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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **The lower court's failure to award an offset for prior payments made to Respondent or on his behalf permits a double recovery in violation of well-established law.**

II. **The lower court erred in failing to grant a new trial after admitting opinion testimony from a non-expert local fire chief regarding the cause and origin of the fire.**

III. **The lower court erred in failing to grant a new trial absolute when the jury's breach of contract verdict so far exceeded any contractual damages presented at trial that it could only have resulted from passion, caprice, or prejudice.**

IV. **The lower court erred in failing to remit the jury verdict to the amount of contractual damages supported by the evidence at trial.**

V. **The lower court erred in refusing to grant a JNOV on the bad faith claim because Nationwide had a reasonable basis to deny coverage and permitting a finding of bad faith in this situation chills Nationwide's right to litigate a meritorious issue.**

STATEMENT OF THE CASE

This appeal follows a jury verdict and post-trial motions in favor of Respondent in his breach of contract and bad faith claims against Nationwide. Respondent's house burned under suspicious circumstances on January 17, 2009. Nationwide's investigation revealed that Respondent was the only person present when the fire started, was several months behind on his mortgages and had numerous other outstanding debts. After a cause and origin investigator determined that the fire was intentionally set, Nationwide denied the claim. However, Nationwide did pay the Coverage A (Dwelling) limits in the amount of $154,125 towards Respondent's first and second mortgages as required by South Carolina law.

Respondent filed this suit on June 29, 2009 asserting claims against Appellant for breach of contract, bad faith, and slander, and a claim for slander against the claims representative who investigated the loss. The case was tried before a jury in the Oconee County Court of Common Pleas from November 28 through December 2, 2011. The jury returned a verdict in favor of Respondent and against Nationwide on the breach of contract and bad faith claims, awarding

$501,444 in contractual damages for breach of contract and $3,000 in consequential damages for bad faith. The jury found in favor of Nationwide and the claims representative on the slander claim. The jury also found in favor of Nationwide on Respondent's claim for punitive damages.

Nationwide timely filed a Motion for New Trial, New Trial *Nisi* Remittitur, and JNOV on December 9, 2011. Nationwide sought a new trial absolute based upon the erroneous admission of highly prejudicial testimony and evidence at trial and the grossly excessive verdict on the breach of contract claim. Nationwide, in the alternative, sought a remittitur of the contractual damages to the amount supported by the evidence during the trial of the case and credit for undisputed past payments from Nationwide to the Respondent's mortgage holders. Nationwide also sought a JNOV on the bad faith verdict because Nationwide had a reasonable basis to challenge coverage in a court of law and permitting the bad faith cause of action effectively chilled Nationwide's right to litigate a meritorious issue.

Respondent filed a Motion for Attorney's Fees on December 21, 2011. The Honorable Alexander S. Macaulay held a hearing on the motions on January 17, 2012 and entered an order denying Appellant's motions on February 22, 2012. Because Judge Macaulay's February 22, 2012 order did not address certain issues raised in the post-trial motion, Appellant filed a Motion to Alter or Amend on March 2, 2012. On September 13, 2012, Judge Macaulay granted Respondent's Motion for Attorney's Fees in the amount of $168,148. On October 3, 2012 – seven months after the motion was filed – Judge Macaulay denied the Motion to Alter or Amend. This appeal follows.

SUMMARY OF THE ARGUMENT

If not reversed, the jury's verdict awards a double-recovery to Respondent. Nationwide paid $156,125 to Respondent and his mortgagees pursuant to the insurance contract even before this civil action was filed. Because the jury and the lower court failed to give Nationwide an

offset for making those payments, Respondent received a double-recovery. Moreover, the court failed to review the award for breach of contract in light of the contractual damages presented by Respondent at trial, resulting in a verdict of more than double the maximum amount of damages proven.

The excessive verdict is a result of the lower court's numerous errors, which had the cumulative effect of impassioning the jury and depriving Nationwide of a fair trial. The lower court erroneously admitted expert opinions from a non-expert local fire chief who opined on the central question in the case by concluding that the fire was "unintentional." In doing so, the lower court allowed the imprimatur of the state upon Respondent's theory of the case in direct conflict with Rule 803(8), SCRE.

The lower court then compounded its errors by failing to grant a new trial based upon the erroneous evidence and the excessiveness of the verdict. Furthermore, the lower court failed to remit the damages to an amount consistent with the evidence presented at trial and let stand a verdict that awarded damages far in excess of any amount permitted by applicable law. Lastly, but by far most egregiously, the lower court failed to award a credit for Nationwide's past payments to Respondent and his mortgagees, which totaled $156,125. This failure bestowed on Respondent a windfall double recovery and thereby punished Nationwide with doubled damages by making it pay twice for the same damages.

Finally, the lower court failed to set aside the meager verdict in the bad faith claim even though the evidence viewed as a whole clearly supported the reasonableness of Nationwide's decision to deny the claim and litigate the issue.

STATEMENT OF FACTS

On January 17, 2009, Respondent's home was destroyed in a fire. (R. p. 347, line 23-p. 348, line 5). Nationwide insured Respondent and therefore, performed a thorough investigation

of the fire and surrounding circumstances. Based on the information discovered, Nationwide denied the claim. (R. p. 856, line 25-p. 857, line 3). However, Nationwide paid the policy limits of dwelling coverage to the lienholders in the amount of $154,125.00. Respondent then filed suit and at trial, the jury awarded him contractual damages of $501,444.00. The trial judge refused to grant Nationwide an offset for the amounts previously paid or to remit the verdict to conform the verdict to the evidence presented in light of the policy coverage sub-limits.

A. Damages presented at trial.

The jury verdict on the breach of contract claim almost tripled the highest possible amount supported by the evidence. The amount of contractual damages were largely, but not wholly, uncontested at trial. Nationwide admitted that the house was a total loss. (R. p. 347, line 23-p. 348, line 5). The insurance policy provided Coverage A for the dwelling with limits of $147,700, and an inflation adjustment factor that brought those limits up to $154,125. (R. p. 813, line 25-p. 815, line 8). If the house was rebuilt, and it cost additional funds to completely rebuild the structure, the policy provided an additional replacement cost coverage in the amount of $30,825. (R. p. 815, lines 9-17). Therefore, if the house were rebuilt, the policy would provide up to a total of $184,950 if it cost that much to rebuild. (R. p. 815, line 18-p. 816, line 6). Respondent testified that he thought it would cost up to $105 per square foot to rebuild his house and that the house had a total of 1,722 square feet of heated space. (R. p. 657, line 12; p. 706, line 21-p. 707, line 1). Therefore, the total cost to rebuild the house was, at most, $180,810. (1,722 x $105 = $180,810). This was the highest valuation of the home presented to the jury at trial. However, it was undisputed at trial that Nationwide had already paid a total of $154,125 of Coverage A to Respondent's first and second mortgage holders after the fire. (R. p. 530, lines 2-12; p. 738 line 25-p. 739, line 7).

Coverage B provides additional coverage for damage to detached structures such as a garage or a driveway. (R. p. 817, line 12-p. 818, line 10). Coverage B limits under the policy were $46,113. (R. p. 818, lines 4-10). However, Respondent did not present any evidence of actual damage to detached structures or the value of any detached structures. Nationwide contested whether any such damages occurred. Flanagan did note in his initial report the day after the fire that if the house were rebuilt, the cost for repairing or replacing certain detached structures may be $15,500. (R. p. 524, lines 13-23; p. 552, line 12-p. 553, line 1; p. 1036, lines 13-22). Therefore, to the extent there was any evidence of damages under coverage B, the evidence only amounted to $15,500. Nationwide believes such speculation about future damages is insufficient to establish any amount under Coverage B.

The policy also provided Coverage C for contents destroyed in the fire with limits of $109,910, which were adjusted for inflation to $114,692. (R. p. 523, lines 6-17). Respondent testified that the total value of his contents exceeded the $114,692 limits. (R. p. 700, line 8-p. 701, line 5). Nationwide paid a $2,000 advance and conceded at trial that the contents loss exceeded the remaining limits under Coverage C. (R. p. 1012, lines 3-8). Therefore, Respondent could recover $112,692 for Coverage C losses.

The policy also provided debris removal coverage as a percentage of Coverages A, B, and C in the amounts of $7,706, $2,306, and $5,735, respectively for a total of $15,747. (R. p. 824, line 23-p. 825, line 22; p. 826, lines 15-20). Respondent testified that he removed the debris for the house and contents himself, but he estimated the value of that work to be up to $20,000. (R. p. 709, line 12-p. 710, line 2).[1] Because the policy limits for debris removed totaled $15,747 this is the maximum amount that the jury could award for those damages.

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[1] Under the terms of the policy, debris removal only applies if the corresponding limits were exhausted. Coverage B limits were $46,113, but Respondent only presented evidence of, at most, $15,500 in damages. Therefore, this total should be reduced by an additional $2,306.

The policy also provided Coverage D for additional living expenses, actually incurred, for up to twelve months with a total limit of $154,125. (R. p. 823, line 23-p. 824, line 16). This coverage was limited to a maximum of twelve months. (R. p. 1251; p. 668, line 19-p. 669, line 2).[2] The only testimony relating to the fair rental value of a house comparable to Respondent's house was that a comparable house could be rented for $1,400 per month. (R. p. 516, line 14-p. 517, line 5). Respondent testified that he believed it would take the full twelve months to rebuild the house. (R. p. 705, line 24-p. 706, line 12). Therefore, the maximum amount available under Coverage D based upon evidence presented to the jury would have been $16,800. (12 x $1,400 = $16,800).

Lastly, the policy included coverage for damage to landscaping up to 5% of Coverage A, which amounts to an additional $7,706. (R. p. 826, line 21-p. 827, line 1). Although Flanagan noted that some landscaping might have to be replaced if the house were rebuilt, Respondent failed to present any evidence of the value of any landscaping or that any landscaping was ever damaged. (R. p. 528, line 19-p. 529, line 6).

Added up, the total amount of contractual damages presented in evidence at trial limited by the applicable coverage limits and viewed in a light most favorable to Respondent, was at most, $343,559. After the offset for the $156,125 in payments Nationwide made to Respondent

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[2] The Transcript Index of Plaintiff's Exhibits labels Plaintiff's Exhibit 19 as "Plaintiff's sketch of floor plan." (R. p. 237). This is a repeat of Plaintiff's Exhibit 18. This appears to be a typographical error and the transcript of testimony clearly reveals that the policy was Exhibit 19. (R. p. 668, line 19-p. 669, line 2).

and his mortgage holders, that total number is reduced to $187,424.[3] There was no evidence of any other damages covered under the policy presented at trial.

