

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-0768

James D. Fowler.....Respondent,

v.

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

Of Whom,

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

**RECORD ON APPEAL
VOLUME I**

J. R. Murphy, Esquire
MURPHY & GRANTLAND, P.A.
4406-B Forest Drive
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Appellant

Clinch H. Belser, Esquire
BELSER & BELSER, P.A.
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Respondent

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STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
Plaintiff,)
vs.)
Nationwide Mutual Fire)
Insurance Company and)
Andrew Flanagan,)
Defendants.)

**ORDER DENYING DEFENDANT'S
POST TRIAL MOTIONS**

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 FEB 22 PM 12 03

This matter came before the Court for a hearing, January 17, 2012, on the post-trial Motions for a New Trial or, in the alternative, a New Trial *Nisi Remittitur* and Judgment *Non Obstante Verdicto* ("JNOV") of the Defendant Nationwide Mutual Fire Insurance Company ("Nationwide"). Also scheduled for hearing was Plaintiff's Motion for Attorneys' Fees. At the hearings, the Plaintiff was represented by his attorney, Clinch H. Belser, Jr., Esquire, and the Defendant Nationwide was represented by its attorney, J.R. Murphy, Esquire. At trial, Mr. Murphy had represented also the Defendant Andrew Flanagan, but the jury's verdict had relieved Mr. Flanagan as a party defendant.

The trial of the case had commenced Monday, November 28, 2011, by a jury, which returned a verdict on Friday, December 2, 2011. The jury's verdict was in favor of the Plaintiff against Defendant Nationwide on his first cause of action, breach of contract, as well as on the second cause of action, bad faith. The verdict on the Plaintiff's slander cause of action against both Defendants was in favor of the Defendants, Nationwide and Flanagan.

After the trial, the Court granted the parties ten days to file post-trial motions. Nationwide timely filed its motions, dated December 9, 2011, for a new trial absolute or, in

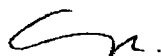


the alternative, a new trial *nisi remittitur* in the breach of contract action and for a JNOV in the in the bad faith cause of action. The Plaintiff timely filed his motion, also dated December 9, 2011, with a supporting affidavit, for attorneys' fees pursuant to S.C. Code Ann. § 38-59-40 (1989). Both parties filed memoranda in support of their respective motions and memoranda in opposition to the other's motions. The Defendant further filed a reply to Plaintiff's memorandum in opposition to Nationwide's post-trial motions.

The Court has reviewed and given careful consideration to the motions, the affidavits in support thereof, all memoranda, and the record of the case particularly that of the jury trial, including the evidence presented and the arguments and rulings made during the course of the trial. The Court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party on the particularly motion. *Sabb v. South Carolina State University*, 350 S.C. 416, 567 S.E.2d 231 (2002). In light of the foregoing, after careful consideration of the evidence and for the reasons discussed hereinafter, the post-trial motions of the Defendant must be denied.

At the January 17th hearing, counsel for Nationwide requested additional time to respond to the Plaintiff's motion for attorneys' fees, and the Court granted the request. The Defendant Nationwide was given until February 24, 2012, to submit its response with the Plaintiff having until March 2, 2012, for any reply.

Nationwide moves for a new trial absolute in the breach of contract action on the ground that "the jury acted with passion, caprice and prejudice" and the further grounds that there was an "erroneous admission of prejudicial evidence that was probative as to material issues in the case" and the amount of the jury's verdict is against the overwhelming weight of the evidence. In the alternative, Nationwide would have the verdict remitted to "the amount of contractual damages proven at trial," or the Defendant



granted a new trial absolute on damages for the breach of contract action alone. As for the bad faith cause of action, Nationwide asserts that it had a legitimate defense to the Plaintiff's claim and that it would be entitled to judgment notwithstanding the verdict, as a matter of law.

In addition to Defendant's assertions attacking the amount of the verdict, the Defendant moved for a new trial on the grounds that the Court erroneously admitted irrelevant and improper evidence, to wit: (1) in the form of "non-prosecution evidence" and (2) the opinions of Fire Chief David Wright as to the cause of the fire. The Court finds the first ground is without merit because there was never any evidence, *per se*, that the Plaintiff was not prosecuted. Rather, the evidence relative to the Defendant's approach to the Oconee County Sheriff's detective was offered to show that the Defendant had acted in bad faith by contacting the Sheriff's Department before Defendant had received the written report by its hired fire investigator, and Defendant never went back to the Sheriff's Department to report that the results of the laboratory tests for accelerants in the debris samples from the site, to which the Defendant's investigator had alluded to the detective, were negative. The prosecution or non-prosecution of the Plaintiff was never mentioned in evidence, nor argued to the jury.

As for the second ground concerning the testimony of the Fire Chief, his expected testimony was carefully considered during the trial when Nationwide objected to the presentation of Chief Wright as an expert witness and to the introduction of his report as being in violation of Rule 803(8), SCRE. Chief Wright, however, was never offered as an expert witness and did not testify as an expert witness. Rather, he was offered as a lay witness whose perceptions were admissible pursuant to Rule 701, SCRE. The written report prepared by Chief Wright, called a "Truck Report," was required to be made by



regulation of the State Fire Marshall and was thereby admissible pursuant to Rule 803(8) SCRE. Moreover, the Court ruled that only the first version of the report, prepared at the scene, was admissible, and excluded the second version of the report, made later with the addition of a narrative, in order to delete any investigative notes which might be said to include "opinions, judgments, or conclusions." Although the written report alone might be considered hearsay, for which an exception might be necessary, the Chief was present in court and testified directly about his observations and the preparation of the report, and he answered all questions upon cross-examination. Rule 801(d)(1)(B) SCRE. Thus, the Court finds there was no error in the admission of the first version of the written report nor any error in allowing the testimony of Fire Chief Wright as a lay witness.

The chief complaint made by Nationwide, now, is that the verdict on the breach of contract cause of action was grossly excessive and a result of passion, caprice, or bias. Defendant seeks, first, a new trial absolute and, second, a new trial *nisi remittitur*. It is well settled that, in determining the granting of a new trial on the ground of excessive verdict, "the crucial question . . . is whether the amount of the verdict falls within the range of damages testified to [at trial]." *Lemoine v. Hollingsworth*, 273 S.C. 477, 478, 257 S.E.2d 713 (1979). At trial, there was introduced the Defendant's policy, known as an Elite Homeowners' Policy, that provided the Plaintiff homeowner "Total Policy Limits For All Coverages" in the amounts of \$523,333, according to the Defendant's schedule, and the uncontroverted testimony was that the Plaintiff's loss was "total." Nevertheless, Plaintiff only received an initial payment of \$2,000 from the Defendant, before it denied coverage. Accordingly, the testimony and evidence "provided an ample basis for the jury's verdict" of \$501,444 on the breach of contract cause of action. *Id.* Moreover, the Court finds no basis to set aside the verdict or substitute Defendant's present arguments in place of the findings

of the jury. Both parties had the opportunity to present evidence and make arguments to the jury. The jury had an opportunity to see the witnesses and to judge their demeanor, bias, and credibility when the witnesses testified and were subject to cross examination.

At trial, the Defendant's took an "all or nothing" position — "Nationwide denied coverage asserting the policy's Intentional Acts Exclusion and asserting that Mr. Fowler had caused the loss." The Defendant made no effort to explain or argue its present position that the policy had limits and conditions which should have been applied to the facts of this case if the jury found that Mr. Fowler had not caused his loss.

The Defendant Nationwide now takes the position that "the jury was motivated by passion, caprice or prejudice because the amounts due and owing to the Plaintiff under the contract were not in dispute and totaled at most \$186,444.00," and, also, "the jury heard undisputed evidence that Nationwide had already paid a total of \$156,125.00 consisting of the full limits of Coverage A – Dwelling to the lien holders (\$154,125.00) and a \$2,000.00 advance [to Plaintiff] under Coverage C – Contracts." This is *petitio principii*, inasmuch as, under South Carolina law, the amounts paid to the lien holders were due under "an independent contract for the insurance of the mortgagee's interest; accordingly, denial of [insured's] claim has no effect on that of the Mortgagee." *Nationwide Mut. Ins. Co. v. Hunt*, 327 S.C. 89, 97, 488 S.E.2d 339, 344 (1997). As noted by the Defendant, "[t]he evidence was undisputed that Nationwide paid \$154,125.00 to the two mortgagees in outright satisfaction of the first mortgage and *partial satisfaction of the second mortgage*," and only "a \$2,000.00 advance [to its insured, the Plaintiff] under Coverage C – Contracts [sic]." (Emphasis supplied). Under Coverage C - Contents, "[t]he policy contains a coverage limits of \$114,692.00," and the Defendant concedes, "[t]herefor, the maximum amount the jury could have awarded for contents was \$112,692.00," a portion of which coverage or of

other coverages would have also made "full satisfaction of the second mortgage," if the Defendant had paid it to the "second mortgagee" under its independent contract. *Id.*

Clearly, the jury made some adjustments and precise calculations in that its verdict on the breach of contract action was a very specific number, \$501,444.00. Just as the Court may not charge on the facts, it is not the role of the Court to make findings of facts on post-trial motions, and the evidence is to be viewed in the light most favorable to the nonmoving party. Inasmuch as the verdict was within the evidence presented and testified to at trial, the Court has no cause or reason to invade the province of the jury or disturb the verdict. *Id.*

Accordingly, the Court must deny the Defendant's motions as to the Plaintiff's cause of action for breach of contract.

As for Defendant's motion for JNOV on the Plaintiff's cause of action for bad faith, Nationwide argues that it was error to allow the jury to hear evidence of alleged bad faith actions after, February 11, 2009, the date of its initial denial of claim letter. Nationwide, in support of its position that there should be a bright line drawn at the time it issued its first letter denying the claim, cites language in the case of *Howard v. Farm Mut. Automobile Ins. Co.*, 316 S.C. 645, 450 S.E.2d 582 (1994). The language cited is merely *obiter dictum*, since on the facts of that case the Court held that the jury should not consider the actions of the insurance adjuster after litigation had commenced. In this case the litigation did not commence until the complaint was filed on June 22, 2009. In the trial it was shown that the claim and denial process was ongoing. The fire occurred on January 17, 2009. The first investigation by the Defendant was on January 18 followed by a second inspection on January 21. The reports related to the second investigation were complete on February 9 and the claim was initially denied by letter dated February 11, even though the lab results

for accelerants requested by Nationwide's own fire investigator were negative. Following the initial denial, the Plaintiff completed a proof of loss for "Coverage C - Contents" under the policy, on March 13th, as required by the Defendant — after it had denied the Plaintiff's request for an extension of time. The Defendant again denied the claim on March 17. The lawsuit was not filed until June 22, 2009. In contrast to the *Howard* case, all the actions and omissions of Nationwide's agents, about which plaintiff Fowler complains in this case, occurred prior to the filing of the lawsuit — during which time the Defendant continued to require and receive timely proof of loss claim forms from the Plaintiff.

Notwithstanding Nationwide's position here, the rationale and policy of the cases on insurance bad faith in South Carolina do not bind the insured or the jury to the findings and conclusions of the insurer's own investigation, and the jury can consider the insured's evidence of the insurer's bad faith in the processing of the claim. Otherwise, an insurer could safely deny all claims out of hand and put its insureds to the burden of filing suit in every case. It was succinctly held and clearly stated in *Varnadore v. Nationwide Mutual Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986), that:

"Nationwide contends that the issue of bad faith should not have been submitted to the jury. It argues that, from its own investigation, a reasonable basis was found to deny the claim, thereby entitling Nationwide to a directed verdict.

The position is not tenable. First, it binds the insured to the findings and conclusions of the insurer's own independent investigation; next, it effectually insulates the insurer from liability; and, finally, it forecloses a jury consideration of the insured's evidence of bad faith." (Emphasis supplied).

289 S.C. at 158, 345 S.E.2d at 714.

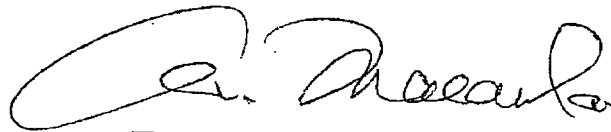
Accordingly, the Defendant's motion for JNOV, which is directed solely at the bad faith cause of action, is denied.

JUDGMENT

For the foregoing reasons, it is, therefore, the judgment of this Court that:

1. The Defendant's Motion for a New Trial Absolute is DENIED;
2. The Defendant's Motion for a New Trial *Nisi Remittitur* is DENIED;
3. The Defendant's Motion for JNOV is DENIED; further,
4. The Defendant may submit any additional response to Plaintiff's motion for attorneys' fees on or before February 24, 2012, and
5. The Plaintiff may reply as to the attorneys' fees on or before March 2, 2012.

AND, IT IS SO ORDERED.



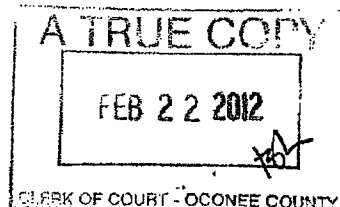
ALEXANDER S. MACAULAY, Judge

February 21, 2012

Walhalla, South Carolina.

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BEVERLY H. WHITFIELD
CLERK OF COURT
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STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
Plaintiff,)

vs.)

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

ORDER GRANTING ATTORNEYS' FEES

FILED OCONEE, SC
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This matter has come before the Court upon the Plaintiff's Motion for Attorneys' Fees pursuant to South Carolina Code Section 38-59-40 (1976 as amended). The plaintiff's motion was filed December 9, 2011, and originally came up for hearing January 17, 2012. The defense requested additional time until February 24, 2012, which the Court granted.

In support of the motion, plaintiff cited the statute, the plaintiff's Complaint, and the record in the case, including but not limited to the jury verdict finding for the plaintiff on the cause of action for bad faith breach of the insurance contract. Plaintiff also submitted an affidavit of counsel dated December 9, 2011, with an itemization of the time and expenses of plaintiff's counsel pursuing the case through the end of the trial, and a memorandum. At the time of the hearing set for January 17, 2012, the plaintiff also submitted the Affidavit of Larry C. Brandt, Esquire, of the Oconee County Bar, dated January 17, 2012. Later the plaintiff submitted a supplemental affidavit of plaintiff's counsel regarding attorney fees dated February 24, 2012 and a supplemental memorandum in support of the motion also dated February 24, 2012.

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In opposition to the motion, the defendant submitted a memorandum dated January 12, 2012. Later defendant submitted a supplemental memorandum in opposition to the motion dated February 22, 2012, and the affidavits of James W. Logan, Jr., Esquire, of the Anderson County Bar and an affidavit of Perry H. Gravely, Esquire, of the Pickens County Bar.

All of the above items were duly filed by the respective parties. The affidavits and exhibits are part of the record of the case, and the Court has given full and careful consideration to the entire record of the case, as well as the memoranda submitted and the authorities cited therein, including but not limited to the statute upon which the motion is based.

Based on the record in the case, and for the reasons stated below, the Court finds that the motion should be granted.

The motion is based upon South Carolina Code Section 38-59-40 (1976 as amended). This section provides that if a claim is covered by a policy of insurance and the insurer fails to pay the claim within ninety days after the demand has been made by the holder of the policy, and if there is thereafter a finding on suit by the trial judge that the refusal was without reasonable cause or in bad faith, then the insurer is liable to pay the policyholder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer. The amount of the attorneys' fees may not exceed one third of the amount of the judgment.

PROCEDURAL HISTORY OF CASE

As the record in this case shows, the plaintiff suffered a fire loss on January 17, 2009. Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide") denied the claim, issuing its official letter of denial on February 11, 2009. The plaintiff later

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submitted a Sworn Proof of Loss, which the insurer timely received March 17, 2009, and returned March 18, 2009. The insurer stated that the claim had been denied February 11, 2009, and that it was rejecting the Sworn Proof of Loss

More than ninety days passed before the plaintiff filed his Summons and Complaint June 22, 2009.

Almost two and a half (2½) years later, the case was reached for trial at the term of the Court commencing November 28, 2011. On Friday, December 2, 2011, the jury returned its verdict in favor of the plaintiff. The jury awarded damages to the plaintiff in the amount of \$501,444 on the cause of action for breach of contract. In addition, the jury unanimously found for the plaintiff on the cause of action for bad faith breach of an insurance contract, and the jury awarded plaintiff an additional \$3,000.

STATUTE AND AUTHORITIES

South Carolina Code Section 38-59-40 provides for attorneys' fees where the insurance company has refused to pay a claim and the refusal was without reasonable cause or in bad faith. South Carolina Code, Section 38-59-40 (1976 as amended). The determination of an insurer's liability for attorney's fees pursuant to the statute is a matter of decision by the trial judge. *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 504 S.E.2d 127 (Ct. App.1998). *Coker v. Pilot Life Ins. Co.*, 265 S.C. 260, 217 S.E. 2d 784 (1975).

Bad faith refusal to pay benefits under a contract of insurance includes: (1) 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 an insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising under the contract; and (4) causing damage to the

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insured. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659, (S.C. App. 2002) rehearing denied, certiorari denied.

ANALYSIS

Denial of Claim without Reasonable Cause or in Bad Faith

Plaintiff's motion is a motion for additional award against Nationwide for reasonable attorneys' fees pursuant to the statute. The claim was made, but denied. More than ninety days commenced before the lawsuit was filed. The jury found for the plaintiff on the breach of contract cause of action and also for the plaintiff regarding the existence of bad faith in the denial.

As the record in the case shows, the litigation was long and hard fought. Counsel for the plaintiff litigated the case very fully, with numerous depositions and motions to handle. Indeed, the defendant's failures to comply with its discovery responsibilities required the plaintiff to file motions to compel discovery on two occasions. After the filing of the first motion, the defendant agreed to a Consent Order of Discovery, but thereafter defendant and its chief expert witness failed to comply with plaintiff's discovery requests to defendant and also even to a subpoena duces tecum duly served upon the expert.

Plaintiff called as an expert witness on the subject of insurance bad faith claims practices, Thomas H. Hesse, Esquire. Mr. Hesse is well qualified, having twenty years experience in the insurance industry defending various claims, including fire loss claims, followed by nineteen years experience as an insurance defense counsel. Mr. Hesse identified a number of actions as part of the Nationwide claims personnel which are evidence of insurance bad faith. All the matters about which Mr. Hesse testified were put in evidence directly for the jury to evaluate independently. As stated above, the jury

found in favor of the plaintiff and against Nationwide on the question of insurance bad faith. Although the trial court is to make the decision under the statute whether the refusal to pay the claim was in bad faith or without reasonable cause, the verdict of the jury is probative and fully supports a finding by the trial judge that the refusal to pay the claim was in bad faith and without reasonable cause.

In brief, the indicators of bad faith are: (1) the insurer contacted the county Sheriff reporting its suspicions of arson before its expert witness completed his report or even received the laboratory test analysis of the six debris samples taken seeking corroboration of the presence of accelerants; (2) the insurer never asked any questions and never changed its initial determination that there was arson when the laboratory analysis came back negative – all six samples, (3) the insurer completely disregarded the findings of the local fire chief, who fought the fire and made observations required by the State Fire Marshall, stating that the cause of ignition was unintentional and the equipment involved in the ignition was the heater, (4) the insurer refused to grant the plaintiff an extension of time to submit his proof of loss after having initially denied the claim, but then immediately returned and rejected the proof of loss which was timely filed, (5) the insurer refused a request from the policyholder for a copy of the Cause and Origin Report unless and until he filed a lawsuit, its internal log notes indicating that the insurer knew that the policyholder would be entitled to obtain a copy of their report “in discovery” once the lawsuit was filed, (6) the insurer unnecessarily told the policyholder’s mortgage holders that the claim of the policyholder was denied because of the intentional acts exclusion, which was “the same thing” as saying that he had set the house on fire, which is arson, and (7) the policyholder’s offer to take a polygraph was not responded to appropriately.

Accordingly, the Court finds and holds that the insurer's refusal to pay the claim was without reasonable cause and in bad faith. Therefore, the Court further holds that the insured is entitled to recover, in addition to the amount of the judgment, all reasonable attorney's fees for the prosecution of the case, not to exceed one third (1/3) of the amount of the judgment. The judgment entered December 5, 2011, was in the total amount of \$504, 444. One-third of that total amount is \$168,148.

Reasonable Attorneys' Fees

In evaluating the request for reasonable attorney's fees pursuant to the statute, the Court has considered not only the language of the statute, but also the six (6) factors normally considered in determining an award of attorney's fees: (1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). Although consideration is given to all six criteria, no one of the six factors is controlling. *Baron Data Systems, Inc. v. Lotter*, 297 S.C. 382, 284, 377, S.C.2d 296, 297 (1989).

In considering the first two of the above factors, the Court has considered not only the record in the case, but also the affidavit of plaintiff's counsel and the itemization of the time and expense of his firm working on the case. The Court observes that this case involved not only an alleged breach of an insurance contract and bad faith; it also involved allegations of arson, which required both sides to retain expert witnesses. In addition, the case involved defamation and the defense of qualified privilege. The defamation cause of action was challenged by the defense unsuccessfully on summary judgment, although the individual defendant apparently changed his deposition

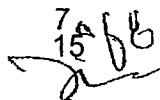
testimony at trial and received a defense verdict. The corporate defendant failed to respond properly to discovery, which necessitated the filing and prosecution of several motions to compel, all of which were successful.

As to the third factor, the Court notes that the professional standing of both counsel, including but not limited to the plaintiffs' counsel, is very high.

As to the fourth factor, this case was handled on a contingency, as would be expected for this type of case and the circumstances.

As to the fifth factor, the Court has considered the affidavits of plaintiff's counsel, that of Mr. Brandt, and those of Mr. Logan and Gravely. All are respected members of the bar with many years of experience trying civil cases. Their fees are not all charged at the same hourly rate, but Mr. Belser's hourly rate is not the highest or the lowest of the rates cited. The Court notes, however, that the fees generally charged for insurance defense work, even in cases of alleged breach of insurance contracts and bad faith, are not readily transferable to representation of an insured in protracted litigation. The relative certainty of payment and the ability to submit periodic billing to an insurance carrier would justify lower fees if calculated on an hourly basis. In this regard, the Court finds that the \$300 per hour rate utilized by plaintiff's counsel is reasonable under circumstances of this particular case, based upon the nature of the work, the quality of the work, and the other relevant factors. The Court notes, of course, that not all the time devoted to the case by counsel can be awarded in full under the statute, since the amount of the fees is limited by the statute to one third of the judgment.

As to the sixth factor, it is clear that beneficial results were obtained. The defense position throughout the case has been that plaintiff was owed nothing. Defendant's regularly retained fire investigation expert (Mr. Byers) and all of the

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defendant's on staff witnesses took the absolute position that defendant owed nothing. Almost thirty-four months after the fire, the jury's verdict absolved the plaintiff from responsibility of the fire. In addition, the jury made a substantial award of actual damages and found the insurance company guilty of bad faith.

Accordingly, the Court finds and holds that the plaintiff should be awarded the maximum amount allowable under the statute. One-third of the \$404,444 judgment is \$168,148. This is the amount to be awarded as attorney's fees to the plaintiff, in addition to the amount of the judgment.

ORDER

Therefore, for the reasons set forth above, the Court finds that the motion of the plaintiff for attorneys' fees pursuant to South Carolina Code Section 38-59-40 should be, and is hereby granted, in the amount of \$168,148. Judgment shall be entered by the Clerk of Court in the amount of \$168,148 for attorneys' fees, in addition to the judgment entered on the jury's verdict.

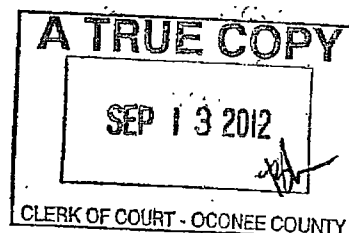
AND IT IS SO ORDERED.


Alexander S. Macaulay
Presiding Judge
Oconee County Court of Common Pleas

September 7, 2012.

Walhalla, South Carolina.

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 SEP 13 PM 4 35



STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
James D. Fowler,)
Plaintiff,)
v.)
Nationwide Mutual Fire Insurance Co. and)
Andrew Flanagan)
Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2009-CP-37-0768

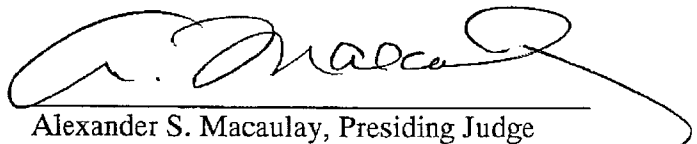
**ORDER DENYING DEFENDANTS' RULE 59(e)
MOTION TO ALTER OR AMEND**

FILED
OCCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 OCT 3 PM 4 47

THIS MATTER is before the Court upon Defendant's Rule 59 (e) Motion to Alter or Amend, filed on March 8, 2012. Plaintiff is represented by Clinch H. Belser, Jr., Esquire, and the Defendant is represented by J.R. Murphy, Esquire. Each party timely filed memoranda with the Court in support or opposition of the Motion at hand.

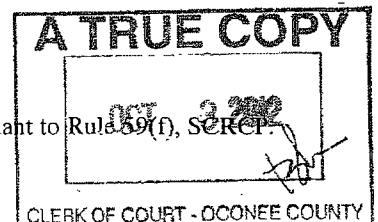
After careful consideration of the able argument and filings of Counsel and review of the record, the Court finds that the verdict rendered on December 2, 2011, is supported by the record. Furthermore, the Court has duly considered the mortgage payments and the issue of offset as it addressed these issues in the Order Denying Defendant's Post-Trial Motions, filed February 22, 2012. The Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendant's Motion, pursuant to Rule 59(e), SCRPC, ¹ is DENIED.

AND, IT IS SO ORDERED.


Alexander S. Macaulay, Presiding Judge

Walhalla, South Carolina
October 3, 2012

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRPC.



STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

Civil Action: 2009-CP-37-768

James D. Fowler)

Plaintiff,)

v.)

VERDICT

Nationwide Mutual Fire Insurance)
Company and Andrew Flanagan)

Defendant.)
_____)

SECTION I

1) On the **FIRST** cause of action, **BREACH OF CONTRACT**,

We, the jury, unanimously find:

☒ For the Plaintiff, **James D. Fowler**, and against the Defendant, **Nationwide Mutual Fire Insurance Company**, actual damages in the amount of:

*Five hundred and one thousand four hundred and (\$ 501,444.00) Dollars.
forty four dollars*

OR

_____ For the Defendant **Nationwide Mutual Fire Insurance Company**.

[GO TO NEXT PAGE]

- 2) On the **SECOND** cause of action, **BAD FAITH BREACH OF AN INSURANCE CONTRACT**,

We, the jury, unanimously find:

✓ For the Plaintiff, **James D. Fowler**, and against the Defendants, **Nationwide Mutual Fire Insurance Company** actual damages in the amount of:

three thousand dollars (\$ 3000.00) Dollars.

OR

____ For the Defendant **Nationwide Mutual Fire Insurance Company.**

- 3) On the **THIRD** cause of action, **SLANDER *PER SE***,

We, the jury, unanimously find:

_____ For the Plaintiff, **James D. Fowler**, and against the Defendants, **Nationwide Mutual Fire Insurance Company** and **Andrew Flanagan**, actual damages in the amount of:

_____ (\$_____._____) Dollars.

OR

✓ For the Defendants **Nationwide Mutual Fire Insurance Company and Andrew Flanagan.**

Paul R. [Signature]

PAUL R. GRABER, Foreperson

Walhalla, South Carolina
December 2, 2011

[GO ON TO NEXT PAGE]

If in **SECTION I**, you found for the **DEFENDANTS** on the **SECOND** and **THIRD** causes of action,

STOP and go no further.

OR

If, in **SECTION I**, you found for the **PLAINTIFF** on either the **SECOND** or **THIRD** causes of action,

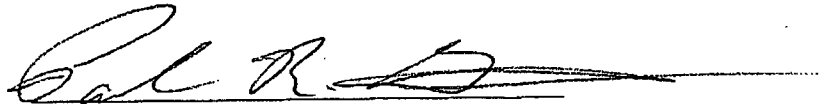
GO and to **SECTION II** below.

SECTION II

If, you found for the Plaintiff on either the **SECOND** or **THIRD** causes of action in **SECTION I** above, then, do you the jury unanimously find by **CLEAR** and **CONVINCING** evidence that the conduct of the Defendants was willful, wanton or in reckless disregard of the Plaintiff's rights?

YES _____

NO ✓ _____



PAUL R. GRABER, Foreperson

Walhalla, South Carolina
December 2, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

James D. Fowler,)

Plaintiff,)

vs.)

Nationwide Mutual Fire)

Insurance Company and)

Andrew Flanagan,)

Defendants.)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-

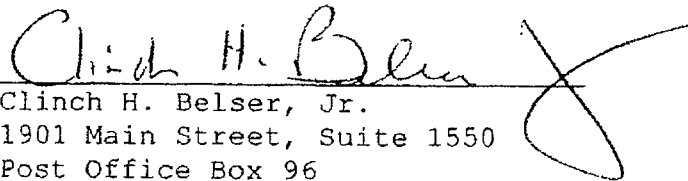
SUMMONS
(Jury Trial Demanded)

FILED
CLINTON COUNTY
2009 JUN 22 A 11:36

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer upon the undersigned attorney at 1901 Main Street, Suite 1550, Post Office Box 96, Columbia, South Carolina 29202, within thirty (30) days from the date of service hereof upon you, and in the event you fail to answer the time specified herein, plaintiff will apply to the court for the relief demanded in the Complaint.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096

Attorneys for Plaintiff

Columbia, South Carolina

June 19, 2009.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	Civil Action 09-CP-37-
James D. Fowler,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT
	)	(Jury Trial Demanded)
Nationwide Mutual Fire	)	
Insurance Company and	)	
Andrew Flanagan,	)	
	)	
Defendants.	)	

FILED
 JUN 22 A 11:36
 OCONEE COUNTY, SC
 CLERK OF COURT

Plaintiff, complaining of defendants, alleges that:

1. Plaintiff is a resident of Oconee County and has lived in Oconee County more than twenty years.
2. Defendant Nationwide Mutual Fire Insurance Company is an insurance company organized in a state other than South Carolina, but owns real estate and other property in South Carolina, and does business in Oconee County and other parts of South Carolina.
3. The defendant Andrew Flanagan, on information and belief, is a resident of Greenville County, is an employee and agent of the insurance company, and has authority and duties as a member of the claims department.
4. On information and belief, this Court has jurisdiction over these parties and the subject matter of this case, and venue is proper in Oconee County because the most substantial part of the acts and omissions giving rise to the causes of action hereinafter set forth occurred in Oconee County.
5. On or about February 19, 2008, for value received, the defendant insurance company issued to the plaintiff its policy number 61 39 HO 787845 (hereinafter "the policy") which insured

the plaintiff's residence at 328 Frank Gailliard Road, Seneca, South Carolina 29678-5376. Plaintiff incorporates herein by reference the policy, and all of its terms and conditions.

6. The policy insured said residence against certain specified perils, including but not limited to fire.

7. The policy had various coverages, including but not limited to (a) the structure for the basic amount of \$147,700, with inflation protection up to \$154,125; (b) the personal property or contents of the house in the basic amount of \$109,910, with extended replacement coverage costs up to \$114,692; (c) loss of use or additional living expense in the amount of \$147,407 with additions up to \$154,125; (d) biological deterioration/damage cleanup in the basic amount of \$5,000 with additions up to \$7,706; (e) landscaping in a basic amount with additions up to \$7,706; and (e) various other coverages as set forth in the policy.

8. The said policy was in full force and effect on January 17, 2009.

9. On the morning of January 17, 2009, the plaintiff's said residence was destroyed by fire, the dwelling being a total loss, and the plaintiff's personal property was also destroyed or rendered thereafter essentially useless by the fire.

10. When plaintiff discovered the fire in progress, he promptly sought assistance from his neighbors, and the fire department was called.

11. The fire department promptly came to fight the fire and fought the fire for a number of hours, to no avail.

12. The fire officials advised the plaintiff to report his loss to the insurance company, which plaintiff did on January 17, 2009.

13. Defendant Flanagan came to plaintiff's residence on Sunday, January 18, to inspect the house and the fire damage.

14. Defendant Flanagan made certain requests of the plaintiff, with which the plaintiff has promptly and fully complied.

15. Defendant Flanagan, while acknowledging that plaintiff had suffered a total loss, nonetheless persisted in causing certain tests to be made, on information and belief, in order to find a reason to deny payment under the policy.

16. On or about February 11, 2009, another agent of defendant Nationwide working with defendant Flanagan notified plaintiff that all defendants' tests were negative (meaning there was no evidence that the fire was intentionally set) and everything would be handled by Mr. Flanagan from this point.

17. On or about February 11, 2009, Defendant Flanagan, having received the results of his requested tests, acknowledged that the tests were negative (meaning they had shown no evidence the fire was intentionally set), but stated that he felt the fire had been intentionally set by the plaintiff and that he was going to deny the plaintiff's claims for the contents and for debris removal.

18. Thereafter, on or about February 18, 2009, Defendant Flanagan, acting as an agent of the insurance company, within the scope of his employment and his duties and with full authority, contacted an agent of the finance company holding the second mortgage on plaintiff's residence, and stated to this third party located in Oconee County, that Nationwide would pay the mortgage companies because he was required to do so by state law, but insisted that the finance company was required to sign and submit a full proof of loss in order to get paid, not plaintiff as the insured, because under the circumstances of the loss the insured was no longer involved, or words to that effect, implying and imputing that plaintiff had intentionally set the fire.

19. Plaintiff has duly submitted a Proof of Loss as demanded by Agent Flanagan on behalf of Nationwide, even though Defendant Flanagan had previously stated more than once that he was going to deny plaintiff's claim under the policy.

20. Plaintiff submitted his Proof of Loss on March 13, because Agent Flanagan would not agree to an extension of time beyond the normal sixty day requirement for the submission of the Proof of Loss.

21. Defendant Flanagan, as an agent of and within the scope of his duties and with authority from Defendant Nationwide, has stated orally and in writing that plaintiff's claim was denied.

22. More than ninety days have passed since the submission of plaintiff's Proof of Loss, and Defendant Nationwide has failed to make payment.

23. On information and belief, the insurance company's refusal to make payment of this claim within ninety (90) days, without reasonable cause and in bad faith, violates South Carolina Code Section 38-59-40, and subjects the insurance company to liability for plaintiff's reasonable attorney's fees in connection with prosecuting this case, and further damages as set forth below.

24. The insurance company has refused to pay for the damage cleanup at the fire, causing plaintiff to incur this trouble and expense himself.

25. The insurance company has also failed to provide for the plaintiff's loss of use of the damaged house, in that it did not provide alternate living arrangements for him, and the plaintiff has been forced to live in an outbuilding on the property without proper heat or running water, and has suffered inconvenience and discomfort thereby.

FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT

26. Plaintiff incorporates by reference and realleges the allegations of the preceding paragraphs.

27. The aforesaid policy of insurance constituted a contract between plaintiff and Defendant Nationwide, for which the plaintiff had paid valuable consideration in the form of the premiums on the policy, and which was in full force and effect on January 17, 2009.

28. The fire at plaintiff's residence on January 17, 2009, was a loss covered by the aforesaid policy.

29. The insurance company was obligated by the policy to pay plaintiff for the damage to the structure, for the damage and loss of his personal property, for his loss of use of the property until such time as he can rebuild, for the cleanup of the property, for landscaping, and for other matters as provided by the policy.

