

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0768

James D. Fowler.....Respondent,

v.

Nationwide Mutual Fire Insurance Company and Andrew Flanagan.....Defendants,

Of Whom,

Nationwide Mutual Fire Insurance Company.....Appellant.

**RECORD ON APPEAL
VOLUME II**

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1 the consolidated version of my designation of --

2 THE COURT: That's what we have just marked as
3 Court's Exhibit 2. That includes also the Defendant's.

4 MR. MURPHY: Yes, sir.

5 MR. CLINCH BELSER: May it please the Court?

6 THE COURT: Please.

7 MR. CLINCH BELSER: At this in time I'd like to
8 read certain sections from the Deposition of Mr. Andrew
9 T. Flanagan taken July 23, 2010, in Mr. Murphy's office
10 in Columbia. I'm going to read the questions,
11 Mr. Dillard who is seated there will be reading the
12 answers. He's not under oath, but Mr. Flanagan was.
13 And these are not Mr. Dillard's answers, these are
14 Mr. Flanagan's answers.

15 I'd like to read first from Page 36, Lines 5
16 through 12. (Reading):

17 Q. (Question): Okay. When you told Mr. Fowler that
18 you thought he had set the fire and that you were going
19 to deny the claim, he was always disagreed with your
20 conclusions; is that correct?

21 A. (Answer): He did.

22 Q. (Question): He was always emphatic that he did not
23 set the fire; is that correct?

24 A. (Answer): Yes, sir.

25 MR. CLINCH BELSER: And now I would like to read

1 from Page 37, Lines 1 through 14. (Reading):

2 By Mr. Belser:

3 Q. (Question): Is that correct that you told

4 Mr. Fowler orally and in writing that Nationwide had

5 denied his claim because the fire was intentionally set?

6 A. (Answer): It was. The claim was denied because of
7 the intentional act exclusion.

8 Q. (Question): Is that the same thing as saying

9 Mr. Fowler had set the fire himself?

10 A. (Answer): Yes, sir.

11 Q. (Question): Okay. And is it correct there that
12 you had stated this position to one or more third
13 parties?

14 A. (Answer): Yes, sir.

15 Q. (Question): Okay. And to whom would you have said
16 that?

17 A. (Answer): Both of the mortgage companies.

18 MR. CLINCH BELSER: I'd also like to read Lines 20
19 through 25 of that page. (Reading):

20 Q. (Question): Now, if you will turn to the second
21 page of Exhibit 1, in that letter where you requested to
22 send us a copy of the investigative report and its
23 contents.

24 A. (Answer): Yes, sir.

25 Q. (Question): And did you agree to that?

1 A. (Answer): No, sir.

2 MR. CLINCH BELSER: The next page, Lines 1 through
3 12:

4 By Mr. Belser:

5 Q. (Question): Would you tell us why?

6 A. (Answer): It's Nationwide's policy not to release
7 those reports.

8 Q. (Question): Is it Nationwide's policy to require
9 that a lawsuit be filed before you would give the
10 reports to the policyholder?

11 A. (Answer): Generally, yes.

12 Q. (Question): Why does Nationwide require that a
13 lawsuit be filed?

14 A. (Answer): It's the policy that's set by
15 management, sir.

16 MR. CLINCH BELSER: Now Page 46, Lines ---

17 MR. MURPHY: Excuse me. That's a counter-
18 designation appears there. 13 through 16.

19 THE COURT: Is this yours?

20 MR. MURPHY: Yes, sir.

21 THE COURT: All right. Then you can read the
22 question.

23 MR. MURPHY: Okay. I'm happy for -- whatever his
24 questions -- he just overlooked it. I thought I needed
25 to address it now instead of at the end. I don't mind.

1 I'll be glad to read mine.

2 MR. CLINCH BELSER: Well, it's my mistake.

3 THE COURT: All right. Very well.

4 By Mr. Belser:

5 Q. (Question): Can you think of any reason which
6 would be the basis for that decision by Nationwide
7 management?

8 A. (Answer): It was work product, it was our product.
9 By "our" I mean Nationwide's work product.

10 MR. CLINCH BELSER: Now I'd like to go to Page 46,
11 Lines 1 through 25; Page 47, Lines 1-25; and Page 48,
12 Lines 1 through 3. And this will involve Exhibit Number
13 4 of the Deposition which has been marked in this trial
14 as an exhibit.

15 By Mr. Belser (Reading):

16 Q. (Question): Now let me ask you now to look at
17 what's been marked as Exhibit Number 4. Do you
18 recognize this?

19 A. (Answer): I do.

20 Q. (Question): Please identify it for the record.

21 A. (Answer): Sure. This is a letter I sent to you on
22 March 2nd, 2009.

23 Q. (Question): I've highlighted something in
24 paragraph 3. Is that your statement at that time that
25 Nationwide was not going to share the reports?

- 1 A. (Answer): Yes, sir.
- 2 Q. (Question): Okay. The last paragraph is
- 3 highlighted also. It referred to the proof of loss
- 4 form.
- 5 A. (Answer): Yes, sir.
- 6 Q. (Question): Is it true that you were wanting one
- 7 from him because you requested it on January the 18th
- 8 and you were telling his lawyer that he had not
- 9 submitted one?
- 10 A. (Answer): Correct.
- 11 Q. (Question): The purpose of doing that was to get
- 12 him to submit one; is that correct?
- 13 A. (Answer): It is -- was his duty under the policy
- 14 to submit one up until the point where we denied the
- 15 claim.
- 16 Q. (Question): Okay. When did you first deny the
- 17 claim?
- 18 A. (Answer): I would have to look in the log to tell
- 19 you for certain. I denied the claim verbally to
- 20 Mr. Fowler on February 12th.
- 21 Q. (Question): Okay. Is that the first, according to
- 22 your recollection and your notes, February the 12th was
- 23 the first denial of the claim?
- 24 A. (Answer): Yes, sir.
- 25 Q. (Question): And this letter to his lawyer was

1 dated March the 2nd?

2 A. (Answer): Yes, sir.

3 Q. (Question): What did you mean a moment ago when
4 you said it was his duty to submit the proof of loss
5 until you deny the claim?

6 A. (Answer): At that point you no longer -- once we
7 deny the claim, there was no further reason for it to be
8 submitted.

9 Q. (Question): Okay. And what was your purpose in
10 saying in this letter that from my information
11 Mr. Fowler had not submitted a proof of loss for --

12 A. (Answer): If he wanted to continue to push the
13 claim, he would have to submit that proof of loss. That
14 was his duty under the policy.

15 Q. (Question): Okay. The second page of this is your
16 handwritten -- addressed to our office?

17 A. (Answer): Yes, sir.

18 Q. (Question): And so do you recall sending this
19 letter even though it's not actually signed?

20 A. (Answer): Yes, sir. I did send the letter.

21 Q. (Question): There's no dispute that you sent this
22 letter?

23 A. (Answer): Correct.

24 MR. CLINCH BELSER: Now I'd like to read on Page
25 48, Line 4, through Page 49, Lines 1 through 24.

1 By Mr. Belser:

2 Q. (Question): Okay. Now let me show you what's been

3 marked as Exhibit Number 5. Do you recognize this?

4 A. (Answer): I do.

5 Q. (Question): And on the second page some of it is

6 highlighted.

7 A. (Answer): Yes, sir.

8 Q. (Question): The first page -- I mean the first

9 sentence of the paragraph essentially recites what's

10 stated in the last exhibit, and the second paragraph

11 refers to a conversation on March 10th between you and

12 me as Mr. Fowler's lawyer. Is it true that you said you

13 would not grant an extension because you had denied the

14 claim? And did you also say you would deny the claim

15 again if we submitted a proof of loss?

16 A. (Answer): I did.

17 Q. (Question): Okay. And now, I guess before we turn

18 away from Exhibit Number 5, although this is just a

19 letter, did you receive this letter with Mr. Fowler's

20 claim, the proof of loss with the inventory of contents?

21 A. (Answer): I did.

22 Q. (Question): Okay. So it was received with that

23 letter of March the 16th, which would have been within

24 the 60-days limit that you are enforcing; is that

25 correct?

1 A. (Answer): I signed for it on March 17th, so it
2 would have been within that 60 days.

3 Q. (Question): If it had come later than 60 days,
4 would you have denied Mr. Fowler's claim for late
5 submission of the proof of loss?

6 A. (Answer): I would, would have discussed that with
7 management.

8 Q. (Question): That was -- was that the reason you
9 did not grant the extension, though, was because you
10 were reserving the option to deny the claim on that
11 basis; is that correct?

12 A. (Answer): No, sir -- not -- no, sir.

13 Q. (Question): Why would -- tell me again, then, why
14 would you refuse to grant the extension?

15 A. (Answer): The 60-days extension is set by the --
16 the 60-days limit is set by the policy. That's one of
17 the policy duties that Mr. Fowler has.

18 Q. (Question): Do you have authority to waive some of
19 the provisions of the policy during the claims process?

20 A. (Answer): I do not, no, sir.

21 Q. (Question): Does Nationwide?

22 A. (Answer): Nationwide does.

23 MR. CLINCH BELSER: Now I'd like to read Page 50,
24 Line 3, through Page 51, Line 2.

25 By Mr. Belser:

- 1 Q. (Question): Do you recognize item number 6,
2 Exhibit Number 5?
- 3 A. (Answer): I do.
- 4 Q. (Question): And would you state what it is for the
5 record, please?
- 6 A. (Answer): Sure. This is a letter written to you
7 from me on March 18th, 2009.
- 8 Q. (Question): The highlighted third paragraph is
9 what I'd like to ask you about now. So you had received
10 the proof of loss before March the 18th, and you said a
11 moment ago that it was actually on the 17th; is that
12 correct?
- 13 A. (Answer): Say that again?
- 14 Q. (Question): This letter is dated March the 18th?
- 15 A. (Answer): Yes, sir.
- 16 Q. (Question): And you said a moment ago that you had
17 received the proof of loss the day before, the 17th; is
18 that correct?
- 19 A. (Answer): Yes, sir.
- 20 Q. (Question): And you said that you had reviewed the
21 documents inventory. Did you review the contents
22 inventory form as you stated in your letter? Is that
23 correctly stated in your letter?
- 24 A. (Answer): I looked it over, yes, sir.
- 25 Q. (Question): Okay. You stated you had no opinion?

1 A. Yes, sir.

2 MR. CLINCH BELSER: Now I'd like to read from Page
3 51, Line 20 through Page 53, Line 1.

4 By Mr. Belser:

5 Q. (Question): Okay. Is it true you had no opinion
6 about the contents of the claim forms?

7 A. (Answer): Yes, sir.

8 Q. (Question): And that's because you had made no
9 study of it and didn't know whether there was an
10 accurate list or that the values stated were correct?
11 No opinion. Do you know about that?

12 A. (Answer): We had no opinion about the values or
13 the list itself.

14 Q. (Question): So, okay. You have no and you
15 weren't -- and you returned -- and that's dated --

16 MR. MURPHY: I don't think that part was
17 designated, Mr. Belser. I think it was line 10.

18 MR. CLINCH BELSER: I'm sorry.

19 Reading Line 10 through Page 52 through Line 1 of
20 Page 53.

21 By Mr. Belser:

22 Q. (Question): Did you return with this letter the
23 proof of loss?

24 A. (Answer): Yes, sir.

25 Q. (Question): Okay. So at that point you had no

1 basis to dispute the list or the list of items or the
2 values. Isn't that correct?

3 A. (Answer): We didn't review the list extensively
4 with values or scope.

5 Q. (Question): So you at that time, you didn't have
6 any disagreement with the list or of the values. You
7 just rejected it and sent it back. Is that correct?

8 A. (Answer): We did not evaluate it for scope or
9 value. We just returned it as the claim had been
10 denied.

11 MR. CLINCH BELSER: I'd like to read now from Page
12 54, Line 12, through Page 55, Line 19.

13 By Mr. Belser:

14 Q. (Question): Do you recognize Exhibit Number 7?

15 A. (Answer): Yes, sir.

16 Q. (Question): Please identify it for the record.

17 A. (Answer): This is a letter sent to Mr. Fowler on
18 February, dated February 11th, 2009.

19 Q. (Question): This is signed by you at the bottom?

20 A. (Answer): It is.

21 Q. (Question): All right. In this letter you stated
22 you were denying it for what reason?

23 A. (Answer): The loss was not covered because the
24 intentional acts are specifically excluded by the
25 policy.

1 Q. (Question): Does that mean that you are accusing
2 Mr. Fowler of setting fire to his own house?

3 A. (Answer): We believe that Mr. Fowler set fire to
4 his house.

5 Q. (Question): And that's what this letter says when
6 it is read and interpreted; is that correct?

7 A. (Answer): Yes, sir.

8 Q. (Question): Now, on the second part which is
9 highlighted, the next-to-the-last sentence uses the
10 phrase "criminal acts." Do you see that?

11 A. (Answer): I do.

12 Q. (Question): Were you accusing Mr. Fowler of a
13 criminal act?

14 A. (Answer): No, sir.

15 Q. (Question): Why would you put that sentence in
16 there?

17 A. (Answer): That's part of the policy language.

18 Q. (Question): So you don't think Mr. Fowler
19 committed a criminal act?

20 A. (Answer): I have no opinion one way or the other
21 about all that.

22 Q. (Question): Would you agree that somebody else who
23 read this letter could have interpreted that as meaning
24 that you were accusing him of a criminal act of lighting
25 the house on fire?

- 1 A. (Answer): Possibly.
- 2 MR. CLINCH BELSER: Now I'd like to read Page 56,
- 3 Lines 1 through 20 --
- 4 MR. MURPHY: Excuse me. You skipped over again I
- 5 think the rest of that page. We designated Lines 20
- 6 through 25.
- 7 MR. CLINCH BELSER: I will be glad to read that. I
- 8 didn't mean to leave that out. That's not on this list.
- 9 By Mr. Belser:
- 10 Q. (Question): Okay. What is the date of this
- 11 letter?
- 12 A. (Answer): February 11th.
- 13 Q. (Question): What day did you receive Mr. Byers'
- 14 report?
- 15 A. (Answer): I'm not sure. The --
- 16 Q. (Question): Investigative, the Cause of Origin?
- 17 A. (Answer): Verbal report or written report?
- 18 MR. CLINCH BELSER: And now continuing where I was
- 19 from Page 56.
- 20 MR. MURPHY: I don't know if you wrote them down
- 21 wrong, but there it is right there, all of them.
- 22 MR. CLINCH BELSER: I've got it here.
- 23 I'm sorry, Your Honor, I thought we had this sorted
- 24 out ahead of time.
- 25 (Discussion off the record.)

1 MR. CLINCH BELSER: That was my mistake. I thank
2 you for pointing it out.

3 With it, reading from now Page 56, 1 through 25,
4 and 57, 1 through 13.

5 By Mr. Belser:

6 Q. (Question): When did you receive Mr. Byers'
7 report?

8 (Answer): Oral report, written report?

9 (Question): The question is each.

10 A. (Answer): Okay.

11 Q. (Question): Give me both dates, please, sir.

12 A. (Answer): I received the verbal report on January
13 25th, 2009. Actually, that's incorrect. I received, I
14 spoke with Jerry Byers on January 23rd, 2009, and wrote
15 the log notes on January 25th, 2009.

16 Q. (Question): So both of those were before the date
17 of this letter, February 11th?

18 A. (Answer): Yes, sir.

19 Q. (Question): And before February the 11th you also
20 received a report from Mr. Byers that the laboratory
21 tests on these samples were negative?

22 A. (Answer): Let me check to be sure of the date on
23 that.

24 Q. (Question): Let me save you some time. Let me
25 show you what's been marked Exhibit Number 8.

- 1 A. (Answer): Okay.
- 2 Q. (Question): Do you recognize that, what's been
- 3 marked Exhibit Number 8?
- 4 A. (Answer): I do.
- 5 Q. (Question): Would you say what that is, please?
- 6 A. (Answer): This is a report from, the analysis
- 7 report from the samples that were taken.
- 8 Q. (Question): And did you receive this? What's the
- 9 date of this document?
- 10 A. (Answer): February 4th.
- 11 Q. (Question): Okay. And did you receive these
- 12 results prior to February the 11th?
- 13 A. (Answer): We received a verbal before February
- 14 11th, definitively -- or definitely.
- 15 Q. (Question): Okay. Very good. Now, did you have a
- 16 chance to look at this?
- 17 A. (Answer): I have.
- 18 Q. (Question): Is it fair to say that all of the six
- 19 samples came back negative and said to each one that
- 20 there was no ignitable liquid detected?
- 21 A. (Answer): Yes, sir.
- 22 MR. CLINCH BELSER: Now, continuing on Page 57,
- 23 starting at Line 19, through Page 59, the last line, 8.
- 24 By Mr. Belser:
- 25 Q. (Question): Do you recognize Exhibit Number 9?

- 1 A. (Answer): I do.
- 2 Q. (Question): Would you please state what it is for
- 3 the record?
- 4 A. (Answer): This is the Friendship Fire Department
- 5 Truck Report.
- 6 Q. (Question): And did you receive this as part of
- 7 your investigation?
- 8 A. (Answer): I did.
- 9 Q. (Question): And what's the date of this document?
- 10 A. (Answer): January 17th, 2009.
- 11 Q. (Question): And when --
- 12 A. (Answer): Saturday.
- 13 Q. (Question): All right. When did you receive this?
- 14 A. (Answer): I'm not positive when I, when I received
- 15 it.
- 16 Q. (Question): Close to the time it was issued?
- 17 A. (Answer): Sure.
- 18 Q. (Question): Before February the 11th?
- 19 A. (Answer): Definitely.
- 20 Q. (Question): Would you look at the second page,
- 21 please.
- 22 A. (Answer): Yes, sir.
- 23 Q. (Question): I've highlighted some near the middle
- 24 of the page. What does it say was the Cause of
- 25 Ignition?

- 1 A. (Answer): "Unintentional."
- 2 Q. (Question): What does it say was the equipment
3 involved in the ignition?
- 4 A. (Answer): "Heater."
- 5 Q. (Question): And you had that report from the
6 Friendship Fire Department before February the 11th?
- 7 A. (Answer): I did.
- 8 Q. Now, just to go back a little bit.
9 (Question): Just to be as little repetitive as
10 possible. You hired Mr. Byers to investigate the fire
11 to see whether there was any proof that it was an
12 incendiary fire; is that correct?
- 13 A. (Answer): That's not entirely correct.
- 14 Q. (Question): Please, what is correct?
- 15 A. (Answer): We hired Jerry Byers to determine the
16 cause and origin of this fire.
- 17 Q. (Question): Okay. Now, you note from your past
18 experience with Mr. Byers that these chemical tests are
19 very important; is that correct?
- 20 A. (Answer): That they are very important? I have no
21 opinion one way or the other on that.
- 22 Q. (Question): Do you know what this cost you to get
23 it?
- 24 A. (Answer): It was \$600.00, I believe.
- 25 Q. (Question): Right. So it was worth \$600.00 to get

- 1 these chemical tests taken; is that correct?
- 2 A. (Answer): Yes, sir.
- 3 Q. (Question): And these test results were negative?
- 4 A. (Answer): There was no ignitable liquids detected.
- 5 Q. (Question): Right. And when you got that, that
- 6 didn't change your view about whether it was incendiary
- 7 or not?
- 8 A. (Answer): No, sir.
- 9 Q. (Question): Okay. You -- but you refused to give
- 10 this to Mr. Fowler; is that correct?
- 11 A. (Answer): Correct.
- 12 MR. CLINCH BELSER: Now I'd like to start on Page
- 13 60, on Line 12, and going through Page 63, Line 25.
- 14 By Mr. Belser:
- 15 Q. (Question): Let's talk about your contact with the
- 16 mortgage holders a minute.
- 17 A. (Answer): Yes, sir.
- 18 Q. (Question): We talked about that already a little
- 19 bit. By the time you received the mortgage -- by the
- 20 time you contacted the mortgage holders and asked them
- 21 to file a proof of loss, you actually yourself already
- 22 knew there was a fire; did you not?
- 23 A. (Answer): Yes.
- 24 Q. (Question): And you knew from your investigations
- 25 there were -- it was a total loss?

- 1 A. (Answer): Yes.
- 2 Q. (Question): And you knew there were two mortgages
- 3 on the property?
- 4 A. (Answer): Yes, sir.
- 5 Q. (Question): And you also knew that state law
- 6 requires Nationwide to pay the mortgage holders no
- 7 matter what. If there's a fire set by the policyholder,
- 8 or no matter what it is, the mortgage holders have got
- 9 to be paid no matter what. Isn't that true?
- 10 A. (Answer): Yes, sir.
- 11 Q. (Question): But you still contacted the mortgage
- 12 holders and told them that you were denying the claim
- 13 because Mr. Fowler had lit the fire?
- 14 A. (Answer): No, sir.
- 15 Q. (Question): You did contact them?
- 16 A. (Answer): I did.
- 17 Q. (Question): And did you tell them that you denied
- 18 the claim?
- 19 A. (Answer): Yes, sir.
- 20 Q. (Question): And you still contacted the mortgage
- 21 holders and told them that you were denying the claim
- 22 because Mr. Fowler had lit the fire?
- 23 A. (Answer): No, sir.
- 24 Q. (Question): And did you contact them?
- 25 A. (Answer): I did.

1 Q. (Question): And did you tell them that you denied
2 the claim?

3 A. (Answer): Yes.

4 Q. (Question): And did you tell them that it was
5 because of the intentional acts?

6 A. (Answer): Yes.

7 Q. (Question): And were you doing that just to delay
8 payment to them, to the mortgage company?

9 A. (Answer): No, sir.

10 Q. (Question): Or were you doing that to tell them
11 that Mr. Fowler had lit the fire?

12 A. (Answer): No, sir.

13 Q. (Question): What, if you already knew that they
14 were, had mortgages and you knew the amount of the
15 mortgages was more than the maximum limits, why did you
16 say any of this to the mortgage companies?

17 A. (Answer): They required an explanation as to why
18 they were required to fill out a sworn proof of loss.

19 Q. (Question): Well, okay. Well, if you already knew
20 that there was a loss and knew all about it, and they
21 didn't, and you already knew there were mortgages and
22 you already knew that the all the money, the coverage
23 would be paid to the mortgage on these, why did you
24 require anything of them in view of the state law you
25 had to pay them?

1 A. (Answer): Policy language says that in the case of
2 denial to the main policyholder, the lienholders will be
3 paid once they submit a sworn proof of loss.

4 MR. CLINCH BELSER: Now I would like to read from
5 Page 63, Line 12, through Page 65, Line 14.

6 By Mr. Belser:

7 Q. (Question): Okay. On another subject. During
8 your investigation you learned that Mr. Fowler had built
9 this house himself?

10 A. (Answer): Yes, sir.

11 Q. (Question): And you also learned that he had put
12 in lots of work?

13 A. (Answer): Yes, sir.

14 Q. (Question): And he had put in special materials?

15 A. (Answer): I'm not, I'm not sure about special
16 materials.

17 Q. (Question): Did you know that the house had
18 replacement value costs over the amount of the
19 mortgages?

20 A. (Answer): I did on my initial inspection, yes,
21 sir.

22 Q. (Question): And you saw the house on that
23 beautiful site on the shore of the lake; is that
24 correct?

25 A. (Answer): I did.

- 1 Q. (Question): It's a nice neighborhood?
- 2 A. (Answer): I don't recall one way or the other.
- 3 Q. (Question): Okay. Would you agree, in view of the
- 4 fact that Mr. Fowler had built this house himself and
- 5 put his own stuff in it, that he wouldn't have enough
- 6 money to pay to pay off all the mortgages if the house
- 7 burned down because your policy limits were on those
- 8 exhibits before would financially hurt him if there was
- 9 a fire?
- 10 A. (Answer): No, I'm not aware. I don't understand
- 11 the, I don't understand the question.
- 12 Q. (Question): Well, what --
- 13 A. (Answer): Restate the question for me if you
- 14 would.
- 15 Q. (Question): I can do that. If you knew that
- 16 Mr. Fowler did not have enough insurance to pay off the
- 17 mortgages -- or did you know that?
- 18 A. (Answer): I -- my investigation showed that.
- 19 Q. (Question): And did your investigation show you,
- 20 show that he was in the process of getting the house
- 21 ready to be sold so he could pay off his mortgages?
- 22 A. (Answer): He told me that.
- 23 Q. (Question): In view of those two facts that you
- 24 knew or you were told, would you agree that it would be
- 25 financially harmful to Mr. Fowler for this house to get

- 1 burned?
- 2 A. (Answer): No, sir.
- 3 Q. (Question): If the only way he could pay off the
- 4 mortgages was to sell the house, and he would have
- 5 difficulty selling a burned house, wouldn't it be a
- 6 mistake for him to light the fire himself and burn his
- 7 own house?
- 8 A. (Answer): I can't speak to a mistake on his part
- 9 one way or the other.
- 10 Q. (Question): Well, you can talk about the numbers.
- 11 A. (Answer): You remember that the policy limits
- 12 don't include the value of the land, of the plot itself.
- 13 Q. (Question): Well, it would be difficult to sell
- 14 the land with a burned house on it; isn't that correct?
- 15 A. (Answer): It may be.
- 16 MR. CLINCH BELSER: Now I'm gonna read from Page
- 17 67, Lines 11 through 24.
- 18 By Mr. Belser:
- 19 Q. (Question): Had you told Mr. Gilden, who made this
- 20 entry, that Mr. Fowler had told you that all he wanted
- 21 to do was pay off his mortgages?
- 22 A. (Answer): I did.
- 23 Q. (Question): And when did Mr. Fowler allegedly say
- 24 that to you?
- 25 A. (Answer): On my initial inspection visit.

1 Q. (Question): What was the context?

2 A. (Answer): He was, just wanted to know how long the
3 claim was gonna be, it would take for him to be paid.

4 Q. (Question): When did Mr. Fowler allegedly say that
5 to you? What was the context?

6 A. (Answer): He was, just wanted to know how long the
7 claim was gonna be, take for him, take for him to be
8 paid.

9 Q. (Question): What was his reference to the mortgage
10 being paid off?

11 A. (Answer): He indicated at the time that all he
12 wanted was his mortgages be paid off.

13 MR. CLINCH BELSER: Now reading from Page 68, Lines
14 9 through 25.

15 By Mr. Belser:

16 Q. (Question): Is this alleged statement in one of
17 your recorded interviews?

18 A. (Answer): I'm not sure one way or the other.

19 Q. (Question): Okay. And why is that important, if
20 it is important?

21 A. (Answer): It highlights the financial motive of
22 Mr. Fowler.

23 Q. (Question): So, when he says that, do you think it
24 would show that he had financial motives -- motive to
25 burn his own house?

1 A. (Answer): It could show that, yes, sir.

2 Q. (Question): Do you not know whether it's in any of
3 his recorded interviews or not?

4 A. (Answer): I'm not sure one way or the other, sir.

5 Q. (Question): Have you ever listened to the tapes of
6 your recorded interviews?

7 A. (Answer): I have.

8 Q. (Question): Isn't it true that nowhere in the
9 recorded interviews did Mr. Fowler say anything of this
10 nature?

11 A. (Answer): Like I said, I don't remember one way or
12 the other.

13 MR. CLINCH BELSER: Page 69, Lines 15 through 22.

14 By Mr. Belser:

15 Q. (Question): And did you tell Mr. Fowler that you
16 felt he had lit the fire even though the results were
17 negative?

18 A. (Answer): I believe I did.

19 Q. (Question): Okay. So you were disregarding, you
20 paid \$600.00 to get the samples, and they came back
21 negative, and you told Mr. Fowler that you felt he lit
22 the fire himself anyway?

23 A. (Answer): Yes, sir.

24 MR. CLINCH BELSER: Now, on Page 70, on Lines 2
25 through 13 and Lines 9 through 25.

1 By Mr. Belser:

2 Q. (Question): Did you ever, did you discuss the
3 alternate living expense claim with Mr. Fowler at any
4 time?

5 A. (Answer): We did.

6 Q. (Question): What was your discussion?

7 A. (Answer): Initially we offered to put him in a
8 hotel immediately. He refused. He said he didn't want
9 to live elsewhere. He wanted to live in the gazebo
10 behind his house. I instructed him that he needed to
11 have a shower put in and a bathroom put in. I asked him
12 to get an estimate on the repair, that we would discuss
13 that at that time.

14 Q. (Question): Okay. Do you know what the fair
15 rental value would be for a house like his in a location
16 like his?

17 A. (Answer): I don't.

18 Q. (Question): Okay. If I suggested to you that the
19 fair rental value of a house like this in a location
20 like his was \$1,400 a month, would you think that was a
21 fair value?

22 A. (Answer): I wouldn't think that was unreasonable,
23 no.

24 Q. (Question): Okay. You rented yourself in the
25 past, according to what you've said before?

1 A. (Answer): Right.

2 Q. (Question): So you think that \$1,400 a month would
3 be a reasonable rent for a house like that in that
4 location?

5 A. (Answer): Sure.

6 MR. CLINCH BELSER: I'm moving over to Page 82,
7 starting at Line 4, and going to the bottom of that
8 page, the first 12 lines on the next page, and the first
9 six lines on the following page is another subject.

10 By Mr. Belser:

11 Q. (Question): Okay. But the next thing highlighted
12 in Exhibit 11, you mention there being a total loss; is
13 that correct?

14 A. (Answer): Yes, sir.

15 Q. (Question): And what do you mean when you wanted
16 to consider a total -- you wanted to consider a total
17 loss and to pay the coverage limits and coverage -- and
18 paid the Coverage A limits and Coverage B off the
19 exactimate (phonetic) estimate. Please explain that for
20 me.

21 A. (Answer): I wanted to pay the Coverage A limits as
22 we would owe under the policy as the dwelling was a
23 total loss, and the estimate I had for other structures
24 is what Coverage B is. Michael Madden, my boss, said it
25 wasn't appropriate to pay Coverage B because it wasn't

- 1 directly damaged by fire. My estimate was specifically
2 for things that would have to be taken out to rebuild
3 the house on site.
- 4 Q. (Question): What was covered in Coverage B:
5 Things like the driveway, just structures, or was it
6 houses or was it driveways and sidewalks and things like
7 that?
- 8 A. (Answer): Coverage B is other structures, anything
9 not attached to the dwelling itself, Coverage A.
- 10 Q. (Question): So would it cover the driveway?
- 11 A. (Answer): It would.
- 12 Q. (Question): All right. Look at the bottom entry
13 on Exhibit 11 and tell us what it means where it says
14 under "Advisory Comments MGR." What does that portion
15 of this mean?
- 16 A. (Answer): That's Advisory Comments Manager.
- 17 Q. (Question): What does this advisory mean other
18 than just a response? Are you supposed to treat an
19 advisory different from just a regular response?
- 20 A. (Answer): It's just his advice in the claim log.
- 21 Q. (Question): Okay.
- 22 A. (Answer): His direction.
- 23 Q. (Question): All right. Okay. Well, what does
24 that mean? Another reading is, let me ask you if
25 there's another reading, if Nationwide is not going to

1 pay --

2 MR. MURPHY: Excuse me, but I don't see that on my
3 list of being designated. We skipped to Page 84 at that
4 point.

5 MR. CLINCH BELSER: Page 84, Lines 1 through 6.

6 MR. DILLARD: He did.

7 MR. MURPHY: Okay. Excuse me.

8 By Mr. Belser:

9 Q. (Question): Let me ask you if there's another
10 reading, if Nationwide was not going to pay unless
11 somebody made an actual claim?

12 A. (Answer): Those items weren't damaged directly by
13 the fire so they weren't covered in this, in this loss.

14 MR. CLINCH BELSER: Now I'd like to read from Page
15 85, Line 24, all the way through Page 94, Line 1.

16 By Mr. Belser:

17 Q. (Question): Let me show you what's now been marked
18 as Exhibit 13.

19 A. (Answer): Okay.

20 Q. (Question): Can you identify this for the record,
21 please?

22 A. (Answer): Yes, sir.

23 Q. (Question): Please identify it for the record.

24 A. (Answer): This is a Property Loss Report Form.

25 Q. (Question): What is that?

- 1 A. (Answer): This is the type of form that we use to
2 summarize the claim and forward it when we need to set
3 the reserves and the authority per management.
- 4 Q. (Question): Who prepared this one?
- 5 A. (Answer): I did.
- 6 Q. (Question): And to whom did you send it?
- 7 A. (Answer): I sent it to Michael Madden.
- 8 Q. (Question): All right. The first things, I've
9 highlighted two things in the middle of the page. Would
10 you explain those, please.
- 11 A. (Answer): Sure.
- 12 Q. (Question): Read them and explain them.
- 13 A. (Answer): The policy is Elite HO 39 A.
- 14 Q. (Question): What does that mean?
- 15 A. (Answer): That's the name of the policy and the
16 number of the policy that we use for our homeowners'
17 policies. By "we" I mean Nationwide.
- 18 Q. (Question): What does the word "elite" mean?
- 19 A. (Answer): It's just a type of policy that's listed
20 as "elite."
- 21 Q. (Question): Is it a special or expensive or
22 generous policy for which the insured pays a high
23 premium and gets good coverage?
- 24 A. (Answer): It's the only homeowners' policy that
25 Nationwide offers.

1 Q. (Question): What does the second entry say here,
2 Option J?

3 A. (Answer): Option J is contents, RC; that's
4 replacement cost for contents.

5 Q. (Question): What's the significance of saying RC,
6 replacement costs, as opposed to something else?

7 A. (Answer): That's what Option J, contents RC,
8 that's replacement costs loss for contents.

9 Q. (Question): What is the significance of saying RC,
10 replacement costs, as opposed to something else?

11 A. (Answer): That's what Option J is: Contents
12 Replacement Costs.

13 Q. (Question): So does that mean if the policyholder
14 loses something, he's paid RC, replacement cost of those
15 items, as opposed to something else, what the insurance
16 companies sometimes pay, which is called the actual cash
17 value or the depreciated value?

18 A. (Answer): The policyholders are paid the actual
19 cash value initially, and for any items that they
20 actually replace they can recover the full replacement
21 cost.

22 Q. (Question): Based upon our discussions earlier,
23 you made no opinion about what Mr. Fowler submitted on
24 his list or the value; is that correct?

25 A. (Answer): Right.

1 Q. (Question): The lower right-hand portion of this
2 first page of Exhibit 13 have had highlighted numbers.
3 Explain each one of those, please.

4 A. (Answer): Sure. The Coverage A limit is the limit
5 adjusted for inflation and including the guaranteed
6 replacement cost under Option K.

7 Q. (Question): The number there is \$184,950. Why is
8 that a different number from the numbers we've been
9 through on the other exhibits which deal with these
10 topics?

11 A. (Answer): If you notice in the subtotal column, it
12 the \$154,125, the limit that we've spoken of before.

13 Q. (Question): Yes, sir.

14 A. (Answer): The guaranteed replacement cost is
15 \$30,825. That's Option K. That leaves the total limits
16 at \$184,950.

17 Q. (Question): So, if you were to honor this claim,
18 Mr. Fowler would be entitled to \$184,950, the cost of
19 replacing the house --

20 A. (Answer): No, sir.

21 Q. (Question): -- if it cost that much?

22 A. (Answer): If it cost that much, yes, sir.

23 Q. (Question): All right. If the actual costs were
24 that much, it would require Nationwide to require to pay
25 that much, no matter what your estimate or the MSV

- 1 (phonetic) estimate said?
- 2 A. (Answer): Right.
- 3 Q. (Question): Now, what's Coverage B?
- 4 A. (Answer): That's detached structures. That's
- 5 after the inflation adjustment.
- 6 Q. (Question): What about Coverage C?
- 7 A. (Answer): Contents after the inflation, inflation
- 8 adjustment.
- 9 Q. (Question): Why is the number the same number as
- 10 the one two columns to the left?
- 11 A. (Answer): Because that's the policy limits for
- 12 contents.
- 13 Q. (Question): There's no replacement adjustment for
- 14 that?
- 15 A. (Answer): The initial limit listed was \$109,910.
- 16 The adjustment is \$4,782, leaving the total for
- 17 \$114,692.
- 18 Q. (Question): I guess I can't understand why, why
- 19 are the numbers in the column, the final column, are the
- 20 same as the numbers two columns over on those two items,
- 21 whereas the one at the top of Coverage A is increased by
- 22 \$30,825. Is this all inflation or what?
- 23 A. (Answer): No, it's not. The guaranteed
- 24 replacement cost is Option K and only applies to
- 25 Coverage A.

1 Q. (Question): So what's the last number on the page?

2 A. (Answer): You will have to tell me which one you
3 are looking at.

4 Q. (Question): The bottom right. Not the NW0 number,
5 the last one I highlighted.

6 A. (Answer): The total policy limit for all
7 coverages, \$523,333.

8 Q. (Question): Okay. Would you look at Page 3 of
9 this exhibit. I have highlighted various portions to
10 speed this up. What's the first thing that says, that
11 the building is a total loss; is that correct?

12 A. (Answer): Yes.

13 Q. (Question): The driveway is a total loss. Now,
14 Column B, you're talking about damage to the Koi pond.
15 Tell me about that, please.

16 A. (Answer): Mr. Fowler stated that the Koi pond was
17 damaged through the extinguishment of the fire. On
18 reinspection I couldn't, I couldn't determine what that
19 damage was.

20 Q. (Question): But you put initially there was
21 extensive damage; is that correct?

22 A. (Answer): Yes, sir, that was my initial
23 inspection.

24 Q. (Question): Coverage C. You said that all items
25 in the building were destroyed. Is that what you found?

- 1 A. (Answer): Yes, sir.
- 2 Q. (Question): Now, this entry said the inventory was
3 taken on site with the policyholder, priced by HO
4 pricing program. When was that inventory taken?
- 5 A. (Answer): On the 21st.
- 6 Q. (Question): Two days after the fire or four days
7 after the fire? The 17th to the 21st, four days after
8 the fire?
- 9 A. (Answer): It was on that Thursday.
- 10 Q. (Question): Okay. How long did that inventory
11 process take?
- 12 A. (Answer): It took the morning. I don't know
13 exactly how long it took.
- 14 Q. (Question): Just even a morning, not even a full
15 day?
- 16 A. (Answer): I'm not positive one way or the other.
17 I don't recall.
- 18 Q. (Question): And what you said earlier was that you
19 made, you did the writing, you talked with him, you
20 wrote stuff down, you said -- what does it mean, pricing
21 by HO pricing program? Explain that, please.
- 22 A. (Answer): That's our home office pricing program.
23 They'll transcribe the recording and research the prices
24 given by Mr. Fowler, the policyholder.
- 25 Q. (Question): Okay. This estimate is the exactimate

- 1 estimate that's in the log?
- 2 A. (Answer): Yes, sir.
- 3 Q. (Question): Maybe I didn't recognize this any
- 4 better than I'll recognize the other entry there. Can
- 5 you tell me where the exactimate estimate is?
- 6 A. (Answer): Sure. Where it's, when it was uploaded
- 7 to the log.
- 8 Q. (Question): Yes, sir. Well, where can we find it?
- 9 A. (Answer): This is the pricing list that was
- 10 returned from the home office.
- 11 Q. (Question): Can tell me now the NW, on
- 12 Mr. Murphy's numbers, what Bates Numbers are on it,
- 13 please.
- 14 A. (Answer): It starts with NW 0040 and it goes
- 15 through NW 0044.
- 16 Q. (Question): May I see it a second, please? I'll
- 17 give it right back if it's all right.
- 18 A. (Answer): Okay.
- 19 Q. (Question): Thank you. Okay. This is pricing
- 20 from the home office? That means the Nationwide home
- 21 office?
- 22 A. (Answer): Correct.
- 23 Q. (Question): Was the pricing program ever presented
- 24 to Mr. Fowler for his approval or signature?
- 25 A. (Answer): It was.

- 1 Q. (Question): And you, do you have a copy signed by
2 him?
- 3 A. (Answer): No.
- 4 Q. (Question): So it was not approved by him?
- 5 A. (Answer): No.
- 6 Q. (Question): So these prices are from the insurance
7 company's internal computer program for prices based on
8 what you wrote down after you talked with him that
9 morning?
- 10 A. (Answer): It's from the pricing specialist who has
11 priced each item.
- 12 Q. (Question): What do you mean by "the pricing
13 specialist"?
- 14 A. (Answer): It's an employee that subcontracts for
15 Nationwide to price those items.
- 16 Q. (Question): Do you know which individual human
17 being gave those prices?
- 18 A. (Answer): I, I'm not sure one way or the other.
- 19 Q. (Question): It's a subcontractor and not an
20 employee?
- 21 A. (Answer): Not an employee, no.
- 22 Q. (Question): Where are the subcontractors located,
23 or are where is this subcontractor located?
- 24 A. (Answer): I'm not sure.
- 25 Q. (Question): Is there a way to find out?

1 A. (Answer): Probably.

2 Q. (Question): How?

3 A. (Answer): I don't have an answer for you there. I
4 don't know.

5 Q. (Question): Under Coverage D it's indicated the
6 period of restoration would be approximately six months?

7 A. (Answer): Yes, sir.

8 Q. (Question): How did you determine that six-month
9 period was appropriate?

10 A. (Answer): That's a rough estimate.

11 Q. (Question): Made by whom?

12 A. (Answer): Made by me.

13 Q. (Question): On what basis?

14 A. (Answer): On my history of seeing homes -- seeing
15 houses rebuilt.

16 MR. CLINCH BELSER: Now I'd like to read Page 96,
17 Line 6, through Page 97, Line 10.

18 By Mr. Belser:

19 Q. (Question): All right. Now, what about the last
20 entry there about landscaping? Can you identify the
21 entry there, please?

22 A. (Answer): Sure. It says damage to some trees
23 around, and bushes around the dwelling that would have
24 to be removed or, to replace the dwelling.

25 Q. (Question): Do you have a recollection now as to

1 how many trees or how extensive an operation that was?

2 A. (Answer): There were bushes, normal mature,
3 four-or-five-foot bushes around the house, and that
4 would have to be removed to rebuild the house.

5 Q. (Question): Okay.

6 A. (Answer): They weren't damaged by fire.

7 Q. (Question): To the extent that your policyholder
8 has a loss resulting in a fire, if it's a covered claim
9 and you pay it, how does the cost of damage to trees and
10 bushes get covered? Is there a separate coverage or is
11 it a one-or-the-other coverage?

12 A. (Answer): It's a separate coverage from that.

13 Q. (Question): Mr. Fowler did have that coverage?

14 A. (Answer): He did have that. It's a supplemental
15 coverage.

16 Q. (Question): All right. And that was \$7,700,
17 something like that?

18 A. (Answer): We would have to look at it to be sure.

19 Q. (Question): Is that what it says on Page 1?

20 A. (Answer): \$7,706.

21 Q. (Question): Right.

22 A. (Answer): It's five percent of Coverage A.

23 Q. (Question): Okay.

24 A. (Answer): With a \$500 limit per item.

25 MR. CLINCH BELSER: Page 99, at Lines 2 through 20.

1 By Mr. Belser:

2 Q. (Question): Page 4. Under PSA request, total at
3 the bottom. All right. What does PSA request mean?

4 A. (Answer): Pre-settlement authorization request.

5 Q. (Question): What amounts were you including in the
6 \$171,000?

7 A. (Answer): Under Coverage A was \$154,125. Under
8 Coverage B was \$15,500. And under Coverage C it was
9 \$2,000.

10 Q. (Question): The \$154,125 amount was paid to two
11 mortgage companies; is that correct?

12 A. (Answer): Yes, sir.

13 Q. (Question): Was the \$15,500 ever paid?

14 A. (Answer): It was not. It was requested in case
15 the mortgage companies determined, decided to rebuild
16 the houses on their own.

17 Q. (Question): The \$2,000?

18 A. (Answer): That was an advance issued to Mr. Fowler
19 on my initial visit.

20 Q. (Question): And that was an advance under what
21 coverage?

22 A. (Answer): It's Coverage C, contents.

23 Q. (Question): Okay.

24 A. (Answer): It was a good-faith advance at that
25 time.

1 MR. CLINCH BELSER: Now I would like to take a
2 moment to look at Page 100, Lines 5, through 104, Line
3 19, involving Exhibit Number 16.
4 By Mr. Belser:
5 Q. (Question): Now, I've highlighted some of that in
6 the middle of the page. Did you speak with it says
7 Corporate Bank Manager, Daniel Evatt (phonetic)? Did
8 you speak with Mr. Evatt on that date?
9 A. (Answer): Yes, sir.
10 Q. (Question): What date was that?
11 A. (Answer): February 18th.
12 Q. (Question): Okay. And the first entry below the
13 date and the hour is 0055/legal interest. Received the
14 payoff notice from Citi Financial but the sworn proof of
15 loss was not included. Do you see that?
16 A. (Answer): Yes, sir.
17 Q. (Question): What does that mean that you received
18 the payoff notice from Citi Financial Mortgage? What
19 were you referring to there?
20 A. (Answer): They had sent the payoff amount.
21 Q. (Question): So they told you when -- when did you
22 get that? Can you tell from this when you --
23 A. (Answer): I can't tell exactly from that. It was
24 uploaded to the log at 15:22, three minutes before that.
25 Q. (Question): 15:22:25?

1 A. (Answer): Right.

2 Q. (Question): So that, so what was it that you got
3 from them? Amount, tell me what they told you was the
4 amount to be paid?

5 A. (Answer): It was the payoff amount, the total left
6 on the, on that second mortgage.

7 Q. (Question): Okay. And that's all you really need
8 to know to pay it pursuant to the statute, there was
9 money there that was due that was covered by Coverage A?

10 A. (Answer): The policy language says that they have
11 to fill out a sworn proof of loss.

12 Q. (Question): But you had, you had from what they
13 sent you that day, you had the amount which they said
14 was due; is that correct?

15 A. (Answer): They provided the amount that was still
16 owed --

17 Q. (Question): Okay..

18 A. (Answer): -- under their mortgage.

19 Q. (Question): So when you got that, you called
20 Mr. Evatt?

21 A. (Answer): Yes, sir.

22 Q. (Question): And he's the Manager at Citi
23 Financial?

24 A. (Answer): Yes, sir.

25 Q. (Question): And he's in Seneca?

- 1 A. (Answer): I'm not sure where their office is.
- 2 Q. (Question): Okay. Tell me what your, tell me
- 3 about your conversation with him.
- 4 A. (Answer): We discussed that the loss had been
- 5 denied to Mr. Fowler and that they would have to
- 6 complete the sworn proof of loss, by they, that Citi
- 7 Financial would have to complete the sworn proof of loss
- 8 to receive payment under the policy conditions.
- 9 Q. (Question): And earlier you told him that you had
- 10 denied the claim because Mr. Fowler had lit the fire?
- 11 A. (Answer): No, sir. We told him we denied the
- 12 claim.
- 13 Q. (Question): Intentional acts?
- 14 A. (Answer): Because --
- 15 Q. (Question): I'm sorry. You tell me. I don't want
- 16 to put words into your mouth.
- 17 A. (Answer): We told him we denied the claim under
- 18 the intentional acts exclusion.
- 19 Q. (Question): And then there was a discussion again
- 20 about why they had to do a sworn proof of loss.
- 21 A. (Answer): Yes.
- 22 Q. (Question): In addition to giving you what you --
- 23 what did you state about that?
- 24 A. (Answer): That the policy conditions were clear,
- 25 that the sworn proof of loss had to be completed for

1 them to assert their claim under the policy.

2 Q. (Question): And the last entry there on Page 3 is
3 you that agree to send them this policy language in
4 writing; is that correct?

5 A. (Answer): Yes, sir.

6 Q. (Question): Did you have an exchange of emails
7 with Mr. Madden, which is an exchange being reflected on
8 the first page of this exhibit?

9 A. (Answer): Yes.

10 Q. (Question): Tell us about that, please.

11 A. (Answer): I notified Mr. Madden that Citi
12 Financial determined they did not need to complete a
13 sworn proof of loss and they wanted me to notify them in
14 writing and I asked him to review the letter that I was
15 going to send them.

16 Q. (Question): So you were acting with the approval
17 of Mister -- at the direction of Mr. Madden when you --

18 A. (Answer): At the direction, yes, sir.

19 Q. (Question): Further?

20 A. (Answer): I had wrote the letter and he approved
21 the letter as appropriate.

22 Q. (Question): Let me show you now what is marked as
23 Exhibit 16. Can you identify this, please?

24 A. (Answer): This is a letter to Citi Financial
25 Mortgage, Attention, Daniel Evatt, dated February 18th,

1 2009, from me.

2 Q. (Question): Now this document is marked NW 0069
3 and the next page is NW 0070, which means, of course, it
4 came to me from Mr. Murphy's office. This copy does not
5 show your signature. Did you sign this letter and send
6 it?

7 A. (Answer): I did not sign it but I sent it.

8 Q. (Question): Okay. Now highlight the reference at
9 the top, it says "our insured." Just to make it
10 perfectly clear on the record, this was a letter to
11 Mr. Evatt at Citi Financial about James Fowler; is that
12 correct?

13 A. (Answer): Yes, sir.

14 Q. (Question): And it refers to your conversations
15 that same date, February the 18th; is that correct?
16 That first paragraph, it's not highlighted, but it
17 points out that you had a conversation you just
18 described before?

19 A. (Answer): Okay. Yes, sir.

20 MR. CLINCH BELSER: And now I'd like to read a
21 section from Page 107, Line 4, through 108, Line 14.

22 By Mr. Belser:

23 Q. (Question): Let's look at Exhibit 18 then. Can
24 you identify Exhibit 18?

25 A. (Answer): This is the sworn proof of loss

- 1 submitted by Citi Financial.
- 2 Q. (Question): Who signed it? You may need to look
- 3 at the notary.
- 4 A. (Answer): It looks like to me --
- 5 Q. (Question): I'll show you exactly where it was
- 6 signed.
- 7 A. (Answer): William D. Evatt II.
- 8 Q. (Question): Did you receive this from Mr. Evatt?
- 9 A. (Answer): I did.
- 10 Q. (Question): And what information was Mr. Evatt
- 11 able to supply you about the loss, other than the amount
- 12 that the bank was owed?
- 13 A. (Answer): That the financial interest was First
- 14 Citizens Bank and Citi Financial.
- 15 Q. (Question): That's the only information you got
- 16 from this process of requiring Citi Financial to provide
- 17 proof of loss?
- 18 A. (Answer): And that they wished to assert a claim
- 19 under their duties under the policy.
- 20 Q. (Question): The entries in question, one indicated
- 21 that Citi Financial didn't have any information about
- 22 the fire except what you told them; is that correct?
- 23 A. (Answer): It says unsure. The loss date is from
- 24 Nationwide.
- 25 Q. (Question): And then he also states in question

1 two "he never." He was unsure since he never visited or
2 had seen the home, so he was unable to give you any
3 information about question two; is that correct?
4 A. (Answer): Correct. He doesn't know about the
5 occupancy.
6 Q. (Question): Question number three said who had
7 interest in the property, and he named First Citizens
8 Bank and Citi Financial. But you already knew that,
9 didn't you?
10 A. (Answer): I did.
11 Q. (Question): Okay. So you didn't really learn
12 anything from that. All you really learned in question
13 five was the payoff amount. Question number five was
14 the total insurance. You were given that too, \$154,125?
15 A. (Answer): I had.
16 Q. (Question): That was the number you gave him, too?
17 A. (Answer): I had.
18 Q. (Question): And all the other questions, six,
19 seven, eight, and nine he wrote in "Unknown;" is that
20 correct?
21 A. (Answer): Yes, sir.
22 Q. (Question): Now let's look at Page 3 and 4 of the
23 exhibit, these are labeled NW 0060 and NW 0061. Is it
24 fair to say that those payoff amounts, those are the
25 payoff amounts that Citi Financial had already probably

1 given you a payoff for the March 5th and/or February
2 25th?

3 A. (Answer): This is an updated amount, but yes.

4 Q. (Question): Now, but you already had that
5 information from before?

6 A. (Answer): Right.

7 MR. CLINCH BELSER: Now, Page 113, Line 2, through
8 114, Line 2.

9 By Mr. Belser:

10 Q. (Question): Do you agree that the effect of your
11 call was to tell them, tell Mr. Evatt at Citi Financial
12 right there with Mr. Fowler, that you felt he lit the
13 fire? Question: That was the effect?

14 A. (Answer): The effect of the call was to get a
15 sworn proof of loss so we could fulfill our duties under
16 the policy and under state law.

17 Q. (Question): Well, that was one effect. Wasn't it
18 also an effect that you communicated to Mr. Evatt that
19 Mr. Fowler had lit the fire?

20 A. (Answer): No. I didn't tell him that he had lit
21 the fire.

22 Q. (Question): Well, what does intentional acts mean?

23 A. (Answer): I specifically said to Mr. Evatt that we
24 denied this claim under the intentional acts exclusion
25 and left it at that.

1 Q. (Question): Would you think that Mr. Evatt would
2 have, could have understood that to mean that you were
3 telling him that to mean -- strike that question.

4 Would you agree that Mr. Evatt could have
5 interpreted your statement about intentional acts as
6 equivalent to saying that Mr. Fowler lit the fire?

7 A. (Answer): He could have.

8 MR. CLINCH BELSER: Now I'd like to go Section 116,
9 Line 19, through 119, Line 6.

10 By Mr. Belser:

11 Q. (Question): Now let me show you Exhibit Number 20
12 and ask you to identify that.

13 A. (Answer): This is part of the Nationwide log.

14 Q. (Question): This is NW 172. The first entry was
15 an email from you to Mr. Madden asking you what to do
16 about Mr. Fowler's request for the copy of the C&O
17 report?

18 A. (Answer): Yes, sir.

19 Q. (Question): Is that correct?

20 A. (Answer): Yes, sir.

21 Q. (Question): And what was your response?

22 A. (Answer): We will not share the C&O report. It
23 will be provided at discovery.

24 Q. (Question): Okay. And where was the business
25 about discovery? Would you just read that into the

- 1 record.
- 2 A. (Answer): It was on 2-16-09 at 14:55.
- 3 Q. (Question): Okay.
- 4 A. (Answer): To Andrew Flanagan from Michael Madden.
- 5 Q. (Question): So, as I understand -- correct me if
- 6 I'm wrong -- you were, you received Mr. Fowler --
- 7 Mr. Fowler requested a copy of the Cause and Origin
- 8 Report, that is the C and O Report; is that correct?
- 9 A. (Answer): Uh-huh, yes, sir.
- 10 Q. (Question): You were asking whether it was
- 11 appropriate to send him a copy?
- 12 A. (Answer): I was.
- 13 Q. (Question): At that time did you think it might be
- 14 appropriate?
- 15 A. (Answer): I was unsure either way so I wanted to
- 16 ask management to be positive.
- 17 Q. (Question): Had you ever given a C&O report to a
- 18 policyholder upon request?
- 19 A. (Answer): On a fire, no, sir.
- 20 Q. (Question): Well, when you wanted confirmation
- 21 from Mr. Madden, your supervisor, whether you should not
- 22 give it to him or approval to give it to him, one way or
- 23 the other, you wanted Mr. Madden to make the decision?
- 24 A. (Answer): I wanted direction one way or the other.
- 25 Q. (Question): Right. So this was a -- the decision

1 not to give it to him was made by Nationwide, not just
2 by you, but Mr. Madden was somewhere in the management;
3 is that correct?

4 A. (Answer): That's correct.

5 Q. (Question): And was there any telephone
6 conversation or subsequent email exchange about if you
7 file suit, you will give it to him in discovery?

8 A. (Answer): I don't believe so.

9 Q. (Question): Well, what does this mean, that
10 Nationwide was counting -- does this mean that
11 Nationwide was counting on getting sued by Mr. Fowler
12 because he had disagreed with your statement saying the
13 claim should be denied?

14 A. (Answer): We knew that Mr. Fowler did not agree
15 with our claims decision and that it was likely that he
16 would file a suit.

17 Q. (Question): Is a fair interpretation of this that
18 the company decided in effect you would have to file a
19 lawsuit in order to get a copy of the report? You
20 weren't gonna give it to him unless he filed suit; is
21 that correct?

22 A. (Answer): If he wasn't going to -- if he -- we
23 were not going to provide him with the report unless he
24 filed suit.

25 MR. CLINCH BELSER: Now I'd like to read Page 120,

- 1 Line 13, through 122, Line 1.
- 2 By Mr. Belser:
- 3 Q. (Question): Let me show you Exhibit Number 21.
- 4 Can you identify this?
- 5 A. (Answer): This is a portion of a Nationwide log.
- 6 Q. (Question): So some of this coverage we just
- 7 talked about, did you tell, did you talk with Mr. PH?
- 8 Is that --
- 9 A. (Answer): Mr. Policyholder.
- 10 Q. (Question): Mr. Policyholder. So you told him you
- 11 would not be giving it to him?
- 12 A. (Answer): I left him a message saying that we
- 13 wouldn't supply him with the C&O Report and he could
- 14 call me with questions.
- 15 Q. (Question): Do you recall whether your report said
- 16 he would have to file a lawsuit?
- 17 A. (Answer): I don't.
- 18 Q. (Question): That you would only give it to him if
- 19 there was discovery?
- 20 A. (Answer): I don't believe I would say that, but I
- 21 don't recall.
- 22 Q. (Question): Let me show you what's been marked
- 23 Exhibit 22. Can you identify this, please?
- 24 A. (Answer): This is a part of the Nationwide log.
- 25 Q. (Question): I don't recall the previous page but I

- 1 don't recall what the title is for that first one. Do
2 you recognize it from your own file that you have with
3 you today, just the way it's phrased where there's an
4 entry by you at the top of the page?
- 5 A. (Answer): I know from the log that I have in front
6 of me that it was for Page NW 0172, that it was 2/13/09
7 at 12:44, and it was created by me.
- 8 Q. (Question): By you. Okay. And so Mr. Fowler
9 called you that day?
- 10 A. (Answer): Yes, sir.
- 11 Q. (Question): And even though you told Mr. Fowler
12 what you believed, he denied that he lit the fire; is
13 that correct? He wanted to debate the evidence with
14 you; is that correct?
- 15 A. (Answer): Yes, sir.
- 16 Q. (Question): All right. That's a list of people
17 who were involved in the conference; is that correct?
- 18 MR. CLINCH BELSER: This would be Page 123, Lines 2
19 through 20.
- 20 By Mr. Belser:
- 21 Q. (Question): There's a list of all the people who
22 were involved in conference and in attendance, is that
23 correct, and it says in attendance were and lists some
24 of their names?
- 25 A. (Answer): Yes, sir.

1 Q. (Question): So the decision to do this was partly
2 yours and was partly these other people's; is that
3 correct?

4 A. (Answer): No, sir.

5 Q. (Question): Well, what's the proper interpretation
6 of that?

7 A. (Answer): The decision on coverage was my claims
8 manager, Madden, and Director Barch (phonetic).

9 Q. (Question): Okay. What was the participation of
10 the SIUMs Kline (phonetic), Smart (phonetic) and CLC
11 Sullivan (phonetic)?

12 A. (Answer): The SIU Managers, Kline and Smart, were
13 there also with Mr. Gilden to discuss their
14 investigation into the claim or to discuss the
15 investigation of the claim, and CLC is our, CLC is our
16 Claims Legal Counsel, Kelly Sullivan.

17 MR. CLINCH BELSER: I'd like to read Page 124, Line
18 15, through Page 125, line 7.

19 By Mr. Belser:

20 Q. (Question): Let me show you what's been marked
21 Exhibit 23. Can you identify that, please?

22 A. (Answer): This is a portion of a claims log.

23 Q. (Question): All right. What is the first entry at
24 the top of the page which has been highlighted?

25 A. (Answer): I can't tell the date.

- 1 Q. (Question): Do you have access to dates or NW
2 0175?
- 3 A. (Answer): I do. It was on 2-13 at 9:12 a.m. This
4 documents my discussion with Sue Kaufman (phonetic) at
5 First Citizens.
- 6 Q. (Question): When you spoke to Ms. Kaufman, it says
7 you totaled the loss and the claim had been denied; is
8 that correct?
- 9 A. (Answer): Yes, sir.
- 10 Q. (Question): Now, did you tell her also the reason
11 for the denial?
- 12 A. (Answer): Yes, sir.
- 13 Q. (Question): Intentional acts?
- 14 A. (Answer): The intentional acts exclusion.
- 15 Q. (Question): Page 126, Lines 2 through 21, and this
16 entry which has been highlighted at 2009-02-09 at 17:50,
17 this is the log note --
- 18 A. (Answer): This is the log note that explains the
19 amount of Jerry Byers' investigation, the amount that we
20 would have to pay him.
- 21 Q. (Question): And what was that amount?
- 22 A. (Answer): \$2,814.95.
- 23 Q. (Question): What was your comment about the
24 invoice being higher than usual?
- 25 A. (Answer): It was higher than usual as he spent two

1 full days on site.

2 Q. (Question): What was the amount of the usual --
3 what's the usual bill from him?

4 A. (Answer): Usually they will only spend one day on
5 site.

6 Q. (Question): So this was twice as much work, twice
7 as much bill?

8 A. (Answer): Not quite, not quite twice as much.

9 Q. (Question): Can you estimate what the normal bill
10 would be?

11 A. (Answer): Between a thousand and two thousand
12 dollars depending on the location and the time spent.

13 MR. CLINCH BELSER: Page 127, Line 9, through Page
14 129, Line 17.

15 By Mr. Belser:

16 Q. (Question): Okay. Let me show you Exhibit 26 and
17 I ask you to identify that for the record, please.

18 A. (Answer): This is a portion of the Nationwide
19 claims log.

20 Q. (Question): And what does the highlighted portion
21 indicate?

22 A. (Answer): It documents a conversation with Jerry
23 Byers that the results came back negative on the
24 samples.

25 Q. (Question): Earlier you looked at exhibits which

1 were the actual results themselves. They were dated
2 February the 4th. Do you recall that correctly? You
3 can look at that if you like. But this indicates that
4 you knew by February 5th about the negative results.

5 A. (Answer): Yes, sir.

6 Q. (Question): And everything that you did after that
7 was with the knowledge that the results were negative?

8 A. (Answer): Yes, sir.

9 Q. (Question): Conversations two weeks later were
10 after you already knew that they were negative?

11 A. (Answer): That the results were negative, yes.

12 Q. (Question): And you already knew that the
13 Friendship Fire Department had ruled it unintentional?

14 A. (Answer): Did I know that the Friendship Fire
15 Department had ruled it unintentional?

16 Q. (Question): Yes. They said it was unintentional
17 on Page 2 of this report.

18 A. (Answer): Yes.

19 Q. (Question): Okay. Now let me show you Exhibit 27.
20 Can you identify this for the record, please?

21 A. (Answer): This is a portion of Nationwide's claim
22 log.

23 Q. (Question): Every part which has been highlighted
24 has been made by Mr. Gilden, not you; is that correct?

25 A. (Answer): That's correct.

- 1 Q. (Question): Were you consulted by Mr. Gilden about
2 these beforehand?
- 3 A. (Answer): Consulted about what beforehand?
- 4 Q. (Question): About contacting the Deputy of Oconee
5 County.
- 6 A. (Answer): I had not spoken with Mr. Gilden about
7 contacting the Detective.
- 8 Q. (Question): Did you talk with him afterwards when
9 you saw this in the log?
- 10 A. (Answer): Specifically in regards to this?
- 11 Q. (Question): Yes.
- 12 A. (Answer): I don't recall one way or the other.
- 13 Q. (Question): Okay. This indicates that Detective
14 Mark Lyles of the Oconee Sheriff's Department was
15 contacted. Do you believe that actually happened based
16 upon what's in your log?
- 17 A. (Answer): I do.
- 18 Q. (Question): Do you believe based on what's in the
19 log that he wanted to see the results of the samples as
20 soon as you received them?
- 21 A. (Answer): I do.
- 22 Q. (Question): Do you know whether the results of the
23 samples were ever given to Detective Lyles?
- 24 A. (Answer): I don't know.
- 25 Q. (Question): Who would have done that?