B. Past payments under the policy.

The payments to Respondent and his mortgagees were undisputed throughout the trial. (R. p. 530, lines 2-12; p. 819, lines 5-9; p. 1026, lines 7-11; p. 738, line 25-p. 739, line 7; p. 1145, lines 7-18; p. 530, lines 17-25; p. 861, lines 2-23; p. 1011, line 17-p. 1012, line 11). Throughout the trial, Respondent and Nationwide both presented uncontested testimony of payments made to Respondent's mortgage companies totaling $154,125 as payments due under Coverage A. (R. p. 530, lines 2-12; p. 819, lines 5-9; p. 1026, lines 7-11). Respondent admitted that this satisfied the entirety of his primary mortgage, and the majority of his second mortgage. (R. p. 738, line 25-p. 739, line 7). Respondent's counsel also conceded these payments in closing arguments. (R. p. 1145, lines 7-18). Both sides understood throughout the trial that Nationwide was entitled to offset the $154,125 payment from any contractual amount owed under the policy, and Respondent's counsel explained this fact to the jury. (R. p. 1045, lines 7-18).

Nationwide also paid an advance of $2,000 under Coverage C to Respondent immediately after the fire. (R. p. 530, lines 17-25; p. 861, lines 22-23; p. 1011, line 17-p. 1012,

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[3]

Cost to rebuild house:	$ 180,810
Damage to detached structures:	$ 15,500
Coverage C limits with inflation factor:	$ 114,692
12 Months of Additional Living Expenses:	$ 16,800
Debris Removal:	$ 15,747
Sub-total:	**$ 343,549**
Credits:	
Advance for contents coverage:	$ (2,000)
Payments to Mortgagees	$(154,125)
Total:	**$ 187,424**

line 11). Again, Respondent admitted that he received the $2,000 advance. (R. p. 738, lines 17-19).

C. Jury's note to the court.

The jury clearly heard undisputed evidence of past payments under the policy. During deliberations, the jury sent a note to the court asking two questions: 1) Why does Coverage D subtotal on Property Loss Report Form, Exhibit 30, equal Coverage A?; and 2) Are previous Nationwide payments to be taken out of award amounts? (R. p. 1223, lines 4-11). During discussions between the lower court and counsel regarding how to address the note, the lower court stated that it would make sure that Nationwide would receive a credit for its past payments, "if there is anything done, that's gonna be done, something with a set-off or a credit type thing." (R. p. 1223, line 25-1224, line 2).

Because Appellant's counsel believed the court would grant the setoff, he did not insist on a further jury instruction. The lower court then reminded the jury that it had to decide the case based upon the record. (R. p. 1227, lines 3-24). With regard to the offset, ***Respondent's counsel*** argued to the jury during closing arguments: "[T]he total costs payable is $523,333 if all the conditions are met. ***That's not the right number to start with because they paid 154,000 to the mortgage companies, so if you subtract that from 523*** . . . ."[4] (R. p. 1145, lines 7-18).

D. Verdict on breach of contract.

In spite of the limited evidence on contractual damages, Respondent's admission that Nationwide had made prior payments, Respondent's attorney's admissions in closing arguments that Respondent was not entitled to the amounts already paid by Nationwide, and the repeated testimony at trial that Respondent was only entitled to coverage up to the applicable limits if

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[4] The Court permitted the attorneys to argue the applicable standard for contractual damages to the jury. (R. p. 1103, lines 5-7) ("The Court: Why don't we do this. What I'll do is not cover it and let you argue it.")

those damages actually occurred, the jury awarded breach of contract damages in the amount of $501,444. (R. p. 18). Without accounting for any offset for prior payments, this exceeds the evidence at trial by $157,895 because, as discussed above, the ***maximum*** coverage available based on the evidence was $343,549. After further reducing this figure by $156,125, which represents the amount of undisputed payments to Respondent and his lienholders under the policy, the jury's verdict exceeds the evidence by $314,020.

E. Testimony of local fire chief David Wright and the TRUCK Report.

David Wright is the chief of the Friendship Fire Department, which is the local volunteer fire department. He also works for the Seneca City Fire Department. (R. p. 410, lines 12-18; p. 413, lines 5-18). Although Chief Wright was personally involved in fighting the fire, he was not present when the fire started. (R. p. 415, lines 12-22). By the time he arrived, the flames were already coming out of the roof of Fowler's home and a beam had fallen, blocking entrance into the house through the front door. (R. p. 416, lines 15-19, 418, lines 7-15). Nonetheless, Chief Wright reached the conclusion that the fire started due to the heater and was unintentional.

After the fire, he observed that the area that was most heavily damaged was in the living room. (R. p. 419, line 22-p. 420, line 8). Chief Wright did not see or smell anything that made him suspect arson. (R. p. 422, lines 13-14). Chief Wright completed a "Truck" report, which he filled out and submitted to the State Fire Marshal's Office. (R. p. 423, line 2-p. 424, line 6). In the report, Chief Wright made three conclusions or opinions: 1) that the cause of the fire was "unintentional;" 2) that the area of ignition was the living room; and 3) that the heater was "equipment involved in ignition." (R. p. 423, line 2-p. 427, line 20).

Prior to trial, Nationwide field a Motion *in Limine* objecting to any testimony from Chief Wright regarding the cause or origin of the fire and, at trial, Nationwide specifically objected to admission of the Truck report because it contained expert opinion from a lay person. Nationwide

renewed this objection at trial. (R. pp. 50-92; p. 364, line 1-p. 398, line 2). Chief Wright was never qualified as an expert. (R. p. 394, line 2-p. 395, line 1). He testified in *voir dire* that he did not have extensive training in arson detection or cause and origin investigation, and had only taken a weekend arson awareness class. (R. p. 367, line 10-p. 368, line 7; p. 388, line 22-p. 389, line 5). Chief Wright admitted he did not do a full investigation; he did not dig out the fire and, in fact, attempted to leave everything as it was in case trained investigators became involved. (R. p. 389, line 6-p. 390, line 12).

Just prior to Chief Wright's testimony on the second day of trial, the lower court heard further arguments on the issue of Chief Wright's opinions and the Truck report. (R. p. 399, line 18-p. 407, line 25). In spite of ruling that Chief Wright was not qualified as an expert, the lower court ruled that he could testify to his opinions that the fire was unintentional and that the heater was the location where the fire started and caused of the fire. Moreover, the Court admitted the Truck report into evidence. (R. p. 394, line 2-p. 397, line 7).

Chief Wright's testimony and report became the linchpin of Respondent's case. Respondent referenced Chief Wright and his report throughout opening statements. (R. p. 314, line 17-p. 316, line 22; p. 322, line 18; p. 334, lines 14-15). The Truck report was addressed several times throughout the trial. (R. p. 547, lines 12-17; p. 680, lines 1-7; p. 772, line 20-p. 773, line 2). Respondent used the Truck report in the testimony of all of the experts at trial. (R. p. 569, lines 7-15; p. 572, lines 2-22; p. 1084, line 16-p. 1085, line 9). In closing arguments, Respondent referenced the Truck report and Chief Wright's opinions heavily. (R. p. 1119, lines 2-23; p. 1125, line 11; p. 1125, line 23-p. 1126, line 2; p. 1126, lines 23-25; p. 1129, lines 19-23; p. 1130, line 4-p. 1131, line 15; p. 1141, lines 12-13; p. 1141, line 19).

F. Respondent's expert Doug Ross

Respondent also relied upon the expert testimony of Doug Ross to show that the fire started behind the kerosene heater. While on the stand, Ross presented four separate theories of how the fire started. Ross originally took the position that the sheetrock behind the heater was heated up over a long period of time to the point that it eventually crumbled, which exposed the wooden studs behind the sheetrock causing them to ignite. (R. p. 617, lines 7-13). At trial, he first testified that the fire began between the heater and the wall, penetrated the base board, and then climbed up the inside of the wall to the attic. (R. p. 578, lines 2-17). He then claimed that knickknacks fell from above the heater, caught fire, and then caused the wall to ignite. (R. p. 590, lines 6-15). He then theorized that the fire started within the wall due to heat transfer through a process called pyrolysis where the wooden stud behind the sheetrock dried out and heated over time until it spontaneously ignited even though the sheetrock was still intact. (R. p. 602, line 1-p. 604, line 8). Over objection, Ross was allowed to testify to his theories even though he did not know the temperature at which such processes would take place or how long the wall and stud would have to be exposed to a heat source. (R. p. 617, line 24-p. 619, line 11).

Ross acknowledged that none of his theories could be correct if the heater's tank was still two-thirds of the way full in the morning when the fire occurred. (R. p. 620, line 10-p. 621, line 8; p. 622, lines 7-11; p. 634, line 17-p. 635, line 7). Moreover, Ross also testified that he was confident that accelerants were involved in the secondary fire in the kitchen in spite of the fact that the test samples came back negative. (R. p. 625, line 4-p. 627, line 6). Ross was also unable to identify the source of the burn patterns in the living room identified by Nationwide's expert as where accelerants were ignited. (R. p. 628, line 9-p. 630, line 16).

Highlighting the importance of Chief Wright's lay opinions regarding the cause of the fire, Ross testified that he also relied upon Chief Wright's observations and opinions throughout

his testimony. (R. p. 569, lines 3-15; p. 572, lines 2-22). Ross went so far as to testify, "I have total confidence in Chief Wright. I trained him." (R. p. 638, lines 14-15).

G. Nationwide's investigation.

Because Nationwide is seeking a reversal of the lower court's denial of its Motion for Judgment Notwithstanding the Verdict on the bad faith cause of action, a recitation of the facts presented at trial regarding its investigation and decision to deny the claim is necessary. Andrew Flanagan, Nationwide's claims adjuster, received notice of the claim at around lunchtime on the day of the fire, a Saturday. (R. p. 1010, line 18-p. 1011, line 7). He contacted Respondent that afternoon and set up an appointment to meet him at 9:00 am the following morning. (R. p. 1011, lines 8-16). Flanagan explained the claims process to Respondent, took photographs of the dwelling, took a recorded statement from Respondent, and offered to put him in a hotel. (R. p. 1011, line 19-p. 1012, line 6). Respondent declined the offer, and Flanagan provided him with a $2,000 check as an advance for the contents coverage. (R. p. 1012, lines 3-8). Flanagan's initial investigation raised a number of concerns requiring additional inquiry, including:

1) The house did not have any electricity at the time of the fire;
2) Fowler was heating the home with a kerosene heater;
3) Fowler was essentially living in a furnished gazebo behind the house;
4) Fowler had recently closed a restaurant he owned;
5) Fowler was behind on both mortgages and was considering selling the house;
6) Fowler had an IRS lien against him; and
7) Fowler asked repeatedly about settling the claim and whether he needed a lawyer.

(R. p. 1013, line 8-p. 1014, line 6). Based upon these preliminary concerns, Flanagan chose to involve a member of Nationwide's Special Investigation Unit, Billy Gilden, and requested a cause and origin investigation from an outside consultant. (R. p. 1013, lines 2-7; p. 1014, line 24-p. 1015, line 3).