30. The insurance company has breached the contract, by denying the plaintiff's claim and rejecting the Proof of Loss submitted by plaintiff at the request of the defendants.

31. On information and belief, Defendant Nationwide's failure to pay the claim, in breach of the contract, entitles plaintiff to judgment against Nationwide for the amount of his losses covered by the policy.

SECOND CAUSE OF ACTION

32. Plaintiff incorporates by reference and realleges the allegations of the preceding paragraphs.

33. On information and belief, Defendant Nationwide's failure and refusal to pay plaintiff's claim was without reasonable cause and in bad faith.

34. The insurance company's failure to pay the claim has lasted more than 90 days after demand was made.

35. On information and belief, pursuant to South Carolina Code Section 38-59-40 (1976, as amended) the plaintiff is entitled to recover, as an additional award, the amount of his reasonable attorney's fees for the prosecution of this case.

FOR A THIRD CAUSE OF ACTION

36. Plaintiff incorporates by reference and realleges the allegations of the preceding paragraphs.

37. There was in existence a mutually binding contract of insurance between the plaintiff and Defendant Nationwide.

38. The Defendant Nationwide refused to pay benefits due under the contract.

39. The Defendant Nationwide's failure to pay was the result of bad faith and unreasonable action in breach of the implied covenant of good faith and fair dealing arising under the contract.

40. The Defendant Nationwide's wrongful actions have damaged the plaintiff, in that he has not received the benefits to which he is entitled under the said policy, causing consequential damages.

41. On information and belief, the plaintiff is entitled to recover from Defendant Nationwide actual damages and punitive damages in an amount to be set by the jury.

FOURTH CAUSE OF ACTION

42. Plaintiff incorporates by reference and realleges the allegations of the preceding paragraphs.

43. On or about February 18, 2009, the Defendant Flanagan, acting as an agent of Defendant Nationwide, and acting within the course and scope of his employment and duties and with full authority, contacted a representative of the finance company holding the second mortgage on plaintiff's residence and stated to this third party that he would on behalf of Nationwide pay a certain portion of plaintiff's second mortgage, because he was

required to do so by State law, but insisted that the finance company was required to submit a full proof of loss in order to get paid, not the plaintiff as the insured, because under the circumstances of the loss the insured was no longer involved, or words to that effect, implying or imputing that plaintiff had intentionally set the fire.

44. The aforesaid implication or imputation that plaintiff had intentionally set the fire was false.

45. The aforesaid implication or imputation was known or should have been known by Defendant Flanagan and Defendant Nationwide to have been false, or was recklessly made with a conscious indifference towards plaintiff's rights, in view of the fact that the said defendants knew there was no or no sufficient evidence of incendiary origin of the fire or motive on behalf of the plaintiff, and there was no good faith basis to accuse the plaintiff of setting fire to his own house, so it would be destroyed with all of its contents.

46. The implication and imputation of the statement of Defendant Flanagan and Defendant Nationwide constituted a charge that plaintiff was guilty of the crime of arson, a crime of moral turpitude and a felony in South Carolina punishable by more than one year in prison, and as such a false charge, it was slander *per se* and actionable *per se*.

47. On information and belief, the actions and statements of defendant were made with actual and implied malice.

48. On information and belief, plaintiff has suffered at least nominal damages by reason of the defendants' slander *per se*.

49. On information and belief, the plaintiff is entitled to recover from the defendants actual and punitive damages.

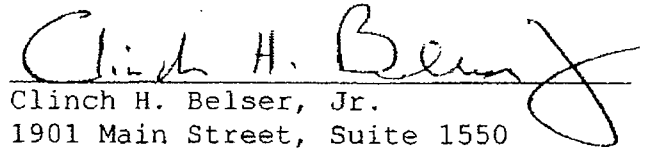
FOR A FIFTH CAUSE OF ACTION

50. Plaintiff incorporates by reference and realleges the allegations of the preceding paragraphs.

51. On information and belief, the amounts due to the plaintiff on his claim and for the breach of contract set forth in Cause of Action number 1, constitute liquidated amounts, or amounts which can be calculated, and pursuant to South Carolina Code Section 34-31-20, the plaintiff is entitled to recover prejudgment interest.

WHEREFORE, the plaintiff prays for judgment against the defendants on all his causes of action, for actual damages, punitive damages, prejudgment interest, and attorney's fees, and such other relief as the Court deems just.

BELSER & BELSER, P.A.

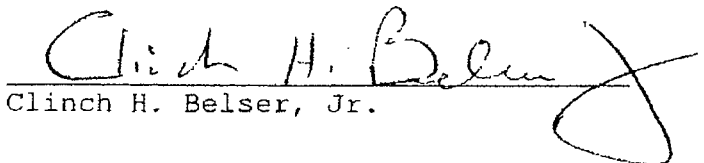


Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
PO Box 96
Columbia, SC 29202
(803) 929-0096
Attorney for Plaintiff
James D. Fowler

Columbia, South Carolina

June 19, 2009.

Plaintiff demands a jury trial.


Clinch H. Belser, Jr.

FILED IN 2009 JUL 17 P 3:18
BEVERLY H. WHITFIELD
CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

2009 JUL 17 P 3:18

CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

**ANSWER ON BEHALF OF
DEFENDANTS**

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

The Defendants, answering the Plaintiff's Complaint herein, would respectfully show
unto the Court that:

FOR A FIRST DEFENSE

1. The Defendants deny each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.
2. Paragraph one (1) is admitted upon information and belief.
3. As to paragraph two (2), Defendants admit that Nationwide is an insurance company organized and existing pursuant to the laws of the State of Ohio but is authorized to transact business and issue policies of insurance in South Carolina; otherwise, paragraph two (2) is denied.
4. As to paragraph three (3), Defendants admit that the Defendant Flanagan is a citizen and resident of Greenville County, South Carolina and was employed as an adjuster by Nationwide; otherwise, paragraph three (3) is denied.



5. As to paragraph four (4), Defendants admit that the court has jurisdiction over the parties and subject matter of the case but denies venue is proper in Oconee County; otherwise, paragraph four (4) is denied.

6. As to paragraphs five (5), six (6) and seven (7), the Defendants admit that Nationwide issued policy 61 39 HO 787845 to the Plaintiff for his dwelling and other property located at 328 Frank Gailliard Road, Seneca, South Carolina and would crave reference to the policy for all the terms, conditions and provisions therein; otherwise, paragraphs five (5), six (6) and seven (7) are denied.

7. Paragraph eight (8) is admitted.

8. As to paragraph nine (9), the Defendants admit that on or about January 17, 2009, the Plaintiff's dwelling structure was destroyed by fire and the Plaintiff also sustained loss to his contents contained in the dwelling; otherwise, paragraph nine (9) is denied.

9. As to paragraph ten (10), the Defendants admit that at some point in time, the fire department was called; otherwise, paragraph ten (10) is denied.

10. The Defendants are without sufficient knowledge and information to either admit or deny the allegations of paragraphs eleven (11) and twelve (12) and therefore, paragraphs eleven (11) and twelve (12) are denied.

11. Paragraph thirteen (13) is admitted.

12. As to paragraph fourteen (14), Defendants would show that Flanagan made certain requests in accordance with the applicable policy provisions in the investigation and adjustment of the Plaintiff's claim; otherwise, paragraph fourteen (14) is denied.

A handwritten signature in black ink, appearing to be 'DJ2' or similar, located at the bottom left of the page.

13. As to paragraph fifteen (15), Defendants admit that the dwelling was a total loss but would show that investigation and adjustment of the claim was necessary and was conducted; otherwise, paragraph fifteen (15) is denied.

14. Paragraph sixteen (16) is denied.

15. As to paragraph seventeen (17), Defendants admit that on or about February 11, 2009, Defendant Flanagan orally advised the Plaintiff that the investigation revealed that the fire to the dwelling had been intentionally set and therefore, the Plaintiff's claim for coverage under the policy was going to be denied; otherwise, paragraph seventeen (17) is denied.

16. As to paragraph eighteen (18), the Defendants would show that on or about February 18, 2009, the Defendant Flanagan, in accordance with the policy provisions, notified the lien holders listed on the policy that the claim to the policy holder (i.e., Plaintiff) was going to be denied and therefore, the mortgagees would be required to submit a separate proof of loss in order to present a claim for its interests; otherwise, paragraph eighteen (18) is denied.

17. As to paragraphs nineteen (19) and twenty (20), the Defendants admit that Plaintiff submitted a proof of loss; otherwise, paragraphs nineteen (19) and twenty (20) are denied.

18. As to paragraph twenty-one (21), Defendants admit that the Plaintiff's claim was denied and Plaintiff was advised of this both orally and in writing; otherwise, paragraph twenty-one (21) is denied.

19. Paragraph twenty-two (22) is admitted and Defendants would show that no payment is due Plaintiff in accordance with the terms of the policy.

20. Paragraph twenty-three (23) is denied.



21. As to paragraphs twenty-four (24) and twenty-five (25), Defendants would show that the policy does not provide coverage for this loss and therefore, no payment is due to Plaintiff under any of the coverages provided by the policy; otherwise, paragraph twenty-four (24) and twenty-five (25) are denied.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION

22. In response to paragraph twenty-six (26), the Defendants reiterate their response to paragraphs one (1) through twenty-five (25) above as if fully set forth verbatim herein.

23. As to paragraph twenty-seven (27), Defendants admit that Nationwide issued a policy to the Plaintiff and that such policy was in full force and effect on January 17, 2009; otherwise, Defendants crave reference to the policy for all the terms, conditions and provisions therein.

24. Paragraphs twenty-eight (28), twenty-nine (29), thirty (30) and thirty-one (31) are denied.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION

25. In response to paragraph thirty-two (32), the Defendants reiterate their response to paragraphs one (1) through thirty-one (31) above as if fully set forth verbatim herein.

26. Paragraphs thirty-three (33), thirty-four (34) and thirty-five (35) are denied.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION

27. In response to paragraph thirty-six (36), the Defendants reiterate their response to paragraphs one (1) through thirty-five (35) above as if fully set forth verbatim herein.

28. As to paragraph thirty-seven (37), Defendants admit that a policy of insurance was issued by Nationwide to the Plaintiff; otherwise, paragraph thirty-seven (37) is denied.



29. Paragraph thirty-eight (38), thirty-nine (39), forty (40) and forty-one (41) are denied.

FOR A FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION

30. In response to paragraph forty-two (42), the Defendants reiterate their response to paragraphs one (1) through forty-one (41) above as if fully set forth verbatim herein.

31. As to paragraph forty-three (43), the Defendants would show that on or about February 18, 2009, the Defendant Flanagan, in accordance with the policy provisions, notified the lien holders listed on the policy that the claim to the policy holder (i.e., Plaintiff) was going to be denied and therefore, the mortgagees would be required to submit a separate proof of loss in order to present a claim for its interests; otherwise, paragraph forty-three (43) is denied.

32. Paragraphs forty-four (44), forty-five (45), forty-six (46), forty-seven (47), forty-eight (48) and forty-nine (49) are denied.

FOR A FIRST DEFENSE TO THE FIFTH CAUSE OF ACTION

33. In response to paragraph fifty (50), the Defendants reiterate their response to paragraphs one (1) through forty-nine (49) above as if fully set forth verbatim herein.

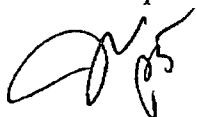
34. Paragraph fifty-one (51) is denied.

FOR A SECOND DEFENSE

35. The Defendants would show, upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and, therefore, the Plaintiff's Complaint should be dismissed with costs.

FOR A THIRD DEFENSE

36. The Defendants would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth



Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendants could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because the Defendants can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates the Defendants' right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendants' exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A FOURTH DEFENSE

37. The Defendants would show that any communications between the Defendants and third persons alleged in paragraph eighteen (18) and forty-three (43) of the Complaint were absolutely privileged or subject to a qualified or conditional privilege and that the Defendants did not exceed the scope of such privilege in that both parties to the conversation had a financial, pecuniary or other interest in the subject matter of the conversation and that the conversation was limited in time, scope and content to the content of the subject matter at



issue and therefore, Plaintiff cannot recover any sum whatsoever for the Fourth Cause of Action.

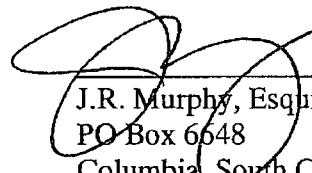
FOR A FIFTH DEFENSE

38. The Defendants would show that any statements made by the Defendants to third persons were true or substantially true and the Defendants plead truth as complete defense to the Fourth Cause of Action.

WHEREFORE, having fully answered, the Defendants pray that the Plaintiff's Complaint be dismissed with costs.

The Defendants demand a jury trial.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendants

p7

Columbia, South Carolina
July 16, 2009

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,
v.
Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,
Defendants.

Plaintiff,

INTERROGATORIES TO PLAINTIFF

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

YOU ARE HEREBY SERVED the following written Interrogatories on behalf of the Defendants, to be answered separately and in writing by the Plaintiff, within thirty (30) days after the service hereof under the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relates to the claim or defense in the case.
3. Set forth a statement of all damages claimed to have been sustained by the party.
4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.
5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
6. Please state each and every act or omission on behalf of Nationwide that the Plaintiff contends amounts to bad faith. With respect to each such act or omission, please state the date on

which it occurred, the person(s) who committed such act or omission and the witness on behalf of Plaintiff who will testify regarding such act or omission.

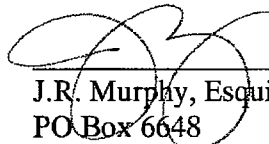
7. With respect to any such allegedly defamatory statement made by the Defendants please state the following:

- a. the date of the statement;
- b. the time of the statement;
- c. the manner of the statement (i.e, in person, by telephone, etc.)
- d. the person to whom t he statement was made;
- e. any other persons to whom the statement was published;
- f. how the Plaintiff found out about the statement;
- g. any damages sustained as a result of the statement being made; and
- h. the exact words of any Defendant allegedly making such statement or as close

thereto as possible of any statement allegedly made by any of the Defendants.

These Interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorney obtain further information between the time answers are served and the time of trial.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendants

Columbia, South Carolina
July 16, 2009

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	Civil Action 09-CP-37-768
James D. Fowler,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S ANSWERS TO
	)	DEFENDANTS' INTERROGATORIES
Nationwide Mutual Fire	)	
Insurance Company and	)	
Andrew Flanagan,	)	
	)	
Defendants.	)	

Plaintiff responds to the defendants' Interrogatories as follows:

1. Give the names and addresses of persons known to the parties or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

(a) Mr. James D. Fowler, Plaintiff
328 Frank Gaillard Rd.
Seneca, SC 29678-5316

No written statement, within the meaning of the rule. Plaintiff has corresponded with plaintiff's counsel, but such correspondence is protected by the attorney-client privilege. Plaintiff has submitted a sworn statement Proof of Loss dated March 13, 2009. The defendant Andrew Flanagan signed the green card Return Receipt for the sworn statement on March 17, 2009. Plaintiff's counsel has a copy. Mr. Fowler gave an Examination Under Oath at defendants' request February 4, 2009. Defendants have a copy of the transcript, as does plaintiff's counsel.

(b) Ms. Bronda Yarborough
225 Knollcrest Drive
Seneca, SC 29678

Two written sets of notes in the possession of plaintiff's counsel.

- (c) Mr. David Wright
Friendship Fire Department
Seneca, SC 29678

No statement per se, but Friendship Fire Department Truck Report dated January 17, 2009, in possession of plaintiff's counsel.

- (d) Donald Douglas Ross, Sr., CFI,
FireFuzz Enterprises
8 Seaton Court
Greenville, SC 29615

Mr. Ross submitted a report dated March 30, 2009, and a report May 29, 2009. These are in the possession of plaintiff's counsel.

- (e) Mr. Jerry Moore
Insurance Claim Consultants, Inc.
359 Bayview Drive
Mt. Pleasant, SC 29464

No statement, but Mr. Moore has prepared an initial inventory of the contents of plaintiff's house destroyed by the fire, supplemented by plaintiff.

- (f) Mr. Andrew Flanagan
Property Claims Representative
Nationwide Insurance Company
PO Box 1051
Mauldin, SC 29662

No statement, but various letters.

- (g) Mr. William Gilden
Investigator, Claims Department
Nationwide Insurance Company
PO Box 415
Richburg, SC 29729

No statement.

- (h) Mr. Jerry G. Byers
Technical Investigations & Services
215 Donington Drive
Greenville, SC 29615

No statement.

- (i) Mr. Daniel Evatt
CitiFinancial Mortgage
906 Tiger Blvd., Ste. 5
Clemson, SC 29631

No statement, but Mr. Evatt was required to submit a sworn proof of loss, since CitiFinancial was a second mortgage holder.

- (j) Mr. Stanley G. Nix
Nationwide Insurance Company
102 North Earle Street
Walhalla, SC 29691

No statement.

(k) Plaintiff reserves the right to supplement this list of witnesses as discovery progresses.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party that relate to the claim or defense in the case.

ANSWER:

(a) Letter from Andrew Flanagan to plaintiff dated January 17, 2009 with attachment.

(b) Homeowner Customer Notice from Stanley G. Nix dated January 22, 2009.

(c) Homeowner Policy Declarations issued January 22, 2009.

(d) Letter from Andrew Flanagan to plaintiff dated January 23, 2009, acknowledging receipt of claim.

(e) Letter from William Gilden to plaintiff dated January 28, 2009, requiring Examination Under Oath.

(f) Letter from Andrew Flanagan to plaintiff dated February 11, 2009, denying claim.

(g) Letter from Andrew Flanagan to CitiFinancial Mortgage dated February 18, 2009.

(h) Letter from Andrew Flanagan to CitiFinancial Mortgage dated February 19, 2009.

(i) Sworn Statement In Proof of Loss, sent in blank to CitiFinancial.

(j) Fax cover sheet from CitiFinancial to plaintiff dated February 19, 2009.

(k) Fax cover sheet from CitiFinancial to plaintiff dated February 19, 2009.

(l) Nationwide Insurance/Andrew Flanagan claim worksheet prepared by Andrew Flanagan with a list of contents and suggested prices and value for each item of contents.

(m) Friendship Fire Department Truck Report dated January 17, 2009.

(n) Letter from Nationwide Insurance Company to First Citizens Mortgage Services dated February 20, 2009, with payoff statement, letter of February 13, 2009, Sworn Proof of Loss, and related materials.

(o) Examination Under Oath dated February 4, 2009. A copy was sent by defendants to plaintiff's counsel and the defendants presumably have retained a copy.

(p) Notes by Bronda Yarborough, undated.

(q) Notes by Bronda Yarborough, undated.

(r) Fire Investigation and Evaluation Report by Donald Douglas Ross, Sr., CFI, FireFuzz Enterprises, dated March 30, 2009, with photos.

(s) Second report by Donald Douglas Ross, Sr., CFI, FireFuzz Enterprises, dated May 29, 2009, with photos.

(t) Contract between plaintiff's counsel and Donald Douglas Ross, Sr., CFI, FireFuzz Enterprises dated February 24, 2009.

(u) Proposed contract between plaintiff and Mr. Ross dated February 24, 2009.

(v) State of South Carolina, Law Enforcement Division, License issued to FireFuzz Enterprises, Donald Douglas Ross, Sr.

(w) Professional Fact Sheet for Donald Douglas Ross, Sr., CFI.

(x) Clipping from *The Daily Journal*, Tuesday, January 20, 2009.

(y) Nationwide Mutual Fire Insurance Company, policy number 61 39 HO 787845, together with Homeowner Policy Declarations, and certificate.

(z) Series of letters and emails between plaintiff's counsel and Donald Douglas Ross, Sr., CFI, dated March 20, 2009, March 25, 2009, March 26, 2009, March 30, 2009, March 30, 2009, April 9, 2009, April 9, 2009, April 24, 2009, and May 9, 2009.

(aa) Series of photographs taken by plaintiff.

Plaintiff reserves the right to supplement this list of documents as discovery proceeds.

3. Set forth a statement of all damages claimed to have been sustained by the party.

ANSWER:

Plaintiff has not received full or proper payment under Nationwide Policy Number 61 39 HO 787845, including but not necessarily limited to the personal property or contents of the home in the basic amount of \$109,910, with extended replacement coverage costs up to \$114,692; loss of use or additional expense in the amount of \$147,407 with additions up to \$154,125; biological deterioration/damage cleanup in the basic amount of \$5,000 with additions up to \$7,706; landscaping in a basic amount with additions up to \$7,706.

Plaintiff has been unable to repair or return to his residence; has been forced to live in an out building on the property without proper heat, running water, toilet or laundry facilities; and has suffered inconvenience and discomfort thereby.

Plaintiff has lost the use of his personal property and the enjoyment of his real and personal property, including the landscaping.

Plaintiff's reputation has been attacked by the defendant's statements addressed to the holder of the second mortgage on plaintiff's house, stating to this third party that the defendants would pay a certain portion of plaintiff's second mortgage because they were required to do so by state law, but the finance company would be required to submit a full proof of loss in order to get paid, not the plaintiff as the insured,

because under the circumstances of the loss the insured was no longer involved, implying and imputing that plaintiff had intentionally set the fire.

Plaintiff has been required to hire a lawyer and incur costs for the prosecution of this lawsuit in order to collect the amounts due under the policy.

Plaintiff reserves the right to supplement this statement of damages as discovery progresses.

4. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial of the case.

ANSWER:

- (a) Donald Douglas Ross, Sr., CFI
FireFuzz Enterprises
8 Seaton Court
Greenville, SC 29615
- (b) Mr. Jerry Moore
Insurance Claim Consultants, Inc.
359 Bayview Drive
Mt. Pleasant, SC 29464

5. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER:

(a) Mr. James D. Fowler, plaintiff, knows that he had a policy of insurance with Nationwide; that the policy was in full force and effect on the day of the fire; that his home was destroyed by fire, together with the contents; that he cooperated fully with the defendants in their investigation; that the defendants denied his claim, even though Mr. Flanagan said there was no negative findings in the defendants' fire analysis; that Mr. Flanagan told plaintiff to go ahead to file a lawsuit; that Mr. Flanagan made defamatory statements to plaintiff's second mortgage holder; that the plaintiff has suffered from the loss of use of his property and has been greatly inconvenienced by the defendants' refusal to pay.

(b) Ms. Bronda Yarborough observed some of the defendants' investigation of the fire.

(c) Mr. David Wright was the Chief of the Friendship Fire Department and made a report that the fire was unintentional.

(d) Mr. Donald Douglas Ross, Sr. has investigated the fire and concluded that the fire was unintentional.

(e) Mr. Jerry Moore has investigated and made a report of the value of the loss of the contents of plaintiff's home.

(f) Mr. Andrew Flanagan has received plaintiff's claim; made investigations which found no negative results; denied plaintiff's claim; and communicated derogatory statements to a third party.

(g) Mr. William Gilden has participated in the defendant's investigation of plaintiff's claim.

(h) Mr. Jerry Byers investigated the fire at the request of the defendants.

(i) Mr. Evatt has received communications from Mr. Flanagan and been required to complete a Sworn Proof of Loss in order for his company to be paid.

(j) Mr. Stanley Nix has provided a copy of Mr. Fowler's policy of insurance issued by Nationwide.

6. Please state each and every act or omission on behalf of Nationwide that plaintiff contends amounts to bad faith. With respect to each such act or omission, please state the date on which it occurred, the person(s) who committed such act or omission and the witness on behalf of plaintiff who will testify regarding such act or omission.

ANSWER:

Nationwide, in the person of Mr. Flanagan, decided to and did deny and has continued to deny the plaintiff's claim without a proper basis. There is no evidence that the plaintiff had a motive to light the fire which destroyed his house. There is no evidence of an incendiary origin of the fire, which the defendants well knew, particularly after the investigation by Mr. Byers. Mr. Flanagan admitted to the plaintiff that Mr. Byers' report showed no evidence of an incendiary origin, but Mr. Flanagan said he "felt" nonetheless that plaintiff started the fire.

The defendants, in the person of Mr. Flanagan, proceeded to require the plaintiff to undergo an Examination Under Oath and to submit a Sworn Proof of Loss, even though Mr. Flanagan had already stated a decision to deny the claim.

Mr. Byers' report, a copy of which has been requested from Mr. Flanagan, but which request has been refused, fails to show a motive on the part on the part of the plaintiff or an incendiary origin of the fire. Nevertheless, the defendants have persisted in the denial of plaintiff's claim.

The report of the Friendship Fire Department indicates that the fire was unintentional, but the defendants have persisted in their denial of plaintiff's claim.

The plaintiff will testify about the statements by Mr. Flanagan that he intended to deny the claim, very shortly after the weekend of the fire. On February 11, Mr. Gilden told plaintiff that all the tests showed negative, but Mr. Flanagan and the company persisted in their denial of plaintiff's claim. Mr. Flanagan called and said he was not going to pay for the contents of the house but Nationwide would pay the mortgages as required by state law. He said he "felt" like the fire was intentional, even though all the tests were negative. He failed to even mention the other coverages under the policy.

Plaintiff called Mr. Flanagan on February 12 and asked why the claim was denied since all the tests were negative, and plaintiff had lost everything he had worked for. Mr. Flanagan replied that it was "fine, . . . do whatever (you) need to do, but we are not paying any more except the mortgages, that is the law".

On February 16, plaintiff asked Mr. Flanagan for a copy of the test results. Mr. Flanagan replied that day that he would have to talk to his supervisor but that the insurance company paid for the test. The next day Mr. Flanagan called back and said he would not give plaintiff a copy of the test results. Mr. Flanagan has refused all further requests for a copy of the report.

Mr. Flanagan, Mr. Gilden, and Mr. Byers are expected to confirm the plaintiff's testimony regarding the above stated test results and their statements to plaintiff.

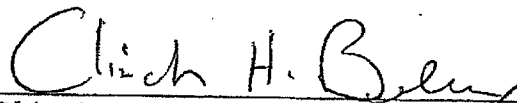
7. With respect to any such allegedly defamatory statement made by the defendants please state the following:

- a. the date of the statement;
- b. the time of the statement;
- c. the manner of the statement (i.e., in person, by telephone, etc.);
- d. the person to who the statement was made;
- e. any other persons to whom the statement was published;
- f. how the plaintiff found out about the statement;
- g. any damages sustained as a result of the statement being made; and
- h. the exact words of any defendant allegedly making such statement or as close thereto as possible of any statement made by any of the defendants.

ANSWER:

On February 18, 2009, the defendant Flanagan contacted Mr. Daniel Evatt, Clemson manager for CitiFinancial, regarding the requirement of Mr. Flanagan that Mr. Evatt complete a Sworn Proof of Loss. Mr. Flanagan said to Mr. Evatt that the insured is no longer involved in this claim because of the circumstances of the claim, that Nationwide was paying the mortgages because it is required to do so by state law, but the finance company was required to submit a full Proof of Loss in order to get paid, not the insured. The statement was made by telephone. Plaintiff found out about the statements of Mr. Flanagan in discussing the matter with Mr. Evatt. Plaintiff has suffered at least nominal damages and, by law, the defendants' statements, which imply or impute that the plaintiff burned his own house are slander per se and actionable per se.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Post Office Box 96
Columbia, South Carolina 29202
(803) 929-0096
Attorneys for Plaintiff

Columbia, South Carolina

September 11, 2009.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**DEFENDANTS' MOTION *IN LIMINE* TO
EXCLUDE THE CAUSE AND ORIGIN
OPINION TESTIMONY OF DAVID
WRIGHT**

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

Defendants Nationwide Mut. Fire Ins. Co. and Andrew Flanagan move, *in limine*, pursuant to Rules 701 and 702 of the South Carolina Rules of Evidence, to exclude testimony of David Wright, Fire Chief of the Friendship Volunteer Fire Department, to the extent that he is asked to offer his opinion regarding the cause and origin of the fire. Mr. Wright is not qualified to offer this opinion testimony.

This motion is based on the grounds that Mr. Wright, by his own admission, is not an expert in fire investigation, has no formal education or training in fire investigation, and has taken no classes through the National Association of Fire Investigators or through the National Fire Protection Association. Therefore, Mr. Wright's opinions regarding the cause and origin of the subject fire are inadmissible pursuant to Rule 701 and 702 of the South Carolina Rules of Evidence.

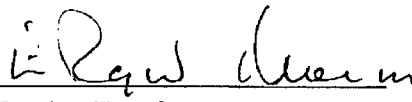
This motion is supported by the South Carolina Rules of Civil Procedure, applicable case law and Defendant's Memorandum in Support of Their Motion *in Limine* filed herewith.

WHEREFORE, based on the fact that Mr. Wright is not qualified to render opinions regarding fire cause and origin, Defendants Nationwide Mut. Fire Ins. Co. and Andrew Flanagan respectfully move the Court limit Mr. Wright's testimony and prohibit him from rendering such opinions.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to read "E. Raymond Moore, III", is written over a horizontal line.

J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendants

Columbia, South Carolina

November 18, 2011

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

James D. Fowler,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2009-CP-37-768

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR MOTION *IN*
LIMINE TO EXCLUDE THE CAUSE AND
ORIGIN OPINION TESTIMONY OF
DAVID WRIGHT**

Defendants Nationwide Mut. Fire Ins. Co. and Andrew Flanagan submit this Memorandum in Support of their Motion *in Limine* to exclude testimony of David Wright, Fire Chief of the Friendship Volunteer Fire Department, regarding his opinion regarding the cause and origin of the fire.

This motion is based the grounds that Mr. Wright, by his own admission, is not an expert in fire investigation, has no formal education or training in fire investigation, and has taken no classes through the National Association of Fire Investigators or through the National Fire Protection Association. Therefore, Mr. Wright's opinions regarding the cause and origin of the subject fire are inadmissible pursuant to Rule 701 and 702 of the South Carolina Rules of Evidence.

FACTS

This action arose out of a residential home fire that occurred at the Plaintiff's residence on January 17, 2009. Nationwide hired Jerry Byers, a fire cause and origin expert, to investigate the fire. (Dep. of Flanagan Exhibit A, pp. 33, 59; Dep. of Byers Exhibit B, p. 21). Byers issued a report of his investigation which indicated that the fire was incendiary and had two separate points of origin. (Byers Report Exhibit C, p. 6; Dep. of Byers Exhibit B, pp. 26, 28, 40). His report also ruled out other possible causes. (Dep. of Flanagan Exhibit A, p. 132; Byers Report Exhibit C, p. 6). The investigation found that there were "pour patterns" in two different areas inside the residence near a window in the living room and across the kitchen

floor. (Dep. of Flanagan Exhibit A, p. 132; Byers Report Exhibit C, pp. 4, 6; Dep. of Byers Exhibit B, p. 40). Byers reported that an ignitable liquid was introduced into these areas and had been ignited by an open flame. (Byers Report Exhibit C, pp. 3-4). Byers also took samples from the residence for testing; however, the samples came back negative for ignitable liquids. (Dep. of Flanagan Exhibit A, pp. 59, 131; Dep. of Byers Exhibit B, p. 36). Byers noted that labs typically note in their reports that just because a sample does not come back positive does not mean that the substance was not there at one time. (Dep. of Byers Exhibit B, pp. 41, 43-44). Byers also noted that in analyzing samples, several factors are at play: how long the fire burns, the amount of accelerant placed, and the amount of water placed. (Dep. of Byers Exhibit B, p. 42).

Plaintiff hired Doug Ross to investigate the fire. (Dep. of Ross Exhibit D, pp. 13-14). Ross concluded that a buildup of radiant heat from the heater ignited the adjacent sheetrock. (Dep. of Ross Exhibit D, pp. 23-24). Ross based his opinion in part on the belief that Fowler had refueled the heater at ten o'clock the night before the fire. (Dep. of Ross Exhibit D, p. 45). However, Ross admitted that if the heater had been filled at six o'clock the night before the fire, when Fowler testified he filled it, then the heater would not have been on by the next morning and the heater could not have caused the fire. (Dep. of Ross Exhibit D, p. 46).

The Town of Friendship volunteer fire department responded to the fire. David Wright, the volunteer fire chief, responded to the scene and participated in supervisory firefighting duties. After the fire, Wright completed the Friendship Fire Department Truck Report for the fire (attached as Exhibit E). The handwritten report reflects Wright's opinion that the fire was likely caused by a kerosene heater located in the living room.

Mr. Wright testified that he had no formal training for fire investigation (Wright Dep. Exhibit F, page 12, lines 3-6). He has not taken any classes through the National Association

of Fire Investigators (Wright Dep. Exhibit F, page 12, lines 10-16) or the National Fire Protection Association.

Wright has never been an arson investigator (Wright Dep. Exhibit F, page 39, lines 20-23). Mr. Wright does not have any forensic fire investigation background (Wright Dep. Exhibit F, page 51, lines 7-9). Further, according to Wright, no one at the Friendship Fire Department has any fire investigation training (Wright Dep. Exhibit F, page 39, lines 8-12). In fact, Wright acknowledged that he would turn the investigation of any suspicious fire over to the State Law Enforcement Division (Wright Dep. Exhibit F, page 39, lines 20- page 40, lines 1-3). He does not hold himself out as an expert in fire investigation (Wright Dep. Exhibit F, page 12, lines 17-19). In fact, when asked whether he held himself out as an expert in the fire investigations, Mr. Wright responded, "No way." (Id.).

With regard to the subject fire, although he believed that the fire was likely started by a kerosene heater in the living room he did not conduct an investigation to determine the fire's cause and origin. Mr. Wright indicated that the cause of the fire was "undetermined" because he did not know what started the fire. (Wright Dep. Exhibit F, page 50, lines 11-14). Mr. Wright did not do an investigation to determine whether the fire was set intentionally or unintentionally. (Wright Dep. Exhibit F, page 51, lines 12-15). No one from the Friendship Fire Department or any other fire department did a further investigation to determine whether the fire was set intentionally. (Wright Dep. Exhibit F, page 51, lines 16-23). Mr. Wright did not take any photographs, measurements, or collect any evidence from the fire scene. (Wright Dep. Exhibit F, page 54, lines 15- page 55, line 3).

ARGUMENT

The Court should exclude Wright's opinion testimony regarding the cause and origin of the fire because he is not qualified to render such an opinion. The decision to admit expert testimony is governed by Rule 702, SCRE, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial court has discretion to evaluate the qualifications of a proffered expert witness.

Watson v. Ford Motor Co., ___ S.C. ___, ___ S.E.2d ___ (2010). A person may be qualified as an expert in a particular area based on knowledge, skill, experience training or education. The test for qualification is a relative one dependent on the witness's reference to the subject. Id. (citing Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004)).

In evaluating the admissibility of opinion testimony, the trial court must make three key preliminary findings, which are fundamental to Rule 702, before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the nature of her testimony was based on personal observations and discussions with the child victim). Secondly, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable. *See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements). The Court should exclude proposed expert testimony that does not satisfy all three requirements.

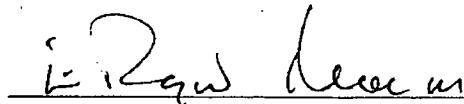
Here, there is no question that the determination of the cause and origin of a fire is beyond the ordinary knowledge of a layperson. Further, by his own admission, Mr. Wright is not an "expert" in making such determinations. He has no training or experience in cause and origin investigation; thus, the Court need not even reach the third element of the Watson test. But, the testimony of Mr. Wright is inherently unreliable based on his lack of expertise.