1 A. (Answer): Mr. Gilden.

2 Q. (Question): Would it be reflected in the log
3 somewhere if he had done what the Detective asked?

4 A. (Answer): It probably would.

5 Q. (Question): Well, if it's not there, that suggests
6 he never bothered to get back to Mr. Lyles; is that
7 correct?

8 A. (Answer): Yes, sir.

9 MR. CLINCH BELSER: Page 131, Line 19, through Page
10 132, Line 20.

11 By Mr. Belser:

12 Q. (Question): We already know that. Did Mr. Byers
13 tell you orally that if he could not smell any
14 accelerants on site, that was not always an accurate
15 indicator?

16 A. (Answer): Yes.

17 Q. (Question): He told you that orally?

18 A. (Answer): Yes.

19 Q. (Question): Tell me about y'all's discussion about
20 smells and accelerants. What did you all say about
21 that? I mean, what did he say and what did you hear?

22 A. (Answer): He initially discussed that he said that
23 he saw a distinct pour pattern in two separate spots in
24 the house, but he couldn't smell any accelerants, which
25 wouldn't be unusual in this case because it had been

1 cold and rainy for three days between the time of the
2 fire and the time that he had got there.

3 Q. (Question): Did he expect to find something with
4 the samples?

5 A. (Answer): He was unsure of what would happen with
6 the samples.

7 Q. (Question): But was it -- it was a hundred dollars
8 a sample that he did for \$600.00?

9 A. (Answer): That's correct.

10 Q. (Question): But he would have thought he might
11 have heard, he might have smelled, but he didn't. So he
12 got the samples but it turned out that the samples were
13 negative, too; is that correct?

14 A. (Answer): Yes.

15 MR. CLINCH BELSER: The next-to-last section is
16 Page 134, Line 25, through Page 136, Line 6.

17 By Mr. Belser:

18 Q. (Question): Let me show you now Exhibit 29. Can
19 you identify this for the record, please?

20 A. (Answer): This is a portion of the Nationwide log
21 notes.

22 Q. (Question): And are these entered by you on the
23 date indicated, which was January 20th?

24 A. (Answer): Yes, sir.

25 Q. (Question): And that was three days after the

- 1 fire?
- 2 A. (Answer): Yes, sir.
- 3 Q. (Question): What does it say there at the bottom
- 4 of the page?
- 5 A. (Answer): Note. Coverage limited to \$154,125.
- 6 Q. (Question): Just above that, all the other things
- 7 which are highlighted?
- 8 A. (Answer): Citi Financial has a payoff, \$80,260.59
- 9 for 1/30/09, and First Citizens, \$100,906.68 for
- 10 2/15/09; total payoffs, \$181,167.27.
- 11 Q. (Question): How did you get that information
- 12 entered into your file January the 20th, just three days
- 13 after the fire?
- 14 A. (Answer): Mr. Fowler contacted the lienholders and
- 15 had them fax me payoff notices.
- 16 Q. (Question): Did you get Mr. Fowler to sign a
- 17 release, a release for financial information?
- 18 A. (Answer): He had signed a financial release
- 19 authorization.
- 20 Q. (Question): He signed that and then you got the
- 21 information from the bank; is that correct?
- 22 A. (Answer): The way I remember it is that Mr. Fowler
- 23 contacted the banks forwarded that, had them forward
- 24 that information to me.
- 25 Q. (Question): But you knew three days after the fire

- 1 what the mortgage payoffs were?
- 2 A. (Answer): I did.
- 3 MR. CLINCH BELSER: Now the last section is Page
- 4 136, Line 19, through Page 137, Line 10.
- 5 By Mr. Belser:
- 6 Q. (Question): Now, can you identify this for the
- 7 record, please?
- 8 A. (Answer): This is a portion of the Nationwide
- 9 claims log.
- 10 Q. (Question): Would you go down the entries which
- 11 I've highlighted, please.
- 12 A. (Answer): 0093, scope of damage, detached
- 13 structures. The Koi pond will have to be taken out and
- 14 put back to repair the dwelling. There will be damage
- 15 to a sidewalk around the dwelling and also a driveway in
- 16 the repair or replacement process.
- 17 Q. (Question): So that was your entry into the log
- 18 based upon your visit to the place just a day after the
- 19 fire, that there was this damage to the Koi pond and the
- 20 sidewalk and the driveway?
- 21 A. (Answer): That this damage would happen in the
- 22 repair or replacement process.
- 23 Q. (Question): Okay.
- 24 MR. MURPHY: Line 10, please.
- 25 A. (Answer): There wasn't direct fire damage to these

1 things.

2 MR. CLINCH BELSER: Thank you, Your Honor. We're
3 finally at the end.

4 Come down.

5 THE COURT: All right. You may step down.

6 (Whereupon, Mr. Dillard, who had been answering the
7 questions as Mr. Flanagan during the reading of
8 Mr. Flanagan's Deposition, left the witness stand.)

9 THE COURT: You may step down.

10 Mr. Foreman, ladies and gentlemen of the jury, I
11 went longer than what I anticipated on this. I wanted
12 to complete it rather than interrupt it.

13 It's almost 1:40. How much time would you like to
14 have for lunch? It's up to you entirely because y'all
15 have been very patient with us.

16 (Jury confer in jury box.)

17 THE FOREMAN: One hour.

18 THE COURT: One hour. That will be 2:45. That'll
19 give us an hour and five minutes. So come back to the
20 jury room at 2:45 and we'll commence at that time.

21 Again, do not undertake discussion of the case among
22 yourselves in any fashion.

23 Everyone else remain seated while the Jury retires
24 from the courtroom.

25 (Whereupon, the Jury left the courtroom at

1 approximately 1:40 p.m.)

2 THE COURT: All right. Anything from the Plaintiff
3 before we break?

4 MR. CLINCH BELSER: Nothing further, Your Honor.
5 Thank you very much.

6 THE COURT: Anything from the Defense?

7 MR. MURPHY: No, Your Honor.

8 THE COURT: Give me some idea perhaps what we can
9 anticipate.

10 MR. CLINCH BELSER: Your Honor, our next witness
11 will be Doug Ross, the fire investigator.

12 THE COURT: He will be a live witness?

13 MR. CLINCH BELSER: Yes, sir.

14 THE COURT: Very good. All right.

15 MR. CLINCH BELSER: I'm trying to break up the...

16 THE COURT: That's very good. I appreciate that.

17 Whoever told us it would be 30 to 40 minutes was a
18 little bit off.

19 MR. MURPHY: It wasn't me.

20 THE COURT: All right. So we'll see you at 2:45.

21 I mean, do we have anything that we should be
22 anticipating this afternoon?

23 MR. MOORE: The next Witness was the subject of our
24 Motion *in limine*, so we'll just preserve it prior to the
25 witness being...

1 THE COURT: All right. So, in other words, when
2 you get to that portion where he's going to be
3 proffering his opinions or you have him qualified as an
4 expert, if you would please let the Court know.

5 Or we'll try to proffer him early. Which would you
6 rather do?

7 MR. FREEMAN BELSER: Your Honor, this is something
8 I'll be handling. Your Honor, I think there's no
9 question as to his qualifications, just as to the
10 reliability of his opinion as to the cause of the fire.
11 And so that's kind of a smaller segment of ---

12 THE COURT: That's what I mean. I don't quite
13 understand. What is your question about his testimony?
14 He is qualified as an expert. I mean, he's got his
15 background, training, experience and all that.

16 MR. MOORE: We won't be challenging the
17 qualification prong. What we will be challenging is the
18 reliability prong under the *Watson* line of cases.

19 THE COURT: All right. Now, what were your grounds
20 under *Watson*?

21 MR. MOORE: The grounds are the test, that the
22 opinion is unreliable because it has not been tested.

23 THE COURT: You mean he tested as far as the
24 heater?

25 MR. MOORE: Either a heater or a theory that

1 radiant heat from a space heater can ignite Sheetrock
2 and degrade Sheetrock so it falls and that radiant heat
3 from a heater can ignite wood, wood studs.

4 THE COURT: All right. What do you say,
5 Mr. Belser?

6 MR. FREEMAN BELSER: Your Honor, Mr. Ross is in the
7 back right here and he can address this. But he
8 testified at his deposition that he's familiar with the
9 data which is exactly what we're talking about here.
10 He's also participated in tests through the Carolina
11 Fire Investigator Association that directly involves
12 kerosene heaters and radiant heat and, you know,
13 proximity to wooden members of the house.

14 THE COURT: In other words, he addresses the
15 question, I think one figure is 1,400 is what it takes,
16 or another says a thousand degrees or something?

17 MR. FREEMAN BELSER: Well, Your Honor, he's not an
18 engineer, so he doesn't take the same approach to it as
19 John --

20 THE COURT: Is he familiar with it?

21 MR. FREEMAN BELSER: Yes, sir.

22 THE COURT: And he's gonna address it?

23 MR. FREEMAN BELSER: Well, I think what he's gonna
24 testify is that the issue of the 1,400 degrees is kind
25 of a red herring. That's if you put something at 1,400

1 degrees in immediate contact with something, it's gonna
2 blow up. But there's a question of intermediate time.

3 THE COURT: All right. I understand. Is there
4 anything else? That's what he's gonna be? In other
5 words, he's never tested Sheetrock to determine when it
6 blows up or ignites?

7 MR. MOORE: He's not tested, nor has he provided
8 any research basis from any source that the heat source
9 of the back of the heater with temperatures in the
10 150-degree range at most would degrade Sheetrock to the
11 point that it would fall off a wall, or can
12 spontaneously ignite Sheetrock. Temperatures that would
13 be hundreds of --

14 THE COURT: And you have something that does?

15 MR. MOORE: Yes, I do.

16 THE COURT: And it's commonly known?

17 MR. MOORE: Well, I have, certainly have learned
18 treatises that our expert has referred to regarding ---

19 THE COURT: All right. In other words, we're
20 talking about really source material and not experience.
21 In *Watson* I think the fella had never driven or tested
22 or even been involved in any sort of testing on speed
23 control or cruise control.

24 MR. MOORE: And in our case we are actually talking
25 about source materials and testing that has been done.

1 We have had an exemplar heater test the theory, and it
2 hasn't happened.

3 THE COURT: It hasn't happened. All right. That
4 will be for the Jury. I think it's credibility. Your
5 motion now is renewed so we can go forward at 2:45.

6 I'm denying your motion to limit his testimony as
7 to causation --

8 MR. MOORE: Yes, Your Honor.

9 THE COURT: -- based on temperature.

10 All right. Very good. And, for the record, it
11 will not be necessary to renew it unless I hear
12 something in the testimony or you hear something in the
13 testimony that would change it.

14 MR. MOORE: Thank you, Your Honor.

15 The only other issue, it is my understanding
16 they've withdrawn the proffered opinion with regard to
17 his evaluation of 60 or 100 other fires that Mr. Byers
18 has been involved in?

19 MR. FREEMAN BELSER: That's correct, Your Honor.
20 And that was 61 versus 105, that was my mistake.

21 THE COURT: All right. In other words, you're not
22 going to be pitting one witness against the other?

23 MR. FREEMAN BELSER: No, sir, Your Honor. We'll
24 just talk about this fire.

25 THE COURT: Very good. I think that's a good

1 Afternoon Proceedings

2 2:53 p.m.

3 THE COURT: All right. Anything from the Plaintiff
4 before we begin?

5 MR. FREEMAN BELSER: No, sir, Your Honor.

6 THE COURT: Anything from the Defendant before we
7 begin?

8 MR. MOORE: No, Your Honor.

9 THE COURT: Very good.

10 Ask the Jury to join us, please.

11 (The Jury entered the courtroom at approximately
12 2:54 p.m.)

13 THE COURT: Let the record reflect the Jury and
14 Alternate are in the Jury box.

15 The Plaintiff may continue with its case. The
16 Plaintiff may now call your next witness.

17 MR. FREEMAN BELSER: Thank you, Your Honor. If it
18 please the Court, the Plaintiff would call Mr. Doug
19 Ross.

20 (Whereupon, the Witness, Mr. Donald Douglas Ross,
21 Sr., was sworn by the Deputy Clerk of Court.)

22 Whereupon,

23 Donald Douglas Ross, Sr.

24 having been first duly sworn, was examined and testified
25 as follows:

1 Direct Examination by Mr. Freeman Belser:

2 THE COURT: I might note for the record, this
3 testimony will be subject to the Court's prior rulings.

4 By Mr. Freeman Belser:

5 Q. Good afternoon, Mr. Ross. Please state your full
6 name for the record.

7 A. Donald Douglas Ross, Senior.

8 Q. And where do you live currently?

9 A. Greenville, South Carolina.

10 Q. Where are you from originally?

11 A. Greenville, South Carolina.

12 Q. And how old are you?

13 A. I'm 59.

14 Q. Okay. And are you married and do you have any
15 children?

16 A. I'm married with three adult children and two new
17 grand-babies.

18 Q. Okay. I'd like to ask you just to give us a brief
19 overview of your employment history. So what is your
20 employment history?

21 A. In 1975 I took a position with the Greenville
22 Police Department. I was in Uniform Patrol for a while
23 and then I was selected to work on a narcotics team, a
24 plain clothes narcotics team that evolved into a vice
25 detective position and then eventually a detective's

1 position. And during that time I developed an expertise
2 and an interest in fire investigation.

3 So in 1981 I was named the Greenville Police
4 Department's first full-time arson investigator. In
5 1988 I was selected or offered a position with the South
6 Carolina Arson Control Team, which at that particular
7 point was under the State Fire Marshal's Office. And
8 under the consolidation of government in 1991 the Arson
9 Control Team was absorbed by the South Carolina Law
10 Enforcement Division, which is SLED.

11 Q. And I understand that you worked at SLED for what
12 time period was that?

13 A. From '91 when it was absorbed until 2006.

14 Q. Okay. And what types of things did you do while
15 you were at SLED?

16 A. The majority of the time I was the supervisor of
17 the Upstate Arson Unit. I had a number of investigators
18 under my command. And we investigated pretty much any
19 request from local departments. If you can picture I-20
20 going through South Carolina, I had everything west of
21 it, so it was a large area at the time.

22 Q. And what is your current employment?

23 A. I am a private investigator and also an instructor
24 of new fire and arson investigators, continuing
25 instructor, and both of these are housed under my

- 1 business name of Fire Fuzz Enterprises.
- 2 Q. And what does Fire Fuzz Enterprises do on a daily
- 3 basis?
- 4 A. Plans training, advertises training, when there is
- 5 an investigation I go and follow up on investigations,
- 6 and whatever needs that come, that come my way.
- 7 Q. What, who are your, what types of clients do you
- 8 have?
- 9 A. I generally -- well, not generally -- but I always
- 10 work for attorneys.
- 11 Q. And do you work for insurance companies?
- 12 A. No, sir.
- 13 Q. What licenses do you hold?
- 14 A. I'm a licensed private investigator through SLED in
- 15 South Carolina. That's the only license I currently
- 16 have now that allows me to conduct private
- 17 investigations.
- 18 Q. And what certifications do you have?
- 19 A. I am recognized as a Certified Fire Investigator
- 20 through the International Association of Arson
- 21 Investigators, which is a, it's a worldwide organization
- 22 that's focused directly on arson investigators for
- 23 support services, resources, information, networking,
- 24 training, and things such as that. Probably the last
- 25 number I saw there was probably about maybe twelve or

1 thirteen hundred certified fire investigators in the
2 world.

3 Q. And what other professional organizations are you a
4 member of?

5 A. I'm a member of the South Carolina Law Enforcement
6 Officers Association, I'm a member of and actually the
7 Board Chairman of an organization called the Carolina
8 Fire Investigators, which is centered in Greenville.
9 We're in like I think our twenty-fifth or twenty-sixth
10 year now of meeting the needs of fire, police, and the
11 insurance professionals who are involved with fire for
12 the purpose of, here again, networking, sharing
13 information, specific training, and things such as that.

14 Q. I understand that you do some teaching. If you
15 could describe generally who are your students and what
16 the topics are.

17 A. Originally, in 2007 I was, I became part of the --
18 I was an adjunct instructor with the Greenville
19 Technical College, their new Associate's Degree Fire
20 Science Program. I did, their arson and fire
21 investigation training fell to me. I also, advertise
22 also that I do it for departments, whether it be law
23 enforcement or fire service.

24 Probably four or five times a year somewhere in the
25 Upstate we'll have a week-long gathering and we'll go

1 over our -- I try my best to teach them what they need
2 to know to go out and be successful in a fire
3 investigation.

4 Q. Have you done any teaching in Oconee County; and,
5 if so, what Departments?

6 A. I have. I know probably three years ago I did a
7 week-long training session over here. And you had
8 participants from the Oconee County Sheriff's Office,
9 Oconee County Emergency Management Division, and the
10 Oconee County Fire Department were in attendance.

11 Q. And what was the topic?

12 A. Fire investigation.

13 Q. And why were they interested in what you have to
14 teach, sir?

15 A. On a local level, it's becoming more and more
16 important for the local agencies to be able to make
17 their own call on origin and causes of fires. For so
18 long they've been dependent upon State resources, and,
19 as you well know, some of those resources are drying up.
20 Over the last several years the local agencies weren't
21 getting the response that they felt like was deserved of
22 them, so it's kind of created a situation where the
23 local chiefs or whatever, they want to have their own
24 person on board who has an expertise to determine the
25 origin and cause of a fire and to carry that

1 investigation further until it runs out of leads pretty
2 much.

3 Q. Now, that was just some discussion about you as a
4 teacher. How about you as a student: do you do
5 continuing education?

6 A. I do. Arson-related, since 1981 I attended the
7 first ever two-week arson investigation class at the
8 South Carolina Police Academy. And, of course, through
9 the South Carolina Police Academy, I know, five years I
10 know of attending the Georgia State Firefighters
11 Association's Annual Arson Conference that was held at
12 the University of Georgia for a number of years.
13 Carolina Fire Investigators, as I mentioned, we meet
14 every other month and have specific focus training
15 connected or concerned with fire and arson
16 investigation.

17 We also, in that same organization, have on
18 occasions been offered houses to burn for training and
19 so forth. And it just makes it much more hands-on. It
20 gives you a better idea of how fire does react when you
21 can see it yourself in person.

22 Q. Can you estimate how many hours of arson
23 instruction you have given?

24 A. Probably well over 700.

25 Q. And how about the number of cause and origin

- 1 instructions that you have actually received?
- 2 A. Hours of training I've received?
- 3 Q. Yes.
- 4 A. Probably five hundred-plus.
- 5 Q. And can you estimate how many fire cause and origin
- 6 investigations you have conducted, an estimate?
- 7 A. A wild estimate. I, you know, didn't keep my logs
- 8 when I should have, but, you know, it averages out to,
- 9 you know, about 70 a year; so from let's say the
- 10 mid-eighties to 2006, 70 a year. It's quite a number.
- 11 Q. Now, have you ever been published before?
- 12 A. I have.
- 13 Q. Okay. And what publications have you published?
- 14 A. I write an arson-related article in a publication
- 15 called *The Carolina Fire Rescue EMS Journal*. It's a
- 16 publication that's centered in Charlotte, North
- 17 Carolina. It's published for Fire Departments and
- 18 Police Departments and EMS Departments in both the
- 19 Carolinas. That is a quarterly, a quarterly article.
- 20 Q. And have you ever been qualified to testify as an
- 21 expert witness in the field of fire cause and origin
- 22 investigations in the State of South Carolina?
- 23 A. I have.
- 24 Q. Okay. How many times?
- 25 A. Probably nine different counties, also U.S.,

1 Federal U.S. District Court in Greenville, Greenville
2 Division.

3 MR. FREEMAN BELSER: Your Honor, I would like to
4 move to qualify Doug Ross as an expert in the field of
5 fire cause and origin investigations.

6 THE COURT: Very good.

7 Voir Dire?

8 MR. MOORE: Without objection, Your Honor.

9 THE COURT: All right. Without objection the
10 Witness will be qualified as an expert in fire --

11 MR. FREEMAN BELSER: -- fire cause and origin
12 investigation, Your Honor.

13 THE COURT: All right. That will mean, Mr. Foreman
14 and ladies and gentlemen of the Jury, that he will be
15 permitted to give his opinion.

16 As you have found out, that most witnesses are
17 limited in what they can testify to as to only their,
18 what they know of their own knowledge, in other words,
19 exercise of their own senses. However, if an individual
20 by reason of background, training and experience has a
21 particular expertise in an area, then they will be able
22 to give their opinion as to that particular area.

23 And again, all testimony of witnesses, expert or
24 lay, are for your evaluation.

25 You may proceed.

1 MR. FREEMAN BELSER: Thank you, Your Honor.

2 By Mr. Freeman Belser:

3 Q. Now, Mr. Ross, I would like to discuss the
4 investigation that you conducted in this case and start
5 with asking how you got involved in this investigation.

6 A. I received a call from one of my former fire
7 investigation training class students who was working on
8 a fire scene with an insurance consultant's business out
9 of Mt. Pleasant, I believe it was, they were
10 inventorying a fire scene. And the --

11 Q. And make sure not to tell me what that gentleman
12 told you because that would be hearsay.

13 A. Okay. The phone call alerted me that there was a
14 particular need for a fire investigator at Mr. Fowler's
15 house.

16 Q. Okay. And the fire was on January the 17th of
17 2009. Is that your recollection?

18 A. That is correct, yes.

19 Q. Okay. When did you get involved?

20 A. I got involved, I think February 20th is when I was
21 on the scene.

22 Q. Okay. So a little more than a month afterwards?

23 A. Yes, sir.

24 Q. And what specifically were you asked to do?

25 A. I was asked basically to make a determination of

- 1 the origin and the cause of the fire that occurred at
2 his residence..
- 3 Q. Okay. And without getting into what was said,
4 because that would also be hearsay, who did you speak
5 with as a part of your investigation?
- 6 A. I spoke with Mr. Fowler.
- 7 Q. And did you speak with Chief Wright?
- 8 A. I spoke with Chief David Wright some time after I
9 left the scene, yes.
- 10 Q. Now, do you know Chief Wright?
- 11 A. I do.
- 12 Q. How do you know Chief Wright?
- 13 A. I have been on fire investigation scenes with him
14 and he's also participated as a student in some of my
15 training.
- 16 Q. Now I'd like to turn your attention to the kerosene
17 heater. Did you do any investigation of the kerosene
18 heater?
- 19 A. I did a visual examination of the kerosene heater.
- 20 Q. Okay. And where was that?
- 21 A. It was in the possession of Jerry Byers at his home
22 in Greenville.
- 23 Q. Okay. Is Mr. Byers here today?
- 24 A. No, sir.
- 25 Q. Now I would like to hand you a stack of exhibits,

1 and then we're gonna go through an exhibit and then the
2 Manual 921 that is not an exhibit that we will
3 reference, and ask you to identify what they are and
4 whether you evaluated those materials as a part of your
5 investigation.

6 A. Beginning with Exhibit Number 17, these are
7 photographs showing the pre-fire conditions of
8 Mr. Fowler's house, pre-fire meaning this is how it
9 looked when he, when he lived in this particular house
10 before the fire.

11 Q. Okay. What about the next exhibit, Exhibit Number
12 28?

13 A. Exhibit 28 are reproductions of my photographs.

14 Q. And when were those photographs taken?

15 A. On February 20th.

16 Q. Okay. What was the scene -- what did the -- well,
17 what did the scene look like when you were there?

18 A. Structurally it was a good representation of as it
19 was the day of the fire, but internally there had been a
20 lot of debris moved. Like I mentioned, they were
21 conducting an inventory. They had several people
22 actively working to inventory the materials that were
23 there. And so it had been, it had been disturbed
24 somewhat.

25 Q. And is it your understanding that that was the fire

- 1 investigation Mr. Byers had done?
- 2 A. Correct.
- 3 Q. Now, what about Exhibit 29?
- 4 A. Exhibit 29 are Jerry Byers' photographs.
- 5 Q. And what's your understanding as to when those
- 6 photographs were taken?
- 7 A. They were taken, I believe, on January the 19th or
- 8 January the 20th, a day or two, probably the Monday
- 9 after this fire occurred.
- 10 Q. And you have reviewed those photographs?
- 11 A. I have.
- 12 Q. Now, the next exhibit is Plaintiff's Exhibit Number
- 13 5. Please identify that for the ladies and gentlemen of
- 14 the Jury, and also let them know whether or not that was
- 15 part of your investigation.
- 16 A. Okay. This was a standard analysis report from a
- 17 chemistry lab in South Carolina that's known as Data
- 18 Resources. When a fire investigator on the private side
- 19 of things takes laboratory samples, they are submitted
- 20 to a private lab, and in this particular case this is a
- 21 report addressed to Technical Investigations and
- 22 Services in care of Jerry Byers, and it documents what
- 23 the results were of the testing on the sample.
- 24 Q. What were the results of those tests?
- 25 A. Of the six samples, they were all the same, no

1 ignitable liquids detected.

2 Q. Now, Plaintiff's Exhibit Number 6 is the next
3 exhibit. What is that document and did you review it as
4 part of your investigation?

5 A. I did. Exhibit Number 6 is the local Friendship
6 Fire Department's Truck Report. This is just an
7 in-house report they do to track the time of alarm, the
8 time of arrival, the time of completion, what equipment
9 was used, who showed up as far as the firefighters and
10 so forth.

11 And also it asks if you had to call for mutual aid
12 from other departments, it gives you choices to circle,
13 also. The information on the call also is recognized
14 and noted on the form, also.

15 Q. And why is it important to you what the first
16 responders observed and found when they were at the
17 scene?

18 A. The writer of this report first says of interest to
19 me that the area of origin was in the living room, and
20 the Cause of Ignition is undetermined -- excuse me,
21 unintentional, and equipment involved in the ignition is
22 a kerosene heater.

23 Q. Now, you don't always rely on what the first
24 responders have to say. You do your own investigation;
25 isn't that true?

1 A. That's true.

2 Q. But that being said, why is what the first
3 responders see and observe important to you?

4 A. Just for that reason. They were there. They see
5 it as it's happening. As you mentioned, I was over a
6 month away getting there. So what the firefighters see
7 is very critical to any investigator that comes in
8 behind them to know what they saw, what they did, and
9 their opinion of it.

10 Q. And, going back to Exhibit Number 5, the test
11 results, why are the test results important to you as a
12 fire investigator?

13 A. If an investigator identifies an area where he
14 suspects somebody has poured a flammable liquid in this
15 area, the samples are taken to corroborate that, to
16 boost your case. I was interested in the fact that of
17 the six samples that Jerry Byers took, there was no
18 ignitable liquids detected in any of the six.

19 Q. Now, the next exhibit is Plaintiff's Exhibit Number
20 27. Do you see that? I'm gonna place up on this board
21 a copy of Exhibit 27 and ask you to make sure that's the
22 same thing that you are looking at.

23 A. It is.

24 Q. Okay. I'm also going to go ahead and hand you this
25 laser pointer, with new batteries, so you can reference

1 that as needed.

2 Now, Mr. Ross, the last document ---

3 MR. MOORE: Your Honor, may I be permitted to stand
4 up here so I may see the exhibits?

5 THE COURT: Yes, sir.

6 MR. FREEMAN BELSER: Now, Mr. Ross, he's not
7 looking over your shoulder, he's looking over there.

8 By Mr. Freeman Belser:

9 Q. The last document is this black book. I'd like for
10 you to identify that for the ladies and gentlemen of the
11 Jury and tell me what it is.

12 A. This is a guide for fire and explosion
13 investigations. This is produced by the National Fire
14 Prevention Administration. This is a private entity
15 that issues these guides on so many different things,
16 mechanical, and things from a standpoint with this
17 particular case.

18 921 is referred to universally among fire
19 investigators as the Bible for fire investigations.

20 Q. And so as a part of your -- what edition is that?

21 A. This edition was the 2008 edition. This was the
22 one that was in effect at the time that Mr. Fowler's
23 house burned. This is reproduced every three years.
24 You know, there may be a need to tweak something here or
25 there, and they always seem to add more to it. So what

1 started out in 1995 was a pretty small book, and now
2 it's grown to be quite sizable. It's definitely, it's
3 300-plus pages.

4 But this is, this is the Bible, so to speak. This
5 is what, this is what your fire investigators use. They
6 use it to teach. They use it to show others like we're
7 gonna do today. This is what I go by when I make my
8 determinations. And this is, as I mentioned, this is a
9 universal document and it is recognized as such,
10 especially through the International Association of
11 Arson Investigators, of which I'm a member. That's the
12 same organization or association that certified me
13 through testing as a fire expert.

14 Q. Now, as a part of your investigation in this case,
15 did you also familiarize yourself with applicable
16 research and data?

17 A. I did.

18 Q. Okay. Explain that to the ladies and gentlemen of
19 the Jury.

20 A. I did research, of course, on the heater itself and
21 researched also on different aspects of wall -- or,
22 excuse me -- fires within walls themselves, especially
23 which are protected by Sheetrock, and found certain or
24 several notations in the 921 that directly dealt with
25 that.

1 Q. And have you in the past participated in tests that
2 would help with your investigation in this case?

3 A. We, from time to time, as I mentioned, we would
4 burn, we have been given houses or buildings to burn for
5 test purposes just to see if our theories still stand
6 true and so forth, just to kind of like make sure that,
7 you know, as materials change that what we are seeing is
8 gonna be, you know, concise to what our training is.

9 Q. Now, Mr. Ross, have you developed any opinions in
10 this case as to the cause and, or the origin and cause
11 of the fire that burned Mr. Fowler's house?

12 A. I did.

13 Q. Okay. And are your opinions with a reasonable
14 degree of certainty as a fire cause and origin
15 investigator?

16 A. They are.

17 Q. Okay. All right. Mr. Ross, I would like to ask
18 you about your opinion about the origin of the fire.
19 Before we launch into that, I'd like to ask Mr. Dillard
20 to come up because I'm going to ask him to project some
21 documents.

22 MR. MOORE: Were you going to use the exhibit?
23 Maybe I misunderstood that.

24 MR. FREEMAN BELSER: Yes. He is gonna reference
25 that, so...

1 By Mr. Freeman Belser:

2 Q. Okay. Now, Mr. Ross, what is your opinion as to
3 the origin of the fire in Mr. Fowler's house? And I'd
4 like you to refer -- if you could point to the Jury
5 using the laser pointer to explain yourself.

6 MR. MOORE: Don't point to the Jury.

7 (Laughter.)

8 THE WITNESS: May I step down?

9 THE COURT: Certainly.

10 All right. In order to do that -- go ahead, sir --

11 (Witness leaves stand.)

12 THE COURT: -- we might need to resituate ourselves.

13 In other words, I think the Witness should be to
14 the other side of the exhibit but bring your exhibit
15 back. The reason I'm doing this is because the Court
16 Reporter needs to be able to see the Witness when he
17 testifies.

18 MR. FREEMAN BELSER: Okay.

19 THE COURT: Now you can leave the tripod up there,
20 but leave it a little bit behind the line of vision.

21 MR. FREEMAN BELSER: Okay.

22 THE COURT: All right. Now, if you would please,
23 sir, you will be talking not only to the Jury, but also
24 to the Court Reporter.

25 THE WITNESS: Okay.

1 By Mr. Freeman Belser:

2 Q. Now, Mr. Byers [sic], what is your opinion as to
3 the origin of the fire? Mr. Ross. I'm sorry.

4 A. In my opinion the origin of the fire -- and, of
5 course, the origin is where the fire burns the
6 longest -- it's gonna be in the area --

7 Q. You need to make sure the folks on the other side
8 can see.

9 A. -- it's gonna be in the area directly behind this
10 kerosene heater.

11 You can see the notation here and the parameter
12 pointing into that particular box, that's the kerosene
13 heater. In my opinion the fire originated and spread
14 from a point behind this heater to within a wall and up
15 through the top of the wall into the attic. And, of
16 course, once in the attic it had free run of the whole
17 attic and, of course, caused the damage that it did.

18 Q. Now, Mr. Ross, what physical evidence at the scene
19 did you observe and were you told about by Mr. Wright
20 that are consistent with your opinion?

21 A. Well, I found out later that the Fire Chief pretty
22 much corroborated what I saw originally as far as the
23 point of origin. He said that as he arrived at the
24 scene and as he looked into the scene, he saw the
25 majority of the fire around the kerosene heater on the

1 wall behind it.

2 Q. Okay. And did you observe any areas of high or low
3 burns?

4 A. Yeah. There was an area of low burning behind the
5 kerosene heater into the baseboard. And, of course, low
6 burning is always of interest to a fire investigator to
7 make sure why there's such low burning in a particular
8 place. This was behind the heater at floor level and it
9 had burned completely through to the baseboard, and I
10 feel that's where the breach was possibly made to where
11 it got inside the wall. There was, there's photographs
12 that show this particular baseboard that's consumed, and
13 there's also a photograph of a wall stud.

14 And just as a quick lesson in fire investigation,
15 once a fire originates, it burns upwards because of the
16 buoyancy of the hot air, it's gonna go upwards. And as
17 it goes upwards and begins to build overhead into a
18 cloud, it kind of like starts arcing out, forming a V,
19 like the letter V. And just to be real quick and
20 elementary about it, if you find these V patterns and
21 you feel like you are in the area of origin, use these V
22 patterns to corroborate your findings by inverting the
23 V. If you can imagine that the fire burns upward and
24 outward, so down here is gonna be the origin, you invert
25 your Vs back down to that point, and you are generally

1 in the area of where the fire originated. If you are in
2 the area of where the fire originated and you are in the
3 area of where the fire burned the longest; so,
4 therefore, you realize you are certainly gonna have the
5 most damage there.

6 Q. Now, Mr. Ross, why don't you return to your seat
7 and then we're gonna project some pictures.

8 (Witness resumed stand.)

9 By Mr. Freeman Belser:

10 Q. Now, Mr. Ross, in the exhibit that's marked Number
11 28 -- those are your photographs, correct?

12 A. That's correct.

13 Q. -- turn to 36 at the bottom, and I would also like
14 to ask Mr. Dillard to project that on the screen.

15 Are the photographs projected on the screen the
16 same photograph that is the exhibit numbered 36 and
17 Exhibit 28?

18 A. It is.

19 Q. Now you just gave your opinion about the origin of
20 the fire. Here's a photograph. Explain how this is
21 demonstrative of your opinion.

22 A. Because the wall studs that I mentioned are gonna
23 show directional patterns or pointer patterns to help
24 lead you back to where the fire originated. I mentioned
25 the fire burns upwards and outwards, so you're gonna

1 have a V pattern is what it's called, is what we call
2 it, and you can use these patterns to direct you back to
3 where the fire originated.

4 And I'll do that here, if you could see, this is
5 the wall stud, and you can see where it's burned going
6 upward and outward. So, as I mentioned, you invert that
7 V and it's gonna bring you back down to this area right
8 here. This is the baseboard and this is where the
9 baseboard was breached, pretty much directly behind the
10 heater, maybe a little towards the left rear side of the
11 heater.

12 But nonetheless, that baseboard was breached, and I
13 feel like that's where the fire got to within the wall
14 and created the size fire that they had.

15 Q. Now, Mr. Ross, just for reference --

16 MR. FREEMAN BELSER: And can everybody see?

17 (Jurors nod heads.)

18 Q. -- just for reference on the diagram, is that
19 photograph right there pointing behind the kerosene
20 heater?

21 A. That's correct.

22 Q. Okay. And where was the most damage in the house?

23 A. Along that wall. That wall was consumed.

24 Q. Okay. And can you see that by looking at this
25 photograph?

- 1 A. Well, this is one wall stud. There should have
2 been a wall here, but it's completely consumed. And, if
3 you could draw back further, I don't know if there's
4 another photograph that's gonna be projected, but it
5 shows that that whole wall was consumed all the way down
6 to the end of the wall going into the kitchen.
- 7 Q. Okay. So that's like a stud, that's a stud, what's
8 left of a stud right there, which would like be in this
9 wall behind here, correct?
- 10 A. Yes.
- 11 Q. Now, the next photograph is also in Exhibit Number
12 28, and it's picture number 28. And that photograph is
13 a picture of this wall in the living room; isn't that
14 true?
- 15 A. That's the wall behind it, yes, sir.
- 16 Q. Okay. And so the wall that I'm pointing at is the
17 wall behind the TV?
- 18 A. Yes.
- 19 Q. Okay. And are those studs right there?
- 20 A. Those are, those are studs. You see one, two,
21 three, four, five of them that are visible in the
22 photographs.
- 23 Q. Uh-huh.
- 24 A. These studs are set on I think 16 inches, every 16
25 inches there's a stud, that's a part of your wall

1 system.

2 Q. Okay. And, now, this photograph shows the studs
3 that were not burned. But what does it show at the top
4 of the studs?

5 A. The top of the studs are exhibiting a very deep
6 charring, and this is as a result of a cellulosic
7 product, wood in this case, going through the pyrolysis
8 process to where these hard blisters are formed. It's a
9 carbon blister. It's a good indication to me that the
10 fire was high in that particular area and that it burned
11 longer there than in other places.

12 Q. Now, what's the significance of the high burn in
13 that location there?

14 A. In my opinion the fire breached the wall behind the
15 heater, and as it rose up inside that wall, it's gonna
16 spread upward and outward, but in this particular case
17 breached the attic, and as it continued to free burn and
18 leaving this pretty much the high damage that you see
19 here. The damage down below, you still see good wood
20 finish on those wall studs. So once that fire breached
21 that wall and got up into the attic and began to spread
22 horizontally, it left the wall studs in fairly good
23 shape, the ones that survived.

24 MR. FREEMAN BELSER: Now, Mr. Dillard, the next
25 picture is picture number 37, and that's in Exhibit 29,

1 which are Mr. Byers' photographs.

2 By Mr. Freeman Belser:

3 Q. Now, Mr. Byers was at the scene before you were; is
4 that correct?

5 A. That's correct.

6 Q. Okay. Now, what does this, what does this
7 photograph number 37 from Mr. Byers' photographs show?

8 A. That's showing the kerosene heater in place as he
9 found it.

10 Q. Okay. And again, that photograph shows the
11 kerosene heater which is on Mr. Byers' diagram is right
12 there; is that correct?

13 A. That is correct.

14 Q. And can you see the burnt stud on this picture?

15 A. I think the battery is gone again (referring to
16 laser pointer).

17 Q. Out of juice again?

18 A. Sorry.

19 Q. That's all right.

20 A. I can point. I can come down and point. It's
21 working now.

22 Q. It's working now? Well, here is a backup.

23 A. This is at the wall stud that we just looked at a
24 picture of. Even from this angle you can see where it's
25 higher on this end of the wall stud and you see a gentle

1 slope going down that way and this particular wall from
2 being completely gone. This is the area where I feel
3 like the fire originated and grew from.

4 Q. Okay. And we talked about your familiarity with
5 921. Does 921 reference -- what does Section 6.3.7.6.1
6 say?

7 A. 6.3.7.6.1 in 921 --

8 Q. And before you read, I want to make sure that
9 what's projected, you can see it's 6.3.7.6.1.

10 A. Shall I read it?

11 Q. Yes, sir.

12 A. Reading, it says: The shape of the studs'
13 cross-section will tend to produce arrows pointing back
14 toward the general area of the source of heat.

15 Q. Okay. And were there any diagrams on the other
16 side?

17 A. There is.

18 Q. You can go to the next page.

19 A. In figure 6.3.7.6, it's just a schematic diagram
20 illustrating the direction of the fire's travel by
21 reading wall studs. Of course, you see designated here
22 the source of the heat and as it burns upward and
23 slightly outward, you see that gentle slope.

24 Fire investigators work backwards, so we look for
25 the highest amount of burning and trace it back down to

1 the lowest amount of burning, and in this case with that
2 wall stud we found, that's what I did.

3 Q. Those look like one half of the V because I guess
4 the other side there's nothing to burn?

5 A. Right.

6 Q. Now, talk about the importance to fire
7 investigators of the V pattern is to fire investigators.

8 A. The V pattern, there's a number of patterns, but
9 the V pattern is basically the hallmark of patterns for
10 fire investigators to interpret. That's the pattern you
11 look for first. As you begin on the outside of your
12 structure and work your way in, you are interpreting the
13 V patterns, and if there are any V patterns left, to
14 direct you and point you to the fire's origin.

15 Q. Now, you've read Mr. Byers' report, haven't you?

16 A. I have.

17 Q. Okay. Does Mr. Byers make any reference to the V
18 pattern in his report?

19 A. No.

20 Q. Okay. Is that significant?

21 A. I think it's significant because, first of all, as
22 I mentioned, it's a very indicative pattern, it's a very
23 true pattern, and it shows the investigator exactly
24 where to look for the area of origin and it seems as
25 though this would discount it completely.

1 Q. Now, in your opinion you've talked briefly about
2 how the fire in your opinion went up and then went into
3 the attic where it had free reign. What is your opinion
4 as to how the fire spread, if you could map it out for
5 the Jury?

6 A. Well, the particular wall that I'm talking about
7 that was consumed on that left-hand side of that wall
8 was part of the supporting process for a steel beam that
9 pretty much supported the whole structure, the attic
10 structure itself. When that wall burned away, the
11 I-beam failed, falling into the scene which, of course,
12 caused a chain reaction of everything in the attic
13 dumping into this floor level scene itself.

14 Q. Now, Mr. Byers -- I'm sorry, Mr. Ross -- what is
15 your understanding of Mr. Byers' opinion as to the
16 origin of the fire in Mr. Fowler's house?

17 A. The report notes that he identified two areas of
18 what appeared to him to be intentionally distributed
19 accelerants.

20 Q. Okay. And where were the two burn patterns that he
21 cited?

22 A. One is in the kitchen. They're both noted on the
23 diagram there. And one back towards the -- in the
24 living room towards the front, in front of what would
25 have been Mr. Fowler's grandfather clock.

1 Q. Now, I would like for you to explain to the Jury
2 how in your opinion Mr. Byers' opinion is inconsistent
3 with the physical evidence that was present at the
4 scene.

5 A. Well, first of all, where the samples were taken,
6 six samples is a pretty significant number of samples,
7 and all of them came back negative. There was nothing
8 found by the chemist or his equipment in the process.

9 The pour patterns, I looked at one of them over
10 closer towards the sliding glass doors and my opinion
11 was a result of the curtains and the sheers and all the
12 material dressing that Mr. Fowler had out of those
13 curtains, and when the fire, as I mentioned, burns
14 upward and outward and begins to collect overhead, it
15 begins to fill in with a gas cloud or superheated
16 temperatures, and anything that's combustible such as
17 curtains will reach ignition temperature, burn away from
18 the curtain rod, fall down to the floor and continue to
19 burn unless they're extinguished.

20 Q. Now, what about Mr. Byers' claimed point of origin
21 in the kitchen? Why do you disagree with that?

22 A. I feel like the patterns that he is seeing and
23 calling an intentional pour pattern is in my opinion a
24 direct result of everything in the attic that Mr. Fowler
25 had stored up there releasing and dumping into the

1 kitchen as that I-beam failed.

2 MR. FREEMAN BELSER: Now, Mr. Dillard, put picture
3 number 1, Exhibit 17, photograph 1, on the screen.

4 By Mr. Freeman Belser:

5 Q. Mr. Ross, what does this picture show that is
6 consistent with what you were just talking about?

7 A. It shows me that there is a significant amount of
8 fire load, and when I'm talking about fire load, there's
9 a significant amount of combustible materials that, once
10 heated to its ignition temperature, is going to burn.
11 For a fire to survive from its smallest origin it has to
12 have other fuel load or fire load to feed off of. It's
13 a continual process, for the fire to survive and to
14 grow, it's got to feed off of other materials, and in
15 this particular photograph it shows that there was quite
16 a bit of combustible materials in this scene.

17 Q. Can you point out the window dressings to the Jury,
18 the curtains?

19 A. You can see a drape here and, of course, you have
20 sheers over here and then the dressing overhead all
21 attached to a sheet metal curtain rod.

22 MR. FREEMAN BELSER: And, Mr. Dillard, if you could
23 move the photograph down a little bit so you could see
24 it in the top left corner -- if you could move it in the
25 other direction -- yes, sir -- so we can see the...

1 By Mr. Freeman Belser:

2 Q. What do you see right there and how is that
3 significant?

4 A. Those are dried flowers in a basket and this would
5 have been very close to the area of the heater.

6 Q. And what about what's hanging on the wall?

7 A. You have the wide variety of picture frames,
8 mirrors, knickknacks, as Mr. Fowler called them, he had
9 a good number of those around. You can even see on top
10 of his television over there, also the grandfather clock
11 was also a display case as well. So you had a lot of
12 material over here and attached to that wall that once
13 it goes through an extended period of heating, certainly
14 can serve to ignite and carry the fire through that
15 wall.

16 MR. FREEMAN BELSER: And, Mr. Dillard, the next
17 photograph is picture 42 from Mr. Ross's photographs.

18 By Mr. Freeman Belser:

19 Q. And you can look up on the screen. What does this
20 photograph show?

21 A. This is a photograph I took showing a close-up of
22 number one, the curtain rod still in place; number two,
23 the thickness of the char blisters up top as compared to
24 coming down this way. They were deeper. Char blisters
25 don't dictate how long a fire burns, but you can

1 certainly use them to give you a direction of the fire.

2 The deeper the char blisters, the closer to the fire.

3 And also you can see this particular angle where it
4 looks pretty clean and then it looks like it's not so
5 clean right here. You can see here again is that gentle
6 slope of that V pattern that's leading me back down this
7 way back towards the heater. If you're looking for V
8 patterns, it is not always both legs of the V, you may
9 have just one, and that's what we have here.

10 Q. The next one is picture number 48 from Mr. Byers'
11 photos. What does this photograph show?

12 A. It shows the edge of the sliding glass doors, it
13 shows a window just before you get to the grandfather
14 clock and display case and you come over this way to the
15 entertainment center with the television. You have
16 carpet right here. You have spoiled concrete right in
17 here. And my opinion for the reason for that spoiled
18 concrete is when the drapes burned away and piled up on
19 the floor, they continued to slow burn, a
20 smoldering-type burn that produced enough heat to spoil
21 that concrete. You can see also a pattern of some sort.
22 I think Mr. Byers is calling that an intentional pour
23 pattern.

24 Q. Point to the Jury what you're talking about.

25 A. This area in here (pointing). And, here again, I

1 feel like this is secondary after the fact of the
2 original fire in the wall behind the heater that spread
3 over to these other things and you had secondary fires
4 falling into the scene itself causing this particular
5 pattern right here.

6 Q. Now, in your opinion if Mr. Byers' theory were
7 correct that Mr. Fowler poured some ignitable liquid in
8 his own house, what would that area look like?

9 A. I think it would be much more demonstrative as far
10 as the pattern itself. As you can see, if there was a
11 pour of an accelerant, whether it be gasoline, kerosene
12 or whatever, I would expect, I would expect it to be
13 affecting the rug over here, affecting more of the
14 wires, the insulation is burned off of the drop cords
15 that Mr. Fowler was using to run his light inside, a
16 coffee pot and service to his fish pond up front to keep
17 it from freezing. I would expect there to be more
18 damage to the front to this window frame and more damage
19 the sliding glass door set.

20 Q. And can you see the studs in the background?

21 A. I could see the studs that still remain away from
22 the heater that we looked at earlier.

23 Q. And, in your opinion, if the fire had started in
24 that area, what would those studs look like?

25 A. I feel like the studs would have been much lower,

1 have much more char to it. They would have been lower
2 to the scene -- or lower to the floor, excuse me. What
3 you are seeing here is good wood on the studs as they
4 progress away from my area of origin.

5 Q. Okay. Now let's go back -- we spent time talking
6 about the area of the back sliding door. I would like
7 you to explain specifically why you disagree with
8 Mr. Byers' opinion that there's a pour pattern, quote,
9 in the kitchen. And looking at this photograph is not
10 gonna help, so if you could just explain that to the
11 Jury?

12 A. The pattern on the kitchen?

13 Q. Yes.

14 A. Okay. The kitchen floor pattern, of course it
15 seems to be like an arc of a pattern, and I'll try to
16 use as an illustration again. If you can imagine, if
17 you can picture in your mind, if you take a half a
18 gallon of water and dump it on your linoleum floor, it's
19 gonna run all kind of ways like little fingers, you're
20 gonna have little streams going everywhere. So it's not
21 gonna be even at all. It's gonna be very ragged and
22 jagged as far as the pattern. Any pattern that you see
23 that has a smooth arc to it or slight arc indicates to
24 me that something fell, collected in that area and, of
25 course, burned in that arc or burned that arc into the

1 linoleum itself.

2 MR. FREEMAN BELSER: Now, Mr. Dillard, if you would
3 put Exhibit 24 from Plaintiff's 29.

4 By Mr. Freeman Belser:

5 Q. Now, Mr. Ross, who took this photograph and what
6 does it show and why is it significant?

7 A. This is Jerry Byers' photograph, and this is a very
8 good illustration of the release I'm talking about.
9 Once you had the wall behind the heater consumed, the
10 I-beam, I-support beam fell and started a chain reaction
11 of the truss system, ceiling joists, whatever you're
12 gonna call them, overhead falling into the kitchen, and
13 you can see that these were at one time overhead, they
14 were part of the ceiling and part of the attic and attic
15 truss system, but as the I-beam gave way it fell into
16 the scene dumping a lot of materials that Mr. Fowler
17 stored up there.

18 Q. What's stored up there?

19 MR. MOORE: I object at this time. I believe that
20 the only way that Mr. Ross could have that understanding
21 is through Mr. Fowler or someone else's oral
22 representation.

23 THE COURT: It could be on the schedule.

24 MR. FREEMAN BELSER: My response to that would be
25 that Mr. Ross has been qualified as an expert witness,

1 and expert witnesses in fire cause and origin
2 investigators, and it can be routinely relied upon by
3 the owner of the house that burned.

4 MR. MOORE: In this case the Rule requires the
5 opinion be given, but the hearsay is not admissible
6 through the Witness.

7 MR. FREEMAN BELSER: I don't think that's what the
8 Rule says.

9 THE COURT: I don't think that is, either. That's
10 one reason we have experts because they are able to rely
11 on other sources.

12 Let's see. Go ahead and testify as to what your
13 understanding was and we'll determine if we'll have to
14 find out where it came from.

15 THE WITNESS: Okay.

16 A. My understanding, of course, with talking with
17 Mr. Fowler, there was materials that he used from his
18 time as a contractor stored up in the attic, types of
19 lumber, hand tools, other tools, paints, paint thinner,
20 lacquer thinners and things such as that, and of course
21 those things are very flammable, and that was what
22 collectively, once this caved in, fell into the kitchen
23 floor.

24 By Mr. Freeman Belser:

25 Q. Now, Mr. Ross, I'd like for you to relate that

1 photograph on the projector to the diagram that we have
2 right here just to try to help you out. Is it true that
3 that photograph is taken from the breakfast area door,
4 this side door, back towards the kitchen?

5 A. That's correct.

6 Q. Okay. And so the fallen roof boards that are
7 falling boards that we see that came from the attic
8 would be from here down towards the kerosene heater; is
9 that correct?

10 A. That's correct. Going that way the kerosene
11 heater. This was a photograph that was taken from the
12 left side of the house which has an access door that
13 goes into the utility room and then to the kitchen, and
14 that's the representation shown here.

15 Q. And where in this photograph does Mr. Byers say
16 Mr. Fowler poured an accelerant in his own house to burn
17 it down?

18 A. In this kitchen floor area here.

19 Q. Okay. And can you see what's in that area?

20 A. I see very good cabinets that have a good wood
21 finish on it, not deteriorated, not affected by direct
22 burning or scorching of a fire. So I would have to say
23 that there's really no evidence of an intentionally set
24 fire through a pour pattern right there. It would have
25 left marks on those cabinets.

1 Q. So, in addition to the negative samples, the
2 physical evidence is instructive as well?

3 A. That's correct.

4 Q. Now, again, you've read Mr. Byers' report. Does
5 Mr. Byers make any reference at all to any V patterns,
6 full V's, half V's, whatever you want to call it,
7 anywhere in his report?

8 A. No, he doesn't.

9 MR. FREEMAN BELSER: Okay. Now, Mr. Dillard, if
10 you would please put up photograph number 15 in Defense
11 Exhibit Number 1. The photographs are not numbered, but
12 this is what it is. I believe this is the same
13 photograph they've got blown up.

14 (Counsel confer.)

15 By Mr. Freeman Belser:

16 Q. Now, Mr. Ross, is this photograph the same one that
17 you see that's blown up?

18 A. It is.

19 Q. Now, does it, in your opinion does it show any V
20 patterns? And why don't you point to this for the Jury.

21 THE COURT: Let me ask you, is your pointer working
22 now?

23 MR. FREEMAN BELSER: Here's one.

24 THE COURT: Let me have it.

25 (Witness leaves stand.)

1 THE WITNESS: Again, this is showing the sliding
2 glass doors. This is taken from in the inside of the
3 kitchen area back porch where the utility room is.

4 By Mr. Freeman Belser:

5 Q. Where is the refrigerator?

6 A. This --

7 MR. FREEMAN BELSER: Can we turn the lights back
8 on? I'm sorry, y'all. There we go.

9 THE COURT: Mr. Ross, I ask you to step to the
10 other side. There we go. Don't get in the way of the
11 Juror. Thank you.

12 And, Mr. Belser, if you would stand back just a
13 little.

14 THE WITNESS: You can see what looks like a
15 refrigerator. Of course, it's been altered considerably
16 by the ongoing fire. I see some patterns that I
17 wouldn't really call that a V pattern so to speak. I
18 just know that your sheet metals and your finished
19 metals that are made, that appliances are made of that
20 really once they go through a heat process, they do
21 strange things, turn strange colors and so forth. And
22 this little hook right here, that just was to me never
23 seen before, even if it was described as a V pattern,
24 I've never seen a hook in it like that.

25 By Mr. Freeman Belser:

1 Q. And if the fire was burning up and out like that,
2 what would the wooden members around that area look
3 like?

4 A. The door frame itself would be heavily charred on
5 this side. Probably even over here. But you can see
6 where there's good paint on that door frame, also, much
7 better paint here on this door frame.

8 MR. FREEMAN BELSER: Thanks. Have a seat.

9 (Witness resumes witness stand.)

10 By Mr. Freeman Belser:

11 Q. Now, Mr. Ross, in Mr. Byers' report, what words
12 does he use in describing the two points of origin that
13 he claims in his, or the report?

14 A. He denotes them as patterns being made by the
15 intentional introduction of accelerants.

16 Q. Okay. But what does he call them?

17 A. Pour patterns.

18 Q. Pour patterns. What does Manual 921 of the black
19 book that you got say about that, and explain to the
20 Jury why Mr. Byers used the term "pour patterns" as a
21 violation of 921.

22 MR. MOORE: Objection to the term "violation."

23 THE COURT: The Witness hasn't used the term.

24 No editorializing. Let the Witness testify.

25 Objection sustained.

1 THE WITNESS: In Section 6.3.7.8.5 there's a
2 paragraph that reads this way (reading):

3 The term "pour pattern" implies the liquid has been
4 poured or otherwise distributed and, therefore, is
5 demonstrative of an intentional act. Because fire
6 patterns resulting from burning ignitable liquids are
7 not visually unique, the use of the term "pour pattern"
8 in reference to the nature of the pattern should be
9 avoided.

10 And it gives you the correct term to use is an
11 irregularly-shaped fire pattern.

12 Q. Okay. And what does the next sentence say?

13 A. It gives advice on being very careful about
14 visually identifying and saying that what you are seeing
15 is a pour pattern, especially without laboratory
16 confirmation.

17 Q. Okay. And in this particular case Mr. Byers did
18 not have laboratory confirmation (pointing)?

19 A. No.

20 Q. Okay. Now, this is the 6.3.7.8.5. I'd like you to
21 explain how that's inconsistent with what Mr. Byers
22 said.

23 A. Well, he's used the term "pour pattern" in his
24 report to describe what he calls an intentional act by a
25 person or persons unknown. In this particular case I

1 believe he directly accuses Mr. Fowler of pouring this
2 in his house. And this NFP 921 is a guide and it gives
3 pretty strong advice. This is peer-reviewed. These are
4 our fellow investigators that are writing this stuff,
5 and they tell you to be very, very careful not to call
6 something a pour pattern unless you can corroborate it
7 with a positive laboratory sample.

8 Q. Thank you, Mr. Ross.

9 My next question is, What is your opinion as to the
10 cause of the fire in Mr. Fowler's house?

11 A. Knowing that Mr. Fowler's house was without
12 electricity and knowing that the only heat source was
13 the kerosene heater that had been running continuously
14 and the position it was against that wall and with the
15 combustible materials, knickknacks or whatever, hanging
16 overhead, I think it was a process of the heat igniting
17 the baseboard, maybe even having support from the
18 combustibles that had ignited and fallen down behind the
19 heater. And then, once that fire had breached into that
20 wall through the baseboard, it has a pretty free run all
21 the way to the top. You got like that much room
22 (indicating) between studs for it to run. It's an open
23 area.

24 Q. Okay. And I would like to talk about the basis or
25 bases of your opinion.

1 MR. FREEMAN BELSER: And first I would like for
2 Mr. Dillard to project Section 6.3.3.1.2.2 (points) of
3 the 921 Manual.

4 By Mr. Freeman Belser:

5 Q. And what does this section say?

6 A. Here again, Section 6 is talking about different
7 fire patterns that we encounter. The Section says
8 (reading): Fire damage can be found inside walls and
9 ceilings as a result of heat transfer through surfaces.
10 It is possible for the heat of a fire to be conducted
11 through a wall or ceiling surface and to ignite wooden
12 structural members within the wall or ceiling.

13 Q. And is that what you believe happened in this case?

14 A. It is.

15 Q. Now, what in your experience as a fire investigator
16 is the basis of your opinion?

17 A. I've seen on a number of occasions where you may
18 have a wall that has drywall for you, in fact, the
19 Sheetrock fully intact, but as you pull it away, you
20 expose burning within the studs themselves and burning
21 on the -- so it's kind of like, it confirms my belief of
22 what happened here, that fire can be created within the
23 wall, even though the Sheetrock is there.

24 Q. Now, what physical evidence at the scene is the
25 basis of your opinion?

1 A. The physical evidence I used to interpret my
2 opinion is the pattern on the baseboard, we saw the
3 wooden baseboard directly behind the heater was
4 consumed, and also that one remaining visible stud, the
5 nub of a wall stud that had that slope going back toward
6 the heat source, which was the heater, and then, of
7 course, as this progressed on towards the corner where
8 the grandfather clock was, the studs became more
9 prominent and some of them were even unaffected.

10 Q. Mr. Ross, what tests have you participated in that
11 are a basis of your opinion?

12 A. Here again, using the live fire scenarios that we
13 do, using those to help us answer questions about a
14 number of concerns really, could this happen? That's
15 the scenario we tried to set up using accelerants and
16 using no accelerants at all.

17 Q. And you don't know what the exact temperature it
18 was, do you?

19 A. No.

20 Q. Describe your familiarity that heat applied to
21 wooden structures can cause ignition.

22 A. Well, heat applied to cellulose or a wooden stud,
23 so to speak, continual heating, it goes through a
24 process that where it dries the water molecules out of
25 the wood through a process of pyrolysis, turns the water

1 molecules into vapor, so to speak, and you have those
2 blisters that begin to form, those shiny black blisters
3 that we've seen today. All of that is initiated by a
4 heat source, a continued heat supplied and the drying
5 out of the water components of the wall stud itself to
6 where eventually it's gonna degrade to the point to
7 where ignition temperatures and self-ignition is very
8 possible.

9 Q. What is your understanding as to how long the
10 heater was on?

11 A. Mr. Fowler told me he kept it on continuously
12 because it was, number one, it was very cold weather
13 that particular few days. I did a historical weather
14 check. The high that day was 18 degrees. Excuse me.
15 The low was 18 degrees, I think the high was like 34.
16 So he had a concern with pipes freezing and busting. He
17 also used it on occasions when he went in to make coffee
18 and to use the rest room. So the heater was on all the
19 time except when he refueled it.

20 Q. Okay. And I've just got a few more pictures and
21 then we'll be finished, or at least I'll be finished,
22 Mr. Ross.

23 MR. FREEMAN BELSER: Mr. Dillard, if you could put
24 up photograph 52, this is Plaintiff's Exhibit Number 28
25 which are Mr. Ross's photographs number 52.

1 By Mr. Freeman Belser:

2 Q. What does this show?

3 A. It shows the rear of the kerosene heater. And you
4 can see the yellowish orange areas, that's the heat
5 damage to the back of that particular unit. Here again,
6 in my theory where I feel comfortable that the
7 combustible materials, the knickknacks, wooden picture
8 frames and things such as that igniting and falling back
9 down behind the heater and causing this burn on the back
10 of the heater. I don't see any other reason why that
11 heater would go through any type of damage like that
12 without that being the scenario.

13 MR. FREEMAN BELSER: Okay. And, Mr. Dillard, if
14 you could put up photograph 36 from Exhibit 28.

15 By Mr. Freeman Belser:

16 Q. And again, this is a picture of the V pattern?
17 What does this show?

18 A. This is the remaining, that little nub of a wall
19 stud over here which would be the only remaining
20 physical wall stud closest to where the heater was over
21 here. And remember, if we look at that gentle slope,
22 fire burns upward and outward. So, if this is burning
23 upward and outward, you see how it's gonna leave that
24 gentle slope. We interpret that, we'd follow it from
25 the highest amount of damage to the lowest, we're

1 generally gonna be in the area where the fire
2 originated. And that's what we call a pointer pattern
3 or a V pattern, and that directs us back to the origin
4 of the fire. The only heat source in that area was the
5 heater.

6 MR. FREEMAN BELSER: And, Mr. Dillard, photograph
7 number 37 from him Plaintiff's Exhibit 29.

8 By Mr. Freeman Belser:

9 Q. And we've already talked about this, but with
10 regards to the cause of that, how is this relevant?

11 A. The heater is pretty much placed flush against that
12 wall or the wall that was there. I know there's caution
13 that's given about how far to place your heating sources
14 away from combustible materials, but in my opinion the
15 heater was placed too close to that wall.

16 Q. Mr. Ross, what is your understanding of Mr. Byers'
17 opinion as to the cause of the fire?

18 A. Here again, he says in his report that it's an
19 intentional act based upon two pour patterns that he saw
20 within the house.

21 Q. Okay. So is it really true what he's saying is
22 that Mr. Fowler poured material in his house, liquid
23 accelerant in his own house?

24 A. That is right.

25 Q. And Mr. Byers identifies the two separate points of

1 origin; is that correct?

2 A. He does.

3 Q. Now, what is Mr. Byers' explanation as to how the
4 fire spread? And what I mean by that is, does he ever
5 connect the dots?

6 A. There's no explanation as to just how his two
7 points of origin connect or if they connect.

8 Q. And going back to Exhibit 28, picture number 36 --
9 I'm sorry, I must have the wrong one. We'll leave that
10 up there.

11 If Mr. Byers were correct, his theory were correct
12 that Mr. Fowler poured these liquid accelerants in this
13 area and then lit it and also poured liquid accelerants
14 in the kitchen and then lit it, what would the walls
15 look like and where would the burn area be?

16 A. The burn area or the degradation of the fire area
17 would be much lower. I think we showed pictures, the
18 majority of the fire damage and heavy charring is up
19 high. The actual damage is at the opposite end of what
20 you would expect if the fire were set on purpose.

21 Q. Okay. Now, Mr. Ross, in your opinion is there any
22 evidence that the fire in Mr. Fowler's house was
23 intentionally set?

24 A. No.

25 MR. FREEMAN BELSER: Mr. Ross, I don't have any

1 further questions. Mr. Moore may have some.

2 THE WITNESS: Okay. Thank you.

3 MR. MOORE: Your Honor, it may be appropriate to
4 take a short break at this time.

5 THE COURT: Mr. Foreman, ladies and gentlemen of
6 the Jury, if you would, please, this will be your break,
7 so you can knock on the door when you are ready to come
8 back.