Billy Gilden arrived at Respondent's house on the Wednesday after the fire and began his investigation. (R. p. 879, lines 11-20). He conducted an interview with Respondent and then

approached Respondent's neighbors to find out if anyone else may have started the fire. (R. p. 880, lines 20-22; p. 885, line 11-p. 886, line 8). Gilden contacted the local Friendship Volunteer Fire Department chief David Wright, but determined that Chief Wright did not conduct any formal investigation of the fire. (R. p. 882, lines 21-24). Gilden also reviewed Respondent's financial situation at the time of the fire. (R. p. 883, lines 15-17). He requested Respondent's bank statements and documentation, ran a credit report, and went to the Oconee County Courthouse to review any records relating to collections or judgments entered against Respondent. His investigation revealed that Respondent had recently shut down his restaurant, and he was two or three months behind on his primary mortgage and one or two months behind on his second mortgage. (R. p. 884, lines 3-6). He also had a tax lien and two prior debt settlements according to court records. (R. p. 884, lines 11-19). Furthermore, Respondent had six collections from the past 2 years totaling $6,515, a credit card balance of $2,000, and he was behind on his mortgages by $4,368. (R. p. 884, line 22-p. 885, line 2). Finally, Gilden contacted local law enforcement to determine if there was any ongoing investigation into the cause of the fire. (R. p. 887, lines 10-24). Local law enforcement was not investigating.

Nationwide hired Jerry Byers, a Certified Fire Investigator through the International Association of Arson Investigators who had over 30 years of experience investigating the cause and origin of fires, to determine the cause and origin of the fire. (R. p. 926, line 15-p. 930, line 6). He promptly arrived at Respondent's home and initially interviewed Respondent. (R. p. 931, line 11-p. 932, line 8). Byers then spent two full days digging out the fire to investigate the cause. (R. p. 933, line 18-p. 934, line 9). Byers determined that the fire was not caused by electricity because power to the house was cut-off. Moreover, when the firefighters were fighting the fire, the water caused arcing between two drop cords that were running through the home from Respondent's gazebo. (R. p. 933, lines 8-17). Byers then reached the kerosene

heater, which was the only other power source in the house. He first tested the heater's safety mechanism to make sure it was working properly. (R. p. 947, line 5-p. 948, line 3). He also examined the amount of fuel in the heater. On a full tank, the heater could run for no more than 13 hours. (R. p. 1049, line 10-p. 1050, line 1). Respondent indicated that he had filled the heater up at approximately 6:00 pm the night before the fire and left the heater running on "high." (R. p. 675, line 24-p. 676, line 3; p. 949, lines 9-17). The fire was discovered at approximately 8:00 am the following morning. (R. p. 1237). Although the fire was discovered 14 hours after the last refill, the heater was still 75 to 80% full when it was located in the ruble after the fire. (R. p. 948, line 4-p. 950, line 2).

Byers also discovered two separate points of origin for the fire, one in the living room, and the other in the kitchen. (R. p. 966, lines 7-14). Both points had burn marks on the floor that indicated the use of accelerants. (R. p. 941, line 11-p. 942, line 24; p. 958, line 22-p. 959, line 20). Byers also determined that the drop-down stairwell to the attic was left open, which allowed the fire to vent and spread more quickly. (R. p. 960, line 10-p. 961, line 18).

Between the date of the fire and the time that Byers began his investigation, it rained. (R. p. 962, lines 3-5). When he arrived, there were puddles of water on the concrete slab of the house. (R. p. 962, lines 6-8). Byers took six samples to be sent to a laboratory to test for traces of accelerants, but all six were negative. However, Byers explained that many factors affect the likelihood of a positive test sample, including, among others, the amount of water used to put out the fire, the duration of the fire, the type of accelerant used, and weather conditions after the fire. (R. p. 963, line 6-p. 965, line 13). Because of these factors, Byers did not expect the samples to come back positive and he expressed these expectations to Flanagan before the results returned. (R. p. 1018, lines 1-11).

Based upon all of this information, and after two conferences between various Nationwide individuals and other individuals involved in the investigation of the claim, Nationwide made the decision to deny the claim based upon the intentional acts exclusion. (R. p. 850, line 21-p. 852, line 18; p. 1018, line 12-p. 1023, line 3). Specifically, Nationwide determined that Fowler had motive and opportunity based upon his financial distress and the fact the he was the only one at or near the house at the time of the fire. Moreover, there was substantial evidence that the fire was incendiary due to the two points of origin and lack of power to the house. (R. p. 856, lines 3-24).

After the second conference, Flanagan promptly notified Fowler by phone of Nationwide's determination regarding coverage. (R. p. 1022, lines 14-25). He then followed up that communication with a letter to Fowler. (R. p. 1023, lines 1-7).

ARGUMENT

I. The lower court's failure to award an offset for prior payments made to Respondent or on his behalf permits a double recovery in violation of well-established law.

Ignoring well-established law, the lower court let stand a judgment that awarded Respondent damages he did not suffer and forced Nationwide to pay an amount that it has already paid. The amount and effect of the payments to Respondent's mortgagees was undisputed at trial. Respondent admitted that Nationwide paid $154,125 to his two mortgagees and he admitted that those payments reduced his debts by $154,125. (R. p. 738, line 25-p. 739, line 7). Respondent will never have to repay the principal or interest on that portion of his debts. If the verdict stands, Respondent ***also*** receives – and Nationwide is forced to pay – ***another*** $154,125 in hand to do with as he pleases. This amounts to a total recovery of $308,250 for an undisputed contractual amount of only $154,125. Respondent's debts are satisfied and he gets an additional windfall of $154,125. "It is well settled in this state that 'there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once." Collins

Music Co., Inc. v. Smith, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) (citations omitted). Because the failure to credit Nationwide for the undisputed payments results in a double-recovery, the lower court – at a minimum – should have granted Nationwide's request for an offset based upon the past payments.

In denying Nationwide's request for an offset, the lower court misconstrued the Supreme Court's holding in Nationwide Mut. Ins. Co. v. Hunt, 327 S.C. 89, 488 S.E.2d 339 (1997). In that case, the Supreme Court held that the insurer owes a separate legal duty to a mortgagee under a standard mortgage clause. Therefore, even if an insurer denies coverage to a named insured based upon an exclusion or misrepresentation, the insurer still has a legal obligation to pay the mortgagee for the dwelling coverage under the standard mortgage clause. The lower court erroneously interpreted the holding in Hunt to mean that, because the insurer owes an independent contractual duty to the mortgagee, the insurer does not get a credit for payments made to the Respondent's mortgagees pursuant to the standard mortgage clause. In other words, the lower court held that Nationwide could not get a credit for payments that it was required to make under the terms of the insurance policy because Nationwide was required to make those payments under the terms of the insurance policy. (R. p. 5). This circuitous logic confuses the holding in Hunt.

The Supreme Court in Hunt conformed to the majority of other jurisdictions in holding that an insured's misrepresentation does not relieve the insurer of its obligation to pay the insured's mortgagees pursuant to a standard mortgage clause in an insurance policy. Id. at 93-94, 488 S.E.2d at 341-42. However, although the insurer owes an independent duty to the mortgagee, the insurer owes only one contractual amount. Every jurisdiction that has considered the issue holds that an insurer that pays mortgagees pursuant to the standard mortgage clause after rejecting coverage is entitled to an offset if a court or jury subsequently determines that the

rejection of coverage was erroneous. See e.g. 44 Am. Jur. 2d Insurance § 1494 ("The insurer can deduct payments made to a loss payee, such as a mortgagee"). "An insurer which elects under the mortgage clause to deny coverage [and] pay off the insured's loss mortgagee . . . is entitled to a credit or offset toward a judgment entered against it if the insurer's payment was a partial payment of the underlying policy claim. Id.

The New York Appellate Division aptly clarifies the lower court's confusion between the insurers' obligation under the standard mortgage clause and the effect of payments to the mortgagees under the mortgage clause:

> In this respect the standard mortgage clause has been said to create a separate and independent insurance of the mortgagee's interest, free from the conditions imposed upon the mortgagor or owner. ***However, this does not mean that a policy containing the standard mortgagee clause permits two complete recoveries for the same loss.*** It merely requires that the insurer first make payment of the loss to the mortgagee to the extent of his interest in the property and then pay the balance of the loss, if any, to the mortgagor, so long as the latter is not in default of any of the conditions of the policy.
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> Thus, a homeowner's insurance policy containing a New York standard mortgagee clause ***requires the insurer to make but one payment for any loss***, up to the face amount of the policy. . . . Where the insurer is not entitled to subrogation under the terms of the policy, payment to the mortgagee works a Pro tanto reduction of the mortgage lien. . . . the insurer's liability is fixed at the amount of the damage sustained in the fire up to the limit of the policy.

Grady v. Utica Mut. Ins. Co., 419 N.Y.S.2d 565, 569, 69 A.D.2d 668, 673-74 (App. Div. 1979).

The United States Court of Appeals for the Fourth Circuit held that this is the rule in South Carolina in State Farm Fire and Cas. Co. v. Barton, 897 F.2d 729 (4th Cir. 1990). The facts of Barton are largely the same as in this case. Barton had a homeowner's policy with State Farm covering his home. His house was damaged by fire. State Farm concluded that Barton either intentionally burned the house or it was burned by someone acting at his direction.

Although it denied coverage to Barton, State Farm paid $43,879.71 under two mortgages on Barton's home. Id. at 733. State Farm lost its declaratory action at trial and the jury awarded Barton $200,000 in actual damages and $35,000 punitive damages. Id. at 730. The district court granted State Farm's motion for an offset of $43,879.71 for the payments to Barton's mortgagees. Id. at 730-31. The Fourth Circuit affirmed the offset, holding that "in such a situation, the insurer is entitled to recover the amount paid to the mortgagees." Id. at 733. See also Kerr v. State Farm Fire & Cas. Co., 731 F.2d 227 (4th Cir. 1984) (applying South Carolina law) (modifying award of offset, and holding that prejudgment interest payments must be calculated on the balance due *after* the offset).

The Barton court cited Selby v. Union Auto. Indem. Ass'n, 164 Ill. App. 3d 34, 517 N.E.2d 687 (1987). In that case, the insurer lost on its defense of arson. The trial court denied the insurer's post-trial motion and motion for credit against the judgment for the amount paid to the mortgagee. The appellate court reversed as to the credit, finding that "an insurer is entitled to recover money paid to a mortgagee under a standard mortgage clause since it was made under the contract and for the account and benefit of the insured." Id. at 35-36, 517 N.E.2d at 688 (citing 18 Couch on Insurance 2d. § 74:218). Likewise, the payments to Respondent's mortgagees reduced his debts and therefore went to his benefit.