CONCLUSION

Therefore, based on the above, Mr. Wright is not qualified to render opinions regarding fire cause and origin, Defendants Nationwide Mut. Fire Ins. Co. and Andrew Flanagan request the Court limit Mr. Wright's testimony and prohibit him rendering such opinions.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to read "J.R. Murphy", is written over a horizontal line.

J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendants

Columbia, South Carolina
November 18, 2011

STATE OF SOUTH CAROLINA ,)
COUNTY OF OCONEE) IN THE COURT OF COMMON PLEAS
CASE NO. 09-CP-37-768

James D. Fowler,

Plaintiff,

-vs-

Nationwide Insurance Company
and Andrew Flanagan,

Defendants.)

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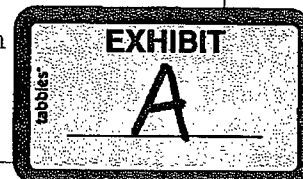
DEPOSITION TRANSCRIPT OF:
Andrew T. Flanagan

Deposition of Andrew T. Flanagan, taken before Tina F. Behles, Nationally Certified Court Reporter and Notary Public in and for the State of South Carolina, commencing at the hour of 9:58 a.m. on Friday, July 23, 2010 at the law offices of Murphy and Grantland, P.A., 4406-B Forest Drive, Columbia, South Carolina.

Reported by:
Tina F. Behles, CVR

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1 Q. --- the 19th?

2 A. Yes, sir.

3 Q. And what instructions did you give Mr. Byers?

4 A. To perform a cause and origin investigation at the

5 loss site.

6 Q. And did he go to the -- he, he went to the site and

7 spent two days there; is that correct?

8 A. Yes, sir.

9 Q. And during that time, he took samples?

10 A. He did.

11 Q. And he made a report which essentially said that he

12 -- in his opinion, based upon what he thought, it

13 was an incendiary fire?

14 A. Yes, sir.

15 Q. He did get the test results back on his samples?

16 A. Yes, sir.

17 Q. And those were negative?

18 A. Yes, sir.

19 Q. And he did not change his report?

20 A. No, sir.

21 Q. Okay. Now, you also made arrangements to pay the

22 mortgage holders; is that correct?

23 A. I did.

24 Q. You required them to sign a proof -- Proofs of Loss

25 ---

1 Byers to investigate the fire to see whether there
2 was any proof that it was an incendiary fire; is
3 that correct?

4 A. That's not entirely correct.

5 Q. Please, what is correct?

6 A. We hired Jerry Byers to determine the cause and
7 origin of this fire.

8 Q. Okay. Now, you know from your past experience with
9 Mr. Byers that these chemical tests are very
10 important; is that correct?

11 A. That they're very important? I -- no opinion one
12 way or the other on that.

13 Q. Do you know what this cost you to get?

14 A. It was \$600, I believe.

15 Q. Right. So it was worth \$600 to get these chemical
16 tests taken; is that correct?

17 A. Yes, sir.

18 Q. These test results were negative?

19 A. There was no ignitable liquids detected.

20 Q. Right. But when you got that, that didn't change
21 your view about whether it was incendiary or not?

22 A. No, sir.

23 Q. Okay. You were -- but you refused to give this to
24 Mr. Fowler; is that correct?

25 A. Correct.

- 1 Q. Tell me about this discussion of smell of
2 accelerants. What did y'all say about that? I
3 mean, what did he say and what did you hear?
- 4 A. He initially discussed that he saw a distinct pour
5 pattern in two separate spots in the house, but he
6 couldn't smell any accelerants, which wouldn't be
7 unusual in this case, as it had been cold and rainy
8 for the three days between the time of the fire and
9 the time that he had got there.
- 10 Q. But he expected to find something with the samples?
- 11 A. He was unsure of what would happen with the
12 samples.
- 13 Q. But the -- was it \$100 a sample that he did six for
14 \$600?
- 15 A. That's correct.
- 16 Q. Okay. But he, he would've thought he might have
17 heard -- he might have smelled, but he didn't. So
18 he got the samples and it turned out that the
19 samples were negative, too; is that correct?
- 20 A. Yes.
- 21 Q. On the second page, it says you informed the
22 policyholder, Mr. Fowler, that he needed to leave
23 the building as is until there's a coverage
24 decision and agreed pricing.
- 25 A. Yes, sir.

1 A. This is a portion of the Nationwide claim's log.

2 Q. And with reference to the entry on the first page
3 of this exhibit which is marked NW0195, is it true
4 that Mr. Byers was told not to go do any testing of
5 the heater or the electrical cords?

6 A. The log says he was instructed not to test any
7 further.

8 Q. All right. Well, the, the -- Mr. Byers took the
9 heater and the electrical cords, is that correct,
10 from the house?

11 A. Yes.

12 Q. But he was -- according to this log, which was made
13 by you, is that correct, he was instructed not to
14 test it any further?

15 A. Correct.

16 Q. Okay. It also says Mr. Byers took samples and sent
17 them for testing; is that correct?

18 A. Yes, sir.

19 Q. And we already know that. Now, did Mr. Byers tell
20 you orally that he could not smell any accelerants
21 on site, but this was not always an accurate
22 indicator?

23 A. Yes.

24 Q. He told you that orally?

25 A. Yes.

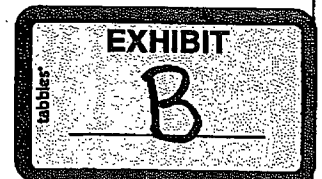
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	C O P Y
James D. Fowler,	)	
	)	C.A. Number 2009-CP-37-768
Plaintiff,	)	
	)	
vs.	)	
	)	
Nationwide Mutual Fire	)	
Insurance Company and	)	
Andrew Flannagan,	)	
	)	
Defendants.	)	

DEPOSITION OF JERRY G. BYERS

PURSUANT to Notice and/or Agreement, the deposition of JERRY G. BYERS was taken commencing at the hour of 9:55 A.M., on Thursday, August 19, 2010, at the offices of Covington, Patrick, Stern & Lewis, P.A., 211 Pettigru Street, Greenville, South Carolina.

ELAINE C. HAMBY, REPORTER

ELAINE C. HAMBY
Deposition & Court Reporter
103 Hamby Drive
Piedmont, South Carolina 29673
(864) 295-4697



1 Association. I don't have the time nor the energy to
2 travel and the expense of going to these meetings all
3 over the place anymore.

4 Q. Who asked you to get involved with the fire at Mr.
5 James Fowler's house in 2009?

6 A. I received a call from adjuster Andy Flannagan with the
7 Nationwide Insurance Company. He called on January the
8 19th, 2009, and he requested that I go to Mr. Fowler's
9 residence located in Oconee County outside of Seneca
10 and conduct a cause and origin investigation of the
11 fire.

12 Q. Before I ask you anymore questions, if I ask, are you
13 looking at a copy of your report?

14 A. Yeah.

15 Q. And that's the one that you did produce in response to
16 the subpoena we sent you.

17 A. Right.

18 Q. Let me look at it briefly just to see if it's the same.

19 BY MR. MURPHY:

20 We brought some spares if you want to mark that or
21 whatever.

22 BY THE WITNESS:

23 That is a copy of my file, and right there's a copy of
24 all the photographs.

25 BY MR. BELSER:

1 A. Yes.

2 Q. What other ways?

3 A. Well, if something was placed on it, a towel, something
4 fell on it, a curtain, anything like that, yes, that
5 could happen.

6 Q. Those are other examples of the way that the heater
7 itself would not be damaged, but it would cause
8 something else to ignite.

9 A. That's correct.

10 Q. Now if you look at your log notes from January the
11 23rd, this is on page four of four of your log, there
12 are three or four entries for January 23rd. Did you
13 give a telephone call to Mr. Flannagan, give him a
14 verbal report as to what your conclusions were on
15 January the 23rd?

16 A. Yes.

17 Q. And that's the same Mr. Flannagan you mentioned before.

18 A. I had talked to Mr. Flannagan just about daily during
19 this investigation.

20 Q. Well, at that time it says you gave, it was a cellular
21 call to adjuster Andy Flannagan, verbal report to
22 adjuster Andy Flannagan, and at that time you told him
23 your conclusion that the fire was a set fire or
24 incendiary fire.

25 A. Most likely I did, yes.

1 Q. Now did you tell him also that, in your opinion, it was
2 a set fire?

3 A. Yes.

4 Q. And at that time did you accuse Mr. Fowler of being the
5 one who set the fire?

6 A. I've never accused Mr. Fowler of setting the fire.
7 That's not what I'm hired to do.

8 Q. Now the next entry on that page four of four of your
9 log says in the last entry that you dictated the first
10 report on January the 24th of 2009; is that correct?

11 A. That is correct.

12 Q. What does this mean, first report? Is there a second
13 report?

14 A. No, it means that my, this was a first report, and
15 after I finished at that point and did that report,
16 Nationwide instructed me to close my file, and that's
17 what I did.

18 Q. So this is dictation of the report.

19 A. The report, right, but, see at the time I did it, I
20 did, you know, did this report, I didn't know whether
21 it was gonna be final 'cause see sometimes they'll call
22 me and ask me to go back and do other things, but in
23 this particular case they didn't.

24 Q. When you dictate a report, you include a written
25 report, which follows this.

1 more pages, the next one, go to the next one, you see
2 there at the bottom, it says, "Note."

3 Q. Well, you understand their, we'll come to that in a
4 second, on their report it says, "No ignitable liquid
5 detected;" is that correct?

6 A. That is correct.

7 Q. And you would believe that they're independent and that
8 they're qualified and if they said none was detected
9 that none was detected.

10 A. That's correct.

11 Q. On page six of your report, under the section that's
12 called, "Summary of Origin and Cause," you dictated on
13 January the 24th of 2009 that the fire was incendiary.

14 A. That's correct.

15 Q. And you also dictated there were two separate unrelated
16 fires set on each area of the structure.

17 A. That's correct.

18 Q. That's what you dictated on January 24th of 2009.

19 A. Yes, sir.

20 Q. And then the last part of that paragraph says, "an
21 ignitable liquid was introduced into these areas and
22 ignited by an open flame."

23 A. That's correct.

24 Q. That's what you dictated on January 24th of 2009; is
25 that correct?

1 some places and rug on other places when you cleaned
2 the debris off the top; is that correct?

3 A. That's correct.

4 Q. So the--are you the one that cleaned the debris?

5 A. I shoveled out this area, yes.

6 Q. In your report, you say you took samples.

7 A. That's correct.

8 Q. And you took samples here in this location, which is
9 showing picture number 50.

10 A. Yes.

11 Q. And is that the same location that is shown in pictures
12 51 and 52 or is there another one?

13 A. I'd have to look, you know. I've got, somewhere in
14 here I've got photographs of where the samples were
15 taken. I take pictures of the cans in there, their
16 location, but this is, you know, the first area of
17 origin that I discovered in this fire.

18 Q. So you took samples in this place you think.

19 A. Yes.

20 Q. You actually took six samples, samples in six places.

21 A. Throughout the house, yes.

22 Q. And we'll come back to that in a minute, but if you
23 will look on page three of your report again, the last
24 paragraph, which is paragraph number 11 by my account,
25 that's the last paragraph, it refers to the heater in

1 A. That's correct.

2 Q. Now the lab reports came in according to the documents
3 on February the 4th of 2009; is that correct?

4 A. That is correct.

5 Q. And all reports were negative.

6 A. That's correct.

7 Q. They were not mentioned in the report, the lab results.

8 A. I hadn't received it when I dictated this report.

9 Q. And you don't think it was appropriate to mention in
10 your report the negative results of the lab tests.

11 A. The only thing the lab, when the lab analysis, the
12 final analysis of the lab findings comes back, it just
13 tells me, one, if there was something there or not,
14 which doesn't, as the lab report denotes, and it's in
15 every lab report. I don't care if you go to the FBI
16 lab, if you go to the ATF lab, if you go to the South
17 Carolina State Law Enforcement Division lab, all of
18 them put that note at the bottom. Just because they
19 didn't identify it doesn't mean that it wasn't there at
20 one time.

21 Q. Now you used the word a moment ago, "identify," so just
22 since it wasn't identified, that doesn't mean it wasn't
23 there.

24 A. That's correct.

25 Q. Are you talking about identified as gasoline or

1 then whatever's in the attic, the last thing to come
2 down is gonna be the roof shingles, and, you know, the
3 decking comes down, and then the shingles. All that's
4 protecting what's underneath it. The burn that was
5 there when the fire started is still there, so I have
6 to systematically, like any fire investigator, start
7 from the top of the debris and work my way through it
8 down to the floor level to find it.

9 Q. Earlier I think you agreed with the proposition that
10 the areas where the rug has been burned away are areas
11 where the fire was hot enough to burn the rug away. Is
12 it a question, it's a function of heat.

13 A. That's correct.

14 Q. And the area which is burned away is not a function of
15 what it was that was hot.

16 A. I'm not following what you're asking.

17 Q. Unless you can detect something in that hot area, you
18 don't know what it was. All you know is that it was
19 hot.

20 A. Exactly, but in my experience of over 31 years,
21 probably in excess of 5,000 fires that I've been in,
22 that I have gone through and removed the debris, and
23 have gone, and have observed these similar type burn
24 patterns or identical type of patterns on this floor,
25 and taken samples, some I've had positive

1 identification, some have been negative, but as I
2 previously stated, that does not preclude that there
3 wasn't something placed there, and due to the duration
4 of the burn, the amount of water put on, and all, that,
5 you know, the lab doesn't identify. Just because the
6 lab doesn't identify it doesn't mean that something
7 wasn't placed there.

8 Q. Let me ask you, what you're really saying is that
9 there's an absence of proof if the lab--

10 A. No, it's not in the proof. I mean, my experience, you
11 have to understand, in my experience as a fire
12 investigator, and the thousands of fires that I've been
13 in, I see a pattern. If I take, I'll give you an
14 example, if I take a can of cigarette lighter fluid or
15 charcoal lighter fluid, and I put a spot right here on
16 this table and set it on fire, it's gonna leave a
17 distinct pattern on this table. It doesn't matter
18 whether I do it with a spot the size of a quarter or
19 pour it from one end of the house to the other, it's
20 gonna leave a distinct pattern. Take a sample of it,
21 I may or may not identify with it because that's gonna
22 be, number one, how long it burns, number two, how much
23 water dilutes it, there's a number of factors, but that
24 burn pattern is still there.

25 Q. Let me ask you this. The reason why there's the

1 identified as kerosene or identified as lighter fluid
2 or identified as something else; is that what you mean
3 by identified?

4 A. Right.

5 Q. This report says it wasn't even detected.

6 A. That's not unusual in fires. There's a number of
7 factors that affect the debris cycles that are taken
8 from fires. One is, how long it burns, the amount of
9 accelerant placed there, number two, the amount of
10 water put into a fire. All these factors play into it.
11 You know, the water dilutes it, you know, and because
12 we don't find it doesn't mean it wasn't there. The
13 burn patterns, these type burn patterns that I observed
14 in this house are abnormal burns. If this room catches
15 on fire, the burn in here is gonna indicate where the
16 fire started. It's gonna indicate the progress of the
17 fire. That's why we systematically, fire investigators
18 like myself, systematically go through the debris, and
19 we go starting from the top down. What's the first
20 thing in most houses that goes to the floor, what's
21 directly above, Sheetrock. Sheetrock is a fire
22 retardant, and when it falls during a fire, it goes
23 down and protects the floor. If there's any burning
24 there or abnormal burning before, when the Sheetrock
25 comes down, then the insulation, then the wood, and

South Carolina Office: 215 Donington Dr., Greenville, SC 29615; (864) 268-9639; Fax: (864) 268-9639
Virginia Office: P.O. Box 999, Goochland, VA 23063; (804) 556-6524; Fax: (804) 556-6499

February 5, 2009

Privileged and Confidential Report for:

Andy Flanagan
Nationwide Insurance Company
P. O. Box 1051
Mauldin, SC 29662

Copies: Bill Gilden
Nationwide Insurance Company
P. O. Box 415
Richburg, SC 29224

Insured: James Fowler

Date of Loss: January 17, 2009

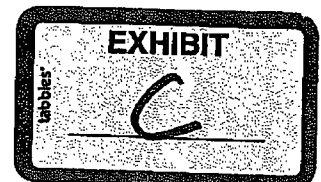
Loss Location: 328 Frank Gillard Road
Seneca, South Carolina

Policy Number: Unknown

Claim Number: 6139HO787845

TIS File Number: 2-09009-B

This report furnished to addressee -- release to any other company, concern or individual is the sole responsibility of addressee.



There were no adverse conditions affecting the scene examination. The scene had not been altered. There were no conditions that affected my final determination of origin and cause.

The roof over the center of the risk was all but totally consumed. Forced entry was not required since the insured was home and discovered the fire. He had been living in the gazebo on the right rear of the risk for approximately five months. There was no power to the risk. There was power to the gazebo.

The insured discovered the fire and called the fire department. When they arrived in the scene fire was already coming through the roof.

The contents were not normal for the type of occupancy.

The major fire damage occurred in the living room, kitchen, and hallway of the risk. There was also extensive damage to the area above these rooms.

An exterior examination revealed the fire vented out through the left rear window and sliding glass doors of the living room. They are located on the rear of the risk. These sliding glass doors were still in tact when the fire was discovered by the insured.

The scene examination commenced in the area of the sliding glass doors to the living room. Debris was removed from the floor in the living room and worked back towards the dining room and kitchen. Through this process the remains of two drop-cords that came from the gazebo, through the left rear windows of the living room, and were lying on the living room floor were found. They came from the window across the floor and made a turn and went across the kitchen.

Examination of these drop-cords revealed some exposure damage.

An inspection of the television and a cabinet in the left corner of the living room revealed extensive damage. There was a burn pattern coming from the window across the floor of the living room in front of the television.

This burn was indicative of an ignitable liquid having been placed in this area. Debris samples were collected from the living room floor.

Debris was removed in the living room to where a kerosene heater was located. This heater received only flame impingement damage to the left rear corner. The tank in the heater was all but completely filled. A measurement was taken and there was only approximately 3" of fuel burned off from the top of the tank.

The heater was removed from the living room floor to the exterior. An examination of the drip pan, the burner, and controls for the heater revealed no damage. They were still in tact. There was no evidence of kerosene having leaked from the heater.

The carpet and tile the kerosene heater was sitting on was inspected. There was no odor or any evidence of kerosene leakage from the heater. A debris sample was collected from this area.

Debris was removed from the laundry room and breakfast area floors. The debris was removed from the floor in the kitchen. As I progressed from the laundry room into the kitchen there was a distinct line of demarcation of burning and scorching to the linoleum floor. There was also an orange drop-cord that came from the left end entrance door, into the breakfast and laundry room area, and ran over to the side of the refrigerator. I learned from your insured that this drop-cord supplied power to his fishpond at the front of the risk.

In going through the debris in the kitchen I discovered the remains of a pedestal for a wooden kitchen table and two chairs. The chairs were severely burned. The kitchen table was a solid oak table and the top was all but totally consumed. The burn to the underside of the pedestal and chairs revealed it was coming from floor level upward.

With the debris removed from the kitchen floor over next to the living room and into the hallway and bath at the rear of the kitchen revealed an ignitable liquid pour pattern. These burn patterns are indicative of a flammable liquid having been introduced into this area. The burn patterns were separate and unrelated to the burn patterns in the living room. Two separate fires had been set in the risk.

The remaining drop-cords were examined. There was a large drop-cord sitting to the left side of the refrigerator. An examination of these drop-cords revealed the plug and power cord for the refrigerator were still in tact and unburned. One drop-cord ran out the door to the fishpond. A second drop-cord came across the floor in the kitchen and up on top of the kitchen counter. There was a coffee pot plugged into this drop-cord and a lamp.

In searching through the debris in the hallway I found the remains of the disappearing stairs. The rear portion of these stairs still had some plywood retained on it on the side next to the bathroom door. This stairwell had to have been in the down position when the occurred, due to the burn patterns observed both on the moldings and stairwell. These burn patterns are indicative of the angle the stairwell would have been down during the early stages of the fire.

The drop-cords were inspected and they were collected as evidence. I also collected the kerosene heater from the scene.

He was last in the risk the evening before the fire. He had gone over, got the kerosene heater, took it outside, and filled it with kerosene. He brought it back into the structure and placed it in the living room. He relit the heater at this time. Later in the evening he came back in the risk and used the bathroom. This was approximately 10:00 p.m.

He was awakened by one of his birds. He looked out he observed smoke coming from the gable ends of the roof. He came out of the gazebo over to the sliding glass doors at the rear of the living room and looked in. He could see no fire, since the windows were smoked. He came around to the front door, opened it, and stepped into the dining room and did not observe any fire. The entire area, including the kitchen, dining room, and living room were filled with smoke. He backed out of the structure and got a neighbor to report the fire department of the fire. He took no further action.

Mr. Fowler related in December he had closed his restaurant in Seneca, South Carolina. The business was bad and he could not afford to keep it open.

SUMMARY OF ORIGIN AND CAUSE

The fire is incendiary. There were two separate, unrelated fires set on the interior of the structure. The first point of origin was around the left rear window of the living room. The second point of origin was a semi-circle across the kitchen floor over towards and into parts of the breakfast and laundry room area and eventually ended in the hallway beneath the disappearing stairs. An ignitable liquid was introduced into these areas and ignited by an open flame.

All other causes were examined, evaluated, and completely eliminated.

COMMENTS

This report is being submitted for your review. If you have any questions, comments, or additional instructions, please contact me.

Jerry Byers, CFI
Greenville, South Carolina
Email Address: bversltis@charter.net
864-268-9639
864-630-5863 (cell)

cc: File

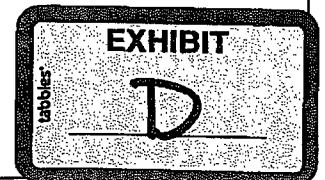
STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF OCONEE) **C O P Y**
)
 James D. Fowler,) C.A. Number 2009-CP-37-768
)
 Plaintiff,)
)
 vs.)
)
 Nationwide Mutual Fire)
 Insurance Company and)
 Andrew Flannagan,)
)
 Defendants.)

DEPOSITION OF DOUG ROSS

PURSUANT to Notice and/or Agreement, the deposition of DOUG ROSS was taken commencing at the hour of 12:00 P.M., on Thursday, August 19, 2010, at the offices of Covington, Patrick, Stern & Lewis, P.A., 211 Pettigru Street, Greenville, South Carolina.

ELAINE C. HAMBY, REPORTER

ELAINE C. HAMBY
 Deposition & Court Reporter
 103 Hamby Drive
 Piedmont, South Carolina 29673
 (864) 295-4697



1 Q. Now when you, do you recall when you were contacted in
2 connection with Mr. Fowler's case?

3 A. Yes, sir, the date was January 24th of 2009. Robert
4 Payne called. He was like an independent adjuster or
5 a public adjuster that was on the scene of Mr. Fowler's
6 fire, and he had hired some off-duty firefighters to
7 help him go into the scene, and inventory the goods,
8 and Mr. Payne asked one of the firefighters that was
9 helping him if he knew of a, of an expert witness in
10 fire investigations, and one of the Greenville
11 firefighters that I have trained over the years
12 suggested me, and that's how I got involved.

13 Q. Did Mr. Payne retain you or did you make those
14 arrangements with someone else?

15 A. I responded to the scene, talked with Mr. Payne. Mr.
16 Payne referred me to Mr. Fowler saying that he had an
17 attorney. That afternoon I contacted Mr. Belser,
18 Clinch Belser, and explained that why I was there, and
19 that I was, you know, while I was there I could offer
20 my assessment as to the fire and verbally we struck a
21 deal on the phone, and, of course, later, over the next
22 day, I sent him a contract. It was signed and
23 returned.

24 Q. Now did Mr. Payne need your assistance just to, what
25 did you initially go out there for?

1 A. He was looking for an investigator for Mr. Fowler
2 essentially is the way I understood the story.

3 Q. Were you told anything at that time about the status of
4 his claim or any other investigation that had been
5 performed by Nationwide?

6 A. No, sir.

7 Q. When you talked with Mr. Fowler, well, I'm going to
8 walk through each person. Did Mr. Payne indicate to
9 you anything about what he believed to be the cause or
10 origin of the fire?

11 A. No.

12 Q. Did Mr. Fowler?

13 A. In my discussions with Mr. Fowler, he said that
14 basically he discovered it. There was no reason for
15 there to be a fire in his opinion. Obviously, he said
16 he didn't set the fire, so based upon the brief
17 discussion I had with Mr. Fowler, I began my own
18 assessment, and then went back later and talked to him
19 and asked him more specific questions.

20 Q. When you talked with Mr. Belser in arranging your
21 retention as an expert, did he give you any indication
22 about the fire or about possible causes or any other
23 factual information?

24 A. No, sir.

25 Q. Now this is the first time you had ever worked with

1 A. No, sir.

2 Q. And did you review any documents that you had not
3 previously reviewed?

4 A. From the day of the fire, I have reviewed Mr. Fowler's
5 examination under oath that was taken some while back,
6 and, of course, through discovery, the information that
7 was sent to Mr. Belser was forwarded to me.

8 Q. Were you asked to give any specific opinion in this
9 case?

10 A. I was asked to make a determination of the cause of the
11 fire and where it originated.

12 Q. Were you aware that Nationwide had already taken a
13 position on what they believed to have been the cause
14 and origin of the fire?

15 A. Mr. Fowler told me that Mr. Byers told him that he said
16 it was a set fire.

17 Q. And did you understand that if, in fact, it was a set
18 fire that Mr. Fowler would not receive any monies from
19 Nationwide?

20 A. Of course, that's, that's the structure of insurance.

21 Q. Well, what opinions did you come to as a result of your
22 investigation?

23 A. I came to the opinion that, in my opinion where the
24 fire originated was in an area behind the heater, in a
25 wall behind the heater that had a, where the heater had

1 created so much heat over a long period of time that,
2 in my opinion, the Sheetrock fell, crumbled, and the
3 wood studs and so forth that comprised the makeup of
4 the wall eventually ignited and spread up into the
5 attic. Once in the attic, it had a free run. If you
6 look on the photographs, every, all of the studs and
7 trusses have high damage on them, and Mr. Fowler tells
8 me that he had quite a bit of stuff stored in the
9 attic, and, of course, I viewed a lot of that that was
10 in the scene, and here, again, my opinion when the roof
11 collapsed and the attic fell in, there were a lot of
12 materials and construction materials, and cans of stuff
13 that he had collected over the years that fell into the
14 scene, so I still believe that the origin and cause,
15 excuse me, the point of origin of that fire is in a
16 wall behind the kerosene heater, not within the heater.

17 Q. And what was it and where was it on that wall that
18 first ignited?

19 A. The, well, my opinion, the heat dried out the moisture
20 content in the gypsum and over a period of time with
21 that heat, and, of course, understanding from Mr.
22 Fowler that it stayed on high all the time to keep the
23 pipes from freezing, my opinion is that it degraded the
24 Sheetrock to the point to where all the moisture
25 content was drawn out and the Sheetrock fell, crumbled

1 of fuel in it.

2 Q. Did you look in the tank?

3 A. Yes, sir.

4 Q. Did you put your finger down in there or put a ruler or
5 a pencil or anything in there to see?

6 A. No, sir.

7 Q. Do you doubt what he told you about how much fuel was
8 in there?

9 A. No, sir.

10 Q. Well, if it had that much fuel in it, it wasn't running
11 all night, was it?

12 A. When I talked to Mr. Fowler onsite, one of the
13 questions I asked him was when the last time he
14 refueled his heater.

15 Q. What did he tell you?

16 A. 10 o'clock P.M.

17 Q. 10 o'clock P.M.?

18 A. Yes, sir.

19 Q. It still could have been out of fuel by the time the
20 fire suppression got on it at 8:00 A.M. just about,
21 wouldn't it?

22 A. Could have been out of fuel, but the heat had generated
23 into the, to the wooden structure, wooden members. You
24 know, it's kind of like a space shuttle. Once you have
25 that ignition, that initial ignition booster, you don't

1 need it anymore, but it still goes up. It still has
2 lots of fire to it.

3 Q. If that heater wasn't on all night it kind of blows
4 your analysis, doesn't it?

5 A. No, sir.

6 Q. It doesn't?

7 A. No.

8 Q. If it wasn't on fire and the Sheetrock was intact at
9 6:00 P.M. on Friday night, and the heater is not on,
10 then something else had to start that fire other than
11 radiant heat from a heater that wasn't on.

12 A. The heater was on from the information I'm saying.

13 Q. That's not my question. I'm asking you hypothetically.
14 You're an expert witness. I want to get your analysis
15 if the facts you were told turn out not to be true,
16 okay, I think I'm entitled to ask it this way. At 6:00
17 P.M. the night before the fire if the Sheetrock isn't
18 falling off the wall and the heater is not on all night
19 then radiant heat from that heater did not cause that
20 fire at 7:00 A.M. or 7:30 A.M. the next morning, did
21 it?

22 A. Probably not.

23 Q. There would have to be some other ignition source
24 because your ignition source would not have been in
25 existence.

FRIENDSHIP FIRE DEPARTMENT TRUCK REPORTMonth 1 Day 17 Year 09 Day of Week Sat Call# 11Time Of Dispatch 803 Time Of Arrival 811 Controlled _____ Back In Service 1203Driver Of Truck: 12A(AS) E12(DW) T12() ST12(WL) 12B() LT12() FFD ID # IS
Rider In Truck: () () () () () POV() 37205Mutual Aid ID# 52 14 Seneca 37313 Crossroads 37203 Corinth 37202 Oakway 37209 Clemson 39302Given or Received remember GPM size _____Type Of Fire: _____ Person In Charge DW Back Up Call # 14House ☒
Mobile Home ☐
Grass ☐
Woods ☐
Vehicle ☐
Other ☐Other Type Calls:Car Wreck ☐
Alarm Malfunction ☐
Bomb Scare ☐
Smoke Scare ☐Smoke Detectors:Present ☐
Battery ☐
Electric ☐
Not Present ☐RemarksAddress Of The Call 328 Frank Gaillard RdOwners Name Jimmy Fowler Address Same

Occupants Name _____ Address _____

Owners Phone # _____ Occupants Phone # Cell 498 9636

Vehicle Tag # _____ Make _____ Year _____ Ser # _____

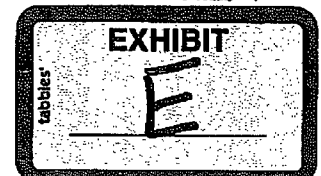
Mobile Home: Year _____ Make _____ ID # _____ Ser # _____

Members Responding To Call

☒ David Wright	☐ Tracy Long	☐ Chad Durham	☐ Matthew Newton
☒ Walter Lee	☐ Bry Durham	☐ Brian Phillips	☒ Austin O'Kelley
☒ Favion Skelton	☐ Moe Merritt	☒ Michael Rice	☒ Nate Cover 3 sta.
☒ William Merritt II	☒ Robert Sparks	☒ Glenn Mitchell	☒ Jonathon Elliott
☐ Duane Lowe	☐ Danny Newton	☒ Jarred Sparks	☐
☒ Rudolph Swaney	☐ Keith Park	☐ Jessica Sanders	☐

Member Making Report: DW

Over For All Calls ➡



Information of Call

*Incident Type: Page 8 111 House Fire

*Action Taken: Page 14 Primary Action Taken (1) 11
Additional Action Taken (2) _____ Additional Action Taken (3) _____

Estimated Dollar Losses & Values: Losses Property: _____
Contents: _____ Pre-Incident Value: Property: _____ Contents: _____

Casualties: Page 16 _____ | Hazardous Materials Releases: Page 17 _____
Detector: Page 17 Unknown | Mixed Property: Page 18 _____

*Property Use: Page 18 419 | Property Details: Page 26 Est. Number of Residential Units
1 Number of Buildings Involved _____ Acres Burned _____

On-Site Materials: Page 27 (1) _____ (2) _____ (3) _____
Storage Use: Page 27 (1) _____ (2) _____ (3) _____

Ignition: Area of Origin Page 30 14 Living Room Heat Source Page 31 Undetermined
Item First Ignited Page 32 Undetermined Type of Material First Ignited Page 33 Undetermined

Cause of Ignition: Page 34 Unintentional | Factors Contributing To Ignition: Page 35 Undetermined
Human Factors: Page 36 NA | Equipment Involved In Ignition: Page 36 Heater

Equipment Power Source: Page 40 33 Kerosene | Equipment Portability: Page 40 Portable
Fire Suppression Factors: Page 41 None

Mobile Property Info is on Front of Page _____ | Mobile Property Type: Page 43 _____
Structure Type: Page 46 _____ | Building Status: Page 46 _____

Building Height _____ Main Floor Size _____
Fire Origin: Fire Spread: Page 47 _____

*Narrative: When we arrived fire was already coming thru the roof.
After going thru the front door we found out the the ceiling had
already fell in. We had to put the fire out from the outside in:
DW

After the fire was out it seemed that it started around the
kerosene heater.

*Need On All Calls

FRIENDSHIP FIRE DEPARTMENT TRUCK REPORT

Month 1 Day 17 Year 09 Day of Week Sat Call# 11

Time Of Dispatch 803 Time Of Arrival 811 Controlled _____ Back In Service 1255

Driver Of Truck: 12A() E12() T12() ST12() 12B() LT12() FFD ID # IS
Rider In Truck: () () () () () POV() 37205

Mutual Aid ID# 52 Seneca 37313 14 Crossroads 37203 Corinth 37202 Oakway 37209 Clemson 39302
Given on Received remember GPM size _____ Back Up Call # _____

Type Of Fire:

House ☒
Mobile Home ☐
Grass ☐
Woods ☐
Vehicle ☐
Other ☐

Person In Charge

Other Type Calls:

Car Wreck ☐
Alarm Malfunction ☐
Bomb Scare ☐
Smoke Scare ☐

Smoke Detectors:

Present ☐
Battery ☐
Electric ☐
Not Present ☐

Remarks

Address Of The Call 328 Frank Gaillard Rd

Owners Name James D Fowler Address 328 Frank Gaillard Rd

Occupants Name James D Fowler Address Same

Owners Phone # Cell 498-9636 Occupants Phone # _____

Vehicle Tag # _____ Make _____ Year _____ Ser # _____

Mobile Home: Year _____ Make _____ ID # _____ Ser # _____

Members Responding To Call

☐ David Wright	☐ Tracy Long	☐ Chad Durham	☐ Matthew Newton
☐ Walter Lee	☐ Bry Durham	☐ Brian Phillips	☐ Austin O'Kelley
☐ Favion Skelton	☐ Moe Merritt	☐ Michael Rice	☐
☐ William Merritt II	☐ Robert Sparks	☐ Glenn Mitchell	☐
☐ Duane Lowe	☐ Danny Newton	☐ Jarred Sparks	☐
☐ Rudolph Swaney	☐ Keith Park	☐ Jessica Sanders	☐

Member Making Report: [Signature]

Over For All Calls ➔

Information of Call

*Incident Type: Page 8 111 House Fire

*Action Taken: Page 14 Primary Action Taken (1) 11 Extinguish
Additional Action Taken (2) _____ Additional Action Taken (3) 86

Estimated Dollar Losses & Values: Losses Property: _____
Contents: _____ Pre-Incident Value: Property: _____ Contents: _____

Casualties: Page 16 _____ | Hazardous Materials Releases: Page 17 _____

Detector: Page 17 Unknown | Mixed Property: Page 18 _____

*Property Use: Page 18 419 single family dwelling | Property Details: Page 26 Est. Number of Residential Units
/ Number of Buildings Involved _____ Acres Burned _____

On-Site Materials: Page 27 (1) _____ (2) _____ (3) _____

Storage Use: Page 27 (1) _____ (2) _____ (3) _____

Ignition: Area of Origin Page 30 Living Room Heat Source Page 31 Undetermined
Item First Ignited Page 32 Undetermined Type of Material First Ignited Page 33 Undetermined

Cause of Ignition: Page 34 Unintentional | Factors Contributing To Ignition: Page 35 Undetermined
Human Factors: Page 36 NA | Equipment Involved In Ignition: Page 36 Heater

Equipment Power Source: Page 40 33 Present | Equipment Portability: Page 40 Portable
Fire Suppression Factors: Page 41 None

Mobile Property Info is on Front of Page | Mobile Property Type: Page 43 _____
Structure Type: Page 46 _____ | Building Status: Page 46 _____

Building Height _____ Main Floor Size _____

Fire Origin: Fire Spread: Page 47 _____

*Narrative: _____

*Need On All Calls

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

C O P Y

James D. Fowler,)
)
Plaintiff,)

vs.)