9 (Whereupon, the Jury left the courtroom at
10 approximately 4:10 p.m.)

11 THE COURT: All right, gentlemen. Inasmuch as we
12 are gonna have apparently battling experts, let me
13 remind you of Rule 703, Bases of Opinion Testimony By
14 Experts. (Reading): The facts or data in a particular
15 case upon which an expert bases an opinion or inference
16 may be those received by or made known to the expert at
17 or before the hearing. If facts or data reasonably
18 relied upon by experts in a particular field in forming
19 opinions or inferences upon the subject, the facts or
20 data need not be admissible into evidence.

21 That's hearsay. My ruling on the objection by the
22 Defendant stands.

23 Now let's take a break.

24 Anything from the Plaintiff before we take a break?

25 MR. FREEMAN BELSER: No, sir, Your Honor.

1 THE COURT: Anything, Mr. Moore?

2 MR. MOORE: No, Your Honor, not at this time.

3 THE COURT: We'll take a break.

4 THE COURT: Mr. Ross, you understand that you are
5 still under oath, right?

6 THE WITNESS: I do.

7 THE COURT: Do not discuss your testimony with
8 anyone.

9 THE WITNESS: Yes, sir.

10 (A recess was taken.)

11 THE COURT: Anything from the Plaintiff before we
12 bring the Jury back?

13 MR. FREEMAN BELSER: No, sir, Your Honor.

14 THE COURT: Anything from the Defendant?

15 MR. MOORE: Nothing, Your Honor.

16 THE COURT: Very good. Ask the Jury to join us,
17 please.

18 (The Jury entered the courtroom at approximately
19 4:27 p.m.)

20 THE COURT: Let the record reflect the Jury and
21 Alternate are in the Jury box. We will now proceed with
22 the Cross-Examination of the Witness.

23 MR. MOORE: May it please the Court.

24 Cross-Examination by Mr. Moore:

25 Q. Good afternoon, Mr. Ross. I'm Ray Moore. It's

1 good to see you.

2 A. It's good to meet you.

3 Q. I'd like to start by asking you a few more
4 questions about your background if I could. Now, you
5 resigned from SLED in 2006?

6 MR. FREEMAN BELSER: Your Honor, objection. Could
7 we approach?

8 THE COURT: Yes, sir.

9 (Discussion at sidebar.)

10 THE COURT: In fact, I think I'll permit a little
11 leading on this question.

12 MR. MOORE: Thank you, Your Honor.

13 THE COURT: You may proceed, Mr. Moore.

14 By Mr. Moore:

15 Q. Mr. Ross, you resigned from SLED in 2006, correct?

16 A. Yes, sir.

17 Q. And at the time you resigned, you were actually
18 assigned to the Alcohol Licensing Unit, correct?

19 A. Correct.

20 Q. Okay. And you had not investigated fires at SLED
21 since 2001, correct?

22 A. No, that's not true.

23 Q. All right. I'll tell you what. Do you recall
24 giving a Deposition in this case?

25 A. I do.

1 Q. You were sworn under oath, gave a Deposition on
2 Thursday, August 19, 2010; is that correct?

3 A. Yes, sir.

4 MR. MOORE: All right. At this time we would
5 proffer the original of Mr. Ross's testimony.

6 THE COURT: All right. Let the record reflect that
7 the Court is opening the Original Deposition of Doug
8 Ross taken in August of 2010 in Greenville, South
9 Carolina.

10 By Mr. Moore:

11 Q. Mr. Ross, I direct your attention to Page 9 of your
12 Deposition.

13 A. Okay.

14 Q. Beginning at Line 10 of Page 9. The question was
15 (reading):

16 So, from then until 2006, you pretty much were not
17 investigating fire scenes for SLED?

18 What was your answer?

19 A. "That's correct."

20 Q. Since 2006, when you resigned from SLED, until your
21 Deposition last year, you had only dug out about three
22 fire scenes, correct?

23 A. "That's correct."

24 Q. So you have had essentially three investigations of
25 your own since 2006; is that right?

- 1 A. "Nothing changes."
- 2 Q. Okay. Let me change a little bit and talk to you
- 3 about your case investigation in this matter. Your
- 4 first contact was with a public adjuster who was working
- 5 for Mr. Fowler, correct?
- 6 A. That's correct.
- 7 Q. Okay. And you understood he was working for
- 8 Mr. Fowler at the time?
- 9 A. No, I did not.
- 10 Q. When did you find out the public adjuster was
- 11 working for Mr. Fowler?
- 12 A. I didn't know until you just mentioned it.
- 13 Q. You understand that if you found that this was an
- 14 intentionally set fire, your client would not recover
- 15 any insurance money?
- 16 A. I just tell it like I see it.
- 17 Q. You understand that, though, correct?
- 18 A. I understand that.
- 19 Q. Okay. Now, Mr. Fowler told you he discovered the
- 20 fire himself, correct?
- 21 A. Correct.
- 22 Q. And, by the time you got to the fire scene, five
- 23 weeks or so later, the scene had been contaminated?
- 24 A. True.
- 25 Q. I don't mean -- you looked at me funny. Were you

- 1 there prior to five weeks before -- after the fire?
- 2 A. No.
- 3 Q. Okay. The first time you got there the fire scene
- 4 had been contaminated?
- 5 A. That's right.
- 6 Q. Investigators had been there, the public adjuster
- 7 had been in there, people taking inventory had been in
- 8 there. The fire scene was disturbed, correct?
- 9 A. Debris had been moved.
- 10 Q. More than debris had been moved. The contents had
- 11 been moved. Correct?
- 12 A. I never saw the contents prior to my being there,
- 13 so I don't know if they had been or not.
- 14 Q. Okay. Fair enough. If there were contents there,
- 15 they had been moved; is that correct?
- 16 A. That's correct.
- 17 Q. You had seen some contents in some other photos,
- 18 correct?
- 19 A. Yes.
- 20 Q. So now you know that the contents had been moved
- 21 prior to your arrival.
- 22 A. The heater was gone when I got there and things
- 23 such as that.
- 24 Q. The table in the kitchen was gone?
- 25 A. A pedestal. I believe I saw some evidence of a

- 1 table in there.
- 2 Q. Okay. The refrigerator, was that still there when
- 3 you got there?
- 4 A. I believe so.
- 5 Q. Okay. You didn't see the condition of the house
- 6 immediately after the fire the way Mr. Byers saw it a
- 7 day or two after the fire?
- 8 A. No, sir.
- 9 Q. No. Your total investigation of this fire took
- 10 three and a half hours, correct?
- 11 A. That's correct.
- 12 Q. In which you took 60 or so photographs and
- 13 interviewed Mr. Fowler. Did you talk to the Chief?
- 14 A. Yes, sir.
- 15 Q. The Chief told you he was unsure about what the
- 16 cause was?
- 17 A. He told me it was, he was unsure of, but he did
- 18 corroborate the location with what I found.
- 19 Q. He told you he was unsure of the cause and that the
- 20 fire was undetermined as far as he was concerned.
- 21 Correct?
- 22 A. I believe he said "unintentional."
- 23 Q. And undetermined, correct?
- 24 A. He told me "unintentional" and his report says
- 25 "unintentional."

- 1 Q. The report also says "undetermined," doesn't it?
- 2 A. I would have to look and see.
- 3 Q. Feel free.
- 4 A. As far as causes of ignition, it's undetermined.
- 5 Q. In forming your own personal opinion you don't rely
- 6 on what the responding senior fire officer reports, do
- 7 you?
- 8 A. Well, what he saw and what he did is always
- 9 considered in the totality of my investigation; it's
- 10 very important.
- 11 Q. What he saw and what he did. But his assessment
- 12 you don't rely upon. Correct?
- 13 A. As far as pinning a cause on it, is that what you
- 14 mean?
- 15 Q. Yes, sir.
- 16 A. No. I make my own interpretation.
- 17 Q. Okay. And from time to time you differ with
- 18 officers' assessments of cause and origin, correct?
- 19 A. I do.
- 20 Q. Let's talk to you a little bit about what you have
- 21 ruled out as potential causes. Based on your
- 22 investigation you are absolutely able to eliminate some
- 23 things, weren't you?
- 24 A. Yes, sir.
- 25 Q. You were able to determine this was not an

- 1 electrical fire?
- 2 A. Correct.
- 3 Q. You were able to determine that there was no
- 4 evidence that the fire started in front of this heater,
- 5 correct?
- 6 A. That's correct.
- 7 Q. By the way, on what side of the heater is it
- 8 usually hotter, the front or the back?
- 9 A. It's projected to the front, but all four sides are
- 10 producing heat.
- 11 Q. And which side is hotter?
- 12 A. The front side is where the reflector is.
- 13 Q. But there's no evidence that this fire started in
- 14 front of the heater, correct?
- 15 A. Correct.
- 16 Q. You determined that the towel that was underneath
- 17 the heater was not burnt?
- 18 A. Correct.
- 19 Q. You inspected the heater yourself. You found no
- 20 malfunction on the heater, correct?
- 21 A. Correct.
- 22 Q. You did some research on these Hamai kerosene
- 23 heaters, didn't you?
- 24 A. I found no re-calls.
- 25 Q. You found to your inspection no rupture or no

1 damage that would have allowed kerosene to escape from
2 this heater?

3 A. No.

4 Q. And you found that there was no evidence that there
5 was anything other than kerosene put in this heater?

6 A. No, sir.

7 Q. Okay. Let's talk about your opinion in the case
8 now. When you gave your Deposition, your opinion in
9 this case was that the Sheetrock was heated up over a
10 long period of time behind the heater so that it
11 eventually fell, crumbled, and the wood studs eventually
12 ignited. Wasn't that your opinion a year ago?

13 A. Yes, sir.

14 Q. Today that's not the opinion you just gave this
15 Jury, is it?

16 A. I think it's all tied together --

17 Q. You just told this --

18 A. -- a baseboard is tied into the wall.

19 THE COURT: Just a moment now. The Jury is the
20 judges of the testimony, so let's don't argue about
21 testimony.

22 MR. MOORE: Thank you, Your Honor.

23 By Mr. Moore:

24 Q. Is it your opinion, then, that the Sheetrock was
25 heated up over a long period of time so that it

- 1 crumbled, eventually fell, and ignited the stud behind
2 the heater?
- 3 A. Yes. I said that.
- 4 Q. In your opinion that this occurred by radiant heat
5 alone?
- 6 A. Yes.
- 7 Q. And how hot does Sheetrock have to get to crumble?
- 8 A. I haven't seen any specific test. I know in some
9 cases I've seen where wooden studs within a Sheetrock
10 wall have been known to ignite over a continuous period
11 of time with low temperatures.
- 12 Q. What temperature does it have to get?
- 13 A. Sheetrock can ignite at 170 degrees.
- 14 Q. Sheetrock can ignite at 170 degrees?
- 15 A. No. The wooden members inside the wall.
- 16 Q. Okay. Now, what period of time does it have to be
17 exposed to 170 degrees to ignite?
- 18 A. It was a long time.
- 19 Q. How long is "long"?
- 20 A. It didn't say. It didn't specify hours.
- 21 Q. So you have no basis, then, to give an opinion that
22 170 degrees in the period from when Mr. Fowler left the
23 heater in there until the morning when he discovered the
24 fire is enough time for that stud to ignite behind the
25 Sheetrock?

- 1 A. That is right.
- 2 Q. You don't know how long it would take Sheetrock to
3 heat up to a point where it could fall off the wall; is
4 that correct?
- 5 A. I don't know how long.
- 6 Q. You don't know what the temperature would need to
7 be, either?
- 8 A. No, sir.
- 9 Q. You don't know what the temperature would need to
10 be for the Sheetrock to ignite?
- 11 A. No, sir.
- 12 Q. You have investigated fires yourself where there's
13 been complete room involvement or a flashover and the
14 Sheetrock had still been on the walls?
- 15 A. In some fires, yes.
- 16 Q. Once the Sheetrock fell off the wall do you think
17 it would take another several hours for the wood members
18 behind the wall to ignite, correct?
- 19 A. For it to go through the pyrolysis process, an
20 hour, two hours, more, yes, sir.
- 21 Q. Several hours?
- 22 A. Yes, sir.
- 23 Q. All this had to happen for this fire to occur under
24 your theory from the time that Mr. Fowler refueled his
25 heater at 5:30 or 6:00 the night before and 7:00, 7:45,

1 whatever time the next day?

2 A. That was the time span for it to be discovered,
3 correct.

4 Q. And for your theory to be correct, the Sheetrock
5 would have had to heat up and fall off the wall or
6 ignite and the wood stud would have time for it to
7 pyrolysize (phonetic) and ignite for a little over 12
8 hours; is that correct?

9 A. That's correct.

10 Q. And, of course, the heater would have had to have
11 been on for this to happen as well?

12 A. Correct.

13 Q. You didn't evaluate how much fuel was in the heater
14 at the time the fire was discovered, did you?

15 A. I didn't see the heater at the time the fire was
16 discovered, I didn't see it until two months later.

17 Q. Okay. And when you saw it, did you evaluate how
18 much kerosene was in it then?

19 A. I looked in it.

20 Q. How much?

21 A. And it appeared about two-thirds full.

22 Q. Two-thirds full when you saw it five weeks after
23 the fire, correct?

24 A. Yes.

25 Q. Now, you know this heater when it's filled up has

1 about 13 hours' worth of fuel. Correct?

2 A. I'm going by what Mr. Fowler told me about how long
3 it would burn.

4 Q. You looked at the heater yourself, correct?

5 A. I did.

6 Q. And the heater's specifications talked about it
7 being a 13-hour capacity, correct?

8 A. Yes.

9 MR. MOORE: For the record, Your Honor, this is
10 pre-admitted Exhibit 2.1.

11 THE COURT: Plaintiff's or Defendant?

12 MR. MOORE: Defendant.

13 By Mr. Moore:

14 Q. So, when you saw it five weeks after the fire, it
15 was two-thirds full, yet it had, supposedly had been
16 burning overnight from 5:30 the night before the fire
17 until the fire was discovered or it was turned off the
18 next morning. Correct?

19 A. Correct.

20 Q. And it was two-thirds full when you saw it?

21 A. The information I was given from Mrs. Yarbrough was
22 that she saw Jerry Byers playing with the heater,
23 tinkering with the heater on the bed of his truck for
24 about two hours and then he made the statement, "I
25 almost got it to light." I don't know what happened to

1 the heater from the time it was removed from the house
2 until the time I saw it.

3 Q. So you are suggesting Mr. Byers put some kerosene
4 in the heater?

5 A. I'm not suggesting anything. There was a gap
6 there.

7 Q. Okay, I understand. If the heater was two-thirds
8 full immediately after the fire, you would agree that it
9 could not have been burning from 5:30 or 6:00 the night
10 before until the fire was discovered the next morning?

11 A. That's correct.

12 Q. You tried to determine the heat output of this
13 heater, correct?

14 A. Yes, sir.

15 Q. The BTUs or the generation, correct?

16 A. Yes, sir.

17 Q. And you determined that this was a 33,000 BTUs and
18 10,000 BTUs?

19 A. A good bit.

20 Q. Three times the heat output. This heater is, in
21 fact, a 10,000 BTU heater, isn't it?

22 A. Was that on the heater itself?

23 Q. Well, I'll tell you what. Since you may not have
24 seen this photograph, you can refer to your photograph
25 number 64.

1 Do you see the placard of the heater in your
2 photograph?

3 A. Yes, sir.

4 Q. You can read the heat generation as 10,000 BTUs?

5 A. I can read it off yours.

6 Q. You can't read it off your photograph? Maybe
7 that's the cause of the discrepancy. Three times the
8 heat output?

9 A. It's very skewed as far as the handle melted over
10 and so forth.

11 Q. Well, I've got a close-up here. Can you see it
12 here?

13 A. Okay.

14 Q. And you have no doubt that this photograph from
15 Mr. Holecek is the same heater that you took a
16 photograph of in number 64, correct?

17 A. Correct.

18 Q. And it's a 10,000 BTU heater?

19 A. Correct.

20 Q. That's a third of the heat generation that you
21 relied on to form your opinion, correct?

22 A. That's correct.

23 Q. Now, we talked a little bit about NFPA and your
24 reliance on that for your opinions. The NFPA calls
25 itself a guideline, correct?

- 1 A. That's correct.
- 2 Q. It does not call itself the Bible. Correct?
- 3 A. NFPA does not call it that, no.
- 4 Q. And it changes, like you said, every three years or
- 5 so. The Bible hasn't changed. NFPA changes every time
- 6 somebody has a new and better idea, correct?
- 7 A. There's probably about 75 different versions of the
- 8 Bible now and there's only like about eight of 921,
- 9 so...
- 10 Q. Good point. So the NFPA when you came out -- well,
- 11 there actually was no NFPA when you went to the Academy,
- 12 was there?
- 13 A. No.
- 14 Q. The term "pour pattern" was widely used?
- 15 A. It was widely used.
- 16 Q. And it was widely used for a long time?
- 17 A. It has.
- 18 Q. Until 2008 there was nothing in NFPA prohibiting
- 19 the use of the term "pour pattern," correct?
- 20 A. That's correct.
- 21 Q. The terms pour pattern, ignitable liquid, irregular
- 22 fire pattern, accelerant pattern, fire investigators
- 23 know what those mean, don't they?
- 24 A. Sure.
- 25 Q. That's the basis of your criticism of Mr. Byers,

1 that he uses the term "pour pattern" that you used here
2 today in your own testimony?

3 I'll move on, Your Honor.

4 You saw flash patterns on the floor of this
5 kitchen, didn't you?

6 A. Yes.

7 Q. Flash patterns that you yourself attribute to an
8 accelerant, correct?

9 A. A flammable material, yes, sir.

10 Q. So you believe there was a flammable material on
11 the floor of Mr. Fowler's kitchen at some point during
12 this fire?

13 A. Yes.

14 Q. And even though we have negative lab data from all
15 of the spots on the floor that Mr. Byers collected from,
16 at least as far as the kitchen is concerned, you believe
17 there was an accelerant there?

18 A. I do.

19 Q. You just believe it fell from the attic?

20 A. Correct.

21 Q. Because Mr. Fowler told you he stored paint thinner
22 in the attic?

23 A. That's correct.

24 Q. Okay. The burn pattern that you saw on the floor
25 of the kitchen was in an arch or semicircular pattern,

1 correct?

2 A. It was.

3 Q. When you were there, the table was gone out of the
4 middle of the floor, correct?

5 A. Yes, sir.

6 Q. And the chairs that were around the table, they
7 were not there on the floor, correct?

8 A. Yes.

9 Q. All you saw was an arch or circular burn pattern?

10 A. Yes.

11 Q. And you have seen those before, semicircular or
12 arched burn patterns on intentionally set fires,
13 correct?

14 A. Yes.

15 Q. And you've given opinions that the arched or
16 semicircular pattern on a floor was as a result of an
17 accelerant being introduced, correct?

18 A. It could be.

19 Q. You've given that opinion before.

20 A. I've also given opinions that distribution of it
21 forms many different kinds of patterns.

22 Q. You believe in this case the material that was on
23 the floor of Mr. Fowler's kitchen was an alcohol- or
24 carbon-based material, correct?

25 A. That's correct.

1 Q. And you believe that because that's a material that
2 dissipates rapidly in a fire, it's consumed rapidly, I
3 should say?

4 A. Paint thinners, yes, sir.

5 Q. Paint thinner, which you think it was?

6 A. I think it is.

7 Q. And you believe that it was uniformly spread across
8 the kitchen floor under the table and under the chair in
9 the kitchen?

10 A. As the attic failed, yes, sir, I do.

11 Q. As the attic fell [sic]. What does that mean?

12 A. As the attic failed. F-a-i-l-e-d.

13 Q. I'm sorry. I misheard that. I don't know that it
14 matters.

15 A. When the structure, when the truss system had
16 burned to the point where it failed and gave in, it
17 pitched everything that was stored in the attic into the
18 kitchen and bringing it down to the stuff that was
19 burning along with it.

20 Q. Okay. I do understand that. When you said the
21 attic failed, I didn't know if you were talking about
22 the attic door. Do you have an opinion about the
23 involvement of the pull-down attic door involved in this
24 fire at all?

25 A. No, I do not.

1 condition of the staircase before the fire and after the
2 fire?

3 A. Yes, sir.

4 Q. When did you test when a disappearing
5 staircase could fall down open in a fire?

6 A. In Boiling Springs, South Carolina, a house we
7 burned one Saturday, probably, I'm guessing 1992, '3, or
8 '4. Byers was there.

9 Q. Okay. All right. Now let's talk about the second
10 pattern, what Mr. Byers calls the second point of origin
11 in this house near the sliding glass door and the window
12 next to it. You would agree that that's an
13 irregular-shaped fire pattern on the floor under the
14 window, correct?

15 A. Yes, sir. Under the bigger pattern?

16 Q. Yes, sir. The window nearest the sliding glass
17 door.

18 A. The small concrete pattern?

19 Q. No. Under the window.

20 A. Do you have a number? Is this it, I believe 58?

21 Q. Yes, that's fine. Or you can use Mr. Byers'
22 photograph.

23 A. This is it.

24 Q. Okay. Looking at Mr. Byers' photograph Number 50
25 from Plaintiff's Exhibit Number 29, you would agree that

1 is an irregular-shaped fire pattern, correct?

2 A. It is.

3 Q. And that's your opinion that that's from the drapes
4 that fell?

5 A. No. I'm talking about where the drapes fell is the
6 area where it caused the spoiled concrete. This area
7 right here (pointing).

8 Q. Okay. What in your opinion caused the
9 irregular-shaped fire pattern that extends into the
10 living room from underneath the window? Is that
11 accelerant, too?

12 A. No, sir. It was something that was introduced as
13 the fire burned like what I talked about in the kitchen,
14 no, sir. I see whatever it is, the drop cord ran
15 through with the insulation still in pretty fair shape
16 on the drop cord. Like if it would have been an
17 accelerant, it would have really affected the drop cords
18 a lot more than this picture shows.

19 Q. My question to you is, What in your opinion caused
20 that irregular-shaped fire pattern under the window?

21 A. Outside of falling debris, I don't know.

22 Q. Okay. Falling debris, you're not talking about the
23 curtains now?

24 A. I'm talking about the grandfather clock display
25 case.

- 1 Q. The grandfather clock that's over in the corner?
- 2 A. It's about a half a foot from this pattern.
- 3 Q. Okay. And so let me get this straight, then. It's
- 4 not the curtains?
- 5 A. Not this particular pattern, no.
- 6 Q. Okay. Because the curtains would fall straight
- 7 down?
- 8 A. As they did.
- 9 Q. Okay. So then you are speculating about the
- 10 grandfather clock but you don't know what caused the
- 11 irregular fire pattern, the second one that Mr. Byers
- 12 found under the window?
- 13 A. Right.
- 14 Q. And that burn pattern extends several feet into the
- 15 living room, correct?
- 16 A. It does.
- 17 Q. Did you measure that?
- 18 A. I photographed it.
- 19 Q. It's approximately six to eight feet into the
- 20 living room, correct?
- 21 A. It looks to be about six feet, yes.
- 22 Q. Back to the laboratory analysis. We've already
- 23 established since you have agreed that there was an
- 24 accelerant on the floor of the kitchen, that a
- 25 laboratory analysis is not dispositive of whether there

- 1 was an accelerant involved in the fire, correct?
- 2 Let me ask it a better way.
- 3 A. Please.
- 4 Q. Because you find accelerant in a fire doesn't mean
- 5 it was used to start a fire, correct?
- 6 A. In general, correct.
- 7 Q. In fact, the lab reports don't say that. Do you
- 8 have the lab reports in front of you?
- 9 A. Here they are.
- 10 Q. If I could direct your attention to the beginning
- 11 of the lab reports themselves. Do you see the note at
- 12 the bottom of the lab reports which are Plaintiff's
- 13 Exhibit 5?
- 14 A. No, I've got a disclaimer.
- 15 Q. And what does that say?
- 16 A. To me it says if we keep giving you back negative
- 17 samples, you take your business somewhere else.
- 18 Q. Can read it to the Jury?
- 19 A. (Reading): Negative results do not preclude the
- 20 possibility that ignitable liquids were present at the
- 21 fire scene.
- 22 Q. And you agree with that, correct?
- 23 A. I do.
- 24 Q. And there's research on that in the fire cause and
- 25 origin industry, if I can use that term. Correct?

- 1 A. Correct.
- 2 Q. Are you familiar with the treatise *Kirk's Fire*
3 *Investigations*?
- 4 A. I am.
- 5 Q. Okay. So you know that there's been research done
6 similar to the description of your test at Boiling
7 Springs where they intentionally put gasoline or some
8 other ignitable material in a fire and then tested it
9 afterwards to see if they could get a positive sample
10 and they've come back negative? You understand that
11 kind of thing?
- 12 A. Yes, I do.
- 13 Q. Do you understand that a negative laboratory
14 finding is not proof that an accelerant was not used, it
15 merely failed to establish its presence after the fire?
- 16 A. I understand.
- 17 Q. And you understand there was the *Kirk's*, *NFPA 921*,
18 *The Admission Handbook*. None of these say you can have
19 an incendiary fire intentionally set with the use of
20 ignitable materials without a positive lab sample.
21 Correct?
- 22 A. Yes.
- 23 Q. I'd like to ask you a couple of questions about the
24 photographs that Mr. Belser asked you about. We talked
25 about Exhibit 34 of your -- excuse me, number 34 --

1 excuse me -- 36 of your photographs. You were asked
2 about 36, correct?

3 A. Yes, sir.

4 Q. Now, can you tell me by just looking at that
5 photograph 36 where in relation to the heater it is?

6 A. This wall stud is to the right of where the heater
7 was.

8 Q. All right. So, if we could see a little better in
9 photograph 33 and 34 where the heater would have been,
10 correct?

11 A. That's correct.

12 Q. Turn to 33. There is a sort of protected space on
13 your photograph 33, correct?

14 A. There was a shop towel on top of the carpet.

15 Q. A shop towel that didn't burn, correct?

16 A. No.

17 Q. And what we see, if we look at the stud, first of
18 all, the char patterns tell us the direction of the heat
19 source, correct?

20 A. Correct.

21 Q. Isn't that what we use char patterns for?

22 A. The closer to the heat source, the deeper they
23 should be.

24 Q. And on this side, which is the living room side of
25 stud, it's virgin wood or relatively clean wood,

- 1 correct?
- 2 A. It's perpendicular to the living room.
- 3 Q. Looking at photograph 33 -- do you have that?
- 4 A. Yeah, I'm looking at it.
- 5 Q. The char in that photograph is coming from the
- 6 kitchen side and from the back side, correct?
- 7 A. Within the wall.
- 8 Q. From the kitchen side and the back side within the
- 9 wall? Is that your testimony? From the kitchen side
- 10 and the back side within the wall?
- 11 A. Yes, I understand.
- 12 Q. And what we use char pattern for is to determine
- 13 the heat source?
- 14 A. To determine direction.
- 15 Q. The direction that the heat source is located?
- 16 A. Yes, sir.
- 17 Q. At 6:00 the night before the fire, if Sheetrock
- 18 isn't falling off the wall and the heater is not on all
- 19 night, then radiant heat from the heater couldn't cause
- 20 a fire at 7:00 or 7:30 the next morning, correct?
- 21 A. Correct.
- 22 Q. If the kerosene heater was filled near sundown the
- 23 night of the fire and left on all night, it would have
- 24 been empty the next morning, correct?
- 25 A. It would have been empty about 7:00 the next

- 1 morning.
- 2 Q. It would have been bone dry?
- 3 A. Yes, according to the specs on it.
- 4 Q. If there was ample fuel in the heater the morning
- 5 after the fire, then this heater couldn't have caused
- 6 the fire, could it?
- 7 A. No.
- 8 Q. Okay. The Chief told you that by the time he got
- 9 there, he saw the wall behind the heater involved in the
- 10 flame?
- 11 A. Yes, sir.
- 12 Q. And he didn't get there immediately after the fire
- 13 started. You know that there was a delay?
- 14 A. 11 minutes.
- 15 Q. 11 minutes from the call?
- 16 A. Yes.
- 17 Q. And, of course, the call wasn't made immediately
- 18 when the fire started, correct?
- 19 A. Mr. Fowler, he recognized it, he ran next door.
- 20 His neighbor, Ms. Bright, called 9-1-1 at 8:03, they
- 21 received the call and the fire trucks arrived at 8:11.
- 22 Q. Did Mr. Fowler recognize the fire immediately after
- 23 it started?
- 24 A. I can't say if he recognized it. How would he know
- 25 what time it started?

- 1 Q. How would he?
- 2 A. He saw smoke coming out of the eaves.
- 3 Q. Okay. So that's the time that we're using is the
- 4 time Mr. Fowler first recognizing the fire?
- 5 A. Roughly 7:45.
- 6 Q. The V pattern that we talked about at length today
- 7 can be impacted by many factors, can't it?
- 8 A. Sure.
- 9 Q. The fire load, or the fuel load, I should say?
- 10 A. Start over again.
- 11 Q. Sure. The location or shape of a V pattern can be
- 12 altered by fuel load or the presence or lack of fuel
- 13 load.
- 14 A. The word 'altered' is messing me up. It's like
- 15 maliciously altered?
- 16 Q. No. I apologize to imply that. It can be
- 17 distorted, it can give a false sense of origin of a fire
- 18 if there's additional fuel load somewhere else and the
- 19 fuel load, even though it didn't originate from the
- 20 fire, provided more fuel for the V from that point?
- 21 A. That's correct. Certain elements are conclusive in
- 22 the V pattern. Ventilation is one.
- 23 Q. Sure. The ventilation, similarly the structure
- 24 itself can alter --
- 25 A. The fire load.

1 Q. The V pattern, the V, excuse me, would vent, would
2 form towards the ventilation, correct?

3 A. Yes, sir.

4 Q. All right. Now, one other issue that Mr. Belser
5 asked you about with regard to NFPA was calling a fire
6 an intentional fire based on the visual evidence alone,
7 correct? Isn't that what the NFPA says?

8 A. It discourages that.

9 Q. Based on visual evidence alone, correct?

10 A. Yes, sir.

11 Q. There can be other evidence to support a finding
12 that a fire was intentionally set besides lab data and
13 besides the visual appearance of an irregular-shaped
14 fire pattern, correct?

15 A. Yes. Like my conversation with the Fire Chief.

16 MR. MOORE: Beg the Court's indulgence for a
17 moment.

18 THE COURT: Certainly.

19 MR. MOORE: Thank you, Your Honor, Mr. Ross. I
20 appreciate your time.

21 THE COURT: Re-exam?

22 Redirect Examination by Mr. Freeman Belser:

23 Q. Mr. Ross, with reference to Mr. Moore's question
24 about the length of your investigation, the three and a
25 half hour figure, does that three and a half hour figure

1 include everything you've done or only your time on the
2 scene?

3 A. That was the time on the scene.

4 Q. Okay. And, but you have spent many more hours than
5 that investigating this fire, talking to people,
6 researching, et cetera?

7 A. That is correct.

8 Q. Now, with reference to Mr. Moore's question about
9 your reliance on first responders' opinions and how
10 sometimes you make your own determinations that
11 sometimes differ from the first responders?

12 A. Sometimes.

13 Q. Yeah. But that's not what happened here, is it?

14 A. I have total confidence in Chief Wright. I trained
15 him.

16 Q. Now, Mr. Moore asked you a question about the fact
17 that you saw the scene five weeks after the fire and
18 that the scene was contaminated. Do you remember that?

19 A. Yes, sir.

20 Q. Is it for that reason that it was important to you
21 what Mr. Wright said?

22 A. It is.

23 Q. You've talked about Mr. Byers' report, and you read
24 the text of the report?

25 A. Yes, I have.

1 Q. And with reference to Mr. Moore's questions about
2 the falling staircase and that type stuff and the hinges
3 and springs, there's no reference to that in Mr. Byers'
4 report, is there?

5 A. He took into evidence the spring itself.

6 Q. But in the actual written report there's no
7 reference to that being an issue?

8 A. Not that I recall.

9 Q. Now, with reference to Mr. Moore's questions about
10 the fire in the kitchen, you're not saying that there
11 was -- it's not your opinion that there was no fire in
12 the kitchen, was it?

13 A. No, that's not my opinion. There was burning in
14 the kitchen on the kitchen floor.

15 Q. And explain the difference to the Jury between a
16 primary fire and a secondary fire.

17 A. The primary fire, of course, is the one that
18 ignites first, the one that has the better opportunity
19 to spread, propagate, grow. As a result of this growing
20 fire, combustible materials in its way can be ignited to
21 where they fall to the floor and create other patterns
22 that may, may to some people look like a pour pattern
23 when it was a matter of combustible materials falling in
24 a clump and burning much slower, but still with a high
25 heat release rate, burning into the concrete, drawing

1 all the moisture out of the concrete and spoiling the
2 concrete, which is what I figure.

3 Q. So, for example, if there was a fire in this
4 courtroom and fire fell from the ceiling and burned on
5 the floor, smoldering, if you went back and later did a
6 fire investigation, what would it look like?

7 A. Like somebody poured an accelerant there, puddled
8 it.

9 Q. Now, with reference to Mr. Moore's questions about
10 the amount of fuel that was in the kerosene heater,
11 explain what Ms. Yarbrough said to you.

12 A. She told me that for about two hours on the second
13 afternoon -- first of all, I understand that Jerry Byers
14 removed the heater from the inside to the outside and
15 left it out unprotected overnight, and on the second day
16 had it on the tailgate of the truck and was fiddling, I
17 believe the word was, with it for about two hours. And
18 she made eye contact with him, and Jerry told her, "I
19 almost got it to light."

20 Q. And so the idea that the kerosene heater was
21 two-thirds full, that assumes Mr. Byers didn't put any
22 fuel in it?

23 A. I'm assuming he didn't.

24 Q. Now, with reference to the 13-hour time limit, is
25 it your understanding that the kerosene heater was

1 burning there just starting at 5:00 p.m. the night
2 before or was it several days?

3 A. My interview with Mr. Fowler it was later than 5:00
4 in the afternoon, it was more like 4:30 -- excuse me,
5 5:30, 6:00. One thing with Mr. Fowler, he had really no
6 time to be punching clocks on these activities. He's
7 guessing these times. So, if you have a heater that can
8 burn 13 hours, and it started let's say 6:00, it's gonna
9 take until 7:00 the next morning. And take into
10 consideration here again not knowing at what the part in
11 time the combustible materials on the wall played, I see
12 that as the heat source that caused the fire.

13 Q. Now, Mr. Fowler observed the fire about 7:45, 8:00
14 in the morning. How far, how long before that was the
15 fire, do you think the fire began?

16 A. I couldn't guess to put a time on it. There's
17 nothing reliable that could give me an idea of how long
18 a piece of something burned, so to speak.

19 Q. But the fact that there was smoke at 7:45, that
20 means that the fire started before 7:45?

21 A. Oh, yes.

22 Q. Now, with reference to Mr. Moore's question about
23 the damage in the kitchen and the difference between
24 primary and secondary fires, could you kind of
25 incorporate into that discussion the importance of the

1 area of the greatest burn?

2 A. The area of the greatest burn is significant
3 because you have to realize and theorize that what is
4 damaged the most burned the longest. So in this
5 particular wall that I keep referring to is completely
6 consumed up to a certain point. Cabinets in the kitchen
7 weren't consumed, floor-level cabinets, up cabinets up
8 here weren't consumed, but the wall was consumed,
9 partial baseboard was consumed. That's the lowest level
10 of burning. In my opinion the fire burned there the
11 longest. With the only heat source being the heater,
12 that's how I made my findings upon the fact that look at
13 the pictures of the stuff that he had hanging on his
14 wall and stuff that could have ignited and fallen back
15 behind that heater, and once the fire breached the
16 baseboard and got in between the Sheetrock, it traveled
17 into the attic and we ended up with what we see here
18 today.

19 Q. Compare the extent of the damage we've got in the
20 kitchen versus the living room.

21 A. The kitchen damage is light.

22 Q. And compare the extent of the damage in the,
23 towards the sliding back doors to where the kerosene
24 heater was.

25 A. I'm not sure I'm following. I know there's low

1 level burning where the drapes burned away and fell.

2 Q. No. I'm talking about the same comparison you just
3 made with comparing the extent of the damage.

4 A. You still have the framing of the glass floors, you
5 have wall, you have good window frame of the window that
6 was by the grandfather clock, and then as you turn that
7 corner, it becomes more involved and more involved until
8 it just becomes consumed.

9 Q. Was it your understanding the heater was refilled
10 at 6:00 p.m. the night before?

11 A. That was my understanding.

12 Q. Was it your understanding that went on for several
13 days?

14 A. Yes, sir.

15 MR. FREEMAN BELSER: That's all the questions I
16 have, Your Honor.

17 THE COURT: Now, no new matter, just remember we
18 are limiting it to what was brought out in Redirect
19 Examination.

20 MR. MOORE: Right. Yes, Your Honor, very briefly.
21 Recross-Examination by Mr. Moore:

22 Q. A moment ago you talked about knickknacks or things
23 falling off the wall. Just to be clear, your opinion is
24 that the Sheetrock was heated up over such a long period
25 of time that it fell off the wall and then the stud

1 behind the wall ignited.

2 A. Well, I feel like a knickknack came into play,
3 also.

4 Q. Well, your opinion that you gave in your
5 Deposition --

6 A. I agree. And at the Deposition I hadn't seen these
7 pre-fire photographs that Mr. Fowler had produced.

8 Q. Okay. So you issued your report in this matter and
9 gave your Deposition in this matter without seeing the
10 photographs of the pre-fire condition?

11 A. The photographs of the pre-fire condition just made
12 my theory and opinion all the more believable.

13 Q. Well, it's, apparently it changed your opinion
14 because now you're talking about knickknacks and before
15 you were talking about Sheetrock falling off the wall.
16 Correct?

17 A. Well, as far as causation, let's say you're about
18 to investigate a wreck and let's say you have a
19 crushed-up car. But then you realize, look at the slick
20 tires on this. It had slick tires, but did that change
21 the wreck? No, it didn't.

22 Q. You changed your opinion in this case because you
23 got John Holecek's test data that showed this heater
24 couldn't ignite to cause Sheetrock to fall off the wall?
25 Isn't that why you changed your opinion?

1 MR. CLINCH BELSER: Yes, sir.

2 THE COURT: From the Defense?

3 MR. MURPHY: Yes, Your Honor.

4 THE COURT: All right. Ask the Jury to join us,
5 please.

6 (The Jury entered the courtroom at 9:10 a.m.)

7 THE COURT: All right. Let the record reflect the
8 Jury and Alternate are in the Jury box.

9 Mr. Foreman, ladies and gentlemen of the Jury, we
10 will now proceed with the Plaintiff's case.

11 Mr. Belser.

12 MR. CLINCH BELSER: The Plaintiff calls Mr. James
13 D. Fowler, the Plaintiff, as the next witness.

14 Whereupon,

15 James D. Fowler,

16 Having first been duly sworn, was examined and testified
17 as follows:

18 Direct Examination by Mr. Clinch Belser:

19 THE COURT: All right. You may proceed.

20 Oh, excuse me. If you would, Mr. Fowler, give us
21 your full name for the record, spelling your last name.

22 THE WITNESS: James D. Fowler, F-o-w-l-e-r.

23 THE COURT: Thank you, sir.

24 By Mr. Belser:

25 Q. Mr. Fowler, state first for the members of the Jury

- 1 your age?
- 2 A. I am 60 years old, I'll be 61 in March.
- 3 Q. What is your address, please?
- 4 A. 328 Frank Gaillard Road, Seneca, South Carolina.
- 5 Q. How long have you lived in Oconee County?
- 6 A. 32 years.
- 7 Q. Where were you born?
- 8 A. I was born in Greenville, South Carolina.
- 9 Q. And where did you grow up after you were born?
- 10 A. I grew up in Greer, South Carolina.
- 11 Q. What is your educational background?
- 12 A. I went -- I quit school in the seventh grade, but I
- 13 went back and got my G.E.D.
- 14 Q. Have you been in the military?
- 15 A. I have, yes, sir.
- 16 Q. And how long -- which branch?
- 17 A. I was in the U.S. Army.
- 18 Q. And how long were you in?
- 19 A. Almost three years.
- 20 Q. What type of discharge did you receive?
- 21 A. I had an Honorable Discharge.
- 22 Q. Have you been married?
- 23 A. Yes, I have.
- 24 Q. Are you presently married?
- 25 A. No, sir.

1 Q. Do you have children from your marriages?

2 A. I do, yes, sir.

3 Q. Where do your children live?

4 A. I have two biological children. My daughter lives
5 in Texas, my son lives up in Travelers Rest. I have
6 four stepchildren; which one lives in Six Mile, one
7 lives in Greer, one lives in West Oak, and another one
8 lives up in, I believe, Pickens.

9 Q. Without reciting your entire work history, would
10 you tell the members of the Jury what has been your
11 career and what's been your main job?

12 A. Yes, sir. My career has been in the construction
13 industry. I started out digging ditches by labor. I
14 moved up to carpenter and then lead carpenter. Then I
15 moved up to project superintendent. I was over the
16 entire jobs over all the subs. I've been doing that,
17 well, basically counting with my father, 50 years.

18 Q. How long did you work with your father?

19 A. I grew up -- well, my father, I worked for him when
20 I was a child, and when we got older, we went to
21 Houston and he worked with us, me and my brothers,
22 until he passed away in 1980.

23 Q. After working with him, what other companies have
24 you worked with?

25 A. I worked for, superintendent for Fish-Carter

1 Construction. I was superintendent for construction
2 maintenance, I was superintendent for Rice Fielding
3 (phonetic) Construction, and Marsh Bell Construction in
4 Piedmont.

5 Q. How long did you work with Marsh Bell Construction?

6 A. I worked for Marsh Bell for almost 13 years.

7 Q. And what was your job title when you stopped
8 working there?

9 A. I was project job superintendent.

10 Q. What type of work did Marsh Bell do?

11 A. Construction, mostly commercial work and industrial
12 work.

13 Q. Does it do any residential work?

14 A. No, sir. We did do residential. I didn't do any.
15 But Jerry Marsh, who has passed now, he was the
16 residential contractor.

17 Q. Have you ever been involved in the construction of
18 residences, homes, individual homes?

19 A. Just my own and some I used to subcontract from Jim
20 Walker Homes way back in the early years.

21 Q. What kind of work did your father do?

22 A. My father was a welder and then he -- well, first
23 he was a minister when I was a kid, he was a preacher.
24 And then he got out of that and he was a welder, and
25 then he got into carpentry work.

1 Q. When did you stop working with Marsh Bell?

2 A. I quit Marsh Bell, I give them a two- or three-
3 months' notice, I'm really not sure, but my last day
4 with them was after I opened my restaurant, it was
5 April the 24th of 2008, I believe.

6 Q. And why did you quit, retire from Marsh Bell or
7 quit Marsh Bell?

8 A. It was my dream for years to open my own restaurant
9 because I have a good chili recipe, and so I wanted my
10 own restaurant. I love to cook.

11 Q. And what was the name of your restaurant?

12 A. It was Chili and Spuds.

13 Q. Where was it located?

14 A. It was in Seneca, South Carolina.

15 Q. When did you open the restaurant?

16 A. I opened the restaurant, my grand opening I
17 remember because my grand opening was my birthday,
18 March the 7th.

19 Q. And how long did Chili and Spuds operate?

20 A. It operated, unfortunately, less than a year.

21 Q. And why did you stop?

22 A. Because the economy went downhill and I just
23 couldn't make ends meet with it.

24 Q. Briefly, who else was involved with the restaurant?

25 A. Pardon me?

1 Q. Who else was involved with the restaurant business?

2 A. I had a manager, supposedly, and a couple of cooks.
3 And Bronda, Ms. Yarbrough, she was my specialty because
4 she cooked all my homemade desserts, my banana pudding,
5 my strawberry shortcake, my Mexican cornbread and my
6 regular cornbread.

7 Q. What role did you have in the restaurant?

8 A. I was manager/cook.

9 Q. And what did Bronda -- was the result of closing
10 the restaurant, of closing the restaurant, the reasons
11 of lack of business, what were the financial results
12 for you?

13 A. The financial results for me is I lost money in the
14 restaurant. What really helped me go under is I hired
15 the cook that I --

16 Q. We don't want to get into another case here.

17 A. Okay.

18 Q. Do you have any judgments against you on account of
19 the restaurant's closing?

20 A. I do. I have a tax lien, yes, sir.

21 Q. Do you have any other judgments against you or
22 associated with that business or any other business?

23 A. I got one, yes, sir, that my son helped me acquire
24 from Tremendous Landscaping and Irrigation.

25 Q. What's the name of the company?

- 1 A. Treemendous Landscaping and Irrigation.
- 2 Q. Just for the record, that's spelled T-r- --
- 3 A. T-r-e-e-m-e-n-d-i-o-u-s. Treemendious.
- 4 Q. Whose business was that?
- 5 A. That was basically my son's. He did the work. I
- 6 did most of the financial purchasing, trying to help
- 7 him get started.
- 8 Q. Okay. If it was his business, why did you lose
- 9 money?
- 10 A. Pardon me, sir?
- 11 Q. Did you co-sign some of the notes?
- 12 A. Yes, sir, I did.
- 13 Q. Okay. After the restaurant closed -- when did you
- 14 lose the money with your son's business, I guess I
- 15 should say?
- 16 A. Well, my son, his business was just like every
- 17 industry. It went downhill, too. He's still actually
- 18 in business, but it's just right now slow. It's not
- 19 completely dissolved, it's just slow. He got barely
- 20 enough to keep him in that business.
- 21 Q. Do you still work with him on any part-time basis?
- 22 A. Yes, I do.
- 23 Q. Tell the ladies and gentlemen of the Jury about
- 24 what work you are doing.
- 25 A. Sometimes we go out and we put in small trees or

1 shrubbery or sometimes he gets fish ponds, which we do
2 a little fish ponds. Or right now people is not
3 putting in fish ponds. And we do pine straw for the
4 bigger elaborate homes and all.

5 Q. Do you have any other business activity with any of
6 your other sons or stepsons?

7 A. Yes, sir. I also, I got a son that builds docks,
8 he's a contractor for Kroeger Marine. And I worked
9 with him a lot building new docks and refurbishing
10 docks, putting new floats, redecking, staining.

11 Q. Is that a full-time business occupation for you?

12 A. No, sir, I'm just part-time.

13 Q. Now let's go to the subject of the house at 328
14 Frank Gaillard Road, which you said was your address.
15 Who owns that lot?

16 A. I own the lot.

17 Q. When did you buy it?

18 A. I bought the lot back in 1978 or '79.

19 Q. Why did you buy this particular lot?

20 A. Because I worked, I did a job when I was a
21 superintendent for Fitz Carter (phonetic), I did a
22 refurbishing job at Clemson University, and every
23 weekend we would go water-skiing, and that's the area I
24 skied in, so that's where I pretty much knew the lake.

25 Q. Will you describe the location in more particular,

1 where it is in the lake? Tell the members of the Jury
2 where your lot is located.

3 A. My lot is located in the Friendship community about
4 a mile by water from the Friendship Bridge, and by road
5 it's coming down Mill Road on Alexander (phonetic) by
6 road, and from the landing it's six and a half miles.

7 Q. What is the size of the lot?

8 A. My size of the lot is a hundred foot wide on the
9 rear, 105 foot on the road frontage, and it's about
10 close to 400 foot deep not counting the Corps property.

11 Q. How much water frontage do you have?

12 A. I have about a hundred foot water frontage.

13 Q. Okay. And what do you mean by the Corps property,
14 just so all members of the Jury know what that is?

15 A. Well, on all the lakes now they're either
16 controlled, every lake is either controlled by the
17 power companies, which would be Duke Power or either
18 the Army Corps of Engineers.

19 Q. All right. Now, what kind of a view from this lot
20 do you have of the lake?

21 A. I have a tremendous view. I'm not on real big
22 water. I guess the little cove I'm in is probably
23 three or four hundred feet wide.

24 Q. What kind of a road is Frank Gaillard Road?

25 A. Frank Gaillard Road is a paved road, and I live on

1 the very end almost on the cul-de-sac end.

2 Q. Do you have any neighbors?

3 A. I do, yes, sir.

4 Q. How close are they?

5 A. My neighbors are, their houses actually, the
6 structure is probably from the edge of my lot probably
7 15 feet on one side, on the left side, it may be 60
8 feet on the other, right side.

9 Q. Generally what is the size of the other lots in
10 your neighborhood?

11 A. They're all basically the same size lots.

12 Q. Okay. And how would you describe the neighborhood?

13 A. The neighborhood is to me the most superb
14 neighborhood there are in Oconee County.

15 Q. And are Mr. and Mrs. Bright who testified, I think
16 yesterday, day before yesterday afternoon, are they a
17 member of your neighborhood?

18 A. Yes, sir, they are.

19 Q. And where do they live?

20 A. They live right next door to me to the left.

21 Q. Going back to 1978 or '79, when you bought the
22 property, what structures, if any, were on the lot?

23 A. When I bought the property, it had a little mobile
24 home on it, it was like a 12-by-45 feet, it was a
25 Champion mobile home, it was about a '65 model, I'm

1 really not sure. It was a pretty old mobile home.

2 Q. And who built the house which is the one which was
3 insured and involved in this particular case?

4 A. I built the house.

5 Q. When did you start building the house?

6 A. I started building the house I believe in '90, '89
7 or '90. See, I worked out of town on constructions,
8 and so when I'd get off on weekends I'd come home and I
9 worked on the house.

10 Q. How long did it take you working on that part-time,
11 after-hours basis?

12 A. I think I finished the house and moved in, I
13 actually moved in before it was completely finished. I
14 moved in in 1992.

15 Q. And when did you finally finish?

16 A. I finished it the end of '92.

17 Q. Please describe the building process. What
18 materials did you use, what labor did you use?

19 A. Well, I built the house entirely myself. Me and my
20 sons, they helped me some, they was teenagers and was
21 dating so they wasn't too dependable being there. So I
22 built the house, I dug the footings and poured the
23 footings, put the rebar in, I framed the house, I done
24 all the plumbing, all the electrical, the cabinets,
25 wall cover and drywall. I done everything in that

1 house but pour the concrete slab.

2 Q. How did you know how to do all of that?

3 A. I've been in construction for 40 years and
4 supervision. I read blueprints, I know the codes and I
5 know the rules. That's how I know, by on-the-job
6 training.

7 Q. For this house you were building for yourself, did
8 you include any special features?

9 A. I did.

10 Q. Would you tell the members of the Jury what those
11 were?

12 A. I did. On the interior I did solid red oak
13 cabinets with lace panel doors. On the exterior part I
14 put dentil mold all the way around the house, handmade
15 dentil mold, each little block was cut one at a time
16 and painted one at a time and put up on the house. And
17 also, instead of using half-inch plywood which most
18 contractors use on houses on the exterior, I put
19 three-quarter plywood. I had 6 mil poly well-insulated
20 on the exterior walls and also on the ceiling.

21 Q. What sort of windows did you have?

22 A. I had the thermal windows, dual pane windows,
23 insulated.

24 Q. Were they all regular, flat windows?

25 A. They was what you call like nine like windows.

1 There was one actual pane which you had a strip in them
2 that actually looked like individual pane glass, a nine
3 like.

4 Q. What sort of equipment did you put in the house for
5 daily operation?

6 A. I put in everything that you would put in the
7 house. I had a central vacuum system, a trash
8 compactor, garbage disposal, central air and heat, all
9 the whistles and bells that you could possibly have.

10 Q. Now, what size was the house in square feet?

11 A. My house in square feet was actually 28 by 60 with
12 a bay window. It was 1722 heated square feet.

13 Q. Let me show you -- or let me project what has been
14 marked Plaintiff's Exhibit Number 16 and ask you to
15 look -- 18 -- exhibit 18 and ask you --

16 Can we adjust the lights so that is more easily
17 visible?

18 THE COURT: Turn them off.

19 (The Bailiff complied.)

20 MR. CLINCH BELSER: That's hard for me to read. It
21 has an alternate drawing. May it please the Court, if I
22 could have the next drawing for the Witness to ---

23 THE COURT: What is your request?

24 MR. CLINCH BELSER: To turn back on the lights.

25 THE WITNESS: I can see that pretty good, Mr.

1 Belser.

2 MR. CLINCH BELSER: Well, I know you're good at
3 what you do, but the members of the Jury don't know as
4 much about it as you. I'm gonna hold on this table and
5 ask you if you will --

6 THE COURT: Let's do the tripod. Then he can come
7 down if that's what you want.

8 Certainly.

9 MR. CLINCH BELSER: May I ask the witness to come
10 down off the stand?

11 THE COURT: Certainly. And, Mr. Fowler, if you
12 would please stand where Mr. Belser is standing so you
13 can talk back towards this way as well as the Jury so
14 the court reporter can see you.

15 THE WITNESS: Yes, sir.

16 (Witness leaves stand.)

17 By Mr. Belser:

18 Q. Mr. Fowler, let me ask you to identify this
19 drawing, when it was made, and by whom?

20 A. The drawing was made by, I did the drawing.

21 Q. Okay.

22 THE COURT: Does that have a number?

23 MR. CLINCH BELSER: This is the same thing as
24 Exhibit 18. Just for illustrating what has already been
25 admitted as Plaintiff's Exhibit 18.

1 THE COURT: Very good, thank you.

2 By Mr. Belser:

3 Q. Mr. Fowler, will you just tell the members of the
4 Jury what the house is in size and point out the
5 different rooms?

6 A. Yes, sir. The house, like I said, total heated
7 space is 722 square feet. This end right here, of
8 course, was the master bedroom and the master bath,
9 this whole end of the house.

10 This here was my living room and dining room
11 combined. This is my kitchen, this here was a food
12 pantry, this is all cabinet work. The dotted lines you
13 see represents upper cabinets.

14 This is the bedroom, the closet. The dotted line
15 here, which I know by blueprints, represents shelving
16 in the cabinet. The X represents my return air for my
17 HVAC unit. This was a full bath here, and this here
18 was a full bath.

19 This here was my breakfast room where I could get
20 up and drink coffee and watch the sun come up.

21 And this here was my smaller bedroom, 12-by-12.

22 Q. Where was the front door of the house?

23 A. The front door is right there, sir.

24 Q. And where would the lake be in relationship to the
25 way you've laid out this drawing?

1 A. The light?

2 Q. The lake.

3 A. Yes, sir. The lake was all on the back of the
4 house.

5 Q. And how far away from the back of the house was the
6 lake?

7 A. Counting the Corps property, you are talking about
8 approximately, I really don't know, less than 400 feet.

9 Q. How many bedrooms did you say the house ---

10 A. It has three full bedrooms.

11 Q. And beside the bedrooms, it had a living room,
12 dining room area, and kitchen?

13 A. Yes, sir. Living room, dining room, and breakfast
14 room. I draw the drawings myself for the home.

15 Q. Okay. And when did you prepared this?

16 A. I prepared this a year or so ago.

17 Q. That's not the drawing from which you built the
18 house?

19 A. No, sir.

20 Q. If you would take the stand back again, that's all
21 we need for now.

22 A. Yes, sir.

23 (Witness resumes stand.)

24 By Mr. Belser:

25 Q. Thank you, Mr. Fowler. What other structures were

1 there beside the house and the lot which you just
2 illustrated?

3 A. I built a gazebo, a two-story gazebo, which was
4 actually my rec room, which I have a hot tub downstairs
5 and a pool table upstairs and a couple chairs and love
6 seats.

7 Q. And any other structures?

8 A. Yes, sir. I have a storage building with a lean-to
9 shed at the back of the lot which I keep my riding lawn
10 mower under and tillers. Then I have a boat shed at
11 the front the driveway which I kept my boat under and
12 tools, saws. I was a pack rat.

13 Q. Who lived at 328 Frank Gaillard Road after you
14 built the house but before the fire?

15 A. I lived there by myself after I got a divorce.

16 Q. Do you have a pet?

17 A. I do. I have, I have a parrot named Baby.

18 Q. How long have you had this parrot?

19 A. I've had Baby probably eight to ten years. I'm
20 really not sure of the date.

21 Q. Do you have other parrots also?

22 A. I had one that was, it actually was given to
23 Ms. Bronda Yarbrough by her sister, and when we picked
24 it up, it had a broken wing and they didn't want to
25 maintain it, and I went with Ms. Yarbrough to pick up

1 her parrot, which when the parrot seen me, it...

2 Q. Well, let's not talk not about the parrot so much
3 but the furniture and furnishings in the house. Would
4 you describe the furniture and furnishings in general
5 terms.

6 A. Yes, sir. I had -- all my interior furniture, my
7 china cabinet, all my dining rooms and all was red oak
8 hardwood furniture, top of the line in my opinion for
9 residential use. I had my sofa and all, I had a sofa
10 that was top of the line. I had a recliner on each end
11 of it. I had an individual recliner which was my
12 chair, and then I had a love seat that also, both of
13 them was recliners. And I had bedroom suites which was
14 good material normally I guess for every residential
15 home.

16 Q. And without going into great detail, you were here
17 yesterday when Ms. Yarbrough testified about the
18 pictures which she had about the family events in past
19 years?

20 A. I was, yes, sir.

21 Q. Just to speed things up, did you hear her testimony
22 about what was in those photographs and the people in
23 them and the furnishings showing pictures of the
24 family?

25 A. I did, yes.

1 Q. And were her descriptions accurate?

2 A. Yes, sir, they was.

3 Q. Now, without going through those pictures, let me
4 ask you if you will tell the members of the Jury about
5 your collections of lighthouses.

6 A. Yes, sir. I had a collection -- well, I have
7 actually two collections. I collect light houses and
8 elephants. And I had lighthouses that I had bought all
9 over every state I went in and worked. On weekends
10 when I wasn't working I would go and I would buy
11 lighthouses and elephants. Any kind of lighthouse,
12 some of them big, some small, any kind of elephant I
13 collected them in my house.

14 Q. How many would you have roughly of each?

15 A. Oh, roughly I guess I had -- it's hard to say --
16 maybe a hundred, or a little more or a little less of
17 each.

18 Q. Did you have any special lamps?

19 A. I do.

20 Q. Please describe those to the members of the Jury,
21 please.

22 A. Yes, sir. When I went to Orlando, Florida for Rice
23 Freeman Construction, I went down there to build an
24 Apex movie theater, and I seen two horse lamps, very
25 detailed, I mean, it had the horse, the saddle and the

1 bridle, so detailed and highly painted, you could even
2 see the veins in the horses, a tree trunk that held the
3 shade, it had like an old water trough. It was very
4 unique. I never seen anything like it in my life. So
5 those were like I remember \$459 a piece, so I had to
6 have them so I bought them.

7 Q. Well, let me ask you about the prohibition liquor
8 bottles.

9 A. Yes, sir. I also, I had a lot of alcohol in my
10 house. I drank, once in a while, maybe a whiskey sour
11 or an occasional beer. I'm not an alcoholic but all of
12 my subcontractors, every Christmas they would all bring
13 me liquor. When you are in the construction industry I
14 think the only gift they know how to give you is
15 alcohol. And I had a whole cabinet full of liquor.
16 Under my cabinet was full of liquor of every kind from
17 Jack Daniels to Crown Royal. And I had Prohibition
18 Canadian mash.

19 I do drink whiskey sours. I love them. My dentist
20 give me the recipe, so... I have prohibition bottles
21 which was collectors' items lined up across the top of
22 my cabinet in the kitchen.

23 Q. What are you talking about when you say Prohibition
24 bottles? What do you mean?

25 A. Prohibition, they was actually replicas before I

1 was even born. They had, I guess they tried to shut
2 down all the liquor stills and get all the liquor taxed
3 so people was bootlegging. I've not really understood,
4 but Prohibition I guess it was illegal to have liquor.
5 But they got replica bottles that was made just like
6 the bottles back during Prohibition and I was attracted
7 to the shape, so I collected them.

8 Q. How many bottles were in that collection, roughly?

9 A. I believe I had eight or nine. I'm really not
10 sure, sir. Unopened bottles that still had the label
11 on them and the cards and all that told about them.

12 Q. What about the grandfather clock?

13 A. The grandfather clock was a Howard Miller. I
14 purchased it for my ex-wife in Myrtle Beach, South
15 Carolina, when I went down there to build some jobs. I
16 liked the clock so I actually purchased it and was
17 gonna give it to her for a Christmas present.

18 Q. I have to ask you what happened.

19 A. Well, unfortunately, she didn't make it with me
20 till Christmas. She --

21 Q. No, that's enough about that.

22 A. Okay.

23 Q. You ended up with the clock?

24 A. Yes, sir.

25 Q. How much did you pay for the clock?

1 A. I give a little over \$5,000 for the clock.

2 Q. Let's talk about the cabinetry. Well, talk about
3 the clock. How could it cost that much money? What
4 did it have on it?

5 A. It was a grandfather clock. It was actually a
6 lighted curio cabinet clock that had brass solid
7 pendulums and weights and on each side it had glass
8 adjustable shelves with a glass top where you could
9 actually turn on a light in it and look and see all the
10 movements and all the shelves and figurines which was
11 full of lighthouses and elephants.

12 Q. We'll go back to the items later. But who took
13 care of and maintained the house and the furniture and
14 the furnishings in the house?

15 A. I did.

16 Q. Since you were the person who bought all the
17 furniture and furnishings and the one who maintained
18 them, how well were you familiar with the condition and
19 the value of these items that you owned?

20 A. I took care of my furniture. I bought high-grade
21 furniture. I took care of my furniture. My furniture
22 when the house burnt was basically in the same shape it
23 was the day I purchased it.

24 Q. Now, did your house have an attic, a usable attic?

25 A. It did, yes, sir.

1 Q. How was it used?

2 A. It was used for -- I have a lot of construction
3 tools, and like I say I'm a pack rat, so I had it full
4 of brand-new oak boards, bead boards of every shape and
5 size, and tools you could probably imagine in my attic.

6 Q. Where did these items come from?

7 A. I bought them over all my years in construction, I
8 bought all the tools. All my lumber, I built a lot of
9 Applebee's and Ryan's Steak Houses. And Applebee's had
10 a lot of oak in it, and when my sons would come they
11 was all out of state and they didn't want to transport
12 it back, so they would give me a lot of the materials
13 and, of course, I would carry it home.

14 Q. Why did you keep all that stuff?

15 A. I'm a carpenter and I love to build, and it was
16 expensive.

17 Q. How would somebody get into the attic?

18 A. You would go into the second pine made bath.
19 Before you went into it, I had a little hallway there,
20 and you would reach up and pull down the attic stair
21 and it would open up into my office bedroom.

22 Q. Where was that in relationship to the front door,
23 if you came in the front door?

24 A. You came in the front door, you went to the kitchen
25 to the left and you made an extreme right right down

1 the little hall -- yes, sir -- and you make a right
2 there, right there, that was where that stairwell was
3 in that little hall there.

4 Q. Right below, right there?

5 A. No, sir, it's on the back, right in front of the
6 bathroom.

7 Q. Is this the bathroom right here?

8 A. That's the bathroom. Can I come down there.

9 Q. Yes, sir. Thank you.

10 (Witness leaves stand.)

11 A. My drop stairway was right here in this little
12 hallway, and it dropped down this way and the last step
13 would end up in this bedroom probably a foot. It was
14 very tight.

15 MR. CLINCH BELSER: Thank you. Please take your
16 seat again.

17 (Witness resumes stand.)

18 By Mr. Belser:

19 Q. Now at this time I'd like to go to another subject
20 and show you what's been marked as Plaintiff's Trial
21 Exhibit Number 19 and ask you what this is (handing)?