All of the jurisdictions that have addressed this question are in agreement with the Fourth Circuit's conclusions in Barton that an offset must apply when an insurer fails in its coverage defense but has already made payments to the insured's mortgagees. See Williams v. Auto Club Group Ins. Co., 2011 WL 3689153 (Mich. Ct. App. 2011) (reversing trial court's refusal to award offset because without the offset, the insured would receive a double recovery); Marketos v. American Employers Ins. Co., 240 Mich. App. 684, 693-97, 612 N.W.2d 848, 853-855 (Ct. App. 2000) rev'd on other grounds, 465 Mich. 407, 633 N.W.2d 371 (2001) (holding that under

the standard mortgage clause, payments made to the mortgagee are credited against any amount owed to the insured, "ruling otherwise would allow plaintiffs a double recovery.); Grady, 419 N.Y.S.2d at 569, 69 A.D.2d at 673-74; Krupp v. Aetna Life & Cas. Co., 480 N.Y.S.2d 372, 373, 104 A.D.2d 857, 858 (App. Div. 1984) (Insurer "having made payment to the mortgagee pursuant to the terms of the underlying insurance policy, is entitled to have its liability to plaintiffs, if any, reduced by the amount thus paid."); 10 Park Square Associates, Inc. v. The Travelers, 757 N.Y.S.2d 394, 303 A.D.2d 958 (App. Div. 2003) (reversing trial court's refusal to offset for payments made to mortgagees under a standard mortgage clause); Farace v. Independent Fire Ins. Co., 699 F.2d 204, 211 (5th Cir. 1983) (applying Louisiana law, holding a fire insurer that lost its arson defense in a breach of contract action was still entitled to an offset); Luparelli v. United States Fire Ins. Co., 117 N.J.L. 342, 344-45, 188 A. 451, 452-53 (1936) (holding that an insurer that is obligated to pay a mortgagee under the standard mortgage clause is entitled to a credit for such payments if it is unsuccessful in a subsequent coverage action brought by the insured, stating "The law abhors double satisfaction of an obligation."); Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 158 Md. 169, 148 A. 252, 256 (1930) ("Accordingly, the insurer will be allowed as a credit against the mortgagor's demand, the amount of loss paid or payable to the mortgagee on account of his unsatisfied mortgage debt . . . ."); Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439 (Tenn. 1993) (on rehearing, holding that if insurer proves payments made to mortgagee on remand, it would be entitled to a set-off against judgment for insured).

Disregarding this overwhelming weight of caselaw, the lower court denied Nationwide's post trial motion for an offset, thereby awarding Respondent a double-recovery and forcing Nationwide to pay twice for a single loss. South Carolina law is well-settled that a plaintiff cannot recover twice for a single injury. Moreover, the authorities appear unanimous that failure

to offset payments to mortgagees from the insured's recovery creates a double-recovery. Therefore, the lower court's Order is erroneous under well-settled law. Moreover, it is manifestly unjust to require Nationwide to pay twice for a single contractual obligation.

II. The lower court erred in failing to grant a new trial after admitting opinion testimony from a non-expert local fire chief regarding the cause and origin of the fire.

Nationwide is asking this court to grant it a new trial on two independent grounds, beginning with the trial court's admission of opinion testimony from the local volunteer fire chief who readily admitted he was not qualified as an expert in cause and origin investigations. This abuse of discretion significantly prejudiced Nationwide's ability to defend the case. Chief Wright candidly acknowledged his lack of education, training and experience and the trial court acknowledged he was not qualified to serve as an expert witness. However, the trial court then allowed him to give opinions, over objection in violation of the applicable South Carolina Rules of Evidence.

Furthermore, it cannot be seriously argued that such evidence was not prejudicial; on the contrary, Nationwide suffered immeasurable prejudice from this improperly admitted testimony that Respondent relied upon heavily throughout the trial. The prejudicial impact of this non-expert opinion testimony from the local volunteer fire chief cannot be overstated. Respondent utilized the report and Chief Wright's opinion that the cause of the fire was "unintentional" in the cross-examination of nearly every one of defendant's witnesses. Counsel then also referenced the report and Chief Wright's conclusions *ad nauseam* throughout closing arguments. He insinuated that Nationwide was questioning the competence of Chief Wright as a firefighter by challenging his "expert" testimony in trial. Because this testimony was inadmissible and highly prejudicial, the lower court erred in failing to grant a new trial absolute.

A party is entitled to a new trial where evidence is erroneously admitted and that evidence is prejudicial. Mali v. Odom, 295 S.C. 78, 83, 367 S.E.2d 166, 170 (Ct. App. 1988). "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Id. at 84, 367 S.E.2d at 170 (citing South Carolina State Hwy. Dep't v. Graydon, 246 S.C. 509, 144 S.E.2d 484 (1965)). Where the erroneously admitted evidence has probative value on an issue of fact, prejudice must be presumed and the burden rests on the party opposing a motion for a new trial to affirmatively show that no prejudice resulted from the introduction of the questioned evidence. Id.

Rule 803(8) carves out a narrow exception to the hearsay rule for public records and reports:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report . . . ; *provided, however*, that investigative notes involving opinions, judgments, or conclusions are not admissible. . . ."

Rule 803(8), SCRE (emphasis in original). The notes to Rule 803(8) explain that South Carolina's version of Rule 803(8) differs from the federal rule in that it includes the limitation that "investigative notes involving opinions, judgments, or conclusions are not admissible." Notes to Rule 803(8), SCRE. Therefore, although portions of the Truck Report may have been admissible, Chief Wright's conclusions that the cause of the fire was unintentional and that the source of ignition or equipment involved in ignition was the heater were improperly admitted in direct conflict with Rule 803(8). Moreover, as a non-expert, these conclusions were improper testimony even when made on the stand. See Rule 701, SCRE.

Nationwide raised the objection to Chief Wright's testimony and the Truck Report in a Motion in *Limine* and then reargued the issue at trial both on the day before Chief Wright testified and immediately before he was permitted to testify. The lower court ruled that Chief

Wright was not qualified as an expert. However, the lower court nonetheless allowed Chief Wright, over objection, to give his opinion as to the origin of the fire and his opinion that it was unintentional. Even after referencing State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008), and noting that opinions in Chief Wright's report should not be admitted, the lower court ultimately ***allowed*** the report [in the form of Plaintiff's Ex. 6] to be admitted in its entirety and excluded only the narrative from the second version of Wright's report.[5] The version of the Truck Report that was admitted stated a number of conclusions that were not personally observed by Chief Wright and required expert opinions, including: 1) The area of origin was the living room; 2) the Cause of Ignition was "unintentional"; and 3) Equipment Involved in Ignition was the heater. (R. pp. 1237-1238). Moreover, the lower court permitted Chief Wright to testify that he believed the fire was unintentional and caused by the heater. (R. p. 427, lines 7-20). The cumulative effect of this testimony was highly prejudicial and its admission exceeded the scope of discretion the trial judge had under existing South Carolina law.

A. Chief Wright's opinions were improperly admitted.

The lower court justified permitting Chief Wright's opinion testimony through the following logic: "He's already said he doesn't know what's in the books and he hadn't been to the schools except for that one course. So obviously if he's not qualified to give an opinion, he can't give an opinion so that must not be an opinion." (R. p. 393, lines 8-12). Not only is this circuitous reasoning erroneous as a matter of basic logic, but Chief Wright's testimony as to how the fire started – when he was not present at the time the fire started and did not observe the fire starting – is the epitome of opinion testimony that requires specialized knowledge, skill, experience, or training. See Rule 701, SCRE. Therefore, allowing Chief Wright to give an opinion amounts to an abuse of discretion.

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[5] The narrative portion of the report stated in pertinent part: "After the fire was out it seemed that it started around the kerosene heater." (R. p. 1240).

This Court has previously held that opinions as to the cause and origin of a fire are expert in nature and require qualification as an expert. Wright v. Hiester Const. Co., Inc., 389 S.C. 504, 523, 698 S.E.2d 822, 832 (Ct. App. 2010). In Wright, the trial court provisionally found that the purported expert, a local fire chief, was qualified, but later determined that he was not qualified to testify as an expert because he did not perform a thorough investigation and did not reach a definitive conclusion about the cause of the fire. Id. at 523, 698 S.E.2d at 832. This Court affirmed. Id.

In State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985), the Supreme Court addressed a similar situation in the context of a testifying officer who investigates an automobile accident. In Kelly, the defendant was convicted in Magistrate's court for failure to stop for a stop sign arising out of an automobile collision. Id. at 374, 329 S.E.2d at 442. At trial, the Magistrate permitted the investigating police officer's testimony regarding his conclusions from his direct observations as to how the accident occurred. Id. at 374, 239 S.E.2d at 443. The Supreme Court held that the officer "may not give his opinions to the cause of an accident . . . unless he is qualified as an expert." Id. The Supreme Court held that "it is clear that [the] testimony was an opinion." Id. Moreover, the "testimony dealt with the ultimate issue at trial." Id. Therefore, the Supreme Court reversed. Id.

Chief Wright's testimony that the fire was unintentional and caused by the heater is no different from the officer's testimony in Kelly. Although Chief Wright could testify that he observed fire coming out of the roof or that the living room had more damage than other areas that he observed, he could not state his conclusions that the fire was unintentional or started from the kerosene heater without first qualifying as an expert. He readily admitted he did not qualify as an expert and for the trial court to allow him to give opinion testimony constitutes an abuse of discretion.

The lower court also abused its discretion when it admitted the Truck Report containing Chief Wright's handwritten conclusions that the fire was unintentional and caused by the heater. In Morris, the defendant objected to the trial court's refusal to admit a bankruptcy examiner's report as a public record under Rule 803(8). 376 S.C. at 207, 656 S.E.2d at 368. The Supreme Court held that the report contained investigative opinions and potential conclusions and was therefore outside the scope of the public records and reports exception. Id. at 207, 656 S.E.2d at 368-69; see also South Carolina Dep't of Motor Vehicles v. McCarson, 391 S.C. 136, 147 n.11, 705 S.E.2d 425, 430 (2011) (noting that Rule 803(8), while providing for the admission of certain public records, still excludes "investigative notes involving opinions, judgments, or conclusions" and therefore would not allow the admission of an Incident Report for purposes of proving probable cause for a lawful arrest); Cardinal v. Farmers Mut. Ins. Co., 2011 WL 2022948 (Mich. App. May 24, 2011) (Fire investigator's report that fire was not a result of human factors was not admissible under Rule 803(8) because it consisted of opinions).[6]

As in Morris, Chief Wright's opinion and conclusion regarding the origin of the fire and that the cause of the fire was "unintentional" was inadmissible hearsay and does not fall within the exception under Rule 803(8). (R. pp. 1237-1238). Moreover, as a non-expert, the opinion statements were not admissible under Rule 701. See Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which . . . do not require special knowledge, skill, experience or training."). Therefore, the admission of this evidence amounts to an abuse of discretion.

[6] The Cardinal Court found that the report was admissible under Rule 803(6); however, this is a result of a difference between South Carolina's Rule 803(6) and Michigan's. The South Carolina Rules of Evidence except from the hearsay rule business records, "*provided, however*, that subjective opinions and judgments found in business records are not admissible." Rule 803(6), SCRE (emphasis in original). Michigan's Rules of Evidence do not include comparable language.