C.A. No. 2009-CP-37-768

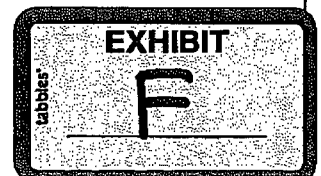
Nationwide Mutual Fire)
Insurance Company and)
Andrew Flanagan,)
)
Defendants.)

Ray
DEPOSITION OF JOHN DAVID WRIGHT

PURSUANT to Notice and/or Agreement, the deposition of John David Wright was taken commencing at the hour of 10:25 A.M. on Thursday, September 22, 2011, at Derrick, Ritter, Williams & Morris, P.A., 107 N. Fairplay Street, Seneca, South Carolina.

ELAINE C. HAMBY, COURT REPORTER

ELAINE C. HAMBY
Deposition & Court Reporter
103 Hamby Drive
Piedmont, South Carolina 29673
(864) 295-4697



1 five or six of them. Most of the other classes I've got
2 have always been around here.

3 Q. Have you had any formal education or training in terms
4 of fire investigation?

5 A. No. Nothing except for just awareness of looking when
6 you first get through.

7 Q. I'm not quite following what you mean by that.

8 A. Just things to look for if it looks suspicious, but as
9 far as coming down and pinpointing, I haven't.

10 Q. You haven't taken any classes through NAFI, do you know
11 what NAFI is, National Association of Fire
12 Investigators?

13 A. I haven't took any like that.

14 Q. Any courses through the National Fire Protection
15 Association?

16 A. No.

17 Q. Do you hold yourself out as an expert in fire
18 investigation or anything like that?

19 A. No way.

20 Q. I didn't mean to be rude about it. Do you have any
21 military service?

22 A. No, sir.

23 Q. Are you a member of any churches?

24 A. Yes.

25 Q. What is your church membership?

1 you also wrote the number 86. Can you tell me what that
2 is?

3 A. 86 means it's like an investigation, you know, the
4 overall picture.

5 Q. Who performed the investigation?

6 A. Pretty much everybody, me, you know, it's just an
7 investigation to see if you notice anything.

8 Q. Does anybody on your staff or in your fire department
9 have anymore fire investigation training besides you?

10 A. I don't believe anybody at the station has got any kind
11 of, you know, official investigation training. It's
12 just years of experience.

13 Q. Fighting fires?

14 A. Yes. None of them went to like a SLED school or
15 anything like that.

16 Q. Are any of these members involved in law enforcement?

17 A. No.

18 Q. Have you ever been involved in law enforcement?

19 A. No.

20 Q. Have you ever been an arson investigator?

21 A. No, I haven't. Like I said, from years of experience we
22 know not to move no more than what we have to, and
23 that's what we try to do.

24 Q. And the reason for that is?

25 A. If we see anything suspicious that way we can call SLED.

1 Q. And the reason for that is you don't move things so that
2 an appropriately trained investigator can come behind
3 you and do an investigation?

4 A. That's right. If we move too much, then it messes them
5 up.

6 Q. You did not - I'm sorry. Let me finish with 86. The 86
7 that you are referring to is the looking around that all
8 of your department did after the fire to see if they saw
9 anything suspicious; is that right?

10 A. Pretty much a fire department investigation type thing,
11 I guess. Not an official investigation like an arson
12 investigation or anything, no.

13 Q. With respect to the next line, you did not complete any
14 kind of estimate of the loss here; is that right?

15 A. Most of the guys at the station, we don't know nothing
16 of the value.

17 Q. And now there is a as I understand it, NFIR's has fields
18 or blanks for you to fill in estimated losses; is that
19 right?

20 A. Yes. This is exact. Everything right here, that's what
21 I'm saying, if we had a computer printout, it would be
22 everything just like this. That's where we got it from.

23 Q. Generally you don't fill in the fields on the NOIR
24 system for estimated property loss or the contents loss
25 or pre-incident value?

1 that was holding the beam up was actually burnt and gone
2 so that's where I decided it just looked like to me, and
3 that was right under that heater, and that's the reason
4 all that came to play about the heater.

5 Q. What do you mean, all that came to play about the
6 heater?

7 A. That's the reason I said it apparently started with the
8 heater because all that behind the heater was burnt and
9 gone, and that corner post was what was holding up the
10 beam.

11 Q. Now, you said, "Heat source, page 31," you wrote,
12 "undetermined." What do you mean by "undetermined?"

13 A. I didn't know for sure what started the fire. You know,
14 I didn't know what started it.

15 Q. You wrote, "Item First Ignited, Page 32." What do you
16 mean by that?

17 A. Usually that is normally like stuff in the house like
18 the paneling or the door or carpet. We didn't know what
19 started first. I didn't know what caught on fire first.

20 Q. First of all you didn't know what the heat source was
21 you have already told us, and then you also didn't know
22 what the first item ignited was; is that right?

23 A. Yes. That's based on not knowing what started the fire.
24 I mean I knew that there was a KeroSun Heater in there.

25 Q. The type of material first ignited and what did you

1 write there?

2 A. I put "undetermined." That could have been, you know,
3 I don't recall if it was Sheetrock or paneling or what.
4 I didn't know what started burning first. That's not a
5 detail right there. Most of the time we don't really
6 know because if you didn't see it start.

7 Q. You don't have a forensic fire investigation background
8 to tell you what started it?

9 A. No, I don't.

10 Q. And the cause of ignition you wrote "unintentional?"

11 A. Yes.

12 Q. Did you do an investigation to determine whether it was
13 intentional or unintentional?

14 A. No, I didn't. It's just that heater. It just looked
15 like that heater, and it just looked like accidental.

16 Q. Did anyone from Friendship Fire Department do an
17 investigation to determine whether it was intentional or
18 unintentional?

19 A. No.

20 Q. To your knowledge did anyone from any of the mutual aid
21 fire departments do an investigation to determine
22 whether it was intentional or unintentional?

23 A. No.

24 Q. The next line, "Factors Contributing to Ignition," what
25 does that mean as far as you are concerned?

1 Q. What is "Fire Suppression Factors," the next item?

2 A. That's like if you had problems getting to the fire, and
3 I guess you could say we did to a certain degree because
4 of that beam.

5 Q. Right.

6 A. But all we did was backed out and went in another door
7 so we put none because basically it didn't hinder us too
8 much.

9 Q. And it looks like none of the other blanks--

10 A. The next one is "Mobile Property," and that would be a
11 mobile home or car.

12 Q. And then "Building Height" and "Main Floor Size," you
13 didn't do any calculation?

14 A. No. We didn't measure that.

15 Q. A couple of questions. Did you take any photographs
16 after the fire of the home or the scene?

17 A. No.

18 Q. Did you take any measurements?

19 A. No.

20 Q. Did you take any samples of anything?

21 A. No. I didn't have nothing to take them in, and like I
22 said, none of us seen anything that we thought - if we
23 had seen something that we thought that we needed to do
24 that, we would have called SLED and let them do the
25 investigation. We just didn't see anything that made us

1 believe we should.

2 Q. Did you collect any evidence at all?

3 A. No.

4 Q. And other than the conversations you have talked about
5 with Mr. Fowler during the suppression efforts, did you
6 conduct any interviews of anybody?

7 A. No.

8 Q. Are you familiar with NFPA 921? Have you ever heard of
9 that?

10 A. Just a number. I don't know.

11 Q. It's a standard dealing with, it's called the Guide for
12 Fire and Explosion Investigations. Are you familiar
13 with that at all?

14 A. Not the whole thing, no.

15 Q. Would you say that you followed NFPA 921 in doing your
16 investigation?

17 A. I feel like I did as long as we didn't see anything or
18 smell anything that made us suspicious. None of us did.

19 Q. My question is, did you follow NFPA 921, are you
20 familiar with that standard at all? I'm not accusing
21 you of saying you should have. I'm just asking if you
22 did follow it.

23 A. I don't know.

24 Q. The last line, there is no narrative written on Exhibit
25 1, the document that you left with Mr. Fowler, correct?

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler, Plaintiff,
201 NOV 21 P 2:40

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**DEFENDANTS' MOTION *IN LIMINE* TO
EXCLUDE TESTIMONY OF
PLAINTIFF'S EXPERT DOUG ROSS**

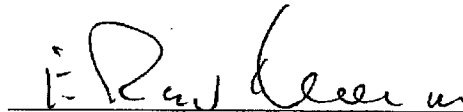
**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

Defendants Nationwide Mutual Fire Insurance Co. and Andrew Flanagan move, *in limine*, pursuant to Rules 402, 403, 701 and 702 of the South Carolina Rules of Evidence, to exclude certain opinion testimony of Doug Ross, Plaintiff's retained fire cause and origin expert, regarding (1) his opinion that the subject fire was caused by a kerosene heater located in the Plaintiff's living room; and (2) his analysis of a "sampling of written reports" from Defendants' cause and origin expert, Jerry Byers, for fires that Byers previously investigated on behalf of Defendant Nationwide, but that Ross did not himself investigate.

This Motion is based on the South Carolina Rules of Evidence, applicable case law, and the Memorandum in Support of this Motion, filed contemporaneously herewith.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
E. Raymond Moore, III, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100

Attorneys for the Defendants

Columbia, South Carolina
November 18, 2011

FILED 2009-11-20
DEPT. OF CLERK
STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

201 NOV 21 PM 2:40
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF THEIR MOTION *IN*
LIMINE TO EXCLUDE TESTIMONY OF
PLAINTIFF'S EXPERT DOUG ROSS**

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

Defendants Nationwide Mutual Fire Insurance Co. and Andrew Flanagan submit this Memorandum in Support of their motion *in limine* to exclude certain opinion testimony of Plaintiff's expert cause and origin investigator Doug Ross regarding (1) his opinion that the subject fire was caused by a kerosene heater located in the Plaintiff's living room; and (2) his analysis of a "sampling of written reports" from Defendants' cause and origin expert, Jerry Byers, for fires that Byers previously investigated on behalf of Defendant Nationwide, but that Ross did not himself investigate.

FACTS

This action arose out of a residential home fire that occurred at the Plaintiff's residence in the morning of January 17, 2009. Plaintiff hired Doug Ross to investigate the cause of the fire. Ross opines that the fire was caused by a kerosene heater that ignited the wall behind the heater with radiant heat from the heater. (Ross Dep. Exhibit A, pp. 23-25). Ross conducted a three and one-half hour investigation including an inspection of the fire scene and a visual inspection of the kerosene heater. (Ross Dep. Exhibit A, p. 16). He opines that the fire was caused because the sheetrock on the wall behind the heater crumbled and fell, exposing wooden

studs which were then ignited by radiant heat from the rear of the heater and then allowing fire to spread into the attic. (Ross Dep. Exhibit A, p.24-25, 40, 44). Ross opines that radiant heat from behind the heater ignited the wooden wall studs. However, Ross failed to test his theory of whether radiant heat from the back of a kerosene heater is capable of causing gypsum wall board to fall off of a wall, much less whether radiant heat from the rear of a kerosene heater is capable of igniting wooden wall studs. Further, Ross based his opinion in part on his mistaken belief that Fowler had refueled the heater at ten o'clock the night before the fire. (Dep. of Ross Exhibit A, p. 45). However, Ross admitted that if the heater had been filled at six o'clock the night before the fire -- which is when Fowler testified he filled it -- then the heater would have been out of fuel by the next morning and the heater could not have caused the fire. (Dep. of Ross Exhibit A, p. 46).

Ross has not produced any scientific literature, data, or test results to support his theory that radiant heat from the back of a kerosene heater can degrade gypsum and ignite wooden wall studs. However, in response to Ross's theory, Nationwide hired John Holecek, an engineer with the Warren Group, to analyze whether there was any possibility the subject heater could have caused the fire. Holecek analyzed the heater, scientifically tested Ross's theory, and determined that the heater could not have caused the fire. (Exhibit B, Holecek Summary of Conclusions and Opinions).

Ross also performed a review of other investigative reports and invoices from Nationwide's cause and origin investigator, Jerry Byers, for sixty-one fires Byers had investigated for Nationwide between 2005 and 2009. Nationwide produced invoices and reports from Mr. Byers for the sixty-one separate investigations Byers performed over this time period. Ross indicated that he examined "a large sampling of written reports" and has written

opinions regarding several of these fires (Ex. C, August 10, 2011 letter from Ross to Belser). However, there is no evidence that Ross performed his own investigation of the other fires that Byers investigated for Nationwide and therefore Ross has no personal knowledge of any of the fires to support an analysis he might have done solely on the basis of his review of Byers reports.

ARGUMENT

I. The Court should exclude Ross's opinion that the kerosene heater caused the fire because it is not based on any scientific data, literature or testing.

Ross has failed to provide any support for his theory that radiant heat from the rear of a kerosene heater is capable of degrading gypsum on a wall to the point that it falls off of the wall studs and then igniting the wall studs behind the gypsum. This theory has no support in scientific literature and Ross himself did not test it to even attempt to determine whether it had any validity whatsoever.

The decision to admit expert testimony is governed by Rule 702, SCRE, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial court serves as a "gatekeeper" and must decide whether expert testimony is admissible. Watson v. Ford Motor Co., 389 S.C.434, 699 S.E.2d 169 (2010). In evaluating the admissibility of opinion testimony, the trial court must make three key preliminary findings which are fundamental to Rule 702 *before* the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *See State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding that the witness was improperly qualified as a forensic interviewing expert where the

nature of her testimony was based on personal observations and discussions with the child victim). Secondly, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). Finally, *the trial court must evaluate the substance of the testimony and determine whether it is reliable. See State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (evaluating whether expert testimony on DNA analysis met the reliability requirements). The Court should exclude expert testimony that does not satisfy all three requirements.

Ross's testimony does not meet the "reliability threshold" established in Council and Watson. While no factor is necessarily dispositive of whether expert opinion testimony is "reliable" the court may consider whether the theory has been subjected to publication or peer review (it has not in this case); prior application of the method (or theory) to the type of evidence in the case (none known in this case); quality control procedures used to ensure reliability (none offered in this case); and the consistency of the method with recognized scientific laws and procedures (none offered in this case). Watson, supra (citing State v. Council, 335 S.C. 1, 515 S.E.2d 515 and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)). Consistent with the facts the Supreme Court noted in Watson, there is no evidence that Ross has published the theory that radiant heat from the rear of a kerosene heater can degrade sheetrock or ignite walls, nor is there any testing to support such a theory. In fact, the only testing done, by Nationwide's retained engineer, unequivocally refutes the possibility of radiant heat can degrade or ignite gypsum or wooden studs. Simply put, there is no

scientific basis that the radiant heat temperatures that could be encountered on the back side of a kerosene heater can degrade gypsum such that it falls off a wall and allow the ignition of wooden studs behind it. The Court should not allow the ipse dixit testimony of a proffered expert without some scientific basis for the opinion *Cf. General Elec. Co. v. Joiner*, 522 U.S. 136 (2000) stating: “But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert”). Here, Ross has nothing but his own un-reviewed and unsupported opinion, in the face of engineering and testing analysis that says otherwise. Thus, this opinion should be excluded.

II. The Court should exclude Ross’s analysis of Byers’ sixty-one other fire cause and origin reports provided by Nationwide.

The Court should not permit Ross to testify regarding his analysis of other reports for which he did not conduct his own investigation because those reports are irrelevant and the trial of this matter would devolve into as many as sixty-one “mini trials.” In Ross’s summary review of Byers’ reports, Ross criticizes Byers for such issues as “no corroboration,” “mere speculation” “report only three paragraphs in length,” “no mention of lab samples” and “seems speculative to me.” (Exhibit C, Ross letter at pp. 5-13). Yet there is no evidence that Ross himself investigated any of the fires as Byers did before generating the reports. Without actually investigating these fires, Ross’ testimony about Byers’ reports are inherently unreliable and cannot meet the third council factor.

Not only are these opinions not properly supported under Rule 701 and 702 of the South Carolina Rules of Evidence, but the opinions are irrelevant and should be excluded under Rules 402 and 403. The admission of Ross’s opinions regarding as many as sixty-one other fire investigations carries a significant danger of unfair prejudice, confusion of the issues and

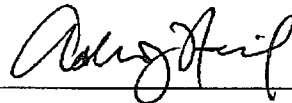
misleading of the jury, much less significant and undue delay and a waste of time. Thus, Ross's opinions regarding his review of Byers' other reports should not be admitted.

CONCLUSION

For the foregoing reasons, nationwide and Flanagan request an order from the Court, *in limine*, barring admission of Plaintiff's expert Ross's opinions (1) that the fire was caused by radiant heat from the rear of the kerosene heater in the Plaintiff's living room; and (2) regarding his review of 61 fire cause and origin reports issued by Nationwide's cause and origin investigator, Jerry Byers.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



for

J.R. Murphy, Esquire
E. Raymond Moore, III, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendants

Columbia, South Carolina
November 18, 2011

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF OCONEE) **C O P Y**
)
 James D. Fowler,) C.A. Number 2009-CP-37-768
)
 Plaintiff,)
)
 vs.)
)
 Nationwide Mutual Fire)
 Insurance Company and)
 Andrew Flannagan,)
)
 Defendants.)

DEPOSITION OF DOUG ROSS

PURSUANT to Notice and/or Agreement, the deposition of DOUG ROSS was taken commencing at the hour of 12:00 P.M., on Thursday, August 19, 2010, at the offices of Covington, Patrick, Stern & Lewis, P.A., 211 Pettigru Street, Greenville, South Carolina.

ELAINE C. HAMBY, REPORTER

ELAINE C. HAMBY
Deposition & Court Reporter
103 Hamby Drive
Piedmont, South Carolina 29673
(864) 295-4697



1 began my assessment and tried to determine the exact
2 point of origin, which hopefully would reveal to me the
3 cause and origin of the fire.

4 Q. How long did that process take for you on that day?

5 A. I was probably there three and a half hours.

6 Q. Do you have anyone assisting you in the process?

7 A. No, sir.

8 Q. Did you do everything that you wanted to do?

9 A. I did.

10 Q. Is there anything you wanted to do that you were not
11 allowed to do or prevented from doing?

12 A. No, sir.

13 Q. Were there, did you ever conduct any further
14 investigation after that one day in terms of onsite,
15 which I'm going to say it was between a walk-around and
16 photograph, I would call that a visual inspection, did
17 you do anything further?

18 A. On the interior, I did actually move some debris. I
19 had a shovel and had my rake and a broom, and I went in
20 and tried to reconstruct the wall best I can or the
21 baseboard of a wall, and so there was actually some
22 drastic physical labor, yes, I went inside and--

23 Q. But that was all done on that first day, the three and
24 a half hours.

25 A. That's correct.

1 A. No, sir. ,

2 Q. And did you review any documents that you had not
3 previously reviewed?

4 A. From the day of the fire, I have reviewed Mr. Fowler's
5 examination under oath that was taken some while back,
6 and, of course, through discovery, the information that
7 was sent to Mr. Belser was forwarded to me.

8 Q. Were you asked to give any specific opinion in this
9 case?

10 A. I was asked to make a determination of the cause of the
11 fire and where it originated.

12 Q. Were you aware that Nationwide had already taken a
13 position on what they believed to have been the cause
14 and origin of the fire?

15 A. --- Mr. Fowler told me that Mr. Byers told him that he said
16 it was a set fire.

17 Q. And did you understand that if, in fact, it was a set
18 fire that Mr. Fowler would not receive any monies from
19 Nationwide?

20 A. Of course, that's, that's the structure of insurance.

21 Q. Well, what opinions did you come to as a result of your
22 investigation?

23 A. I came to the opinion that, in my opinion where the
24 fire originated was in an area behind the heater, in a
25 wall behind the heater that had a, where the heater had

1 created so much heat over a long period of time that,
2 in my opinion, the Sheetrock fell, crumbled, and the
3 wood studs and so forth that comprised the makeup of
4 the wall eventually ignited and spread up into the
5 attic. Once in the attic, it had a free run. If you
6 look on the photographs, every, all of the studs and
7 trusses have high damage on them, and Mr. Fowler tells
8 me that he had quite a bit of stuff stored in the
9 attic, and, of course, I viewed a lot of that that was
10 in the scene, and here, again, my opinion when the roof
11 collapsed and the attic fell in, there were a lot of
12 materials and construction materials, and cans of stuff
13 that he had collected over the years that fell into the
14 scene, so I still believe that the origin and cause,
15 excuse me, the point of origin of that fire is in a
16 wall behind the kerosene heater, not within the heater.

17 Q. And what was it and where was it on that wall that
18 first ignited?

19 A. The, well, my opinion, the heat dried out the moisture
20 content in the gypsum and over a period of time with
21 that heat, and, of course, understanding from Mr.
22 Fowler that it stayed on high all the time to keep the
23 pipes from freezing, my opinion is that it degraded the
24 Sheetrock to the point to where all the moisture
25 content was drawn out and the Sheetrock fell, crumbled

1 and exposed the wooden members of the wall, and the
2 heater ignited the wooden members of the wall.

3 Q. By heat alone.

4 A. By radiant heat.

5 Q. What's the threshold temperature for radiant heat to
6 ignite the members that you say became ignited?

7 A. There's lab conditions where they do tests, maybe an
8 inch for 45 minutes depending upon type of wood it is,
9 but they really, it's not conclusive due to ambient
10 conditions, humidities and things like that.

11 Q. Well, certainly all that could be determined and a
12 ballpark figure could be come up with between the
13 amount of heat being emitted from this kerosene heater
14 and the amount of heat necessary to spontaneously
15 combust a wooden stud after it caused the Sheetrock to
16 fall off the wall.

17 A. Well, the kerosene heater, the best I could find out,
18 generated 33,000 BTUs an hour, and I would think that
19 would be sufficient heat to, first of all, for all
20 sides of the wooden members, and then, of course, later
21 ignite those members.

22 Q. How long would that take?

23 A. The process, in my opinion, took a long time before the
24 heater actually drew all the moisture content out of
25 the Sheetrock. You know, we're talking, it could be

1 was the point of ignition and the cause of ignition for
2 this fire to start.

3 A. That's the only heat source that I identified. I
4 can't, I can't negate whether or not, well, you know,
5 yeah, I can negate it wasn't an electrical fire because
6 he didn't have power, so that's the only heat source,
7 therefore, I base that heat source as the originating
8 reason for the fire.

9 Q. In other words, this fire was ignited by heat and not
10 by open flame.

11 A. Radiated heat, which converted to open flame once the
12 wooden members paralyzed.

13 Q. What is the temperature at which they would ignite?

14 A. I've, in tests we've done, I've seen where for an
15 extended period of time, well like five, ten minutes,
16 200-plus degrees depending upon the type of wood now,
17 depending upon the age of the wood and how dry it was.
18 I've seen that happen in the past.

19 Q. And you think this heater could give off sufficient
20 heat to do that.

21 A. Over a long period of time the heat degraded the
22 Sheetrock, and over a longer period of time, the heat
23 paralyzed the wooden members to the point to where
24 an ignition resulted from it.

25 Q. And, of course, we're talking about a night with a

1 A. The radiated heat from the heater.

2 Q. I understand the radiated heat from the heater.

3 A. Okay.

4 Q. I'm talking about some other malfunction, the leakage
5 of fuel, some other product-related cause; you don't
6 see any evidence of that, do you?

7 A. No, sir.

8 Q. I mean, you agree with that.

9 A. I agree.

10 Q. How long would that heater go with a full tank of fuel?

11 A. Thirteen hours.

12 Q. And that's according to the manufacturer's instructions
13 stuff you had.

14 A. Yes, sir.

15 Q. So if it had been filled up prior to 6:00 P.M. the
16 preceding night it would have shut off no later than
17 7:00 A.M. the next morning.

18 A. If that's when it was filled.

19 Q. Well, I'm just saying, I just gave you that as, you can
20 answer it hypothetically based on that.

21 A. Hypothetically, it's gonna, yeah, it's gonna, it's
22 gonna produce heat 'til it runs out of fuel.

23 Q. How much fuel was in it when you went to look at it?

24 A. I didn't measure it. Jerry told me that he felt like
25 when he measured it, there were like a couple of inches

1 of fuel in it.

2 Q. Did you look in the tank?

3 A. Yes, sir.

4 Q. Did you put your finger down in there or put a ruler or
5 a pencil or anything in there to see?

6 A. No, sir.

7 Q. Do you doubt what he told you about how much fuel was
8 in there?

9 A. No, sir.

10 Q. Well, if it had that much fuel in it, it wasn't running
11 all night, was it?

12 A. When I talked to Mr. Fowler onsite, one of the
13 questions I asked him was when the last time he
14 refueled his heater.

15 Q. What did he tell you?

16 A. 10 o'clock P.M.

17 Q. 10 o'clock P.M.?

18 A. Yes, sir.

19 Q. It still could have been out of fuel by the time the
20 fire suppression got on it at 8:00 A.M. just about,
21 wouldn't it?

22 A. Could have been out of fuel, but the heat had generated
23 into the, to the wooden structure, wooden members. You
24 know, it's kind of like a space shuttle. Once you have
25 that ignition, that initial ignition booster, you don't

1 need it anymore, but it still goes up. It still has
2 lots of fire to it.

3 Q. If that heater wasn't on all night it kind of blows
4 your analysis, doesn't it?

5 A. No, sir.

6 Q. It doesn't?

7 A. No.

8 Q. If it wasn't on fire and the Sheetrock was intact at
9 6:00 P.M. on Friday night, and the heater is not on,
10 then something else had to start that fire other than
11 radiant heat from a heater that wasn't on.

12 A. The heater was on from the information I'm saying.

13 Q. That's not my question. I'm asking you hypothetically.
14 You're an expert witness. I want to get your analysis
15 if the facts you were told turn out not to be true,
16 okay, I think I'm entitled to ask it this way. At 6:00
17 P.M. the night before the fire if the Sheetrock isn't
18 falling off the wall and the heater is not on all night
19 then radiant heat from that heater did not cause that
20 fire at 7:00 A.M. or 7:30 A.M. the next morning, did
21 it?

22 A. Probably not.

23 Q. There would have to be some other ignition source
24 because your ignition source would not have been in
25 existence.

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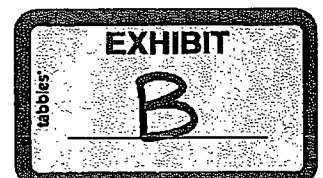
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SUMMARY OF OPINIONS

As a result of the investigation, a number of observations have been made and conclusions reached. The observations and conclusions stated herein are based on information available as of this writing. It is conceivable that additional information may be forthcoming that bears on these conclusions and opinions. The author reserves the right, therefore, to review all conclusions and opinions at any point in time, should, in fact additional information become available.

The provided bases for the opinions are primary, however are not necessarily all inclusive. Additional supportive bases to the facts and opinions may be contained in the documents and testimony provided and in the author's education, training and experience.

1. To a reasonable degree of engineering certainty, the subject HAMI HKS-25 heater did not cause the fire that burned Mr. James Fowler's home on January 17, 2009.
 - a. There are a limited number of possibilities for the heater to have ignited combustible surroundings. These possibilities have been considered and are evaluated as follows:
 - i. Heat emanating (radiating) from rear of heater ignites wall or wall finish / vinyl wall coverings. This causation theory was advanced by Mr. Ross in his reports of March 30, 2009 and May 28, 2009.
 1. Heater would have emitted insufficient radiant energy from the rear of the heater to ignite the wall.
 - a. Wall temperatures behind heater likely approximately 20°F above room temperature (generally less than 100°F) based on lab testing of very similar heater. (See attached information on exemplar heater and temperature tests)
 - b. Measured auto-ignition temperature of gypsum wall board ranges from 341-565°C (597-1049°F) according to Babrauskas in his book *Ignition Handbook*. (See attached excerpt)
 - c. Measured auto-ignition temperature of gypsum wall board with wall paper is 412°C (774°F) according to Quintiere in his book *Principles of Fire Behavior*. (See attached excerpt)
 2. The subject heater was UL listed and UL testing requires that the heater not ignite adjacent combustible materials. UL testing limits temperature of adjacent walls and floors to 90F above ambient temperature during testing (e.g. 165°F in a 75°F room). This temperature is well below the ignition temperatures of wall materials. (See attached excerpts from UL standard #647 *Unvented Kerosene-Fired Room Heaters and Portable Heaters*.)
 3. The heater had been in place for some time and there was no damage to the wall noted by Mr. Fowler. (Fowler EUO p110 lines 21-23)



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ii. Radiant heat causes failure of gypsum board which falls and wood studs in wall ignite. This causation theory was raised by Mr. Ross in his deposition. (Ross p23, line 23- p25, line 4)

1. Heater would have emitted insufficient radiant energy from the rear of the heater to cause failure of gypsum board or ignition of wood.
 - a. Wall temperatures behind heater estimated approx 20°F above room temperature (generally less than 100°F) based on lab testing of very similar heater. (See attached information on exemplar heater and temperature tests) .
 - b. Required temperature to cause gypsum board to fall from wall is 800°C (1472°F) according to Icove and DeHaan in the textbook *Forensic Fire Scene Reconstruction*.
 - c. Measured temperature to cause auto-ignition of wood (southern yellow pine) ranges from 320-367°C (608-693°F) according to Babrauskas in his reference book *Ignition Handbook*.
2. Subject heater was UL listed and UL testing requires that the heater not ignite adjacent combustible materials. UL testing limits temperature of adjacent walls and floors to 90F above ambient temperature during testing (e.g. 165°F in a 75°F room). This temperature is well below the ignition temperatures of pine wood or the temperature to cause failure in gypsum wall board. (See attached excerpts from UL standard #647 *Unvented Kerosene-Fired Room Heaters and Portable Heaters*.)
3. The heater had been in place for several weeks and there was no damage to the wall noted by Mr. Fowler. (Fowler EUO p110 lines 21-23)

iii. Radiant heat ignites sofa that was in front of the heater.

1. Heater would have emitted insufficient radiant energy to ignite the sofa.
 - a. Temperatures 24 inches in front of heater less than 130°F based on lab testing of very similar heater. (See attached information on exemplar heater and temperature tests).
 - b. Measured auto-ignition temperature of various fabrics range from 230 to greater than 500°C (446-932°F) according to Babrauskas in his book *Ignition Handbook*.
2. The sofa is not badly burned. A sofa is a large fuel load and heat released in its burning would have created pronounced damage within the room if the sofa was the first fuel ignited.

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3. Subject heater was UL listed and UL testing requires that the heater not ignite adjacent combustible materials. UL testing includes a test wherein cheesecloth fabric attached to a black wood wall is placed directly in front of heater as close as possible. The material cannot ignite or produce glowing particles. The test is run for a period of time equal to a full tank of fuel or seven hours. (See attached excerpts from UL standard #647 *Unvented Kerosene-Fired Room Heaters and Portable Heaters*.)
- iv. Radiant heat ignites dry towel under heater.
1. Heater would have emitted insufficient radiant energy to ignite the towel.
 - a. Temperatures in front of heater less than 150°F based on lab testing of very similar heater. (See attached information on exemplar heater and temperature tests).
 - b. Measured auto-ignition temperature of white cotton terry cloth towel is 302°C (576°F) according to Babrauskas in his book *Ignition Handbook*. Cotton / polyester towel auto-ignition temperature would be higher.
 2. Subject heater was UL listed and UL testing requires that the heater not ignite adjacent combustible materials. UL testing limits temperature of floors under and around heater to 90F above ambient temperature during testing (e.g. 165°F in a 75°F room). This temperature is well below the ignition temperatures of terry cloth toweling. (See attached excerpts from UL standard #647 *Unvented Kerosene-Fired Room Heaters and Portable Heaters*.)
 3. Examination of the heater and pan that is at the bottom of the heater shows no substantial burned or sooted areas that are consistent with the towel under the heater being the first fuel ignited.
- v. Flammable fumes from kerosene soaked towel rise and are ignited by heater burner which results in the towel igniting.
1. Mr. Fowler indicates that the towel was "*pretty much free*" of kerosene, "*maybe a drop or two where it would drip, but other than that it was free.*" (Fowler EUO p 87, lines 12-19)
 2. Mr. Fowler indicated he never spilt kerosene in the house or on the towel. (Fowler EUO p86 line 24- p87, line 19)
 3. Examination of the subject heater which indicates that it does not leak kerosene that would soak the towel.

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4. Examination of the subject heater that indicates that there is no sooting or burned paint around the drip pan edges which should be present if a fuel soaked towel was the first fuel ignited. Lab burn test of similar pan placed on kerosene soaked towel on top of carpet indicates that sooting and burned paint should be present if the towel had been the first fuel consumed.
5. Lab test of carpet sample from around heater showed no kerosene residue.

vi. Flare up of spilt fuel

1. Mr. Fowler indicated he never spilt kerosene in the house or on the towel. (Fowler EUO p 86 line 24- p 87, line 19).
2. Examination of the subject heater that indicates that there is no sooting or burned paint around the drip pan edges which should be present if a fuel soaked towel was the first fuel ignited. Lab burn test of similar pan placed on kerosene soaked towel on top of carpet indicates that sooting and burned paint should be present if the towel had been the first fuel consumed.
3. Examination of the subject heater that indicates that there is no sooting or burned paint inside the heater that should be present if enough excessive fuel inside the heater burned to allow flames to escape from the heater housing and ignite nearby combustibles.
4. Lab test of carpet sample from around heater showed no kerosene residue.
5. If fuel had been spilt during refueling on the evening before the fire, it should have ignited early in the heaters use rather than the following morning.

vii. Flare up due to wrong type of fuel (use of gasoline).