22 A. This is a copy of my insurance policy, homeowners
23 Dec page that I purchased through Nationwide.

24 Q. We're not gonna go through it in detail, but this
25 is your policy which is marked as Plaintiff's Exhibit

- 1 Number 19, correct?
- 2 A. It is, yes, sir.
- 3 Q. Now, please tell the members of the Jury where you
- 4 were living on January the 16th of 2009.
- 5 A. I was living in --
- 6 Q. The month of January of 2009.
- 7 A. Okay. I was living at 328 Frank Gaillard Road in
- 8 my house.
- 9 Q. On what parts of the property did you occupy on a
- 10 daily or weekly basis?
- 11 A. My house.
- 12 Q. Let me show you now, I'll ask my son to put on the
- 13 screen a document which is marked Exhibit 29, photo
- 14 number 9. Can you see the screen?
- 15 A. I do, yes, sir.
- 16 Q. This was taken by Mr. Byers. What does that show?
- 17 A. That shows my gazebo rec room which was built like
- 18 a lighthouse.
- 19 Q. And from what angle is that photograph taken?
- 20 A. That is taken from the, if you are coming in the
- 21 driveway, it looks like that was taken from the left
- 22 side of the back of the house in the backyard.
- 23 Q. So that's looking parallel to the lakefront?
- 24 A. No, sir. That's looking across the lot.
- 25 Q. Across the lot?

1 A. Yes, sir.

2 Q. And where was your main house?

3 A. My main house is, if you look to the right, there's
4 going up a set of steps that's made out of those
5 blocks. My main house was up on there actually the
6 second floor of the gazebo.

7 Q. Thank you. We'll leave that on the screen for a
8 moment.

9 In the month of January of 2009, what use, if any,
10 were you making of the gazebo while you were living in
11 the house?

12 A. Pardon me, sir?

13 Q. During the month of January did you make any use of
14 the gazebo while you were living in the house?

15 A. Yes, sir.

16 Q. Please explain that to members of the Jury.

17 A. When it was real cold, I would sleep in the gazebo
18 on real cold nights because I had central air and heat
19 in it and I didn't have no central air and heat working
20 in the house.

21 Q. And why briefly did you have no power on in the
22 house?

23 A. I had a dispute with Blue Ridge Electric concerning
24 the power bill in my home.

25 Q. Please explain what the dispute was.

1 A. The dispute was the bill was way more extreme than
2 it should have been, and I had a dispute with them
3 because it was way too high for the structure of my
4 house. It was well-insulated and well-built so my
5 power bill should not have been that high.

6 Q. What level was your power bill?

7 A. My power bill would sometimes run from three
8 hundred some dollars, I think one month it was up to
9 seven hundred dollars.

10 Q. Did you try to talk to Blue Ridge about this?

11 A. I did.

12 Q. Without quoting anything they said, what was the
13 result of your efforts to talk with them about the high
14 power bills?

15 A. I would call them and talk to them about it and
16 told them I wanted a new meter in, and they told me
17 they would not put one in and that one was fine, and if
18 I wanted a new meter put in, that I would have to pay
19 an additional \$75.

20 Q. And what was your reaction to that position taken
21 by them?

22 A. My reaction was I'm not paying another \$75, and
23 once my bill comes due, cut it off.

24 Q. Did they cut it off?

25 A. Yes, sir.

1 Q. And when was that, approximately?

2 A. I think it was, not sure of the date, but it was
3 when I had the restaurant open. I'm not sure what
4 month, it was September, I'm not really sure, October,
5 I'm really not sure of the date.

6 Q. September-October of 2008?

7 A. Yes, sir.

8 Q. And so with the power off in the main house did you
9 use the house anyway?

10 A. Yes, sir.

11 Q. And what use did you make of the house anyway even
12 though the power was off at the house?

13 A. Well, I lived in the house. I had two drop cords
14 running from my gazebo, which I had my refrigerator, my
15 coffee pot, my lights, my TV and microwave.

16 Q. Okay. Did you have a separate meter for the
17 gazebo?

18 A. I did.

19 Q. So you ran drop cords from the gazebo to the house
20 for those purposes?

21 A. Yes, sir.

22 Q. And did you continue to pay your bill for the
23 gazebo you used?

24 A. Yes, sir.

25 Q. And I think you mentioned the Koi pond before. Did

1 you have to supply the power to the Koi pond?

2 A. Yes, sir. I had a Koi pond that me and my son put
3 in at the front of the house. It was actually shaped
4 kind of in line like the State of Florida. It had a
5 little arch bridge and it ran, it was approximately 70
6 feet long that me and my son put in.

7 Q. Now, when did you go back and forth to the gazebo,
8 when would you sleep in the gazebo and when would you
9 sleep in the house?

10 A. I would sleep in the gazebo when it was freezing,
11 freezing temperatures, and I would stay in the house
12 when it was not so freezing and cold.

13 Q. And where would you eat?

14 A. I would eat at home or go out to eat.

15 Q. Did you eat at the gazebo or eat in the house?

16 A. I ate in the house.

17 Q. Now, how long had -- well, what was the weather in
18 January of 2009?

19 A. It was freezing cold.

20 Q. And when the weather was freezing cold, what did
21 you do to keep the house warm since there was no power
22 other than the drop cords you had?

23 A. I had a kerosene heater which I kept burning. Even
24 when it wasn't really, really cold I still kept it lit
25 in there because the house is closed up, you know, when

1 you keep the doors closed and the windows, it still
2 stayed warm because when you let it cool down, it takes
3 forever to heat them back up, so I kept the heater
4 burning 24 hours a day, seven days a week when it was
5 cold.

6 Q. And in the month of January -- well, when did you
7 start using the kerosene heater that winter?

8 A. I'm really not sure of the date. When it started
9 turning cold. I'm really not sure. I know it was
10 probably in maybe November or October. It was
11 according to when the weather turned cold.

12 Q. How often did you have to refill the kerosene in
13 the heater?

14 A. I didn't have, I didn't have no certain time that I
15 refilled the heater. I just know how long it would
16 burn and when I was coming by I would stop and make
17 sure it was still burning and take the little portable
18 tank out and fill it up. But usually once a day.

19 Q. And for how many weeks before the night of the fire
20 had that been going on, approximately?

21 A. Probably approximately two weeks.

22 Q. Okay. Now, where was the heater placed?

23 A. The heater was placed in my living room on the wall
24 right adjacent to the walkway where you go into the
25 kitchen.

1 Q. Stay up there, if you will, and let me, if I point
2 on the screen to the part on the --

3 A. Right there is where you -- approximately right
4 there where your finger is.

5 MR. CLINCH BELSER: Let the record reflect that I
6 put my finger in the living room closer towards the
7 pantry; is that correct?

8 THE WITNESS: That's correct, yes, sir.

9 By Mr. Belser:

10 Q. How close to the wall was it, as best you recall?

11 A. I'm really not exactly sure. I'm gonna say roughly
12 between ballpark figures three to seven inches, maybe
13 eight. I'm really not exactly sure. I know the drip
14 pan I don't believe quite touched the wall. It may
15 have, but I really don't know, sir.

16 Q. How well had your system been working of having the
17 power on on the Kerosun heater in the place you just
18 described on cold nights of January of 2009? How well
19 was that working?

20 A. It was working good.

21 Q. At what setting -- did the Kerosun heater have
22 different settings?

23 A. Yes, sir, it did.

24 Q. What settings did you use?

25 A. I used high. What I would do, I would turn it up

1 on high and they'll smoke a little bit so I would take
2 and just barely turn it back to where it would not
3 smoke and that's the setting that it stayed on.

4 Q. Now let's turn to the night of January 16th of
5 2009. Can you describe the weather that particular
6 night?

7 A. It was cold. It was freezing cold. I think it got
8 into the teens.

9 Q. Where were you that evening?

10 A. Well, that evening I was in the house, but, and
11 that day in the house, but when it got right before
12 dark I went to the gazebo and started, turned on the
13 DVD player and started watching DVD movies.

14 Q. Was anyone else there at all during that evening?

15 A. No, sir. I can't remember if Bronda came over that
16 day before she went to work if she was working or my
17 son. But I really don't recall, sir. But I don't
18 think so.

19 Q. What did you do before you went to sleep?

20 A. I might have, I really can't swear to it, but
21 sometimes I would go in the house of the night and get
22 me a glass of tea or make me a pot of coffee, but I
23 cannot swear to it that night whether I did that or
24 whether I did not.

25 Q. Where did you spend the night?

1 A. I spent the night sleeping on my pool table/
2 makeshift bed in the gazebo.

3 Q. And which floor was that on?

4 A. It was on the second floor.

5 Q. Okay. Going to the next morning, what time did you
6 awaken the next morning?

7 A. Baby, my bird, she actually woke me up. She
8 always, she flew down on me and she would come onto the
9 bed and she would climb and she would crawl up under
10 the cover and lay down beside me. And she was I guess
11 my pal. But she woke me up playing with her.

12 Q. After you were awakened, please describe what you
13 saw.

14 A. I was playing with Baby and I was laying on the
15 pool table, and as I was playing with her I looked up.
16 My front door to the gazebo is a window. And when I
17 looked up, I glanced out and I seen smoke coming out of
18 the vent of the house.

19 Q. So the gazebo was slightly downhill from the house
20 so you were looking up slightly?

21 A. Yes. I was looking up toward the sky.

22 Q. And what did you do when you saw that?

23 A. I jumped up and got dressed, tried to find my phone
24 but I couldn't, so I jumped up and run next door and
25 banged on my neighbor, Sue Bright's, house.

1 Q. What did you tell her?

2 A. I told her that could she please call 9-1-1, that
3 my house was on fire.

4 Q. And what did you do after you asked her to do that?

5 A. I, I took off running back over to the house. Of
6 course, Sue, I didn't give her my physical address, so
7 she stopped me and asked me what my address was. I
8 turned around and told her that it was 328. I went
9 over there. I went to the front door which in school I
10 was taught if there was a fire to put your hand on the
11 door. So I felt the door, I did not feel any heat. So
12 I opened the door and I could not see nothing, it was
13 total smoke. I seen no flame, nothing but smoke. So I
14 closed the door back and waited on the Fire Department.

15 Q. How soon did the Fire Department get there?

16 A. It seems like forever but it was actually just a
17 few minutes.

18 Q. Did you see what they did when they arrived?

19 A. Yes, sir. They started getting, pulling hoses out.
20 I tried to help them get the hoses out and stretch them
21 out.

22 Q. How long did they stay to fight the fire?

23 A. I believe, I don't really know the time because I
24 didn't have a watch on, but I believe the engine report
25 said it was close to 1:00.

1 Q. What was the condition of the house when the
2 firefighters finished?

3 A. It was to me totally destroyed.

4 Q. Did you have any conversation with the firefighters
5 that day?

6 A. I did, yes, sir.

7 Q. Who did you talk to?

8 A. I talked to Mr. Chief Wright.

9 Q. And do you remember what he said to you, if
10 anything, about the fire?

11 MR. MURPHY: Objection, Your Honor, we're getting
12 into hearsay.

13 THE COURT: All right. Very well.

14 MR. MURPHY: There is no exception I'm aware of
15 that will allow that.

16 THE COURT: Well, we'll find out. Otherwise,
17 hearsay would not be permissible.

18 MR. CLINCH BELSER: I'll withdraw the question,
19 Judge.

20 THE COURT: Restate your question, if you would.

21 Again, hearsay is not admissible by either the
22 Plaintiff or the Defendant because it's what we think we
23 heard.

24 By Mr. Belser:

25 Q. Did the Chief give you anything?

1 A. Yes, sir. The Chief gave me a Truck Fire Report.

2 Q. Let me ask you, if you look on the screen and look
3 at what's marked already as Plaintiff's Exhibit Number
4 6?

5 A. Yes, sir. That's the Truck Report he give me.

6 Q. Could I impose upon the Court to dim the lights a
7 moment so this could be better seen by the Jury?

8 (Bailiff dimmed lights.)

9 MR. CLINCH BELSER: Thank you.

10 By Mr. Belser:

11 Q. We're not gonna go through this in detail since
12 this is not your report. But when did you receive this
13 document?

14 A. I received that document January the 17th, the day
15 of the fire.

16 Q. Okay. And without telling the Jury what he might
17 have said specifically, did he tell you what to do with
18 the document?

19 A. Yes, sir. He told me to keep that document and
20 give it to the insurance company.

21 Q. And did you do as he suggested?

22 A. I did, yes, sir.

23 Q. Now, what was your first contact with the insurance
24 company as a result of dealing with what the Chief
25 said? What was your first contact with Nationwide

1 Insurance Company?

2 A. I'm really not sure of the name of the lady I
3 called. I called like a toll free number and talked
4 with a lady. She didn't give her name but she got some
5 information, and then Mr. Andrew Flanagan returned my
6 call that day.

7 Q. And what did Mr. Flanagan and you talk about, not
8 what he said, but what did you talk about, the subject?

9 A. On the phone?

10 Q. Yes.

11 A. First he talked about if there was any injuries and
12 I told him no, sir.

13 And that he would -- did I have a -- I think, sir,
14 it was he took the information on the house. I can't
15 really remember everything he talked about.

16 Q. Did you make an appointment to see him?

17 A. Yes, sir, I did.

18 Q. When did that occur and where?

19 A. He told me he would meet me the following day,
20 which was Sunday morning.

21 Q. And did you meet with him on Sunday morning,
22 January the 18th?

23 A. I did, yes, sir.

24 Q. And where was that exactly?

25 A. He come to the house and I met him at, on the

1 driveway.

2 Q. Did Mr. Flanagan ask you to do anything or give you
3 any instructions as to what to do or make any requests
4 of you when he came?

5 A. Yes, sir. He told -- well, let me back up. On the
6 phone that day, that Saturday, the day of the fire -- I
7 forget to mention this -- he give me his fax number and
8 told me to go ahead and notify the mortgage companies
9 and give them his fax numbers and let them fax the
10 amount owed or something like that, so that's what I
11 did.

12 Q. When he arrived on Sunday, did he ask you to sign
13 any documentation?

14 A. Yes, sir, he did.

15 Q. Let me ask you to look at the screen and we'll go
16 through what's been marked Plaintiff's Exhibit 21, a
17 series of pages, and if we could dim the lights so the
18 Jury could see.

19 All right. Is that your signature on that form
20 right there?

21 A. Yes, sir, it is.

22 Q. And can you focus in so he can read what that
23 document says?

24 I don't think we need to go line by line. But is
25 that your signature signing this authorization for the

1 insurance company to get certain information?

2 A. It is, yes, sir.

3 Q. Now let's go to the next document which would be
4 Exhibit 21. Is that your signature on that document?

5 A. It is, yes, sir.

6 Q. And this is sometimes called a Reservation of
7 Rights. He will do certain things but the company
8 reserves its rights.

9 Let's go to the next document. Let's look at this
10 document right here. Is that your signature at the
11 lower left corner of item number 3 of Exhibit 21?

12 A. Yes, sir, it is.

13 Q. And what is the title of it?

14 A. Receipt for Sworn Statement in Proof of Loss.

15 Q. And did Mr. Flanagan give you a blank Sworn
16 Statement in Proof of Loss like it says in that
17 document?

18 A. Yes, sir. He give me that and I had to sign it and
19 give it back to him, and I think he give me a copy for
20 my personal...

21 Q. It says you've got to complete and return it to him
22 in accordance with the conditions of the policy
23 contract. Without going back and reading the contract,
24 did he tell you how much time he had to submit that?

25 A. I think he said 30 days. I'm really not sure. He

- 1 told me, but I can't recollect the time.
- 2 Q. Let's go to the next document. That's your
3 signature and Mr. Flanagan's signature on that
4 document, which is the fourth document in Exhibit 21?
- 5 A. Yes, sir, it is.
- 6 Q. This gave the company permission to go upon your
7 property to investigate the loss?
- 8 A. Yes, sir, it did.
- 9 Q. Let's go to the next document. Is this your
10 signature on this document in the lower left?
- 11 A. Yes, sir, it is.
- 12 Q. This is the Lienholder and Judgment Statement?
- 13 A. Yes, sir, it is.
- 14 Q. You mentioned the tax lien?
- 15 A. Yes, sir.
- 16 Q. And let's go to the next document. Without reading
17 all of these in detail, is that your signature in this
18 document, the lower left-hand corner?
- 19 A. Yes, sir, it is.
- 20 Q. All right. Let's go to the next document. Now,
21 did you sign this document in the lower left-hand
22 corner, the second page?
- 23 A. Yes, sir, I did.
- 24 Q. And did you cooperate with Mr. Flanagan as best you
25 could in signing all the documents and giving all the

1 releases and authorizations that he requested?

2 A. Yes, sir, I did.

3 Q. Now let me show you now a document which has been
4 marked as Exhibit Number 22. And I may need to enlarge
5 this. Have you seen this document before, Mr. Fowler?

6 A. Yes, sir, I have.

7 Q. All right. And what's the date of this letter?

8 A. It's 1 -- the date of loss -- oh, January the 23rd,
9 2009.

10 Q. Does this letter say why the company may not pay
11 you for your claim?

12 A. Yes, sir. It says it does not pay for intentional
13 acts.

14 Q. Does it use the word criminal acts?

15 A. Yes, sir, it does.

16 Q. I have the red light on the word "criminal acts"?

17 A. Yes, sir, it does.

18 Q. Now let's turn to Exhibit Number 23. Is this a
19 letter you received from Mr. Flanagan on or about
20 January 28 of 2009?

21 A. Yes, sir, it is.

22 Q. Now, did Mr. Flanagan explain to you in this letter
23 and orally about this, I think he calls it an
24 examination under oath? What did Mr. Flanagan state to
25 you about having an examination under oath?

1 A. He said I had to -- I don't think he -- I may be
2 wrong. I don't think he give me that in person. I
3 think that was sent to me in the mail. But I can't
4 really be sure.

5 Q. I apologize. I misstated in my question. But this
6 letter appears to be signed by Mr. William Gilden.

7 A. Yes, sir.

8 Q. But you did receive this letter from Mr. Gilden?

9 A. Yes, sir.

10 Q. Okay. Now, this letter says in this paragraph: Be
11 advised that you are entitled to have an attorney
12 attend to represent you at your own expense. Are you
13 aware that you could have a lawyer at the examination
14 under oath?

15 A. Yes, sir.

16 Q. Did you take a lawyer with you to the examination
17 under oath?

18 A. No, sir, I did not.

19 Q. Why not?

20 A. I didn't feel like I needed no attorney.

21 Q. Did you even have a lawyer on January the 28th of
22 2009?

23 A. No, sir, I did not.

24 Q. Did you voluntarily give an examination under oath
25 on February the 4th, 2011?

1 A. I did, yes, sir.

2 Q. And that was February the 4th, 2011?

3 A. Yes, sir.

4 Q. And did you answer all the questions under oath
5 freely and voluntarily?

6 A. I did, yes, sir.

7 Q. Did you make any offers at the examination under
8 oath to do anything further?

9 A. Yes, sir. I denied the accusations and told them
10 that I would even take a polygraph test.

11 Q. Did they ever offer you a polygraph?

12 A. No, sir.

13 Q. On another subject. Are you aware Mr. Flanagan
14 also hired a man named Jerry Byers to do a fire
15 investigation?

16 A. Yes, sir.

17 Q. When did you first learn about that, the fact that
18 he was going to do it?

19 A. About Mr. Byers coming?

20 Q. Yes, sir.

21 A. Mr. Flanagan told me Sunday, January the 18th, that
22 he was trying to contact someone that would come out
23 and do a Cause and Origin. He said it may be Monday,
24 but he said being Martin Luther King day, it may be
25 Tuesday, but he would call back and let me know.

- 1 Q. When did Mr. Byers come?
- 2 A. Mr. Byers came that Tuesday.
- 3 Q. How long did he take doing his work?
- 4 A. He took approximately two days.
- 5 Q. Okay. Did you see him doing whatever he was doing?
- 6 A. I basically seen him, yes, sir, doing something
- 7 when he was in the gazebo, I'd look out the window.
- 8 Q. Did he allow you to watch him and go around with
- 9 him?
- 10 A. No, sir, he did not.
- 11 Q. Was there any conversation between you and the
- 12 insurance people about why you wouldn't be able to go
- 13 with him, what else they wanted you to do?
- 14 A. They wanted me to work on a contents list and
- 15 mainly stay out of the area, I guess.
- 16 Q. Were you questioned by Mr. Gilden in a recorded
- 17 statement?
- 18 A. I was, yes, sir.
- 19 Q. Were you aware that Mr. Byers took samples of the
- 20 debris, the dust and the mess and the material left
- 21 after the fire?
- 22 A. Yes, sir.
- 23 Q. How did you become aware of that?
- 24 A. Mr. Gilden told me that, and Mr. Byers I think that
- 25 they was taking debris samples.

1 Q. Did they explain what the debris samples were and
2 why they were being taken?

3 A. Yes, sir. They said that they was accelerants put
4 on the floor.

5 Q. And what did the debris samples have to do with
6 that allegation that there were accelerants on the
7 floor?

8 A. They sent them off to check them to identify the
9 accelerants.

10 Q. So before the took the accelerants, they told you
11 they were doing that to confirm that there was --

12 MR. MURPHY: Objection. He's leading his witness
13 and we're getting back into some more hearsay.

14 THE COURT: Just restate your question. Ask what
15 the Witness knows.

16 By Mr. Belser:

17 Q. Was anything said to you about the reason for the
18 debris sample testing at the laboratory before the
19 results came back?

20 A. Yes, sir. Mr. Byers, their investigator --

21 MR. CLINCH BELSER: Anything said by Mr. Flanagan,
22 he is a party to the case. Anything said by
23 Mr. Flanagan?

24 THE WITNESS: Mr. Flanagan. Yes, he told me that
25 they was taking samples because the fire was

1 intentionally set.

2 By Mr. Belser:

3 Q. Did you talk with any of these individuals,
4 Mr. Flanagan or Mr. Gilden? When did you find out what
5 the results of the tests were?

6 A. I'm not sure of the exact date, but I believe I
7 talked with, Mr. Gilden called me.

8 Q. All right. Don't say what he said. But what did
9 you say to him about the test results?

10 A. I asked him had he received the test results.

11 Q. And did you ask him whether he could get any?

12 A. Yes, sir, I asked him if I could get a copy of the
13 test results.

14 Q. And did he answer that?

15 A. Mr. Gilden said that --

16 Q. Don't say what he said. But did he answer or refer
17 you to someone else?

18 A. He referred me to someone else.

19 Q. Did you talk to Mr. Andrew Flanagan about the test
20 results?

21 A. I did.

22 Q. And what was your conversation with Mr. Flanagan?

23 A. Could I get the test results.

24 Q. And what was his answer?

25 A. No, sir, they was Nationwide's property.

1 Q. And did he tell you the results? Did he tell you
2 the reason you could not get a copy?

3 A. He said that they was negative.

4 Q. Did he say what effect, if any, that had on his
5 plans for handling your case?

6 A. Yes, sir. He said even though the test was
7 negative, he was still denying my claim because I set
8 the fire.

9 Q. Did you ask him for a copy of Mr. Byers' report in
10 addition to the test results specifically?

11 A. I did.

12 MR. MURPHY: Your Honor, I know in accordance with
13 what we discussed earlier, but this was after the claim
14 was denied.

15 THE COURT: It will be subject to the Court's
16 ruling.

17 MR. MURPHY: Yes, sir, Your Honor.

18 THE COURT: No action has been brought at this
19 time.

20 MR. CLINCH BELSER: No action has been brought.

21 THE COURT: Very good.

22 By Mr. Belser:

23 Q. When you asked Mr. Flanagan for a copy of
24 Mr. Byers' report, what was his response?

25 A. His response was, no, I wasn't getting a copy.

1 Q. Did he say why you were not?

2 A. 'Cause it was the property of Nationwide.

3 Q. Did you make any comment to him about the negative
4 results and what they should do because of the negative
5 results?

6 A. Yes, sir, I did. I disputed the fact and I told
7 Mr. Flanagan that that wasn't right, that he needed to
8 come back and take every bit of the carpeting of the
9 whole house out and all the inlay and get that tested.
10 There was no accelerants put in that house.

11 Q. Did he accept that offer?

12 A. No, sir. He said that he wasn't coming back and
13 doing anything else, checking nothing else. He was
14 through with this case and he wasn't doing nothing and
15 I wasn't getting a dime.

16 Q. Was he physically present when you had this
17 conversation or was it conducted by some other means?

18 A. It was conducted by telephone.

19 Q. Now, going back to the beginning of your first
20 meeting with Mr. Flanagan, did he ever tell you what
21 his plans were with reference to your claim or about
22 your claim?

23 A. Yes, sir. The day, the very first day I met
24 Mr. Flanagan, when he drove up the very first day on
25 that Sunday, I met him at the driveway and I had the

1 Fire Marshal's Report, and I asked him, you know, did
2 he know that it was a total loss yet? And his response
3 was, his very first response was, "We don't even know
4 if we have a claim yet."

5 Q. Going back to where we were, was there any change
6 in his position, going back where you were after you
7 got the word about the results of Mr. Byers' laboratory
8 test results?

9 A. No, sir.

10 Q. His position was the name as the first?

11 A. Sir?

12 Q. I withdraw that question.

13 Did you ever see Mr. Flanagan again after the test
14 results came back negative?

15 A. No, sir.

16 Q. Let me ask you directly. Did you burn your house
17 down January 16th of 2009, did you burn it?

18 A. No, sir, absolutely not.

19 Q. Were you present anywhere near the house when the
20 fire apparently started?

21 A. Yes, sir, I was in my gazebo.

22 Q. When were you first aware that the house was
23 burned?

24 A. When I woke up that morning and seen smoke coming
25 out of the vents.

1 Q. Did you have any reason to burn the house and all
2 the contents?

3 A. No, sir, I had absolutely no reason to.

4 Q. Did you have any reason to -- what were your plans
5 to do with that house?

6 A. My plans to do with that house, I was cleaning it
7 up and fixing it up to put on the market because I had
8 talked to the mortgage holders about my financial
9 situation, and they said put it on the market, it would
10 be fine to sell.

11 Q. What steps had you already taken before the fire to
12 prepare the house for sale?

13 A. I was cleaning up and making repairs.

14 Q. Did anybody work with you on that?

15 A. My son.

16 Q. And how would a fire destroying the house or
17 damaging the house affect the plans if you had to fix
18 it up to sell it?

19 A. I wouldn't have no house to sell to pay the liens
20 off.

21 Q. Did you ever tell Mr. Flanagan that you just wanted
22 to have your mortgages paid?

23 A. Absolutely not, no, sir.

24 Q. After Mr. Flanagan told you he was going to deny
25 your claim, even though the test results were negative,

1 did he ever send you a letter about his official
2 decision?

3 A. Yes, sir, I think so.

4 Q. I'd like to have projected onto the screen a letter
5 marked as 24 and dated February 11, 2009. Would you
6 identify this letter for the Jury?

7 A. Yes, sir.

8 Q. What's the date of the letter?

9 A. February the 11th.

10 Q. Was it addressed to you?

11 A. Yes, sir.

12 Q. And what does he say in this paragraph right here?

13 A. Your homeowner contract explicit coverages as
14 cited. Your loss was not covered because of
15 intentional acts that are specifically excluded by your
16 policy.

17 Q. I'd like to show you what's been marked as Exhibit
18 21, have that projected on the screen. That would be
19 the document which has NW 0112 on it relating to the
20 date of loss. This is the document which you signed
21 the first day that Mr. Flanagan was there; is that
22 correct?

23 A. Yes, sir, it is.

24 Q. Did you proceed to comply with this instruction
25 here even though you got the letter of February 11th

1 denying the claim?

2 A. Yes, sir, I did.

3 Q. And why did you do that? How did you go about
4 making the Proof of Loss?

5 A. I filled out the information and signed it as
6 Nationwide and Andrew Flanagan requested, if I
7 understand your question.

8 Q. Let me show you Exhibit 25 and ask you if you can
9 identify this Exhibit Number 25?

10 A. Yes, sir, I can.

11 Q. What is that document?

12 A. It's a Sworn Statement in Proof of Loss.

13 Q. And who signed that?

14 A. I did, sir.

15 Q. And is it notarized?

16 A. Yes, sir.

17 Q. What date did you sign it?

18 A. The 13th day of March, 2009.

19 Q. I'd like to ask permission of the witness to come
20 down and stand with me in front of the Jury so we can
21 show some of the pages. Please come this way.

22 (Witness leaves stand.)

23 By Mr. Belser:

24 Q. Now, if you would like to hold it so the members of
25 the Jury can see it. The first page has your

1 signature?

2 A. Yes, sir.

3 Q. Now, there are a number of other forms which are
4 preprinted forms. And what comes behind a copy of the
5 policy?

6 A. That is a list of my contents of the house.

7 Q. This is typed up the part and some handwriting?

8 A. Yes, sir.

9 Q. Whose handwriting is on these pages which are the
10 typed list?

11 A. As much as I can tell that's mine.

12 Q. There are a number of pages there until you get to
13 the back of the document. What are the pages in the
14 back?

15 A. Those are additional items that was put on the
16 list.

17 Q. And whose writing are these handwritten pages
18 nothing but handwriting?

19 A. That is Bronda Yarbrough's.

20 Q. And why is it her handwriting instead of yours?

21 A. Because she couldn't read my scratch.

22 MR. CLINCH BELSER: Please go back up there. This
23 will be available to the Jury. It's been admitted into
24 evidence as Exhibit Number 25.

25 THE COURT: Very well.

1 (Witness resumes stand.)

2 By Mr. Belser:

3 Q. Now, other than Ms. Yarbrough, did anybody help you
4 prepare the long lists which are the first pages?

5 A. Yes, sir. Mr. Moore, he helped me do a, he's a
6 person I hired after I hired an attorney to help me go
7 through my contents because I didn't know how to find
8 contents in a burned residence.

9 Q. What role did you have in helping him help you?

10 A. I had a role in telling him what I had and giving
11 him the prices of what I had.

12 Q. Where is Mr. Moore from?

13 A. I think he was from Columbia or Charleston, I'm
14 really not sure.

15 Q. Did Mr. Moore have any part in preparing the
16 handwritten list, the part written by Ms. Yarbrough?

17 A. No, sir.

18 Q. And who determined all the information on the form?

19 A. I did.

20 Q. And are you the one who had the information about
21 the age of the document or the claims?

22 A. Yes, sir.

23 Q. And you are the one who had the value information?

24 A. Yes, sir.

25 Q. Had you had a chance to look over this document in

1 detail before you signed it in front a notary almost
2 three years ago now?

3 A. Yes, sir.

4 Q. Now, where did you send it after you got it
5 notarized?

6 A. I sent it to I think the corporate office of
7 Nationwide or maybe to --

8 Q. Well, did you send it to me?

9 A. I can't remember. I think so, yes, sir.

10 Q. And do you know that it got sent to Mr. Flanagan?

11 A. Yes, sir.

12 Q. And do you know that he got it within the 60 days
13 he requested it?

14 A. Yes, sir. I discussed that with you.

15 Q. And did you read Mr. Flanagan's deposition where he
16 admitted that he got it on time?

17 A. Yes, sir.

18 Q. Why did you go ahead to complete this document and
19 have it submitted through your lawyer to Mr. Flanagan
20 even though Nationwide already denied your claim?

21 A. Because that was my obligation as for my policy.

22 Q. Okay. Now in a minute we'll come back and go
23 through -- well, let's ask you if you will examine and
24 identify --

25 THE COURT: How much more do you have on Direct of

1 this Witness.

2 MR. CLINCH BELSER: A good bit. This the last bit
3 of proof about total values.

4 THE COURT: All right. Very good. Let's wind up
5 this part of it and then we need to take a break. But
6 go ahead and wind it up.

7 By Mr. Belser:

8 Q. Mr. Fowler, let me have you look at Exhibit 26
9 which is also on the screen. What is this document
10 right here?

11 A. This is a document with the price of the total
12 contents estimate.

13 Q. What's the title of it?

14 A. The Total Cost of Damaged or Destroyed Contents.

15 Q. Does that document go page by page to record all
16 the numbers which are on the last exhibit?

17 A. Yes, sir, it does.

18 Q. And just very quickly, what's the total at the
19 bottom of the page of all the contents which you had
20 claimed were damaged or destroyed in the fire?

21 A. \$142,610.75.

22 Q. Have you had a chance to examine that document to
23 confirm that the numbers and mathematics are correct to
24 the best of your knowledge?

25 A. Yes, I have.

1 Q. How does this total value come to \$142,000 and --

2 A. -- 610.75.

3 Q. How does that compare with what you understand to
4 be your total contents coverage under your policy?

5 A. This is more than my coverage.

6 MR. CLINCH BELSER: Your Honor, this would be a
7 convenient place to stop and take a break.

8 THE COURT: Very good.

9 All right. Mr. Foreman, ladies and gentlemen,
10 we'll take the morning break at this time, and when you
11 are ready to come back, just knock on the door and come
12 back. But do not undertake discussion of this case or
13 any part of it among yourselves.

14 Everyone else remain seated while the Jury retires
15 from the courtroom.

16 (Whereupon, the Jury left the courtroom at
17 approximately 10:34 a.m.)

18 THE COURT: Anything from the Plaintiff before we
19 take a break?

20 MR. CLINCH BELSER: Nothing, Your Honor.

21 THE COURT: From the Defense?

22 MR. MURPHY: No, Your Honor.

23 THE COURT: Just to clarify the Motion, or at least
24 the Notice of the Motion by the Defense, the Court has
25 previously ruled that it's not the time of the denial of

1 THE WITNESS: Thank you, sir.

2 THE COURT: Thank you.

3 (Witness leaves stand.)

4 (A recess was taken.)

5 THE COURT: Anything from the Plaintiff?

6 MR. CLINCH BELSER: Nothing, thank you.

7 THE COURT: From the Defense?

8 MR. MURPHY: Nothing, Your Honor.

9 THE COURT: Mr. Fowler, you understand you are
10 under oath and do not need to be re-sworn?

11 THE WITNESS: Yes, sir.

12 THE COURT: Ask the Jury to join us, please.

13 (The Jury entered the courtroom at approximately
14 10:50 a.m.)

15 THE COURT: Let the record reflect the Jury and
16 alternate are in the Jury box.

17 Mr. Foreman, ladies and gentlemen of the Jury, we
18 will continue with the Plaintiff's Direct Examination of
19 Mr. Fowler.

20 MR. CLINCH BELSER: May it please the Court?

21 THE COURT: You may proceed.

22 By Mr. Belser:

23 Q. Mr. Fowler, I want to go back a moment with
24 reference to my questions about the heater and how long
25 it had been in use at that location in the living room.

1 A. Yes, sir.

2 Q. I want you to clarify, when did you start using the
3 heater for the purposes described? When did you start
4 approximately?

5 A. When the temperatures got cold.

6 Q. Earlier you mentioned October-November some
7 context. When did the heater get turned off?

8 A. The heater got turned on, it might have been -- I
9 really can't answer that, Mr. Belser, accurately
10 because if it was cold in October or November, I might
11 have had it on briefly and then turned it off. I
12 really can't, don't have no date.

13 Q. Can you estimate how long before the night of the
14 fire it had been on continuously?

15 A. I think it was -- I'm really not sure. It could be
16 four or five days, it could be six. It could be a
17 week. I'm not sure about that.

18 Q. That's fine. Now, going forward from where we left
19 off, have you replaced all the items on the list which
20 were part of the next-to-the-last exhibit, which is
21 Exhibit Number 25? Have you replaced all those items
22 yet?

23 A. No, sir, I have not.

24 Q. Why not?

25 A. I haven't had the money.

1 Q. Is there any way you could possibly comply with the
2 language of the policy which purports to require you to
3 replace the items since you don't have any money?

4 A. No, sir.

5 Q. If you got the money to do so, what would you do
6 about those items?

7 A. I would replace my items.

8 Q. What is your belief as to whether you could
9 actually replace those items for \$114,692, which is the
10 maximum coverage under Coverage C?

11 A. I could probably replace them, but there's no way I
12 could replace the actual items that meant so much to me
13 because they were sentimental.

14 Q. Could you replace the items at any price for --
15 strike that question.

16 Would you be able to replace all those items,
17 setting aside the sentimental value for the \$114,000 in
18 your opinion?

19 A. No, sir.

20 Q. Since the fire where have you been living?

21 A. In my gazebo.

22 Q. Has Mr. Flanagan or Nationwide given you any money
23 to rent a comparable three-bedroom house on the shores
24 of the lake while your house is being rebuilt after the
25 fire?

1 A. No, sir.

2 Q. Do you have the funds to rent a place to replace
3 your living quarters?

4 A. No, sir.

5 Q. Is there any way you could possibly comply with the
6 language of the policy which purports to require you to
7 incur rental expenses in view of their decision not to
8 pay you anything?

9 A. I didn't understand your question.

10 Q. Is there any way you could possibly rent a place
11 without money from them?

12 A. No, sir. No, sir.

13 Q. Have you read the deposition of Mr. Flanagan which
14 was read into the court to the Jury yesterday?

15 A. Yes, sir.

16 Q. Do you recall his testimony on page 70 and 71 that
17 the fair market value of a comparable house would be
18 1400 per month?

19 A. Yes, sir.

20 Q. Do you recall Mr. Flanagan's testimony in his
21 deposition that it would take approximately six months
22 to rebuild your house? Do you recall that testimony?

23 A. I do.

24 Q. Do you agree with that estimate of how long it
25 would take to build your house with a full crew, not

1 you by yourself on the weekends, a house of that size
2 with those materials, or comparable materials?

3 A. That depends on the weather and the time of year
4 but six months would not be long enough.

5 Q. What would you, based upon your years of
6 experience --

7 A. It would probably be more like a year according
8 to -- see, there's a lot that goes into building than
9 time limit. In order to get started with building you
10 have drawings that you have to submit, and they have to
11 be reviewed by the Building Codes Department, and
12 sometimes they take two months reviewing drawings.

13 Q. Well, if you had the money to do so from
14 Nationwide, would you rebuild your house?

15 A. Yes, sir.

16 Q. And, based upon your years of experience with Marsh
17 Bell and the other companies, I can't remember the name
18 right this minute, and going back to your residential
19 days, have you been able to estimate what it would cost
20 you to rebuild the house?

21 A. Yes, sir. To build the house I estimate, with
22 using reliable, good contractors and subcontractors,
23 you are probably talking about an estimate -- this is
24 just an estimate, not an exact amount -- probably of
25 around a hundred or one hundred five dollars a square

1 foot.

2 Q. Okay. What has been the effect on you since
3 January the 17th of 2009 resulting from Nationwide's
4 decision not to pay you any money for renting another
5 spot? What has been the effect on you and your
6 enjoyment of life?

7 A. It's real hard. Because of course in the gazebo I
8 have no toilet facilities, no kitchen facilities. And
9 it's been rough. It's been devastating.

10 Q. What had you done about getting toilet facilities
11 now that it's been almost 34 months since the fire?

12 A. Well, the first year I used to take a shower, my
13 neighbor was kind enough to let me use his trailer
14 across the street because they live in Alabama, which
15 I'm actually caretaker of his property anyway while
16 they're gone. But I've been taking showers and all
17 over there. But for a long time before I got with them
18 from Alabama, I went in the lake sometimes and took a
19 bath when the temperature was permitting or went to
20 Ms. Yarbrough's.

21 Q. What have you done in recent months?

22 A. I built a temporary bath house on the slab.

23 Q. Where is that located on the slab?

24 A. It's located where the, I use the same sewer system
25 that my other bathroom in the center of the house was

1 located.

2 Q. So the sewer system and the water supply were not
3 destroyed or damaged by the fire?

4 A. Well, they was destroyed down to the slab, but I
5 had to go back and dig up the water line where it come
6 into the house, replumb it, run a line across the slab
7 to my temporary bath house.

8 Q. What's the size of your temporary bath house?

9 A. It's approximately ten foot by nine or ten, give or
10 take.

11 Q. What materials did you use to build it?

12 A. I used -- right now it's just rough framed and a
13 little bit of vinyl siding and insulation on the inside
14 with stud walls.

15 Q. Were you able to do that alone without any help?

16 A. Bronda helps me.

17 Q. Were you able to hire any other outside
18 subcontractors?

19 A. No, sir.

20 Q. What has it been like not to have any money for
21 replacing the contents? What effect has that had on
22 your attitude and enjoyment of life?

23 A. It's had a big effect. I mean, that was my,
24 everything I worked for and sweated for all these
25 years, and it's been devastating, like it would

1 anybody. I mean, I had a lot of hard work and time in
2 that.

3 Q. Can you state very briefly what your policy says
4 about the cost of removing debris after a fire?

5 A. Can I state what I remember?

6 Q. Yes, sir. Just the best you remember. The policy
7 itself is in effect, but this is just a lead-in
8 question to...

9 A. I think it said that I had coverage for removal.

10 Q. I don't want you to get --

11 A. Okay.

12 Q. Has the debris been removed?

13 A. Yes, sir.

14 Q. And how did you get -- who did that?

15 A. I tore that down, me and my son, Bronda, and
16 removed it by hand.

17 Q. Okay. And based upon your experience in
18 construction over the many years you already described,
19 are you able to estimate what would be the cost of
20 hiring somebody to remove the debris?

21 A. Yes, sir. I got a price right now on a concrete
22 slab.

23 Q. Don't say what price you got. But can you estimate
24 based upon your experience an estimate of what it would
25 cost?

1 A. Probably twenty thousand, eighteen, twenty
2 thousand, give or take.

3 Q. Are you aware that Mr. Flanagan paid off your first
4 mortgage in full and part of your second mortgage?

5 A. Yes, sir.

6 Q. And are you aware from reading his deposition what
7 he told the mortgage companies in that process?

8 A. Yes, sir.

9 Q. And what has been the effect on you and your
10 feelings and enjoyment of life when you learned that
11 Mr. Flanagan admitted that he told Mr. Evatt that your
12 claim was being denied for the intentional acts which
13 he --

14 MR. MURPHY: Your Honor, it's based on what he read
15 in deposition post lawsuit and privileged as part of
16 this judicial proceeding, so it would be an improper
17 question.

18 THE COURT: All right. You might need to lay a
19 foundation.

20 MR. CLINCH BELSER: We can do this in the front if
21 you like.

22 THE COURT: All right. Let's have a trial sidebar.
23 (Discussion at sidebar.)

24 THE COURT: A Motion or Objection has been made as
25 to hearsay which has been overruled. I'll put it on the

1 record later.

2 MR. CLINCH BELSER: May it please the Court, I
3 would like to ask another lead-in question to get us
4 back to where we were.

5 By Mr. Belser:

6 Q. Mr. Fowler, did you learn anything from Mr. Evatt
7 at the time in February of 2009 about a conversation he
8 had with Mr. Flanagan? Don't say what he said, but did
9 you learn of it?

10 A. Yes, sir.

11 Q. And, without saying what it was, do you know the
12 substance of the conversation and the subject of the
13 conversation between Mr. Flanagan and Mr. Evatt at the
14 time back in February of 2009?

15 A. Yes, sir.

16 Q. And, based upon the deposition testimony of
17 Mr. Flanagan after the trial commenced, do you have
18 confirmation of what Mr. Flanagan admittedly said?

19 A. Yes, sir.

20 Q. And what has been the effect on you of your
21 learning that Mr. Flanagan had accused you of lighting
22 the fire at your house?

23 MR. MURPHY: Objection, Your Honor, because that's
24 clearly not what was put in the deposition. He said
25 that ---

1 THE COURT: Just a moment. As I understand it, the
2 ruling has been anything pre-litigation. And I think
3 the litigation is based on the service, filing and
4 service of the Complaint and it lays out just what I
5 think Mr. Belser is trying to elicit. Overruled.

6 MR. MURPHY: I understand. But I want to make sure
7 I clarify. My objection is that he misstated what
8 Mr. Flanagan's deposition testimony revealed. That's my
9 objection.

10 THE COURT: Again, sir, thank you. And this goes
11 to both the Plaintiff and the Defendant. The Jury is
12 the judge of what the testimony was, not the attorneys.
13 Very good.

14 You may proceed.

15 By Mr. Belser:

16 Q. What's been the affect on your enjoyment of life
17 and feelings about this whole thing based upon what
18 Mr. Flanagan testified and the Jury heard?

19 A. My feelings is he accused me of being a criminal
20 and an arsonist, and it's been devastating to my
21 reputation in Oconee County and everyone that knows me.

22 Q. Going to another subject -- and this is the final
23 subject -- since the fire, have you been able to work?

24 A. Yes, sir.

25 Q. And what type of work have you been doing?

1 A. I worked with my sons, both my son, my stepson; I
2 work for other people doing odd jobs, my neighbors,
3 acquaintances. I also scrap. I do whatever I can do.
4 I stay pretty busy.

5 Q. Have you ever put in for Unemployment?

6 A. No, sir.

7 Q. Have you been given any advice -- don't say what it
8 was -- about getting financial assistance from anybody?

9 A. No, sir.

10 Q. Okay. Have you done anything, asked anybody for
11 something you didn't earn for yourself?

12 A. Sir?

13 Q. Have you asked anybody for anything you didn't earn
14 for yourself?

15 A. No, sir. I want no handouts. No, sir, I work for
16 what I get.

17 MR. CLINCH BELSER: Thank you. Please answer any
18 questions Mr. Murphy may have.

19 THE WITNESS: Thank you.

20 THE COURT: All right. Mr. Murphy?

21 MR. MURPHY: May it please the Court, Your Honor.

22 THE COURT: You may proceed. Thank you.

23 MR. MURPHY: Let me get a little bit organized
24 here. Court's indulgence.

25

1 Cross-Examination by Mr. Murphy:

2 Q. Mr. Fowler, let me ask you a few questions going
3 back in time to the events in your life leading up to
4 January 2009, okay?

5 A. Okay.

6 Q. And, as I go back over that, I know that you had a
7 couple of failed businesses, one with your son and one
8 with yourself, correct?

9 A. I had one failed with myself. My son's actually,
10 it didn't make -- it ain't failed, it's still in
11 existence, but yes, it lost money.

12 Q. Okay. But as to you, you put in at least \$40,000
13 into your son's business and got nothing out of it,
14 correct?

15 A. I got -- that's not entirely true. I try to help
16 my children. But as far as monetary gain, no, sir, I
17 have not.

18 Q. Okay. I just want to make clear. Because I know
19 in your deposition --

20 A. Yes, sir.

21 Q. -- that you purchased his trucks and his equipment
22 to get him started and you put thirty-five or forty
23 thousand dollars into his business and you got no
24 financial return on that. Correct?

25 A. That's correct.

1 Q. And that put you at a significant financial setback
2 to you, that one thing?

3 A. Yes, sir.

4 Q. In fact, that was when you emptied your retirement
5 account with Marsh Bell, and that was gone, to help
6 finance your son's business, correct?

7 A. Yes, sir.

8 Q. Okay. And that was in 2008 sometime when you put
9 all that money in and you never got any back?

10 A. It was. But let me -- I did get some money back
11 because sometimes when my boy had a good week, he would
12 give me money.

13 Q. Okay. Well, you remember giving a deposition under
14 oath, don't you?

15 A. Yes.

16 Q. I'm gonna ask you about that in just a moment.

17 MR. MURPHY: Your Honor, this is the original
18 deposition.

19 THE COURT: Thank you. Let the record reflect that
20 the Court is opening the Original Deposition of James
21 Dorsey Fowler taken August, 2010, in Greenville, South
22 Carolina.

23 MR. MURPHY: The Judge will hand you that and we'll
24 flip over to page 33 when you are ready.

25 THE WITNESS: Okay.

1 (Court hands Original Deposition to Witness.)

2 THE WITNESS: Thank you, sir.

3 By Mr. Murphy:

4 Q. Now I'll start with my question on 33.

5 Question: Did you work in the business --
6 referring to Treemendious Landscaping -- or did you
7 just put up the money for the business?

8 Answer?

9 A. I had the money and bought the equipment.

10 Q. Question: How much, and did you get a return on it
11 when as a shareholder or a partner?

12 A. I was supposed to, but I didn't.

13 Q. Question: Never did. How much money did you put
14 up?

15 A. May I read my answer?

16 Q. Yes, sir.

17 A. My God, I bought trucks and equipment. I'm gonna
18 say probably thirty-five to forty thousand dollars more
19 or less.

20 Q. And you got no return on that?

21 A. No, sir.

22 Q. And you're out the money?

23 A. Yes, sir.

24 Q. Do you have any prospects for getting reimbursed?

25 A. No, sir.

1 Q. (Reading stopped.) Now, does that help you answer
2 my question now that you got no return on the \$40,000
3 you sunk into your son's business?

4 A. That's correct. But prior to --

5 MR. MURPHY: That's all I need, Your Honor.

6 THE COURT: I'm afraid that once you ask the
7 question, he is to answer the question and he also gets
8 to explain his answer.

9 THE WITNESS: Can I answer it, Your Honor?

10 MR. MURPHY: Sure.

11 THE COURT: Yes, that's the way it works.

12 And again, please understand, gentlemen, this
13 applies to both the Plaintiff and the Defense. If
14 you're gonna ask a Witness a question, he will answer
15 the question, but also has the opportunity to explain
16 his answer.

17 You may proceed.

18 THE WITNESS: When I opened the restaurant, my son
19 would come down. If he had a good week where we had big
20 jobs, that's back before the economy crashed, I would
21 get two or three thousand dollars from him.

22 By Mr. Murphy:

23 Q. Well, Mr. Fowler, you sure had the chance to tell
24 me all about that in your deposition last year --

25 A. Well --

1 Q. Excuse me. Let me talk. I'll wait on you, you
2 wait on me, okay? We'll work with each other.

3 THE COURT: Just a moment, both of you and all of
4 you. The court reporter has to take down what is being
5 said in the courtroom. She can only take down one
6 person at a time. So regardless if it's a witness or an
7 attorney, if the one is speaking, the other does not
8 speak over that person.

9 Do you understand, Mr. Fowler?

10 THE WITNESS: Yes, sir, I do.

11 THE COURT: And I think the gentleman out here
12 understands that. But again, when that happens, let me
13 admonish the Witness.

14 MR. MURPHY: Yes, Your Honor.

15 THE COURT: I need something to do.

16 By Mr. Murphy:

17 Q. Your deposition was taken August the 18th of 2010,
18 correct? I think it's on the front page.

19 A. Yes, sir.

20 Q. And then, near the last page, Page 151, is where
21 you signed, and behind that is a sheet where you could
22 correct answers that were incorrect. Do you see the
23 last two pages, 151 and 152?

24 A. I haven't got there yet. Yes, sir.

25 Q. You signed it?

1 A. No, sir, I didn't sign it.

2 Q. All right. Did you make any changes to the
3 deposition?

4 A. No, sir.

5 Q. So this cash money that your son would give you,
6 you didn't tell me about that in your deposition but
7 you are trying to tell me about it now for the first
8 time?

9 A. Yeah, okay.

10 Q. Okay. Now, in addition to that business, your
11 restaurant failed, also, didn't it?

12 A. Absolutely.

13 Q. It had been your dream, you put your heart and soul
14 into it and you put a lot of money into it, probably
15 about the same amount of money that you put into your
16 son's business?

17 A. Not quite as much, no, sir.

18 Q. Okay. But a good bit. We're talking in the
19 thousands?

20 A. And food and content, not actually in the building.

21 Q. I understand that.

22 A. Yes, sir.

23 Q. But in the materials, it still takes money to start
24 up and to run a business, especially a restaurant
25 business?

1 A. Yeah. But it wasn't nowhere near what I put in my
2 landscaping business.

3 Q. In 2008 your credit cards had been cancelled on you
4 because you had been no longer able to make payments on
5 them?

6 A. That's right.

7 Q. You had at least six accounts sent for collections
8 in the year leading up to the fire?

9 A. I don't believe that, no, sir.

10 Q. Okay. All right. Your bank account had a negative
11 balance, it was overdrawn?

12 A. When was that?

13 Q. In the fall of 2008 you had a bank account I
14 believe with SunTrust for your business. That was the
15 only banking account that you had. Correct?

16 A. Yes. And you said it was overdrawn?

17 Q. Yes, sir. And sir -- okay, go ahead. Please
18 respond.

19 A. No, sir. When I closed the restaurant, I had a
20 positive of four or five hundred dollars.

21 Q. Okay. But then with the credit card machine issue
22 the charges whittled that down to zero; is that
23 correct?

24 A. Yes, sir.

25 Q. Okay. But at the time of the fire you didn't have

1 any money in your checking account with which you could
2 have made payments on your mortgages or things like
3 that?

4 A. No, sir.

5 Q. I mean, is that correct?

6 A. Yes, sir.

7 Q. Okay. And, in fact, you had two mortgages. You
8 had a first mortgage through First Citizens Bank.
9 Correct?

10 A. Correct.

11 Q. That was about a hundred thousand dollar balance at
12 the time of the fire?

13 A. Yes, sir.

14 Q. And it was about three months behind on making
15 payments?

16 A. I don't believe it was three months.

17 Q. Okay. But the records that you authorized
18 Nationwide to obtain, they would be accurate, it was
19 either two or three?

20 A. Which I had knowledge of.

21 Q. And then your second mortgage was with Citi
22 Financial, and that was more like an equity line, and I
23 think as you mentioned, you kind of could write a check
24 and you kind of spent a lot of money and you kind of
25 just blew most of that money, didn't you?

1 A. That was the prior loan before that loan. That was
2 an equity line. That was not...

3 Q. Okay. But you had a second mortgage with Citi
4 Financial?

5 A. Yes, sir, I did.

6 Q. And you were two or three months behind on that at
7 the time of the fire, also?

8 A. I think one or two.

9 Q. And those total combined were about \$1600 a month
10 at the time of the fire, just those two mortgages?

11 A. That's correct.

12 Q. You had several other accounts that were in
13 collections of about \$6,000, correct?

14 A. It's possible, yes, sir.

15 Q. Then you had a personal loan with Citi Financial
16 that was not part of the mortgage but was maybe an
17 additional \$9,000 or so?

18 A. Yes, sir.

19 Q. You had a State tax lien against your property, and
20 that was noted in one of the exhibits?

21 A. Yes.

22 Q. And you basically had no income coming in from the
23 time that you closed your restaurant, correct?

24 A. No, sir, I did odd stuff like I do now.

25 Q. And you had no ability to get out of your situation

1 with your mortgage companies and that's why you say
2 that they were gonna allow you to sell the property or
3 otherwise they would have to foreclose on you?

4 A. No, sir. I called my financial, Citi Financial and
5 First Citizens and discussed it with them before I got
6 into this financial trouble about putting my house on
7 the market and selling my house instead of going into a
8 foreclosure, and they said that would be perfectly
9 fine, they had rather do that.

10 Q. We'll come back in just a little bit and talk a
11 little bit more about that later.

12 Now, when the fire was discovered, you were the
13 person who discovered it?

14 A. Yes, sir.

15 Q. And I think you indicated your bird was your alarm
16 clock and you played with her a little bit in the bed
17 there, maybe smoked a cigarette?

18 A. Yes, sir.

19 Q. And then, when you got around to kind of waking the
20 sleep off, then at that point you noticed smoke coming
21 from your main residence?

22 A. Yes, sir, that's correct.

23 Q. Now, you had had the power shut off to the main
24 residence for four or five months. Correct?

25 A. I'm not really sure how long, but yes, sir.

1 Q. And all over not getting a \$75 meter?

2 A. Yes, sir.

3 Q. Okay. Now, you had TV, dish TV service in the
4 gazebo but not in the house, correct?

5 A. My son had that, not me.

6 Q. And you were pretty self-sufficient down there.
7 And, in fact, you continued to live in the gazebo
8 almost three years since the fire?

9 A. I was pretty much self-sufficient on cold nights
10 when I slept out there. Otherwise, I wasn't
11 self-sufficient. I had no toilet facilities, no
12 kitchen facilities. So how you will call that
13 self-sufficient?

14 Q. And, but that's kind of what you had. I mean, your
15 stove with the power off you couldn't operate your
16 stove in the house.

17 A. I still had a double propane gas stove that I had
18 in my restaurant, and also I do chili cook-offs, so I
19 got a way to cook.

20 Q. Right. Whether you're in the gazebo or the house.

21 A. In the house, not in the gazebo.

22 Q. Well, you could use a propane cooker anywhere,
23 couldn't you?

24 A. I could, but I was not living in the gazebo, I was
25 living in my house.

1 Q. When you finally noticed it, you say you couldn't
2 find your cell phone, so you had to kind of get dressed
3 and then go over to the Brights' house and ask them to
4 call 9-1-1?

5 A. That's correct.

6 Q. And, as far as you observed, you were the only
7 person on your property the night before and the
8 morning of the fire?

9 A. Yes, sir.

10 Q. And you were the person who discovered it?

11 A. Yes, sir.

12 Q. And the last time, the best you recall, that you
13 went into the house the night before was around sunset
14 or dusk and that's when you last refilled the kerosene
15 heater?

16 A. Yes, sir. But I might have went in, I can't recall
17 that night, I might have went in to get a glass of tea
18 or make a pot of coffee. I really cannot recall
19 whether I did or not. Some nights I did and some
20 nights I didn't.

21 Q. And I think in one statement you said that you did,
22 given to Mr. Gilden, and then in the deposition given
23 to me, you said you didn't think you did return to the
24 house?

25 A. Sir, I really, I have had no reason to document

1 when I get something to drink.

2 Q. Well, now, when you would fill your kerosene heater
3 it would not burn 24 hours on a tank of fuel?

4 A. No, sir, it would not.

5 Q. So you would have to fill it about every 12 hours
6 or so, wouldn't you?

7 A. I'd have to fill, I can't remember the exact time.
8 I filled it usually every night before dark because I
9 didn't have power in the breakfast room, all I had was
10 a lamp in the kitchen, so I tried my best to fill it
11 when I could see what I was doing.

12 Q. Sure. And then I assume if it had been full and
13 run all night by 8:00 the next morning it pretty much
14 would have been empty, wouldn't it?

15 A. No, sir.

16 Q. Okay. And, but did you examine the heater ever
17 after the fire?

18 A. No, sir.

19 Q. You have no evidence to dispute that it was
20 two-thirds full of fuel, do you?

21 A. The only thing I dispute is I had the kerosene
22 heater burning and I dispute that it could not have
23 been full of fuel when the investigator found it that
24 it burned all that. I dispute that.

25 Q. All right. Now, the only power in the house came

1 from a couple of electrical drop cords that ran in
2 through a window?

3 A. That's correct.

4 Q. And, in fact, when the firefighters were there,
5 they responded about the drop cords arcing with water
6 being applied. Did you go and manually turn off the
7 breakers?

8 A. The breaker one, I went down and I looked at them
9 and one had already tripped where the arc water hit it.

10 Q. Okay. After the fire had already started. It
11 tripped after the fire had already started and the
12 firemen were there?

13 A. I really, I'm assuming so because if it was tripped
14 before the fire started, there wouldn't have been no
15 arcing.

16 Q. That's all I was saying. Okay.

17 And you unplugged them just to make sure there was
18 no further risk from them?

19 A. Yeah.

20 Q. Being around electrical equipment, tools and
21 things, those cords didn't short at any time before the
22 fire was being suppressed, did they?

23 A. That's correct.

24 Q. I want to change gears a little bit with you and
25 talk to you a little bit about your involvement about

1 the Nationwide personnel.

2 A. Okay.

3 Q. Without the lectern I really have no place else to
4 stand. But you were contacted the same day of the loss
5 by Mr. Flanagan?

6 A. Yes, sir.

7 Q. That's the young man seated there at the table with
8 us?

9 A. Yes, sir.

10 Q. And you told me that in all your dealings with him
11 you found him to be courteous and professional?

12 A. No, sir.

13 Q. Well, you told me that in your deposition, didn't
14 you?

15 A. I don't recall. I might have. But I also told in
16 my deposition, I'm not sure where, but when I first met
17 Mr. Flanagan in my home on that first initial meeting,
18 he insinuated that I might not even have a claim.

19 And that's when I said, Do I need to get me an
20 attorney?

21 And his response was, you can hire an attorney if
22 you want to, but Nationwide is not gonna pay for it.

23 Q. And, of course, the first thing you were talking
24 about was getting an attorney on this, huh?

25 A. Yes, sir.

1 Q. Okay.

2 A. When he told me, You might not have a claim,
3 absolutely.

4 Q. Is that before or after you kept inquiring about
5 whether your mortgages were gonna be paid off?

6 A. That was on the day of, that Mr. Flanagan got there
7 that Sunday.

8 Q. Okay. Now, during the pendency of the claim
9 Mr. Flanagan explained the process to you, didn't he?

10 A. Yes, sir.

11 Q. All the forms that he went over with you, he went
12 over and explained those to you, didn't he?

13 A. Yes, sir.

14 Q. You had a prior claim with Nationwide, some storm
15 damage, and they handled that to your complete
16 satisfaction, didn't they?

17 A. Yes, sir.

18 Q. Okay. When you called him, he either took your
19 call or promptly returned it?

20 A. He promptly returned it.

21 Q. And when you wrote him, he promptly responded to
22 you, didn't he?

23 A. I don't know if I wrote him.

24 Q. Or if your counsel did, you were aware of it. I
25 think we saw some exhibits.

- 1 The first day was a Saturday of a holiday weekend
2 and he called you on the phone that day?
- 3 A. Yes, sir.
- 4 Q. Okay. And he came the next morning on Sunday to
5 begin his investigation?
- 6 A. Yes, sir.
- 7 Q. And over that weekend after the fire it remained
8 cold and was even raining some off and on during that
9 weekend, wasn't it?
- 10 A. Yes, sir.
- 11 Q. He looked at the property and interviewed you
12 regarding some of the basic facts, some of the stuff we
13 just talked about here, haven't we?
- 14 A. Yes, sir.
- 15 Q. And then he explained the process, had you fill out
16 the documents, and later indicated that a Cause and
17 Origin investigator would be coming out there to look
18 at your house?
- 19 A. Yes, sir.
- 20 Q. Okay. So you were aware of all these things and
21 the process as how it went along?
- 22 A. Yes, sir.
- 23 Q. And then Mr. Gilden is the other Nationwide
24 employee seated in the courtroom back there, and you
25 also had some introduction with him during this claim,

- 1 didn't you?
- 2 A. Yes, sir.
- 3 Q. If you don't recognize him, you remember the name?
- 4 A. He looks different now.
- 5 Q. He might have some whiskers and not a hat.
- 6 A. And a bit grayer, I believe, than he was.
- 7 Q. That happens to all of us, doesn't it? I wish we
- 8 could not do it, unfortunately. I didn't used to carry
- 9 these around with me in the courtroom. I can't see
- 10 anything. He was professional and courteous to you in
- 11 all his dealings, wasn't he?
- 12 A. Very professional.
- 13 Q. Both he and Mr. Byers were looking at the scene
- 14 probably the middle of the week after the fire. Does
- 15 that jog your memory?
- 16 A. Yes, sir.
- 17 Q. And he took a statement from you, y'all sat down
- 18 and talked in the gazebo and y'all talked about the
- 19 loss, some of the similar things, maybe in a little
- 20 more detail than Mr. Flanagan had talked to you about?
- 21 A. Yes. And he did a recorded statement.
- 22 Q. Yes. And that was when he came out to your house
- 23 that day, and I think Mr. Byers was out there that day
- 24 also?
- 25 A. Yes, sir.

1 Q. Okay. And then a little later, maybe a week, ten
2 days, he contacted you about taking an even, a little
3 bit more formal statement known as an examination under
4 oath?

5 A. I was notified. I really don't remember. I can't
6 remember who notified me. It seemed like I got a
7 letter, but I don't think he called me on the phone.

8 Q. But somehow made arrangements, I guess you went to
9 Mr. Nixon's Agency here in town and y'all sat down and
10 kind of did a question-and-answer with a court reporter
11 like we have here today; isn't that correct?

12 A. Yes.

13 Q. And you were advised if you wanted to have counsel,
14 you could. I mean, Nationwide didn't try to pull
15 anything on you, did they?

16 A. No, sir.

17 Q. They let you know what it was about, didn't they?

18 A. Yes, sir.

19 Q. Okay. And then probably within a week after that
20 time, Nationwide advised you through Mr. Flanagan
21 calling you on the phone that they were denying your
22 claim?

23 A. Yes, sir.

24 Q. Okay. And then you got a letter following that up,
25 I think it's been marked an exhibit, from Mr. Flanagan

1 confirming the basis of their denial?