Appellate courts from other jurisdictions have also held that a fire chief or firefighter's report cannot be used to introduce testimony that is otherwise inadmissible. For example, in Bloomgren v. Fire Ins. Exchange, 162 Ill. App. 3d 594, 597, 517 N.E.2d 290, 292 (Ct. App. 1987), a local firefighter filled out a report of a fire in an insurance case pursuant to his duties. In the report, he stated his opinion that the fire was caused by an electrical ignition factor and the trial court admitted the report into evidence. Id. The Illinois Court of Appeals reversed. Id. at 598-600, 517 N.E.2d at 293-94. Specifically, the Court of Appeals first held that the report was not admissible under Illinois' version of Rule 803(8), SCRE, because "records which concern causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions are generally not admissible under the public records exception." Id. The report contained opinions that the "ignition factor" was "electrical" and that equipment involved in ignition was "fixed wiring." Therefore, the Court of Appeals held that "this report clearly contains an opinion as to the cause of the fire and, as such, was not admissible under the public records exception to the hearsay rule unless the author of the report . . . was qualified as an expert to give such an opinion." Id.

Like the lower court in this case, the trial court in Bloomgren did not admit the firefighter as an expert witness. The firefighter – like Chief Wright – admitted that he did not have proper training in the investigation of the cause and origin of fires and had never conducted an investigation into the cause and origin of a fire. Id. Therefore, he was not qualified to testify as an expert and the admission of the report containing his non-expert opinions was erroneous. Id. Moreover, admission of the report and the firefighter's testimony was prejudicial because the trial court relied upon the report in reaching its decision in the case. Id.

Chief Wright's conclusions that the fire was unintentional and started from the kerosene heater constitute opinion testimony that can only be admitted if Chief Wright was qualified as an

expert. The trial court found that Wright was not an expert because he did not have specialized training, experience or knowledge, nor did he conduct any type of scientific or detailed investigation. Yet, the trial court then allowed him to give opinion testimony. This amounts to an abuse of discretion.

B. Testimony from the local fire chief on the central issue in the case was highly prejudicial.

Respondent relied heavily upon Chief Wright's conclusions in order to pit the local fire chief's testimony against that of Nationwide's cause and origin expert. Moreover, admitting Chief Wright's opinions on a form that he was required by statute to complete placed the imprimatur of the State – as Respondent repeatedly argued – on the opinions and conclusions of Chief Wright. (R. p. 1119, lines 2-9; p. 1129, line 19-p. 1130, line 19). Respondent even argued that Chief Wright answered "the key question in this case." (R. p. 1130, lines 11-19). The Court need look no further than Respondent's closing arguments to understand the significance of this report and Chief Wright's conclusions.

"[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Mali, 295 S.C. at 84, 367 S.E.2d at 170 (citing South Carolina State Hwy. Dep't v. Graydon, 246 S.C. 509, 144 S.E.2d 484 (1965)). Respondent's counsel relied almost exclusively on the report of David Wright and the negative lab results in his closing arguments as showing that the evidence from "independent" sources supported Respondent's position that the fire started from the kerosene heater. His first point in closing arguments was Chief Wright's report:

> [N]umber one, Chief Wright's report on the day of the fire. He made that when he was there, the smoke was still coming up, I guess, and his observations on the report he was required to make to the State Fire Marshal that the fire started near the Kerosun heater and his, the note that it was unintentional. . . . We put the independent man on the side of the Plaintiff here to testify as to whether there was any incendiary fire.

(R. p. 1119, line 3-p. 1120, line 3). Later, Respondent used Chief Wright's conclusion to bolster his own expert, Ross, and to discredit Nationwide's cause and origin expert, Byers, stating, "Mr. Ross uses the classic V factor analysis which is supported by the 921, and Chief Wright, with his 30-plus years of experience also uses the V factor analysis." (R. p. 1126, line 5-p. 1127, line 18). Later, he argued regarding Chief Wright's conclusions in the Truck Report: "That's the part which shows that the local official who is required by the State Marshal found and observed on the day of the fire when it was still hot and smokey that it was located near the kerosene heater for the reasons we've just talked about." (R. p. 1129, line 24-p. 1130, line 3). Respondent then used the following two pages of Trial Transcript promoting Chief Wright's experience: "he has plenty of experience to do his job, plenty of common sense and experience to make this report, ***and plenty of common sense and experience to answer the key question in this case.***" (R. p. 1130, line 4-p. 1131, line 8).

Respondent's arguments culminated with reliance on Chief Wright as being more trustworthy than either side's experts because he was independent: "Now, it's important also to look at the big picture and say, who are the independent people who have looked at this? . . . Number one was Chief Wright, of course." (R. p. 1131, lines 9-16). Respondent also used Chief Wright as a means of pitting the Oconee County jury against Nationwide: "Now let's talk a little bit about Oconee County again. Nationwide has had a very strange attitude about what it was gonna do with Chief Wright. . . . Now, what do his [sic] actions show about not just their attitudes towards the officials here . . . ."(R. p. 1143, line 21-p. 1144, line 14).

Because it is often impossible to infer what evidence made the greater impact on the jury's mind, courts apply a legal presumption of prejudice where wrongly-admitted evidence has some probative value upon a material issue. See Johnson v. Broome, 175 S.C. 385, 179 S.E. 315, 318 (1935); Mali, 295 S.C. at 84, 367 S.E.2d at 170. As this Court held in Mali, a trial court

"commit[s] reversible error in admitting incompetent evidence that may have played, not improbably, some role in the jury's determination . . . ." Mali, 295 S.C. at 85, 367 S.E.2d at 171.

In this case, Chief Wright's conclusions that the fire was unintentional and that the heater was the source of ignition addressed the key material factual dispute in the case. Respondent took the position that the kerosene heater caused the fire while Nationwide took the position that the fire was started by the use of accelerants away from the heater. Respondent's repeated reliance and emphasis upon Chief Wright's conclusions merely highlights the prejudicial impact that this improperly admitted testimony had on the case.

The lower court erred in allowing a non-expert to opine on the cause of the fire and source of ignition. These are expert evaluations that require "special knowledge, skill, experience, or training." Rule 701, SCRE. The lower court also erred in allowing admission of the Truck Report under Rule 803(8) when the report contained "opinions, judgments, or conclusions," which are specifically ***not*** admissible under that rule. Rule 803(8), SCRE. Moreover, Chief Wright's conclusions – both in his testimony and in the Truck Report – were probative on the key material issue in the case. These conclusions came from the local fire chief and with the imprimatur of the State as Respondent repeatedly argued that Chief Wright was required to complete this form and submit it to the State Fire Marshall. Respondent's heavy reliance throughout trial on this improper testimony and evidence reflects the highly prejudicial nature of the testimony and the lower court erred in failing to grant a new trial.

III. The lower court erred in failing to grant a new trial absolute when the jury's breach of contract verdict so far exceeded any contractual damages presented at trial that it could only have resulted from passion, caprice, or prejudice.

In spite of Respondent's own summary of the evidence in closing arguments reflecting evidence of damages that only totaled $174,458 (after offsetting the mortgage payments and the $2,000 cash advance), the jury returned a verdict for breach of contract that was almost three

times that number.[7] Respondent conceded both while arguing the charges before the lower court and in his closing arguments that the jury could only award damages based upon the evidence presented, limited by the policy limits. Moreover, Respondent sought consequential damages only under his bad faith cause of action, for which the jury awarded $3,000. Therefore, the damages award for the breach of contract must be limited to the evidence presented at trial in support of that claim. Because the verdict grossly exceeded any amount presented in evidence, the lower court erred in failing to grant a new trial absolute.

"If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (emphasis in original). "'A trial judge's refusal to grant a new trial absolute when the verdict is grossly inadequate or excessive is an abuse of discretion' and on appeal this court will grant a new trial absolute." Wachovia Bank Nat. Ass'n v. Beane, 397 S.C. 612, 616, 725 S.E.2d 715, 717 (Ct. App. 2012) (internal quotation omitted). The phrase "passion and prejudice," "like the unhappily framed expression 'abuse of discretion' is frequently misunderstood." Beasley v. Ford Motor Co., Inc., 237 S.C. 506, 513, 117 S.E.2d 863, 866 (1961). The Supreme Court clarified the meaning of "passion and prejudice" in Beasley: "[T]he phrase 'passion and prejudice' does not necessarily imply bad faith, wrongful purpose or moral delinquency. . . . '[A] verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence." Id. at 513, 117 S.E.2d at 867 (citation omitted). A verdict that is not supported by the evidence and cannot be explained on any rational basis must be set aside, "[w]hether it was the result of

[7] In closing arguments, Respondent sought $30,825 for replacement costs for his home, $15,500 for other structures, $114,692 for lost contents with $5,735 for debris removal, and $7,706 for landscaping. (R. p. 1146, line 4-p. 1148, line 4). There was also evidence at trial of additional living expenses of $1,400 per month for twelve months, totaling $16,800. Once added to that number, the total is $191,258. However, the evidence actually presented at trial only supported, at most, $187,431 in contractual damages.

sympathy, passion or prejudice or whether it was due to mistake or misapprehension of the charge and issues involved, the result is the same." Id. Where, as here, "the damages are capable of being measured by fixed principles, it is error for the jury or judge to base damages on other standards." Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 559, 314 S.E.2d 19, 24 (Ct. App. 1984) (citations omitted).

A. Damages for breach of a first-party insurance contract for property damage are limited to the amount due on the policy.

As a contract for an obligation to pay money, damages under Respondent's breach of contract claim were limited to the amount due on the contract plus interest.[8] See Cook v. Mack's Transfer & Storage, 291 S.C. 84, 89, 352 S.E.2d 296, 299 (Ct. App. 1986). In Nichols v. State Farm Mutual Automobile Insurance Co., 279 S.C. 336, 306 S.E.2d 616 (1983), the South Carolina Supreme Court first recognized a cause of action for "bad faith or unreasonable refusal by an insurer to pay first party benefits due under a mutually binding insurance contract." Cook, 291 S.C. at 89, 352 S.E.2d at 299. Importantly, the Supreme Court's holding in Nichols ***changed the law*** relating to contractual damages "by modifying the rule that damages for breach of an obligation to pay money are generally limited to the amount due plus interest." Id. (citation omitted); See also Holmes v. Nationwide Life Ins. Co., 273 S.C. 711, 258 S.E.2d 924 (1979) (damages in breach of first-party insurance contract limited to the amount provided for in the policy plus accrued interest). If, and only if, an insured proves that the refusal to pay first party benefits is unreasonable or in bad faith, then the insured "can recover damages not limited to the face amount of the policy." Id.

Where the verdict form provides separate blanks for measuring contractual damages and bad faith damages, consequential damages are properly located under the bad faith cause of

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[8] Respondent did not present any evidence of interest damages to the jury and did not seek interest in any post-trial motions.

action. The verdict form provided three separate blanks, with one blank for each cause of action. The jury awarded $501,444 specifically for the breach of contract cause of action and $3,000 for the bad faith breach of an insurance contract cause of action. (R. pp. 18-20). Importantly, damages for the breach of contract were limited to the amount due plus interest. Respondent never submitted any evidence regarding interest. Moreover, the jury entered a separate finding and damages award for bad faith consequential damages.