1. This problem would have manifested itself earlier in the heater's operation. Fowler indicates that the heater had been in continuous operation for days and that he had refilled the tank *"right before dark"*. (Fowler EUO p 85 line 13-18). In January, sunset is approximately 5:30-6:00pm and the fire occurred the following morning approximately 7:30-7:45am, a span of time of about 13-14 hours.
2. Fowler indicated that he did not use gasoline to fuel the heater. (Fowler deposition p82, lines 4-10)
3. Examination of the subject heater indicates that there is no sooting or burned paint inside the heater. These should be present if a wrong fuel such as gasoline was used with the heater and had caused a flare up

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sufficient to allow flames to escape from the heater housing and ignite nearby combustibles.

viii. Flare up due to heater malfunction

1. A leak in the removable barometric fuel tank could cause the fuel in the tank to overflow the lower fuel reservoir and potentially ignite. The barometric fuel tank was checked for a leak in the tank and none was found.
2. Fuel spill and flare up due to expansion of cold fuel due to its warming after a refueling has been hypothesized as a failure mode for kerosene heaters. However, the UL 647 standard requires that a heater be designed to allow for this expansion of fuel without overflowing or flaring up.
3. Examination of the subject heater that indicates that there is no sooting or burned paint inside the heater or melted internal wiring some or all of which should be present if a malfunction occurred inside the heater sufficient to allow flames to escape from the heater housing and ignite nearby combustibles.
4. Wick appears in normal location which is indicative that there was no gross abnormality in the heater wick.
5. Subject heater was UL listed and the UL standard includes a number of tests that test a heaters tendency to "flare up". The subject heater would not have been UL listed if it had failed these tests. (See attached excerpts from UL standard #647 *Unvented Kerosene-Fired Room Heaters and Portable Heaters*).
6. Mr. Fowler indicated that he had never had problems with the heater. (Fowler EUO p 108 lines 16-18).

ix. Material falls on heater and ignites.

1. Examination of the subject heater indicates that there is no substantial sooting or burned paint on top of the heater which should be present if a substantial combustible item fell on top of the heater. As required by UL listing, the back and sides of heater would have been insufficiently hot to have ignited touching combustible materials. Burned areas on the sides of the heater are from fall down burning debris or radiant heat from other locations.
2. Mr. Fowler indicated that, with the possible exception of a picture frame, there were no combustible materials attached to the wall above the heater that could have fallen on the heater. (Fowler EUO p 107 lines 19-25 and p110 line24 to p 111 line 11).

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3. Generally, combustible items would not fall onto the heater absent some action by an occupant like a child or pet. The home was unoccupied at the time of the fire.

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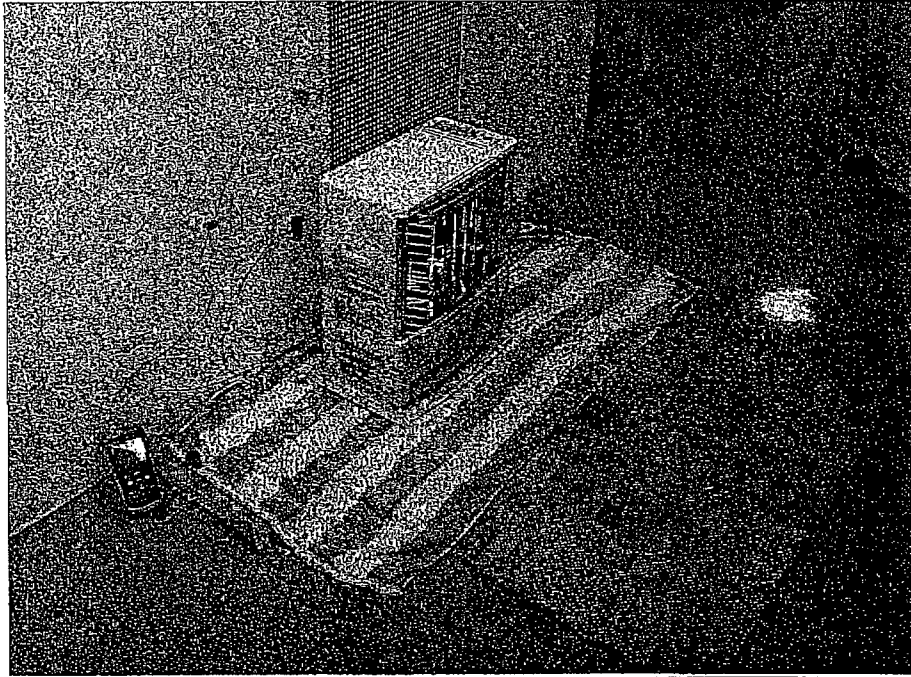


Figure 1. A view of the exemplar heater temperature testing arrangement during test #3. Temperatures are measured continuously at two locations on the wall. Additionally, IR thermal photography was used to measure all surfaces of the wall and floor. The ambient temperature was around 70°F at the start of the test.

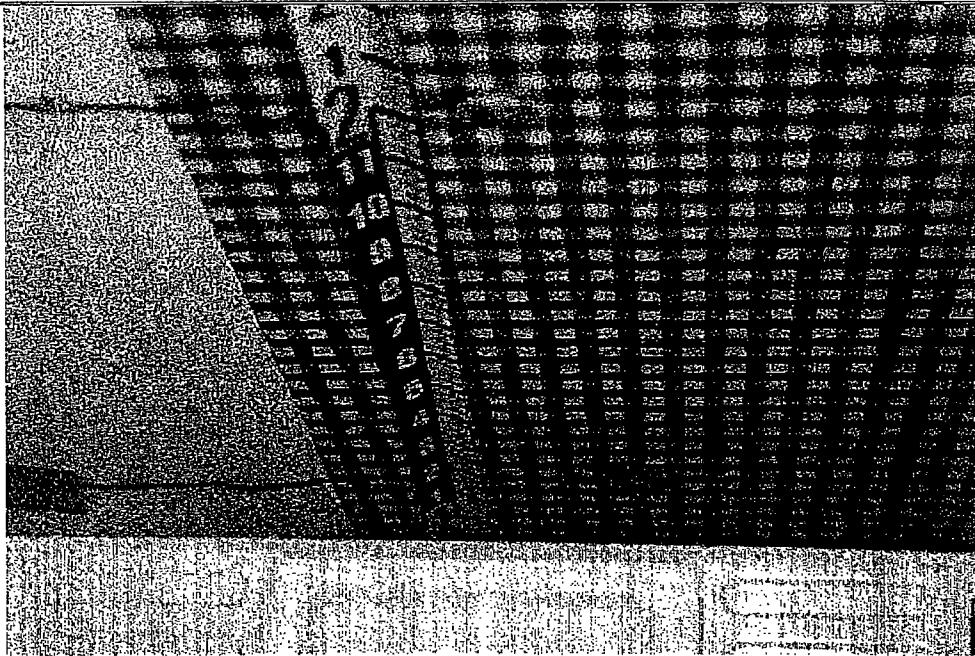


Figure 2. A detail view of the thermocouple sensor locations on the wall. The thermocouple inside the wall was sandwiched between the gypsum board and the wall stud at the 2 foot elevation.

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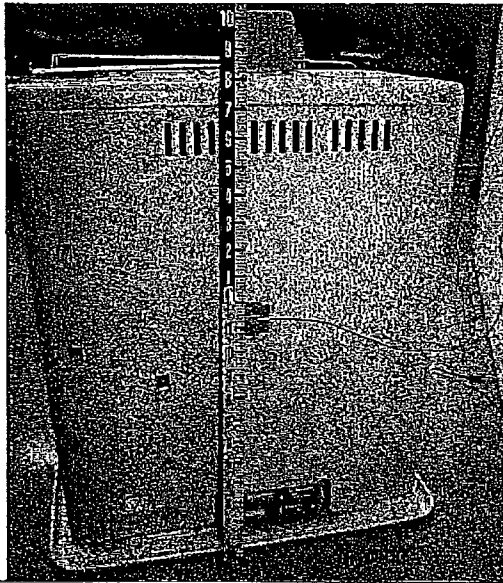


Figure 3. A detail view of the thermocouple sensor location on the rear of the heater. Note the hot air vents on the rear of the heater. These vents are located on the top of the subject heater. This would likely cause a wall behind the subject heater to be even cooler than one behind the exemplar heater.

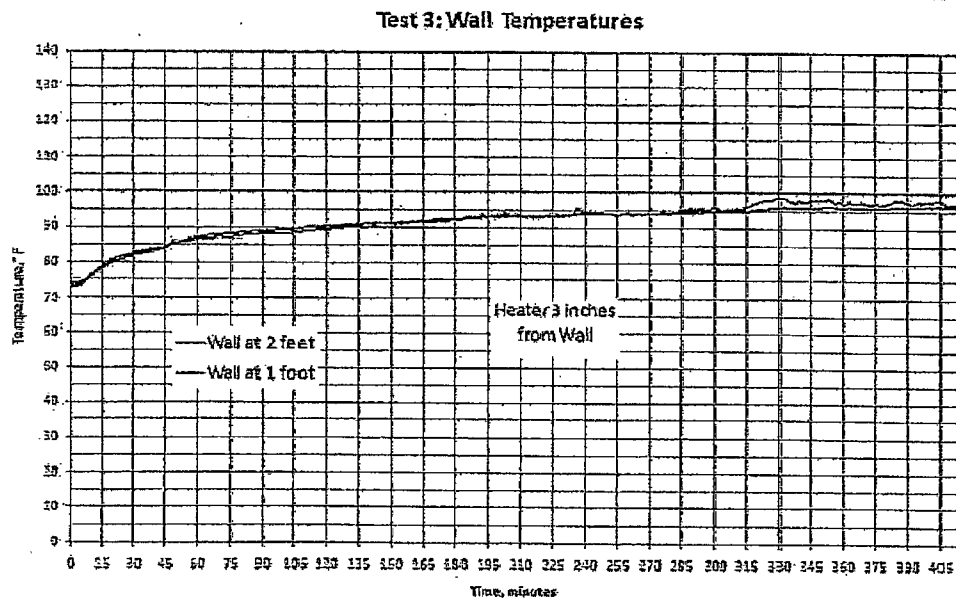


Figure 4. A graph of wall and heater temperatures during test #3. The back of the heater was placed 3 inches from the wall for the test. The maximum wall temperature at the thermocouple locations was 98.9°F. Ambient temperature during the test ranged between 70 and 80°F. Two other tests showed similar results.

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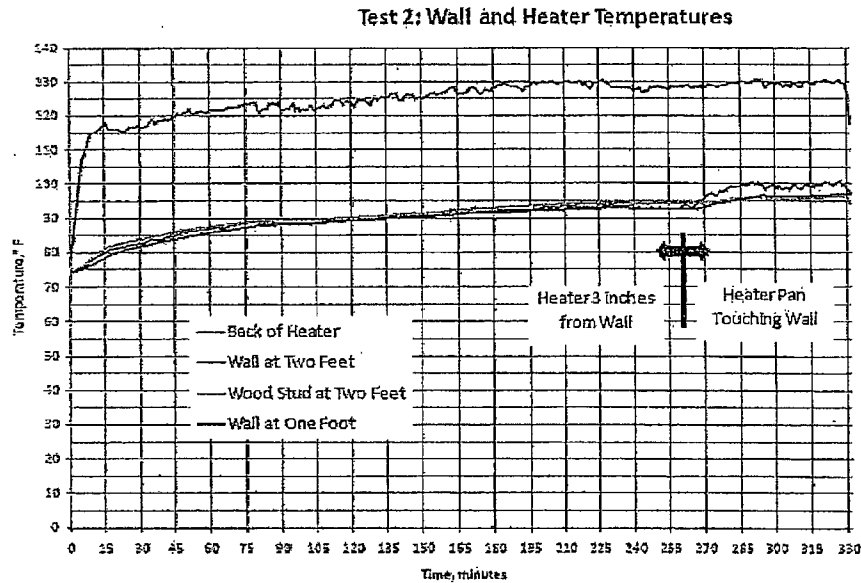


Figure 5. A graph of wall and heater temperatures during test #2. The back of the heater was placed 3 inches from the wall for most of the test. At approximately 260 minutes the heater was moved back until the base pan touched the wall. The maximum wall temperature at the thermocouple locations was 100.8°F when the heater pan touched the wall. The maximum temperature was 94.3°F when 3 inches from the wall.

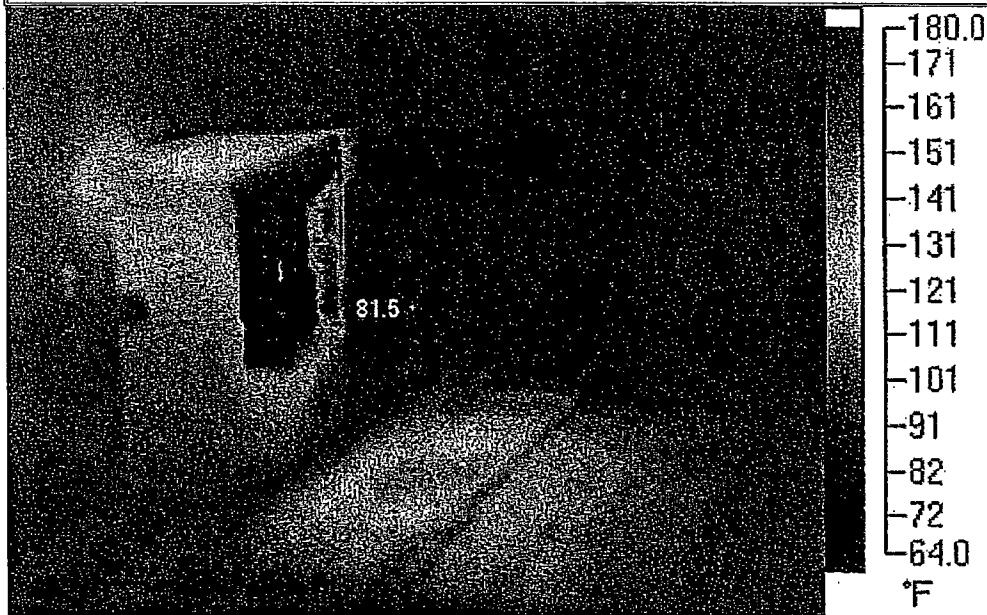


Figure 6. An IR thermal image of test #3. Note that, other than where slots on the rear of the heater discharge hot air (not on subject heater), the wall temperatures are below 101°F. The towel under the heater reached a maximum of 150°F. The ambient temperature in the lab was between 70 and 80°F

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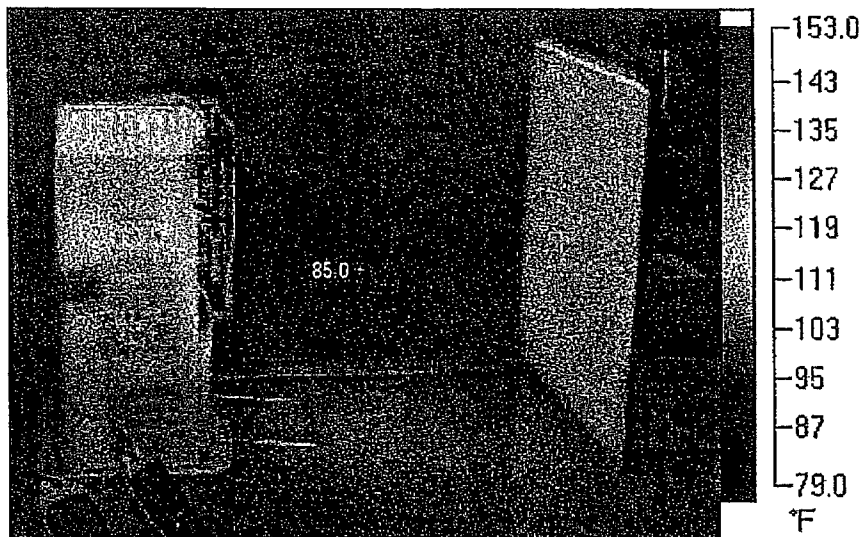


Figure 7. An IR thermal image of a gypsum panel placed 24 inches in front of the heater. The panel reached a maximum of 126°F.

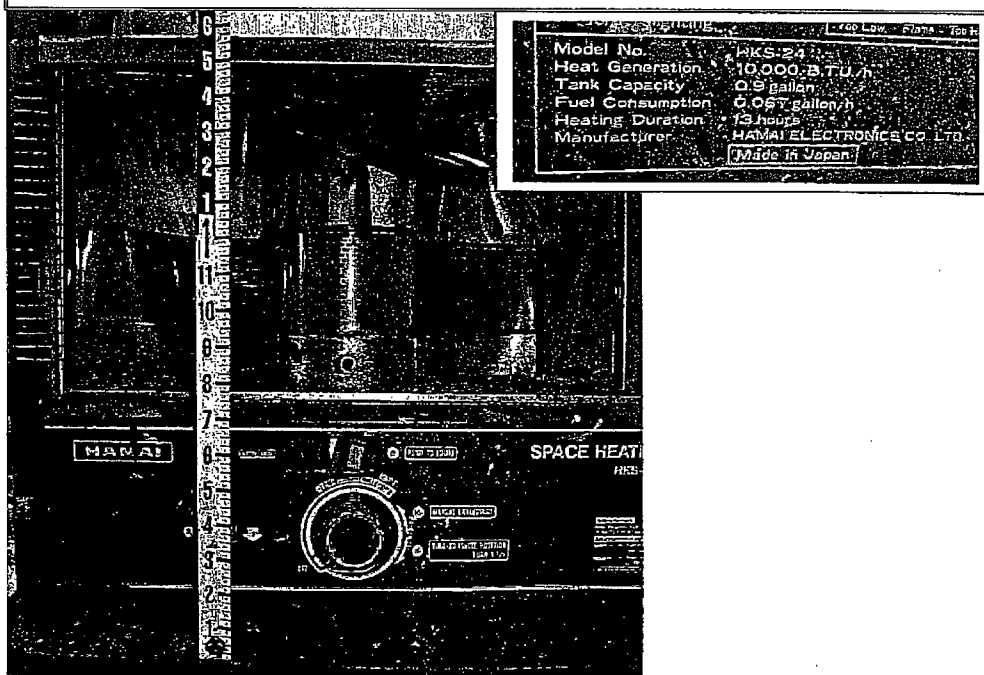


Figure 8. A view of the front of the subject heater. Note that the burner and the reflector are not sooted. The heater is rated 10,000 BTU per hour.

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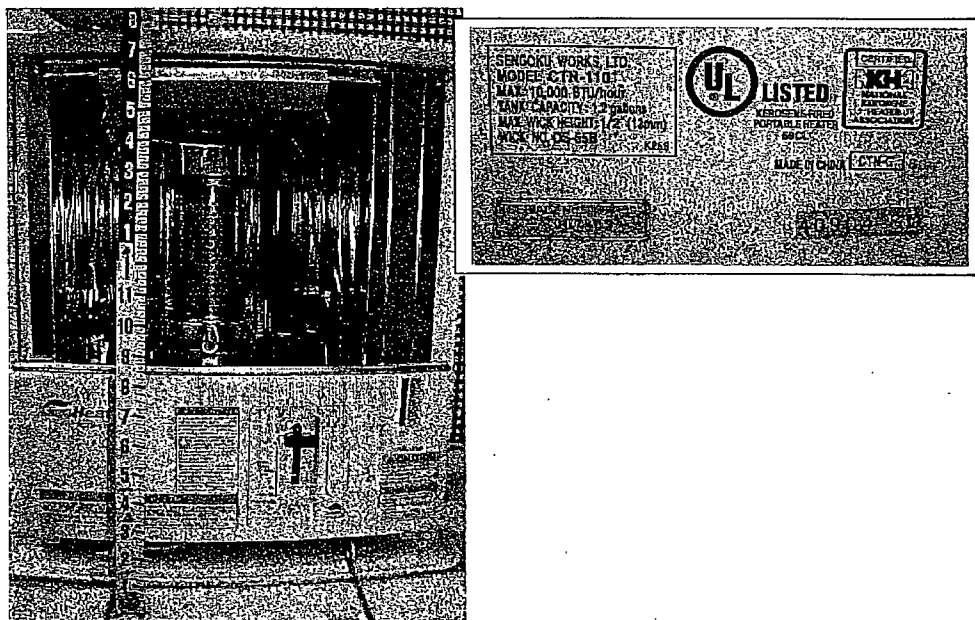


Figure 9. A view of the front of the exemplar heater. Note the similarity to the subject heater. Both heaters were radiant kerosene heaters rated at 10,000 BTU per hour.

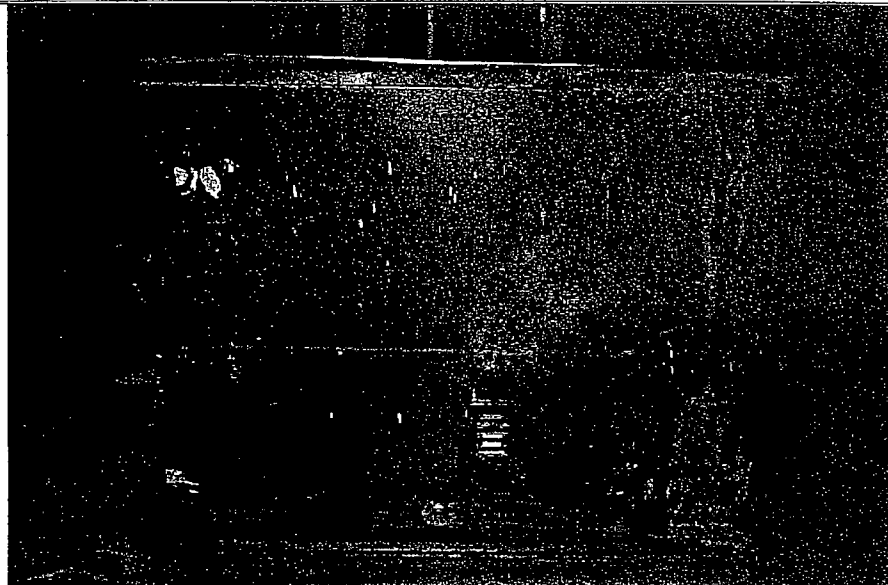


Figure 10. A view of the back of the subject heater. Note the burned spots that are from hot / burning debris that fell onto the back of the heater or radiant heat from an external fire. These burned spots are not from an internal malfunction or overheating of the heater. Note also that the heater lacks rearward hot air vents like the exemplar. Hot air discharges up through top vents on the subject heater.

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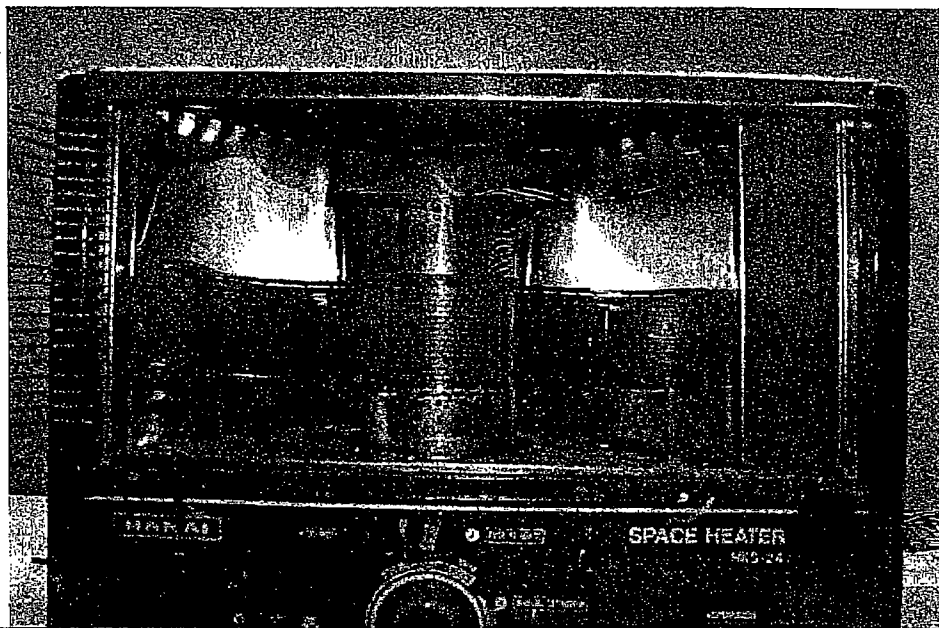


Figure 11. A view of the burner area of the subject heater. Note the reflector is shiny and lacks sooting or oxidized areas from flame impingement. The area between the reflector and rear surface of both the subject and exemplar heaters is un-insulated. Wiring inside the area of the burner behind the reflector is not melted. No sooting or oxidized areas from flame impingement were noted inside the heater.

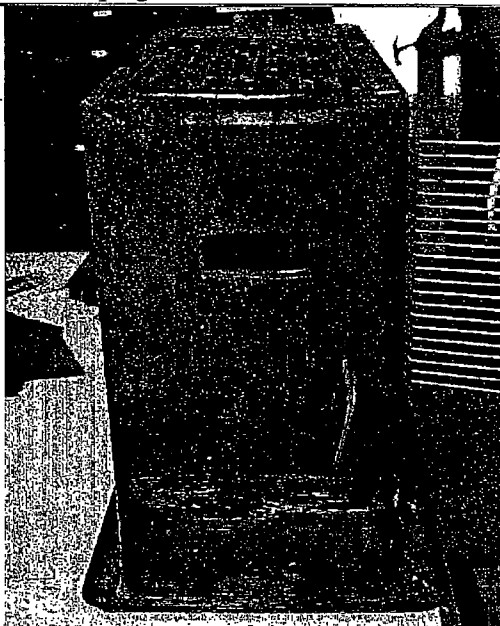


Figure 12. A view of the side of the subject heater. Note that the base pan is not sooted or burned. The handles are melted from external heating. Plastic insulation on wiring inside the heater was not melted.

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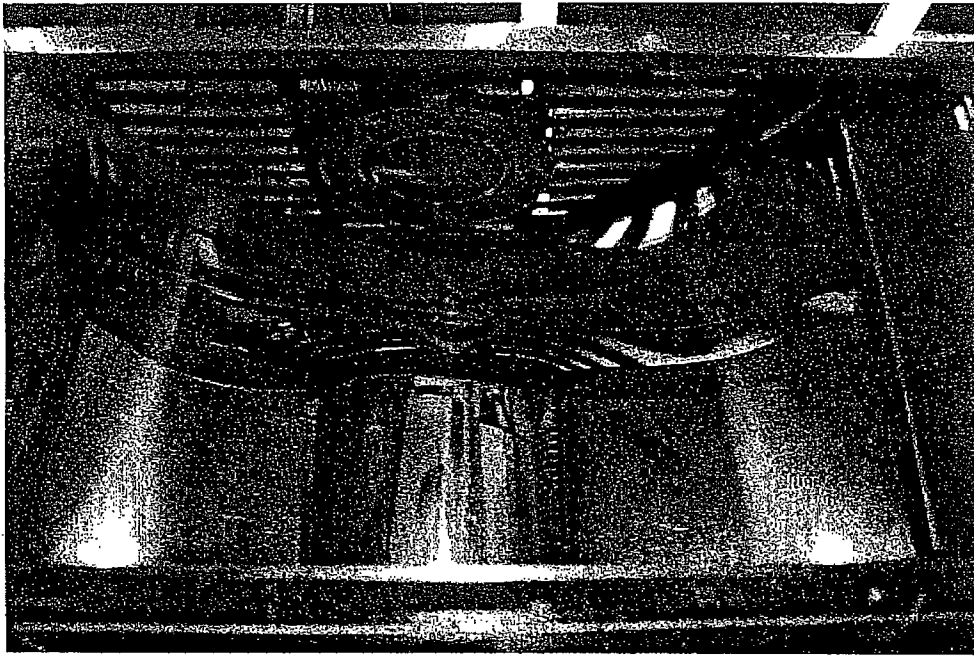


Figure 13. A view of the area above the burner in the subject heater. Note that the inside surface of the grill above the burner is not significantly sooted or burned. Note the reflector is shiny and lacks sooting or oxidized areas from flame impingement.

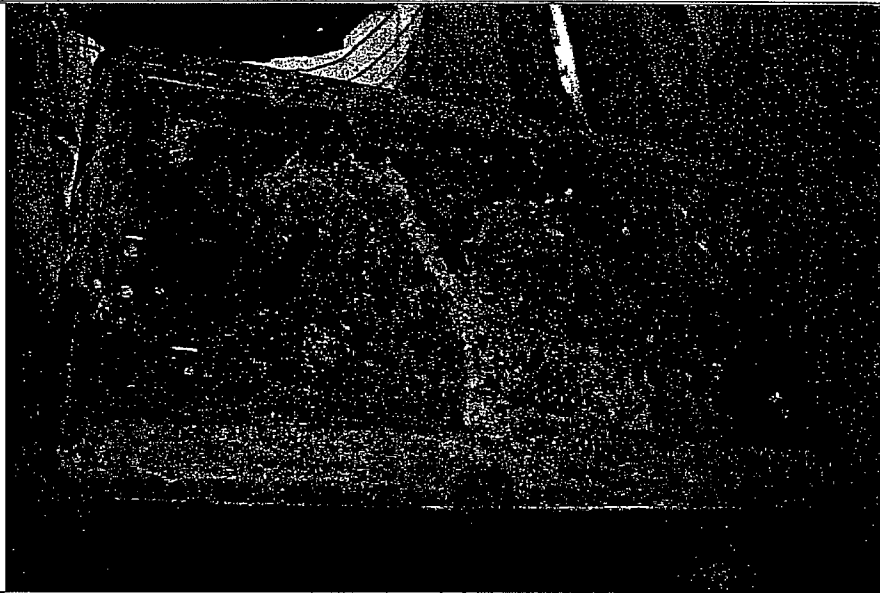


Figure 14. A view of the bottom of the subject heater drip pan. Note that, although rusted, the drip pan is not sooted or burned.

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Date: October 27, 2011

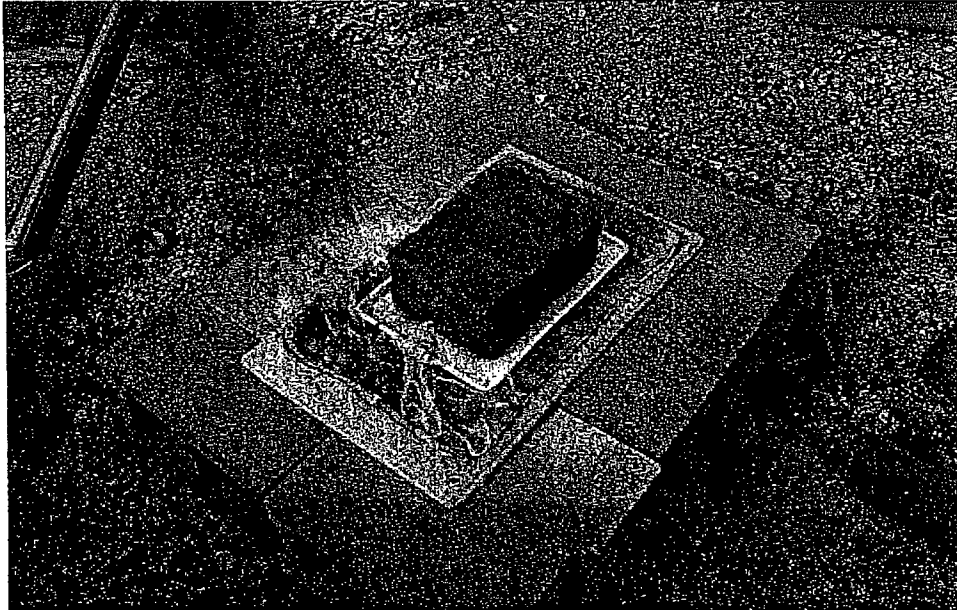


Figure 15. A view of a test to determine the marking that a burning towel would create on a heater base pan. The towel was wetted with kerosene then was wrung out completely and placed on carpet. Several bricks were placed in the pan to represent the weight of the heater.

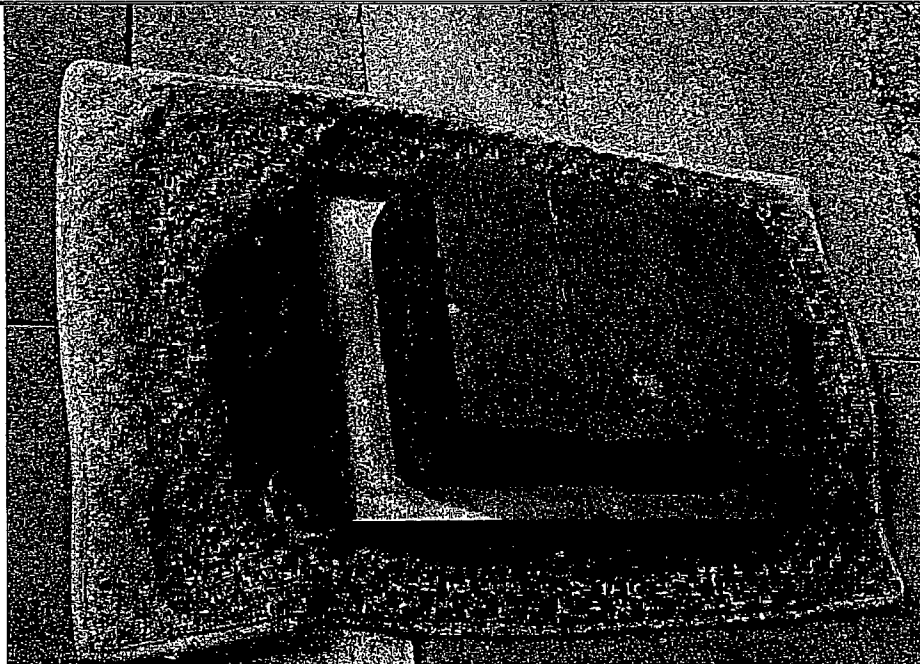


Figure 16. A view of the drip pan and bricks after the test shown in figure 15. The bricks have considerable soot residue. The drip pan is sooted and burned.

Reference: Fire Loss at Fowler Residence
Client: Murphy & Grantland, PA
Contact: Mr. Raymond Moore

TWG File Number: 110401
EiC/CiC: John Holecek
Date: October 27, 2011

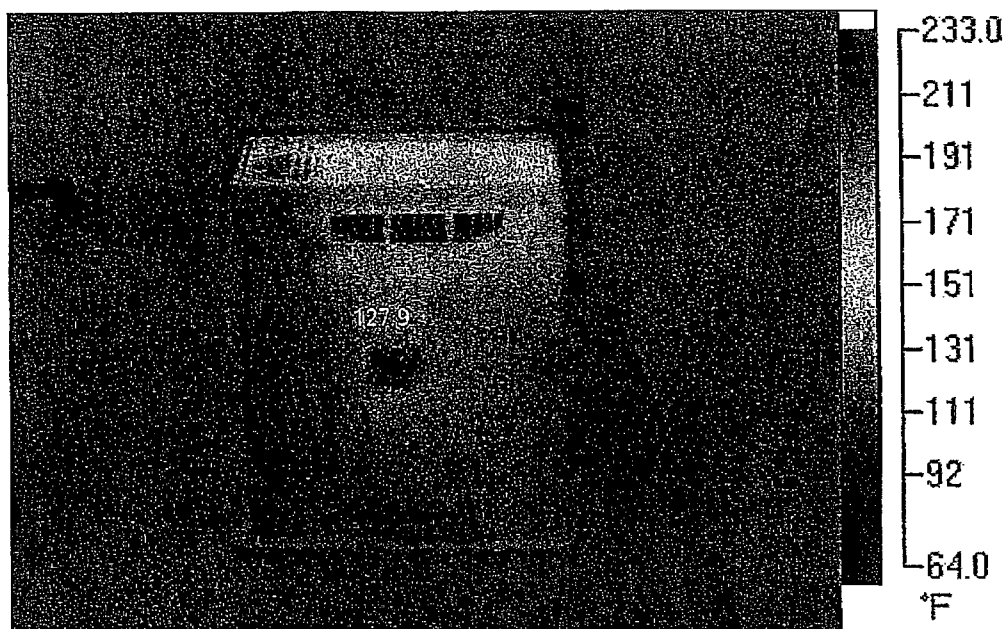


Figure 17. An IR thermal image of the back of the exemplar heater at the end of test #1. Note that the heater rear surfaces are generally less than 150°F except around the vent slots (not on subject heater). Temperatures around the gas tank area to the left and near the floor are between 90 and 100°F.