2 A. Yes, sir.

3 Q. And there was never any question about what their
4 position was and why they were not able to pay you any
5 additional money under your policy for this loss?

6 A. They was questioning for me.

7 Q. I understand you didn't agree with them.

8 A. Correct.

9 Q. But you understood what position Nationwide was
10 taking?

11 A. I knew the position they was taking. I didn't
12 understand it.

13 Q. In terms of you thought it was wrong?

14 A. Yes, sir.

15 Q. But you understood that they believed the evidence
16 that they had uncovered in their investigation
17 indicated an intentionally set fire?

18 A. Yes, sir.

19 Q. Okay. No question about that. And, in fact,
20 what's known as the Reservation of Rights letter that
21 you got early put you on notice that that might be an
22 issue right away, probably I think it was dated January
23 23rd. So after the preliminary Cause and Origin was
24 done, they gave you a notice that they might be looking
25 at that?

1 A. Yes, sir.

2 Q. Okay. Now, you not only disagree with Nationwide,
3 but I think you called Mr. Jerry Byers an idiot to
4 Mr. Flanagan, didn't you?

5 A. Yes, sir.

6 Q. That's pretty hard words, and kind of impugning
7 somebody's ability to do their job as an expert
8 investigator, isn't it?

9 A. It's pretty hard words when you tell me I'm an
10 arsonist, too, isn't it?

11 Q. Well, no one has ever actually said that, have
12 they?

13 A. Yes, sir. Mr. Byers.

14 Q. Now, you followed up because you knew debris
15 samples had been taken and Nationwide advised you of
16 what those results were, that they had come back
17 negative?

18 A. Yes, sir.

19 Q. You were here yesterday. You heard your own hired
20 expert, Doug Ross, talk about the relative importance
21 of that and how that factors into an overall fire
22 investigation, correct?

23 A. Yes.

24 Q. It's not the only thing you can look at, is it?

25 A. Correct.

1 Q. And he also, you heard him talk about what he saw
2 in your kitchen was clearly caused by the presence of
3 accelerants?

4 A. Yes, sir.

5 Q. No dispute about that, but no positive sample on
6 the testing?

7 A. Well, I had a dispute about it, but I'm not no
8 investigator.

9 Q. That's right. The investigators, the experts, they
10 don't dispute that's what it looked like. But despite
11 that everyone agrees that's what caused it, the samples
12 were still negative?

13 MR. CLINCH BELSER: Objection, Your Honor.

14 THE COURT: Again, let's be careful about
15 characterization of the testimony because that's not in
16 the record and the Jury needs to make that
17 determination.

18 MR. MURPHY: Sure. Yes, Your Honor.

19 MR. CLINCH BELSER: I want it on the record that
20 there's no inference that everybody agrees about
21 anything. It's an improper question.

22 THE WITNESS: Yes.

23 THE COURT: I understand.

24 By Mr. Murphy:

25 Q. Mr. Fowler, the contents of your house, you

1 initially met with Mr. Flanagan to begin doing an
2 inventory on the scope, meaning how much you had in
3 your house and to try to come up with both the value of
4 them based on maybe when you purchased them and how old
5 they were and then some replacement?

6 A. Correct.

7 Q. And Mr. Flanagan spent a good time with you at the
8 scene and in your house going around with you in trying
9 to help you establish what may have been lost in there?

10 A. No, sir.

11 Q. He did go through the house, take some pictures,
12 and then give you a list to keep working on?

13 A. He did. What he told me exactly is to fill out
14 those papers and try to come up with my list of
15 contents because I had to get it submitted in a pretty
16 short time so they could start doing that. And I told
17 him, I said, Well, that don't give me much time, I have
18 a lot of stuff.

19 He said, Well, get basically the primary stuff.
20 You will have up to two years to keep adding additional
21 items. We just want the majority of the furniture.

22 Q. Okay. But it wasn't until you hired a public
23 adjuster that your list grew and grew and grew,
24 correct?

25 A. Yes, sir. Well, it grew and grew and grew because

1 I'm gonna tell you, when Mr. Flanagan come there and
2 wanted my contents listed and didn't give me but a
3 week, with the devastation I just had, that is not
4 developing to cover back over 40 years of what I had
5 acquired.

6 Q. Okay. Well, you were working on it, but --

7 A. I was working on it.

8 Q. -- they helped you a lot, your public adjusters?

9 A. Yes, sir.

10 Q. Because they get 10 percent of whatever you are
11 awarded, don't they?

12 A. Yes, sir.

13 Q. And if you don't recover anything, then you don't
14 owe them anything?

15 A. Yes.

16 Q. The same thing with Mr. Ross, correct?

17 A. I'm not sure about Mr. Ross.

18 Q. Okay.

19 A. I don't have a -- Mr. Belser I know is, but
20 Mr. Ross, I'm not, I don't have no agreement with
21 Mr. Ross.

22 THE COURT: There's nothing in the record about a
23 contingency on Mr. Ross's testimony.

24 MR. MURPHY: There was getting to be, getting ready
25 to be.

1 THE COURT: A contingency?

2 MR. MURPHY: No. Just --

3 THE COURT: Well, that's what you are implying.

4 And again, I know you just overstated it. But let's
5 stay within the record. If you want to put it in the
6 record or have something that will establish it, that's
7 different. But let's stay within the record.

8 MR. MURPHY: He does not know those terms and I'll
9 withdraw my prior question on Mr. Ross.

10 You do not know the exact terms of Mr. Ross.

11 THE WITNESS: No, sir.

12 MR. MURPHY: That's what I meant to ask.

13 THE COURT: You're not implying that ---

14 MR. MURPHY: No, I'm not. That's what I meant to
15 ask.

16 By Mr. Murphy:

17 Q. Early on you were given a \$2,000 advance while the
18 investigation was pending?

19 A. That's correct.

20 Q. And the investigation took about 26 or 27 days from
21 the time you reported the loss until Nationwide called
22 to advise you through Mr. Flanagan that the claim was
23 not gonna be honored as to you?

24 A. Yes, sir.

25 Q. Okay. Nationwide did pay your first mortgage off

1 in full?

2 A. Yes, sir.

3 Q. And Nationwide did pay the majority of the second
4 mortgage off, leaving a much smaller balance than had
5 been there because the limits on your policy was
6 \$154,000?

7 A. Yes, sir.

8 Q. And, in fact, Mr. Evatt, this person that
9 Mr. Flanagan talked to, was willing to renegotiate and
10 reschedule the payments under your second mortgage and
11 drop that payment way down?

12 A. He wasn't really willing. He had no choice.

13 Q. Well, he did that for you, though?

14 A. Yes, sir, he did.

15 Q. And no one at Citi Financial or anywhere in that
16 office treated you any differently after the loss and
17 after the partial payment to them than they had before,
18 correct?

19 A. Well, they was just doing their job. I'm not
20 really sure how they looked at me. I felt like they
21 felt like I was a criminal. I'd been accused, so...

22 Q. You don't know what was said to Daniel Evatt by
23 Andrew Flanagan, do you?

24 A. Yes, I do.

25 Q. How do you know that?

1 A. Mr. Evatt called me on the phone and told me that
2 Mr. Flanagan called him and sent him paperwork and
3 wanted them to fill out a Proof of Loss that I had
4 refused to fill out a Proof of Loss and that I had
5 intentionally set the fire and he didn't know nothing
6 about a Proof of Loss form.

7 Q. Well, if you will turn with me to page 107 of your
8 deposition.

9 A. Ready.

10 Q. My question on line 11 (reading):

11 Has anyone from there -- meaning Citi Financial --
12 treated you different, either in a business or social
13 setting since that phone call?

14 Your answer?

15 A. "No, sir."

16 Q. Thank you.

17 Now let me ask you just a few things about the
18 heater just to make sure. It was at least three to
19 maybe seven inches from the wall and it was not
20 touching the baseboard, correct?

21 A. I don't believe it was. I don't think it was. I'm
22 really not sure, but I do not think it was touching the
23 baseboard, the drip pan.

24 Q. And then it was in the same location, the same
25 setting being used the same way on the night or morning

1 over the 16th to the 17th as it had been on the other
2 times you had been using it since your power had been
3 cut off?

4 A. Yes, sir. Give or take. I might have moved it a
5 couple times when I vacuumed my floors, to vacuum
6 carpet, but other than that, it's basically the same
7 place, yes, sir, consistently.

8 Q. And using it the same way?

9 A. Yes, sir.

10 Q. Now, the last thing I want to ask you is, your
11 house. You love that lake, don't you?

12 A. I enjoy the lake, yes, sir.

13 Q. I mean, you have been up there 30 years, you talked
14 about the tremendous view and the great neighborhood
15 that you live in?

16 A. Yes, sir.

17 Q. And the pride that you have in your house. And you
18 should, building it yourself. And your gazebo, too?

19 A. Yes, sir.

20 Q. Let me ask you, even though you say you were
21 preparing it for sale, you had not talked to any real
22 estate agents or listing agents about selling the
23 property, had you?

24 A. No, I didn't. The only ones I had talked to were
25 First Citizens and Citi Financial and told them that I

1 had a lot of cleaning up to do to get it on the market
2 because they can come out and take photos and I had a
3 lot of debris and move leaves and material and
4 equipment, yes, sir.

5 Q. But it had not been on the market before and you
6 haven't put in on the market since?

7 A. I don't have no house to put on the market.

8 Q. And I think the reason is because you said you
9 wouldn't want to live anywhere else?

10 A. I didn't.

11 Q. And that's what you told me at your deposition and
12 that's what you told me today?

13 A. Yes.

14 MR. MURPHY: Thank you, sir.

15 THE COURT: Redirect?

16 Redirect Examination by Mr. Clinch Belser:

17 Q. Mr. Fowler, just a very few questions with
18 reference to some of the insinuations made in the last
19 set of questions. You were asked whether Mr. Ross said
20 there were other factors which could have caused the
21 fire in the kitchen?

22 A. Yes, sir.

23 Q. Did you hear his testimony yesterday about the
24 accelerants falling from the attic and creating a
25 secondary fire?

1 A. Yes, sir.

2 Q. With reference to the business with Mr. Evatt,
3 Mr. Murphy asked you whether Mr. Evatt had treated you
4 any differently. Has Mr. Evatt ever made any new loans
5 to you or just rescheduled the loans you already owed
6 him?

7 A. No, sir. What he did is he had to redo the loan
8 for the rest of the moneys that's owed on the previous
9 loan because I did not have enough coverage in my
10 policy to pay off the loan.

11 Q. I'd like to ask you to look at the deposition and a
12 small portion which Mr. Murphy asked you to read on
13 page 107. He asked you to read line 11 and 13.

14 A. Line 11 and 13?

15 Q. I'll read it again: Line 11 and 13. I want you to
16 read 11 through the bottom of the page and through the
17 next page on line 6. I'll read the questions if you
18 will read the answers on that page.

19 A. Okay.

20 Q. Question by Mr. Murphy: Has anyone from there
21 treated you differently, either in a business or social
22 setting, since that phone call?

23 A. Answer: No, sir.

24 Q. Have you been denied a loan or any credit from Citi
25 Financial?

Examination by
Attorney J.R. Murphy

1 A. Answer: I haven't.

2 Q. Since that phone call?

3 A. Answer: I haven't applied for any extra loan. I
4 couldn't answer that.

5 Q. Question: Has there been any detrimental effect to
6 you as a result of anything Mr. Flanagan said to Daniel
7 Evatt?

8 A. Answer: I don't understand what you mean by that.

9 Q. Question: Have there -- have you suffered any
10 damages?

11 A. Oh, yes, I've suffered.

12 Q. Just let me finish my question.

13 Next page. Go to the top.

14 A. Okay. Answer: Okay.

15 Q. Solely because of what Mr. Flanagan is alleged to
16 have said to Mr. Evatt, has that damaged you in any
17 way?

18 A. Yes. In my feelings it has.

19 Q. It hurt your feelings?

20 A. Yes, sir.

21 MR. CLINCH BELSER: No further questions. Please
22 answer any questions Mr. Murphy may have.

23 Recross-Examination by Mr. Murphy:

24 Q. Just two questions on 108 at the bottom, Mr. Fowler
25 I'll read my question there on line 21.

1 MR. CLINCH BELSER: Nothing further, Your Honor.

2 THE COURT: Very good. You may step down.

3 THE WITNESS: I'm excused?

4 THE COURT: Yes, sir. Please. You may step down.

5 But, no, you are not excused.

6 THE WITNESS: Okay, I'm sorry. Thank you, sir.

7 (Witness leaves stand.)

8 MR. CLINCH BELSER: At this time the Plaintiff is
9 ready to call Mr. Thomas Hesse.

10 THE COURT: I do need to take up something with the
11 attorneys. I'm going to ask you for a very short period
12 of time so I can do that on the record and then proceed.
13 I'm gonna ask you to retire to the jury room just for a
14 moment. It might be ten minutes or so. Again, do not
15 undertake discussion of the case among yourselves in any
16 way.

17 (Whereupon, the Jury left the courtroom at
18 approximately 11:45 a.m.)

19 MR. CLINCH BELSER: May it please the Court, I'd
20 have Mr. Hesse come forward.

21 MR. MURPHY: Do we really need to proffer him?

22 (Counsel confer.)

23 MR. CLINCH BELSER: May it please the Court,
24 Mr. Murphy -- I don't think either one of us feel a need
25 to have a proffer because of the ruling. If he could

1 put objection on record and we could go forward subject
2 to your ruling of yesterday.

3 THE COURT: This is the motion *in limine*; is that
4 right?

5 MR. MURPHY: Yes, sir. There were two parts. One
6 had to do with the post-denial conduct which I know has
7 been ruled on and I know I'm protected.

8 The other had to do, though, with Mr. Hesse giving
9 an opinion on a legal matter of law as opposed to a
10 proper opinion under the *Barton* case and that is the one
11 that involved Professor Freeman.

12 THE COURT: Wasn't that his affidavit?

13 MR. MURPHY: The opinions executed legal
14 conclusions as opposed to factual opinions that would be
15 proper and that was the objection because in his
16 deposition, Mr. Hesse's, all of his opinions go really
17 into an ultimate legal issue as opposed to a proper
18 expert level that it violated the standard or whatever
19 it just said it deviated from the duty of good faith and
20 fair dealing. That's the Jury's province to decide
21 that.

22 THE COURT: All right, Mr. Belser.

23 MR. CLINCH BELSER: If it please the Court, the
24 intention is to have Mr. Hesse who has got many years of
25 representing insurance companies, approximately 20

1 years, and 19 years as a legal career, as insurance
2 defense counsel among other things, and had six years'
3 service as a Judge in Mt. Pleasant Summary Court, and
4 have him testify based on his experience about whether
5 certain things he's observed in reading the depositions,
6 the Defendants' log notes, and other things which he
7 will testify about, whether those things are examples of
8 what the law, the Judge, Your Honor, will charge the
9 Jury that there is a duty to observe the covenant of
10 good faith and fair dealing that's in every contract and
11 in every insurance contract. He's not gonna speak the
12 law. He's just gonna state his experience and generally
13 accepted practice in the insurance industry these
14 certain things are deviations from the normal practice
15 or deviations.

16 THE COURT: Very well.

17 MR. CLINCH BELSER: He doesn't state the law, but
18 he says you take the law as you take it, and he'll say
19 that these specific things, there's about five or six of
20 them, are as a fact violations of the normal standards
21 of insurance claims handling.

22 THE COURT: All right. Mr. Murphy?

23 MR. CLINCH BELSER: And he's been qualified before
24 to testify about insurance claims practices.

25 MR. MURPHY: The only other thing I would add is --

1 THE COURT: What would be the difference in a
2 physician testifying to the standard of care as far as
3 the practice is concerned?

4 MR. MURPHY: I understand that. I understand it's
5 a very close line sometimes between legal and factual.
6 But I believe that some of his went into the Jury's
7 province and are no more than really what was noted in
8 the *Barton* case of being Counsel's points in closing
9 argument.

10 THE COURT: Well, again, after that time,
11 apparently Professor Freeman apparently cleaned up his
12 act and he's testified as an expert, and I think one of
13 them is a legal malpractice case, *Ward v. Van Hess*, of
14 all things, I think is the case. And there you might
15 say there were duelling experts because the Plaintiff or
16 the Defendant was an attorney and then, of course,
17 Professor Freeman. So, no, I do that.

18 But, more importantly, I think that this comes from
19 my experience or whatever. In the case of *Shields*
20 *versus the Highway Department*, the Court of Appeals,
21 303, SC 439, 1991, there, the Department objected to the
22 expert witness testifying over objection of the
23 Department about placement of warning signs and devices
24 on the highway, which Shields or the decedent was
25 killed, they say, quote, borders on criminal negligence,

1 close quotes.

2 The Department objected to this testimony and gave
3 as a ground, quote, The witness does not have the
4 ability to comment on what the law is, close quotes.

5 The Court of Appeals says, We do not agree with the
6 Department that the expert witness commented on what the
7 law is regarding placement of warning signs and devices
8 rather than express an opinion on the law. The expert
9 witness merely gave his opinion on the issue of fact
10 whether the signs and devices used by the Department
11 sufficiently warned the travelers.

12 I think that from what I understand of the
13 testimony, that it would probably come in closer to the
14 *Shields* case where you do have experts who testify as to
15 conclusions of whether or not it deviates from a
16 standard rather than establishing the standard. I think
17 where we have a problem is when witnesses try to
18 establish a legal duty. But once the duty is
19 recognized, of course, they can testify whether or not
20 it's a deviation.

21 MR. MURPHY: The only other quick matter, Your
22 Honor --

23 THE COURT: So I overrule your objection, and let's
24 have that as a continuing objection on that.

25 MR. MURPHY: Yes, Your Honor, I will.

1 And, Your Honor, the only other thing. I think
2 Mr. Hesse serves as a City Judge in Mt. Pleasant, I
3 think, and I would just ask that not be allowed to be
4 indicated because I think that gives him the imperator
5 of your role as opposed to being in the witness chair,
6 and I think they should be restricted from referring to
7 him as judge or bringing out his judicial duties because
8 I think that would be too prejudicial and it has nothing
9 to do with qualifications to serve as an expert.

10 THE COURT: Well, it certainly goes to credibility,
11 I would think. If judges have any credibility at all.

12 MR. CLINCH BELSER: But he's also a defense
13 counsel. We won't mention that. That might hurt his
14 credibility.

15 THE COURT: Well, come on. Now, gentlemen, let's
16 see. I really don't find it objectionable being a
17 judge, and the fact that he is, it's much like any other
18 qualification, I think, is to experience and things of
19 that nature. And when I say experience, I'm talking
20 about not so much in municipal jurisprudence, but the
21 fact that he knows the difference between law and fact.

22 MR. CLINCH BELSER: Your Honor, I will not address
23 him as Judge Hesse.

24 THE COURT: All right. Well, he's not appearing as
25 Judge Hesse.

1 MR. CLINCH BELSER: But I think as part of his
2 background for the Jurors' evaluation of his
3 credibility.

4 THE COURT: I think the probative value of his
5 credibility is that he is experienced and is recognized
6 in certain value in the community is more important than
7 any prejudice that the fact being a judge might entail.

8 MR. CLINCH BELSER: May it please the Court, Judge,
9 just one other comment. That yesterday you asked if we
10 had any further -- Rule 704 of the evidence rule says
11 (reading):

12 Testimony in the form of an opinion or inference
13 otherwise admissible is not objectionable because it
14 raises an ultimate issue to be decided by the trier of
15 fact.

16 THE COURT: Well, that's the trier of fact, not of
17 law.

18 MR. CLINCH BELSER: He's testifying to the fact, so
19 even though it goes to the issue of fact.

20 THE COURT: That's what *Shields* testified to.
21 That's what 704 is based on. They probably read Judge
22 Goolsby's opinion.

23 All right. Anything else from the Plaintiff first
24 and then the Defendant? Anything else on this matter?

25 MR. CLINCH BELSER: No, sir.

1 MR. MURPHY: No, Your Honor.

2 THE COURT: Now, how long do you think Mr. Hesse's
3 testimony might be? It's getting on to 12.

4 MR. CLINCH BELSER: Well, I have a bad record of
5 making responses about time.

6 THE COURT: You said a half an hour yesterday and
7 it was an hour and ten minutes, or you did say a half an
8 hour to 40 minutes. I don't want to do that again.
9 Let's go ahead and take his testimony and see if we
10 can't get it out of the way.

11 MR. CLINCH BELSER: We'll go as quickly as we can
12 through the preliminaries since there's not gonna be a
13 challenge on that. Then do you want me to move to
14 qualify him or can we do that through stipulations?

15 THE COURT: Unless you find something that we
16 haven't discussed or whatever, your lack of Voir Dire
17 will be by reason of my rulings, in other words, you are
18 not waiving any objections that you have already made --

19 MR. MURPHY: Yes, sir.

20 THE COURT: -- but unless you recognize something
21 that after he does a presentation, then he can move for
22 his admission.

23 MR. MURPHY: I don't need to Voir Dire. I'm pretty
24 familiar with Mr. Hesse's resume and he's got a lot of
25 experience.

1 THE COURT: Very good. All right.

2 MR. MURPHY: Could I have about two minutes before
3 we bring the Jury in?

4 THE COURT: Yes, sir. I will say this. That
5 Mr. Hesse, would you come forward, please?

6 MR. HESSE: Yes, sir.

7 THE COURT: This is off the record.

8 (Discussion off the record.)

9 (A recess was taken.)

10 THE COURT: Is there anything from the Plaintiff?

11 MR. CLINCH BELSER: We're fine, Your Honor, thank
12 you.

13 THE COURT: Anything from the Defense?

14 MR. MURPHY: No, Your Honor.

15 THE COURT: So the record is clear, subject to all
16 my prior rulings, we will continue with the examination
17 of Mr. Hesse.

18 Ask the Jury to join us, please.

19 (The Jury entered the courtroom at approximately
20 12:04 p.m.)

21 THE COURT: Let the record reflect the Jury and
22 Alternate are in the Jury box.

23 We will now proceed with the Plaintiff's case.

24 MR. CLINCH BELSER: May it please the Court, the
25 Plaintiff would now call Thomas H. Hesse, Esquire.

1 Whereupon,

2 Thomas H. Hesse, Esq.

3 after first having been duly sworn, testified as

4 follows:

5 THE COURT: If you would please, sir, give us your
6 full name, spelling your last name for the record.

7 THE WITNESS: Thomas Hayden Hesse, H-e-s-s-e.

8 Direct Examination by Mr. Belser:

9 Q. Mr. Hesse, what is your age for the record, please?

10 A. I'm 62 years old.

11 Q. What is your address, please, sir?

12 A. I live at 714 New Market Drive in Mt. Pleasant,
13 South Carolina.

14 Q. Are you married, sir?

15 A. Yes. I've been married for 39 years.

16 Q. Any children?

17 A. I have three daughters, grown daughters.

18 Q. Would you state briefly your education after high
19 school?

20 A. I finished the Citadel in 1971, and while in
21 Atlanta, Georgia, working for an insurance company I
22 went to night law school at Woodrow Wilson and received
23 a law degree from Woodrow Wilson, that was 1976. And
24 then in 1991 I received a law degree from the
25 University of South Carolina, I went back to law school

1 again when I was 40.

2 Q. And can you explain to me the reason why one
3 subjects himself twice to law school?

4 A. Georgia was a night law school, it was
5 unaccredited. I did pass the Bar in Georgia and was
6 eligible to practice law in Georgia, but I always knew
7 that I was coming back to South Carolina. South
8 Carolina would not allow me to take the Bar Exam
9 because it was an unaccredited law school, so the
10 only way that I was gonna be able to practice law in my
11 home State of South Carolina would be to start all over
12 and go back to law school.

13 Q. And have you taken the Bar Exam in South Carolina?

14 A. Yes, I have.

15 Q. How many Bar licenses do you hold now?

16 A. I'm licensed in Georgia since 1976, and in South
17 Carolina since 1992.

18 Q. What is your occupation now, sir?

19 A. I'm a practicing attorney in Charleston.

20 Q. Do you have any continuing association with the
21 insurance industry?

22 A. Yes. Most of the cases I'm involved in I've been
23 given by, I've been employed by insurance companies
24 either to defend people in accidents or in certain
25 events or as coverage counsel for an insurance company,

1 when they have questions of coverage they will hire me,
2 and I would say that probably 90 percent of my practice
3 is my being employed by insurance companies.

4 Q. But you are not actively an employee of an
5 insurance company now?

6 A. No.

7 Q. You do that in your capacity as a lawyer hired by
8 insurance companies?

9 A. That's correct.

10 Q. Well, let's go back, then, to the 1970s when you
11 were in Atlanta, you went to the night school for
12 getting your law degree over there. Where were you
13 employed at that time in Atlanta?

14 Well, actually I started off with American Mutual
15 Fire Insurance probably a week after I graduated from
16 the Citadel, I started as an adjuster trainee in
17 Charleston, that was in 1971. A year later I was
18 transferred to Atlanta. American Mutual had a claims
19 branch in Atlanta, and I started working there in 1972.
20 And I stayed with American Mutual from 1972 until 1977.
21 It was during that time that I went to night law school.

22 Q. After you were employed by American Mutual Fire
23 Insurance Company, were you employed by any other
24 company?

25 A. Yeah. In 1977 I went to work for Atlanta Casualty

1 Company in Atlanta, I became their first claims
2 manager, and worked with Atlanta Casualty for two years
3 until 1979.

4 Q. By whom did you become employed in 1979?

5 A. Well, I had an opportunity to get back to
6 Charleston with my, the company I had left, American
7 Mutual Fire Insurance Company, the company I had
8 started working with, and this opportunity came up to
9 get back to Charleston where I grew up, and I went back
10 to work for American Mutual Fire Insurance.

11 Q. What is the name of American Mutual Fire Insurance
12 Company at this time?

13 A. Well, actually, the name changed to Unisun
14 Insurance Company but technically the company is now
15 out of business. It never recovered from Hurricane
16 Hugo in 1989 because it had homeowners policies
17 throughout South Carolina and in Georgia and everywhere
18 that they had policies, Hurricane Hugo came through and
19 it survived for maybe -- I've lost track -- maybe for
20 another ten years after that, got bought out. But they
21 pretty much rounded up their business.

22 Q. What was your position as you moved through the
23 ranks of what was then American Mutual or became
24 Unisun, what was your position for them?

25 A. Okay. Well, again, I think I already talked about

1 being an adjuster trainee for a year in the Charleston
2 branch. Then from, with Unisun from 1972 until I left
3 to go to Atlanta Casualty in 1977, I was what they call
4 a property adjuster. My job was to handle property
5 claims, mainly homeowners' claims or claims for fire
6 policies or claims for commercial property. Those
7 homeowners' claims in a nutshell could be anything from
8 grease fires to larger fires, total loss fires, or we
9 handled hundreds of ice storm claims when the ice storm
10 came through Atlanta, it could involve theft claims.
11 But that was -- I handled those type claims with
12 American Mutual until 1977 when I left.

13 And when I returned to American Mutual in 1979, I
14 was involved with supervising litigation and also
15 supervising what they call casualty claims, it was more
16 of the automobile accident claims.

17 Q. When you were the litigation manager between 1987
18 and 1989, what types of claims did you handle and how
19 many would you estimate you handled during that period?

20 A. I was responsible for the supervision, I mean
21 literally, it could have been ten thousand claims that
22 were in suit. Did I handle every one of them? No. I
23 had a staff of probably two or three examiners. But at
24 that time you'd get in a thousand new suits a year and
25 maybe hopefully you'd close a thousand suits during

1 that time. But most of those or the vast majority of
2 them were automobile suits.

3 Q. And when you actually left the insurance industry
4 as an employee was 1992; is that correct?

5 A. Yeah. I started law school at South Carolina in
6 1989 and worked part-time with American Mutual. Part
7 of that was -- actually Hurricane Hugo happened about a
8 month after I left to go back to law school, and I
9 worked some part-time helping with the Hurricane Hugo
10 claims in their Columbia office, but if any time I was
11 out of law school, they were kind enough to let me work
12 in the litigation department, and I did that off and on
13 until I finished law school and began practicing law.

14 Q. Without your stating the law, because you're not
15 the Judge today, are you familiar as a matter of fact
16 with what insurance companies normally do in the
17 adjustment of claim of all of the sorts you have
18 mentioned?

19 A. Yes, I do.

20 Q. And do all insurance companies do exactly the same
21 procedure in handling claims?

22 A. No.

23 Q. Are there some generally accepted principles of how
24 the claims adjustment process should work?

25 A. That's correct.

1 Q. Have you testified as and are you familiar with
2 those factual questions as what insurance companies
3 generally do in a proper claims adjustment process?

4 A. Yes.

5 Q. Have you testified as an expert witness before in
6 these topics of insurance claims handling?

7 A. Yes.

8 Q. And you testified in the State Courts?

9 A. Yes. I've testified in the Florence County Court
10 of Common Pleas. I've also testified in the
11 Master-in-Equity Court in Charleston, I've testified in
12 Magistrate's Court in Charleston.

13 Q. Have you also testified in connection with Federal
14 Court cases?

15 A. Actually through the Charleston District Federal
16 Court, actually through deposition testimony.

17 Q. You've already testified about the nature of your
18 law practice since you returned to South Carolina and
19 practiced in Charleston defending insurance companies
20 on matters that you've already described and the Jury
21 will remember that.

22 Do you have any other role in the judicial system
23 besides being a trial lawyer, a defense counsel?

24 A. I'm a part-time Municipal Judge in the town of Mt.
25 Pleasant.

1 Q. How long have you done that?

2 A. Approximately five years.

3 Q. Is being an expert witness your occupation?

4 A. No. No.

5 Q. What is your occupation as you would describe it?

6 A. I would say 90 percent of what I do as a practicing
7 attorney, perhaps ten percent of my time would be as a
8 part-time municipal judge, maybe a little bit less than
9 that, and this represents a very small percentage of
10 what I do.

11 Q. Do you consider yourself an expert in regard to the
12 matter of insurance claims practices and compliance
13 with the law that the Judge will tell the Jury about
14 and what is required?

15 A. Yes, I do.

16 MR. CLINCH BELSER: Your Honor, I would like to
17 make a formal motion to qualify Mr. Hesse as an expert
18 witness on that subject.

19 MR. MURPHY: We're familiar with Mr. Hesse's
20 qualifications.

21 THE COURT: And also the Court ruled previously in
22 this matter. So the Witness will be qualified as an
23 expert -- and again, state your qualification, the area
24 that you wish that Witness to be qualified in.

25 MR. CLINCH BELSER: Well, insurance claims

1 practices, and the Judge will instruct as the --

2 THE COURT: Well, in other words, you want him as
3 an expert in insurance claims practices.

4 MR. CLINCH BELSER: Yes.

5 THE COURT: All right. Very good. The Witness is
6 so qualified or the Court finds the Witness qualified by
7 reason of background, training, and experience, and will
8 be permitted to give his experience relating to
9 insurance claims practices.

10 Now, as with all witnesses, as I've said before, a
11 witness's testimony is for your evaluation.

12 You may proceed.

13 MR. CLINCH BELSER: Thank you, Your Honor.

14 By Mr. Belser:

15 Q. Now, Mr. Hesse, first, what investigation have you
16 made into the facts of this case and what materials
17 have you reviewed in order to...

18 A. If I could refer to some notes I have?

19 Q. Yes, sir.

20 A. But I reviewed certain pleadings in the case. I've
21 reviewed the recorded statements given by Mr. Fowler to
22 Andrew Flanagan and also the recorded statement he gave
23 to William Gilden, I've reviewed the examination under
24 oath that Mr. Fowler gave to Mr. Gilden.

25 I reviewed the claim activity logs of Nationwide.

1 I've reviewed Nationwide's policy. I've reviewed the
2 Cause and Origin Report from Nationwide, either to
3 Mr. Fowler or to the mortgage companies. I've reviewed
4 the report of Jerry Byers of TIS. I've reviewed the
5 Nationwide Property Best Claims Practice. I reviewed
6 the Proof of Loss submitted by Mr. Belser for, on
7 behalf of Mr. Fowler, and I've also reviewed the
8 Depositions of Mr. Flanagan, Mr. Gilden, Mr. Madden and
9 Mr. Fowler.

10 Q. Based upon your experience and expertise and your
11 review of those materials, have you formed any opinions
12 to a reasonable degree of factual certainty as to
13 Nationwide's claims handling in this case?

14 A. Yes, I have.

15 Q. Do you hold these to a reasonable degree of
16 certainty?

17 A. Yes, I do.

18 Q. Briefly, what is your opinion?

19 A. That Nationwide deviated from the covenant of good
20 faith and fair dealing in its handling of Mr. Fowler's
21 claim; that Nationwide also deviated from its own
22 standard claims practices in its handling of
23 Mr. Fowler's claim.

24 Q. Now, without stating the law, which the Judge will
25 instruct the Jury, can you give this Jury some examples

1 on a factual level on what you see these materials
2 you've reviewed as to what you see in the materials
3 you've reviewed as to whether there are examples of
4 this deviation?

5 A. Yes, I can.

6 Q. What would be the first one, sir?

7 A. This is not in any sort of chronological order.
8 The first example would be the contact that Mr. Gilden
9 had with Detective Lyles of the Oconee Sheriff's
10 Department on January 29th, 2009, where Mr. Gilden
11 indicated to the Detective that they had motive and
12 opportunity and that they had samples from the fire
13 that were being tested and wanted to know whether or
14 not the Detective would be interested in the results of
15 those samples when they came in.

16 And it's my opinion that's a deviation certainly
17 from, certainly from Nationwide's standard claims
18 practice to act fairly towards Mr. Fowler in that this
19 approach is being made to the Police Department before
20 Mr. Byers' report is complete, before they have the
21 results of the samples from the laboratory, and once
22 again, it's only 12 days after the fire has occurred.
23 And then, to add to that is, that when the samples do
24 come back and they do come back negative, Mr. Gilden
25 then does not go back to the Detective to advise him

1 that the samples came back negative. Again, it's just
2 being unfair to Mr. Fowler.

3 And the best claims practice, I call it a Manual
4 from Nationwide says that they're gonna provide fast,
5 fair, and friendly claims service. That's their
6 standard. And it's my opinion that was not fair for
7 Mr. Gilden, the SIU investigator, to go to the Police
8 Department before the investigation is complete and
9 before the results are back from the lab. And then,
10 the compound injury is when the labs come back
11 negative, he doesn't get back with the Detective.

12 Q. Mr. Hesse, you have mentioned the Claims Practices
13 Manual. I show you what's been marked as Exhibit
14 Number 38 which has been admitted in evidence. Is that
15 the document which you mentioned?

16 A. Yes, it is.

17 Q. Without going into detail right now, I just wanted
18 to hear you say that's what we were talking about.

19 A. Correct.

20 Q. Put it there on the bench where everybody can see
21 it. Now did it result in harm of a specific nature to
22 Mr. Fowler for that deviation to have occurred?

23 A. It didn't result in any harm to Mr. Fowler, but
24 it's just not fair. It's not...

25 Q. We'll come back to this in a second.

1 What other things about the claims handling are on
2 a factual level in your experience deviations from the
3 legal requirements?

4 A. The, the next one would be -- again, I'm looking at
5 this through the eyes of an adjuster, that the report
6 from Mr. Byers is sent to Mr. Flanagan, and in the
7 report it discusses that, well, one comment made is
8 that the contents are not normal for the occupancy.

9 Then throughout the report it talks about the burn
10 patterns says Mr. Byers in his report are indicative of
11 flammable liquids having been introduced into the area,
12 referring to the kitchen and the living room area. And
13 toward the end of the report it says that if
14 Mr. Flanagan has any questions, he should contact
15 Mr. Byers regarding the report.

16 However, despite Mr. Byers' report being pretty
17 adamant in several places that the burn patterns are
18 indicative of flammable liquids having been introduced
19 into the area, the lab results come back and they are
20 negative. And the, however, Mr. Flanagan nor anyone at
21 Nationwide asked any questions about that. And, by the
22 way, Mr. Byers report, as I understand by review of
23 them, refer to the fact that the lab results come back
24 negative.

25 It's a deviation at least from Nationwide's

1 standard claims practice regarding it to be fair to its
2 insured that they didn't question that report. How is
3 it that the report says that there's flammable liquids
4 being introduced into the area, yet the lab results
5 come back negative? If there is an explanation for it,
6 what is it? Why isn't it documented in the file? Why
7 isn't anybody questioning that report?

8 And, frankly, when Mr. Byers says that the contents
9 are not normal for the occupancy, what does he mean by
10 that? How about an explanation regarding that comment?
11 That's the adjuster's duty. It's not the expert who's
12 handling the claim, it's the adjuster.

13 Q. How do those comments you just made tie in with the
14 legal instruction that the Court will give that the
15 insurance company has a duty to do a thorough and
16 reasonable investigation into...

17 A. Well, they didn't, it's my opinion they didn't do a
18 thorough investigation where if the lab results were
19 coming back negative, that somebody needs to question
20 the expert on that. And, Mr. Expert, well, talking
21 about Mr. Byers, please explain what looks to me as an
22 adjuster would be a discrepancy. You say these
23 flammable liquids are there, but the lab results are
24 negative. Please explain it to me what your, you know,
25 why it's that way. Or in the alternative get a second

1 opinion.

2 Q. Have you examined all of the Nationwide claims
3 adjustment log notes which were produced pursuant to
4 Court Order?

5 A. Yes, I have.

6 Q. Is there any documentation of any inquiry about
7 that or any explanation of those questions you asked?

8 A. I saw none in any of the notes or activity logs.

9 Q. On a factual level, what's the normal claims
10 practice about documenting things that you do?

11 A. Well, in my handling of insurance claims that in
12 every file you have -- now everything is different,
13 it's on a computer. Your activity logs, back in the
14 day when I was a full-time adjuster it was handwritten.
15 You have in a file folder and stapled to it were notes
16 of any activity that went in on that file. And so it
17 was, first of all, it serves several purposes. First
18 of all, it would document what the adjuster has done on
19 that file so that you can answer to your supervisor,
20 "What have you been doing on this file? What do you
21 have documentation of what you are doing?"

22 It is also if the adjuster is out sick or the
23 adjuster leaves the company, that you have an
24 explanation of what's going on with that file so that
25 they can pick the file up. And every usual accepted

- 1 claims practice by all insurance companies are to
2 document the file so that everybody knows what's going
3 on. The same applies to Nationwide in their Best
4 Claims Practices, they have some statement about
5 documenting the file, and that's, that was one of their
6 requirements. And the lack of it indicates that
7 nothing was ever done, nobody ever questioned the fact
8 that the lab results, there was no documentation that
9 anybody questioned that the lab results were negative
10 when the report says that there were flammable liquids.
- 11 Q. Just for clarity, part of your answer said what you
12 always did and part of it said what the industry
13 standards are.
- 14 A. Right.
- 15 Q. Is what you described just what you did or are they
16 industry standards?
- 17 A. No. I've looked at a lot of claim files. I mean,
18 both the ones that I've handled, the ones that I've
19 supervised. I've seen claim files when insurance
20 companies send their file to me to either defend one of
21 their insureds or if there's a coverage question. So
22 what I'm talking about is not just what my company did
23 or what Nationwide did. This is accepted claims
24 practice that the file needs to be documented.
- 25 Q. All right. Thank you very much. Can you comment

1 about the contact with Citi Financial?

2 A. I'm sorry?

3 Q. Go to your next one. I'm sorry.

4 A. Okay. Well, the next one was that Mr. Flanagan's
5 contacting the mortgage companies and telling them that
6 Mr. Fowler had intentionally set the fire. That was a
7 deviation from the covenant of good faith and fair
8 dealing for the adjuster to tell the mortgage company
9 that Mr. Fowler intentionally set the fire. They are
10 denying the claim. Nationwide is denying the claim.
11 That's all they have to tell the mortgage company.
12 We're denying this claim. And because we're denying
13 the claim, it says in the policy, if we deny the claim
14 it says in the policy if we deny the claim because
15 there are certain things in the mortgage company that
16 it has to do. It was not required that Mr. Flanagan
17 tell the mortgage companies that Mr. Fowler
18 intentionally set the fire in order to pay the mortgage
19 companies.

20 Q. On a factual level what's the deviation and the
21 unfairness in that?

22 A. Well, the deviation is they're doing something
23 that's certainly not fair and it's not friendly to
24 Mr. Fowler that you're, well, they're accusing him of
25 setting the, they say intentional act. That just means

1 they are saying he set the fire and there was no
2 requirement for them and it's unfair for Nationwide to
3 have done that. All they had to do was say, "We're
4 denying the claim and we'll pay the mortgage. Mortgage
5 company, these are your duties now that we're denying
6 the claim to Mr. Fowler."

7 Q. Okay. What's your next point, please?

8 A. The failure of Nationwide to share the Cause and
9 Origin Report with him, Mr. Fowler, that this is at
10 least one third of their reason, my understanding, for
11 denying Mr. Fowler's claim. They base it on motive,
12 opportunity, and the existence of accelerants.

13 And I'm not sure of the sequence, Mr. Flanagan or
14 Mr. Gilden, or one or the other, both had told
15 Mr. Fowler that the Cause and Origin Report prepared by
16 Mr. Byers indicates that he set the fire. And
17 Mr. Fowler says, "Well, can I have a copy of that?"

18 And they say, "No, we don't provide it to you. The
19 only way you're gonna get it is if you file suit."

20 And that is a deviation from the covenant of good
21 faith and fair dealing not to provide that report to
22 Mr. Fowler. It's also a deviation from Nationwide's
23 claims practice to be fair in its dealing with its
24 insured. This is what they're basing, part of what
25 they are basing their denial on.

1 Give it to Mr. Fowler. Let him review it. Let
2 Mr. Fowler be able to see what their explanation is for
3 why they're denying his claim based on the report. So
4 it's just an issue of unfairness.

5 Plus, my understanding is that the loss claims
6 manager, Mr. Madden's, testimony was that they did not
7 provide the -- it is standard procedure not to provide
8 the Cause and Origin Report, my understanding is under
9 any circumstances to make the insured file suit.

10 However, they do provide that Cause and Origin if
11 it helps Nationwide, if there's a fire, Nationwide pays
12 it, and they want their insured to file suit against
13 somebody who may have caused that fire, then they will
14 give it to their insured.

15 So to make a blanket statement that they don't
16 provide a copy of the Cause and Origin Report unless
17 the insured filed suit is not correct, and again, it's
18 a deviation of the standard to be fair to the insured.

19 Q. What's the next one?

20 A. It's also my opinion that the investigation by
21 Nationwide seems to be designed to support their
22 denial, that they're on this track and nothing anyone
23 provides them or suggests to them is gonna get them off
24 this track of denying the claim. For example, they
25 ignored the Friendship Fire Department report that

1 indicated that the fire was probably caused by the
2 kerosene heater and it was accidental in nature.

3 They didn't, despite Mr. Fowler's telling them that
4 the steps that he had, or discussions he had had with
5 the mortgage companies regarding selling his house
6 before, trying to fix his house up in order to sell it,
7 no inquiry was made by Nationwide to confirm that with
8 the mortgage companies that, in fact, they had had
9 those discussions with Mr. Fowler about trying to sell
10 his house and what efforts Mr. Fowler was making trying
11 to fix his house up.

12 The other one was Nationwide not giving any weight
13 to Mr. Fowler's, his making the suggestion during his
14 examination under oath that he will take a polygraph.
15 This is not a case where Nationwide says, Mr. Fowler,
16 why don't you take the polygraph. That's not what
17 happened here. Mr. Fowler is saying, he's making the
18 offer: I will take a polygraph. Now, whether they
19 would follow up on that or not, at least, in order to
20 give Nationwide cause to say let's take another look at
21 this. We have an insured we think intentionally set
22 that fire, he's agreed to a polygraph, maybe we are
23 wrong about our conclusion that Mr. Fowler set the
24 fire.

25 There shouldn't be any rush to judgment. And in

1 the process it was done pretty quick. I mean, the fire
2 happens on January 17th and the fire, and the claim is
3 denied less than 30 days later. There was no rush to
4 come to that conclusion, and they should have pursued
5 other avenues.

6 Q. How does what you said tie into the legal standard
7 the Judge will instruct the Jury about the insurance
8 company's obligation to do a reasonable investigation
9 and to respond to a reasonable defense in the
10 investigation?

11 A. The requirement is to do a thorough investigation
12 and also it's part of fairness standard to the insured
13 that the accepted claims practices to treat the insured
14 fairly and it is also part of Nationwide's standard
15 that we give fast, fair, and friendly claims service,
16 and they should have done a more thorough investigation
17 before they denied the claim.

18 MR. CLINCH BELSER: Thank you very much, sir. If
19 you will answer any questions that -- I'm sorry. Is
20 there anything else?

21 THE WITNESS: I have a couple more very quickly
22 that --

23 By Mr. Belser:

24 Q. I'm sorry.

25 A. One of them is that the failure by Nationwide,

1 after Nationwide denies the claim, now the mortgage
2 company steps in the shoes of Mr. Fowler, and there was
3 additional coverage that could have been available to
4 the second lienholder, Citi Financial, under this
5 Coverage B. That would have been additional funds to
6 pay, one example is the Koi pond or the fish pond that
7 was damaged in the fire. There was additional, you've
8 got your Coverage A which pays for the dwelling, you've
9 got your Coverage B that pays for parts of the property
10 that are separated from the main house.

11 And what Nationwide should have done is go back to
12 the mortgage company and explain that there is possible
13 additional coverage that could be used to pay down the
14 mortgage even further. In fact, Mr. Flanagan in his
15 notes indicates to Mr. Madden that there is possible
16 additional funds available for the driveway, and
17 Mr. Madden's response is that, well, let the mortgage
18 company make them come, let them come to us, when the
19 process should be that Nationwide, because the mortgage
20 company, since they denied the claim of Mr. Fowler, had
21 stepped into Mr. Fowler's shoes, had an obligation to
22 explain these additional coverages to them, and that's
23 a deviation from their -- well, from the covenant of
24 good faith and fair dealing and also from Nationwide's
25 standard claims practice.

1 Another one is after Mr. Belser got involved and
2 the time for filing the Proof of Loss had not run,
3 Mr. Fowler had 60 days to file his Proof of Loss after
4 the fire occurred. He has Mr. Belser get involved.
5 Mr. Belser contacts Mr. Flanagan about giving him an
6 extension of time to prepare the Proof of Loss, and
7 Mr. Flanagan's response was, We're not gonna give you
8 an extension to submit that Proof of Loss. You've got
9 60 days to submit it. That to me was a deviation from
10 the accepted claims practices to deal fairly with the
11 insured and it would be a deviation from Nationwide's
12 claims practice to deal fairly with the insured. What
13 difference does it make to Nationwide to give to
14 Mr. Belser and in essence Mr. Fowler the additional
15 time to complete that Proof of Loss so they will have
16 more time to complete it and be more thorough about it
17 as opposed to being a rush job. And I believe it's
18 been presented into evidence, or at least referred to.
19 Proof of Loss is a pretty comprehensive document, it's
20 not a one-page document.

21 And finally -- I know we're getting --

22 Q. No, no.

23 A. Okay. The only other opinion I have. It is a
24 two-way street as far as being, dealing in good faith
25 and being fair, the insurance company has to be fair to

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Attorney J.R. Murphy

1 Mr. Fowler, and Mr. Fowler has to be fair to the
2 insurance company. And Mr. Fowler did everything
3 Nationwide asked him to do. He completed all the forms
4 that they asked him to complete. He was interviewed by
5 Mr. Byers. He agreed to being interviewed by Mr. Byers
6 as referred to in Mr. Byers' report. He gave a
7 recorded interview to Mr. Flanagan. He then gave a
8 recorded interview to Mr. Gilden. He then submitted to
9 an examination under oath to Mr. Gilden. He cooperated
10 in every way in this investigation, did everything he
11 was asked to do. He didn't run to an attorney until,
12 or seek the advice of legal counsel until after they
13 denied the claim. And I guess my opinion there is that
14 Mr. Fowler did deal in good faith and fair dealing with
15 Nationwide in this matter.

16 MR. CLINCH BELSER: Thank you very much. Please
17 answer any questions Mr. Murphy will ask.

18 THE COURT: Go ahead.

19 MR. MURPHY: Thank you, Your Honor.

20 Cross-Examination by Mr. Murphy:

21 Q. Mr. Hesse, I'm trying to stand in a place where not
22 too many people have to look at the back of my head. I
23 don't want to have him twist his neck around, either,
24 so let's just leave the lectern there. I,
25 unfortunately, have a little cumbersome thing.

1 THE COURT: All right. Let's just move the lectern
2 out.

3 MR. MURPHY: Would that be all right? That would
4 help me just a little bit.

5 Let Mr. Hesse get a reload there. That's the main
6 thing, the water.

7 Q. I'd like to ask you a little bit just in general
8 about the overall claims process based on your
9 experience of working for insurance companies and
10 representing them. And a normal claims sequence would
11 start when someone notifies the insurance company that
12 a loss of some sort has occurred, an accident, a fire,
13 a hail storm, or something like that?

14 A. That's correct.

15 Q. And then an insurance company -- and these are all
16 just normal protocol. They would make an initial
17 contact with their insured to get information about
18 what had happened other than the basic information
19 given in the initial notice?

20 A. That's correct.

21 Q. And then probably that insurance company is gonna
22 assign that claim to a specific individual to take
23 responsibility for it?

24 A. That's correct.

25 Q. Whether it's the injury claims that most of your

1 career was spent with or property claims that you
2 handled for a few years early in your career?

3 A. That's correct.

4 Q. Okay. And from that point that adjuster will work
5 within, you know, the chain of demand. He probably has
6 a supervisor or manager or maybe different people in
7 the organization that oversee the handling of the
8 claims just from the claims side?

9 A. Yes.

10 Q. And then the adjuster may involve other people such
11 as outside vendors, an accident reconstruction expert
12 or a Cause and Origin expert or someone who has more
13 advanced training to help them figure out what
14 happened?

15 A. Yes.

16 Q. Nothing unusual about that at all?

17 A. No.

18 Q. Nothing about having maybe two or three Cause and
19 Origin investigators in an area, and depending on the
20 number of claims, they may get called multiple times a
21 year?

22 A. That's correct.

23 Q. Nothing unusual about that at all?

24 A. Right.

25 Q. And, furthermore, when you hire an expert like

1 that, as a claims adjuster you have to be able to rely
2 on their findings, don't you?

3 A. Yes. And only, my only exception to that is if you
4 get too comfortable with one expert.

5 Q. Sure.

6 A. You have to evaluate your experts from time to time
7 to make sure you're not getting too complacent with
8 your experts. But in general I agree with you that is
9 the process.

10 Q. That's what you did when you were an adjuster?

11 A. Correct.

12 Q. That's what you had your people do when you were
13 the manager. You had them, you oversaw the decisions
14 that you all made together, just like Nationwide did in
15 this case, and you had to put a certain amount of
16 reliance if you had an expert help you understand what
17 happened?

18 A. In general, yes. The only exception I'll make to
19 that is if you had to review that process with the
20 experts from time to time. But I agree with you in
21 general.

22 Q. Sure. And we're not talking about this specific
23 case yet.

24 A. Right.

25 Q. But in general that's the normal thing?

1 A. You are correct.

2 Q. It's normal for someone to go and to do a site
3 visit, whether go take photographs of an accident scene
4 or look through the house?

5 A. Yes.

6 Q. Take a recorded interview of their insured. That's
7 standard. Done all the time?

8 A. Yes.

9 Q. And then if there are any questions, anything
10 unusual, out of the ordinary, you can't determine it,
11 that's when you might involve these other people?

12 A. Yes.

13 Q. And a house that has no power to it would probably
14 be sufficient to help you get someone to figure out how
15 the fire occurred?

16 A. Yes.

17 Q. So hiring a Cause and Origin expert would be the
18 right thing to do?

19 A. Yes.

20 Q. Okay. And then if there's questions, obviously if
21 there's losses like that in property, there might be
22 financial information that might go toward motive,
23 there might be witness or, you know, figuring out
24 things that go to opportunity, so you might get a
25 special investigator who's a little bit more trained

1 and focuses on just investigating those factual issues?

2 A. Yes.

3 Q. Nothing unusual about that at all?

4 A. No.

5 Q. And then insurance companies, to make sure that
6 they're on the same page with their insureds, they
7 submit to them and have them go over some things in
8 writing so there's no question about these activities
9 going on?

10 A. That's correct.

11 Q. And you reviewed the file, Mr. Flanagan the first
12 day went over that, a non-waiver, which means neither
13 Mr. Fowler nor Nationwide has given up any rights by
14 just by going through the process?

15 A. That's right.

16 Q. They get to hold on to their claims against each
17 other if they can't agree at the end of the process?

18 A. Right.

19 Q. And that's very standard?

20 A. Right.

21 Q. There is a financial authorization. That's very
22 standard in a fire loss case?

23 A. Yes.

24 Q. There is an authorization to come on the property
25 because it is private property and so that's very

1 standard?

2 A. Yes.

3 Q. And insurance policies require an insured to let
4 the insurance company come on there, but that's no
5 problem. Mr. Fowler agreed, Nationwide asked. That's
6 just how it's done, isn't it?

7 A. That's correct.

8 Q. Okay. Of course, a Proof of Loss is something that
9 can be requested from an insured, but in the Nationwide
10 policy it's absolutely required from the lienholders.
11 Did you glean that from your review of the policy?

12 A. Yes. There's a requirement. I'm a little bit
13 hesitant because at any time the insurance company can
14 waive the requirement for Proof of Loss --

15 Q. Sure.

16 A. -- but yes, I'll concede that the policy requires
17 the mortgagee to submit a Proof of Loss.

18 Q. Yes. And, of course, there's nothing unusual about
19 requesting one, either from the insured or from the
20 lienholder?

21 A. No.

22 Q. And then after some of these investigative
23 activities take place, you heard talk about a log, and
24 in this case we have quite a significant log, lot of
25 entries, a lot of activity, a lot photographs and

1 things like that, and it's all compiled?

2 A. Yes.

3 Q. But not everything is done in complete
4 word-for-word detail. I mean it's a summary of most
5 things?

6 A. Yes.

7 Q. And when you manage people, some adjusters wrote
8 more and some adjusters wrote less. Some might have to
9 be encouraged to write more and some might have to be
10 encouraged to write less?

11 A. I don't think anybody, any supervisor ever
12 encouraged an adjuster to write less. They want to
13 know as much as possible written down there, within
14 reason, because you handle a bunch of claims.

15 Q. That's right. And it's just to document things
16 that are going on in the file?

17 A. Correct.

18 Q. And your review of the Nationwide log in this case
19 is that all the activities that were done, times gone
20 to the scene, interviews, things like that, they were
21 put down in there, weren't they?

22 A. Yes. Obviously, I don't know what wasn't done. I
23 mean, if something was done and it was not in the log,
24 I don't know what happened. But yes, I can see in the
25 log activity being done.

1 Q. And then when insurance companies make decisions,
2 it's not unusual to have a conference call or maybe a
3 round table maybe, and that occurred in this case?

4 A. Yes.

5 Q. And that's how decisions are made, so we don't have
6 someone out there in a vacuum all on their own flying
7 blind?

8 A. Yes. I mean, if you want to get into specifics
9 about some conference calls, I'd like to, you know,
10 comment on them.

11 Q. I'm just talking about in general process involves
12 that.

13 A. If we're talking in general, yes.

14 Q. Okay. And that allows managers like you used to be
15 to gather information and participate in whatever
16 decisions need to be made?

17 A. Correct.

18 Q. Okay. An examination under oath. That's not an
19 unusual thing, is it?

20 A. No.

21 Q. Now, it's not taken in every case, but when
22 circumstances suggest it, those are asked for, aren't
23 they?

24 A. Correct.

25 Q. And most insurance policies you've ever seen

1 requires that?

2 A. Yes.

3 Q. In fact, you take them for insurance companies now
4 as a lawyer?

5 A. Yes.

6 Q. And you authorized them or requested them many
7 times while you were in the insurance industry?

8 A. Yes.

9 Q. And then, unfortunately, not every claim can be
10 paid, can it?

11 A. No.

12 Q. There are claims that have to be denied?

13 A. Yes.

14 Q. Because a mutual company like Nationwide and like
15 you used to work for, they owe not only a duty to the
16 insured that has the loss, but to all their other
17 insureds who don't have questionable losses that might
18 not be covered?

19 A. That's right.

20 Q. Okay. Now let me ask you a little bit about your
21 involvement in this case. You were not even contacted
22 till October 5th of 2011, about six or seven weeks ago?

23 A. That sounds correct.

24 Q. Okay. Now, in all your experience, you've never
25 actually supervised or handled a claim denial based on

1 the intentional act exclusion in a fire, have you?

2 A. That's not correct.

3 Q. Okay. I thought that's what you told me at
4 deposition. I'll stand corrected?

5 A. Tell me what your question is again. In what
6 capacity? I'm sorry.

7 Q. When you were a claims adjuster, you don't recall
8 any claim in which you recommended a denial based on an
9 intentionally set fire is what I thought you told me.

10 A. I don't -- that, that would not be correct because
11 we handled not only homeowners' claims. I don't recall
12 on homeowners' claims ever denying based on intentional
13 act. I can't recall on auto claims that I handled for
14 American Mutual or Atlanta Casualty whether or not we
15 ever had those circumstances.

16 Q. And that's fair. I think my question was a
17 homeowners claim. I had it in my head, but I apologize
18 for not making that clear.

19 A. Okay.

20 Q. And then you, in terms of coordinating Cause and
21 Origin of investigation of house fires and things like
22 that, you just haven't done that or been involved in
23 that decision making process as long as you can
24 remember?

25 A. That's correct.

1 Q. Okay. But yet you are here at \$250 an hour to tell
2 this Jury how Nationwide failed to handle Mr. Fowler's
3 claim?

4 A. It doesn't matter what kind of claim it is,
5 Mr. Murphy, in order for the insurance company to have
6 to act in good faith and fair dealing. It doesn't have
7 to be a homeowners fire claim where there are
8 allegations of arson. It applies to every claim, it
9 applies to any kind of policy, whether it's automobile
10 policies, fire policies, and health policies. So what
11 I'm talking about, accepted claims practices, apply
12 across the board to any policies and all claims.

13 Q. Now, at the time -- but your hourly rate, I did get
14 that correct?

15 A. You got it right.

16 Q. So every -- and I think before we took your
17 deposition a couple weeks ago you had already billed
18 about \$6,000 on this case?

19 A. That's correct.

20 Q. And you got \$250 an hour for every minute I think
21 it took you to drive up here?

22 A. I will.

23 Q. You will. You will bill for it?

24 A. I will bill for my travel time, yes.

25 Q. And the minutes you had to wait around. Your time.

1 That's what you bill for. Everything you've done
2 connected with this file?

3 A. It's the same thing as I do as a defense attorney
4 representing insurance companies. I charge by the
5 hour.

6 Q. Now, what, the decision that was made that involved
7 a refusal to pay benefits under an insurance policy was
8 a refusal based on the intentional act exclusion; is
9 that correct?

10 A. Are you asking the basis for their denial?

11 Q. The issue in terms of why benefits weren't paid
12 under the insurance policy was because of Nationwide's
13 position that the intentional act exclusion applied?

14 A. Correct.

15 Q. And you understand the standard of good faith and
16 fair dealing is whether or not benefits should be paid
17 or not and whether there was a reasonable basis to
18 whether the benefits should be paid?

19 A. That's correct.

20 Q. And in a fire like this with intentional acts an
21 insurance company must establish that the policyholder
22 had the motive and the opportunity to set the fire and
23 that the fire itself was of an incendiary or an
24 intentional origin?

25 A. Correct.

1 Q. Okay. So the focus would be as to whether or not
2 there was a reasonable basis, as the Judge will
3 instruct this Jury, for Nationwide to take the position
4 that they believe the intentional act exclusion
5 applied?

6 A. That's correct.

7 Q. Now I want to look at a few of your opinions that
8 have nothing to do with that issue. Can I do that?

9 A. You're asking the questions.

10 Q. Yes, sir. The contact between Billy Gilden and any
11 local law enforcement had nothing to do with the claims
12 decision to deny coverage, did it?

13 A. Yes, sir.

14 Q. The refusal to turn over the Cause and Origin
15 Report was after the claim had already been denied?

16 A. That's my understanding, yes.

17 Q. And that would not factor into that decision at
18 all, would it?

19 A. No, it wouldn't. No. The refusal to turn it over
20 would have nothing to do with the claim being denied.
21 That was after the fact.

22 Q. Okay. The contact with the mortgage company was
23 after the fact?

24 A. Correct.

25 Q. The extension on the Proof of Loss was after the

1 fact?

2 A. Correct.

3 Q. And, moreover, once the claim had been denied
4 Mr. Fowler would no longer be found to have to submit
5 one, would he?

6 A. Well, I think Mr. Fowler was covering all bases.
7 To answer your question, yes. If the company denies
8 Mr. Fowler's claim there's probably no obligation for
9 Mr. Fowler to submit that Proof of Loss. But
10 Mr. Fowler is gonna cover all bases because if there's
11 some kind of reconsideration on the part, I think he's
12 still hoping on the part of Nationwide that they're
13 gonna change their position, he doesn't want it to be
14 some kind of a technicality now that he did not get his
15 Proof of Loss within 60 days.

16 Q. And Nationwide never even took that position and
17 never even apprised Mr. Fowler that they might take
18 that position due to Mr. Fowler's failure to present
19 that Proof of Loss in time?

20 A. That's correct. But that would also beg the
21 question why they're not giving Mr. Belser the
22 extension to file the Proof of Loss if the Proof of
23 Loss doesn't mean anything to Nationwide.

24 Q. Now, you said that some of the investigation was
25 designed to support a denial. And, for example, you

1 gave the opinion to this jury that Nationwide ignored
2 the Friendship Fire Department. Didn't you give that
3 opinion?

4 A. Yes.

5 Q. Are you aware that his report was received and
6 reviewed by Andrew Flanagan, the Friendship Fire
7 Department report, did you glean that from the file?

8 A. Well, what I reviewed from the file material is
9 that, yes, they had it, but that their opinion was that
10 the Fire Department were not the professionals. We're
11 gonna rely on our expert, Mr. Byers, the Cause and
12 Origin Investigator, we're not giving weight. That was
13 my interpretation of it, of reading the file, that
14 they're not giving credibility to the Friendship Fire
15 Department report.

16 Q. And that's certainly their prerogative, isn't it?

17 A. Yes, that's their prerogative.

18 Q. You are aware of Chief Wright's testimony about how
19 he basically said the same thing, that he leaves it
20 like it is so the investigators can come in and make
21 the determination?

22 A. I wasn't here for Chief Wright's testimony.

23 Q. Okay. So they didn't ignore it, but they
24 considered it but gave it its impact that they had from
25 all the other information they had.

1 A. That's correct.

2 Q. That's what you're supposed to do?

3 A. (There was no response.)

4 Q. Now, the polygraph. Mr. Fowler offering to do that
5 with Billy Gilden. I mean, as a Judge you would never
6 admit the results of a polygraph test in court, would
7 you?

8 A. Well, we're talking about two different things
9 because I'm in criminal court and I'll answer it this
10 way. This is a civil matter. The action we are
11 hearing today is a civil matter. I have been as a
12 supervisor for, either litigation supervisor or
13 litigation manager for American Mutual Fire Insurance
14 and been involved in a case, one of our cases, where
15 actually it was an automobile accident and both sides
16 agreed to take a polygraph, both sides agreed that
17 those polygraph results would come into evidence, and
18 the Judge in that particular case agreed that, okay.
19 It's not normally done, but by consent of the parties
20 I'm gonna let that, the results of those polygraphs
21 come in.