Respondent only sought the amount due under the policy for the breach of contract. The Complaint provides in pertinent part, "Defendant Nationwide's failure to pay the claim, in breach of the contract, entitled plaintiff to judgment against Nationwide ***for the amount of his losses covered by the policy***." (R. p. 26). Respondent only sought consequential damages in his bad faith cause of action. (R. p. 27). At trial, Respondent conceded that the consequential damages were only sought as part of the bad faith cause of action:

> **The Court:** I'm not gonna charge 5.
> 6, I've got damages on contract. Of course, on insurance contract you've got a question of – well, you're not limited to the terms of the policy, nor to the policy limits.
>
> **Mr. Murphy:** I believe it would be under the insurance policy, Your Honor.
>
> **The Court:** Oh, right. Oh, wait a minute. Let's see.
>
> **Mr. Clinch Belser:** I agree with Mr. Murphy that on Cause of Action Number 1, Breach of Contract, that's the most that we could probably get, but on the bad faith, you can get consequential damages.

(R. p. 1100, line 14-p. 1101, line 12). During closing arguments, Respondent argued:

> The last thing I want to talk about is the damages for bad faith. Listen closely when the Judge reads the instructions about insurance bad faith, because if you find that the Defendant is guilty of insurance bad faith because of all the reasons we've talked about, too much, you can give Mr. Fowler extra damages as long

> as he – because those are called consequential damages, not just the direct damages, the lack of payment of the contract . . . .

(R. p. 1148, lines 7-14).

The policy of insurance is a contract for an obligation to pay money. Therefore, damages for breach of contract are limited to the amount due under the policy. Moreover, Respondent's own Complaint and statements at trial confirm that he only sought consequential damages under his third cause of action for bad faith failure to pay. Therefore, the verdict on the breach of contract must be limited to the amount due under the contract.

B. The failure to grant a new trial absolute when the verdict is not supported by any rational view of the evidence is an abuse of discretion.

When a verdict grossly exceeds the amount supported by the evidence, the trial court abuses its discretion by failing to grant a new trial absolute. Beane, 397 S.C. at 616, 725 S.E.2d at 717. "[W]here, as here, the damages are capable of being measured by fixed principles, it is error for the jury or the judge to base damages on other standards." Hutson, 280 S.C. at 559-60, 314 S.E.2d at 24. Furthermore, the court "need not find specifically that the jury's verdict was actuated by passion, caprice, prejudice or other undue considerations" if the verdict is "against the overwhelming weight of the evidence, . . . not supported by any rational view of the evidence, and bear[s] no reasonable relationship to the character and extent of [plaintiff's] damages." Id. at 561, 314 S.E.2d at 25.

In the case of a breach of contract to pay money – where damages are limited to what was owed under the contract – the test of whether the verdict is excessive is simpler because the jury did not have the additional role of valuing pain and suffering or other more subjective elements of damages. Because the verdict of $501,444 was against the overwhelming weight of the evidence and not supported by any rational view of the evidence presented at trial, the verdict must be set aside and Nationwide is entitled to a new trial absolute.

In Hutson, the Court of Appeals ordered a new trial where the jury awarded $65,000 for the loss of use and depreciation of a truck. Although the trial court remitted the award to $47,500, the Court of Appeals still found that the award was against the overwhelming weight of the evidence and not supported by any rational view of the evidence, bearing no relationship to the character and extent of the damages. Id. at 561, 314 S.E.2d at 25. The Court of Appeals noted that, if believed, the jury could have found $6,819.73 in repair costs, $9,360 in loss of use, and $2,000 in depreciation, totaling $18,179.73. Thus, the remitted award was about two and one-half times the amount supported by the evidence.

In Beane, a jury awarded damages of $198,395.17 for mismanagement of a financial account when the claimants' expert's testimony only stated damages of $176,121.00. 397 S.C. at 617, 725 S.E.2d at 718. Like the breach of contract claim, pain and suffering damages are not recoverable for mismanagement of a financial account. Id. at 617 n.1, 725 S.E.2d at 718. "Therefore, the maximum award supported by the evidence presented in this case [was] the amount of damages testified to by the [claimant's] expert--$176,121.00." Id. Based upon this excessive verdict, along with the jury's erroneous award of attorney's fees and verdict relieving the claimants of their outstanding debts to the bank, this Court found that the verdict was grossly excessive. The excessive verdict indicated "that the jury acted on some basis other than the evidence presented and that it did not follow the legal instructions given by the trial court." Id. Therefore, "when a grossly excessive jury verdict is based on improper considerations such as these, the trial judge must grant a new trial." Id. (citation omitted).

C. The $501,444 verdict is almost triple the amount of covered damages presented at trial.

The maximum potential amount of damages covered by the insurance contract that was presented at trial was $187,431. The jury's verdict must be supported by two elements of evidence. First, the contract establishes a cap on breach of contract damages by setting forth the

maximum policy limits. Second, evidence of what property was damaged and the value of such property shows what amounts Respondent could recover under the policy. The existence of the contract – by itself – is not evidence that Respondent is entitled to damages. The contract provides the requirements for coverage – i.e., property that was covered under the policy was damaged – and sets a limit on the amount Respondent could potentially recover. However, without evidence of the amount and type of covered damages, the jury could not award any contractual damages.

As discussed above in parts a., through d. of the Statement of Facts, *supra*, the jury received evidence of the various policy limits and property damage under the different forms of coverage. When added together and limited to the applicable coverage limits, the evidence could not support a contractual damages award in excess of $343,549. Moreover, the jury heard uncontested evidence that Nationwide made an advance payment of $2,000 to Respondent for the contents coverage on the policy and paid $154,125 on Respondent's mortgages. Therefore, the maximum amount possibly supported by the evidence was $187,424. However, the jury awarded actual damages for breach of contract in the amount of $501,444.

The breach of contract verdict exceeds the maximum possible amount presented at trial by over two-and-a-half times. Under well-established principles of contract law, damages for breach of contract are specific and any verdict exceeding the amount owed under the contract plus interest is erroneous and evinces the jury's confusion, passion, or influence from improper considerations.[9] The breach of contract verdict is not supported by any rational view of the evidence presented at trial. Even if this Court finds that the lower court should have awarded the offset rather than the jury, the verdict exceeds the highest possible pre-offset amount by nearly

[9] Because Respondent did not present any evidence or seek interest at trial, his damages are limited to the amount due under the policy.

one and one-half times. There is no interpretation of the evidence presented at trial that supports the jury's verdict.

The Supreme Court in Beasley, citing American Jurisprudence, stated:

> A close analysis of the results reached in the cases justifies the statement that the courts generally grant relief if convinced that the verdict substantially exceeds any rational appraisal or estimate of the damages even though the inference of passion, prejudice, partiality, or other improper motive on the part of the jury is no more natural or reasonable than the inference of mistake or misapprehension on their part.

237 S.C. at 512, 117 S.E.2d at 866 (quoting 15 Am. Jur. 623, Damages §205). The disparity between the evidence and the verdicts in both the Hutson breach of contract case and the present suit is nearly identical. Therefore, the award of damages close to the maximum policy limits without regard to the evidence presented at trial demonstrates that the jury was motivated by passion, caprice and prejudice or some other influence outside the evidence. Regardless of whether the jury reached its verdict through a misapprehension, mistake, or passion and caprice, a verdict that greatly exceeds the amount of damages presented at trial cannot stand. Respondent cannot gain the benefit of a jury's mistake. Because the jury's verdict greatly exceeds the maximum amount of damages recoverable under the law of contract, the lower court abused its discretion when it failed to grant a new trial absolute.

IV. The lower court erred in failing to remit the jury verdict to the amount of contractual damages supported by the evidence at trial.

Despite the specific evidence and Respondent's own position at trial that he was ***not*** entitled to the full policy limits under every form of coverage listed on the declarations page, the jury entered a verdict for nearly every policy limit, whether applicable or not. A jury may not award damages in excess of the amount proved at trial or in excess of any amount permitted under the law. See Wright v. Colleton County School Dist., 301 S.C. 282, 290-91, 391 S.E.2d 564, 569-70 (1990) (holding that limitation on damages does not infringe on the right to have a

jury determine damages because the limitation does nothing more than establish the outer limits of a remedy, which is a matter of law rather than fact). "When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial *nisi.*" V.E. Amick & Assocs., LLC v. Palmetto Envtl. Group, Inc., 394 S.C. 538, 549, 716 S.E.2d 295, 300 (Ct. App. 2011) (quoting Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct. App. 1997)). "The consideration of a motion for a new trial *nisi* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." Id.

In Holmes, the plaintiff asserted a cause of action for breach of a health insurance policy. 273 S.C. at 712, 258 S.E.2d at 925. Like Respondent, the plaintiff in Holmes did not allege special damages. Id. Nonetheless, the jury – like the jury here – awarded damages that exceeded the amount of covered expenses under the terms of the policy as presented at trial. The Supreme Court held that damages could not exceed the amount provided under the terms of the policy. Id. Therefore, the trial court should have remitted the award "to a figure commensurate with the protection provided in the insurance policy." Id. at 715, 258 S.E.2d at 927.

Even when construing every doubt in Respondent's favor, the evidence at trial could not support a contractual damages award in excess of $343,549. If the jury awarded the offset for payments by Nationwide to Respondent and his mortgagees, the evidence could not support a contractual damages award in excess of $187,424. Although $501,444 grossly exceeds either of these amounts and requires a new trial absolute, the lower court also erred by failing to grant the new trial *nisi* remittitur to the amount actually supported by the evidence at trial. The lower court erred by failing to remit the breach of contract verdict to $187,424.

V. The lower court erred in refusing to grant a JNOV on the bad faith claim because Nationwide had a reasonable basis to deny coverage and permitting a finding of bad faith in this situation chills Nationwide's right to litigate a meritorious issue.

Although South Carolina recognizes the cause of action for bad faith, the accessibility of this cause of action must be balanced with the important policy of permitting parties to litigate disputed issues. Generally, a trial court ruling on a directed verdict or JNOV motion is required to view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the opposing party. V.E. Amick & Assocs., 394 S.C. at 546, 716 S.E.2d at 299 (quoting Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002)). However, with regards to bad faith actions, the Supreme Court has cautioned: "[c]ertainly in a free society, one is entitled to properly litigate without the fear of unequal punishment." Nelson v. United Fire Ins. Co. of New York, 275 S.C. 92, 267 S.E.2d 604 (1980). "If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992) (citation omitted). An insurer "should be able to litigate novel issues without fear of being accused of acting in bad faith." Id. at 398, 562 S.E.2d at 661-62. In the same vein, an insurer should be able to present honest and reasonable disputes of fact to a jury without fear of suffering excessive non-contractual damages merely because it is an insurer. An insurer "should not be penalized for its decision to litigate a meritorious claim." Greene v. Durham Life Ins. Co., 287 S.C. 197, 199, 336 S.E.2d 478, 480 (1985).