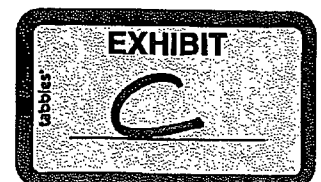
Doug Ross
Firefuzz Enterprises
Private Investigations

Mr. Clinch Belser
Belser and Belser, Attorneys
PO Box 90
Columbia, SC 29202

August 10, 2011

Dear Mr. Belser,

The following report documents the review I conducted concerning the investigative reports written by Investigator Jerry Byers and provided to you by Mr. James Dorsey Fowler's insurance provider. Several file numbers have been copied and highlighted for your review. In general, his findings are not specific and no further testing has been conducted to confirm his initial findings. As set forth in the National Fire Protection Association's *Guide to Fire and Explosive Investigations* all fire investigations are conducted using the *Scientific Method* as a guide and to ensure findings are correct. You may recall that I mentioned this document, commonly referred to by fire and arson investigators as "921", to you earlier last year. NFPA 921" is designed to assist individuals who are charged with the responsibility of investigating and analyzing fire and explosion incidents. This document has been developed as a model for the advancement and practice of fire



and explosion investigation, fire science, technology, and methodology” (NFPA 921).

This document strongly suggests all fire investigation findings are corroborated through the use of the Scientific Method. A fire investigation is a compilation of facts gathered on the fire scene and corroborated through the use of a systematic approach. As an investigator collects data and uses this systematic analysis's, it very likely uncovers additional data that requires initial conclusions to be re-evaluated before finally selecting the proper hypotheses.

Again, NFPA 921 18.6.1 stresses the use of the Scientific Method *dictates that any hypothesis formed from analysis of the data collected in an investigation must stand the test of careful and serious challenge, by the investigator testing the hypotheses or by examination by others.* I don't recall any instance of Byers using the Scientific Method in establishing the determination of the origin and cause of the fires I reviewed.

Investigator Byers unfortunately does not ascribe to the use of the Scientific Method at all. Some of his findings seem to be pure speculation or assumption on his part. I have highlighted the investigations in which laboratory samples were taken either by Byers or a public safety agency but none have the findings are listed in the reports. He has failed to list the law enforcement findings of the

laboratory samples retrieved by public safety in his reports making his investigations incomplete although he lists his opinions and ends with the statement *“all other sources of ignition were examined, evaluated and totally eliminated”*. Without having the results of the local public safety agency’s laboratory findings, I hardly feel the examination is conclusive. I have also listed specific file numbers that the findings are contradicted in his written reports.

The NFPA 921 Guide to Fire and Explosion Investigation is recognized as the fire and arson investigators “go-to” guide for current, up-to-date resource universally. It is the fire investigators “bible” and is used by fire investigators worldwide.

In the current NFPA 921 section on Incendiary Fires, entry 22.2.8.2 reads, *“The investigator is strongly cautioned against using subjective opinions to support an incendiary cause determination in the absence of physical evidence”*.

NFPA 921 section on fire patterns reaffirms that *irregular patterns are common in situations of post-flashover conditions, long extinguishing times, or building collapse. These patterns may result from the effects of hot gases, flaming and smoldering debris, melted plastics, or ignitable liquids. If the presence of ignitable liquids is suspected, supporting evidence in the form of laboratory analysis should be sought” (NFPA 921 6.3.7.8).*

Finally, NFPA 921 section 6.3.7.8.5 cautions against the use of the term “***pour pattern***”. *The term pour pattern implies that a liquid has been poured or otherwise distributed, and therefore, is demonstrative of an intentional act. Because fire patterns resulting from burning ignitable liquids are not visually unique, the use of the term “pour pattern” and reference to the nature of the pattern should be avoided. The correct term for this fire pattern is an **irregularly shaped fire pattern**. The presence of an ignitable liquid should be confirmed by laboratory analysis. The determination of the nature of an irregular pattern should not be made by visual interpretation of the pattern alone”.*

Another interesting entry in NFPA 921 is found in section 8.3.7.4 which reads, “*Pooled ignitable liquids that soak into flooring or floor covering materials as well as melted plastic can produce irregular patterns. These patterns can also be produced by localized heating or fallen fire debris*”. I strongly opine that the irregular patterns referred to in Byers “Fowler” investigation were actually caused by stored materials in Fowler’s attic which spilled into the kitchen when the roofing structure collapsed. Additionally, the deep burn pattern in the carpet adjacent to the double glass door set that Byers is calling a second point of origin is, in my opinion, the result of overhead curtain/drapes igniting from the build-up of heated gases at ceiling level and falling to the floor as a secondary “fall down” fire.

I look forward to reviewing the document with you when we meet to prepare for the trial.

If I can be of service to you, please get in touch. Thank you!

Date: July 27, 2011

Files Reviewed ref: Jerry Byers, Investigator

I was asked by Attorney Clinch Belser to review a large sampling of written reports produced by Private Investigator Jerry Byers of Technical Investigations and Services, Inc. The review was commenced on June 8, 2011 and completed on July 27, 2011. The furnished files were on CD Rom which is still in my possession. The file numbers of the furnished reports **begins with 0001 and concludes with 1045, although not consecutively.** For each written report describing his actions on fire scenes, there was an accompanying invoice with a different file number. They are listed as follows:

0001	Invoice only
0002	Written report; accidental fire
0027	Invoice only
0028	Written report; accidental fire (iron left on-he did not maintain custody of the iron
0061	This is an identical written report of the above file listed as 0028
0067	Invoice only
0068	Undetermined; "too much damage to call"
0070	Invoice only

0073 Written report; no details in report; seems to be his most logical choice with no corroboration.

0088 Accidental

0105 Invoice only

0106 Arson determined by Pickens County Sheriff's Office; Byers deferred to their findings

0117 Invoice only

0118 Arson determined by the York County Sheriff's Office; Byers deferred to their findings

0120 see attached copy and highlighted item; took 4 lab samples-no report of the findings in the report

0124 Duplicate of above report (120)

0151 Invoice only

0152 Invoice only

0153 Accidental

0187 Invoice only

0188 Accidental; electrical; 2 fatalities; Aiken County SO investigated

0234 Duplicate of above report (0188)

0279 Invoice only

0280 One page report; Concurred with the Laurens Fire Department investigation. Short circuit ignited nearby wood

0284 Invoice only

0285 Fatal fire; SLED investigated; discarded smoking material ignited bed clothing

0307 Somewhat different wording of above report (0285); two reports-one fire

0329 Invoice only

0330 No formal report or cause listed

0331 Invoice only

0332 Byers assumed the fire was initiated by "direct flame". Against a mattress on the interior". He also brings up the possibility of fireworks initiating the fire on the exterior. "All causes were examined, evaluated, and completely eliminated". Mere speculation

0336 Invoice only

0337 Undetermined cause; could not rule out gas or electrical utilities

0339 Invoice only

0340 Electrical short circuit in a baseboard heater

0347 Foreclosure; no power; little contents; samples obtained by police; **no results listed**

0364 Invoice only

0365	Same invoice as 0364
0366	Electrical fire
0383	Invoice
0385	Accidental fire from cooking mishap; no samples
0407	Invoice only
0408	Accidental fire (seems to be a guess)
0412	Invoice only
0413	Child playing with fire
0435	Invoice only
0436	Invoice only
0437	Arson fire " <i>due to the condition of the scene, no samples were taken</i> ". See attached highlighted page numbered as "437"
0445	Fatal; electrical ignition " <i>Likely from a loose connection</i> ". Speculation.
0469	Invoice only
0470	Accidental; faulty flue pipe
0485	Invoice only
0486	Caterpillar "skid loader" tractor; accidental
0518	Invoice only
0519	Invoice only

0520 Invoice only

0521 Forklift; propane tank leak; Sumter FD investigated

0527 Invoice only

0528 Accidental; SLED and ATF investigated

0533 Invoice only

0534 Accidental; report only three paragraphs in length

0536 Invoice only

0538 Accidental; cigarette in plastic trash can; 30 minutes ignition-not likely

0548 Invoice only

0549 Arson; 4 points of origin; never identifies the ignition source identified during his investigation but states "*an open flame*" set the curtains on fire. Spartanburg County Sheriff's Office investigated. Their investigation ongoing but Byers closed his investigation out.

0554 Arson; "*some type of ignitable liquid had been poured from the front window and down between the two single beds. The fire was set using an open flame*" (not identified as to what the open flame was); there is no mention of Byers obtaining lab samples but there is an evidence transmittal form in the file. See attachment numbered "554"

0596 Invoice only

0597 His one page report stating *"an electrical short occurred igniting combustible products in the wall". Breaker box revealed excessive damage"*

0599 Invoice only

0600 Fire caused by an open flame in the attic. See attachment numbered "600". *"This fire had to have occurred as a result of an open flame being placed in the numerous combustible products in the attic"*

0605 No determination made; too much damage

0611 Invoice only

0613 Invoice only

0614 Invoice only

0615 Invoice only

0616 Electrical cause; seems speculative to me

0650 Invoice only

0651 Undetermined

0653 Invoice only

0654 See attachment numbered "654". *"The fire is accidental resulting from a radiant heater either overheating or malfunctioning in the fan for the heater"*. No occupants in the home for three days prior to the fire.

0681 Invoice only

0682	Accidental; lint in dryer vent
0702	Invoice only
0703	Arson; 2 points of origin-No Samples Retained
0706	Invoice only
0707	Invoice only
0708	Shorted wires-no proof
0739	Invoice only
0740	Accidental-electrical; beading on conductor wires
0743	Invoice only
0744	Ceiling fan short-another guess in my opinion
0771	Invoice only
0772	See Attachment numbered "0772". Claims an <i>extension cord being kinked and crushed caused close-by combustibles to ignite</i> . Said the policy holder had numerous aerosol cans of spray paint that she used in her business. She was outside and " <i>heard an explosion and discovered the fire</i> ". Which one is it? Mr. Fowler had numerous flammable materials stored in his attic which failed and spilled onto the kitchen floor. Similar situation here.
0774	Invoice only
0776	Possible lightning strike
0800	Invoice only

0802	Short circuit; no evidence taken
0817	Invoice only
0818	<i>Unattended candle</i> So difficult to prove-speculative.
0850	Invoice only
0851	Accidental ignition; faulty ceiling fan
0872	Duplicate report of 851
0877	Invoice only
0878	FOWLER CASE; refers to Fire Chief Wright instead of Chief White; Arson fire; 2 points of origin; 6 lab samples taken-all negative.
0884	Invoice only
0885	Arson fire; samples taken-no results listed in case file
0917	Duplicate report to 0885
0949	Invoice only
0950	Too much damage to determine. Westminster Fire Marshal did conduct an investigation. We need his report: Fire was on June 14, 2007. Byers took no samples
0952	Invoice only
0953	Undetermined; no samples taken
0971	Invoice only
0972	Short circuit over laundry room-ignited wooden ceiling

0992	Invoice only
0994	Arson; 4 separate fires in one week
1032	Invoice only
1033	Electrical short in ceiling fan
1035	Invoice only
1036	Pot of grease on stove; burn patterns on floor
1039	Invoice only
1040	Arson; York County Sheriff's Office took samples-no results listed in case file
1045	Invoice only

Total of 105 file numbers reviewed.

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
Plaintiff,)

vs.)

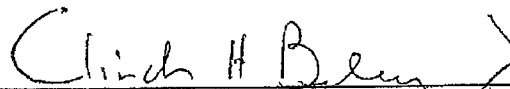
**PLAINTIFF'S MOTION
FOR ATTORNEYS' FEES**

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

PLEASE TAKE NOTICE that the plaintiff hereby moves the Court for an order granting the plaintiff reasonable attorneys' fees pursuant to South Carolina Code Section 38-59-40 (1976 as amended). The motion is based upon the statute, the plaintiff's Complaint, and the record in the case, including, but not limited to the jury verdict finding for the plaintiff on the cause of action for bad faith breach of an insurance contract. The motion is also based upon the affidavit of counsel, the itemization of the time and expenses of plaintiff's counsel in pursuing this case through the end of the trial, and the memorandum filed herewith.

Pursuant to the statute, the plaintiff reserves the right to move for additional fees if there is an appeal by the defendant.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Columbia, South Carolina 29201
(803)929-0096
Attorney for Plaintiff

December 9, 2011

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
Plaintiff,)

vs.)

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

**AFFIDAVIT OF COUNSEL
REGARDING ATTORNEYS' FEES**

PERSONALLY APPEARED, Clinch H. Belser, Jr., Esquire, who being first duly sworn, deposes and says:

My name is Clinch H. Belser, Jr. I have been counsel for the plaintiff in this matter since 2009. This affidavit is respectfully submitted in connection with the Plaintiff's Motion for Attorney's Fees filed pursuant to South Carolina Code Section 38-59-40 (1976 as amended).

In 1970, I graduated from the University of South Carolina School of Law with a Juris Doctor degree, *Magna Cum Laude*. My undergraduate degree was a Bachelor of Arts from Princeton University. In 1970, I was admitted to the South Carolina Bar and admitted to practice in the United States District Court for South Carolina and in the Fourth Circuit Court of Appeals. From 1971 through June of 1974, I was on active duty with the Judge Advocate General Corps of the United States Navy, serving as trial counsel, defense counsel, and occasionally as military judge in the Navy Law Centers in the Philippine Islands and in San Francisco.

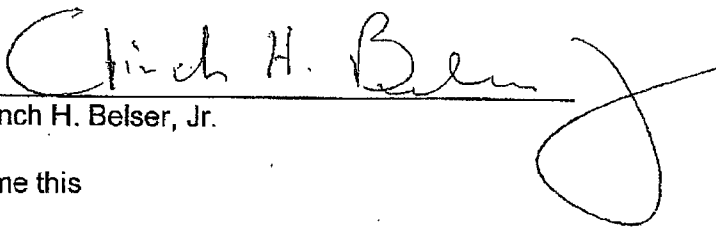
Since July of 1974, I have been actively engaged in the private practice of law in the State of South Carolina. My litigation experience includes civil trials in the Court of Common Pleas and in the United States District Court, with some appellate work in the South Carolina Court of Appeals and the South Carolina Supreme Court, as well as the Fourth Circuit Court of Appeals. Occasionally, I have tried cases in the Family Court,

the Magistrate's Court, the Administrative Law Court, and the United States Bankruptcy Court.

My professional memberships include the South Carolina Bar, the American Bar Association, and the South Carolina Defense Trial Attorneys Association, as well as the Richland County Bar Association.

My fee agreement with the plaintiff, James D. Fowler, is a contingency fee agreement, whereby he owes one third of the amount recovered, plus expenses. I am attaching to this affidavit, however, an itemization of the time and expense on the file. It runs from the beginning of the file to the end of the trial. The itemization comes from our computer and shows the time and expense as it has been contemporaneously recorded pursuant to our standard office procedures applicable to all files, regardless of the type of fee agreement. My standard hourly charge for trial work and other work is \$300 per hour, but sometimes I charge more and sometimes less. Accordingly, the itemization is based on my standard rate of \$300 per hour, with lower rates for other lawyers in the office, as shown.

In my opinion, all the work done on the file has been necessary for the proper and diligent handling of this somewhat complicated and difficult case, which had many issues, and which was being vigorously defended by experienced and very competent counsel for the defense. Unfortunately the defendant Nationwide's failure to respond fully to our discovery required more work to be done and extra hearings to be held.


Clinch H. Belser, Jr.

SWORN TO and SUBSCRIBED BEFORE me this

9th day of December, 2011.



Notary Public for South Carolina

My Commission Expires: 5-23-13

BELSER & BELSER, P.A.
1901 MAIN STREET, SUITE 1550
POST OFFICE BOX 96
COLUMBIA, SC 29202
803-929-0096

Belser & Belser, P.A.
Tax Identification Number 57-0979589

Date of Invoice: December 09, 2011

Invoice Number: 15239

Invoice submitted to:

Mr. James Fowler
328 Frank Gillard Road
Seneca SC 29678

File Number/Description **09024 Fire Claim - Nationwide**

Professional Services

		<u>Hours</u>	<u>Amount</u>
2/13/2009 - CBjr	Attorney Telephone conversation with J Moore; telephone conversation with J Fowler.	1.00	300.00
2/17/2009 - CBjr	Attorney Office conference with J Fowler, B Yarbrough, and J Moore; extended conference with J Moore.	2.75	825.00
2/19/2009 - CBjr	Attorney Telephone conversation with J Fowler; receipt and review of fax from D Evatt of Citi Financial	0.75	225.00
2/20/2009 - CBjr	Attorney Consideration of telephone message from J Fowler about request to call Citi Financial; telephone conversation with same; telephone conversation with D Evatt.	0.50	150.00
2/22/2009 - CBjr	Attorney Receipt and review of notes from J Fowler.	0.25	75.00
2/24/2009 - CBjr	Attorney Telephone conversations with J Fowler, J Moore, and D Ross.	0.40	120.00
2/25/2009 - CBjr	Attorney Receipt and review of fax from D Ross with materials and proposed contract; telephone conversation with J Moore; telephone conversation with D Ross; preparation of letter to Nationwide; receipt and review of fax from D Ross with contract; preparation of fax to same; telephone conversation with same; preparation of letter to same; review and organization of entire file.	2.50	750.00

Mr. James Fowler

09024 Fire Claim - Nationwide

Date of Invoice: December 09, 2011
Invoice Number: 15239

Page 32

		<u>Hours</u>	<u>Amount</u>
11/29/2011 - CBjr	Attorney Trial and preparation.	12.00	3,600.00
- HFB	Attorney Trial preparation and trial.	12.00	3,000.00
11/30/2011 - HFB	Attorney Trial preparation and trial.	12.00	3,000.00
- CBjr	Attorney Trial and preparation.	12.00	3,600.00
- MJP	Attorney Research regarding admissibility of resumes and CVs.	0.30	75.00
12/1/2011 - CBjr	Attorney Trial and preparation.	12.00	3,600.00
- HFB	Attorney Trial preparation and trial.	12.00	3,000.00
- MJP	Attorney Correspondence with Judge's law clerk regarding jury instructions.	0.25	62.50
12/2/2011 - CBjr	Attorney Trial and preparation; travel.	12.00	3,600.00
- HFB	Attorney Trial preparation; trial; travel.	12.00	3,000.00
For professional services rendered		669.95	\$188,985.00
Additional Charges :			
2/26/2009 - CBjr	Investigator FireFuzz Enterprises - retainer		1,000.00
2/27/2009 - CBjr	Photocopies Photocopies		1.50
- CBjr	Postage Postage charges		2.52
3/31/2009 - CBjr	Photocopies Photocopies		31.60

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF OCONEE	)	IN THE COURT OF COMMON PLEAS
	)	Civil Action 09-CP-37-768
James D. Fowler,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN SUPPORT
	)	OF MOTION FOR ATTORNEYS' FEES
Nationwide Mutual Fire	)	
Insurance Company and	)	
Andrew Flanagan,	)	
	)	
Defendants.	)	

Plaintiff respectfully submits this memorandum in support of plaintiff's motion for attorneys' fees. The motion is filed this date, together with an affidavit of counsel and an itemization of the time and expense devoted to this case from the commencement thereof until the conclusion of the trial.

The motion is based upon South Carolina Code Section 38-59-40 (1976 as amended). This section provides that if a claim is covered by a policy of insurance and the insurer fails to pay the claim within ninety days after the demand has been made by the holder of the policy, and if there is thereafter a finding on suit by the trial judge that the refusal was without reasonable cause or in bad faith, then the insurer is liable to pay the policyholder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer.

PROCEDURAL HISTORY OF CASE

As the record in this case shows, the plaintiff suffered a fire loss on January 17, 2009. Nationwide Mutual Fire Insurance Company (hereinafter "Nationwide") denied the claim, issuing its official letter of denial on February 11, 2009. The plaintiff later

submitted a Sworn Proof of Loss, which the insurer timely received March 17, 2009, and returned March 18, 2009. The insurer stated that the claim had been denied February 11, 2009, and that it was rejecting the Sworn Proof of Loss

More than ninety days passed before the plaintiff filed his Summons and Complaint June 22, 2009.

Almost two and a half (2½) years later, the case was reached for trial at the term of the Court commencing November 28, 2011. On Friday, December 2, 2011, the jury returned its verdict in favor of the plaintiff. The jury awarded judgment to the plaintiff in the amount of \$501,044 on the cause of action for breach of contract. In addition, the jury unanimously found for the plaintiff on the cause of action for bad faith breach of an insurance contract.

STATUTE AND AUTHORITIES

South Carolina Code Section 38-59-40 provides for attorneys' fees where the insurance company has refused to pay a claim and the refusal was without reasonable cause or in bad faith. South Carolina Code, Section 38-59-40 (1976 as amended). The determination of an insurer's liability for attorney's fees pursuant to the statute is a matter of decision by the trial judge. *Dorman v. Allstate Ins. Co.*, 332 S.C. 176, 504 S.E.2d 127 (Ct. App.1998). *Coker v. Pilot Life Ins. Co.*, 265 S.C. 260, 217 S.E.2d 784 (1975).

Bad faith refusal to pay benefits under a contract of insurance includes: (1) 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 an insurer's bad faith or unreasonable action in breach of an implied covenant of

good faith and fair dealing arising under the contract; and (4) causing damage to the insured. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659, (S.C. App. 2002) rehearing denied, certiorari denied.

ARGUMENT

Plaintiff respectfully submits that he is entitled to an additional award against Nationwide for his reasonable attorneys' fees pursuant to the statute. The claim was made, but denied. More than ninety days commenced before the lawsuit was filed. The jury found for the plaintiff on the breach of contract cause of action and also for the plaintiff regarding the existence of bad faith in the denial.

As the record in the case shows, the litigation was long and hard fought. Counsel for the plaintiff litigated the case very fully, with numerous depositions and motions to handle. Indeed, the defendant's failures to comply with its discovery responsibilities required the plaintiff to file motions to compel discovery on two occasions. After the filing of the first motion, the defendant agreed to a Consent Order of Discovery, but thereafter defendant and its chief expert witness failed comply with plaintiff's discovery request to defendant and even a subpoena duces tecum duly served upon the expert.

Plaintiff called as an expert witness on the subject of insurance bad faith claims practices, Thomas H. Hesse, Esquire. Mr. Hesse is well qualified, having twenty years experience in the insurance industry defending various claims, including fire loss claims, followed by nineteen years experience as an insurance defense counsel. Mr. Hesse identified a number of actions as part of the Nationwide claims personnel which are evidence of insurance bad faith. All the matters about which Mr. Hesse testified were

put in evidence directly for the jury to evaluate independently. As stated above, the jury found in favor of the plaintiff and against Nationwide on the question of insurance bad faith. Although the trial court is to make the decision under the statute whether the refusal to pay the claim was in bad faith or without reasonable cause, the verdict of the jury is probative and fully supports a finding by the trial judge that the refusal to pay the claim was in bad faith and without reasonable cause.

In brief, the indicators of bad faith are: (1) the insurer contacted the county Sheriff reporting its suspicions of arson before its expert witness completed his report or even received the laboratory test analysis of the six debris samples taken seeking corroboration of the presence of accelerants; (2) the insurer never asked any questions and never changed its initial determination that there was arson when the laboratory analysis came back negative – all six samples, (3) the insurer completely disregarded the findings of the local fire chief, who fought the fire and made observations required by the State Fire Marshall, stating that the fire was unintentional, (4) the insurer refused to grant the plaintiff an extension of time to submit his proof of loss after having initially denied the claim, but then immediately returned and rejected the proof of loss which was timely filed, (5) the insurer refused a request from the policyholder for a copy of the Cause and Origin Report unless and until he filed a lawsuit, its internal log notes indicating that the insurer knew that the policyholder would be entitled to obtain a copy of their report “in discovery” once the lawsuit was filed, (6) the insurer unnecessarily told the policyholder’s mortgage holders that the claim of the policyholder was denied because of the intentional acts exclusion, which was “the same thing” as saying that he

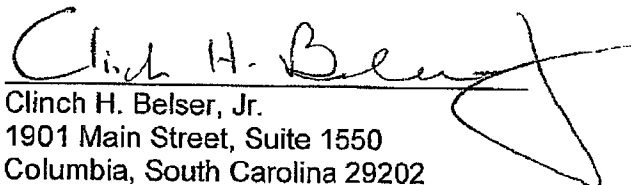
had set the house on fire, which is arson, and (7) the policyholder's offer to take a polygraph was not responded to appropriately.

The time devoted to the case by plaintiff's counsel and the expenses associated therewith were very substantial, as shown by the itemization attached to the affidavit of counsel. The time and expense were increased by the necessity to combat the insurer's noncompliance with discovery rules and the need to file motions to compel. Accordingly, the plaintiff should be entitled to receive the maximum amount allowed by the statute for attorneys' fees.

CONCLUSION

The plaintiff respectfully submits that the insurer should not have refused to pay his claim, that the insurer's refusal to pay the claim was in bad faith and without reasonable cause, that the refusal lasted more than ninety days before a lawsuit was filed, and that the insurance company should be required to pay the maximum amount allowed by the statute for attorneys' fees.

BELSER & BELSER, P.A.


Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Columbia, South Carolina 29202
(803)929-0096
Attorney for Plaintiff

December 9, 2011

Columbia, South Carolina.

STATE OF SOUTH CAROLINA, IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE
FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

2011 DEC 13 AM 10 55

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**NATIONWIDE MUTUAL FIRE
INSURANCE COMPANY'S MOTIONS
FOR NEW TRIAL OR NEW TRIAL NISI/
REMITTITUR AND FOR JUDGMENT
NOTWITHSTANDING THE VERDICT**

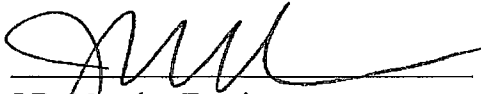
**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendants, Nationwide Mutual Fire Insurance Company and Andrew Flanagan, will move before the presiding judge of the Oconee County Court of Common Pleas at the Oconee County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order granting a new trial or, in the alternative, a new trial nisi remittitur as to Plaintiff's breach of contract claim pursuant to Rule 59, and for judgment notwithstanding the verdict in favor of Defendant Nationwide on the bad faith claim pursuant to Rule 50. The verdict amount is grossly excessive and a result of passion, caprice, or bias. Furthermore, the erroneous admission of irrelevant and improper evidence in the form of non-prosecution evidence and Chief David Wright's opinions as to the cause of the fire was highly prejudicial. In the alternative, the verdict amount should be reduced to an amount consistent with the evidence presented at trial and the plain terms of the contract. In addition, there was no evidence to support a finding that Nationwide did not have a reasonable basis for denying coverage in this case. Therefore, Nationwide is entitled to a judgment notwithstanding the verdict on the bad faith claim.

These Motions are based on the South Carolina Rules of Civil Procedure, the South Carolina Rules of Evidence and applicable case law, and will be supplemented and supported by a memorandum of law

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to read 'JRM', is written over a horizontal line.

J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendants

Columbia, South Carolina
December 9, 2011

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

2011 DEC 14 AM 9 54

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**MEMORANDUM IN SUPPORT OF
NATIONWIDE MUT. FIRE INSURANCE
COMPANY'S MOTIONS FOR A NEW
TRIAL, NEW TRIAL NISI REMITTUR
AND JNOV**

INTRODUCTION

This case was tried before a jury in the Oconee County Court of Common Pleas on November 28, 2011 through December 2, 2011. The Court submitted three causes of action to the jury: (1) breach of contract, (2) bad faith breach of contract and (3) slander. The court denied motions for directed verdict at the close of all evidence as to the bad faith and slander causes of action. The jury returned a verdict in favor of the Plaintiff on the contract claim in the amount of \$501,444.00 and the bad faith claim in the amount of \$3,000.00 (actual damages). The jury found in favor of the Defendants on the slander claim and further found that neither of the Defendants acted in a willful, wanton or reckless manner to support a punitive award. The court granted the parties ten (10) days in which to file any post trial motions or submissions up to and including December 13, 2011. Nationwide submits this memorandum in support of its motions for a new trial or in the alternative, a new trial *nisi* Remittitur on the breach of contract claim and its motion for judgment *non obstante veredicto* (JNOV) in its favor on the bad faith claim.

The motion for new trial absolute is made on the grounds the verdict demonstrates that the jury acted with passion, caprice and prejudice, and that the admission of certain opinion evidence and on the grounds that evidence of the non-prosecution of the Plaintiff was highly

prejudicial such that the Defendant did not get a fair trial because of the erroneous admission of prejudicial evidence that was probative as to material issues in the case and the amount of the jury's verdict is against the overwhelming weight of the evidence. Therefore, Nationwide should be entitled to a new trial absolute on the breach of contract action.

In the alternative, Nationwide would show that the verdict does not conform to the evidence regarding the amount of contractual damages proven at trial. Therefore, the verdict should be remitted to the proven amount or Defendant Nationwide should be entitled to a new trial on damages for the breach of contract claim alone.

Lastly, Nationwide would show that the evidence viewed in the light most favorable to the Plaintiff demonstrated that Nationwide had a reasonable basis to dispute this claim as a matter of law in that no reasonable person could find that Nationwide did not have a legitimate ground for contesting this claim and should not face extra contractual damages for asserting its legal rights to do so. Therefore, the judgment in favor of the Plaintiff on his causes of action for bad faith should be reversed as a matter of law and judgment entered in favor of Nationwide.

NATURE OF THE CASE

Nationwide issued a homeowner's insurance policy to James D. Fowler which was in full force and effect when a fire occurred at his residence located in Seneca, South Carolina on January 17, 2009. After conducting an investigation into the loss, Nationwide denied coverage asserting the policy's Intentional Acts Exclusion and asserting that Mr. Fowler had caused the loss. This lawsuit followed on June 19, 2009, with Plaintiff seeking damages against Nationwide for breach of an insurance contract and bad faith refusal to pay benefits under a fire insurance policy. Mr. Fowler also sued both Defendants for slander.

ARGUMENT

I. MOTION FOR NEW TRIAL ABSOLUTE

A. The verdict was the result of passion, caprice or prejudice.

“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). Failure to do so amounts to an abuse of discretion. Id. 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 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).

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 this case the jury awarded actual damages for breach of contract in the amount of \$501,444.00. This amount demonstrates that the jury was motivated by passion, caprice or prejudice because the amounts due and owing to the Plaintiff under the contract were not in dispute and totaled at most \$186,520.00.¹ The verdict of \$501,444 is therefore over two and one-half times the maximum amount supported by the evidence and therefore Nationwide is entitled to a new trial. The disparity between the evidence and the verdicts in both the Hutson breach of contract case and the present suit is nearly identical. Moreover, Plaintiff's trial exhibit number 30 showed the "Total Policy Limits For All Coverages At \$523,333.00" and the jury heard undisputed evidence that Nationwide had already paid a total of \$156,125.00 consisting of the full limits of Coverage A - Dwelling to the lien holders (\$154,125.00) and a \$2,000.00 advance under Coverage C - Contracts. Therefore, their award of damages close to the maximum policy limits without regard to the evidence demonstrates that the jury was motivated by passion, caprice and prejudice or some other influence outside the evidence. The verdict should be set aside and Nationwide should be granted a new trial absolute.

B. The verdict was the result of highly prejudicial evidence that should have been excluded.

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).

¹ Discussed in more detail below regarding motion for new trial *nisi* remittitur.

“[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. Dept 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.*

Nationwide would show that several erroneous evidentiary rulings resulted in substantial prejudice to Nationwide such that it did not get a fair trial and therefore, this court should set aside the verdict for breach of contract and grant Nationwide a new trial absolute. The erroneous evidentiary rulings consisted of the introduction of the report and opinions of the Friendship Fire Department Chief David Wright, evidence of non-prosecution of the Plaintiff in connection with the fire, and evidence of post-denial conduct of Nationwide.

A. Defendants were heavily prejudiced by the erroneous admission of Chief David Wright’s opinions on the cause and origin of the fire through the Friendship Fire Department Truck Report.

Rule 803(8) carves out a narrow exception to the hearsay rule for public records and reports. The rule permits the admission of otherwise hearsay statements where those statements are

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).

When Defendants first raised their objection to the admission of the opinion statements in the Truck Report, the Court ruled that Chief Wright was not qualified as an expert. However,

Chief Wright was nonetheless allowed, over objection, to give his opinion as to the origin of the fire and his opinion that it was unintentional. The Court revisited its ruling on this issue at the beginning of the second day of trial, citing State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008). However, the Court ultimately allowed the report [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.

The Court was correct when it relied upon Morris in determining that opinions and findings in Chief Wright's report are inadmissible hearsay and do not fall under the exception provided by Rule 803(8). However, the court should have excluded the opinions and conclusions of the report. 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). 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. Morris, 376 S.C. 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)².

² 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.

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). (Ex. 6. Truck Report). Therefore, the evidence was erroneously admitted.

The fire chief's opinion that the cause of the fire was unintentional was clearly probative on the material and central issue of whether the fire was intentionally set. Therefore, its admission is presumed to be prejudicial. The local fire chief's opinions on the cause and origin of the fire stated on a form which he is required by statute to complete, places the imprimatur of the State, as Plaintiff repeatedly argued, on the opinions and conclusions of Chief Wright. The Court need look no further than Plaintiff's closing arguments to understand the significance of this report. Plaintiff'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 Plaintiff's position that the fire started from the kerosene heater. Plaintiff's counsel repeatedly harped on the fact that this report was filled out as part of Chief Wright's statutory duty. Furthermore, Plaintiff's counsel used Chief Wright's report in the direct examination of Chief Wright, and the examination of both expert witnesses Ross and Hesse. Plaintiff's counsel also used the report heavily in the cross-examinations of nearly every defense witness.

Rule 802 excludes hearsay evidence that does not fall within any clear exception. As applied in Morris, opinions and conclusions in a public record do not fall within the exception outlined in Rule 803(8). Therefore, the admission of Chief Wright's opinions as to the cause and origin of the fire in the truck report was clearly in error. Nationwide's position at trial that the fire was intentionally set was clearly harmed by the admission of the opinions of the local fire

chief that concluded that the fire was unintentional. Furthermore, the fire chief's opinions went directly to a critical issue in the case and were therefore probative as to a material issue and presumptively prejudicial. Therefore, the evidence was highly prejudicial and Nationwide is entitled to a new trial on the breach of contract claim.

B. Defendants were heavily prejudiced by the admission of evidence of non-prosecution of Fowler.

"[E]vidence of non-prosecution for criminal arson is irrelevant and immaterial in a civil case for fire insurance proceeds." Brown v. Allstate Ins. Co., 344 S.C. 21, 24, 542 S.E.2d 723, 725 (2001) (citations omitted). "[E]vidence of criminal charges related to arson is excluded in suits for fire insurance proceeds because such evidence goes to the principal issue before the court and is highly prejudicial." Id. at 25, 542 S.E.2d at 725 (emphasis added) (citation omitted). "Furthermore, a prosecutor's decision not to prosecute and a jury's decision to acquit in a criminal trial are based on different criteria than those that apply in a civil proceeding." Id.