22 We're not talking about whether Mr. Fowler's offer
23 is not, is not about whether this is admissible in
24 court or not. It's his saying, Look, I'll take a
25 polygraph. Let's clear this thing up. In all my --

1 I've been in this business 40 years. I consider myself
2 in the insurance business for 40 years, 20 years in
3 claims, 20 years in claims, roughly 20 years practicing
4 law. I've never had an insured or claimant, opposed to
5 the insurance company, let me take a polygraph. I've
6 seen the insurance company say, how about you take a
7 polygraph. I've never seen in all my experience
8 someone come forward and suggest that first to the
9 insurance company, so I thought that was pretty
10 remarkable.

11 Q. That's an unusual thing, isn't it?

12 A. It is.

13 Q. But the insurance policy does not require that.
14 Nationwide could not make anyone do that?

15 A. We're not talking about that. No. They cannot
16 make Mr. Fowler take a polygraph, but they can accept
17 Mr. Fowler's volunteering to take a polygraph. There's
18 nothing prohibiting them taking up Mr. Fowler on his
19 offer.

20 Q. Except the fact that polygraphs are universally
21 known as being inherently unreliable.

22 MR. CLINCH BELSER: Objection.

23 THE COURT: I'm afraid we're getting into something
24 more than is in the record. If you want to take the
25 stand on polygraphs, that will be fine. But let's

1 concentrate on the facts of this case, and then you can
2 argue to the Jury later that you don't believe something
3 should be done or shouldn't be done. But let's talk
4 about the facts.

5 By Mr. Murphy:

6 Q. About your comment on Coverage B, that would have
7 been money payable to the mortgage company?

8 A. Yes.

9 Q. You indicated you were provided and reviewed
10 Mr. Flanagan's deposition?

11 A. Yes.

12 Q. So I assume you read pages 82 and 84, which have
13 been published to this jury where he indicated that the
14 pond had not been damaged and that is the reason that
15 no payment had been made.

16 A. I don't recall what I read in Mr. Flanagan's
17 deposition regarding that.

18 Q. But if that's what he testified, if he said on page
19 82 that Michael Madden, his boss, said it wasn't
20 appropriate to pay Coverage B because the Koi pond
21 wasn't directly damaged by the fire, then on Page 84
22 that Coverage B wasn't paid because that wasn't
23 directly damaged by the fire, that would be a proper
24 way to handle that because they would have to be
25 damaged by the fire to be payable, correct?

1 A. Well, that's, I can't, sitting here today I can't
2 tell you what the condition of the Koi pond was, I
3 can't tell you what the condition of the driveway was,
4 I can't tell you the condition of any of the property
5 that may have been eligible under Coverage B to have
6 additional proceeds.

7 Q. Sure.

8 A. What, my point on that is that there was additional
9 coverage under Coverage B that should have been
10 explained to the mortgage company. Whether or not
11 there was anything that should have been paid, whether
12 it was damaged, that would have to be worked out
13 between the mortgage company and Nationwide. I'm just
14 saying that coverage wasn't explained to him. And I do
15 recall the notes from Mr. Flanagan that this driveway
16 may get, there may be damage to the driveway from this
17 fire that may be covered under Coverage B, and
18 Mr. Madden says Well, the mortgage company needs to
19 make the claim. And so we never get any more
20 discussion about what the nature of the damage was, if
21 there was damage to the driveway. Mr. Flanagan brings
22 it up. Mr. Madden says, No, we're not doing that.

23 Q. Sure. But damage that might become payable in the
24 future if the house is reconstructed is very different
25 from damage which resulted from the fire itself.

- 1 A. Correct.
- 2 Q. Now, I just want to lastly go over just a couple
3 things. The property, best claims practices, the only
4 thing you referred in all of your testimony was the
5 statement that the philosophy is described for claims
6 service as fast, fair, and friendly.
- 7 A. I may have made some indirect reference to the
8 document in the file.
- 9 Q. The one on Page 4 where it says that all contacts
10 and attempts, written and oral, are documented
11 specifically in the file log.
- 12 A. If you will just give me a second. Well, Page 6,
13 under Damages and Negligence Investigation, as a
14 reference to all relevant parties are investigated and
15 fully documented. That's in there as well and that's
16 probably what I was referring to.
- 17 Q. But in terms of these specific practices you would
18 agree that many, many, many of them were followed in
19 the handling of this claim. I can give you examples if
20 you would like for me to and you can say yes or no.
- 21 A. I'm not saying that -- yes. They followed some and
22 as I pointed out they didn't follow those standards in
23 other circumstances in my opinion.
- 24 Q. Just that general standard of being fair?
- 25 A. Well, friendly.

1 Q. But in terms of some of the specifics, making
2 meaningful contact, complete the claims documents, we
3 talked about that. They did that, Andrew did that?

4 A. Correct.

5 Q. The document contacts with Mr. Fowler in the file.
6 They did that. To promptly respond to all
7 communications, as far as you could review the file he
8 did that?

9 A. Yes.

10 Q. The potential coverage defenses are identified and
11 preserved, and he did that?

12 A. Yes.

13 Q. Sent the Reservation of Rights letter very quickly,
14 it was about six days?

15 A. Right.

16 Q. The denial of coverage that should be communicated
17 verbally and in writing, and he did that?

18 A. Yes.

19 Q. He arranged a supportive investigation by SIU
20 experts and it was completed promptly?

21 A. Yes.

22 Q. And it was coordinated with the claims personnel
23 assigned to the file. In other words, it was shared
24 and Billy Gilden did some things, Jerry Byers did some
25 things, and Andrew did some things?

1 A. I agree different people did different things. To
2 say everybody did their part, I disagree with that.

3 Q. Okay. I understand that. Evidence of potential
4 arson should be immediately investigated and
5 documented. Mr. Flanagan did that?

6 A. Yes.

7 Q. The police, fire, weather, expert and other
8 official reports are obtained as appropriate. They did
9 that?

10 A. Yes.

11 Q. Okay. So when we get into some of these specific
12 guidelines, there were a lot of things, the majority of
13 which are in there, that implied Mr. Flanagan complied
14 with?

15 A. Yes.

16 Q. And the decision that this case is about is whether
17 or not they had evidence to support a denial under the
18 intentional acts exclusion which would require some
19 basis of motive, opportunity, and incendiary origin?

20 A. Whether it was, whether their denial was
21 reasonable, whether it was based on reasonable
22 documentation that there was a -- whether their
23 investigation was thorough before they denied the
24 claim, whether they pursued other avenues to determine
25 whether or not this was an arson.

Examination by
Attorney Clinch Belser

1 Q. Correct. But those are the three things that they
2 had to have some basis on and not just make something
3 up, right?

4 A. When you say some basis, I say it has to be a very
5 reasonable basis.

6 Q. Okay. Well, you say "very." I think we'll let the
7 Judge instruct the Jury about the real standard. How
8 about that?

9 A. Right.

10 MR. MURPHY: Thank you, Mr. Hesse.

11 THE COURT: Redirect?

12 MR. CLINCH BELSER: Just very briefly, Your Honor,
13 thank you.

14 Redirect Examination by Mr. Clinch Belser:

15 Q. Mr. Hesse, with regard to the last series of
16 questions about whether the insurance adjuster touched
17 all the bases and whether the investigation as a whole
18 was reasonable and thorough, can you comment about
19 whether doing something to touch the bases to come to
20 the results you already want is a factual level doing a
21 reasonable and thorough investigation to --

22 A. Well, it's not counting up, well, we had ten things
23 to do and we did seven of them right. Therefore, the
24 insurance company is good. They've got to be thorough
25 with everything that they do as far as their

1 investigation. They may have done some things right as
2 far as, you know, prompt contact, about getting the
3 Cause and Origin Report out, but there's some serious
4 things they did not do properly as far as the
5 investigation. That's where they failed to meet the
6 standards.

7 Q. Just briefly, what were the serious things they did
8 not do in their investigation? You've already gone
9 into detail, but just summarize it.

10 A. Well, I think the key one is their failure to
11 question Mr. Byers' report regarding he says flammable
12 liquids and that the samples came back negative. Where
13 is the explanation for that?

14 Now, Mr. Murphy referred to these conferences where
15 the large loss claims manager was, and I believe this
16 was done by phone, Mr. Flanagan is on the phone, they
17 got the SIU investigator, Mr. Gilden, probably got an
18 SIU manager on the phone and all discussing the claim
19 before the denial and just a brief note about this
20 conference. But no, no discussion about anybody
21 questioning the fact that the samples came back
22 negative, that doesn't seem to jive with Mr. Byers'
23 report that says it's indicative of flammable liquids
24 being introduced in the kitchen and living area.
25 Someone needs to question that and nobody did. It's

1 the Cause and Origin Investigator basically adjusting
2 the claims opposed to the adjusters with Nationwide and
3 that's where they failed.

4 Q. On a factual level as you look at an investigation
5 process, is there any reasonable -- is it generally
6 acceptable in the industry to make a quick denial and
7 cut off any further investigation of leads which come
8 back in? How do you evaluate the process of the claims
9 investigation?

10 A. Both as a supervisor of claims and also in giving
11 guidance to insurance companies, I've told the
12 adjusters when they were working for me or giving
13 advice to the adjusters denying the claim is the thing
14 of last resort. You take it very seriously before you
15 deny the claim. There should be no rush to judgment.
16 You should actually, it sounds a little bit silly, but
17 try to find a way to pay the claim. If you've gone
18 every avenue and you say, look, there's just no way to
19 pay this, then you know at that point you should deny
20 the claim, there should be other avenues to pursue. If
21 there's some question about the Cause and Origin
22 Report, question that. If you're not satisfied with
23 the explanation you get from your Cause and Origin
24 investigator, get a second opinion. Is our Cause and
25 Origin investigator being objective about this claim or

1 not? So there shouldn't be any rush to judgment. And
2 this was a rush to judgment. It was within 30 days of
3 the time of the fire that they take this most serious
4 action of denying the claim when they should have
5 pursued other avenues to investigate.

6 Q. With reference to Mr. Murphy's questions about the
7 contact with the Sheriff and the contact with the
8 mortgage companies, and his question was, since those
9 were after the February 11th denial, they were
10 irrelevant to evaluation of the claims handling
11 process. Can you clarify your position?

12 A. They're clearly not irrelevant. It's just further
13 evidence of being unfair to Mr. Fowler. I mean, their
14 duty doesn't stop -- it's not that they can deny the
15 claim. Nationwide can say, okay, after that, anything
16 we do is fair game. For example, if Mr. Fowler
17 physically handed them the Proof of Loss after they
18 deny the claim and hypothetically an adjuster just tore
19 it up in his face, and say no harm there because we
20 already denied the claim, well, that's not fair to
21 Mr. Fowler. So, no, they don't get off the hook by
22 what their actions are after they deny the claim in my
23 opinion.

24 Q. Do those actions throw light on the reasonableness
25 of the whole approach by Nationwide?

1 A. Yes, they do. It kind of gives you, I mean during
2 the process and even after denying it, before the claim
3 was denied and even after the claim was denied, there
4 were actually many circumstances unfair and breach of
5 the standard, breach of the covenant of good faith and
6 fair dealing and also a breach of their standard claims
7 practices.

8 Q. With reference to the questions about your reading
9 of Mr. Flanagan's deposition, and the alleged statement
10 that there was no damage to the Koi pond, did you also
11 have a chance to read all of the log notes which were
12 prepared during the time the claim was being processed?

13 A. Yes, I did.

14 Q. I'd like to hand you what's been marked and
15 admitted into evidence as Plaintiff's Exhibit Number 2
16 and ask you to look on the bottom of the first page of
17 that and also the bottom of the second page and read
18 into the record what seems significant to you on a
19 factual level about whether the insurance company was
20 being...

21 A. You want me to read down here?

22 Q. Well, just read it. And while you're looking at
23 that, I'll hand you Plaintiff's Trial Exhibit 36 which
24 also deals with the Koi pond.

25 A. All right, sir.

1 Q. What do those log notes say was the fact and what
2 do those suggest on a factual level what's the
3 reasonable action for?

4 A. Well, either discussions about the potential damage
5 that may occur to the drive, and these are
6 Mr. Madden's, I believe, comments to Mr. Flanagan or
7 addressing somebody that the potential damage that you
8 think may occur to the drive, et cetera, should not be
9 paid unless the mortgage company files a claim if, if
10 needed, if repairs are made and also a comment on the
11 scope of damages detached structure which is Coverage
12 B, comments that the Koi pond will have to be taken out
13 and put back to repair the dwelling. There will also
14 be damage to sidewalk around the dwelling or also the
15 driveway in the repair or replacement process, so
16 that's where I got it that there was additional, that
17 there was damage there that potentially would have
18 resulted in a claim under Coverage B.

19 MR. CLINCH BELSER: Thank you very much.

20 MR. MURPHY: Briefly?

21 THE COURT: You are limited on what was brought out
22 on re-exam.

23 Recross-Examination by Mr. Murphy:

24 Q. You talked a little bit about the Cause and Origin.
25 But you are not commenting on the reasonableness of the

1 decision of whether this was an incendiary fire because
2 that's not your area of expertise, is it?

3 A. That's correct. I'm not an expert in Cause and
4 Origin.

5 Q. So whether tests were dispositive or not, you have
6 no comment, that's not your area?

7 A. That's correct.

8 MR. MURPHY: Okay. Thank you.

9 THE COURT: You may step down.

10 MR. CLINCH BELSER: I just ask this Witness be
11 excused.

12 MR. MURPHY: Most certainly, Your Honor.

13 THE COURT: All right. Very good.

14 All right, Mr. Hesse, you may be excused.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Ladies and gentlemen, again, I
17 apologize, but I do think it was important that we
18 finish as much of the testimony as we could this
19 morning, or now early afternoon.

20 I'm going to let you go to lunch at this time.
21 Again, you think about an hour, 2:30? Come back and be
22 in the jury room at 2:30 and we'll resume the trial
23 then. Again, do not undertake discussion of the case
24 among yourselves in any way.

25 (Whereupon, the Jury left the courtroom at

1 approximately 1:25 p.m.)

2 THE COURT: How many more do we have from the
3 Plaintiff?

4 MR. CLINCH BELSER: No more live witnesses.

5 THE COURT: All right. You do have a deposition?

6 MR. CLINCH BELSER: At this hour I don't want to
7 start doing that.

8 THE COURT: I'm just asking. So you've got a
9 deposition?

10 MR. CLINCH BELSER: A short reading of the
11 deposition and debate whether to do that.

12 THE COURT: Let's break for lunch and let me know.

13 MR. MURPHY: Mr. Madden is here and I'm gonna put
14 him up in my case if that helps in their decision. I'm
15 not trying to limit his use of it.

16 THE COURT: If something should happen before you
17 get to your case, and Mr. Madden should be present, it's
18 better to go ahead and do it while we're here. How many
19 have you got?

20 MR. MURPHY: We have five witnesses. And we'll try
21 to be brief, but the three insurance company personnel,
22 Mr. Flanagan, Mr. Madden and Mr. Gilden. We would like
23 to get Gilden and Mr. Madden done today because they are
24 not parties so they can go home. We have our Cause and
25 Origin expert, Jerry Byers, is here.

1 THE COURT: He is from Greenville?

2 MR. MURPHY: Yes. If we get started close to 2:30
3 in the Defendant's case.

4 THE COURT: If we have no other issues coming up,
5 we'll go ahead and start with the, read the whatever you
6 have in the deposition and then -- it's a little
7 premature, but I'd almost like to hear some Motions.

8 MR. MURPHY: I'd be glad to protect this on the
9 record or do it at the end of the day.

10 THE COURT: Let the record note Motions made at the
11 conclusion of all of the Plaintiff's case.

12 MR. MURPHY: Yes, sir.

13 THE COURT: All right. Very good.

14 MR. MURPHY: I'm thinking in my head of what is
15 realistic to get done today. If we are able to do
16 Mr. Gilden, Mr. Madden and Mr. Byers, between 2:30 and
17 5:15, then we'll just have the two short witnesses, one
18 expert in the morning and then Mr. Holecek. He's from
19 Columbia. If we had those two in the morning, they
20 would be rather short and then we would be at a place
21 mid-morning to proceed.

22 THE COURT: All right. Very good. I'll see you
23 back at 2:30.

24 (A luncheon recess occurred at 1:30 p.m.)

25

1 Afternoon Proceedings

2 2:30 p.m.

3 THE COURT: All right. Anything from the
4 Plaintiff?

5 MR. CLINCH BELSER: Nothing further. Other than we
6 further shortened the reading of the deposition.

7 THE COURT: All right. But you are gonna do the
8 deposition?

9 MR. CLINCH BELSER: Yes, sir.

10 THE COURT: Anything from the Defendant?

11 MR. MURPHY: Nothing, Your Honor.

12 (Court's Ex. # 2, Deposition Excerpts from
13 Deposition of Andrew Flanagan which were read to
14 Jury, was marked for identification.)

15 (Court's Ex. # 3, Deposition Excerpts of Michael K.
16 Madden which were read to Jury, was marked for
17 identification.)

18 THE COURT: Very well. Ask the Jury to join us,
19 please.

20 (Whereupon, the Jury entered the courtroom at
21 approximately 2:44 p.m.)

22 THE COURT: Let the record reflect the Jury and
23 alternate are in the Jury box.

24 We'll now proceed with the Plaintiff's case.

25 MR. CLINCH BELSER: May it please the Court, the

1 last thing we would like to do in terms of the testimony
2 is publishing something from the Deposition of
3 Mr. Michael Madden. We have shortened the selections,
4 and by popular demand we've got a new reader and I'll be
5 sitting down.

6 THE COURT: Very well.

7 MR. CLINCH BELSER: I'll hand up the copy of
8 Mr. Madden's Deposition to the Court.

9 THE COURT: Very good. All right. Let the record
10 reflect that the Court has been provided the original
11 deposition of Michael K. Madden taken in September,
12 2011, in Columbia, South Carolina.

13 All right. And, Mister Foreman, ladies and
14 gentlemen of the Jury, again, this is a deposition taken
15 outside of the courthouse at the time and the place as
16 determined by the parties. Each party is represented by
17 Counsel, and the Deponent, Mr. Madden, will be under
18 oath, so you should treat it just as if he was
19 testifying from the stand here.

20 You may proceed.

21 MR. FREEMAN BELSER: Thank you, Your Honor. Just
22 briefly, we've marked as an exhibit the portions of the
23 deposition transcript and given that to your law clerk
24 and also to the Clerk. I'm gonna blow up the exhibits
25 just to make it easier. The exhibits are in evidence

1 and will go in the jury room with you.

2 Mr. Durham, let's start on Page 27.

3 Reading Deposition Excerpts of Depo of Mr. Madden:

4 (Whereupon, the foregoing Deposition transcript is
5 transcribed as read by the readers, Mr. Freeman
6 Belser reading the questions, and Mr. Durham
7 reading the answers.)

8 Reading by Mr. Freeman Belser:

9 Q. I show you a four-page document which was produced
10 by the Defense Counsel earlier and it's been marked
11 Exhibit 1 in the lower right-hand corner and also below
12 that there are some numbers, NWO 35 on the first page
13 and on the other pages after that are 36, 37 and 38,
14 and that's the last one, 38. Do you recognize this?

15 A. I recognize the form, yes.

16 Q. Can you identify this for the record?

17 A. It's a Property Loss Report Form. It's basically a
18 snapshot of the file and what the investigations
19 uncovered, coverages and so forth.

20 Q. Who prepares this?

21 A. The claim associate.

22 Q. Can you tell me by looking at this who prepared
23 this document?

24 A. Yes. Andrew Flanagan.

25 MR. FREEMAN BELSER: I'd like to introduce this as

1 Exhibit 1 for the record, it's already been marked.

2 Q. Now, the first question I'd like to ask you about,
3 this is on Page 1. Do you see the portion in the
4 middle of paragraph 3 where it says policy type and
5 coverage information? It says Option J, Contents RC?
6 Do you see that?

7 A. Yes.

8 Q. Can you explain that for the record, please?

9 A. It gives replacement cost coverage for the
10 contents.

11 Q. And does, is it fair to say that that means if
12 there is a covered loss, that Nationwide is obligated
13 to its policyholder to pay the replacement cost for the
14 contents which have been destroyed or lost in the fire?

15 A. If he replaces them, it does, yes, up to whatever
16 the policy limits are.

17 Q. Okay. And depreciation for the fact that something
18 might have been used for a day or a year or two years
19 is not a proper deduction from what Nationwide would
20 pay under the terms of the policy?

21 A. It's based on the item itself and the condition of
22 it, the age and condition of it.

23 Q. But the replacement cost means what it costs to
24 replace it, it's not the same thing as what's sometimes
25 called actual cash value, is it?

- 1 A. The replacement cost is just that. Because the
2 coverage for that, if they do replace it, the policy
3 has specific language in there that says that we'll pay
4 ACV until the item is replaced and then we'll pay RC.
- 5 Q. Okay. All right. Let's look down to the next line
6 where it says K -- I mean Option K, dwelling
7 replacement cost plus 20 percent. Do you see that?
- 8 A. Yes.
- 9 Q. Can you explain that, please?
- 10 A. That's guaranteed replacement cost. What that
11 does, it gives an additional 20 percent over and above
12 their limits in case the actual repairs cost more than
13 what the limits are for replacement.
- 14 Q. And it's up to 20 percent of what?
- 15 A. Coverage A.
- 16 Q. Okay. And Coverage A is what? Is that the stated
17 amount of the policy?
- 18 A. That's the dwelling limits, Coverage A is.
- 19 Q. All right. Now, looking at the bottom of this
20 first page of exhibit 1, you see where the coverages
21 are listed in the far left, Coverage A, Coverage B,
22 Coverage C, Coverage D, et cetera, down in the left
23 column there?
- 24 A. Yes.
- 25 Q. Now, what is Coverage A in this particular policy?

- 1 A. The base limit is 147-7.
- 2 Q. What do you mean by the base limit?
- 3 A. That's what, that's what the base coverage is,
- 4 \$147,700.
- 5 Q. Is that the value which was set by the insurance
- 6 company and the insured when the policy was issued as
- 7 the --
- 8 A. Uh-huh.
- 9 Q. -- insured value of this, of the house?
- 10 A. That's correct..
- 11 Q. And what is the next column here, ED-LD?
- 12 A. That's the inflation factor that's been calculated.
- 13 Q. Please explain that for me.
- 14 A. The policy has a built-in inflation protection
- 15 guard for it, and it's based on ED-LD factors which
- 16 you'll see over to the left column just above the
- 17 limits. You'll see where the inception date was and
- 18 the loss date, the different factors that are there.
- 19 And they give it a 1.0435 that's multiplied by the
- 20 147-7 to give additional coverage for it. So it
- 21 actually gives additional coverage over and above what
- 22 the base was.
- 23 Q. What do the initials "ED" represent?
- 24 A. It's inception date and the loss date is what it
- 25 stands for.

1 Q. E is inception?

2 A. Yeah. It's not, it doesn't, it's not the right
3 spelling, but that is what it is.

4 Q. That's why we're here today, to find out. All
5 right. And so with the inflation guard as you call it
6 or inflation something, the value of this, of the
7 amount of coverage for the subtotal is what?

8 A. \$154,125 which is the base.

9 Q. All right. Just go to the right of that. There's
10 a column headed GRC.

11 A. That's your option K.

12 Q. What?

13 A. The guaranteed replacement cost. So it would be
14 the 20 percent of the \$154,125.

15 Q. All right. So the figure on the far left -- far
16 right total limit is what?

17 A. \$184,950.

18 Q. All right. Under what circumstances is that
19 payable by Nationwide according to your understanding?

20 A. The limit that he would get, let's say that on a
21 total loss, if it was totaled, had to be rebuilt, the
22 \$154,125, if that was not enough to cover, if that was
23 not enough coverage to take care of, then he's got up
24 to \$30,825 additional coverage to take care of it.
25 That's the guaranteed portion of it. So he technically

1 could have up to \$184,950 if it took that much to
2 rebuild what he had.

3 Q. So is it fair to say that if he actually rebuilt it
4 and it actually took that much, Nationwide would pay up
5 to \$184,950 for rebuilding a total loss fire?

6 A. If it took that much, yes.

7 Q. Now, turning the page 26, Mr. Dillard, line 21.

8 Okay. Now, skipping ahead from this actual page,
9 you say you are familiar with the history of this
10 claim; is that correct?

11 A. Uh-huh.

12 Q. And how do you know whether the Coverage A, the
13 basic Coverage A, was paid to the mortgage companies in
14 this case?

15 A. The mortgage companies were paid, that's correct.

16 Q. Okay. Is it correct that that was paid just to the
17 mortgage companies and Mr. Fowler himself was, received
18 no cash for Coverage A?

19 A. That's correct to my understanding.

20 Q. But if all the policy conditions were satisfied,
21 the total amount of \$184,950, would be is the maximum
22 that Nationwide would be required to pay if all the
23 conditions were met?

24 A. Correct. On the structure.

25 Q. On the structure, Coverage A; is that correct?

- 1 A. That's correct.
- 2 Q. Now, before we leave page 1, let's look in the
3 middle of the page where it has the letter G and the
4 insured to value, and then there's a Y. Can you
5 explain what that is, please?
- 6 A. We have an initial investigation that appeared that
7 it was insured to the value, to the appropriate value.
- 8 Q. In other words, when the insurance company and the
9 agent and the policyholder set the amount of coverage,
10 this was saying they set the right amount?
- 11 A. Yeah.
- 12 Q. Okay. While still looking at Page 1 of Exhibit 1,
13 would you tell me what Coverage B is?
- 14 A. An attached structure.
- 15 Q. And what is the limit of that for Mr. Fowler's
16 policy?
- 17 A. \$44,190 with the base, and then with inflation
18 added it's brought up to \$46,113.
- 19 Q. What are samples -- what are some examples of other
20 structures?
- 21 A. Detached garage, fences, driveways, pools. So
22 forth, such as that.
- 23 Q. A fish pond, would that --
- 24 A. Could be.
- 25 Q. Storage shed?

- 1 A. Right.
- 2 Q. And a driveway?
- 3 A. Yes.
- 4 Q. Okay. So, if I understand what you are saying, it
- 5 is fair to say that the attached structure doesn't have
- 6 to be a building, but something which is constructed
- 7 like a driveway, but depending on the cost to fix it,
- 8 the maximum exposure of Nationwide would be this figure
- 9 of \$46,113; is that correct?
- 10 A. That's correct.
- 11 Q. Do you know whether Nationwide has made payment to
- 12 anybody under Coverage B?
- 13 A. I'm not sure if they have or not. No, I don't, I
- 14 don't think they have.
- 15 Q. You say they --
- 16 A. Or we.
- 17 Q. Let me show you another document which has been
- 18 marked as Exhibit 2.
- 19 Now let's go to page 35, line 19.
- 20 In this case were the mortgage companies advised,
- 21 do mortgage companies have a copy of the policy?
- 22 A. I don't know if they did or not. They should.
- 23 Q. Were they told that was an option, they could
- 24 request that, or was that just between you and
- 25 Mr. Fowler -- Mr. Flanagan, excuse me?

1 A. They should be aware of it. Now, whether they've
2 got a copy I don't know. Most, most of the time they
3 do have a copy of them, but whether they keep it that's
4 a different story. I couldn't tell you.

5 Q. Okay. Now, according to your familiarity with the
6 file and the history of this case as you know it, it's
7 your understanding, however, that the mortgage
8 companies just were paid up to the figure of \$154,125?

9 A. Correct.

10 Q. Now, do I -- is it fair to interpret Mr. Flanagan's
11 log entry to you that he wanted to pay Coverage B of
12 the exact estimate?

13 A. Correct.

14 Q. That's what he wanted to do?

15 A. That's correct.

16 Q. But you said, no, you have to wait until the
17 mortgage company makes a claim?

18 A. That's correct.

19 Q. And under that coverage, if they made the claim,
20 the amount they could get was an additional \$46,113?

21 A. Up to that amount.

22 Q. If that's what it cost?

23 A. Right.

24 Q. And then Line 11, Page 37.

25 Pursuant to your instructions did you go ahead and

- 1 pay the lienholders the Coverage A limits?
- 2 A. That's correct.
- 3 Q. And he made no payment under Coverage B?
- 4 A. No.
- 5 Q. Let's look back now at Exhibit 1 and turn to the
- 6 third page which has on it NW 37. What does it say in
- 7 the entry for Coverage B which has been highlighted in
- 8 yellow?
- 9 A. Extensive damage to a koi pond in front of the
- 10 dwelling. The pond runs the entire length of dwelling
- 11 and will have to be taken apart and replaced as the
- 12 liner is ripped. Boulders have to be removed and
- 13 reset. Exact estimate in the log.
- 14 Q. Does that mean that there was already damage to the
- 15 Koi pond because the liner was ripped?
- 16 A. Appears there might have been, yeah.
- 17 Q. So, according to this entry in the log, there was
- 18 already damage, but no payment was made to anybody for
- 19 that damage from the other structure which is here as
- 20 the Koi pond?
- 21 A. I would have to look back in the file to see for
- 22 sure.
- 23 Q. Well, look at this right here. Isn't that what
- 24 that means?
- 25 A. No, it doesn't mean that there wasn't payment made,

1 but I would have to look in the file and see.

2 Q. Okay. Does this mean if the liner was ripped as
3 this says, then there should have been a payment
4 because this damage, this was damage to another
5 structure?

6 A. Uh-huh, yes.

7 Q. And do you have any reason to believe that
8 Mr. Fowler -- I'm sorry. Start this question over.

9 Is there any reason to believe that Mr. Flanagan
10 was in error when he wrote in this official log that
11 the liner was ripped?

12 A. No, not to my knowledge it wasn't an error.

13 Q. So the Koi pond was another structure which was
14 covered by Coverage B; is that correct?

15 A. Uh-huh, yes.

16 Q. And Page 39, Line 14.

17 Then is it fair to say that some additional
18 payments should have been made because there was
19 already damage to the liner?

20 A. Okay. As I stated, I don't know if it was, if it
21 was paid or not because I don't have the file in front
22 of me.

23 Q. I know. But I'm just saying, was, should it have
24 been paid?

25 A. Could have been.

1 Q. Now, what is the reference there which is the last
2 portion which is highlighted for Coverage B exactimate
3 estimate in the log?

4 A. That means written estimates has been in the file.

5 Q. So that means -- is it fair to say that means that
6 Mr. Flanagan already had a figure for the damage to the
7 liner?

8 A. Yes.

9 Q. And if the mortgages were not paid off in full,
10 then under Coverage B additional payments should have
11 been made?

12 A. Yes.

13 Q. Do you have an understanding of that amount, or
14 what that amount was?

15 A. No, I don't.

16 Q. Could that be determined by looking somewhere in
17 the log and --

18 A. Yes.

19 Q. Okay. And do you know -- how would you -- strike
20 that.

21 You could also look in the log to tell whether the
22 payment of any sort was made?

23 A. Yes.

24 Q. Do you have any present reason to believe that it
25 was actually paid?

1 A. I can't say it was or wasn't. I don't know without
2 looking in the file.

3 Q. Okay. Turn to Page 49.

4 Is that based on the experience of Nationwide that
5 in practical terms the insured and the mortgage company
6 and the contractor need to get money up front to do the
7 work to which they are entitled if they are entitled?
8 You pay up front so the policyholder who's had a loss
9 doesn't have to come out of pocket and do it himself or
10 herself?

11 A. Well, once you establish that the claim is owed and
12 what the damages are, we'll pay it if that's what you
13 are asking.

14 Q. Right.

15 A. Yeah.

16 Q. Now, the question would be the reason for that. Is
17 it because it would be it's recognized that it would be
18 impossible for the policyholder to do it any other way?

19 A. No. It's simple. It's owed, so you pay it.

20 Q. Okay.

21 A. It's got nothing to do with if they need it to get
22 started. It's that we owe the money so let's pay it.

23 Q. Okay. Is that the way you do it for the Coverage
24 D, also? How do you know how much to pay for Coverage
25 D?

1 A. As an incurred basis, unless you've already
2 established a lease, such as they were gonna rent a
3 house or apartment, and you know what that's gonna be
4 so you can go ahead and pay that up front.

5 Q. Okay. What about the estimate of six months as is
6 shown on Page 3 of Exhibit 1 turns out to be not long
7 enough?

8 A. Then you would add to it.

9 Q. Nationwide would then pay more at the end of the
10 six months, however long it took for the house to be
11 rebuilt?

12 A. Correct. However long that they have, which is 12
13 months.

14 Q. Okay. So there's also a limit on how much, on how
15 much you will pay if it's this figure of \$154,125?

16 A. That's correct.

17 Q. So if it took --

18 A. It took --

19 Q. -- such a long time that the rent for a comparable
20 place amounted to \$154,125, that's the most you would
21 have to pay?

22 A. That's correct.

23 Q. Okay. Now, why is -- going back to Exhibit Number
24 1. Is there a coverage specified on Exhibit Number 1
25 for debris removal?

- 1 A. Yes. Under additional coverages.
- 2 Q. What is the amount of that coverage?
- 3 A. It's a built-in amount of 5 percent for Coverage A
- 4 for the coverages. So, in other words, if the repairs
- 5 to the dwelling, including the debris, exceeded the
- 6 \$154,125, they would have an additional 5 percent just
- 7 for debris to be used to clear the debris out, which in
- 8 this case was 7,708 -- no -- 6 dollars.
- 9 Q. Was there a similar coverage for the detached
- 10 structures such as the Koi pond or the driveway?
- 11 A. Same percentage.
- 12 Q. What is the percentage?
- 13 A. Five.
- 14 Q. And is there a debris removal coverage for the
- 15 contents?
- 16 A. Yes.
- 17 Q. And?
- 18 A. Same percent.
- 19 Q. The same amount of that is what?
- 20 A. 5 percent of \$114,692, which appears to be --
- 21 Q. Okay.
- 22 A. -- \$5,735.
- 23 Q. The total is there. What is the last figure on the
- 24 lower right-hand corner of Exhibit 1, Page 1?
- 25 A. The number \$523,333. Is that what you're asking?

- 1 Q. Yes, sir. What does that mean?
- 2 A. That's the total of all coverages payable. It's
- 3 the total amount of coverages if that much was
- 4 incurred.
- 5 Q. Okay.
- 6 A. It's the combination of all the coverages.
- 7 Q. Is the policyholder entitled to get the debris
- 8 removal paid in advance?
- 9 A. No. It's on an incurred basis if it's over the
- 10 limits.
- 11 Q. What do you mean if it's over the limits?
- 12 A. If it's over the limits of \$154,125, whatever it
- 13 cost them, including debris removal, that's where the
- 14 five percent would come into play.
- 15 Q. So, if I understand you correctly, that these
- 16 amounts, \$7,708, \$2,306, \$5,735, those were added to
- 17 the numbers which were above them for Coverage A, B and
- 18 C?
- 19 A. Those where additional coverages if the other
- 20 coverage limits are met.
- 21 Q. Okay. Now is there a similar, a similar entry here
- 22 for landscaping?
- 23 A. Yes.
- 24 Q. And what's the amount of coverage for landscaping?
- 25 A. It's also at five percent of Coverage A up to which

1 is \$7,706.

2 Q. Okay. Under any circumstances does the
3 policyholder have the right to do the work himself?

4 A. It's his option.

5 Q. So, if the policyholder does the work himself, he
6 can be paid the fair market, the fair value of his work
7 up to these amounts?

8 A. Yes.

9 Q. Okay. Before we finally leave Exhibit Number 1,
10 let's look at Page 3 of Exhibit 1 and ask you about the
11 entry for debris removal.

12 A. Uh-huh.

13 Q. What does that say and what does that mean?

14 A. It's telling me that the claims associate has
15 written an estimate and for debris removal it exceeds
16 its limits.

17 Q. In other words, that says that the estimated cost
18 to remove the debris was actually more than this five
19 percent?

20 A. Right.

21 Q. So the estimated cost of the debris removal was
22 more than just the \$7,708 for the contents, for the
23 dwelling, or was it, or was it more than that plus
24 \$565,735, which was debris removal for the contents?

25 A. He didn't specify here, but it's probably both.

1 Q. How can we determine what is the exactimated
2 estimate?

3 A. You would just have to look at his estimate. That
4 would be in the file.

5 Q. Okay. And that is the estimate of the fair cost of
6 getting it done by a third party?

7 A. Correct.

8 Q. Okay. Turn to Page 60.

9 Let me show you now a document that's marked
10 Exhibit Number 6 and ask you to identify that for the
11 record, please, sir?

12 A. It's another printout from the log.

13 THE COURT: All right. Let's take a short break at
14 this time. Again, do not undertake discussion among
15 yourselves in any way. We'll get back to the testimony
16 in a moment.

17 (Whereupon, the Jury left the courtroom at
18 approximately 3:06 p.m.)

19 THE COURT: I have a note from the Jury: A juror
20 does not feel good and a break is requested. So we'll
21 have to wait to find out what the situation is.

22 Madam Clerk, if you would go check. All right.
23 We'll just stand at ease.

24 We're off the record.

25 (A recess was taken.)

1 THE COURT: Madam Clerk, I feel more comfortable if
2 you would inquire of the Jury if they are ready to come
3 back.

4 THE CLERK: I surely will.

5 (The Clerk leaves courtroom and returns.)

6 THE COURT: I understand the Jury is ready to come
7 back. Anything from the Plaintiff?

8 MR. CLINCH BELSER: No, sir.

9 THE COURT: Or the Defendant?

10 MR. MURPHY: No, Your Honor.

11 (The Jury entered the courtroom at approximately
12 3:25 p.m.)

13 THE COURT: All right. Let the record reflect the
14 Jury and alternate are in the Jury box.

15 We will now continue with deposition testimony.

16 MR. FREEMAN BELSER: Thank you, Your Honor.

17 Mr. Durham, Page 60.

18 Q. Let me show you now a document that's marked
19 Exhibit Number 6 and ask you to identify that for the
20 record, please, sir.

21 A. It's another printout from the log.

22 Q. Do you recognize this?

23 A. Let's see. Yes. It's where Mr. Flanagan was
24 requesting a copy of the C and O report with the
25 insured.

1 Q. All right. Let's mark Exhibit Number 6 and let's
2 introduce into the record what's already marked Exhibit
3 6. Is the entry at the top dated 2009-216, time
4 14:55:06 an entry by you?

5 A. Yes.

6 Q. Now, is it fair to say from these two entries that
7 Mr. Fowler had requested a copy of the C and O report
8 but Nationwide declined to give it to him?

9 A. That's correct.

10 Q. And the C and O report is what?

11 A. Cause and Origin.

12 Q. And that's the report which Nationwide had
13 Mr. Byers perform?

14 A. Yes, TIS.

15 Q. Right. And is it your policy personally or is it
16 Nationwide's standard policy to refuse to give a
17 policyholder a copy of a C and O?

18 A. It's standard procedure.

19 Q. All right. But what's stated in your responsive
20 log entry was, If he files suit, he would be given it
21 then in discovery; is that correct?

22 A. Right.

23 Q. So is it fair to say that you knew that if a
24 lawsuit was filed, the company would be required to
25 give the C and O report at that time?

- 1 A. Yes.
- 2 Q. And can you explain the words, quote, at discovery,
3 end quote? What do you mean by that phrase?
- 4 A. When Plaintiff's counsel is in discovery, when they
5 are investigating a file.
- 6 Q. Okay.
- 7 A. An investigation.
- 8 Q. So essentially you knew and Nationwide knew that if
9 Mr. Fowler did file a lawsuit, you would have to give
10 it to him anyway?
- 11 A. Yes, sir.
- 12 Q. Was it the hope of Nationwide that he wouldn't file
13 a lawsuit so you wouldn't have to give it to him?
- 14 A. No.
- 15 Q. But you say you wanted to be, have the lawsuit if
16 he --
- 17 A. No.
- 18 Q. If he was gonna ask for this? You wanted to be
19 sued?
- 20 A. No, we didn't want to be sued.
- 21 Q. Well, why is it that you don't give it to them?
- 22 A. It's proprietary.
- 23 Q. Unless he files a lawsuit?
- 24 A. It's proprietary information from our
25 investigation.

1 Q. When Nationwide carries out their standard
2 procedure of withholding the C and O report unless
3 there's a lawsuit, does it sometimes happen that the
4 policyholder does not file a lawsuit, and so you never
5 have, never have to give it to them?

6 A. I'm not sure if I understand the question.

7 Q. Does it sometimes happen that because of
8 Nationwide's standard procedure not to give a C and O
9 report unless there's a lawsuit, does it sometimes
10 happen that the policyholder never files a lawsuit so
11 you never have to give the report?

12 A. There's probably been sometimes, yeah, since
13 there's, if there is subrogation involved, to benefit
14 the insured, yeah, you know, we'll give it to them to
15 help them out.

16 Q. Or she. Now let me show you what's been marked
17 Exhibit Number 7 and ask you to identify that for the
18 record, please.

19 A. That's a log note where Mr. Flanagan is letting me
20 know that the insured is wanting the heater, the
21 kerosene heater, and drop cords to have tested.

22 Q. Okay. And also that he declined to turn those back
23 over to the policyholder unless he hired an expert; is
24 that correct?

25 A. No. Not unless he hired an expert. No. It's an

1 attorney. What was your question?

2 Q. Well, let's, well, let's enter this into evidence
3 first, Exhibit 7, and then I'll ask you the question
4 again.

5 Is it fair to say based upon this Exhibit Number 7
6 that Nationwide through Mr. Flanagan declined to give
7 Mr. Fowler his kerosene heater and the drop cords
8 unless Mr. Fowler hired an expert?

9 A. No. What he's saying here is that if he hired an
10 expert, then we would allow him to inspect it if that's
11 what you are asking.

12 Q. Well, read what's highlighted here on the top.

13 A. All right. Policyholder asks if he could have the
14 kerosene and the fire and the drop cords back to have
15 tested on his own. CA indicated that if the
16 policyholder hired an expert, the expert could get in
17 touch with me for an inspection of that evidence.

18 Q. Okay. So is that also a standard procedure to
19 decline to give the policyholder back things like the
20 kerosene heater unless he hires an expert?

21 A. Yes and no. What we'll do is allow him to inspect
22 it if that's present.

23 Q. So, is Mr. Flanagan, the CA, or claims associate
24 deviating from standard procedure by telling
25 Mr. Fowler, the policyholder, that he would do it if

1 there was an expert?

2 A. No.

3 Q. Okay. Page 67.

4 Let me show you another document which is marked
5 Exhibit Number 8 and ask you to look at it and briefly
6 identify it for the record if you can.

7 A. It's a note to the file from Flanagan.

8 Q. Is this part of the Nationwide log system?

9 A. Yes.

10 Q. Let's enter Exhibit Number 8 into the record.

11 Let's look at the middle part where it says several
12 notes. One, two, three. Do you see that, sir?

13 A. Uh-huh.

14 Q. What's the reason for making those notes? Do you
15 know?

16 A. No, not really. It's just putting in the file what
17 he, what his observation was.

18 Q. Well, read the note number one?

19 A. Policyholder has several unusually expensive items
20 such as a \$5,000 grandfather clock.

21 Q. Okay. Have you ever -- did you come to that -- did
22 that come to your attention before?

23 A. I read it, yes.

24 Q. And what is note number three?

25 A. Three?

- 1 Q. Yes, sir.
- 2 A. Policyholder has some high grade hardwood
3 furniture.
- 4 Q. Is it fair to say from those entries that
5 Nationwide knew as of the date of this entry, which is
6 January the 22nd, 2009, that the policyholder had some
7 expensive contents and was gonna be a big loss?
- 8 A. Just the fact that he had some, had some nice
9 things there.
- 10 Q. Okay. That was recognized by Nationwide as early
11 as three days after the fire?
- 12 A. Yes.
- 13 Q. Or five days after the fire?
- 14 A. Uh-huh.
- 15 Q. On Page 72.
- 16 Okay. Let's enter this Exhibit A into the record.
17 It's marked Exhibit A. Now let's look at the very
18 bottom where it says 0504 SUI file conference, large
19 claim conference. Do you see that, the bottom of the
20 page?
- 21 A. Oh, yeah, uh-huh.
- 22 Q. Who made that entry?
- 23 A. Bill Gilden.
- 24 Q. What time did he make that entry?
- 25 A. 11:13 and 33 on 2-13-09.

1 Q. Okay. And does that mean that, does that mean that
2 was the time the large conference room, the large loss
3 conference began?

4 A. No. I can't speak for him on that, no.

5 Q. Well, the entry was made on what time, 11:13:33?

6 A. Uh-huh.

7 Q. Were you present at that meeting?

8 A. Yes.

9 Q. And is it -- do I understand the system that this
10 entry right here just reflects what happened? There's
11 no, there are no minutes anywhere of what actually
12 happened in detail; is that correct?

13 A. No. That's correct.

14 Q. Just for the record, is that correct that there
15 were no minutes, is that what you mean?

16 A. Uh-huh, yes.

17 Q. Page 75.

18 Do I understand that you -- I'm not sure I
19 understand your questions -- your answers, so I'm gonna
20 ask the question again. Is it your belief that the
21 entries and the words and the entry at 11:14:57 reflect
22 what happened at the meeting which was entered at
23 11:13:33?

24 A. No. As I stated, this appears to be an SIU closing
25 log. It is putting just a brief recap of what his

1 investigation has uncovered.

2 Q. Okay. Well, the second entry does not, it mentions
3 that the results of the accelerant samples were
4 negative; is that correct?

5 A. Yes.

6 Q. And there's no explanation as to why that was not
7 important or no discussion of that in this entry, is
8 there?

9 A. No.

10 Q. Now, the second entry in the middle of the page
11 also indicates that the policyholder contacted his
12 neighbor to notify the authorities. Do you see that?

13 A. Yes.

14 Q. Is there any explanation of why that's not
15 important in this entry or any other slot in your log,
16 to your knowledge?

17 A. No.

18 Q. Page 77.

19 Well, all right. The entry by Mr. Gilden also
20 indicates that the policyholder was planning, preparing
21 his house to put on the market to sell. Do you see
22 that?

23 A. Yes.

24 Q. Is there any entry in this, any statement in this
25 entry, or any other entry to your knowledge as to why

1 that was not important?

2 A. Importance is not mentioned, so no.

3 Q. Wouldn't you agree that the fact that the
4 policyholder was preparing his house for sale would
5 suggest that he would not be the one to burn the house?

6 A. No.

7 Q. Why not?

8 A. Well, that's what his testimony is. That doesn't
9 mean that he was doing it. We have to make our
10 decision based on the facts of the investigation.

11 Q. Well, this entry, this SIU closing, states as a
12 fact that he was preparing his house to put on the
13 market to sell.

14 A. Uh-huh.

15 Q. Isn't that correct?

16 A. It is.

17 Q. Page 79.

18 Let's enter Exhibit 11 into the record. Is it fair
19 to say that this entry, which has been highlighted here
20 from January the 18th, 2009, at 12:19:34 indicates that
21 Mr. Fowler had told Nationwide that the mortgage
22 companies had agreed that he could sell the building or
23 he was gonna try to sell the building?

24 A. That's a statement from the insured, yes.

25 Q. So, as early as that date Nationwide knew that that

- 1 was what Mr. Fowler said?
- 2 A. Yes.
- 3 Q. Do you have any indication to your knowledge that
- 4 that was not the case?
- 5 A. No.
- 6 Q. And it was entered into Mr. Gilden's report
- 7 February the 13th, which is on Exhibit Number 10, that
- 8 that is the fact?
- 9 A. Right.
- 10 Q. Stated as a fact?
- 11 A. Uh-huh.
- 12 Q. Page 82. What did that say the period of
- 13 restoration would be?
- 14 A. Approximately seven months.
- 15 Q. And that was Mr. Flanagan's estimate at that time?
- 16 A. Yes.
- 17 Q. Do you know why this was lowered to six months on
- 18 Exhibit 1, Page 3?
- 19 A. Well, this early on in the investigation, and
- 20 that's what his estimate is. It's just a guess, that's
- 21 all that it is.
- 22 Q. All right.
- 23 A. It can go up, as we stated earlier, or it could go
- 24 down.
- 25 Q. All right. Do you know why he would say

1 Mr. Fowler, the policyholder, would need a one-bedroom
2 apartment?

3 A. He's one person, I would assume. I don't know.

4 Q. Was an earlier discussion -- did I understand you
5 to say that he was entitled to a comparable place or a
6 place comparable to what had been insured?

7 A. He is. But he was also living in the gazebo.

8 Q. But he's entitled to comparable what was insured;
9 is that correct?

10 A. That's correct.

11 Q. At the bottom of the page there's an entry by
12 Mr. Flanagan at 12:41:49. It mentions the word
13 "landscaping." Would you read that into the record,
14 please.

15 A. (Reading): Other coverages. Landscaping. Lot
16 around the house is extensively landscaped. There are
17 48 large bushes and 24 small bushes that were either
18 damaged by fire, will have to be taken out to
19 adequately repair the dwelling. Several trees to also
20 be taken out. There will also be a large portion of
21 labor spent on removing and resetting rocks,
22 lighthouses, and other various landscaping items. It's
23 basically the scope of what may be needed if he does
24 repair the house.

25 Q. All right. Well, to the extent that there were

1 some of the large bushes and small bushes that were
2 damaged, wouldn't that complicate the landscaping
3 coverage of the policy?

4 A. It would be, yes.

5 Q. At the bottom of the page.

6 And were you personally aware in those months that
7 Nationwide was not giving him any money to finance his
8 getting a house comparable to the house that was
9 insured?

10 A. I believe at the time he didn't want anything. He
11 wanted to stay in the gazebo, as I recall.

12 Q. Okay. Page 87.

13 Were you familiar with the log entries by
14 Mr. Flanagan earlier on where he had decided he did not
15 want to pay Mr. Fowler?

16 A. He doesn't make the decision. It's made after a
17 conference. And then we make a decision based on the
18 facts of the investigation.

19 Q. Okay. Page 89.

20 So, would it be fair to say that from time to time
21 after the SIU investigation was commenced Nationwide
22 was considering whether or not to approve the claim?

23 A. No. We did an investigation to try to --

24 Q. Do you have investigations of all claims?

25 A. Yes. Any fire we do an investigation.

1 Q. Page 90.

2 So in the very -- so just a few days after the fire
3 the claim was being investigated because, as it says
4 here in Exhibit Number 10, the claim was referred for
5 investigation during the claims associate's initial
6 investigation he determined that the policyholder had
7 opportunity and motive for starting the fire?

8 A. Yes.

9 Q. So is it fair to say that before the SIU
10 investigation started, that Mr. Flanagan had already
11 determined himself, subject to your approval there,
12 that Mr. Fowler had opportunity and motive for starting
13 the fire and that's why the investigation occurred?

14 A. Yes.

15 Q. And to your knowledge was there any change in
16 Mr. Flanagan's position or the company's position when
17 the company learned that the Friendship Fire Department
18 had done a report saying that the fire was
19 unintentional?

20 A. Yes.

21 Q. Were you aware that the Friendship Fire Department
22 had rendered a report saying the fire was
23 unintentional?

24 A. Yes.

25 Q. There was no change in the company's position based

1 on the report of the Friendship Fire Department?

2 A. We hadn't made a determination yet as to whether
3 anyone had started the fire, we were just doing an
4 investigation to try to determine what happened, what
5 caused it.

6 Q. Was there any change in the company's position when
7 you got the results from the laboratory test and all
8 six samples came back negative?

9 A. No.

10 Q. And there was no change in the company's position
11 when you learned that Mr. Fowler was planning, was
12 actually preparing the house for sale?

13 A. No.

14 Q. Those didn't make a change in your position?

15 A. No.

16 Q. In your opinion?

17 A. No.

18 Q. Mr. Flanagan and also Mr. Gilden knew that
19 Mr. Fowler was not a wealthy man?

20 A. Was what?

21 Q. Not a wealthy man.

22 A. Yes.

23 Q. And is it true that, is it fair to say that
24 Nationwide through those two gentlemen also knew that
25 he was actually a hard working fellow who had been

1 employed in construction for many years but had had
2 recent financial problems?

3 A. We knew that he had financial problems from the
4 investigation, yes.

5 Q. But you also knew that he had also been involved in
6 construction for many years?

7 A. I don't know how many years. I know he had some
8 construction experience.

9 Q. Okay. And, but you knew from your investigation,
10 not your personal investigation but Mr. Gilden's
11 investigation, that the financial problems resulted
12 from Mr. Fowler's efforts to start his own restaurant?

13 A. I knew that he had financial problems with the
14 restaurant.

15 Q. And that the company also knew that he was planning
16 to sell the house and pay off all those debts; is that
17 correct?

18 A. That's what he was saying. That's what he was
19 telling us.

20 Q. Okay. Would you consider him financially
21 vulnerable, is that what you are saying?

22 A. Vulnerable?

23 Q. Right. I mean, in debt?

24 A. His finances were poor. That's what we determined,
25 yes.

1 Q. Page 94 Line 7 -- this is the last one.

2 Well, if the policyholder does not file a lawsuit,
3 then they'll never see what's in the report to know
4 whether something is favorable to him; is that correct?

5 A. It's still, it's still proprietary work, though.

6 Q. Well, proprietary or not, the insured will never
7 actually see it unless he files a lawsuit.

8 A. Uh-huh.

9 Q. Whether it's got good stuff or bad stuff; isn't
10 that correct?

11 A. Potentially, yes.

12 Q. Is that part of the rationale for Nationwide's
13 standard procedure of not giving it to the policyholder
14 unless there's a lawsuit filed?

15 A. I'm not sure if I understand your question.

16 Q. Well, the effect -- wouldn't you agree it's the
17 effect of Nationwide's standard policy or withholding
18 the C and O report if there's a lawsuit, is the effect
19 of that to keep the policyholder from seeing the C and
20 O report unless he does file a lawsuit?

21 A. We just, we just don't give the reports out. We
22 don't give any of our work product out to anybody, the
23 insured or not. If they file a suit, then obviously
24 you're gonna have to give it to them in discovery or if
25 a subpoena is filed.

1 Q. But if they don't file a lawsuit, the effect of
2 your policy is to keep them from ever seeing it. It's
3 not necessarily [sic] --

4 A. It's not necessarily to keep him from ever seeing
5 it. It's just that we don't share it.

6 Q. But they don't ever see it.

7 A. Huh-uh. In most cases no.

8 Q. Would you consider it favorable to the policyholder
9 that the negative -- sorry.

10 Would you have consider it favorable to the
11 policyholder that the negative laboratory samples
12 exist?

13 A. It makes no determination on whether the
14 investigation will show that it's intentional or not.

15 Q. Well, if the debris samples were positive and show
16 that there was something ignitable in the debris, that
17 would be harmful to the insured because you --

18 A. Not necessarily, but potentially could be.

19 Q. So that the absence of the finding or reverse
20 finding, that it's negative, would be favorable to the
21 insured?

22 A. Not necessarily.

23 Q. Well, it might not end, it might not end the
24 matter, but it would be favorable to the insured that
25 there's no ignitable fluids detected in the debris

1 samples?

2 A. No, not necessarily.

3 Q. Even though the company has paid \$600 to get these
4 results --

5 A. Well, we --

6 Q. -- you are denying that the negative results are
7 helpful to the insured?

8 A. It's not helpful or hurtful to them.

9 Q. Well, this withholding of the C and O report, okay,
10 as proprietary lasts from the time that Nationwide
11 gives their C and O report until a lawsuit is filed; is
12 that correct?

13 A. In this case, yes.

14 Q. And this withholding, it occurs at the time the
15 denial is made; is that correct?

16 A. Yes.

17 Q. And this is true with all fire loss claims which
18 Nationwide denies if the policyholder requests a C and
19 O report but doesn't file a lawsuit?

20 A. Yes.

21 Q. Is it fair to say that Nationwide does not have any
22 actual proof that the fire was set by anybody?

23 A. No. No.

24 Q. But what sort of actual proof do you have that it
25 was set?

1 A. Well, we have multiple points of origin and all
2 other means have been ruled out.

3 Q. Are you talking about what's the conclusion of
4 Mr. Byers?

5 A. Yes.

6 Q. But he's ruled out things, but he's ruled out
7 things but he doesn't have any actual proof that it was
8 set. He doesn't have anything specific which says it
9 was set; isn't that correct?

10 A. No, that's not correct.

11 Q. What does he have?

12 A. He has two points of origin that have been
13 identified in the file -- I mean in the structure.

14 MR. FREEMAN BELSER: That's it.

15 THE COURT: All right. You may call your next
16 witness.

17 MR. CLINCH BELSER: Your Honor, the last thing we
18 would like to do is enter a stipulation. Mr. Murphy and
19 I have agreed that instead of putting in a document we
20 would just stipulate by agreement of Counsel for the
21 clients that between January 1, 2005, to January the
22 17th, 2009, Nationwide Mutual Insurance Company hired
23 Jerry Byers Investigational and Technical Services,
24 Inc., to investigate 59 other fire claims in South
25 Carolina. The Plaintiff would stipulate.

1 THE COURT: All right. Is that the stipulation,
2 Mr. Murphy?

3 MR. MURPHY: Yes, Your Honor.

4 THE COURT: All right. Very good. Anything else?

5 MR. CLINCH BELSER: The Plaintiff rests.

6 THE COURT: All right. Mr. Foreman, ladies and
7 gentlemen of the Jury, that concludes the Plaintiff's
8 case and now we'll go forward with the Defendant's case
9 subject to the rulings of the Court.

10 MR. MURPHY: Yes, sir, reserving all Motions.

11 THE COURT: Reserving all Motions, of course.

12 MR. MURPHY: We'll call Michael Madden to the stand
13 as our first witness, Your Honor.

14 THE COURT: Very good.

15 Whereupon,

16 Michael K. Madden

17 Having first been duly sworn, was examined and testified
18 as follows:

19 Direct Examination by Mr. Murphy:

20 THE COURT: All right. If you would, please, sir,
21 give us your full name, spelling your last name.

22 THE WITNESS: Michael K. Madden, M-a-d-d-e-n.

23 By Mr. Murphy:

24 Q. Michael, make sure you project your voice so I can
25 hear you all the way back here. Tell me what you do

1 It's very few.

2 Q. Now, in this case, Mr. Fowler's claim, what was
3 your role as the claims manager I guess involving
4 Georgia and South Carolina at that time?

5 A. To oversee the investigations that the claims
6 associates were doing in the fire.

7 Q. In doing that, what type of activities did you
8 personally involve yourself in in the claim?

9 A. The claims associates would give me the information
10 that they found in their investigation. We would
11 review it to see what status that it had.

12 Q. So part of what you did was to review information
13 as it was being compiled?

14 A. That's correct.

15 Q. Did you offer any direction or input into the
16 activities that others performed?

17 A. Yes, I did.

18 Q. Is that part of your role that you do on every
19 claim?

20 A. It is.

21 Q. In this case did you participate in any conferences
22 or we heard some log notes and had some of your
23 deposition read. Did you participate in those
24 conferences?

25 A. Yes.

1 Q. What is the purpose in holding a conference on a
2 claim like this?

3 A. To try to determine the facts of it, to find out
4 what decisions need to be made and if we're going in
5 the right direction on making a determination on the
6 true cause of loss.

7 Q. Now, how does Nationwide make decisions regarding
8 claims specifically whether to deny the claim or accept
9 the claim?

10 A. We try to gather everyone together that's been
11 involved in the investigation and conference it
12 together and make a decision based on the information
13 that they've uncovered.

14 Q. Are you familiar with the activities that were done
15 and the information that was compiled by Andrew
16 Flanagan and Billy Gilden and the Cause and Origin
17 expert, Jerry Byers?

18 A. Yes.

19 Q. And did you come to any conclusion once you
20 reviewed that information and participated in the large
21 loss conference?

22 A. Yes.

23 Q. Now, the first conference, was a decision made at
24 that time?

25 A. Not the first conference, no.

1 Q. What was decided after the first conference?

2 A. To continue the investigation we needed to get a
3 Cause and Origin expert out to try to determine what
4 had taken place.

5 Q. And what about the conference that was held prior
6 to the time that the denial was issued by Andrew
7 Flanagan? Did you participate in that?

8 A. Yes.

9 Q. Can you tell me the type, the things that were
10 discussed in that conference and the decisions that
11 were made?

12 A. Basically we discussed what had taken place, what
13 we had uncovered as far as the evidence that we had and
14 we decided at that point to do an examination under
15 oath.

16 Q. Okay. And did that require your authorization to
17 conduct an examination under oath?

18 A. Yes.

19 Q. Is that something that's required in the policy?

20 A. If we ask for it, yes.

21 Q. Okay. That's something that from time to time
22 Nationwide requests and conducts?

23 A. That's correct.

24 Q. After that was done did you review the file to see
25 whether any further investigation was needed?

- 1 A. Yes, we did.
- 2 Q. Was there any further investigation needed after
3 that had been done, the examination under oath?
- 4 A. Let me back up. Are you talking about before or
5 after the examination?
- 6 Q. Well, I'm talking about in terms of time. So, what
7 other activities had been done in addition to the
8 examination under oath, in your recollection?
- 9 A. If I understand your question, we continued our
10 investigation to make sure that we had everything
11 uncovered. We wanted to make sure we had a full Cause
12 and Origin created and done.
- 13 Q. Was that done?
- 14 A. Yes.
- 15 Q. All right. Was the special investigator, Billy
16 Gilden, was he retained to work on this matter?
- 17 A. Yes.
- 18 Q. Were you aware of that before it was done?
- 19 A. Yes.
- 20 Q. Okay. And was that appropriate in this case based
21 on your review of the facts and circumstances?
- 22 A. It was.
- 23 Q. And, in fact, one of the things that Billy did was
24 take this examination under oath?
- 25 A. He did.

1 Q. The claims adjuster would have made initial
2 contact. What else would he have done on his part of
3 the file early on?

4 A. He would scope the damages that he could see on the
5 structure and the contents and the damages that may
6 have occurred.

7 Q. Even if a claim may end up being denied, is the
8 claims adjuster still responsible to evaluate or
9 estimate the potential damages?

10 A. Yes. We always do that.

11 Q. And would that be with regard to all of the
12 different types of coverage that might exist in a claim
13 like this?

14 A. Right.

15 Q. But there is a big difference in -- well, is there
16 any difference in claims that are accepted versus
17 claims that are denied and how the moneys are paid?

18 A. No.

19 Q. But if a claim is denied, does the insured receive
20 any payment?

21 A. If the claim is denied, he does not, no.

22 Q. Okay. But is Nationwide still required to pay off
23 the mortgage companies as was done in this case?

24 A. Yes...

25 THE COURT REPORTER: I'm sorry, I'm having trouble

1 hearing you. Could you keep your voice up?

2 MR. MURPHY: If you can get a little closer,
3 because I know I'm having trouble hearing you, and get
4 closer to that mic.

5 THE WITNESS: Is that better?

6 By Mr. Murphy:

7 Q. Did you have to review the information to give your
8 opinion or give your authority for a decision to be
9 made on this claim?

10 A. Yes.

11 Q. And your decision was that you authorized the
12 denial of this claim?

13 A. I did. Well, we do that through the conferences,
14 as I stated earlier. We'll conference a file. You
15 gather all your information, make sure we haven't
16 missed anything and make sure you haven't overlooked
17 anything, and the decision is made.

18 Q. Were you satisfied on your 30 years' experience
19 that sufficient information had been gathered before
20 you gave your input into the decision?

21 A. Yes.

22 MR. CLINCH BELSER: Your Honor, I'd like to object
23 again to all these leading questions. I hate to do it,
24 but...

25 THE COURT: All right. Let's just restate your

1 question, Mr. Murphy.

2 By Mr. Murphy:

3 Q. Did you review all of the investigation information
4 that was uncovered?

5 A. Yes.

6 Q. Can you tell the Jury whether that was adequate for
7 you in your experience or not?

8 A. It was adequate because we, in going through it, we
9 tried to find out the cause, as I stated earlier, and
10 there was no determinations as far as any outside
11 sources that could have caused the loss, there was no
12 power to the home, there was no other causes that could
13 have been in effect at the loss site. We found the two
14 points of origin, and there was no other means by
15 itself of someone starting the fire.

16 Q. And so that aspect of it, you were satisfied, or
17 were you satisfied based on your review that Nationwide
18 had a basis to believe the fire had been intentionally
19 set?