Courts play a special role in striking the balance between protecting insureds from unreasonable denials of coverage and chilling the insurer's right to litigate legitimate disputes. If the evidence at trial shows that the insurer had a reasonable and legitimate dispute regarding coverage, the court has an obligation to grant a directed verdict and prevent the issue from going to a jury. Through several cases, South Carolina's appellate courts have shown a strong willingness to fulfill this gatekeeping role in bad faith actions by holding that the insurer's basis

for denying coverage, even if erroneous, was reasonable as a matter of law. See Madden v. Pilot Life Ins. Co., 272 S.C. 264, 251 S.E.2d 196 (1979) (reversing jury verdict for bad faith even though insurer breached insurance contract); Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993) (reversing trial judge's award of attorney's fees for insurer's bad faith breach of the contract and finding that the insurer had sufficient grounds for refusing the claim and defending the case); Nelson, 275 S.C, 92, 267 S.E.2d 604 (same); Crossley, 307 S.C. 354, 415 S.E.2d 393 (reversing jury verdict of bad faith even though insurer breached the contract); Brown v. State Farm Mut. Ins. Co., 275 S.C. 276, 269 S.E.2d 769 (1980) (finding a legitimate dispute over the value of a damaged vehicle); Baker v. Pilot Life Ins. Co., 268 S.C. 609, 235 S.E.2d 300 (1977) (reversing bad faith finding because company had reasonable basis to defend coverage claim on ground that insured falsified application).

The lower court failed to exercise this important function by failing to grant a directed verdict on the bad faith cause of action at the close of all the evidence and failing to grant Nationwide's motion for a JNOV after the verdict. Regardless of whether Respondent succeeded at trial on the breach of contract claim, the case boiled down to a battle of the experts and Nationwide presented ample evidence showing that Respondent had motive and opportunity to cause the fire and that the fire had an incendiary origin. Nationwide had the right to litigate its legitimate dispute with Respondent without threat of unfair punishment and the lower court should have granted a JNOV on the bad faith cause of action.

A. Nationwide clearly had a reasonable basis to deny Fowler's claim.

"The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant

of good faith and fair dealing arising on the contract; (4) causing damage to the insured." Crossley, 307 S.C. at 359-60, 415 S.E.2d at 396-97. An insurer acts in bad faith when there is no reasonable basis to support the insurer's decision. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

"To prove arson, an insurer must demonstrate by the preponderance of the evidence the fire was of an incendiary origin, and the insured caused the fire." Brown v. Allstate Ins. Co., 344 S.C. 21, 25, 542 S.E.2d 723, 725 (2001) (citing Carter v. Am. Mut. Fire Ins. Co., 297 S.C. 218, 375 S.E.2d 356 (Ct.App.1988)). "An insurer can prevail in an arson defense based solely on circumstantial evidence if it shows the fire was of an incendiary origin and the plaintiff had both the opportunity and the motive to set the fire." Id. (citations omitted)).

The bad faith analysis focuses on whether Nationwide unreasonably denied Fowler's claim and must focus only upon facts available to Nationwide at the time of denial. Howard v. State Farm Mut. Automobile Ins. Co., 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994) ("Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim . . . "). The evidence at trial confirms that Nationwide had a legitimate dispute regarding coverage. As an initial matter, Respondent conceded that he had opportunity to start the fire. (R. p. 1124, lines 8-13) ("There's never been an argument as to whether Mr. Fowler had the opportunity. . . . He wasn't anywhere else and there wasn't anybody else there, so that's not really been an issue."). Nationwide's investigation also revealed that Respondent was in substantial financial distress. Respondent testified that he was instructed by the bank to sell the house and that, although he was planning to put it on the market in order to avoid foreclosure, he had not talked to any real estate or listing agents. (R. p. 741, line 20-p. 742, line 7). Importantly, Respondent was instructed by the bank that he would have to sell the house or it

would be foreclosed on in 2008. The fire occurred in January, 2009, right in the middle of the housing market crash.

Respondent also had sundry other financial problems. In the years leading up to the fire, Respondent emptied his retirement account to help with his son's business, which largely failed. (R. p. 714, line 2-p. 715, line 7). He lost approximately $40,000 in this venture. (R. p. 714, lines 12-17). Respondent's restaurant business also failed. (R. p. 719, lines 10-12). His credit cards had been cancelled because he could no longer make minimum payments. (R. p. 720, lines 3-6). At the time of the fire, he did not have any money in his checking account with which he would have been able to make the past-due mortgage payments. (R. p. 720, line 25-p. 721, line 4). The combined mortgages required monthly payments of $1,600. (R. p. 722, lines 9-11). Moreover, Respondent had a number of accounts in collections totaling approximately $6,000. (R. p. 722, lines 12-14). He had a state tax lien against his property and a personal loan for an additional $9,000. (R. p. 722, lines 15-21). Furthermore, there was no power to the house because of a dispute regarding the amount of Respondent's power bill. (R. p. 723, line 23-p. 724, line 2).

Regardless of how the jury ultimately ruled on the breach of contract issue, the evidence of Respondent's financial distress more than supports a reasonable inference that he had motive to set the fire. He also stood to gain from the fire. Respondent loved his plot of land and did not want to live anywhere else. (R. p. 741, line 10-p. 742, line 13). If he sold the house or if the bank foreclosed, he would have lost the lake site that he so greatly enjoyed. However, by burning the house, he not only kept the land, but obtained funds to pay some of his debts and try to rebuild the house. This wealth of evidence served as a reasonable basis for Nationwide's conclusion that Respondent had motive to set the fire.

Nationwide also had a reasonable basis to determine that the fire had an incendiary origin. After learning about Respondent's financial troubles, that Respondent was not living in

the house at the time of the fire, and that power to the house had been cut off for months, Nationwide hired an expert cause and origin investigator to determine the cause of the fire. Nationwide hired Jerry Byers, who had over thirty years of experience as a fire investigator, held a Certified Fire Investigator designation from the International Association of Arson Investigators, graduated from the inaugural South Carolina Criminal Justice Academy class in 1978 for fire investigation, and who has trained and lectured at criminal justice academies in three states, trained firemen, and advised insurance agencies. (R. p. 927, line 4-p. 930, line 3). Byers was admitted as an expert on the cause and origin of fires without objection. (R. p. 930, lines 4-16).

Byers spent two full days digging out the fire to determine its cause. He ruled out the kerosene heater and drop cords as potential causes of the fire. He also discovered two points of origin, both bearing burn patterns indicative of the use of an accelerant. Based upon his observations, Byers submitted a report to Nationwide that it was his expert opinion that the fire was a set fire. Nationwide relied upon Byer's expert opinions. Like any other business, an insurance company acts reasonably when it retains and relies upon the opinion of a qualified expert, like Byers. Moreover, the physical evidence documented through Byers' photographs of the scene supported his conclusions.

At trial, Respondent relied heavily on the negative test samples and Chief Wright's report. However, Byers indicated to Flanagan that he did not expect the samples to be positive ***before*** the lab reported its results. (R. p. 1018, lines 1-11). Moreover, respondent's own expert agreed that accelerants were present at the fire and that the burn patterns observed by Nationwide's expert in the kitchen were caused by accelerants. (R. p. 625, lines 4-18). Also, Chief Wright testified that he did not perform any semblance of a thorough investigation, had no

formal training in cause and origin investigation, and that he was unsure about the cause of the fire. (R. p. 438, lines 4-18; p. 442, line 10-p. 443, line 5).

The evidence available to Nationwide at the time that it denied coverage sufficiently supported its conclusion that the fire was a set fire and that Respondent had the motive and opportunity to start the fire. Regardless of whether Nationwide met the burden of proving these three elements by a preponderance of the evidence, Nationwide had a reasonable basis for its conclusions and should not suffer penalties in the form of substantial attorney's fees and potential consequential damages exposure merely because it chose to deny coverage and exercise its right to litigate a legitimate dispute. A jury verdict in Nationwide's favor would have been supported by the evidence. Therefore, Nationwide had a reasonable basis to deny coverage as a matter of law.

B. Other courts dealing with similar facts have held that the insurer was entitled to judgment as a matter of law regarding an insured's claim for bad faith.

Courts throughout the country have found that insurers have a reasonable basis to deny coverage under these circumstances even if a jury ultimately determines that the insurer did not meet its burden of proving arson. For example, the Court of Appeals for the Tenth Circuit in Suggs v. State Farm Fire and Cas. Co., 833 F.2d 883 (10th Cir. 1987), found that the insurer did not act in bad faith as a matter of law when it denied coverage for a residential fire loss. State Farm hired a private fire investigator who determined that the fire was intentionally set.[10] Id. 891. Also, the insurer discovered that the insured was having financial difficulties and had the

[10] This determination was based upon the heat and rapidity at which the fire burned, the burn patterns of the fire, the points of origin of the fire, and the existence of traces of accelerants. Id. at 885, n.2. Similarly, Nationwide's cause and origin investigator made his determination based upon the multiple points of origin of the fire, irregular burn patterns due to accelerants (one of which was acknowledged by the Respondent's own expert), unrelated points of origin, protection of the points of origin by ceiling sheetrock that fell during the fire, an unusual venting pattern from the kitchen, and the absence of other available ignition sources since the power was disconnected and the kerosene heater was almost full of fuel.

opportunity to set the fire. Id. at 885 n.3. The insured hired its own expert that came up with a theory that the fire was of an electrical origin. Id. at 886. The insurer then hired another expert that showed that the fire could not have had an electrical origin. Id. at 886. The jury found for the insured on both the breach of contract and bad faith causes of action, but declined to award punitive damages. The district court denied the insurer's motions for JNOV, new trial, or a remittitur.[11] Id. at 886. The insurer defended the bad faith action based upon its position that it had a "reasonable basis" for believing that the fire was intentionally set.[12] The Court of Appeals reversed the denial of the insurer's motion for JNOV, stating:

> Given the set of facts before us with the controversy over the entitlement to the proceeds of the policy, an insurance company is justified in taking reasonable time and measures necessary to establish which party is entitled to the proceeds. The Company's actions here were reasonable and proper under the circumstances.

Id. at 891 (quoting State Farm General Ins. Co. v. Clifton, 86 N.M. 757, 527 P.2d 798, 800 (1974) (other citation omitted)). "While reasonable minds could certainly differ on the question of whether State Farm's arson defense was established, reasonable minds could not differ on the question of whether, in this case, State Farm acted in bad faith." Id. at 891.