The Brown Court relied largely upon the Fourth Circuit's ruling in Rabon v. Great Southwest Fire Ins. Co., 818 F.2d 306 (4th Cir. 1987). In Rabon, the plaintiff injected non-prosecution evidence in examination of witnesses and closing arguments. Id. at 308. The Fourth Circuit found that a "court commits reversible error when it permits the plaintiff in a suit for fire insurance proceeds to present evidence of his nonprosecution or acquittal on related criminal charges," and ordered a new trial. Id. at 309. See also, Munoz v. State Farm Lloyds of Texas, 522 F.3d 568, 572-73 (5th Cir. 2008) (admission of non-prosecution evidence in insurance arson case was reversible error); Tennessee Odin Ins. Co. v. Dickey, 190 Tenn. 96, 228 S.W.2d 73 (Tenn. 1950) (even after trial court gave limiting instructions on its use admission of evidence of acquittal in criminal trial was reversible error in subsequent civil suit for insurance proceeds where insurer's defense was that insured intentionally burned his vehicle); Ashby v. Rendezvous

Farms, 381 So.2d 755, 755 (Fla. Ct. App. 1980) (Insured's attorney's comment in closing arguments that no arrest had been made or anyone convicted as a result of the fire was prejudicial and required a new trial).

In Cook v. Auto Club Ins. Assoc., 217 Mich. App. 414, 522 N.W.2d 661 (Ct. App. 1996), the insured elicited evidence of non-prosecution in his cross-examination of an employee of the insurance company by asking why the insurance company did not file an insurance fraud claim. The attorney then commented on this fact in closing arguments. Id. at 416, 552 N.W.2d at 662. The Court of Appeals noted that “[w]ithout exception, all the courts that have considered this issue have concluded that evidence of acquittal or lack of prosecution is not admissible in an insured's suit against the insurer.” Id. at 417, 552 N.W.2d at 662. The Court of Appeals found that this evidence was prejudicial in that it was damaging testimony and used to good effect in closing arguments. Id. at 418, 552 N.W.2d at 418. The Court of Appeals found that, “under the circumstances that exist here, the admission of evidence of an insured's acquittal or lack of prosecution may not be considered harmless error. Id. at 419, 522 N.W.2d at 663.

Plaintiff was able to introduce evidence of non-prosecution through Chief Wright and the expert testimony of Thomas Hesse. Chief Wright testified that SLED was not notified of any suspicions in the fire and did not become involved in this case. Hesse testified regarding communications between Billy Gilden and local law enforcement and that law enforcement were not investigating the fire. Under Brown and the clear majority of jurisdictions considering this issue, both of these statements are irrelevant and immaterial and therefore inadmissible under Rule 402. Furthermore, they were highly prejudicial in this case. Nationwide had the burden of showing that Fowler intentionally burned his house. By eliciting testimony that Fowler was never prosecuted or charged in this case, Plaintiff injected irrelevant and prejudicial testimony on

the major issue in this case and commented on this testimony in his closing argument. Clearly, this testimony prejudicially impacted Nationwide's contention that the fire was intentionally set by the insured. Therefore, Nationwide is entitled to a new trial on the breach of contract claim.

C. Evidence of Post-Denial Conduct

Over Defendants' objections, the Court allowed evidence of actions taken by Nationwide between the date of denial and the date suit was filed. Specifically, Plaintiff presented evidence that: 1) Billy Gilden of Nationwide's SIU failed to follow-up with a local detective after receiving the negative test results for samples taken at the scene of the fire; 2) Nationwide refused to provide a copy of the cause and origin report or the test samples after it denied the claim; and 3) Nationwide refused to grant Fowler an extension for his submission of a proof of loss claim.

The majority of Plaintiff's expert witness testimony of Thomas Hesse focused on these post-denial actions. Furthermore, Plaintiff's counsel relied heavily upon this evidence in his cross-examinations and closing arguments.

II. MOTION FOR NEW TRIAL *NISI* REMITTITUR AS TO THE BREACH OF CONTRACT CLAIM.

A. Evidence of Losses Covered in the Policy

"When the jury's verdict is excessive, the trial judge has the discretionary power to grant a new trial *nisi*." V.E. Amick & Assocs., LLC v. Plametto Env'tl Group, Inc., 394 S.C. 538, ___, 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.

- A. The verdict amount is not supported by any evidence and grossly excessive based upon the evidence presented at trial and the terms of the contract itself.**

COVERAGE A - DWELLING

The policy provided limits of \$154,125.00 with an additional replacement cost rider in the amount of \$30,825.00 (Plaintiff trial exhibit no. 30). The evidence was undisputed that Nationwide paid \$154,125.00 to the two mortgagees in outright satisfaction of the first mortgage and partial satisfaction of the second mortgage. The Plaintiff sought additional amounts for the replacement costs which the policy provided \$30,825.00 worth of supplemental coverage limits. However, the only evidence at trial consisted of the estimate written by Nationwide adjuster Andrew Flanagan in the amount of approximately \$125,000.00 and the Plaintiff's estimate that the cost to rebuild would be \$100.00 per square foot with a total square footage of 1,722 feet. Therefore, the maximum amount of coverage payable under Coverage A, including the replacement cost endorsement, would have totaled \$172,200.00. After Nationwide is given a credit for the amounts paid to the mortgagees, the maximum remaining amount payable to Mr. Fowler under Coverage A would have been \$18,075.00.

COVERAGE B – OTHER STRUCTURES

Coverage B had a policy limit of \$46,113.00. However, the only evidence of damages subject to payment under Coverage B are contained in the estimate completed by Nationwide adjuster Andrew Flanagan in the amount of \$15,500.00. However, there was no evidence that such damage had actually been incurred and moreover, the Plaintiff's sworn statement in proof of loss, trial exhibit no. 25, did not include any claim for any payment under Coverage B. Moreover, neither the Plaintiff nor any other witness testified that any additional structure was allegedly damaged by the fire. Therefore, the Court should find that the jury should not have

awarded any amount under Coverage B or in the alternative, should not have awarded more than \$15,500.00 based on the evidence.

COVERAGE C – CONTENTS

The policy contains a coverage limits of \$114,692.00 and it was undisputed that Nationwide made a \$2,000.00 advance under Coverage C. Therefore, the maximum amount the jury could have awarded for contents was \$112,692.00.

COVERAGE D – ADDITIONAL LIVING EXPENSE

The policy provides limits of \$154,125.00 for this coverage. However, payment is limited for 12 months³. The only evidence submitted on any damage that would be covered under Coverage D was a fair rental value of \$1,400.00 per month. Therefore, even if the jury were to award the Plaintiff twelve months of additional living expense, the maximum amount they could have awarded him was \$16,800.00.

ADDITIONAL COVERAGES

The policy provided debris removal for the dwelling, detached structures and contents with respective limits of \$7,706.00, \$2,306.00 and \$5,735.00 for a total of \$15,747.00. The additional coverage also included landscaping which was limited at \$7,706.00.

TOTAL AMOUNT OF COVERAGES AVAILABLE

The total amount of coverages available to the Plaintiff based on the evidence submitted at trial is as follows:

³ Additional Living Expense. If a covered loss requires you to leave the resident premises, we will pay the required increase in living expenses you incur to maintain your normal standard of living. Payment will be for the shortest time required to repair or replace the premises; or, if you permanently relocate, for the shortest time required for your household to settle elsewhere. Payment will not exceed the limit of liability shown on the Declarations or 12 months whichever occurs first. This period of time is not limited by the end of the policy period.

Coverage A – Dwelling	\$ 18,075.00
Coverage B – Other Structures	\$ 15,500.00 *
Coverage C – Contents	\$112,692.00
Coverage D – Additional Living Expense	\$ 16,800.00
Additional Coverages – Debris/Landscaping	\$ <u>23,453.00</u>
Total Contractual Damages Proven at Trial	\$186,520.00 *

(* This is the maximum allowable; Nationwide would submit that the figures should be reduced by \$15,500.00 based on the Plaintiff's failure to submit a claim for Coverage B in the Proof of Loss.)

III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON BAD FAITH BASED ON THE ERRONEOUS ADMISSION OF POST-DENIAL CONDUCT IN VIOLATION OF STATE FARM V. HOWARD.

In ruling on a directed verdict or JNOV motion, the trial court 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 ___, 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, where the decision is wholly unsupported by the evidence or the law, a JNOV must be granted. Id.

A. Nationwide clearly had a reasonable basis to deny Fowler's claim and Plaintiff produced no admissible evidence at trial to support a finding that Nationwide's decision was unreasonable.

"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 v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992). 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)).

"If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley, 307 S.C. at 360, 415 S.E.2d at 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. "Certainly in a free society, one is entitled to properly litigate without the fear of unequal punishment." Nelson v. United Fire Ins. Co. of NY, 275 S.C. 92, 267 S.E.2d 604 (1980) (reversing a trial court's award of attorney fees to an insured in a fire insurance dispute). In the same vein, an insurer should be able to present honest and reasonable disputes as to facts to a jury without fear of being accused of acting in bad faith. 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). 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, 316 S.C. at 448, 450 S.E.2d at 584 ("Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim . . ."). See also Nelson, 275 S.C. at 96-97, 267 S.E.2d at 606-07 (where there was a dispute as to

whether the insured maintained an insurable interest in a house even after selling the land on which it was located, insurer did not act in bad faith in contesting coverage over a novel issue of law); Brown v. State Farm Mut. Ins. Co., 275 S.C. 276, 269 S.E.2d 769 (1980) (finding no bad faith where insurer and insured had a legitimate dispute as to the value of a damaged vehicle); Baker v. Pilot Life Ins. Co., 268 S.C. 609, 235 S.E.2d 300 (1977) (where insurer and insured had legitimate dispute as to whether insured concealed material information regarding prior doctor's visits and whether the insured had a preexisting condition, the insurer was justified in defending the coverage issue and the refusal to pay was neither without reasonable cause, nor made in bad faith).

Several cases from outside South Carolina support Nationwide's argument on almost identical facts. In Suggs v. State Farm Fire and Cas. Co., 833 F.2d 883 (10th Cir. 1987), the Court of Appeals for the Tenth Circuit 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.⁴ Also, the insurer discovered that the insured was having financial difficulties and had the opportunity to set the fire. The insured hired its own expert that came up with a theory that the fire was of an electrical origin. The insurer then hired another expert that showed that the fire could not have had an electrical origin. Id. at 885-86. 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

⁴ 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 Plaintiff'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.

motions for JNOV, new trial, or a remittitur.⁵ 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.⁶

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. He also ruled out electrical causes and determined that the fire was intentionally set and that a flammable liquid was used to start the fire. The insurer’s investigation found financial motive and opportunity. Even after a jury found in favor of the insured on both the breach of contract and \$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. Because there was evidence to support the insurer’s defense that the fire was intentionally set, it was entitled to

⁵ In addition to finding as a matter of law that State Farm did not act in bad faith, the Court of Appeals found that a remittitur was required. Id. at 889. The evidence presented at trial and the terms of the policy did not support the jury award on the breach of contract claim. Id.

⁶ The insurer also claimed material misrepresentation and that the insured lacked an insurable interest. The Court of Appeals found that those two positions lacked merit, but still found no bad faith based upon the arson defense.

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 the 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 Fowler's financial distress and determined that Fowler clearly had opportunity to set the fire. Fowler hired his own expert who claimed that the fire was caused by a kerosene heater. Then, Nationwide hired another expert who disproved Fowler's theory. 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.

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.

Furthermore, Plaintiff produced no evidence at trial that supports a conclusion that there was no reasonable basis for Nationwide's decision. Although Plaintiff disputed Nationwide's position and ultimately prevailed on that issue, this alone is not sufficient to support a finding of

bad faith. Plaintiff must provide some evidence that Nationwide's position was unreasonable. See Mixson, Inc. v. American Loyalty Ins. Co., 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002). The undisputed evidence showed that Nationwide hired a private investigator, who was qualified as an expert by the court without even objection from the Plaintiff, to determine the cause and origin of the fire. Nationwide also performed an in-depth investigation into Fowler's financial background and canvassed the neighborhood to determine if any other individuals may have started the fire. Mr. Fowler himself admitted that Nationwide employees acted professionally. There was no evidence that Nationwide's cause and origin investigator, Jerry Byers, did not perform a thorough and complete investigation of the scene. Furthermore, there was no testimony that Byers' report itself was unreasonable. Nationwide reasonably relied upon the independent investigation of Jerry Byers in determining that the fire was of an incendiary origin. It further relied upon Mr. Fowler's financial records and statements of his neighbors in determining that Fowler had both motive and opportunity to set the fire.

B. 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 Mr. Fowler. (Plaintiff's Trial Exhibit 24.) 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 v. State Farm Mut. Automobile Ins. Co., 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994). 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 admission of post-denial conduct evidence at trial was improper under the Supreme Court’s holding in *Howard*. Furthermore, this evidence was clearly prejudicial. Plaintiff’s bad faith expert, Thomas Hesse relied exclusively upon post-denial conduct in his testimony that Nationwide acted in bad faith in denying Fowler’s claim. In fact, he admitted he could not give an opinion as to whether or not Nationwide had a reasonable basis to conclude that the fire was intentionally set. (Hesse acknowledged that there was evidence that supported Nationwide’s position that Mr. Fowler had both the motive and opportunity to cause the loss.) Therefore, this court should not consider such evidence in determining whether Nationwide is entitled to judgment notwithstanding the verdict on the bad faith claim because only the evidence Nationwide had before it at the time of its denial is relevant. Since the record is devoid of any evidence that Nationwide acted in bad faith prior to its denial of coverage, and furthermore, the record is replete with evidence of Nationwide’s thorough investigation and objective, acknowledged evidence that the Plaintiff had the motive and opportunity to cause this loss and that the fire was intentionally set, Nationwide is entitled to have the jury verdict in the amount of \$3,000.00 on the bad faith claim set aside and judgment entered in its favor as to the bad faith claim. The jury heard testimony and Plaintiff’s counsel made closing arguments regarding Nationwide’s refusal to provide a copy of the cause and origin report to Fowler, Nationwide’s refusal to grant an extension on the sixty day period for submission of the proof of loss, and Billy Gilden’s failure to follow up with local law enforcement after Nationwide received the lab results. Not only do none of these examples have anything to do with Nationwide’s decision to

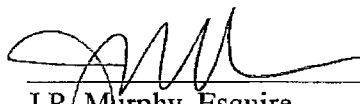
deny coverage in this case, but they are all post-denial conduct and therefore irrelevant and inadmissible under Howard and Rule 402, SCRE. Furthermore, the Supreme Court made it clear in Howard that admission of post-denial conduct is prejudicial and grounds for a new trial. Therefore, this Court cannot consider any such evidence in determining whether Nationwide is entitled to a JNOV on the bad faith claim.

CONCLUSION

Nationwide was heavily prejudiced by the admission of inadmissible hearsay and irrelevant post-denial conduct evidence. Furthermore, the jury's award of \$501,444 for the breach of contract grossly excessive and not supported by the evidence. It is a result of passion, caprice, prejudice, or some other improper consideration. Therefore, Nationwide is entitled to a new trial absolute on the breach of contract claim or, in the alternative, a new trial *nisi* Remittitur to make the verdict consistent with the evidence adduced at trial and the clear language of the policy. Additionally, Plaintiffs produced no evidence supporting his bad faith claim absent irrelevant post-denial conduct. Nationwide had a legitimate dispute as to the cause of the fire and therefore had the right to challenge coverage in court without fear of being subjected to a bad faith claim. Because Nationwide had a reasonable belief that the fire was the result of intentional conduct, Nationwide is entitled to a judgment notwithstanding the verdict on Plaintiff's bad faith claim.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire
E. Raymond Moore, III, Esquire
PO Box 6648

Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendant

Columbia, South Carolina
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FILED OCONEE, SC
 STATE OF SOUTH CAROLINA, WHITEFIELD
 COUNTY OF OCONEE)
 2011 DEC 20 P 2:25)
 James D. Fowler,)
 Plaintiff,)
 vs.)
 Nationwide Mutual Fire)
 Insurance Company and)
 Andrew Flanagan,)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 Civil Action 09-CP-37-768

**MEMORANDUM IN OPPOSITION TO
 DEFENDANT NATIONWIDE'S
 POST TRIAL MOTIONS**

Plaintiff James Fowler (hereafter "plaintiff") respectfully submits this memorandum in opposition to defendant Nationwide Mutual Fire Insurance Company's (hereafter "Nationwide") motions for a new trial, new trial *nisi* remittitur, and JNOV.

STATEMENT OF THE CASE

This is a breach of contract and insurance bad faith case that resulted in a verdict for the plaintiff and against Nationwide on both of these causes of action. There was a defense verdict on the slander cause of action.

As part of its trial strategy, Nationwide put all of its eggs in one basket. Nationwide tried to convince the jury that the plaintiff lit the fire that destroyed his house and that he was therefore not entitled to anything under his insurance policy. Nationwide did not challenge plaintiff's proof of damages, nor assert potential coverage limitations, nor assert any possible setoffs for payments to other parties.

Nationwide lost.

When the case was sent to the jury, the jury had abundant evidence, including the policy, and the law to apply. The court properly instructed the jury to interpret the policy liberally in favor of the policy holder and against the insurance company. The jury could find, based on the policy and all the other evidence, that Nationwide was required to make certain payments, and that it was required to make those payments promptly.

If the jury found that the failure to pay promptly was wrong -- and it did so find because it found not only a breach of contract in cause of action number 1, but also bad faith in cause of action 3 (listed on the verdict form as cause of action number 2) -- then the jury's task was to

apply the policy to the facts, so that plaintiff received what the policy provided, in addition to other appropriate damages. Specifically, if the jury found a breach of contract, it could properly, pursuant to the law and to jury instructions to which Nationwide did not object, award such special/consequential damages as were in the contemplation of the parties and actually resulted from Nationwide's failure to timely pay plaintiff the insurance proceeds to which he was entitled.

The jury could have appropriately found (and did find) that the plaintiff suffered hardship because of the fact that Nationwide did not pay promptly. The plaintiff had been out of his house for 34 months from the date of the loss to the time of trial. Nationwide has paid nothing to plaintiff since it officially denied the claim. The plaintiff testified that it will take twelve months or more to rebuild the house once he had the money, because he would have to obtain the necessary permits and hire a crew or building company to help. The jury, using its common sense, could have reasonably concluded, based on Nationwide's continued unchanging attitude so far, that it will be quite a while before plaintiff gets the money to rebuild. The jury could have further placed (and did place) a large value on the hardship plaintiff has had to endure and will likely continue to endure: living in the gazebo only, bathing in the lake and using the neighbors' toilet facilities until he built his own temporary replacement bathroom facility, and the other damages caused by Nationwide's breach of contract. These are damages that the jury clearly found were in the contemplation of the parties.

Now that Nationwide has lost, it wants to make arguments that it could have and should have made to the jury, probably without success – that is, limits or reductions should apply to plaintiff's claim. It is too late.

Is Nationwide entitled to a credit for the \$154,125 paid to third parties and the \$2,000 paid to plaintiff? Nationwide did not raise the point before or at trial, and did not so argue to the jury. The plaintiff himself only received \$2,000. Nationwide must have felt that arguing for a setoff might be construed as a belated admission that the plaintiff was entitled to the proceeds of the policy and must have decided as part of its overall strategy not to so argue. Apparently as part of its overall strategy, Nationwide decided not to plead or argue payment as an affirmative defense, did not request a setoff because of payment, and did not request a jury instruction on payment. Simply put, Nationwide never argued that it was entitled to an offset for the \$154,125 that it paid to the mortgage companies. Plaintiff should not be penalized because Nationwide gambled on a particular trial strategy and lost, but now belatedly wants to change course.

The policy, called an Elite Homeowners' Policy, provided coverage in the following amounts:

Coverage A - Dwelling	\$154,125
Guaranteed Replacement cost	\$30,826
Total	\$184,950
Coverage B- Other Structures	\$46,113
Coverage C-Contents	\$114,692
Coverage D-Loss of Use	\$154,125
Debris Removal	
Dwelling	\$7,706
Detached Structures	\$2,306
Contents	\$5,735
Landscaping	\$7,706
Total	\$523,333

With regard to Coverage A -- Dwelling, the jury had unchallenged evidence that it would cost at least \$100 per square foot to rebuild the plaintiff's home, which for a structure of 1722 square feet, totals at least \$172,200. The jury was free to find either that amount, with prejudgment interest, or the full amount of the replacement value under Coverage A of the policy, to wit, \$184,950.

With regard to Coverage B -- Other Structures, the jury had evidence, although disputed, that other structures on the site within the meaning of the policy were damaged, and plaintiff was entitled to the maximum amount under Coverage B, to wit: \$46,113.

With regard to Coverage C -- Contents, the jury had unchallenged evidence that the plaintiff's contents loss was \$142,000, so the jury could properly find that the plaintiff was entitled to proceeds under coverage C in the amount of the coverage, \$114,692, or the actual loss, \$142,000. On the evidence presented, the jury could have properly found the higher amount of \$142,000 should be awarded.

With regard to Coverage D -- Loss of Use, it was within the province of the jury to award the maximum amount of \$147,700, in that there is no question that the plaintiff's home was uninhabitable, and he should not be punished for Nationwide's failure to pay for such a long and still continuing period of time.

With regard to coverage for debris removal and landscaping, it was within the province of the jury to award for debris removal, and landscaping, even if the policyholder did the work, as Nationwide's claims manager, Mr. Madden, testified. There is no question that the evidence showed such work was appropriate. The amount of coverage specified for debris removal was: \$7,706 for the removal of structure debris, \$2,306 for the detached structures debris, \$5,735 for contents debris. The jury had evidence that the actual cost of debris removal will be much

greater: \$30,000 according to plaintiff's unchallenged testimony. The amount of \$7,706 was specified for landscaping, but the unchallenged evidence was that plaintiff had very extensive landscaping that was impacted by the fire.

On the breach of contract claim, the jury awarded \$501,444, which is less than the \$523,333 maximum amount of coverage available, and therefore well within the province of the jury, even without reference to the amount of hardship damages resulting from Nationwide's failure to make timely payments required by the policy.

It is not clear exactly how the jury calculated the amount of \$501,444, but it is easy to justify such a number – or an amount much higher. In fact, the \$501,444 may well/probably was the net figure the jury found after applying an offset to what would otherwise be available. This is the most logical interpretation of the fact that the jury in the middle of the deliberations sent out a question whether it should make deductions for prior payments. The precise nature of the verdict makes it clear the jury very carefully considered all the facts in evidence in the record and all the arguments made. The jury did not round off the number, which would suggest imprecision, such as to \$500,000 or \$600,000 or \$700,000.

There is no error in the verdict, and it should not now be set aside or revised because of new arguments presented by Nationwide that could have and should have been pled and should have been argued in front of the trial court and jury.

DISCUSSION

Nationwide has filed motions for a new trial absolute, a new trial nisi remittitur, and a judgment *non obstante veredicto* (JNOV). Nationwide's motions are to be judged taking the facts and inferences therefrom in the light most favorable to the non moving party, the plaintiff. On the facts and the law, all Nationwide's motions should be denied.

I. THE MOTION FOR NEW TRIAL ABSOLUTE SHOULD BE DENIED.

A. The motion should be denied because the verdict is supported by the evidence.

With regard to the motions for a new trial, in order to grant a new trial absolute, the Court of Appeals in *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) observed that:

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the

case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). See also *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion). In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or *nisi* in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the "thirteenth juror." *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). Such discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them...." *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950).

Vinson v. Hartley, 324 S.C. 389, 403-04, 477 S.E.2d 715, 722-23 (Ct. App. 1996)

A new trial absolute may be granted only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, the jury's determination of damages is entitled to substantial deference. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention.

A breach of contract cause of action does not fail where the precise amount of damages are difficult to ascertain because of the wrongful act of the defendant. *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 356, 342 S.E.2d 611, 615 (Ct.App.1986). In *Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 321-22, 57 S.E.2d 638, 644 (1950), the Supreme Court held: "Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must realize that in such cases 'juries are allowed to act upon probable and inferential as well as direct and positive proof.' " See also *Minter v. GOCT, Inc.*, 322 S.C. 525, 529, 473 S.E.2d 67, 70 (Ct. App. 1996).

(1) Hardship Consequential Damages

Nationwide has been on notice since the service of the plaintiff's summons and complaint that the plaintiff sought compensation for the hardship he suffered because of

Nationwide's nonpayment of policy benefits, which constitutes consequential/special damages, and the Court properly instructed the jury on the issue.

Generally, liability for breach of an insurance contract is dependent upon the terms specified in the contract. *Jacobs Press, Inc. v. Hartford Steam Boiler Inspection & Ins. Co.*, 107 F.3d 866 (4th Cir. 1997) (interpreting South Carolina law). Plaintiff may claim damages in the amount of the contractually stated amount of coverage indicated on the face of the Policy together with accrued interest. *Hutson v. Continental Assur. Co.*, 269 S.C. 322, 237 S.E.2d 375 (1977). Additionally, however, the South Carolina Supreme Court has held where the money was to be paid for a special purpose which was known to the party agreeing to make the payment, damages directly and naturally resulting from the breach and therefore supposed to have been in contemplation of the parties may be given in addition to interest. (22 Am.Jur. Damages § 64). Those damages in the contemplation of the parties, known as special damages, must be particularly alleged and proved. *Id.* (citing *Kline Iron & Steel Co. v. Superior Trucking Co., Inc.*, 261 S.C. 542, 201 S.E.2d 388 (1973)). The Court in *Hobbs v. Carolina Coca-Cola Bottling Co.*, 194 S.C. 543, 10 S.E.2d 25 (1940) stated this principle as follows: "But where damages do not necessarily result from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage sustained in order to introduce testimony in regard to it. The rule is to avoid surprise."

The complaint contains the following allegations:

Paragraph 24, "The insurance company has refused to pay for the damage cleanup at the fire, causing plaintiff to incur this trouble and expense himself.

Paragraph 25, "The insurance company has also failed to provide for the plaintiff's loss of use of the damaged house, in that it did not provide alternate living arrangements for him, and the plaintiff has been forced to live in an outbuilding on the property without proper heat or running water, and has suffered inconvenience and discomfort thereby.

The plaintiff also set forth his claim for consequential/special damages in his Answers to Interrogatories, served in September 2009, as follows:

Plaintiff has not received full or proper payment under Nationwide Policy Number 61 39 HO 787845, including but not necessarily limited to the personal property or contents of the home in the basic amount of \$109,910, with extended replacement coverage costs up to \$114,692; loss of use or additional expense in the amount of \$147,407 with additions up to \$154,125; biological deterioration/damage cleanup in the basic amount of \$5,000 with additions up to \$7,706; landscaping in a basic amount with additions up to \$7,706.

Plaintiff has been unable to repair or return to his residence; has been forced to live in an out building on the property without proper heat, running water, toilet or laundry facilities; and has suffered inconvenience and discomfort thereby.

Plaintiff has lost the use of his personal property and the enjoyment of his real and personal property, including the landscaping.

Just as Nationwide cannot deny that it was on notice of the claim, the claim was tried by consent. In the case of *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 85, 572 S.E.2d 298, 300 (Ct. App. 2002), the Court of Appeals was faced with the contention that the plaintiff had no claim for certain damages because the plaintiff did not mention them in the complaint. The court ultimately held as follows:

Having failed to object to the court's consideration of Lee's entitlement to commissions based on Lee's failure to plead a modification of the Parties agreement, Thermal is considered to have tried the issue by consent. See *Simmons v. Tuomey Reg'l Med. Ctr.*, 330 S.C. 115, 125 n. 2, 498 S.E.2d 408, 413 n. 2 (Ct.App.1998) (an issue not expressly mentioned in the complaint but tried without objection and incorporated in the trial court's order is tried by consent according to Rule 15 SCRPC); *McCurry v. Keith*, 325 S.C. 441, 447, 481 S.E.2d 166, 169 (Ct.App.1997) (issues tried by consent will be treated as if raised in the pleadings).

Inasmuch as Nationwide failed to object to the jury instruction regarding consequential/special damages, it cannot do so now. Rule 51, SCRPC, which pertains to jury instructions, states, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection." A party's failure to object or otherwise challenge a jury charge precludes the issue from being raised in a new trial motion to trial court or on appeal. *Winters v. Fiddie*, 394 S.C. 629, 640, 716 S.E.2d 316, 322 (Ct. App. 2011), *Munn v. Asseff*, 226 S.C. 54, 58, 83 S.E.2d 642, 643-44 (1954). Accordingly, because Nationwide failed to object at trial, it cannot now complain about the court's instructions to the jury.

Further, as outlined above in the initial section of this memorandum entitled "Statement of the Case", pages 1 - 4, the jury determined that the total value of the plaintiff's hardship resulting from Nationwide's failure and refusal to pay timely plaintiff's claim was substantial. The calculation of all plaintiff's damage was precisely \$501,444. There is no reason to impeach the verdict on the grounds of passion, caprice, prejudice. If the jurors were so motivated, the

jury would have answered yes, not no, to the interrogatory whether Nationwide acted in a willful, wanton, or reckless manner.

In this case, Nationwide has been on notice since the beginning that plaintiff claimed that he suffered hardship as a result of Nationwide's failure to pay according to the policy and thus consequential damages were an issue. Accordingly, any portion of the award based on the hardship damages should be upheld.

(2) Payment or Offset.

With regard to the issue of payment, it is clear that payment is an affirmative defense that must be pled. Rule 8, SCRCP, states in pertinent part that

In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . payment. . . and any other matter constituting an avoidance or affirmative defense.

According to one legal treatise:

"Payment" is defined as the discharge of a pecuniary obligation by money or what is accepted as the equivalent of a specific sum of money. It is a discharge of a debt by a compliance with the terms of the obligation. Stated more fully, payment is the discharge of an obligation by the actual or constructive delivery of money or its equivalent by an obligor or by someone for the obligor for the purpose of extinguishing an obligation, wholly or partially, and the acceptance of it by the obligee. Payment requires delivery by the debtor and acceptance by the creditor, both with common purpose.

60 Am. Jur. 2d Payment § 1

A second article in that treatise states that:

A setoff does not occur automatically but must be exercised affirmatively. The failure to allege a setoff as an affirmative defense can bar the setoff in the same manner as any other waiver of an affirmative defense by the failure to plead it. The failure to plead recoupment affirmatively can also waive the right to assert it, although recoupment is adequately pled by notice of the asserted defense, regardless of the words used.

20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 106

The venerable treatise *Couch on Insurance* states the following:

Any recovery by insured under a fire policy would be limited to the amount of loss over and above amount paid by insurer to the mortgagee under the mortgage clause of the policy. To the same effect, where a fire insurer paid a mortgagee under a loss-payable clause, such payment was properly deducted from the insured's judgment against the insurer for the face amount of the policy. And, a fire insurer was entitled to setoff against the proceeds payable to a mortgagor the

amount paid to the mortgagee in satisfaction of the unpaid balance of a mortgage debt jointly and severally owed by the insured mortgagors, the fire insurer could not, however, set off the amount it paid to a lienholder of a vehicle under a separate automobile policy covering a vehicle which was also damaged in the fire.

Observation:

Such an offset should be raised as an affirmative defense in any action by an insured against an insurer.

12 Couch on Ins. § 178:60 (emphasis added)

Although there is some authority for offsets being applied by a trial court, those cases are distinguishable in that the court was bound by statutes that mandated such an offset. See *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) (setoff required by terms of statute, therefore it did not need to be pled), *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct.App. 1997)(gambling losses set off by winnings pursuant to statute and therefore not required to be pled or tried by consent.)

Further distinguishing this case is the fact that the payment in this case arguably gave rise to a counterclaim. If a jury agreed with the Nationwide's allegation that plaintiff set the fire, then Nationwide would have had a right to seek payment from Fowler for the payments it made on his behalf. Nationwide chose not to plead the mandatory counterclaim. It did not present evidence as to what the terms of its payments to the mortgage holders were. Nationwide should have asserted this mandatory counterclaim in this suit. SCRPC, Rule 13(a). It did not. Thus, it lost the right to assert the counterclaim. Even if it had asserted the claim, however, it failed to prove its right to counterclaim or offset for the payments made.

In this case, as a matter of trial strategy Nationwide did not assert payment as a defense or otherwise. Nationwide relied solely on its failed plan to persuade the jury that the plaintiff set the fire. Nationwide cannot and should not profit from its gamble at the plaintiff's expense.

3. Specified Policy Benefits

The Nationwide policy required certain specified payments to be made to the policyholder in the event of a fire loss. Nationwide had denied the claim and paid to the plaintiff only a \$2,000 advance for the contents loss. Plaintiff respectfully submits that the jury had abundant evidence on which to find that Nationwide should pay the benefits specified in the policy in full. Please refer to pages 1 - 4 above in the section of the memorandum entitled "Statement of the Case".

As stated above, Nationwide never challenged at trial any aspect of plaintiff's proof of damages. It is too late now for Nationwide to second guess or criticize the jury's verdict.

B. The court properly admitted the evidence challenged by Nationwide.

1. The Court properly admitted the testimony of Chief Wright.

The admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. *Pike v. South Carolina Dep't of Transp.*, 343 S.C. 224, 540 S.E.2d 87 (2000); see also *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (Ct.App.2000), cert. granted (holding the court's ruling to admit or exclude evidence will only be reversed if it constituted an abuse of discretion amounting to an error of law). In order for an appellate Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997).

Very respectfully, Nationwide mistakenly now complains that Chief Wright testified as an expert and that his report is inadmissible hearsay not falling under the exception provided by South Carolina Rule of Evidence 803(8).

The question of the status of Chief Wright as a witness was carefully considered by the Court at the trial. The defendants had filed a motion in limine to exclude testimony by Chief Wright as an expert witness. The plaintiff, however, had offered him as a fact witness. The Court ultimately allowed Chief Wright to testify as a fact witness.

The defendant had further challenged the admission of evidence of the Truck Report signed by Chief Wright. As established by the testimony of all the fire witnesses, however, the Truck Report is a report prepared by Chief Wright pursuant to regulations of the State Fire Marshall. The Chief, who was present not only at the fighting of the fire but also in Court to testify, completed the report making the observations required by the regulation.

The trial Court, in correct observation of the limitations in Rule 803(8), excluded the second version of the Truck Report which had a narrative, which arguably stated opinions, judgments, or conclusions.

It is important to note that Chief Wright was present to testify. Nationwide had the chance to cross examine Chief Wright. Chief Wright never said he was an expert. The jury gave his testimony appropriate weight, as properly instructed by the Court.

The judge's handling of the testimony of Chief Wright was entirely consistent with the provisions of Rule 701 regarding opinion testimony by lay witnesses. As stated in the rule, if a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the

perception of the witness, (b) are helpful to a clear understanding with the witnesses' testimony or the determination of the fact that you, and (c) do not require special knowledge, skill, experience, or training. As stated above, the Chief's testimony was based on his observations at the scene on the day of the fire – clearly a rational basis.

The observation of Chief Wright about the fire was not as to how it started, but rather where it started. The Chief testified that the location was near the heater (not that the heater was the cause of the fire). The Chief identified this location using three factors: (1) the v-factor, (2) the location of the greatest damage; and (3) the area right below the place where the fire first broke out from the roof. Thus, the Chief's testimony as to the location of the fire was not a direct challenge to defense witness Byers' opinion that an accelerant was the cause of the fire; but rather it simply showed that Mr. Byers' opinion as to where the fire was started with the accelerants was wrong; because it was inconsistent with the Chief's observation on the day of the fire as to the location.