20 A. Yes.

21 Q. Did you review the file to determine whether or not
22 the policyholder may have had motive or opportunity
23 with regard to this lawsuit?

24 A. Yes, I did.

25 Q. Are you satisfied, based on your 30 years'

1 experience with Nationwide that the investigation on
2 those issues was thorough?

3 A. Yes.

4 Q. Was it adequate?

5 A. Yes.

6 Q. Did it give you the information you needed to make
7 what you believed was a proper decision?

8 A. It did.

9 Q. Did you make those decisions lightly?

10 A. No.

11 Q. Are you satisfied with the person you supervised,
12 Andrew Flanagan, with his performance on this file?

13 A. Yes.

14 Q. Do you have any question about whether he was
15 professional or thorough in his activities?

16 A. I do not.

17 Q. Now I want to ask you about a couple specific
18 things that came up. One was whether or not any money
19 was payable under Coverage B for what's known as
20 additional structure. Do you recall hearing your
21 deposition read on that and perhaps others?

22 A. Yes.

23 Q. Can you tell me what your understanding of Coverage
24 B is as you sit here today with regard to this claim?

25 A. Coverage B covers other structures. As stated in

1 the deposition, that could include the driveway, the
2 Koi pond, detached structures such as the garage and so
3 forth, and that's basically what we covered under
4 Coverage B.

5 Q. With regard to this case, though, was there any
6 money payable under Coverage B for damage resulting
7 from the fire?

8 A. No.

9 Q. And what have you done to determine that and say
10 that?

11 A. Well, since my deposition I've gone back through
12 the file -- I did not have access to my file during the
13 deposition -- and I could look back through it and see
14 where I denied paying for the Koi pond as an example.
15 The reason we did that was there was no damage that was
16 caused from the fire. The Koi pond, as I recall, was
17 in the front of the dwelling, and there was drop down,
18 there was no way, no means for the fire to have caused
19 any damage to it so there would be nothing payable on
20 it. The same thing with the driveway. There was no
21 damage to the driveway at the time. And Mr. Flanagan
22 wrote an estimate based on what potentially could
23 happen if the house was repaired.

24 Q. This is Plaintiff's Trial Exhibit 30. I'll ask you
25 a couple questions about it. And I think you might

1 have just answered this so this may be very brief. But
2 the coverages are simply set forth as what would be
3 available on the maximum amount. Is that pretty much
4 what is on the front of this form?

5 A. Correct.

6 Q. Is it the adjuster's job to evaluate or estimate
7 what potential damage may occur throughout the pendency
8 of the claim even though such damage or expense has not
9 yet been incurred?

10 A. Yes.

11 Q. Okay. And would debris removal or landscaping,
12 would that be an example of that?

13 A. It would be, yes.

14 Q. And did additional structures under Coverage B,
15 does that fall under the same category?

16 A. Yes, it does.

17 Q. Okay. Now, and are you satisfied as you sit here
18 today that no additional amounts were payable to any of
19 the mortgagees under Coverage B?

20 A. Yes.

21 Q. And, in fact, is that what the log revealed that
22 you had told Andrew Flanagan back in 2009?

23 A. Yes.

24 Q. Now, just clarify for me that Nationwide, when it
25 conducts an investigation, does it share its internal

1 documents with policyholders?

2 A. No.

3 Q. Would that include Cause and Origin?

4 A. That does.

5 Q. You have been with the company 30 years. Has that
6 always been the procedure?

7 A. It has.

8 Q. So was there anything unusual about not doing that
9 in this case?

10 A. No.

11 Q. Would Mr. Fowler have been required to continue
12 with his Proof of Loss after his claim was denied?

13 A. No, he would not.

14 Q. Did you ever issue any supplemental denial based on
15 any failure on his part to submit something?

16 A. No.

17 Q. Did you become aware in your role as manager of any
18 problems that Andrew Flanagan was having with the Citi
19 Financial claim in trying to pay off the portion of
20 their mortgage they were entitled to?

21 A. No.

22 Q. Mike, you are familiar with Nationwide's Best
23 Claims Practices?

24 A. Yes.

25 Q. Are those airtight requirements or what are they?

1 A. Guidelines.

2 Q. Have you reviewed them in connection with the trial
3 of this case?

4 A. Yes.

5 Q. And throughout them, there's a lot of -- well, are
6 there specific items as you go through them, six or
7 seven pages?

8 A. Yes, there are.

9 Q. Have you, in your review of the file and the way it
10 was handled by Andrew, have you seen anything that he
11 did that you think was not in keeping with the Best
12 Claims Practices?

13 A. No. He followed them.

14 Q. Are there, in fact, specific practices outlined in
15 there that he complied with, that he followed?

16 A. Yes.

17 Q. Can you give the Jury some examples?

18 A. Well, to be prompt, which is what he did. He
19 started the investigation to get it going quickly to do
20 interviews of the insured, additional living expenses
21 if needed.

22 Q. Was that the \$2,000 advance we talked about?

23 A. Yes. He did give an advance to him. If there's
24 anything that shows or indicates that it could be a
25 suspicious loss, he would hire -- or not hire, but

1 would engage the SIU unit, which he did, and a
2 continuing investigation on it.

3 Q. What about experts?

4 A. The same thing with SIU would work with experts, as
5 well, in order to determine what the cause was and
6 getting into the truth and the facts and find out why
7 it started or what the cause was.

8 Q. You managed a lot of adjusters in your 30 years?

9 A. Yes.

10 Q. Have you reviewed a lot of files?

11 A. Yes, I have.

12 Q. Would you just tell the Jury your level of comfort
13 or satisfaction or whatever with the way that this file
14 was handled?

15 A. He handled it the way he should have handled it as
16 far as the investigation goes and assistance to the
17 insured.

18 Q. And do you stand behind the decision to deny
19 coverage to Mr. Fowler in this claim?

20 A. Yes.

21 MR. MURPHY: Thank you, Michael. Please answer any
22 questions.

23 THE COURT: Cross-examine?

24 MR. CLINCH BELSER: May it please the Court.

25 (Discussion off the record.)

1 Cross-Examination by Mr. Belser:

2 Q. Mr. Madden, are you ready?

3 A. Yes.

4 Q. Good. Just answer a few questions based upon your
5 responses to statements and questions delivered to you
6 by Mr. Murphy and I would like you to speak loudly
7 enough because, like the others, I think I had a hard
8 time hearing a lot of your answers so far.

9 A. Okay.

10 Q. Can you speak a little louder still?

11 A. Yes.

12 Q. Thank you. Now, one of the first things you said
13 to Mr. Murphy was that you run a tight ship; is that
14 correct?

15 A. Yes.

16 Q. Do you try to have all important contacts and
17 things done in the file documented carefully and fully
18 in the file?

19 A. Yes.

20 Q. Now, is that one of the requirements on the best
21 claims practices piece of paper which has been shown to
22 you as Exhibit Number 38 that you have in front of you?

23 A. Yes.

24 Q. If you look at Page 4, the middle of the page,
25 where it says: All contacts or attempts, written or

1 oral, are documented specifically in a file log?

2 A. Yes.

3 Q. Now, is it proper claims practices to have
4 everything fully documented to claim, as you heard
5 Mr. Hesse testify earlier?

6 A. Yes.

7 Q. Now, with reference to the questions which were
8 addressed in your deposition about the claims
9 conference and the fact that there was no documentation
10 of the reason why it was not important that the
11 policyholder had contacted his mortgage companies and
12 agreed that he should go ahead and prepare his house
13 for sale. Do you remember that portion of the
14 testimony you gave before in your deposition last
15 month?

16 A. Yes.

17 Q. If you're running a tight ship, wouldn't you think
18 it appropriate to document in the discussion why a
19 factor favorable to the insured policyholder was not
20 important?

21 A. Well, it's not necessary that it was or wasn't
22 important.

23 Q. You still maintain that it's not important that the
24 policyholder was preparing the house for sale?

25 A. No, sir, not necessarily.

1 Q. Why was that not important?

2 A. Well, he still has a motive. Number one, if he
3 doesn't make the payments on the home, he'll
4 potentially lose it. If he has to sell it, he's gonna
5 lose it. He's already made the comment that it's a
6 great place to live, he's lived there for over 30
7 years. And a way to be able to not have to move is if
8 it is burned because the mortgages at that point will
9 be paid off.

10 Q. Do you project that as a reasonable interpretation
11 of the information that Mr. Gilden got that he was
12 planning and preparing to sell the house? Do you think
13 that's a reasonable interpretation of that fact?

14 A. No. That's an aspect of that.

15 Q. That's not documented anywhere in your file as to
16 why that was not important.

17 A. No.

18 Q. Now, with reference to that same claims conference
19 or summary written by Mr. Gilden, there's no discussion
20 as to why the lack of accelerants, as proven by the
21 tests, was not important.

22 A. As I stated earlier, the lack of accelerant means
23 nothing because you don't have to have accelerants
24 present or the evidence of accelerants because, as I
25 stated earlier, often those will be washed away by the

1 Fire Department. Often they will be removed because of
2 rain and so forth. There are particular type
3 distillants that you can use. Rubbing alcohol is an
4 example of that. It will go away and you will never
5 get a trace of it.

6 Q. I understand what you're saying today. But none of
7 that was reflected anywhere in the claims log which was
8 produced after a Court Order to make you produce it;
9 isn't that correct? None of that is anywhere in your
10 claims log.

11 A. Well, but that's common knowledge among an expert.
12 And with my 30-plus years of experience in it, I know I
13 don't have to ask those questions.

14 Q. Let me just ask you to finish your answer and
15 include in there, please, a yes or no as to the fact
16 it's not documented in the file.

17 THE COURT: Let's do this, Mr. Belser. As I
18 explained earlier to another witness. The way we do it
19 is the attorney asks the question. You answer the
20 question and then you can explain your answer. But
21 answer the question that's asked and then you'll be able
22 to explain your answer.

23 Mr. Belser you may proceed.

24 By Mr. Belser:

25 Q. Again, Mr. Madden, isn't it true that there's no

1 documentation in your file, as required in the Claims
2 Manual, as to anything you just testified as to why
3 that wasn't important?

4 A. To clarify that, it's not a requirement, it's just
5 a guideline --

6 THE COURT: Mr. Madden, that's not the question.
7 The question was: Is there anything in your records
8 there that show that entry? And then you can explain
9 why.

10 THE WITNESS: Okay. No.

11 By Mr. Belser:

12 Q. No, there was nothing in the file at the time or
13 ever as to why that was not important?

14 THE COURT: All right. Well, let him explain his
15 answer now.

16 MR. CLINCH BELSER: Yes, sir.

17 THE WITNESS: As I stated, the fact that there are
18 or are not accelerants there is not a determining factor
19 of whether it's arson or a set fire or that accelerants
20 were used.

21 By Mr. Belser:

22 Q. And there's no documentation in that closing
23 summary after the conference about the fact that
24 Mr. Fowler had gone to his neighbors to get help to put
25 out the fire? Isn't that true? There's no

1 documentation in your file anywhere?

2 A. Not that I'm aware of.

3 Q. Now, is it the policy of Nationwide to disregard
4 factors which are clearly in the insured's favor?

5 A. No.

6 Q. That you don't document why you're not regarding
7 them, giving them any weight; isn't that correct?

8 A. No.

9 Q. No documentation. Thank you.

10 Now let's talk about those negative test samples.
11 You testified a few minutes ago there was no particular
12 importance to that. Is that your testimony under oath
13 today?

14 A. Yes. As far as the presence or lack of it.

15 Q. You're aware that it costs \$100 per test to send
16 them off for the sample; is that correct?

17 A. Yes.

18 Q. And you are aware that six samples were sent off?

19 A. Yes.

20 Q. So \$600 is just a small amount of money to do
21 something that's not very important. Is that what you
22 are testifying to under oath?

23 A. No.

24 Q. So you think it was important to get those test
25 results?

1 A. Well, the test results -- yes. The test results
2 would help us to determine what caused it in a lot of
3 cases as far as an accelerant being used or not, but
4 it's not an absolute whether one was or was not used.

5 Q. So if I understand correctly, Nationwide under your
6 direction under this claim is willing to spend \$600 to
7 get it because it was important, but you nonetheless
8 are disregarding a negative result. Is that what you
9 are saying?

10 A. No. I'm not disregarding it.

11 Q. Well, how did you give it any weight?

12 A. Well, as I stated earlier, my experience in looking
13 at fires, and I've handled hundreds of them, the fact
14 that there is or is not does not have a lot of bearing
15 as far as us making a decision whether it was or was
16 not an arson, but it helps us determine what the cause
17 is. As far as there being a lack of an accelerant
18 being identified, it doesn't mean that it was not a set
19 fire.

20 Q. It's worth \$600 to get the tests that you're not
21 going to document any reason why a negative result was
22 not important in this tight ship that you run; is that
23 correct?

24 A. It wasn't necessarily a result.

25 Q. Are you a certified fire investigator yourself?

1 A. No.

2 Q. You were asked by Mr. Murphy about the notes
3 entered by Mr. Gilden after the conference called the
4 SIU, Special Investigative Unit conference, is that
5 correct, after each one of them?

6 A. Yes.

7 Q. Is it correct that there were no actual minutes of
8 what was discussed at that meeting?

9 A. There are no minutes. There is a log entry of the
10 meeting.

11 Q. My understanding from the last time we were
12 together in your deposition that the log entries are
13 not made at the time of the conference, they're just
14 made at some other time, whenever Mr. Gilden gets
15 around to it?

16 A. That's incorrect. As far as conferences go, when
17 I'm involved in a conference, I usually at that point
18 during a conference enter the logs. Not 100 percent of
19 the time, but most of the time I do, and I did in this
20 case.

21 Q. You entered it, not Mr. Gilden?

22 A. I entered it. The logs that you're speaking of
23 were his closing logs which is after the fact.

24 Q. But there are no minutes taken by you or by him, it
25 was just a log entry which does not include any

- 1 explanation of the, why the positive factors for the
2 policyholder is not important, just the result.
- 3 A. The results of the conference, that's correct.
- 4 Q. Now, would it be a tight ship which would follow up
5 with Mr. Fowler's lenders if you had reason to believe
6 that he had agreed with them he was gonna fix the house
7 for sale and sell it? Would a tight ship follow up
8 with that?
- 9 A. Yes.
- 10 Q. Did that happen?
- 11 A. I'm not -- I don't know.
- 12 Q. To your knowledge it did not happen?
- 13 A. To my knowledge it did not.
- 14 Q. And you heard your testimony earlier and you were
15 here when Mr. Flanagan's deposition was read. The
16 entry in the log by Mr. Gilden at the final closing was
17 stated as a fact that Mr. Fowler had agreed with his
18 mortgage companies to prepare the house for sale and he
19 was in a process of preparing the house for sale?
- 20 A. Yes.
- 21 Q. So, the fact that your tight ship didn't follow up
22 left you with no choice but to understand that that was
23 a fact?
- 24 A. Yes.
- 25 Q. And that's what's reflected in your log notes that

1 it was a fact that he was preparing the house for sale?

2 A. Yes.

3 Q. Now, after one of my objections to leading
4 questions, you did say that you believe that Nationwide
5 had a basis to believe that the policyholder lit this
6 fire. Do you remember that portion of your testimony?

7 A. Yes, sir.

8 Q. That there was some evidence that was used by
9 Nationwide to say that was a basis to say that
10 Mr. Fowler lit the fire to his own house.

11 A. Yes.

12 Q. Those were your words?

13 A. Yes.

14 Q. Now, would you agree that it's not the
15 responsibility of Nationwide to justify that there's
16 something they can point to to deny the claim, it's
17 really the obligation of Nationwide to do a good-faith
18 investigation of the key facts to find that they
19 actually do believe and admit the fire and it's
20 sustainable based upon the facts revealed by their
21 investigation?

22 A. No. We try to find out what actually happened.

23 Q. So you agree that your real duty is to do a
24 reasonable investigation to find out what really
25 happened, not just to find a pretext for denying a

1 claim?

2 A. We're not looking for a pretext to deny to pay a
3 claim. We're trying to find out what happened to make
4 an informative decision.

5 Q. Say yes or no. You do agree with the proposition
6 that you are supposed to do more than look for a
7 pretext. You are supposed to do a reasonable
8 investigation and follow-up the leads and evaluate them
9 honestly and in good faith?

10 A. Yes.

11 Q. Now, during your testimony you indicated this Best
12 Claims Practices documented carefully avoids the use of
13 the word "manual." You said this is a guideline and
14 just a guideline?

15 A. Yes.

16 Q. So does that mean you don't have to follow what it
17 says?

18 A. These are the guidelines to follow, yes.

19 Q. You should follow them or what?

20 A. Yes, you should.

21 Q. Does it matter what they say?

22 A. Yes.

23 Q. Well, it does say here, as it said before, that:
24 All contacts and attempts, written or oral, are
25 documented specifically in the file log. That's

1 supposed to be done according to your own rules; is
2 that correct?

3 A. Yes.

4 Q. And there is no documentation of the things you
5 already talked about and that's a violation of this
6 particular part of your guidelines; is that correct?

7 A. Be specific.

8 Q. Well, we talked about the failure to document the
9 reason for the unimportance of the negative test
10 samples, the unimportance of the contact with the banks
11 to arrange for the house to be prepared to be sold, and
12 the unimportance of the fact with his neighbors to get
13 the fire to be put out. There's no documentation of
14 that?

15 A. Yes.

16 Q. So that's a violation of your own rules about
17 documenting important things; isn't that correct?

18 A. If deemed as important, yes.

19 Q. So you are telling the members of this Jury that
20 you don't think it's important, any of these factors
21 are not even important enough even to talk about?

22 A. I never said we didn't talk about it.

23 Q. Not important enough to document it.

24 A. Right.

25 Q. Now, you said that you had gone back after the

1 deposition to get more information because you did not
2 have the deposition, your file with you at the
3 deposition. Do you remember that portion of your
4 testimony?

5 A. Yes.

6 Q. This deposition was taken just this fall; is that
7 correct?

8 A. Yes, sir.

9 Q. It was postponed for you to take a family trip and
10 it would be a convenient time for you and Mr. Murphy to
11 take the deposition; is that correct?

12 A. Yes.

13 Q. And it was at Mr. Murphy's office?

14 A. Yes.

15 Q. And you had the file before the deposition so you
16 could read it?

17 A. Yes.

18 Q. So you didn't have the file with you at the time of
19 the deposition because you chose not to have it with
20 you even though you had brought it with you from
21 Atlanta; is that correct?

22 A. No. It was a computer file. I read it on the
23 computer.

24 Q. Now let me talk again about the Cause and Origin
25 Report. In response to questions by Mr. Murphy, you

1 said that Nationwide does not share its internal
2 documents so that's why you did not give the Cause and
3 Origin Report to the policyholder?

4 A. That's correct.

5 Q. Now, are you saying that the report from Mr. Byers
6 is an internal document?

7 A. It's proprietary information and investigative
8 materials that we have.

9 Q. So it's not really an internal document, he's
10 supposedly an outside person who's an independent
11 contractor who is not part of Nationwide, he's
12 supposedly different but you're saying the report is an
13 internal document and, therefore, you didn't have to
14 give it?

15 A. Yes. He is someone we had hired to do the
16 investigation for us.

17 Q. By you saying it's an internal document, are you
18 also implying that it's not an independent, impartial
19 investigation, it's one that you paid for and you got
20 the results so you keep it?

21 A. It's been created by an independent person if
22 that's what you're asking. It's not an employee of
23 Nationwide if I understand your question correctly.

24 Q. Let me ask you if you will hold up your copy of
25 this manual -- do you have it in front of you?

1 A. (Complies.)

2 Q. Why does it say "Confidential" on every page of the
3 document. Was this something which Nationwide regards
4 as --

5 MR. MURPHY: Your Honor, we may need to approach on
6 that.

7 THE COURT: Very well.

8 (Discussion at sidebar.)

9 THE COURT: All right. Would it be fair to
10 announce what the -- in other words it was not done by
11 Nationwide. It was done by the attorneys?

12 MR. MURPHY: No, Your Honor. It was done by its
13 attorneys. That's correct.

14 THE COURT: Move on.

15 By Mr. Belser:

16 Q. Mr. Madden, is it your understanding that a portion
17 of this Best Claims Practices requires that all
18 inquiries are properly responded to and inquiries are
19 made about coverage?

20 A. Yes.

21 Q. Do you think it was an appropriate response not to
22 tell finance companies about Coverage B and they could
23 get more money if they went forward with the building,
24 rebuilding the house?

25 A. If they asked for it, yes, we would discuss it with

1 them.

2 Q. But you felt there was no affirmative duty on your
3 part to discuss with the mortgage company what the
4 policy really was, the coverage that was available so
5 they could make a proper claim?

6 A. Yes. If they make a claim, we'll discuss it with
7 them.

8 Q. But you wait for them to make a claim whether or
9 not they had the information --

10 A. Yes.

11 Q. -- knowing about what the claim could be?

12 A. Yes.

13 MR. CLINCH BELSER: Thank you very much,
14 Mr. Madden.

15 THE COURT: Re-exam?

16 MR. MURPHY: Nothing further, Your Honor.

17 THE COURT: Very good. You may step down. Thank
18 you, sir.

19 (Witness leaves stand.)

20 THE COURT: All right. You may call your next
21 witness.

22 MR. MURPHY: I would call William Gilden to the
23 stand.

24

25

1 A. It's what they call the investigation how it
2 affects the claim, and our percentage of how we affect
3 the claims, approximately 25 to 30 percent.

4 Q. Is that less than 1 percent of all of the claims
5 universally?

6 A. Yes. That's 25 percent of the point 75 percent.

7 Q. So, of all the claims that Nationwide investigates
8 based on those statistics, how many of them result in a
9 denial?

10 A. Very few.

11 Q. Tell me about your role in this case, when you were
12 contacted and the things that you did in connection
13 with this case.

14 A. I believe it was right after Martin Luther King
15 holiday on Tuesday I was contacted by Andy Flanagan and
16 he advised me that he was investigating a fire in, I
17 believe it was Seneca, and he gave me some information
18 as to what was going on, and he asked me when I could
19 get there and I told him I could get there first thing
20 Wednesday.

21 Q. As we go along -- not to tax your memory. If we
22 have anything you may need to review or we can provide
23 any log entries you may have made.

24 But in general what do you recall or what do your
25 notes indicate were the things you did when you arrived

1 on the site for the first time?

2 A. Well, normally when I investigate a house fire or a
3 structure fire, one of the first things I do is I scope
4 the area, look at the house, notice any other houses
5 nearby where I could find possible witnesses. I
6 photograph it.

7 On this particular case Mr. Fowler was present. I
8 spoke with him and also Mr. Byers was present. I
9 started helping Mr. Byers with the, what we call
10 digging out the scene looking for evidence for what
11 actually caused the fire.

12 Q. And in your experience with both CNA and Nationwide
13 have you worked with Cause and Origin experts on fire
14 claims?

15 A. On numerous times.

16 Q. Do you yourself do that part of the investigation?

17 A. No, I don't.

18 Q. What else did you do on that day other than what
19 you just indicated?

20 A. Well, I helped, I helped Mr. Byers a while, and
21 then around noon I interviewed Mr. Fowler, and it took
22 an hour and a half to two hours for the interview. And
23 then shortly after that day I went next door to some
24 neighbors and asked, you know, asked them if they would
25 tell me what they observed because I believe they were

1 the Bryants [sic] where Mr. Fowler went directly to
2 after recognizing his house was on fire.

3 Q. Let me back up with you a minute. What activities
4 did you do with Jerry Byers? Other than digging out
5 the scene, did you do anything else while you were on
6 site with Mr. Byers?

7 A. We did. We pulled a kerosene heater out and
8 brought it to the back steps and examined it.

9 Q. What did you observe about the kerosene heater
10 yourself when that was done?

11 A. Well, one of the first things we did is we pulled
12 the fuel tank out to check for fuel, and it was almost
13 at the top. I'd say it was like 75 to 80 percent full.

14 Q. What else did you do with the heater or observe
15 about it?

16 A. We checked to see if the cut-off mechanism was
17 still operating, and it was.

18 Q. Were you present when any attempt was made to try
19 and start the heater?

20 A. Well, when a Fire Department responds to a fire,
21 there are ashes on the floor, and when the hose hits
22 the floor or blows ashes around, it turns into a real
23 muck, you know, it's almost like mud or pluff mud. And
24 we had to remove some of that from right around the
25 area where it burns. And the wick was actually wet.

1 So we were gonna test it to see if it would operate or
2 if it would actually burn, and the wick was wet so it
3 wouldn't.

4 Q. Other than wiping off some of the ash, did you do
5 anything else to change any characteristics about the
6 heater?

7 A. No, sir.

8 Q. Did you observe Mr. Byers do anything to change any
9 characteristics about the heater?

10 A. No, I didn't.

11 Q. Did you do anything else that day on site, the date
12 that Mr. Byers was still present?

13 A. Well, it took a pretty good while to dig it out
14 because the kitchen and the area around the kerosene
15 heater still had a lot of stuff, a lot of debris on the
16 floor. And I can't remember if I went to the -- I
17 think I went by the Fire Department later that day
18 trying to talk to the Chief and he wasn't there.

19 Q. Did you at some point talk to Chief David Wright?

20 A. I did.

21 Q. Did you discuss with him about whether he performed
22 any type of investigation as part of his duties on this
23 fire?

24 A. He advised me that he did not do any investigation.

25 Q. Did you obtain a copy of the report of your own

1 when you met with him or talked to him?

2 A. I hadn't. Abbey (phonetic) had gotten a report and
3 I was using that report.

4 Q. In talking with Mr. Fowler, what areas were you
5 trying to develop as part of your investigation?

6 A. Well, we wanted to determine whether or not the
7 fire was intentionally set or not.

8 Q. And what are the elements that you investigate to
9 determine, to develop information on that subject?

10 A. Well, this particular fire, there appeared to be
11 two points of origin.

12 Q. And was that based on your observations at the
13 scene and your discussions with Mr. Byers?

14 A. Yes.

15 Q. What other aspects -- did you look at Mr. Fowler's
16 financial condition, for example?

17 A. Later, later I did.

18 Q. What things do you do to analyze someone's
19 financial conditions in a claim like this?

20 A. We request bank statements and documentation. We
21 also run a credit bureau report.

22 Q. And did you talk to Mr. Fowler in his recorded
23 interview about his condition?

24 A. Yes, I did.

25 Q. If you could give a summary, what was your summary

1 of Mr. Fowler's financial condition at the time of the
2 loss?

3 A. Well, he said he had recently closed a restaurant
4 that he owned and he had shut it down. He told me that
5 he was behind two or three months on his primary and
6 one to two months on the secondary mortgage.

7 Q. Were there any other issues with regard to the
8 credit report you might have reviewed or anything
9 Mr. Fowler might have told you?

10 A. I believe he had a tax lien. Let's see. Okay.
11 Well, I went to the Oconee County Courthouse that day,
12 and I reviewed, I ran his history there, and there were
13 three civil actions there. Or actually two civil
14 actions and one was a traffic violation. He had a
15 civil action in 2006, Household Financial versus
16 Mr. Fowler in the amount of \$9,554 and the debt was
17 settled for \$1,177, and the 2007 action was John Deere
18 Landscaping and Irrigation for \$8,000 and the judgment
19 was later settled in September of 2007.

20 Q. Was there any other adverse credit history in your
21 investigation?

22 A. The State tax lien in the amount of \$1,241. He had
23 six collections spanning a 24-month period totaling
24 \$6,515, and none of the collections were medical. He
25 had a past-due mortgage amount of \$4,368, and there was

1 also a credit card that was closed by Chase that had a
2 \$2,000 balance.

3 Q. Did you submit all this information to the claims
4 adjuster handling the case, Andrew Flanagan?

5 A. I advised him that he had some financial issues.

6 Q. And in your experience in handling that, is that
7 evidence that would tend to establish a motive with
8 regard to a loss?

9 A. Yes, sir. That's -- it would be a financial
10 motive.

11 Q. Now, is another aspect that you look at
12 opportunity?

13 A. Yes, sir.

14 Q. Tell the Jury what opportunity means just briefly.

15 A. It basically means you have the ability to commit a
16 crime or commit an act. You know, you are in the
17 vicinity and you have the ability to do that.

18 Q. And did you look to see whether there were any
19 other persons other than Mr. Fowler who may have had
20 opportunity?

21 A. I checked, I went around the neighborhood. The
22 neighbors across the street were gone, they were out of
23 town, and the Brights are the only ones I talked to.
24 Mr. Fowler was sure that no one had come there.

25 Q. Mr. Fowler himself had told you that?

1 A. Yeah.

2 Q. Did the Brights indicate whether they saw anything
3 suspicious or unusual from someone prior to that?

4 A. No, sir.

5 Q. Did your investigation reveal anyone else who may
6 have had a motive or the opportunity to have caused the
7 loss at Mr. Fowler's house?

8 A. No, sir.

9 Q. Now, did you also, subsequently also conduct an
10 examination under oath of Mr. Fowler?

11 A. I did.

12 Q. Just tell us in general, what did that consist of?

13 A. Well, it was conducted because there were some
14 issues that we wanted to clear up. And what we did,
15 Mr. Fowler presented, I asked him to bring some
16 documentation, his banking statements, and he told me
17 that he brought everything that he could bring and the
18 remainder was burned in the fire, and the documentation
19 backed up his statement about his financial situation.

20 He did have a -- in the original recorded statement
21 he told us on the night of the fire, or the night
22 before the fire that he went into the house around
23 10:00 p.m. to use the rest room and he verified that
24 the kerosene heater was still building. But later he
25 contradicted it and told us that likely he went outside

- 1 and used the rest room outside.
- 2 Q. And when was the last time he would have been in
- 3 the home as he reported to you at the EUO?
- 4 A. It would have been right around 6:00 or dusk when
- 5 he put the kerosene heater in the house.
- 6 Q. All right. Now, did you submit that and report on
- 7 that to the claims personnel that were handling the
- 8 claim?
- 9 A. Yes, sir.
- 10 Q. Did you do any other activities with regard to your
- 11 investigation that we haven't discussed?
- 12 A. Well, I did -- let's see -- I contacted Detective
- 13 Mark Lyles.
- 14 Q. Why did you do that?
- 15 A. Well, I'd actually worked with Detective Lyles
- 16 before on an arson investigation and I knew that he was
- 17 with Oconee County, and I wanted to know if he was
- 18 investigating this fire.
- 19 Q. Did you ask him to do that?
- 20 A. Did I ask him to investigate the fire?
- 21 Q. Yes.
- 22 A. No. I just gave him information.
- 23 Q. And what was the purpose of your contacting him?
- 24 A. To find out if he was investigating the fire.
- 25 Q. Did he indicate, did he request anything of you

- 1 with regard to your phone call with him?
- 2 A. Well, he asked me if the samples were positive, to
- 3 let him know something.
- 4 Q. And were you aware the samples came back negative?
- 5 A. Correct.
- 6 Q. Did you mention that to Detective Lyles?
- 7 A. I don't think I called him and let him know that
- 8 they were, they were negative. I just didn't call him.
- 9 Q. Why didn't you call him back?
- 10 A. Well, for a criminal case for arson is beyond a
- 11 reasonable doubt, and they, they have a higher
- 12 standard, and they want a clear-cut case before they
- 13 work an arson. And so they, so if the samples weren't
- 14 positive for them, they wouldn't even investigate.
- 15 Q. And so in your mind was there any reason to call
- 16 them back when you realized the test results were
- 17 negative?
- 18 A. No.
- 19 Q. Let me ask you a little bit about debris samples.
- 20 Has that come up before in your history of being an
- 21 investigator with Nationwide?
- 22 A. Yeah. Most arsons we take samples.
- 23 Q. And are you familiar, just based on your experience
- 24 in working claims that involve fire investigation, what
- 25 the relative impact of a positive or negative sample

Examination by
Attorney Clinch Belser

1 person over and over?

2 A. No. We, we use different vendors.

3 Q. Is there anything else about your investigation or
4 input into your investigation that I've omitted that
5 was important in you reaching the conclusions you came
6 to?

7 A. Bear with me one second. (Witness reads document.)
8 I think that's it.

9 MR. MURPHY: Thank you. Answer any questions
10 Counsel may have.

11 THE COURT: Very well. Cross-Exam.

12 MR. CLINCH BELSER: May it please the Court?

13 Cross-Examination by Mr. Clinch Belser:

14 Q. Mr. Gilden, you are not a fire investigator
15 yourself with any kind of certifications, are you?

16 A. That's correct.

17 Q. So what you are testifying to about Mr. Byers found
18 this or found different things, eliminated other
19 things, that's your opinion what he told you and he's
20 the so-called expert as to what was found from a fire
21 investigation standpoint; is that right?

22 A. Mr. Byers is the expert.

23 Q. Not you. I think that's the point. You're not the
24 expert.

25 A. I'm not a certified fire expert.

- 1 Q. Anything you said about "we found two points of
2 origin" just means you heard Mr. Byers say that?
- 3 A. I did hear Mr. Byers say it and I saw it.
- 4 Q. Well, you saw what he pointed to; is that correct?
- 5 A. Well, he did show me where it was.
- 6 Q. Okay. You saw where he pointed out. Did you all
7 have any discussion -- are you familiar with the
8 National Fire Protection Association Publication 921?
- 9 A. I'm aware that there's a book with guidelines.
- 10 Q. Do you know that that book specifically says that
11 points of origin should not be identified just
12 visually?
- 13 A. No, I'm not aware of that.
- 14 Q. You don't know what that book says about anything,
15 do you?
- 16 A. I'm not an expert.
- 17 Q. Not only are you not an expert, but you have never
18 seen that book, have you?
- 19 A. I've seen the book.
- 20 Q. Have you ever read the book?
- 21 A. I've read parts of it.
- 22 Q. Are you familiar with the section which says you
23 should not try to identify so-called pour patterns just
24 visually?
- 25 A. No, sir.

- 1 Q. Have you ever heard of the V factor?
- 2 A. Yes, sir. It's a way to trace the origin of a
3 fire.
- 4 Q. Did you and Mr. Byers talk about the V factor at
5 the fire at a Mr. Fowler's house in January of 2009?
- 6 A. Yes, sir.
- 7 Q. You did?
- 8 A. He showed me areas where the V was on the walls,
9 the cabinets.
- 10 Q. Did you write that down in any of your reports?
- 11 A. I recorded it in photos.
- 12 Q. Did you ever read Mr. Byers' report?
- 13 A. Yes, sir, I did read his report.
- 14 Q. Would you agree that his report has no mention
15 whatsoever of the V factors?
- 16 A. I don't recall reading the report.
- 17 Q. The report will be in evidence. I'm just asking if
18 you would admit that the report has no mention
19 whatsoever of the V factor analysis?
- 20 A. I can't recall whether it does or doesn't.
- 21 Q. Now let's talk about your courthouse inspection.
22 You say you went to the Oconee County Courthouse?
- 23 A. Yes, sir.
- 24 Q. Where is that located?
- 25 A. I think we're in it.

1 Q. You've got that right. You talk about it like it
2 was some other spot.

3 You said that there are certain statistics about
4 the results of your unit's fraud investigations. Do
5 you remember that portion of your testimony?

6 A. Yes, sir.

7 Q. You say only some small, less than 1 percent of
8 claims are investigated, and of those, less than 25
9 percent of those result in any kind of change in what
10 is done with the claims?

11 A. No, sir. Not less than 25 percent. 25 to 30.

12 Q. Okay. 30 percent of less than 1 percent?

13 A. Correct.

14 Q. Is there always -- what you say -- what you mean by
15 a changing result. Is there always some sort of
16 allegation of fraud spoken or unspoken when a claim is
17 denied?

18 A. Would you repeat that?

19 Q. You are a fraud investigator you say. And you give
20 these statistics about the results of your fraud
21 investigations. And you say that some percentages
22 result in denials of claims or changes of claims?

23 A. Correct.

24 Q. Are you saying that there is some element of fraud
25 in claims which are denied?

1 A. Yes, sir.

2 Q. Now let's talk about the area which you may have
3 some expertise in terms of checking courthouse records
4 for financial records. Is that what your primary
5 expertise, you are trained to do is to check the
6 financial indicators?

7 A. I checked for, I look at financial records and try
8 to make a determination on an individual's financial
9 situation.

10 Q. Well, is it fair to say that Mr. Fowler cooperated
11 fully with you in signing all the releases to get
12 information from all confidential sources -- Mr. Fowler
13 signed a financial release?

14 A. For Andy he did, yes. He didn't sign any for me.

15 Q. Did you use that in the course of your
16 investigation?

17 A. Yes, sir.

18 Q. Because you are part of Nationwide. The release is
19 to Nationwide. You can use that just like anybody else
20 does?

21 A. Correct.

22 Q. So, with that release, you could have gone to
23 Mr. Fowler's mortgage companies to check out what he
24 told you about having his house in the process of being
25 prepared and prepared for sale; is that correct?

1 A. I could have talked to the mortgage company.

2 Q. You did learn from Mr. Fowler that he had arranged
3 with his mortgage companies so that he could just get
4 the house sold and pay off his debts in that fashion;
5 is that correct?

6 A. I did learn from Mr. Fowler what?

7 Q. When you talked with Mr. Fowler, did he tell you
8 that he had been in touch with his mortgage companies
9 and they had agreed that it was okay for him to go
10 ahead and sell the house so that he could pay off his
11 debts?

12 A. He told me that they suggested to him that it would
13 be a good idea to sell the house.

14 Q. And did you also learn from him that he was
15 actually in the process of doing that?

16 A. Mr. Belser, I'm having a hard time hearing you.

17 Q. All right. I'll speak louder.

18 A. Okay.

19 Q. Did you learn from Mr. Fowler that he was actually
20 in the process of preparing the house for sale?

21 A. I learned -- Mr. Fowler told me that he was in the
22 process of preparing the house for sale.

23 Q. And that's what you wrote in your logs when you
24 reported to Mr. Flanagan and Mr. Madden and put
25 generally in the log system of Nationwide; isn't that

1 correct?

2 A. That's correct. I put -- I believe I put that in
3 my closing statement.

4 Q. You believed that as a fact at that time, correct?

5 A. Yes, sir.

6 Q. Now, when you went to the courthouse to check for
7 matters of public record, did you find any evidence of
8 a bankruptcy filing by Mr. Fowler?

9 A. No, sir.

10 Q. Did you find any evidence of actual foreclosure
11 against Mr. Fowler?

12 A. No, sir.

13 Q. Did you find any evidence that he had ever been
14 accused of theft?

15 A. I found that he was arrested I believe in 1981 for
16 a fraudulent check.

17 Q. And didn't you find out also that that was
18 dismissed, he was acquitted?

19 A. Mr. Fowler told me that.

20 Q. So you didn't write that in your report that he was
21 arrested for writing a check, that was irrelevant?

22 A. It's in the, it's in the log notes.

23 Q. Well, the word "fraudulent check" really relates to
24 a check which bounced; isn't that right?

25 A. Yes, sir, usually.

- 1 Q. But that charge was dismissed; is that correct?
- 2 A. Yes, sir.
- 3 Q. So you didn't find any evidence of theft?
- 4 A. No, sir. I didn't find any evidence that he had
- 5 stolen anything.
- 6 Q. You found nothing in the records, public records
- 7 indicating any sort of dishonesty on his part?
- 8 A. No, sir.
- 9 Q. All you discovered was he had some debts; is that
- 10 correct?
- 11 A. That's correct.
- 12 Q. And he told you about that himself; is that
- 13 correct?
- 14 A. And he presented documents for me.
- 15 Q. Right. And he told you about the tax lien, as
- 16 well?
- 17 A. I believe he did.
- 18 Q. So, there's nothing in your courthouse check which
- 19 indicated he was any sort of a dishonest person who had
- 20 done anything of a criminal nature; he just had bad
- 21 financial luck and he had some financial things?
- 22 A. Correct.
- 23 Q. Did you know any of that was related to his son's
- 24 landscaping business?
- 25 A. Treemendious Landscaping, that's correct. I

- 1 believe it was the John Deere.
- 2 Q. So that debt was because Mr. Fowler was trying to
3 help his son, is that correct, his son's business?
- 4 A. I'm assuming that's what it was. He was trying to
5 help him.
- 6 Q. You have no reason to disbelieve that?
- 7 A. No, sir.
- 8 Q. The other tax lien you mentioned was a \$1,200 tax
9 lien related to the restaurant?
- 10 A. I'm not, I'm not sure if it was -- I think it was
11 related to the restaurant if I remember correctly.
- 12 Q. Would you agree with the proposition that burning
13 down his house would not help him pay the tax lien or
14 the judgments which he told you about?
- 15 A. On the tax lien and the judgments, no, I don't
16 think it would help him.
- 17 Q. If he burned down the house, he wouldn't be able to
18 sell the house as he had arranged with the banks; is
19 that correct?
- 20 A. He couldn't sell a burned structure.
- 21 Q. So you agree that his plan to sell the house was
22 completely inconsistent with the idea he had motive to
23 burn the house?
- 24 A. His -- I don't agree. His motive, he had three
25 options. He could either foreclose on the house or he

1 could sell the house or, if he burned the house, the
2 mortgages would be paid and he could rebuild.

3 Q. But my question, sir, is if his plan was to sell
4 the house, which you wrote down as a fact in your
5 investigation after having your party to check it out,
6 if that was his plan to sell the house, it would be
7 completely crazy to burn the house because you can't
8 sell a house, a burnt house; is that correct?

9 A. That might have been his plan.

10 Q. Do you recall talking about this in your deposition
11 which was taken about a year ago?

12 A. Can you remind me? I think it was taken in August
13 or September, wasn't it? Not a year ago.

14 Q. I'm sorry. It was more recent than that. It was
15 July of this year, it was July the 22nd of this year.

16 A. Okay.

17 Q. Some of the depositions were taken a year ago.
18 Yours was taken a few months ago. Forgive me for
19 getting the date wrong.

20 But do you remember talking about this in your
21 deposition?

22 A. I'm sure we discussed it.

23 Q. Do you remember being asked -- if I show you this:

24 A. Okay.

25 Q. I'd like to introduce the -- well, technically he

1 has not said "no" yet, so I guess I'll put this in in a
2 minute. You were saying --

3 THE COURT: Just a moment. Would you hand me --
4 bring it around here.

5 MR. CLINCH BELSER: (Brings original deposition to
6 Court.)

7 THE COURT: Very good. Thank you.

8 Let the record reflect that the Court is opening
9 the original deposition of William H. Gilden taken in
10 Columbia on July, in July of this year.

11 Mr. Gilden (handing).

12 THE WITNESS: Thank you, sir.

13 By Mr. Belser:

14 Q. Mr. Gilden would you turn to Page 48, please. Once
15 you're on Page 48 would you turn down to Line 6 through
16 11?

17 A. All right. I'm looking at 6 and 11.

18 Q. All right. I'm gonna read the question and ask you
19 to read your answer which starts on line 10 (reading):

20 Let me show you -- well, isn't it true that if a
21 house is being prepared for sale, that burning it would
22 interfere with the sale? Would you agree with that?

23 A. Do you want me to...

24 Q. Please read your answer.

25 A. (Reading): I don't think many people want to buy a

1 burned house.

2 Q. Do you remember testifying to that effect under
3 oath at your deposition?

4 A. I recall answering that question under oath.

5 Q. Would you agree now that if the plan was to sell
6 the house, it would be completely crazy to burn the
7 house, because nobody would want to buy a burned house,
8 I quote to you on Page 48, Line 10 to Line 12?

9 A. Right. I don't think anybody would want to buy a
10 burned house.

11 Q. Thank you.

12 Let's talk about the examination under oath which
13 you administered with Mr. Fowler in February of 2009.
14 Do you recall his offering to take a polygraph test?

15 A. I do.

16 Q. Now, do you recall calling upon Mr. Fowler's
17 neighbors, who you call the Bryants, as your
18 investigation began?

19 A. I do. I recall going next door.

20 Q. Did you tell them that you were investigating
21 Mr. Fowler for intentional acts?

22 A. No, sir.

23 Q. Do you know what sort of insinuations you might
24 have made to Mr. Bryant or Mr. Bright?

25 A. Do I recall any comments that I made that offended

1 him?

2 Q. Yes, sir.

3 A. No, sir, I don't remember.

4 Q. He said he wasn't able to help you with the

5 information you were seeking?

6 A. I asked them if they could describe what Mr. Fowler

7 was wearing when he came next door and I asked him to

8 tell me what he told them.

9 Q. Did you do anything which caused Mr. Bright to say

10 he couldn't help you because of the insinuation you

11 were making in all your questions?

12 A. I don't recall saying anything to him that would

13 offend him. In fact, he, he recognized my name and

14 realized that I had a cousin that played baseball for

15 Clemson. We had a nice conversation about family.

16 Q. You said that when you went to the house, you knew

17 the house had no power except for the drop cords. What

18 are drop cords?

19 A. Extension cords. They were 100 foot and 50 foot

20 orange extension cords. I apologize for using a slang

21 term.

22 Q. One other question. You were talking about your

23 record search at this courthouse and you had said that

24 there were several judgments but they were settled, the

25 John Deere judgment was settled in 2007?

Examination by
Attorney J.R. Murphy

- 1 A. Correct.
- 2 Q. That was over with?
- 3 A. That's how I interpret it.
- 4 Q. And the other one in 2006 it was settled, also; is
- 5 that correct?
- 6 A. Correct.
- 7 MR. CLINCH BELSER: No further questions. Thank
- 8 you very much.
- 9 THE COURT: Re-exam?
- 10 MR. MURPHY: Just briefly, Your Honor.
- 11 Redirect Examination by Mr. Murphy:
- 12 Q. Why didn't you take up Mr. Fowler on his offer to
- 13 submit to a polygraph?
- 14 A. Because Nationwide doesn't use polygraphs.
- 15 Q. Why not?
- 16 A. They're not admissible in court. And only law
- 17 enforcement uses them.
- 18 Q. Have you ever asked anyone to take one as a
- 19 Nationwide investigator?
- 20 A. No, sir.
- 21 Q. Has anyone else other than Mr. Fowler ever offered
- 22 to submit to one when you were investigating their
- 23 claim?
- 24 A. You know, well, I've had people saying I'll take a
- 25 polygraph, you know, trying to show that they were

1 innocent. I've never given a polygraph when I was in
2 narcotics or tactical unit when we arrested people. We
3 didn't use it.

4 Q. Was there any reason for that?

5 A. You have to get the evidence on a person. You
6 can't rely on a machine to provide whether somebody is
7 telling the truth or not.

8 MR. MURPHY: Thank you, Mr. Gilden.

9 MR. CLINCH BELSER: Just some limited Recross on
10 that?

11 THE COURT: By the way, just for another little
12 educational thing, I'll permit you to do it but I'll
13 tell you why it's gonna be so short. When we do
14 examinations, we do Direct Examination, which is full;
15 Cross-Examination, which is full; Reexamination, which
16 is limited to things which are brought out in
17 Cross-Examination, and then Recross-Examination about
18 only things brought on -- or reexamination on things
19 brought out on Cross-Examination.

20 Now.

21 MR. CLINCH BELSER: Yes, sir. This is right within
22 those rules.

23 THE COURT: There we go.

24 Recross-Examination by Mr. Clinch Belser:

25 Q. With reference to the last statement about

1 polygraphs not being admissible in court, are you a
2 lawyer? Do you have any legal training as a lawyer?

3 A. No, sir. I took Constitutional law in college.
4 But I'm not legally trained as an attorney.

5 Q. Would you just read -- do you have any basis to
6 disagree with the conclusion that by consent both
7 parties admit to the admissibility of a polygraph test
8 that could be used in court?

9 A. I -- Nationwide's policy is not even to use --

10 THE COURT: Just a minute. Answer the question.
11 You can say "yes" or "no" or "I don't know," but then
12 you can explain your answer.

13 THE WITNESS: Ask me one more time, please.

14 By Mr. Belser:

15 Q. You just said you are not a lawyer despite your
16 course in Constitutional law. Would you agree that by
17 consent if both parties agree to the use of the
18 polygraph results, that could be admitted in court?

19 A. I can't answer that question.

20 Q. Were you here earlier during the deposition, we
21 read your testimony?

22 A. When I heard, I heard that one specific time where
23 the two parties agreed to take the polygraph.

24 MR. CLINCH BELSER: Thank you.

25 THE COURT: All right.

1 THE COURT: Perfect. All right. We'll come in at
2 9:00 and hopefully we'll be ready to go. I apologize
3 that we were a little bit late. We try to do our best.
4 We'll try and see if we can't conclude the testimony and
5 evidence and give it to you after argument and charge.
6 Very good. Again, do not undertake discussion of the
7 case among yourselves in any way.

8 (Whereupon, the Jury left the courtroom at
9 approximately 5:30 p.m.)

10 THE COURT: Anything from the Plaintiff?

11 MR. CLINCH BELSER: No, sir. Thank you very much.

12 THE COURT: From the Defense?

13 MR. MURPHY: Only if Your Honor wants us to put any
14 specific grounds on the record.

15 THE COURT: Yes. As far as directed verdict?

16 MR. MURPHY: Yes, sir.

17 THE COURT: All right. Let's take a short break.

18 MR. MURPHY: I was counting on you.

19 THE COURT: We'll be at ease. Yes, sir.

20 (A recess was taken.)

21 THE COURT: All right. At the close of the
22 Plaintiff's case I believe by agreement we had noted
23 Motions to be made so that we could go forward with the
24 Defense case without interruption. And I noted at that
25 time that we would take up those matters that otherwise

1 would be taken up at the close of the Plaintiff's case
2 or evidence. At this time I'll recognize Mr. Belser.
3 Anything before we hear the Defendant?

4 MR. CLINCH BELSER: No, Your Honor.

5 THE COURT: All right. Mr. Murphy.

6 Motions:

7 MR. MURPHY: Thank you, Your Honor, I appreciate
8 it. And these were Motions that we would file at the
9 conclusion of the Plaintiff's case on their action for
10 bad faith and their action for slander and asking for
11 the Court to direct a verdict on those claims.

12 The bad faith is quite simple. The law requires
13 under *Nichols* and all of the progeny for the Plaintiff
14 to establish that there was a refusal to pay benefits
15 due under their insurance policy, and that in addition
16 it was without a reasonable basis.

17 In this case the refusal was based in some dispute
18 under the intentional act exclusion based on the
19 allegation that the policyholder, the Plaintiff in this
20 case, caused the loss, in this case a fire. The case
21 law under *Carter versus American Mutual* and others is
22 very clear that in order to establish that policy
23 defense, an insurer may show three elements: Motive,
24 opportunity, and incendiary origin. Those issues I
25 believe are for the Jury.

1 What I'm suggesting and committing to the Court is
2 not for the Jury, is whether or not Nationwide had
3 sufficient evidence to constitute a reasonable basis on
4 those issues to deny that claim without threat of this
5 extra contractual claim being argued against them. And
6 it is based on the admissions of the Plaintiff's two
7 experts primarily because I know the evidence has to be
8 viewed in the light most favorable to the Plaintiff. I
9 know under *Varnadore* Nationwide cannot simply rely on
10 its own investigation but on the totality of the
11 evidence.

12 Mr. Hesse had no opinion regarding whether there
13 was a reasonable basis to conclude an incendiary origin.
14 So his testimony would not negate a finding by the Court
15 that there was sufficient evidence to at least have a
16 reasonable basis for that position.

17 He acknowledged that there was evidence of motive
18 and opportunity, and so those issues, acknowledgment by
19 the Plaintiff that there was evidence of that, while it
20 would be for the Jury to decide whether Nationwide met
21 its burden and successfully established those, there was
22 no dispute that there was at least a reasonable basis in
23 the facts before Nationwide at the time it made its
24 decision on those two elements.

25 With incendiary origin the basis was the fact that

1 Doug Ross admitted in his testimony that the burn
2 pattern in the kitchen suggested the presence of
3 accelerants, and he gave a different conclusion and
4 concluded that they came from a different source other
5 than intentional, but it acknowledged that there was a
6 basis for Nationwide to conclude that the burn pattern
7 in the kitchen was used with accelerants, and based on
8 those three elements, there is at least sufficient
9 evidence for Nationwide to deny the claim. They may
10 well lose the claim, but Nationwide should not be
11 subject to the bad faith claim based on the evidence in
12 the light most favorable for the Plaintiff indicating
13 that at a minimum there was some reasonable basis for
14 Nationwide to take its position. And so that is the
15 Motion for the causes of action for bad faith.

16 THE COURT: Have you got another...

17 MR. MURPHY: The other one was on slander and I
18 will address that separately.

19 THE COURT: Mr. Belser?

20 MR. CLINCH BELSER: Your Honor, we believe this
21 Motion is ill-founded. Mr. Hesse, of course, is not an
22 expert on incendiary origin of the fire. He said he
23 wasn't and he wasn't offered for that reason. But
24 Mr. Ross was. And the real purpose of Mr. Hesse was to
25 establish his factual testimony that there must be a

1 reasonable investigation and the evidence in this case
2 is viewed in the light most favorable to Plaintiff.
3 There was no reasonable investigation, there was no
4 proper follow-up on the information that the Plaintiff
5 received. One of the points, of course, is the
6 Plaintiff's plans to, still have inconsistent with the
7 motive, but also Mr. Ross testified that the fire in the
8 kitchen was a secondary fire, not the primary fire.

9 All the testimony from the Chief, Chief Wright, and
10 also the real understanding of Mr. Ross's testimony is
11 the V pointing to the place right where the heater was;
12 number two, the area of greatest damage was right where
13 the fire was, and Mr. Ross had the pictures, and the
14 pictures showed that that's exactly where it was. And
15 that was the spot right below where the fire was.

16 So the pretext that the insurance company has taken
17 here to get a quick rush to judgment, to ignore the Fire
18 Department's report and ignore the invitation to ask
19 questions about the inconsistencies, particularly the
20 negative test samples, those events go back to what
21 Nationwide had as the claims process was being
22 considered, and the claims process goes all the way from
23 the date of the loss to the filing of the lawsuit. We
24 don't have this bright line of the claim being denied.
25 The Plaintiff's claim is based upon the idea as shown by

1 the evidence that the insurance company made a rush to
2 judgment, snapped the decision that we're looking for a
3 pretext, looking for some reason to point to, but they
4 didn't really make a proper investigation to decide what
5 really was right. So we would at this point say it's up
6 to the Jury to decide whether the full story would
7 support the idea there was as a fact a reasonable basis
8 for the company to make that decision.

9 The *Varnadore* case says the insurance company is
10 not only entitled to look only on its own investigation,
11 and that's exactly what Nationwide is doing right here.
12 They are saying our investigation showed this was, gave
13 us reason to close it down. But that's not what
14 *Varnadore* says and that's not what the witnesses say,
15 particularly Mr. Hesse, and we would oppose that Motion.

16 THE COURT: All right, Mr. Murphy.

17 MR. MURPHY: Just basically, it's based on the
18 concessions made by their experts and I think that's why
19 in the light most favorable to the Plaintiff that motion
20 should be granted. Because the Court can say as a
21 matter of law that there was a reasonable basis of the
22 elements that Nationwide was required to prove or deny
23 the claim. That's our position.

24 MR. CLINCH BELSER: I need to say one thing.
25 Nationwide is not required just to show three things,

1 they are required to show that the insured lit the fire.
2 These are things that's allowed them to point to, but
3 that's not the questioning. They don't win just because
4 they can show their version of a motive and their
5 version of an incendiary fire.

6 THE COURT: All right. Anything in response?

7 MR. MURPHY: No, Your Honor, I think we've
8 addressed it.

9 THE COURT: All right. Well, first of all, I think
10 we understand that Rule 50 on a directed verdict, not
11 only do I consider the testimony and evidence in the
12 light most favorable to the non-moving party, but also
13 I'm not to determine the weight of the evidence but
14 whether or not if there is such evidence to go forward.

15 And I might note that even if a witness is
16 inconsistent, in other words, has inconsistent testimony
17 in his own testimony, that is not enough to take it out
18 of the fact-finders' hands. I think that's *Hoxit versus*
19 *Michelin*.

20 As far as the question of whether or not there was
21 enough evidence to take the question of good faith away
22 from the Jury here. One of the cases that were cited in
23 your Request For Admissions was *Flynn v. Nationwide*,
24 which you all are familiar with, which is 281 S.C. 391,
25 which is not altogether indifferent here. Of course,

1 there was a question about post-trial matters.

2 But the fact is that in reaching their decision
3 that Nationwide would be subject to post-trial
4 requirements of attorneys' fees and prejudgment
5 interest. The Court noted that the evidence in that
6 case, which was an arson case, was equally consistent
7 with the proposition that the wrecker was accidentally
8 destroyed in the fire. (Reading):

9 The fact cannot be established by circumstances
10 which are perfectly consistent with directed,
11 unimpeached testimony the fact does not exist. The
12 impeached testimony is both experts agree, or at least
13 Mr. Ross agreed that there was fires he said and, of
14 course, he said that there were subsequent or secondary
15 fires. Regardless, that is the testimony and that's the
16 evidence the Jury is gonna have to discern.

17 So I'm gonna find that there is sufficient evidence
18 to go forward on the bad faith cause of action and deny
19 your Motion for Directed Verdict.

20 MR. MURPHY: Thank you, Your Honor.

21 With respect to the cause of action for slander,
22 there is only one statement in this entire record that
23 is attributable to Andrew Flanagan because it came from
24 his own testimony. No other person who actually heard
25 anything he said has testified. And that statement was

1 that Mr. Fowler's claim was denied based upon the
2 intentional act exclusion. That is an absolutely true
3 statement.

4 THE COURT: I beg your pardon? What was the
5 absolute truth?

6 MR. MURPHY: The statement that he -- that the only
7 statement that is attributable to him in the record came
8 from his own deposition where he admitted that he told
9 the employee of Citi Financial, who did not testify, by
10 the way, Mr. Daniel Evatt, that Mr. Fowler's claim was
11 being denied based on the intentional act exclusion.
12 That is a true statement without any dispute. It is
13 absolutely true. The claim was denied based on the
14 intentional act exclusion. And since truth is an
15 absolute defense, the slander claim cannot go forward
16 against Mr. Flanagan. Secondly, the evidence was --

17 THE COURT: I don't think it was just -- I'm sure
18 that any claim is going to be considered for either
19 payment or nonpayment. But that was not the thrust of
20 the statement. Why were they not paying?

21 MR. MURPHY: Pardon?

22 THE COURT: Why were they not honoring the claim?

23 MR. MURPHY: The statement on slander had to do
24 with the claim was being denied based on the intentional
25 act exclusion. That's the only words that were spoken

1 in this record.

2 THE COURT: Well, is that not impugning one's
3 character?

4 MR. MURPHY: I believe that's insufficient to
5 establish the slander.

6 THE COURT: I know that's what you believe, I'm
7 sure.

8 MR. MURPHY: Yes.

9 THE COURT: No. The statement that he --

10 MR. MURPHY: The statement, the statement that was
11 made was that the claim was being denied based on the
12 intentional act exclusion. The claim was denied based
13 on the intentional act exclusion.

14 THE COURT: Well, if you stopped and said it was
15 just being denied. But under our law in South Carolina
16 we're gonna honor your lienholders' interest. But
17 apparently he had to say a little more, and that's been
18 denied.

19 MR. MURPHY: I understand that. But even what he
20 said more is still true. What he said is true.

21 THE COURT: I thought that's why we're all here, to
22 find out if he had good cause to deny it which depends
23 on whether or not it was intentionally set.

24 MR. MURPHY: Yes. But he didn't say he
25 intentionally set the fire. He said the claim was

1 denied based on the intentional act exclusion.

2 Nationwide --

3 THE COURT: What is the intentional act exclusion?

4 MR. MURPHY: Pardon?

5 THE COURT: What is the intentional act exclusion?

6 MR. MURPHY: It's contained in the denial letter
7 that said that this policy does not apply to any loss
8 caused directly or indirectly of any insured.

9 THE COURT: I mean, in other words, what we're
10 talking about is arson.

11 MR. MURPHY: Yes, sir.

12 THE COURT: And in the common parlance of lenders
13 that if somebody burns their security, that that is an
14 intentional act.

15 MR. MURPHY: Yes, Your Honor.

16 THE COURT: That would exclude payment.

17 MR. MURPHY: Yes, sir.

18 THE COURT: All right. Again, really what concerns
19 me, and I haven't heard it yet, but I think the last
20 testimony of a Witness, Mr. Gilden, said that he was
21 told also, he testified that he was told by Mr. Flanagan
22 that it was arson. And then, and then he goes to the
23 Deputy Sheriff.

24 MR. MURPHY: Well, Your Honor, the only statement
25 that's been -- plus, that's after the directed verdict

1 stage that I'm arguing.

2 THE COURT: I understand.

3 MR. MURPHY: But, Your Honor, the only statement
4 that was allegedly --

5 THE COURT: I think there was testimony that Deputy
6 Lyles was contacted before and was told about tests were
7 being made and -- I don't know. That was done in the
8 Case-in-Chief.

9 MR. MURPHY: They're not claiming that was slander.
10 They have not sued Billy Gilden for slander. They have
11 sued Andrew --

12 THE COURT: No, no, no. They're talking about --
13 let me see.

14 MR. MURPHY: Mr. Belser could help you out here and
15 acknowledge that he sued Mr. Flanagan, the one person he
16 talked to.

17 THE COURT: Well, there's no question about the
18 source of it because Mr. Gilden didn't know anything but
19 what Mr. Flanagan told him.

20 MR. CLINCH BELSER: Your Honor, I think the
21 simplicity of Mr. Murphy's argument is his greatest
22 weakness because the Jury can interpret the real meaning
23 of what was being conveyed to Mr. Evatt by
24 Mr. Flanagan's oral statement, We're denying his claim
25 because of criminal acts -- I mean because of

1 intentional acts. In his deposition, which we read in
2 the very beginning, Mr. Flanagan admitted under oath in
3 his deposition that could mean the same thing -- I think
4 that's a quote -- the same thing as saying he lit the
5 fire. So that the Jury can have that same
6 interpretation of what he said. It's not sufficient to
7 walk around and say, I think that JR Murphy lit the fire
8 because that's an implication of saying that he lit the
9 fire. Maybe I think he lit the fire, maybe I don't. Of
10 course, I'm not saying JR lit it. But you can't just
11 say that's what I really believe. You've got to prove
12 what it was.

13 THE COURT: Very well.

14 MR. MURPHY: I just want to make clear that the
15 only person that the slander allegedly was published to
16 -- publication is a required element -- was Daniel Evatt
17 at Citi Financial. That's the only person in their
18 discovery responses and in their Complaint that they
19 have alleged. So that's the only statement. What that
20 statement was, was that Mr. Evatt was told that
21 Mr. Fowler's claim was being denied based on the
22 intentional act exclusion and that one statement is
23 true. That is the only statement in this record that's
24 being argued as being actionable.

25 THE COURT: I said, no, I don't think that they are

1 arguing that the claim was denied because that's the
2 first cause of action.

3 MR. MURPHY: No, no. I'm talking about the
4 statement about why the claim was denied is what they
5 allege to be the slanderous statement.

6 THE COURT: You don't think it's slander to accuse
7 somebody of arson?

8 MR. MURPHY: That's not what he said. He said the
9 claim was being denied based on the intentional act
10 exclusion.

11 THE COURT: Intentional act of what? Somehow my
12 notes are voluminous. But I do remember some of the
13 testimony being to the effect that it was the
14 intentional, he, quote, lit the fire.

15 MR. MURPHY: Well, I just want to make sure I'm
16 clear on the record --

17 THE COURT: Well, regardless, right now, because
18 obviously slander is like other things that's in the
19 soul of the receiver. In other words, the standing in
20 the community, not the damage felt by the victim.

21 MR. MURPHY: Yes, I understand.

22 THE COURT: So that's what I -- so I find there's
23 sufficient evidence to go forward on it. But you can
24 argue that to the Jury.