The Georgia Court of Appeals reached a similar result in Grange Mut. Cas. Co. v. Law, 223 Ga. App. 748, 479 S.E.2d 357 (Ct. App. 1996). The insurer's cause and origin investigator found multiple points of origin and irregular burn patterns. Id. at 749, 479 S.E.2d at 358. He

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[11] In addition to finding as a matter of law that State Farm did not act in bad faith, the Court of Appeals found that the insurer was entitled to an offset for payments made to the insureds' mortgagees. Id. at 889. The Court of Appeals also ordered a remittitur because, even though the insureds presented evidence of the policy limits, they were not entitled to those limits unless they proved covered damages in the amount of those limits. Id. at 889-90. The evidence presented at trial and the terms of the policy did not support the jury award on the breach of contract claim. Id.

[12] The insurer also claimed material misrepresentation and that the insured lacked an insurable interest. The Court of Appeals found that that those two positions lacked merit, but still found no bad faith based upon the arson defense.

also ruled out electrical causes and determined that the fire was intentionally set and that a flammable liquid was used to start the fire. Id. The insurer's investigation found financial motive and opportunity. Even after a jury found in favor of the insured on the breach of contract and awarded $2,400 on the bad faith claim, the Court of Appeals found as a matter of law that the insurer had a reasonable basis to contest the claim and therefore should have been granted a JNOV on the bad faith claim. Id. at 750, 479 S.E.2d at 358. Because there was evidence to support the insurer's defense that the fire was intentionally set, it was entitled to a JNOV on the bad faith claim. Id. at 750, 479 S.E.2d at 359. See also Tucker v. State Farm Fire and Cas. Co., 981 F. Supp. 461 (S.D. Tex. 1997) (Where insurer relied upon an independent expert's conclusion that there were multiple points of origin and found the presence of accelerants and insurer's investigation found financial distress and opportunity, the district court found as a matter of law that insurer had a "reasonable basis" to deny the claim).

The issues in the present case are certainly similar to those in Suggs. Nationwide hired a fire investigator who determined that the fire was of an incendiary origin. Nationwide's investigation turned up substantial evidence of Respondent's financial distress and determined that Respondent clearly had opportunity to set the fire. Respondent hired his own expert who claimed that the fire was caused by a kerosene heater. Then, Nationwide hired another expert who disproved Respondent's theory.[13] As in Suggs, Nationwide had a reasonable basis to deny coverage. Although reasonable minds may differ on the question of whether Nationwide's arson defense was successfully established, reasonable minds could not differ on the question of whether Nationwide acted in bad faith.

[13] During discovery, Nationwide hired John Holecek, an expert engineer who conducted a laboratory test with a comparable heater under comparable conditions and determined that the radiant heat from the heater, absent a malfunction, would never reach a high enough temperature to cause the fire. (R. p. 1041, line 1-p. 1071, line 3). Holecek also confirmed that the heater did not malfunction.

The breach of contract issue was hotly contested in this case. The fact that the breach of contract issue went to the jury clearly supports a finding that Nationwide had a reasonable basis to believe that the house was intentionally burned. If the jury had found in favor of Nationwide on the breach of contract claim, there would have been ample evidence to support that finding. Because ample evidence existed to support Nationwide's determination at the time Nationwide denied coverage, it should have been granted a directed verdict on the bad faith issue.

C. The only evidence submitted to support a bad faith claim was of irrelevant post-denial conduct that had no impact on Nationwide's decision to deny the claim.

On February 11, 2009, Nationwide issued a Denial of Coverage letter to Respondent. Where an insurer denies coverage for a claim, it's bad faith, *vel non*, is to be determined by its conduct at the time it denied the claim, not by any subsequent conduct. Howard, 316 S.C. at 448, 450 S.E.2d at 584. Evidence that arises after the denial of the claim is not relevant to the propriety of the conduct of the insurer at the time of the insurer's denial of coverage. Id. In Howard, the Supreme Court explained:

> Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim or if the insurance company did not specifically deny the claim by the evidence it had before it at the time the suit was filed. ***Evidence that arises after the denial of the claim is not relevant to the propriety of the conduct of the insurer at the time of its refusal.***

Id. (emphasis added, citation omitted).

The key question regarding bad faith is whether Nationwide had a reasonable basis to support its position that the intentional acts exclusion applied. This question must be answered based upon the information available to Nationwide at the time that it denied the claim. As discussed above, Nationwide had substantial evidence to support its decision at that time.

Respondent's purported bad faith expert, Thomas Hesse, conceded that he took no position on the reasonableness of the decision of whether the fire was incendiary. (R. p. 805,

line 24-p. 806, line 4). He also did not provide any opinion as to whether Nationwide reasonably found that Respondent had motive and opportunity to set the fire. Rather, Hesse's testimony – over Nationwide's objection – consisted almost exclusively of post-denial conduct and legal opinions. (R. p. 745, line 10-p. 753, line 1). Hesse pointed to a number of actions as evidence of bad faith in spite of his own admission that these actions had no bearing on Nationwide's ultimate decision to deny the claim, including: 1) Billy Gilden's contact with local law enforcement regarding whether they were investigating the fire and his failure to follow up and notify the authorities when the test samples came back negative; 2) Nationwide's refusal to provide a copy of Byer's cause and origin report to Respondent after denying coverage; 3) contacts between Nationwide and Respondent's mortgagees after denying coverage; and 4) Nationwide's refusal to extend the time for filing a proof of loss after denying coverage. (R. p. 789, line 11-p. 791, line 23). Hesse conceded that none of these factors had any bearing on the ultimate coverage determination at issue in the case. (R. p. 789, line 11-p. 791, line 23).

The admission of post-denial conduct evidence at trial was improper under the Supreme Court's holding in Howard. Furthermore, this evidence was clearly prejudicial. As Respondent's bad faith expert, Hesse relied almost exclusively upon post-denial conduct in his testimony that Nationwide acted in bad faith in denying Respondent's claim. Therefore, the evidence was improper and should not have been admitted at trial. Moreover, because it was inadmissible, the lower court should not have considered such evidence in determining whether Nationwide was entitled to the JNOV on the bad faith claim because only the evidence Nationwide had before it at the time of its denial was relevant.

The record is devoid of any evidence that Nationwide acted in bad faith prior to its denial of coverage. With the exception of Respondent's own statements, the negative test samples, and the fire chief's report, all of the evidence available to Nationwide at the time of its denial

decision pointed towards an intentional fire. Although Respondent failed to present any evidence that Nationwide acted in bad faith ***prior*** to its denial of coverage, the record is replete with evidence of Nationwide's thorough investigation and objective, acknowledged evidence that the Respondent had the motive and opportunity to cause this loss and that the fire was intentionally set. Because Nationwide had ample evidence to support its decision to deny the claim based on the intentional acts exclusion at the time it issued the denial, the lower court erred in failing to grant a JNOV in its favor.

D. The lower court erred in awarding attorney's fees.

The lower court awarded Respondent attorney's fees in the amount of $168,148 pursuant to South Carolina Code Ann. § 38-59-40. In reaching this decision, the lower court relied upon numerous items that were inadmissible, including: 1) Chief Wright's opinions that the fire was unintentional and the equipment involved in the ignition was the heater; 2) the post-denial refusal to grant an extension to file the proof of loss; 3) the post-denial refusal to provide a copy of the cause and origin report to Respondent; and 4) the post-denial communications between Nationwide and Respondent's mortgagees. (R. pp. 13-14). For the reasons stated above regarding each of these items, the lower court's Order should be reversed in its entirety.

Moreover, the determination of whether to award attorneys' fees under the statute is equitable in nature. Baker, 268 S.C. at 613, 235 S.E.2d at 302. Therefore, this Court "has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." Id. Therefore, even if Nationwide was not entitled to a JNOV on the bad faith question before the jury, this Court is still free to make its own determination based upon the evidence that Nationwide had a reasonable basis to deny coverage.

If this Court affirms the award of attorneys' fees pursuant to § 38-59-40, the statute limits recoverable attorney's fees to one-third of the amount of the judgment. If this Court finds that

the breach of contract award should be remitted to the amount supported by the evidence, including the offset for payments to Respondent's mortgagees, then the attorneys' fees awarded should also be reduced pursuant to the statute.

CONCLUSION

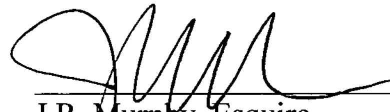
The lower court committed a fundamental error by permitting a double recovery when it failed to award a credit for Nationwide's past payments to Respondent's insurers. This most basic error was the last in a litany of errors that deprived Nationwide of a fair trial. The lower court allowed a non-expert veiled with the authority of the state and local government to testify regarding his opinions and conclusions as to the cause and origin of the fire. As the key factual issue at trial, the prejudicial impact of this testimony was immeasurable and requires a new trial absolute on the breach of contract claim. The impact of this highly prejudicial testimony is evidenced by the verdict, that exceeded the damages presented at trial by almost three times. The excessive verdict proves that the jury was swayed by passion or improper considerations from the improperly admitted testimony. The lower court also ignored the Supreme Court's holding in Howard by admitting evidence on the bad faith cause of action of Nationwide's conduct after the claim had already been denied and Respondent had hired his attorney. For these reasons, this Court should reverse the lower court's denial of Nationwide's Motion for a new trial absolute on the breach of contract claim.

Furthermore, the jury could only award contractual damages for property damages proved at trial and covered under the policy. The verdict grossly exceeds any amount presented at trial and fails to credit Nationwide for the $156,125 in advance payments. Should this Court affirm the lower court on the issue of a new trial, it must reverse on the new trial *nisi* remittitur in order to prevent an excessive verdict that creates a windfall for Respondent.

Lastly, Nationwide had a reasonable basis to invoke the intentional acts exclusion. Respondent admits that he was in severe financial distress and that he alone had opportunity to set the fire. The investigation and conclusions of an expert revealed that the fire was intentionally set. Therefore, even if Nationwide failed to prove its arson defense by a preponderance of the evidence, it should not be deprived of its right to litigate a legitimate dispute. The lower court erred in letting the issue go to the jury and not granting a JNOV. This Court should reverse.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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In the South Carolina Court of Appeals

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APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

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James D. Fowler, ...Respondent,

v.

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Of Whom,
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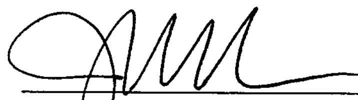
CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Appellant, certify that the Final Brief of Appellant complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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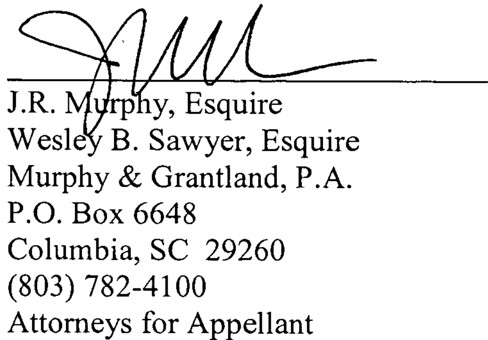
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on October 28, 2013, addressed to his attorney of record, Clinch H. Belser, Esquire, 1901 Main Street, Suite 1550, Columbia, South Carolina 29202.



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