25 MR. MURPHY: I understand that.

1 But there was one other ground and that was based
2 on qualified privilege because of the relationship
3 between Nationwide and Citi Financial was that of a
4 mortgagee which had certain rights under its policy and
5 so that --

6 **THE COURT:** Well, again, I'm not gonna argue the
7 case because they can do it. The only thing is, it
8 sounds like it was a very tenuous sort of relationship
9 inasmuch as there is testimony, I don't know if it's
10 believable, but there is testimony that even their
11 financial friends weren't advised of the full coverage
12 available. That doesn't sound like they are too much in
13 the same boat.

14 **MR. MURPHY:** Your Honor, at the risk of not mixing
15 evidence, I am simply saying that the substance of the
16 phone call was the relationship between the amounts
17 being paid to Citi Financial, and it had to do with
18 their rights, Citi Financial's rights under the policies
19 issued by Nationwide, and there's no evidence that
20 Mr. Flanagan exceeded the scope of the qualified
21 privilege that would exist --

22 **THE COURT:** But did he have to say what was the
23 basis of the exclusion?

24 **MR. MURPHY:** He was asked why are you denying the
25 claim. That's in the record. That's from his

1 deposition. And so he responded to that. And that's
2 the type of conversation that a qualified privilege is
3 designed to protect, so that there can be an open back
4 and forth between individuals who have a common business
5 interest in the subject matter of the conversation.

6 THE COURT: I agree that everybody has curiosity,
7 but it's not limited to financial business.

8 MR. CLINCH BELSER: May it please the Court, I only
9 offer two points. One is this exact same argument which
10 was made by Counsel a year ago and denied at summary
11 judgment. One of the key questions was the scope of the
12 conditional privilege exceeded, and did the man say more
13 than he really needed to say? Did he say more than the
14 circumstances required?

15 The cases cited in Judge McIntosh's Order denying
16 the Summary Judgment Motion last year is exactly on
17 point and your question is exactly right. Why did he
18 have to say all of that? And he didn't, and that's a
19 question for the Jury. But the cases cited in the Order
20 denying the summary judgment in November, it was heard
21 in November but the Order wasn't signed until later.
22 It's a jury question as to whether the speaker has gone
23 beyond the needs of the occasion and says that the
24 speaker has got to be very careful to limit it to what
25 was required.

1 I'd like to state that I think Mr. Murphy is
2 completely wrong when he says that the testimony says
3 anything about Mr. Evatt asking him why it was denied.
4 He asked, Why do we have to submit a Proof of Loss? He
5 didn't ask, Why was it denied? Mr. Flanagan went way
6 beyond the circumstances and said, We are denying it
7 because of the intentional acts exclusion, and then he
8 later said in his deposition, That's the same thing as
9 saying he lit the fire.

10 The only other thing is it's up to the Jury, as you
11 say, is to interpret the fair meaning conveyed by the
12 words used. In this case Mr. Flanagan under oath at his
13 deposition said it was the same thing as to say lit the
14 fire and that's arson, slander.

15 **THE COURT:** Gentlemen, please understand the reason
16 I prefer being in the court that I am rather than say
17 Family Court or Equity or something where I have to do
18 all the lifting, I have a jury over there that y'all
19 will be able to convince of your positions that will
20 decide, because I do not find as a matter of law that
21 you would be entitled to a directed verdict for either
22 of the causes of action.

23 **MR. MURPHY:** Your Honor, if I can just put one more
24 thing on the record unrelated to that and that would be
25 with regard to those second and third, those two causes

1 of action also carry with them a request for punitive
2 damages, and so I would want to put on the record a
3 motion for directed verdict because there is no evidence
4 by a clear and convincing standard that would entitle
5 the Plaintiff to submit punitive damages to the Jury on
6 either the slander cause of action or on the bad-faith
7 cause of action.

8 THE COURT: What do you say about that?

9 MR. CLINCH BELSER: Well, we've had so many
10 disagreements in this particular case, I just want to
11 register another disagreement. The record at this point
12 is sufficient to put that to the Jury because of all the
13 factors cited as to what Nationwide was doing and why
14 they did what they did and it was a pretext or not
15 pretext or whether there was a reasonable investigation
16 if they knew or should have known if they were not doing
17 a reasonable investigation and they were intentionally
18 violating, recklessly violating the rights of their
19 policyholder.

20 I think it's a clear question. I want the Jury to
21 decide whether it's enough. I think the record is
22 adequate for it to be required to go to the Jury, so I
23 would oppose this motion as well.

24 THE COURT: As I said earlier, I do think that
25 there is enough evidence for the Jury to be able to

1 consider whether or not there is some clear and
2 convincing evidence, all that evidence is clear and
3 convincing as to whether or not there was willful,
4 wanton, and reckless disregard of the interests of the
5 Plaintiff. All right. So I deny that, too.

6 Anything else? How many more witnesses do you
7 have?

8 MR. MURPHY: We still have three witnesses, Your
9 Honor. We tried to be as brief as we could today but we
10 feel like we have to allow them to testify.

11 THE COURT: Well, you know, let me say something.
12 I've been in a courtroom before, and sometimes I pay
13 attention to juries more than I perhaps should. But at
14 a point they have gotten a little, I won't say
15 uncomfortable, but when I see them looking at the clock,
16 and some of them, like judges seem to kind of nod a
17 little bit, you might want to think about our
18 presentation to go to the Jury when they're fresh, and
19 not -- a lot of this has been plowed over. And the
20 other thing is we all know that the reasons we have
21 advocates more so than just, as they say in the British
22 system Solicitors while we have advocates is because
23 really your purpose is to get the basis in the record
24 for the argument, but you have to deliver it. So, I
25 mean, sometimes if you overwork an issue or something

1 like that, it kind of loses its significance. You can
2 still argue it if it's in the record. But I do want to
3 say this. I want to take thank you for culling a little
4 bit of it away. I hope that sort of thing is no longer
5 necessary. We're in your case now, so...

6 MR. MURPHY: Well, Your Honor, I had two of my
7 witnesses' depositions published *ad nauseam* and so it
8 makes it difficult for me.

9 THE COURT: I know that. I'm not in any way trying
10 to -- I'm just saying that fortunately you won't have to
11 publish their testimony.

12 MR. MURPHY: We have all live witnesses.

13 THE COURT: That's exactly right. Also I
14 appreciate the way that you cooperated with each other
15 in trying to get those matters that you could get out of
16 the reading.

17 My point is that fortunately we don't have --

18 MR. MURPHY: Yes, sir.

19 THE COURT: -- that problem tomorrow, and I hope
20 that we will enjoy the benefit of it, or the absence of
21 it.

22 All right. Anything further from the Plaintiff?

23 MR. CLINCH BELSER: No, Your Honor.

24 THE COURT: From the Defense?

25 MR. MURPHY: No, sir, Your Honor.

1 MR. CLINCH BELSER: Would you like us to come in a
2 little early?

3 THE COURT: A little bit early. I'm not quite
4 sure.

5 We're off the record.

6 (Discussion off the record.)

7 (Court adjourned at approximately 6:30 p.m. on
8 Thursday, December 1, 2011, to resume at
9 approximately 8:55 a.m. on Friday, December 2,
10 2011.)

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1 call Mr. Jerry Byers.

2 Whereupon,

3 Jerry Byers

4 Having first been duly sworn, was examined and testified
5 as follows:

6 Direct Examination by Mr. Moore:

7 Q. Good morning, Mr. Byers.

8 A. Good morning.

9 Q. We heard your name already in this case, but would
10 you please introduce yourself to the Jury.

11 A. My name is Jonathan G. Byers, Senior. I go by
12 Jerry. I live in Greenville, and married 40 years, one
13 son who is also a fire investigator like his dad. Two
14 grand kids that drive me crazy but I love them to death.

15 Q. Thank you, sir. Can you tell us a little bit about
16 your professional background?

17 A. Originally I worked for the Greenville County
18 Sheriff's Department as a Uniform Patrol Officer. Then
19 was promoted into the Major Crimes Section and assigned
20 to work arson. I had been a volunteer fireman with Wade
21 Hampton Fire Department there in Greenville for several
22 years, so I had some fire background.

23 I subsequently went to numerous schools while with
24 the Sheriff's Department, and National Fire Academy and
25 other fire-related schools and enhanced my knowledge of

1 fire investigation. During this period of time I was
2 also going to Greenville Technical College taking
3 criminal justice courses.

4 Q. What was the first formal training you had as a
5 fire investigator?

6 A. It was basic arson investigation which was the, at
7 the South Carolina Criminal Justice Academy. This is
8 where back in 1978, where they had the first class
9 outside of the National Fire Academy which was located
10 in Emmitsburg, Maryland. This was a test program that
11 they came to South Carolina and put this program on,
12 there were 50 of us in the class, and made it localized
13 where I didn't have to go to Maryland and spend two
14 weeks up there. Eventually I went back to the same
15 school here -- I mean to the advanced schools and other
16 related schools dealing with fire investigation.

17 Q. Have you been in courses and training in fire
18 investigation with Mr. Douglas Ross?

19 A. Yes, sir, I have.

20 Q. And when were those occasions?

21 A. Well, Mr. Doug Ross and I were in the very first
22 class I just mentioned at the South Carolina Criminal
23 Justice Academy when it was put on in 1978. We were
24 both in that class with a number of others, the Chief of
25 Police now in Greenwood was in that class. There were a

1 number of us.

2 Q. Since that time in 1978 have you continued to
3 further your knowledge of fire investigation?

4 A. Oh, yes, sir.

5 Q. How many hours -- is it possible for you to
6 estimate how many hours of fire investigation education
7 you have had over the years?

8 A. It would be -- I'd have to go back to, number one.
9 When I started my career we didn't have computers or fax
10 machines, cell phones. So basically the records that
11 were kept were kept by the County or the department we
12 worked for. Since, I would estimate totally in the
13 range of seven, eight thousand tested hours of schooling
14 throughout the years, maybe more. I just don't have a
15 way of keeping, of accessing the records.

16 Q. In addition to the extensive hours of educational
17 time, have you also served as a lecturer yourself on
18 fire investigation topics?

19 A. Yes, sir. I've testified -- I've lectured to
20 different insurance agencies. I've, the Criminal
21 Justice Academies up in Virginia and North Carolina and
22 in South Carolina. I helped train firemen in different
23 fire departments throughout the State. I don't do it as
24 much anymore as I've gotten older and I really don't
25 have the time.

1 Q. How about certifications? What certifications do
2 you hold in the area of fire cause and origin
3 investigation?

4 A. I hold a CFI which is Certified Fire Investigator
5 through the International Association of Arson
6 Investigators. I was working in Virginia when I
7 received my designation in I think it was 1987, and
8 that's the pin I wear here. My certificate number was
9 007, so I was the seventh one in the United States to
10 receive my certificate. And it all was based on three
11 things: experience, training, and courtroom testimony.
12 And, you know, it takes some years to obtain these. You
13 know, there are a number of points to disqualify. When
14 I took, when I originally was certified, it encompassed
15 a written test, and then back then they did an oral test
16 where I had to go in before a committee of Fire Chiefs
17 or firemen, attorneys, solicitors or prosecutors, we had
18 a judge on the committee, and all these people
19 questioned me about my knowledge of fire and fire
20 investigation.

21 Q. So you actually testified in a courtroom before?

22 A. Oh, yes, sir. I've testified in South Carolina,
23 numerous counties, both in the federal and state court.
24 I never testified in this courthouse, but I have
25 testified in the old courthouse next door here in Oconee

1 County. I've testified in North Carolina, South
2 Carolina, Georgia, Alabama, Tennessee, Virginia, West
3 Virginia, and Pennsylvania.

4 Q. And what field do you hold yourself out as an
5 expert?

6 A. To the cause and origin of fires.

7 MR. MOORE: Your Honor, at this time the Defendants
8 would proffer Mr. Jerry Byers as an expert in the field
9 of origin and cause of fire investigations.

10 MR. FREEMAN BELSER: No objection, Your Honor.

11 THE COURT: All right. Without objection the
12 Witness of the Defendant, Mr. Byers, will be authorized,
13 recognized as an expert in the area of cause and origin
14 of fire investigations. Again, his testimony, like all
15 the witnesses, expert or lay, is for your evaluation.

16 You may proceed.

17 MR. MOORE: Thank you, Your Honor.

18 By Mr. Moore:

19 Q. Mr. Byers, how did you first become involved in the
20 fire at Mr. Fowler's home?

21 A. I received a call from Andy Flanagan, who was an
22 adjuster with Nationwide Insurance Company, that he had
23 a house fire that he wanted me to go and examine. At
24 that time I just get the basic information, who I'm
25 working for, their address and phone number, the owner

1 of the home, in this case was Mr. Fowler, his address,
2 his contact information, the policy number or the claim
3 number. And basically what they are requesting me to do
4 in this particular case was to determine the origin and
5 the cause of the fire.

6 Q. With the understanding, Mr. Byers, that we're gonna
7 go through your photographs or some of your photographs
8 in a few moments, can you tell the Jury just with a
9 general overview what you did in the course of this
10 investigation?

11 A. Well, after receiving the assignment, I think it
12 was the next day I went to the loss location, which was
13 here in Oconee County down on the lake. Upon my arrival
14 I met with Mr. Fowler, and like I do on every fire I go
15 to, I want to get the general information about the
16 house, the age, any recent renovations, any problems
17 with the house, any electrical problems, any issues with
18 the heat system, anything. We discussed the fact that
19 he had informed me that there was no power to the house
20 due to the issue that he had had with the power company
21 and that he was staying in the gazebo out back. We also
22 talked about a kerosene heater that was in the house and
23 the drop cords that were supplying power through a
24 window from the gazebo in through a window into the
25 kitchen. And he had a coffee pot and a lamp there on

1 the counter in the kitchen and he had another drop cord
2 that went over to the refrigerator and then the other
3 drop cords that actually ran out the left end of the
4 house out towards his fish ponds. And we talked about
5 that. And he informed me that during the fire when the
6 firemen got there and started spraying the water into
7 the house is when the drop cords physically
8 short-circuited.

9 Q. What was the significance of the drop cords
10 short-circuiting at that point in the fire?

11 A. Well, it helps me as an investigator to eliminate
12 the electrical aspect of a fire.

13 Q. Why did you ask Mr. Fowler when you met with him
14 about the electrical supply to the house and the
15 kerosene heater?

16 A. Well, two reasons. Number one, for my safety. A
17 lot of fires that I've gone into, there's still power to
18 the breaker box and to the house, even after fires, and,
19 you know, I don't want to go in, especially when
20 everything is wet and start touching live electric wires
21 where I'll end up being a statistic. So it's again,
22 it's just a safety factor that I have to consider in
23 every fire that I go into.

24 This particular house had a concrete slab
25 foundation so I didn't have to contend myself with

1 falling through the floor, of holes burning through the
2 floor, and that has happened over the years. So safety
3 is an issue, not only from items falling through floors
4 and stuff like that, also from items from up above
5 falling down on top of me. So I have to look, just do
6 an overall evaluation interior and exterior basically
7 for my safety.

8 Q. You mentioned two reasons. What was the second
9 reason that you were asking Mr. Fowler about the power
10 supply and the drop cords and kerosene?

11 A. Well, to find out, you know, I knew that he told me
12 that he had an issue with the power company. There was
13 a power meter there. But, as I learned, they had the
14 rubber boots on it and there was no power into the house
15 except to the meter. Now, the drop cords themselves
16 shorting out when the firemen sprayed water on them
17 helped me to eliminate that aspect of the fire.

18 Q. How long did you spend in total on your
19 investigation of the Fowler fire?

20 A. Two full days.

21 Q. Is that a normal time?

22 A. It varies. I have been on fire scenes from several
23 hours. I think the longest period of time we ever
24 worked on a fire scene was six weeks.

25 Q. And in this case why did it take two days to

1 conduct your investigation?

2 A. Well, to properly go through and remove the debris,
3 and this is not easy work and you have to get in with a
4 shovel and you go through the debris, and it's called
5 layering. What I want to do is to start at the top of
6 the layer of debris and work my way down to the floor.

7 That tells me the sequence of events that this fire
8 occurred and when this debris piled up starting from the
9 top down to floor level.

10 Q. During your investigation over the period of two
11 days were you in contact with anyone from Nationwide?

12 A. Oh, yes, sir. I was there with Billy Gilden, I
13 think he testified yesterday afternoon.

14 Q. Okay. Did you give any verbal telephone reports to
15 the folks at Nationwide?

16 A. You know, I'd give them my head's up at the end of
17 each day of my investigation. At the end of the first
18 day -- they ultimately are paying my bill for my
19 services, so I want to spend their money as wisely as
20 they do. And, you know, I don't want to shortchange the
21 investigation, but I want to keep them advised that at
22 the end of the first day I hadn't completed the scene
23 exam, that I needed more time and that was fine with
24 them.

25 Q. At the end of your two days of investigation, had

1 you come to an opinion regarding the cause and origin of
2 this fire?

3 A. Yes, sir, I did.

4 Q. And had you come to an opinion of the cause and
5 origin of this fire to a reasonable degree of certainty
6 in the field of fire cause and origin investigation?

7 A. Yes, sir.

8 Q. And what was the opinion that you came to after
9 your investigation?

10 A. That there were two separate unrelated fires in
11 this structure. The first was in the living room, this
12 was a localized fire that burned there on the floor, the
13 heat transferred over, totally consumed a grandfather
14 clock and a TV next to it. There were other factors
15 there which I can show you in the photograph of finger
16 burns where a flammable ignitable liquid had been
17 introduced there and ignited by an open flame.

18 The second point of the of origin was on the floor
19 of the kitchen. They had a large wooden kitchen table
20 with wooden chairs. After I went through,
21 systematically went through the debris in the kitchen
22 and removed it from the floor, there was a burn pattern,
23 a semicircle burn pattern around the kitchen table that
24 came from the back wall around toward the sink area.
25 Examination of that area including the chairs, the

1 pedestal, and the kitchen table revealed the fire coming
2 from the floor upward. Most people don't have things on
3 their floors and their living room and in the kitchen
4 floor that's gonna catch fire at floor level and burn
5 up.

6 Q. Did you provide Nationwide first with an oral
7 summary of your conclusions?

8 A. Yes, sir, I did.

9 Q. And, after you did that, did you prepare a report?

10 A. Yes, sir, I did.

11 Q. I want to hand you what's been marked as Defense
12 Exhibit 3 and ask you if you can confirm that that's a
13 copy of the report you provided to Nationwide?

14 A. Yes, sir, it is.

15 Q. Mr. Byers, would it assist you to explain to the
16 Jury your investigation using these photographs and the
17 diagram that you made?

18 A. Yes, sir.

19 MR. MOORE: Your Honor, at this time I would ask if
20 the Witness could step down to the easel.

21 THE COURT: Certainly.

22 MR. FREEMAN BELSER: No objection.

23 (Witness leaves stand.)

24 MR. MOORE: Mr. Byers, I'm gonna set up the
25 photographs here.

1 THE WITNESS: Okay.

2 MR. MOORE: What I'm gonna ask you to do is refer
3 to your photograph over here and then orient the Jury to
4 where the photograph is using this laser pointer over
5 here.

6 THE WITNESS: That's no problem.

7 By Mr. Moore:

8 Q. All right. Obviously these are not all the
9 photographs that you took; is that right?

10 A. That's correct.

11 Q. Okay. Do you recall how many you did take?

12 A. It was over 150 photographs.

13 Q. Okay. We've tried to cull some of these down. But
14 let's, for the benefit of the Jury, can you explain the
15 significance of this photograph which is part of Defense
16 Exhibit 1?

17 A. Yes, sir. This is a photograph of the rear of the
18 house. I was standing on the, next to the gazebo which
19 would have been on the, facing the house would have been
20 the left rear. I would have been standing in this area
21 right here taking the photograph back.

22 The damage you see, the burn here on the, this area
23 here is the only exterior fire damage that I found when
24 I'm making my round around the structure. One of the
25 things I do as I do my exterior exam, I'm photographing

1 it. I'm also checking doors and windows to see where
2 the security of the house, if there was any breach of
3 the doors or the window. The front door, this door here
4 is a sliding glass door, was still locked. The glass is
5 missing here and that's where the firemen took that out.

6 This window here in the living room at the top, you
7 can still see the cross bar here and the framing with no
8 low burning there.

9 This is a bedroom window and another bedroom here
10 and also you can observe that a large portion of the
11 roof is missing.

12 Q. In the photograph can you see the drop cords that
13 you mentioned?

14 A. Yes, sir. The drop cords are coming, as you can
15 see the red line here on the, my diagram coming out of
16 the basement, the bottom section of the gazebo comes
17 over through the window and diverts off into the house.

18 Q. Now, the drop cords were actually through the
19 bottom of the window?

20 A. Right. They came through this window right here.
21 You can see the drop cords right there in that
22 photograph where it went in and the window was closed
23 down.

24 Q. Now, what effect would having the drop cords under
25 the window have on --

1 A. There was a slight crack in the window.

2 Q. Okay. What would that allow?

3 A. It would allow an air flow.

4 Q. If we could turn to the next photograph, and I ask
5 you what the significance of this photograph is.

6 A. Okay. This is a photograph of the living room
7 looking at the sliding glass door, the window here, the
8 drop cords are coming across the floor right here. You
9 can see there's a stuffed chair here, a large can with
10 an ash tray. This is Sheetrock that had fallen from the
11 ceiling here. That would have been a photograph that
12 would have been taken, I would have been standing in
13 this area here shooting back towards the sliding glass
14 doors and the window. And also in this photograph, just
15 pay attention, with the debris field that's in there,
16 this is what I mentioned earlier, I had to go through
17 and assess along the base here of the sliding glass
18 doors where the drapes and all fell, the remains are
19 still there.

20 Q. And then this next photograph, maybe make it a
21 little different angle. Can you identify this for us,
22 please?

23 A. This is the -- you can see the edge of the sliding
24 glass door here. Here's the living room window that
25 would have been that window right there where the drop

1 cords come through. This is that corner of the living
2 room here. There's a grandfather clock. The
3 grandfather clock here, the TV is right over here, and
4 there is a heat duct register in the ceiling. That
5 allowed also as the fire progressed up into the ceiling
6 and brought that around, that heat duct allowed the fire
7 to get into the attic in a fairly early stage.

8 Q. Now, what is this?

9 A. This is just Sheetrock that had fallen during the
10 fire.

11 Q. All right. Explain the significance of this
12 photograph?

13 A. Well, this is another photograph of the living
14 room. You can see there's a kerosene heater here. This
15 would have been the wall of the living room and that's
16 this wall right here which separates the living room
17 from this bedroom. There's a TV here, here's the
18 kerosene heater.

19 Q. Now, by the time you took this kerosene heater, had
20 you examined this kerosene heater yet?

21 A. No, no. All I'm doing at this point is going room
22 by room that are damaged by fire and just doing an
23 assessment of what I'm gonna have to do to investigate
24 the fire.

25 Q. Did you ultimately clean off the debris on the

1 floor just inside the double doors?

2 A. Yes, sir.

3 Q. Can you explain to the Jury what this is?

4 A. This is a photograph taken of the living room.

5 Here's the sliding glass door, there's the TV, here's
6 the remains of the base for the grandfather clock, and
7 you can see the drop cord coming through the window,
8 across the floor, and going back through the kitchen.

9 And that was taken with me standing right there beside
10 those doors looking back at this wall here.

11 Q. What's the significance of this pattern?

12 A. Okay. After I went through the debris and the
13 layering part which was going from the top of the debris
14 down, it tells me at what time what first fell during
15 this fire. The first thing that come down on the floor
16 naturally it would be the Sheetrock. The second thing
17 was the insulation from the attic, and then some burned
18 ashes from the rafters burning up there. That's the
19 normal thing I've seen after hundreds of fires.

20 And then, after cleaning the floor off, I seen
21 these burns, burns here on the carpet. The burns in
22 itself don't mean a lot unless you can qualify them.
23 This right here is drop down from where the stuff come
24 down from up above that were along the curtains and
25 stuff from the sliding glass doors. This pattern here

1 is abnormal.

2 Number one, when the curtains and all fell, they
3 would be along the base, base heater. And the reason
4 this is an abnormal or point of origin, and I know you
5 heard this probably over the last several days, there's
6 several factors. The burn itself doesn't mean nothing,
7 but if I can qualify it to meet certain criteria, then
8 it does mean something.

9 One is I have a finger that comes across here.
10 That's abnormal. If something falls to the floor, it's
11 not gonna leave an irregular shaped pattern like this.
12 The burnout through here, that discounts the curtains
13 blowing out and falling to the floor and causing this
14 pattern because this is probably about six feet out from
15 the base of the wall. And also in one of the qualifying
16 factors is this, it's kind of hard to pick out, I've
17 seen this numerous times, but it's what we call a
18 doughnut in a burn pattern, especially, as everybody
19 knows, floors are not level.

20 So what happens is an accelerant is poured there,
21 it makes a pool and it burns there and leaves a distinct
22 line. Here's the center of the donut and here's the
23 round part. And I think this next one will show it even
24 clearer.

25 Q. Are you able to tell in this next picture just the

1 unevenness in the slab?

2 A. Oh, yes. See this pattern here, out along here,
3 where and how irregular it is. That's where flammable,
4 ignitable liquid was poured across the floor. Because
5 your line of demarcation of burn is so distinct of where
6 the liquid was poured. Here's the drop cords going
7 through the burn pattern there.

8 Another factor that I have to qualify this is I
9 have to ask myself a question. Why did this happen in
10 this area when there's nothing there to burn? The only
11 thing coming down was, the first thing that came down
12 was Sheetrock, and when it falls on the floor, it's
13 gonna protect it. The other thing is insulation, which
14 insulation doesn't burn, unless it's cellulose. And a
15 lot of houses still use cellulose, but anyway, we didn't
16 have it in this house.

17 But this pattern is once it started it was ignited,
18 it started burning and it burned hot and it burned
19 rapid. It was so hot that it completely consumed all
20 but the base of this grandfather clock. The TV, look at
21 the damage here. That radiant heat that was being
22 projected into this corner totally consumed the part of
23 the TV and the grandfather clock. This is not normal.
24 This is not normal evolution of how a fire moves through
25 a structure.

1 Q. Well, why isn't it the rest of the carpet that
2 didn't have accelerant on it didn't burn the same way?

3 A. Because accelerant wasn't there. In other words,
4 if you pour kerosene, gasoline, alcohol, anything that's
5 a flammable liquid and ignite it, no matter where you
6 pour it, it's gonna leave these specific lines of
7 demarcation of this type burn.

8 Q. Now, the picture that we're looking at, do you see
9 liquid or water in it somewhere?

10 A. Yes. There's water still pooling here.

11 Q. And why would it be pooling in those particular
12 areas?

13 A. Because of the unlevelness in the floor.

14 Q. Did you put water down in the residence when you
15 got there?

16 A. No.

17 Q. Was there water down in the residence when you
18 started to unpack the debris?

19 A. Yes.

20 Q. And there's been some testimony regarding the
21 damage to the drop cords as to the extensiveness of it.
22 Can you comment on the extensiveness on the damage to
23 the drop cords and the significance of the line of
24 demarcation?

25 A. Well, the line of demarcation in the burn pattern,

1 which is this pattern here, the drop cord runs through
2 it, and as you can clearly see, where the burn pattern
3 stops, the damage to the insulation and the drop cord
4 stops, and you can see it right there very clearly.

5 Q. I have a photograph of the heater next. Is this
6 another photograph that you took?

7 A. Yes, sir.

8 Q. What's the significance of this photograph?

9 A. This is a kerosene heater, it's a rectangular or
10 barometric-type of kerosene heater. All of us have had
11 them, I had one that I've used for a number of years.
12 This particular heater, you open up the door here and
13 you reach down and you pull the tank out, you turn the
14 tank upside down and you take the top off and you fill
15 it. And then you put it back in, and there's a needle
16 valve near the bottom that when you set it down that
17 needle valve opens up a rubber grommet and allows the
18 kerosene to flow in a sump tank underneath it. This was
19 the way it was setting after the fire. It hadn't been
20 moved. The fire scene had not been altered. This is
21 where, where I found it.

22 Q. Were you able to determine how far away from the
23 preexisting wall the kerosene heater was before the
24 fire?

25 A. It was five or six inches away from the wall. You

1 can see the base of the wall here, the studded wall that
2 comes along here. This is that wall here that separates
3 the bedroom from the living room here.

4 Q. Now, is there any significance to the studs that we
5 see behind the heater in this photograph?

6 A. Yes, sir. The studs are burned here in a direction
7 coming from the kitchen coming this way. In other
8 words, the studs in that part are burned in a direction
9 coming toward the back of the heater.

10 Q. And actually you moved your finger there through
11 the diagram through a rectangle that's not labeled. Can
12 you identify for the Jury what that was? Bad question.

13 A. You're talking about here?

14 Q. Yes, sir.

15 A. Okay. This area here, which I didn't realize until
16 I was looking at some other photographs, this is
17 actually a closet, and it had a set of bi-fold doors
18 which allowed the fire that was burning here to go into
19 the closet and come through and burn those studs. And
20 the studs indicate that they are being burned from the
21 backside coming forward.

22 Q. Do you have another photograph of the studs to show
23 that?

24 A. Yes, sir. You can see these studs here. See this
25 one here? Here's the walls coming along here. This was

1 the opening for that closet. And the fire is coming
2 through the back through the closet and attacking this
3 stud here and that's why it's burning from the back
4 side.

5 Q. Now did you remove the heater from --

6 A. Yes, sir, I did.

7 Q. Now, there was some talk about you cleaning up the
8 heater. And can you describe for the Jury what you were
9 doing when you were what someone else called cleaning up
10 the heater?

11 A. The only thing I wanted to do -- like I said, I've
12 owned one of these myself. I wanted to make sure that
13 the safety mechanism for this heater, and that's that
14 dial on the front that's spring loaded, that if you bump
15 it, the spring will release it and shut it off. And
16 that's the only thing. I just removed enough debris
17 from the interior to check that mechanism and it did
18 work.

19 Q. And when did you do that, did you open the grill?

20 A. Yes.

21 Q. Okay. And you confirmed that the safety mechanism
22 worked?

23 A. That's correct.

24 Q. Now, does the safety mechanism only trigger if the
25 heater is on, or does the safety mechanism also trigger

1 when the heater is off?

2 A. The heater has to be on, in other words, the burner
3 has to be burning and up for it to work.

4 Q. Okay. Now, did you also check the volume of the
5 kerosene, the remaining volume of the kerosene in the
6 heater?

7 A. Yes, sir, I did.

8 Q. How did you check that?

9 A. Remove the kerosene heater outside to a bench there
10 to the rear. This photograph is just the right side.
11 It's just got Sheetrock damage on it here. This is
12 where the plastic handle melted out of it, really no
13 flame impingement or discoloration to it from the fire.

14 Q. How did you measure the amount of kerosene in the
15 heater?

16 A. Well, this --

17 Q. I'm sorry (puts new picture up).

18 A. All right. This is another view of the kerosene
19 heater. Here's the door I was referring to earlier
20 where the tank is. Myself, Mr. Gilden was there with
21 me. This was the second day. I pulled the tank out,
22 held it upside down, unscrewed the top, and stuck my
23 finger in it, and stuck it in, and I got kerosene on my
24 finger when I went that deep here to my knuckle.

25 Q. Were you holding the kerosene tank upright?

1 A. It was upright. As a matter of fact, I was setting
2 it down kind of on the bench when I stuck my finger in
3 it to keep it level.

4 Q. Okay. And what did that tell you about the volume
5 of kerosene in the tank?

6 A. That the kerosene heater was anywhere 75 to 80
7 percent full, that it could not have burned all night
8 long.

9 Q. Now, when you talked to Mr. Fowler, did he tell you
10 what time he had turned the kerosene heater on the night
11 before the fire?

12 A. Yes. That he had went into the house between 5:30
13 and 6:00 before it got dark, took the tank out of the
14 heater, took it outside and filled it back up. Came
15 back in, reinserted the tank, lit the tank, lit the
16 heater with a match, turned it on almost wide open, and
17 this was around 5:30 to 6:00.

18 Q. Did you analyze the heater to determine whether it
19 could have had 75 to 80 percent, even two-thirds full
20 the morning of the fire if it had been set wide open at
21 5:30 to 6:00 the night before?

22 A. Oh, yeah. This was what was in it when the fire
23 occurred. Now, I know what I was told. I was told it
24 was filled the night before and that it had burned all
25 night. But there's no way this heater can burn 13 to 14

1 hours and have that much fuel still remaining in the
2 tank.

3 Q. Now, there's a pattern on the corner of this
4 heater. What corner is this pointing to?

5 A. Okay. This area going back here would be going
6 back toward the kitchen. That would have placed this
7 corner right here, this end with the heater here. The
8 kitchen is over here, this is the dining room, and that
9 burn right there on it is this end here.

10 Q. And was there a similar burn in this angular
11 pattern on the other side?

12 A. Yes, sir.

13 Q. Okay. And did you determine the source of the
14 damage to the heater while you were doing your
15 investigation?

16 A. Yes, sir. Eventually, after going through the
17 kitchen area, I determined a fire from the kitchen was
18 coming around this area and that's why the flames as
19 they turned that corner damaged the, that end of the
20 heater itself.

21 Q. Did you examine the floor to further evaluate that
22 hypothesis?

23 A. Yes. This is the, this is the metal threshold
24 right here, that runs along and separates, it's in all
25 our houses, where you have linoleum with a metal strip

1 and then you move over to carpet. And that would have
2 been this area here. That's that metal strip that
3 starts linoleum to the carpet. You can see the carpet
4 here. As you come around the corner, the heavy burning
5 there on the floor. Again, this is in an area where
6 people walk. You don't expect to find abnormal burning
7 here.

8 Q. What is the area, the heavier damage on the
9 threshold?

10 A. It's right here at the corner where the wall
11 starts.

12 Q. The corner with the heater that had the
13 irregular-shaped pattern on it, what corner are we
14 talking about?

15 A. That would have been in this area here where it
16 came to the end of that heater there, that pattern seen
17 in that photograph.

18 Q. Okay. Changing slightly the subject. What's this
19 photograph of?

20 A. Okay. This is looking from the kitchen in that
21 corner there going around -- this is before I'd cleaned
22 all that debris out.

23 Q. So this is -- I'm sorry, I must have done it
24 backwards. This is the before and this is the after?

25 A. Right. See, this is that area here. You got floor

1 level burning here that's burning these cabinets in the
2 kitchen, that would have been along this wall here.
3 There was a closet with bi-fold doors, the fire got into
4 it and actually came through the wall to the back of the
5 heater.

6 Q. Can we see the closet?

7 A. Yeah, it's right here.

8 Q. The closet's right there?

9 A. Yeah, that's part of it right -- well, actually
10 right there. There's the opening there.

11 Q. How do you discern it?

12 A. Thousands of fires and looking at these and having
13 been in these buildings and seen the debris and
14 shovelled them out.

15 Q. What's this?

16 A. This right here is part of the kitchen cabinet that
17 runs along the back wall of the kitchen there.

18 Q. How would you describe the damage to the kitchen
19 cabinets at that location?

20 A. Again, the fire was coming from the floor coming
21 up. But look at the damage here. It's burned all the
22 way -- I mean, actually, you know how most kitchen
23 counters have a place that when the counter comes down
24 kind of a little niche you can kind of go up underneath
25 it? This actually burned up underneath there. This

1 tells me as an investigator that fire was burning on
2 that floor in the early stages. Now we're getting to
3 the second point of origin.

4 Q. Okay. Now, can you tell us which direction these
5 cabinets were burned? Were they burned top down or
6 bottom up?

7 A. They were burned from the bottom going up.

8 Q. Another photograph of the kitchen -- I think I got
9 this one right. This is a before; is that correct?

10 A. That's correct. These are the two doors, the sink
11 is right here, here's your dishwasher, the chair here,
12 here's the remnants of another chair, and that's part of
13 the pedestal right there for the kitchen table. This
14 was a large round kitchen table that was there. You can
15 see burning on the floor. Folks, this is the way I seen
16 it the first day I was there or the second day. And you
17 can see the debris here. There's a propane cylinder
18 that's in the kitchen.

19 Q. Now, was that full or empty?

20 A. It was empty.

21 Q. Okay. Now, the significance of the burn pattern
22 on, for instance, this chair and on the pedestal of the
23 table, can you explain that, please?

24 A. Okay. I mean, this is very simple. You can
25 clearly see that the pedestal is burned from the floor

1 up. This is in the center of the table, it's not out on
2 the outer edges. You can also see the legs of the chair
3 here. There's heavy charring to this. But look here to
4 the back. You got less up here. Why is that? I have
5 to ask myself that question and look for an answer. And
6 the reason being is that an ignitable liquid was poured
7 on this floor and ignited it, it had to be, because the
8 fire is burning this floor and burning upward.

9 Q. Now let me ask you about the kind of protected area
10 of the chair. Why was that protected?

11 A. Because the seat that's burning underneath and the
12 seat there is burnt in flames. Another thing, too, the
13 same principle as in the kitchen as in the living room.
14 What's the first material that's gonna come down from
15 the ceiling into the kitchen? It's gonna be the
16 Sheetrock. You can see the Sheetrock debris on the
17 floor. I removed it.

18 The next thing is the insulation. Then I know
19 Mr. Fowler had all kind of stuff in the attic. That
20 came down last.

21 Q. Let's set this one down momentarily. And did you
22 find a V pattern in the kitchen?

23 A. Yes, sir.

24 Q. Explain to the Jury what this is.

25 A. All right. This is the refrigerator, the counter

1 is beside it. And here is that V pattern, you can see
2 it going up the side of the refrigerator, it kind of
3 goes up, and you can see the pattern along the wall, the
4 back wall of this hallway.

5 Q. Why don't we see the counter beside the
6 refrigerator?

7 A. The refrigerator doors are open. This is the
8 ceiling area above there. Look, your roof rafters, your
9 ceiling rafters, and probably the decking floor that was
10 in the attic is still there. The evolution of the fire,
11 again, as I said, what causes this heat pattern on
12 there, on the side of this window? The only thing it
13 can be is flames. Direct flame impingement of that fire
14 going, going upward. And the reason it was going upward
15 is there's a disappearing stairwell here in this attic
16 in this hallway and it's sucking that fire right up into
17 that attic, it wants that cold air, and that's where
18 this fire went.

19 Q. Did you evaluate whether the attic was open at the
20 time of the fire?

21 A. Yes, sir.

22 Q. What did you find?

23 A. It had to be opened.

24 Q. How did you determine that?

25 A. Well, by a physical examination of the frame and

1 the mechanical mechanism for the stairwell. It had to
2 be open. The springs were extended. Now, this piece of
3 wood here was attached to one of the hinges for this
4 stairwell. All right. I got one hinge that has no wood
5 left on it. If you are standing in this hallway and I
6 was standing right here looking at that back this way
7 toward that stairwell opening, the stairs would have
8 came down right towards it. The hinge on my left
9 looking at that stairwell would have been closest to the
10 kitchen. This hinge here with the wood left is closest
11 to the bathroom. That tells me that it was open, and
12 that the fire was coming up the side of that
13 refrigerator you've seen in the last photograph going
14 right into that scuttle hole or that disappearing
15 stairwell hole going into the attic, and it was going
16 more so on the left side that it completely consumed the
17 wood framing and left this partially burned.

18 Q. And is this showing the same thing?

19 A. Right.

20 Q. Now I'd asked you about why we couldn't see the
21 cabinets. And can you tell us the significance of this
22 photograph of the refrigerator and the cabinets?

23 A. Yes. This is the refrigerator. Again, this is the
24 back wall of the kitchen. Here's that kitchen counter
25 there along the back wall. Look at all that's burning

1 here along the floor, the heat coming up through the
2 floor. And this is linoleum in this kitchen. You can
3 see the damage to the interior of the refrigerator and
4 you can see the drop cords, there is a big pile of them
5 here. And these drop cords shorted out. Chief Wright
6 told me that when they first got there, they determined
7 that there was no power. They entered through a door on
8 the left end of house originally to start the
9 extinguishment part. When they sprayed water into the
10 kitchen it started arcing. Well, water and electricity
11 don't go together very well, and the firemen were
12 fearful, so that's why they backed out.

13 Q. Okay. Now, you had a before and after photograph
14 of the kitchen; is that right?

15 A. That's correct.

16 Q. Can you explain to the Jury the difference of what
17 we see here?

18 A. Okay. This photograph at the bottom, this shows
19 with the debris the chair and the table still there.
20 The pedestal for the TV -- not the TV -- for the table
21 was in this area and the chairs were there. You could
22 see this circular burn pattern coming across the floor.

23 Again, qualifying this, how do I reach that
24 conclusion? See the line of demarcation? A burn? And
25 then you don't see -- I mean, it's completely clear. I

1 can take a wet rag and clear the line of demarcation off
2 and it looks like it's brand-new. Again, as a fire
3 investigator, that's part of my training is to recognize
4 and identify these patterns and ask myself questions.
5 Why did this happen? What was really there to cause
6 this? There is no logical explanation to cause this
7 type pattern in this house. Ask yourself, Did falling
8 debris from the attic cause it? No.

9 What's the first thing that came down? You can see
10 it here on the other photograph. It's the Sheetrock.
11 The Sheetrock falls to the floor. It depicts that
12 service.

13 Q. Is there a line of demarcation towards the side of
14 the house in the kitchen as well?

15 A. Yes, sir. This is the door over here that the
16 firemen entered. And you can see the drop cords.
17 Here's that burn pattern on the kitchen floor. And you
18 can see the line of demarcation across here. This is
19 the entrance here to the hallway. There's a very
20 distinct line of demarcation, and you can see the
21 blistering here. This is a close-up of it.

22 Q. What's the significance of these spots in this
23 photograph?

24 A. That's where again, as I mentioned, the high and
25 low spots on the floor, that an accelerant pooled up and

1 caused these burn spots here. These are indicated by
2 the line of demarcation of a burn here.

3 Look at the pattern going up the wall here. The
4 heat that was being generated from this area. But look
5 at the baseboard here away from it. It is not even
6 damaged.

7 Q. Do you have an opinion as to why we have small
8 circular patterns like that?

9 A. That's where this time whoever poured the liquid,
10 it was dropping up in drops and pooled up there.

11 Q. Are those indicative to you as a fire investigator
12 of an area that was intentionally soaked with
13 accelerant?

14 A. Yes, sir. This, this is part of that second point
15 of origin that was in the kitchen that went around the
16 kitchen table where there was fire underneath the
17 kitchen table. If the Sheetrock came down and hit the
18 top of the table, it should protect it. There shouldn't
19 be any fire under it. There shouldn't be any fire under
20 a chair. But that's what I found.

21 Q. Okay. Now this is the last photograph. I'm sure
22 the Jurors will be happy.

23 What is this pattern that we see here in the
24 kitchen?

25 A. This is a V pattern going up. You can see it

1 there. Again, some of this stuff is very visible and
2 easy to see but some of it's not. But there is actually
3 a pattern that comes off of the floor here and goes up.
4 But here's another one of those fingers that I showed
5 you in the previous fire. You can see underneath here
6 the fire on the floor burning up underneath this
7 counter, and then that circular pattern that comes over,
8 and there's the dishwasher in that corner that's coming
9 over in front of it.

10 Q. Why do we only see a slight V pattern in this
11 picture when we've seen a more distinct V pattern in the
12 others?

13 A. Because the fire is being drafted. That's an
14 initial issue that fire investigators have to determine
15 where that fire vents out, and how it vents out of that
16 house tells a lot about the progress of the fire. We
17 didn't have what's called a full involvement fire in
18 this house.

19 And the reason I, what I'm talking about there is
20 that we had fire from one wall all the way through
21 because this is a large open room here. It's open all
22 the way from this wall all the way across into the
23 living room. The only dividers are these extensions of
24 the cabinet.

25 This never went to flashover. Flashover means that

1 a fire in a compartment, say a stuffed chair, gets
2 ignited, from a cigarette or whatever reason, it goes
3 up, the fire hits the ceiling and starts rolling back
4 down, and eventually that whole room has fire from
5 ceiling to floor. When I have that, I have to
6 reconsider and look at, and reevaluate the fire.

7 In this one it didn't happen. I've got windows
8 over here that are hardly, I mean, they're un-smoked up.
9 And as an investigator I have to ask myself that simple
10 question. Why, would these windows over here in the
11 kitchen, with all this fire on the floor, not get
12 damaged. Why are the curtains still there?

13 The main reason, the fire was vented. Where was it
14 vented? Right out to the disappearing stairwell into
15 the attic.

16 Q. Was there also some venting into the living room
17 because of the draft from the window?

18 A. Yes.

19 MR. MOORE: I think you can return to the stand and
20 I just have a very few questions for you.

21 (Witness resumes stand.)

22 By Mr. Moore:

23 Q. When you got there, how many days after the fire
24 had it been?

25 A. I think it was two -- I think the fire was on a

1 Saturday and I think I was there, I think it was
2 Tuesday.

3 Q. And do you know whether it had rained in between
4 the time of fire and the time that you got there?

5 A. Yes. There had been some, some rain at that time.

6 Q. Okay. And did you observe puddles on the slab of
7 the house?

8 A. Yes.

9 Q. Did you ever smell accelerant in the house?

10 A. No, sir.

11 Q. And did you decide to test for accelerants?

12 A. Yes, sir. Part of what I do is I did collect
13 debris samples from the inside. One was taken
14 specifically right in front of the kerosene heater and I
15 wanted to see, you know, if kerosene was there, it
16 wouldn't have bothered me because the kerosene heater
17 was there, it was probably spilt there during fueling or
18 movement of the heater.

19 The sample that I took there was negative. There
20 was no kerosene even remotely close to that kerosene
21 heater.

22 Q. And there was no kerosene or other accelerant
23 detected in the lab data from the other five locations?

24 A. That's correct.

25 Q. And why did you decide it would be good to take

1 those samples?

2 A. Well, I had two separate independent fires, you
3 know, part of the process is the collection of debris
4 samples to see if you can identify an accelerant, and
5 there's a number of factors that affect that.

6 Q. What are the factors that can affect whether
7 accelerant can be found after the fire?

8 A. Number one, fire destroys the evidence. Secondly,
9 it can be diluted by the water put on it by the Fire
10 Department. These are factors that affect every fire
11 that I go to.

12 Q. The type of accelerant?

13 A. The type of accelerate also can be critical. If
14 kerosene, diesel fuel, gasoline was poured in the house,
15 usually we are fairly successful in finding it because
16 it's what they call a heavy petroleum distillate, it's a
17 heavier liquid. Your lighter liquids like paint
18 thinner, mineral spirits, alcohol are very rarely
19 identified. I'm not saying they're not. But they're
20 very, you know, if the fire gets to an advanced stage,
21 then the identification of it is usually pretty small
22 and slim.

23 Q. Are you aware of any standard as a fire
24 investigator that says if you don't get a positive hit
25 in the lab data, that it wasn't an accelerant-caused

1 fire?

2 A. No, that's not true. I can accelerate a fire and
3 not use the first ignitable liquid.

4 Q. Well, even if you have no trace of an ignitable
5 liquid but your opinion is there was an ignitable
6 liquid, are you aware of any standard that says that it
7 can't have been an ignitable liquid caused fire?

8 A. No. Every lab report I've ever seen from the SLED
9 lab right here in South Carolina to other chemists that
10 I have worked with and sent samples to over the years
11 all says the same thing. Negative findings does not
12 preclude the possibility that an ignitable liquid was
13 present.

14 Q. What about other treatises such as *Kirk's Fire*
15 *Investigation*? Are you aware of what *Kirk's* says about
16 testing that's been done where no accelerant was found
17 after accelerant was intentionally induced?

18 A. Yes.

19 Q. And do you base your opinions on your fire
20 investigations on the sole factor of whether or not you
21 get a positive hit?

22 A. No, sir.

23 Q. To your knowledge does anyone base that on a sole
24 factor of a lab hit?

25 A. A lot of your criminal investigators do because

1 they want a more conclusive case, you know, as far --
2 that probably comes from most of your prosecutors. They
3 want a slam dunk. But I know of criminal prosecutions
4 that took place where they didn't have positive
5 identification of accelerants.

6 Q. Have you been involved in a criminal prosecution
7 where there was no identification of accelerant?

8 A. Yes, sir.

9 Q. A successful one?

10 A. Yes, sir. Most notably, probably one that
11 everybody in South Carolina is aware of, and that was
12 the fire at the Comfort Inn, Days Inn there in
13 Greenville on Congaree Road where the six people died.

14 MR. MOORE: Begging the Court's indulgence for just
15 one moment.

16 THE COURT: Certainly.

17 By Mr. Moore:

18 Q. You sent your report directly to Nationwide?

19 A. Yes, sir, I did.

20 Q. Did you send the lab data to Nationwide?

21 A. The lab data, in this particular case I used the
22 Data Resources Lab in Columbia. They send me a copy of
23 the lab findings and they also send -- in this case they
24 sent it to Andy Flanagan with Nationwide -- they send
25 him a copy of that report along with their service bill.

1 Q. Okay. Did the lab report when you received it
2 change your opinions in this case?

3 A. No, sir, it did not.

4 Q. Did you communicate the fact that you still held
5 the same opinion to Nationwide?

6 A. Yes, sir, I did.

7 Q. And what is your opinion to a reasonable degree of
8 certainty in the field of cause and origin investigation
9 as to the cause of this fire?

10 A. That there were two separate, unrelated fires, one
11 in the living room, one in the kitchen, that were
12 separate and unrelated and a flammable ignitable fluid
13 was introduced into the area and had to be ignited by an
14 open flame.

15 Q. Did you attempt to make any determination as to who
16 had done it?

17 A. No, sir. I'm not asked to do that.

18 MR. MOORE: Thank you.

19 THE COURT: Cross-Examination?

20 MR. FREEMAN BELSER: Thank you, Your Honor.

21 Cross-Examination by Mr. Freeman Belser:

22 Q. Good morning, Mr. Byers.

23 A. Good morning.

24 Q. My name is Freeman Belser. We've never met before,
25 but I've got a few questions for you if you don't mind.

1 A. Okay.

2 Q. Okay. Now, you testified that part of your
3 investigation was that you interview his Mr. Fowler; is
4 that correct?

5 A. That's correct.

6 Q. And isn't it true that Mr. Fowler fully cooperated
7 with you in your investigation?

8 A. He most certainly did.

9 Q. So he didn't get in your way or tell you you
10 couldn't look at things or anything like that?

11 A. No, sir. He answered every question I had for him.

12 Q. And isn't it true that Mr. Fowler was adamant that
13 he didn't set the fire?

14 A. I never discussed that with Mr. Fowler.

15 Q. Okay. But, even if you had discussed it with him,
16 it wouldn't really have mattered what he said, it
17 wouldn't have changed your opinions?

18 A. No, sir.

19 Q. Now, Mr. Byers, you do a lot of work for insurance
20 companies, don't you?

21 A. Yes, sir.

22 Q. And isn't it true that Nationwide is one of your
23 big clients?

24 A. It's one of them, yes, sir.

25 Q. Okay. And you also work for Travelers Insurance

1 Company?

2 A. I work for numerous insurance companies: Travelers,
3 Auto Owners, State Farm, Allstate. I mean, the list
4 goes on. Montgomery Mutual, Ohio Casualty. Over the
5 years -- I've been doing fire investigations for
6 insurance companies since 1983 so there's not many I
7 haven't worked for. That also includes law firms that I
8 worked for, self-insured companies. I've worked for the
9 Insurance Reserve Fund for the State of South Carolina.
10 They insure towns like Walhalla, Seneca Fire Departments
11 and local areas.

12 Q. And two of the companies you did not mention which
13 you did mention in your deposition which are Farmers
14 Insurance Company and Safe-Co and Philadelphia
15 Insurance?

16 A. There's other insurance companies, yes.

17 Q. And isn't it true that in this particular case
18 you've invoiced Nationwide \$2,814.95 for your
19 investigation?

20 A. Yes, sir.

21 Q. Okay. That doesn't include the \$600 that you spent
22 for the test samples, does it?

23 A. That's correct.

24 Q. Okay. Now, isn't it true that you work for
25 insurance companies because they can pay you?

1 A. That's absolutely correct.

2 Q. Okay. Isn't it true that you don't work for
3 individuals like Mr. Fowler because he can't pay you,
4 because individuals usually can't pay you?

5 A. That's correct. I mean, you know, I'm in business
6 to support my family and, you know, if I don't get paid,
7 that's simple, that's simple to understand.

8 Q. Okay. I believe you were here yesterday and you
9 heard the stipulation that you have conducted 59 fires
10 for Nationwide, fire cause and origin investigations for
11 Nationwide over about a four-year period?

12 A. Probably so.

13 Q. Okay. But you can't really confirm or deny that?

14 A. No, sir. I don't deal with statistics. And the
15 reason being is, even my case files, the way I identify
16 my case number has nothing to do with tracking whether
17 it's an arson case or its a product liability or
18 subrogation case. Most of my work in the field of fire
19 investigation deals with accidental fires, probably 75
20 to 80 percent. Now that the economy has been bad the
21 arson cases have picked up but, you know, it's just a
22 small percentage, but I don't keep up with those
23 statistics.

24 Q. You bill by the hour; isn't that correct?

25 A. That's correct.

1 Q. Isn't it true that you keep a kind of a detailed
2 accounting of everything that you do as part of your
3 investigation?

4 A. That's how I bill them and bill them for my time
5 and expenses.

6 Q. Anything that's important that goes into your
7 investigation you bill Nationwide for?

8 A. That's correct.

9 Q. Now, you interviewed Chief David Wright as a part
10 of your investigation, too, didn't you?

11 A. Yes, sir.

12 Q. And isn't it true he told you about the V pattern
13 that was right behind the kerosene heater?

14 A. Yes.

15 Q. Okay. Isn't it true that he told you about the
16 area of the most damage was right behind right where
17 that V pattern was?

18 A. That's correct.

19 Q. And isn't it true that he told you that when he
20 arrived at the scene, he saw smoke venting from the
21 house directly above the house?

22 A. That's correct.

23 Q. Okay. Now, isn't it true that Chief Wright is
24 required by state law to make a report of his
25 observations and opinions as to the cause and origin of

1 the fire?

2 A. That's correct.

3 Q. And when my father took your deposition, he said
4 that you don't think that, you don't remember that Chief
5 Wright told you that he believed the fire was
6 unintentional; isn't that correct?

7 A. That's correct. At that time -- if I can explain
8 that, too. At the time I only had the very first page
9 of the Fire Report.

10 Q. We'll talk about that, too.

11 A. Okay.

12 Q. But it didn't really -- you didn't ask Chief Wright
13 what he thought, either, did you?

14 A. Yes.

15 Q. You asked him?

16 A. I asked him what he thought. He said he thought it
17 was an unintentional fire starting somewhere around that
18 kerosene heater. And I asked him if he did a detailed
19 fire investigation, which I already knew the answer
20 because the scene hadn't been altered. They didn't go
21 in and dig it out, go through step by step identifying
22 exactly what was in the house. He told me basically he
23 saw the kerosene heater, he thought possibly it could
24 have caused the fire and that's what he wrote in his
25 report.

1 Q. Okay. But that didn't really matter to you what
2 Chief Wright thought, even though you are required to
3 make a report by state law?

4 A. It mattered, but it wasn't a deciding factor, no,
5 sir.

6 Q. Okay. But it didn't change your opinion?

7 A. No, sir.

8 Q. Your report was dictated on January the 23rd of
9 2009; isn't that correct?

10 A. Yes, sir.

11 Q. And I don't know how old you are, but if you are my
12 father's age, you don't really, you are not really good
13 with computers. Is that fair to say?

14 A. We're in the same boat, trust me.

15 Q. Okay. So once your report is dictated, you
16 actually sent the tape to Goochland, Virginia; isn't
17 that correct?

18 A. Right. My partner -- just to give you a little
19 history there, my partner, Larry Cadden, was the very
20 first fire investigator that the Greenville County
21 Sheriff's Department ever had. He and I both worked at
22 the Sheriff's Department. He left and went with a
23 company called IMS Investigations. I subsequently
24 followed, which was an insurance investigative firm. 16
25 years ago, 17 years ago, in 1996 he and I decided that

1 we were gonna start our own business and that's how we
2 met.

3 The way my company is set up is all our billing and
4 all our reports are kept there in Goochland, Virginia,
5 which is just west of Richmond. It works out that way
6 and it's better for us business wise.

7 Q. Once you dictated it and signed, sealed, and
8 delivered that tape, you were kind of done with that
9 report; isn't that correct?

10 A. That's correct.

11 Q. Okay. And the report says you spoke with Chief
12 Wright?

13 A. That's correct.

14 Q. Okay. And the report says that Chief Wright's
15 report is attached? Or isn't it true the report
16 attaches what you say was the report from Chief Wright?

17 A. Actually, I have a copy of the first page of the
18 Fire Report, correct.

19 Q. Do you have your report with you?

20 A. Yes.

21 Q. I would like for you to turn to the section where
22 you attach what you say you had from Chief Wright.

23 A. Okay.

24 Q. Okay. And so your report only includes one page;
25 isn't that correct? Your report only includes one page

1 of Chief Wright's report; isn't that correct?

2 A. Yes.

3 Q. Okay. And isn't it true that you claim in your
4 deposition on August the 19th, 2010, I guess about 17
5 months after your initial investigation, that you had
6 never actually seen page 2 of the report until that
7 time?

8 A. That's correct.

9 Q. Okay. Now, isn't it true that you shared
10 everything that you had with Mr. Flanagan and Mr. Gilden
11 and Mr. Madden?

12 A. That's correct.

13 Q. Isn't it true you think that Chief Wright is
14 inexperienced to make cause and origin judgments?

15 A. I have, through my experience and I have worked in
16 a lot of rural areas throughout the coal fields of West
17 Virginia and all and have dealt with volunteer firemen.
18 I respect these guys, I understand what they do. I have
19 been one.

20 They are not trained fire investigators. They
21 haven't been to the schools. Even professional
22 firefighters are taught just some basics about fire
23 investigation. If he was to have to do a thorough
24 investigation of a fire scene, he would probably be
25 lost.

1 Q. Even though the State requires Chief Wright to make
2 a cause and origin determination, you don't think he's
3 competent to do so?

4 A. I'm not saying he's not competent. He was taking
5 the path of least resistance. He looked at what was
6 there. I've seen this repeatedly in the 30-odd years
7 I've been a fire investigator.

8 Volunteer firemen, they volunteer. Their interest
9 is once the fire is out, get back to the station, get
10 back to their lives, to their jobs and their families.

11 Q. So you're saying that because it was Saturday, I
12 guess, Chief Wright wanted to take the path of least
13 resistance and just mark it unintentional so he could go
14 back home?

15 A. I think so. I've seen that repeatedly. I mean,
16 you know, no offense to them. They do an excellent job
17 and we have to depend on them. But in turn, they are
18 not trained fire investigators. In this particular case
19 I asked Chief Wright, Did you physically go inside the
20 house and do any investigation?

21 No.

22 Q. Okay. Now, isn't it true that you think that the
23 first responders are really only capable of putting out
24 the fires, what you said, put the wet stuff on the red
25 stuff?

1 A. That's exactly right.

2 Q. That's putting it pretty simple, isn't it?

3 A. That's pretty, that's how simple it is.

4 Q. Okay. You disagree with the State Fire Marshal
5 that the first responders are at least competent to make
6 a cause and origin determination?

7 A. Yes.

8 Q. Okay.

9 A. And I can give you an example. I know a certified
10 instructor that does training, arson training for the
11 South Carolina State Fire Marshal that's never been in a
12 fire scene, never investigated a fire. That's a fact.

13 Q. Okay. Mr. Byers, I'm handing you, I want you to
14 look at a picture that's marked Doug Ross's photographs
15 number 36. And what does that show?

16 A. That's the wall, if I'm looking at it correctly,
17 directly behind where the kerosene heater was set.

18 Q. That shows a half of a V pattern, correct?

19 A. Yes.

20 MR. FREEMAN BELSER: I'm just going to show the
21 Jury, Your Honor, this is the photograph we were just
22 describing.

23 And -- actually let me hand this back to you.

24 By Mr. Freeman Belser:

25 Q. You are saying in your opinion the fire was burning

1 from the kitchen towards this, not from the wall back to
2 the stud; isn't that correct?

3 A. That's correct.

4 Q. Okay. Isn't it true that there's burning on the
5 front of this stud?

6 A. This burning here, that's the front of the stud
7 right here, that's protected. That's where the
8 Sheetrock was attached. The fire is actually coming
9 from behind it and beside it.

10 Q. And isn't it true that the V pattern is what points
11 down to the origin of the fire?

12 A. That can be, you know, interpreted that way, but
13 also the fire is progressing that way from floor level
14 and you would get the same situation.

15 Q. Okay. But isn't it true the kerosene heater was
16 right below where that V pattern was?

17 A. That's correct.

18 Q. Now, I think you have already testified that you
19 did see a V pattern and you say that the area of the
20 most extensive burning was right here, that V pattern;
21 isn't that true?

22 A. That's correct.

23 Q. And isn't it true that the concept of, one way to
24 figure out where the fire started is to figure out where
25 it burned the longest?

1 A. That's true, too. There's several cliches that are
2 used in fire investigation in trying to determine an
3 area where a fire started. If you have a problem, look
4 up where the heaviest overhead damage occurred
5 underneath where it burned the hottest the longest. But
6 some of these, you know, factors can be altered by the
7 fire events, what combustibles are there. All of these
8 factors have to be considered in making your
9 determination.

10 Q. Well, if you looked up from this, instead of taking
11 the V down, if you looked up right where the stud is,
12 that's where the roof collapsed, isn't it?

13 A. That's correct. There's no roof there.

14 Q. Okay. So you saw the same physical evidence that
15 Chief Wright saw?

16 A. That's correct.

17 Q. Okay. And going back to the origin where it burns
18 the longest, that's probably where the most damage is;
19 isn't that correct?

20 A. That's where the most fuel is a lot of times.

21 Q. Okay. And where the most damage is and where the
22 fire burned the longest, that's probably where it
23 started; isn't that true?

24 A. Not necessarily.

25 Q. Now, Mr. Byers, your opinion is that there were two

1 separate unrelated fires that were started in this case;
2 isn't that true?

3 A. That's true.

4 Q. Now, you said that Manual 921, which is the guide
5 for fire investigators, supports what you say; isn't
6 that true?

7 A. Yes.

8 Q. And I'm handing you this book. This is the 2008
9 edition of Manual 921. So this was what was in effect
10 at the time that you were investigating this fire; isn't
11 that true?

12 A. That's correct.

13 Q. Okay. And I believe that you say in your dep --
14 you are not a member of the National Fire Protection
15 Association, are you?

16 A. No, sir.

17 Q. But you do agree that that book, the 921, is a
18 requested guide that's widely used in the industry?

19 A. It's one of the books that's used, yes.

20 Q. Okay. Now, isn't it true that you relied on
21 Section 921, even though in your opinion it's not the
22 Bible *per se* as to step by step of things that I have to
23 do and I don't have to do?

24 A. That's correct. There's nowhere in any edition of
25 this book, and there's a new edition that's out since

1 its inception in 1991 that tells me step by step how I
2 conduct a fire investigation.

3 Q. Now, Mr. Byers, you also said that even though that
4 book doesn't tell you what you have to do, that 921
5 tells you that there were two separate unrelated fires
6 and that something or someone helped the fire.

7 Do you remember when you said that in your
8 deposition?

9 A. Yes.

10 Q. Now I'd like for you to turn to page 184 of that
11 book. You probably beat me to it. Isn't it true that
12 Section 921 Section 22.2.1.2 -- you see that section?

13 A. Yes.

14 Q. It says a lot more than just that two separate
15 unrelated fires means the fire was helped. Isn't that
16 true?

17 A. That's true.

18 Q. Okay. If you'll look at Subsection 4, it says that
19 separate fires -- I'll read the first part and then
20 number 4 and then I want you to tell me if you agree
21 with me. (Reading):

22 Separate fires that are not caused by multiple
23 deliberate ignitions can result from the following:
24 Section 4, fire spread by falling materials, i.e., drop
25 down such as curtains.