The Chief's testimony in its entirety was necessary and relevant to other aspects of the case: (1) there was a fire which resulted in a total loss, (2) the Chief did not smell any accelerants, and (3) the local fire department made a report but Nationwide's hired fire expert essentially disregarded the Chief's observation – relevant to bad faith.

The Judge's instructions to the jury correctly instructed the jury as to the weight to give to the testimony of all the witnesses, including expert witnesses, and the defendant did not object.

The case at bar is distinguishable from the *Morris* case cited by the defendant, because Chief Wright testified in person, whereas the bankruptcy examiner in *Morris* was not in Court to testify and only the bankruptcy examiner's report was offered, under an exception to the hearsay rule.

The case at bar is also distinguishable from the *Carson* case cited by the defendant, because Chief Wright was present to testify, whereas in *Carson* an incident report was offered without the testimony of the officer who prepared it based on his personal observations.

In the *Cardinal v. Farmer's Mutual Insurance Company* case cited by the defendant, the Court determined that even if there were errors in the admission of a report, they were harmless because the fire chief in *Cardinal* was present to testify. As noted, Chief Wright was present and did testify.

2. Defendant was not prejudiced by evidence of non-prosecution of plaintiff.

Defendant mistakenly complains now that it was prejudiced by admission of evidence of non prosecution of the plaintiff. Very respectfully, this is a new complaint and one raised too late.

Defendants never argued this position in a motion in limine. There was no objection on these grounds at trial.

Although the defendant is now seeking objections to make because the verdict was for the plaintiff, the reason that defendant made no such arguments at trial is that there never was any evidence offered, nor any argument made, that the plaintiff had not been prosecuted.

The evidence regarding the Oconee Sheriff's Deputy was simply that Nationwide's investigator Gilden had, as evidence of bad faith, gone to the Deputy before Nationwide had received Byer's report and even before Byers got the negative debris sample test results. It was further evidence of bad faith that Gilden had never returned to the Deputy to report the negative test results when they were received.

Chief Wright testified that he was aware that the house had no electrical power, so he looked carefully for anything suspicious about the fire debris, so that he could make a report to the SLED if there were anything suspicious. This is relevant to the jury's consideration of the bad faith claim. In the Alabama case of *United Services Auto Association v. Wade*, 544 So.2d 906 (1989), the Court explained the rationale for admission of such evidence:

In each of the cases cited by USAA, it is evidence of non-prosecution that the policyholder seeks to elicit. In the present case, the Wades presented the testimony of the investigator that he had never suspected the Wades of arson, not evidence that they were not prosecuted. Although a prosecutor may consider the higher burden of proof in determining whether to bring charges, an investigator obviously does not consider burdens of proof in determining whether or not he suspects someone of arson.

One consideration in a bad faith case is what was known by the insurance company at the time of the decision to deny the policyholder's claim. It would be very relevant to the trial court to know that USAA knew that the investigator from the fire marshal's office did not suspect the Wades of arson. 544 So.2d at 907. (Emphasis added.)

3. Evidence of defendants' conduct in handling the claim before litigation.

In its post trial motion, defendant renews its objection made at trial regarding evidence of actions by the defendants which occurred after the initial claim denial letter dated February 11, 2009, but before the filing of a lawsuit. The defendants' position amounts to the claim that its actions are immune from examination once it has issued an initial claim denial

letter. The Trial Court correctly ruled that there is no such bright line as to when the defendants' actions are immune from the scrutiny of the jury.

The plaintiff submits that the language cited by the defendants in *Howard v. State Farm Mut. Automobile Ins. Co.*, 316 S.C. 445, 45 S.E.2d 582 (1994) is *obiter dictum*. The actual holding of the case, based upon the facts of the case, was that the insurance company could not be held for a bad faith claims handling if the plaintiff's proof consisted of actions taken by the insurance company during the litigation itself. The South Carolina Rules of Civil Procedure provide remedies and sanctions for discovery abuses by an insurance company after litigation begins. Indeed, the plaintiff in this case has successfully filed motions to compel discovery by Nationwide on two occasions.

Nationwide's position in this case amounts to the same position that Nationwide took in the case of *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986). The Supreme Court specifically rejected the idea that the insurer can limit the jury's examination of the defendant's conduct to an evaluation of the contents of the insurer's own investigation, which would have been complete by the time the denial was made. The Court's holding allows the jury to examine the whole process of the claim's handling. The insurer is required to exercise an honest and informed judgment in processing a bad claim. *Am. Fire & Casualty Co. v. Johnson*, 332 S.C. 307, 504 S.E.2d 356 (Ct.App. 1998). The covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed. *Mixson, Inc. v. American Loyalty Ins. Co.*, 349 S.C. 394, 562 S.E.2d 659 (Ct.App. 2002).

It is quite relevant that after the February 11, 2009 initial claim denial letter, the plaintiff submitted his sworn Proof of Loss within the required sixty days. Mr. Flanagan had declined to give him an extension. When he received the Proof of Loss, Mr. Flanagan denied the claim again on March 17, 2009. Thus, the claims process was a continuum of actions on both sides. There is no reason to have a bright line drawn at the initial claims denial letter.

II. THE COURT SHOULD DENY THE MOTION FOR A NEW TRIAL NISI REMITTITUR AS TO THE BREACH OF CONTRACT CLAIM.

Nationwide has belatedly decided to challenge the plaintiff's proof of damages. As noted above, the defendants apparently made the strategic decision to put all their eggs in one basket. They focused at trial entirely on an effort to convince the jury for the plaintiff lit the fire to his own house and therefore defendants would owe nothing at all. Defendants' strategy failed. The jury

found that the plaintiff on both of the breach cause of action and the bad faith cause of action. It is now too late for defendant to try to chip away at the verdict, which was fully supported by evidence which was neither challenged in cross examination nor contradicted by contrary evidence introduced by the defendants.

Plaintiff respectfully refers to the sections of this Brief on page 1 - 4 above in the section entitled "Statement of the case". There is an abundance of evidence to support the award, considering not only the specific policy benefits, but also the hardship damages suffered by the plaintiff.

With reference to the nit picking in the defendants' brief on pages 11-13, several specific comments about Nationwide's present new calculations are in order. First, footnote 3 on page 12 of Nationwide's memorandum would limit to twelve months the payment of additional living expenses. It is quite clear that the intentions of the parties to the contract as to this benefit limitation were premised on the idea that the insurance company would honor the policy holder's claim and would start making payments immediately. In such circumstances, which do not apply here, the parties could well have expected a house to be replaced within twelve months. This does not apply here, however, because Nationwide did not honor the claim and did not start making payments immediately. It has never made payments. Therefore, the jury could properly find that this limitation to twelve months did not apply to the circumstances in this case. Indeed, Nationwide would not have had the cold hearted audacity to make the argument to the jury that, thirty-four months after the fire, it would only be required to make twelve months of additional expense payments even if the jury found that Nationwide should have honored the claim in the first place.

Nationwide's failure to make the cold hearted audacious claim for application of the twelve month limit to the jury, or at any time before the post trial motions, bars Nationwide from making such a claim now.

Secondly, Nationwide's failure to plead or to argue to the jury the applicability of any of the other limits which it now cites in the contract should, and plaintiff respectfully submits, does bar Nationwide from doing so now. If Nationwide had stepped forward in January and February of 2009 and made payments in the amounts specified in the policy, then it would be entitled to have said to the jury that it should not pay any more for these coverages. Nationwide did not step forward in this fashion in 2009. Nationwide did not make these arguments to the jury at the trial. Therefore, Nationwide should be, and is, barred from making such a claim in its post trial motions.

Third, the entirety of defendant's argument on pages 10 through 13 of the memorandum requesting a new trial *nisi* overlooks completely the hardship damages which the jury was entitled to award the plaintiff. The jury was instructed that it could award actual damages to the plaintiff which were within the reasonable contemplation of the parties at the time of the entry into the contract, so long as the damages actually occurred. The jury was well justified in awarding substantial damages for such hardship resulting to the plaintiff from Nationwide's calculated refusal to make any payments to allow him to rebuild his home, to replace his contents, and to find alternate living arrangements.

III. THE MOTION FOR JNOV SHOULD BE DENIED.

The defendants' motion for JNOV is directed only towards the verdict on bad faith. It is based on two ideas. The first is that it Nationwide's own investigation alone gave Nationwide an unimpeachable "reasonable basis" to support the denial. Plaintiff respectfully refers to the discussion above in this memorandum on page 13 regarding the case of *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986).

The second basis of Nationwide's motion is based upon the idea that there is a bright line to cutoff scrutiny of the defendants' conduct at the time of an initial, premature denial letter. Plaintiff respectfully refers to the discussion on pages 12 through 13 above.

With regard to the motion for JNOV, in ruling on a motion for JNOV, the court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996). In making this determination, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the plaintiff. *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct.App.1997). The trial court must deny the motion when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000).

In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003). When considering a JNOV motion, the trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 320, 585 S.E.2d at 274; *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998).

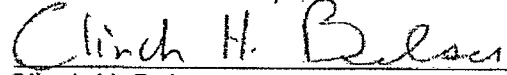
The court should uphold a jury's verdict if there is any evidence to sustain it. *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct.App.1994), *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004).

It is respectfully submitted that, as set forth above, there is ample evidence in the record and the verdict should be upheld.

CONCLUSION

For the reasons stated above, Nationwide's post trial motions should be denied.

BELSER & BELSER, P. A.



Clinch H. Belser, Jr., Esquire

H. Freeman Belser, Esquire

Michael J. Polk, Esquire

1901 Main Street, Suite 1550

Post Office Box 96

Columbia, South Carolina 29202

(803) 929-0096

Attorneys for Plaintiff

Columbia, South Carolina

December 19, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**DEFENDANT NATIONWIDE'S MOTION
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES**

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

Plaintiff filed a Motion for Attorney's Fees pursuant to South Carolina Code § 38-59-40 on December 9, 2011. The statute the Plaintiff relies on limits attorney's fees to a maximum of one-third of the amount of the (not "verdict") judgment. S.C. Code § 38-59-40(1) ("The amount of attorneys' fees may not exceed one-third of the amount of the judgment.") Defendant Nationwide Mutual Fire Insurance Company ("Nationwide") has filed a Motion for New Trial Absolute, or in the alternative, a Motion for New Trial *nisi* Remittitur as to the breach of contract claim and a judgment *non obstante verdicto* (JNOV) as to the bad faith claim. Obviously, if the Court grants Defendant's motion for a JNOV, Plaintiff would not be entitled to any attorney's fees. S.C. Code § 38-59-40 (requiring that the denial of payment be made in bad faith). Furthermore, if the Court grants a new trial absolute, Plaintiff's motion will be moot. Therefore, the motion for attorney's fees is not ripe until the Court resolves these motions.

Plaintiff's listed attorney's fees, totaling \$188,985.00, are not reasonable. Should the Court deny Defendants' post-trial motions, Nationwide request sixty (60) days for discovery and a full evidentiary hearing to determine a reasonable amount of attorney's fees. Plaintiff also lists

costs totaling \$25,797.87. Costs are not recoverable as attorney's fees and a motion for costs under Rule 54(d) is premature. Therefore, the listed costs should be denied.

A. Plaintiff's purported fees are unreasonable Defendants request 60 days for discovery and a full evidentiary hearing to determine what fees are actually reasonable.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993) (citing Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)). "Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling." Baron Data Systems, Inc. v. Lotter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). The court must make "specific findings of fact on the record for each factor" Id. at 494, 427 S.E.2d at 661.

If the Court does not grant the motions for JNOV or the new trial absolute, but does grant the remitter to \$186,520.00¹, Defendant Nationwide will not dispute that reasonable attorney's fees were one-third of that amount (\$62,173.33). However, if the Court denies all of Defendant's motions and enters judgment for \$501,444.00, the maximum amount allowed by the statute would be \$167,148.00. This substantial award of fees would be significantly more than any reasonable amount considering the six factors above-listed. Nationwide should be given an opportunity to address the reasonableness of the fees in a full evidentiary hearing with some

¹ As discussed more fully in Defendants' Memorandum of law in support of its Motions for New Trial, New Trial *nisi* Remittitur, and JNOV, Nationwide would submit that this figure should be reduced by \$15,500.00 based on Plaintiff's failure to submit a claim for Coverage B in the Proof of Loss.

limited discovery. This was a civil arson case. Although both sides used expert witnesses, there were relatively few witnesses and the facts of the case were simple.

Plaintiff failed to provide proper discovery responses regarding attorney's fees. During the early stages of discovery, Defendants, through interrogatories, requested that Plaintiff: "Set forth a statement of all damages claimed to have been sustained by the party." (Interrogatories to Plaintiff, ¶ 3, attached as Exhibit A). Plaintiff's response to this interrogatory, at least as to attorney's fees, merely states: "Plaintiff has been required to hire a lawyer and incur costs for the prosecution of this lawsuit in order to collect the amounts due under the policy." (Plaintiff's Answers to Defendants' Interrogatories, 3, attached as Exhibit B). Defendant also requested production of: "All documents relating to the claims set forth in the Complaint or identified in Plaintiff's answers to Interrogatories." (Request for Production to Plaintiff, ¶ 1, attached as Exhibit C). Plaintiff never provided any documents or identification of specific amounts relating to his attorney's fees. Plaintiff never supplemented his discovery responses and Defendants first received the itemized list with the motion addressed herein.

The itemized list contains over forty (40) pages of entries. Many of the listed rates and items are not reasonable on their face. For example, Plaintiff's counsel bills a law clerk's time for preparing trial exhibits at \$150.00 per hour. See Liberty Mut. Ins. Co. v. Employee Resource Mgt. Inc., 176 F. Supp. 2d at 540 (finding a billing rate of \$90.00 per hour for a summer associate at Moore & Van Allen to be excessive and reducing the rate to \$65.00 per hr).

A reasonable hourly rate is determined by comparing the rates of the prevailing party's attorneys to the prevailing market rates in the community for similar services by lawyers of comparable standing. Liberty Mut. Ins. Co. v. Employee Resources Management, Inc., 176 F. Supp. 2d 510, 535 (D.S.C. 2001) (comparing fees for other similar work both by the prevailing

party's attorney and in the local community). Plaintiff's attorney states that his standard rate is \$300.00 per hour. (Aff. of Counsel Regarding Attorney's Fees, 2, attached as Exhibit D). An hourly rate of \$300.00 per hour in Columbia or Oconee for a civil arson suit is unreasonable.

Due to the substantial amount of alleged fees and Plaintiff's failure to provide proper discovery responses in regards to attorney's fees, Defendants request 60 days to conduct discovery and a full evidentiary hearing on this matter to determine what fees were actually earned and whether those fees are reasonable. See Sunrise Sav. & Loan Assoc. v. Mariner's Cay Dev. Corp., 295 S.C. 208, 211, 367 S.E.2d 696, 698 (1988) (remanding for determination of attorney's fees and noting that it will be necessary to take evidence on the reasonableness of the fees); Smith v. Strickland, 314 S.C. 192, 198, 442 S.E.2d 207, 210 (Ct. App. 1994) (remanding for an evidentiary hearing on the amount of reasonable attorney fees).

B. Plaintiff cannot recover costs in his motion for attorney's fees and cannot file a motion for costs under Rule 54(d) until the Court enters its final judgment.

Plaintiff has not filed a motion for costs under Rule 54(d) and such a motion would be premature until the entry of final judgment. Rule 54(d), SCRPC ("A motion for costs . . . may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment.") Therefore the \$25,797.87 is not recoverable at this time. Defendants reserve their right to challenge the listed costs. Furthermore, many of the listed costs are not chargeable under Rule 54(d) or any other statute.

"Costs and expenses of actions and proceedings are allowed to be taxed against the losing party only by statute." Oliver v. South Carolina Department of Highways and Public Transportation, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992) (citation omitted). "Costs 'have always been regarded in this state as in the nature of penalties; hence statutes allowing them are strictly construed, and the party who claims the right to tax them against another must be able to

point to some statute which allows him to do so.’ ” Id (emphasis added). The party seeking costs must “point to a specific statute or rule of court to support each of his claims for costs, fees, and disbursements.” Black v. Roche Biomedical Laboratories, a Division of Hoffman-Laroche, Inc., 315 S.C. 223, 228, 433 S.E.2d 21, 24 (Ct. App. 1993).

Plaintiff fails to list a single rule or statute authorizing the award of costs for the numerous items listed and many of the items simply are not recoverable under Rule 54 or any other rule. For example, Plaintiff is not entitled to the retainer, consultation or other expert witness fees for FireFuzz Enterprises, Doug Ross, or Thomas Hesse. Black, 315 S.C. at 230, 433 S.E.2d at 25 (citing Oliver, 309 S.C. at 319, 422 S.E.2d at 132 (1992)) (a prevailing party is not entitled to expert witness fees except those provided for in Rule 45(b)(1)). Plaintiff also cannot recover the costs of depositions for witnesses who testified at trial. G. & C. Railroad Co. v. Choice, 7 Rich. 40, 41 S.C.L. 40 (Ct. App. 1853) (holding that where an individual both testifies in deposition and at trial, the prevailing party is only entitled to the trial fees, (i.e. the witness fee and mileage) and not the deposition fees). Because every witness deposed testified at trial, Plaintiff cannot recover any deposition fees. Plaintiffs are only entitled to the witness and mileage fees for witnesses as provided under Rule 45(b)(1).

Also, Plaintiff’s itemized list of costs is not specific enough to determine what costs are or are not recoverable. A large portion of the list consists of photocopy fees, postage fees, and travel expenses, but Plaintiff fails to provide any specificity as to why the costs were incurred or why they were necessary. Travel expenses for witnesses are limited to “witness fees and mileage actually traveled as specified in Rule 45(b)(1), paid to persons who were subpoenaed and testified at trial.” Rule 54(e), SCRCF. Rule 54(e) only allows for costs of “one copy of a document introduced in evidence in lieu of the original” Therefore, only those photocopy

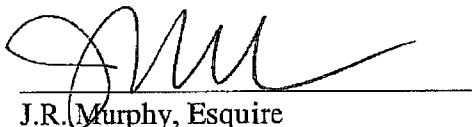
fees that represent the single copy submitted in evidence at trial are recoverable. See Oliver, 309 S.C. at 319-20, 422 S.E.2d at 132 (holding prior to the addition of Rule 54(e)(6), that a prevailing party could not receive any fees for producing exhibits at trial). The itemized list does not specify what the photocopies, color copies, postage charges, or travel expenses were incurred for. The Plaintiff has not met its burden to establish that the requested costs. Without discovery on this issue, it is impossible to determine if any of those listed costs are actually recoverable.

CONCLUSION

Accordingly, the motion for attorney's fees is not ripe at this time and the costs listed in Plaintiff's itemized list should be denied outright until and unless a proper motion for costs under Rule 54(d) is filed after entry of the final judgment. Finally, the purported attorney's fees are unreasonable. If the Court denies Defendants' post-trial motions, Defendants request sixty (60) days to conduct discovery on the issue of reasonable attorney's fees and a full evidentiary hearing on the matter. If the court denies the motions for new trial, or JNOV but grants Remittitur to \$180,000.00, Defendant will not contest attorney's fees of one-third remitted amount.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to be 'JRM', written over a horizontal line.

J.R. Murphy, Esquire
E. Raymond Moore, III, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendant

Columbia, South Carolina
January 12, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

CIVIL ACTION NO: 2009-CP-37-768.

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFF'S
MEMORANDUM IN OPPOSITION TO
DEFENDANT NATIONWIDE'S POST
TRIAL MOTIONS**

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

Plaintiff's Memorandum in Opposition to Nationwide Mutual Fire Insurance Company's (hereinafter "Nationwide") post-trial motions raises several new issues that Defendant now addresses. First, Plaintiff is not entitled to special damages under his breach of contract claim because he never pled such special damages in his Complaint and such damages are not legally warranted by the facts of this case. Secondly, Nationwide had no obligation to affirmatively plead offset for its payments to Plaintiff's lienholders because the payments go to the amount of Plaintiff's damages and are not an affirmative defense to any of his claims. Thirdly, if Plaintiff is entitled to reasonable attorney's fees, the statutory limitation provided in South Carolina Code § 38-59-40 applies to the amount due under the contract and does not include consequential damages.

- I. Plaintiff is not entitled to any special damages because he failed to allege special damages in his complaint and he is not legally entitled to them under the facts of this case.**

"Damages for breach of an obligation to pay money are generally limited to the amount due [under the terms of the contract] plus interest." Cook v. Mack's Transfer & Storage, 291 S.C. 84, 89, 532 S.E.2d 296, 299 (Ct. App. 1986) (citation omitted). The Supreme Court in

Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983), changed this general rule by allowing consequential damages in tort for the bad faith failure to pay benefits due under an insurance contract. Id. Explaining the change, the Supreme Court stated:

Heretofore, the only compensation a successful insured could expect through litigation was the belated payment of his claim and the possibility of recovering attorney fees up [the amount allowed by the predecessor to South Carolina Code § 38-59-40].

We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages.

Id. at 340, 306 S.E.2d at 619. As the Nichols court makes clear, breach of contract damages in first-party insurance cases are limited to the amount due under the policy. Consequential damages are properly pled under Plaintiff's bad faith claim. That is exactly how Fowler pled his claim in this case.

In Nichols, the trial court required that the insured elect between his contractual remedy and his bad faith remedy because the damages were duplicative. Because the jury awarded punitive damages, the trial court threw out the contractual remedy. The Supreme Court ruled that the insured could not recover his statutory attorney fees under what is now South Carolina Code § 38-59-40 because he had elected recovery under the bad faith cause of action. Id.

In an attempt to avoid this problem, Fowler intentionally chose not to plead special consequential damages in his breach of contract cause and agreed to a verdict form that delineates between bad faith consequential damages and contractual damages. Fowler further chose not to submit any evidence relating to attorney's fees. This assured that no part of the two verdicts would represent recovery for the same damages and allowed Plaintiff to theoretically

“maximize” his recovery. Now, after receiving less than he desired for the bad faith cause and more than was warranted under the evidence in his breach of contract cause, Plaintiff retroactively claims he sought special damages all along.

Based upon the pleadings and evidence at trial, Plaintiff never sought special damages under the breach of contract claim. Plaintiff was limited in his breach of contract cause to the amount due under the terms of the contract. The verdict form provided separate locations for the allocation of breach of contract damages and bad faith damages. The issue of punitive damages was not reached by the jury. Therefore, the blank for bad faith damages could only represent the jury’s determination of the amount of consequential damages resulting from Nationwide’s alleged wrongful breach of the policy. It was Plaintiff’s responsibility to either specifically plead and prove special damages or properly inform the jury as to what consequential damages were available in his bad faith cause of action. The jury awarded \$3,000.00 and no more for Plaintiff’s consequential damages. This is the limit of his extra-contractual damages.

a. Plaintiff failed to plead special damages and cannot rely upon an erroneous jury verdict to claim he is now entitled to such damages.

A party must particularly allege and prove special damages in a breach of contract action. Kline Iron & Steel Co. v. Superior Trucking Co., Inc., 261 S.C. 542, 546, 201 S.E.2d 388, 390 (1973); see also Holmes v. Nationwide Life Ins. Co., 273 S.C. 711, 258 S.E.2d 924 (1979) (holding that trial judge erred in charging that insured could recover consequential damages on breach of insurance contract cause of action; where special damages were not pled, judge should have charged the jury that the amount recovered in the policy was the only amount recoverable).

In his general statement of facts, Plaintiff alleged damage for debris removal and loss of use of his house. (Complaint ¶¶ 24-25). He did not seek special damages in his cause of action for breach of contract:

On information and belief, 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.

(Complaint ¶ 31). Plaintiff did plead consequential damages in his bad faith cause of action:

The Defendant Nationwide's wrongful actions have damaged the plaintiff, in that he has not received the benefits to which he is entitled under the said policy, causing consequential damages.

(Complaint ¶ 40).

Furthermore, Plaintiff's responses to interrogatories never put Nationwide on notice of any claim for special damages under the breach of contract claim. Defendant requested that Plaintiff "[s]et forth a statement of all damages claimed to have been sustained by the party."

(Defendant's Interrogatories ¶ 3). Plaintiff responded (in relevant part):

Plaintiff has been unable to repair or return to his residence; has been forced to live in an out building on the property without proper heat, running water, toilet or laundry facilities; and has suffered inconvenience and discomfort thereby.

Plaintiff has lost the use of his personal property and the enjoyment of his real and personal property, including the landscaping.

(Plaintiff's Answers to Defendant's Interrogatories ¶ 3). Plaintiff never asserts that these are special damages or in any other way suggests that these claims are anything other than bad faith consequential damages. He does not set out his claimed damages in subsections for breach of contract, bad faith, and/or slander. Nationwide does not have a duty to read Plaintiff's mind and divine that Plaintiff asserts special damages rather than consequential damages. This is exactly why the caselaw requires that special damages be specifically alleged and proved.

Plaintiff failed to specifically plead special damages as required by Kline, but instead chose to seek these consequential damages in his bad faith claim. Therefore, any amount of the jury verdict for breach of contract constituting special damages is not recoverable.

- b. Nationwide did not try the issue of special damages by consent because the evidence Plaintiff now claims supports an award of special damages was unobjectionable and submitted for the purpose of proving bad faith consequential damages.**

Rule 15(b) allows amendment of the pleadings to properly reflect the evidence when an issue not properly pled is tried by express or implied consent. Sunvillas Homeowners Assoc., Inc. v. Square D. Co., 301 S.C. 330, 334, 391 S.E.2d 868, 870-71 (Ct. App. 1990). “Express consent may be demonstrated by a stipulation but implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial.” Id. at 335, 391 S.E.2d at 871 (emphasis added) (citing 6A C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure Section 1491 (2d ed. 1990)). Evidence that Plaintiff now claims showed “hardship” was relevant and unobjectionable under his claim for bad faith consequential damages. ~~The Court of Appeals in Sunvillas held that, “when the evidence is relevant to the~~ issue already in the case as well as the issue sought to be added by amendment,” the defendant did not impliedly consent because it was not conscious of the relevance of the evidence to issues not raised by the pleadings if that matter was not made clear by the plaintiff. Id. at 335, 391 S.E.2d at 871.

Plaintiff asserts that Nationwide, by failing to object to the consequential damages evidence, impliedly consented to trying the issue of special damages for breach of contract. However, Nationwide did not object to the evidence or instructions regarding consequential damages because South Carolina law clearly allows consequential damages in the event that Nationwide acted in bad faith. See Nichols, 279 S.C. at 340, 306 S.E.2d at 619 (first recognizing

a cause of action for insurance bad faith wherein an insured may recover consequential damages). It is Plaintiff who failed to plead special damages for breach of contract or make a motion to amend his complaint to plead special damages and he has thereby waived any right to claim them in the verdict.

As in Sunvillas, Nationwide had no reason to object to Plaintiff's supposed "special" damages evidence because such evidence was clearly admissible and available as consequential damages if the jury determined that Nationwide acted in bad faith. Plaintiff only asserted that he was entitled to the "amounts of his losses covered by the policy" under the breach of contract cause of action. He only asserted a claim for consequential damages in his bad faith cause of action. Because consequential damages are available for bad faith, Nationwide had no reason to object to such evidence and did not, in any way, consent to trying the issue of special damages. Therefore, any portion of the breach of contract verdict that Plaintiff claims as special or consequential damages is not recoverable and the verdict should either be thrown out and a new trial granted or the court should remit the award to an amount supported by the terms of the contract as more fully detailed in Defendant's Memorandum in Support of its Motion for New Trial Absolute, New Trial *nisi* Remittitur, and JNOV.

c. Plaintiff is not legally entitled to special damages under the facts of this case because such damages were not in the contemplation of the parties at the time the contract was executed.

The jury clearly awarded more damages for breach of contract than the maximum amount due under the terms of the policy based upon the evidence submitted in the case. Plaintiff asserts that this amount is justified as "hardship" damages. The Supreme Court addressed this issue in Holmes, wherein Nationwide denied benefits due under a health insurance policy. The plaintiff alleged that he borrowed \$3,800.00 at 9% interest to pay his

medical bills after the claim was rejected. The jury awarded more than the amount applicable under the terms of the contract (and apparently more than the 9% interest as well). Special damages were not specifically alleged. The trial court remitted the award to \$4,058.10, representing the medical expenses incurred plus interest paid on the loan. Holding that “the proper measure of damages in this case is that amount actually stipulated by the terms of the policy,” the Supreme Court held that the trial court should have further reduced the award to “the amount covered in the policy” which was “the only amount recoverable in this action.” Id. at 715, 258 S.E.2d at 926-27.

In Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992), State Farm denied health insurance coverage to an insured based upon its position that the contract was never formed or that the preexisting condition exclusion applied. A jury found in favor of the insured, awarding \$34,863.06 in actual damages and \$30,000.00 in punitive damages. On appeal, the Supreme Court reversed the bad faith verdict, finding that State Farm had a reasonable basis to investigate the claim because the insured was diagnosed with coronary artery disease the day after making the application for health insurance. Because State Farm did not act in bad faith, the Supreme Court reduced the amount of actual damages to the amount permitted under the contract, noting: “Actual damages are limited by the contract absent a finding of bad faith.” Id. at 360, 415 S.E.2d at 397. The Supreme Court failed to elaborate as to what the reduction in damages represented, but it seems that it must have been the consequential damages from State Farm’s refusal to pay the medical bills when due.

Plaintiff relies upon Kline for the proposition that a party may recover special consequential damages in a breach of contract action. However, special damages are only recoverable in a breach of contract action where such damages are within the contemplation of

the parties at the time the contract was entered into. Kline, 548, 201 S.E.2d at 391 (“The rule is well settled that ‘notice at the time of the contract of circumstances from which special damages may reasonably be expected to result will make the defendant liable for such damages on the ground that they were within the contemplation of the parties, and therefore regarded as forming a part of the contract.’”)

Kline is inapplicable. First, and foremost, Kline is not an insurance case and was not a contract to pay money. Kline involved the production and delivery of a shipment of steel to a contractor. As noted above, damages for breach of a contract to pay money are typically limited to the amount due plus interest. There is no similar limitation for damages in contracts for the delivery or sale of goods.

Secondly, in Kline, the plaintiff informed a steel supplier that a delivery of steel was needed immediately for the construction of a television tower and that without the steel, the plaintiff would be forced to pay stand by time. Therefore, the breaching party was put on notice of the special consequential damages at the time it entered into the contract. There was no such communication in this case to put Nationwide on notice of any special circumstances of Mr. Fowler. Plaintiff failed to present any evidence suggesting that Nationwide (or Mr. Fowler) anticipated that Mr. Fowler would choose to live in a gazebo with no running water in the event that Nationwide failed to pay under the policy. There was no evidence of Mr. Fowler communicating such special circumstances to Nationwide at the time the contract was entered into. Furthermore, Plaintiff never alleged such special damages for breach of contract in his Complaint. It is an essential element of special damages that the parties contemplate the special damages at the time of contract and Plaintiff failed to present any evidence in support of this element.

Thirdly, Kline is pre-Nichols. The Supreme Court in Nichols changed the law of damages with regards to insurance contracts. Post-Nichols, an insured may recover consequential damages for breach of an insurance contract, but these damages are properly awarded under a bad faith cause, not a breach of contract. See Crossley 307 S.C. at 360, 415 S.E.2d at 397 (“Actual damages are limited by the contract absent a finding of bad faith.” (citing Nichols, 279 S.C. at 340, 306 S.E.2d at 619); see also Holmes, 273 S.C. at 715, 258 S.E.2d at 927 (Even before Nichols, if a Plaintiff fails to plead special damages, he is limited to the amount due under the terms of the contract)).

Therefore, under the plain application of the rule that special damages must be specifically pled and must be in the contemplation of both parties at the time they enter the contract, Plaintiff cannot recover for “hardship” or special consequential damages under his breach of contract claim. These damages were properly pled and submitted to the jury in connection with the bad faith cause of action and the jury awarded Plaintiff \$3,000.00. This is the maximum amount Plaintiff can claim as consequential damages. Plaintiff’s post-verdict claim to special damages is improper. He failed to plead special damages in his Complaint and failed to present any evidence of special circumstances at trial.

The erroneous breach of contract award must be limited to the amount allowed under the plain terms of the contract and the evidence presented at trial. Furthermore, because the amount awarded is grossly excessive when compared to the amount provided under the terms of the contract, Nationwide is entitled to a new trial absolute.

II. Nationwide did not have to affirmatively plead offset for the payments to Plaintiff's lienholders because the evidence went merely to the amount of Plaintiff's damages and did not provide a defense to Plaintiff's claims.

Setoff based upon a payment to Mr. Fowler's lienholders does not constitute an affirmative defense. An affirmative defense is defined: "In pleading, matter constituting a defense; new matter which, assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary 29 (5th ed. 1983). A defendant alleging an affirmative defense "assumes all elements of the plaintiff's case have been established. Because the plaintiff is taken to have proved a good cause of action, the burden of proof shifts to the defendant to show he is not liable." O'Neal v. Carolina Farm Supply of Johnston, Inc., 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983).

On the other hand, "where the defendant pleads special matter that denies an element of the plaintiff's cause of action, the defense is not affirmative and the burden of proof remains on the plaintiff to establish his case." Id. Obviously, the fact of the payments to the mortgagees is not an affirmative defense. Even if the fact of the payment to mortgagees is true, Plaintiff could – and did – still succeed in his breach of contract claim. Nationwide's payment to the lienholders merely goes to the amount of damages.

"Rule 8(c) does not list set-off as an affirmative defense which must be pled in order to be pursued at trial." Broome v. Watts, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995). Furthermore, set-off "does not fall within the 8(c) catchall of 'any other matter constituting an avoidance or affirmative defense.' " Id. A partial payment is not an affirmative defense and need not be affirmatively pled. This issue was addressed in Howard v. Abernathy, 751 S.W.2d 432 (Tenn. Ct. App. 1988). The defendant made a "post-judgment motion to reduce the judgment by the amount of medical expenses paid by defendant's insurer to plaintiff, which

expenses were proven by plaintiff and presumably included in the verdict of the jury.” Id. at 433. The plaintiff alleged that by failing to affirmatively plead the partial payment, the defendant waived its right to seek the set-off. The Court of Appeals disagreed, holding:

The money received by plaintiff was an advance payment or partial satisfaction of the claim of the plaintiff. [Civil Rule 8], cited by plaintiff contains a reference to payment as an affirmative defense which must be specifically pleaded. However, the circumstances of the case excuse the defendant from pleading or proving partial payment by his insurer, which was not a defense as to liability, but a mitigation in event of liability.

Id. at 434-35; see also Flowers v. Turner, 2003 WL 135055 (Tenn. Ct. App. 2003) (applying the same rule to award a post-verdict offset for payments made by defendant’s liability insurer to plaintiff’s former employer under a worker’s compensation lien); Washington v. Atchison, Topeka and Santa Fe Railway Co., 114 N.M. 56, 834 P.2d 433 (Ct. App. 1992) (allowing post-verdict set-off over plaintiff’s objections and finding that set-off for partial payments is not an affirmative defense); Hamm v. City of Milton, 358 So.2 121 (Fla. Ct. App. 1978) (advance payments made by defendant’s insurer to plaintiff need not be affirmatively pled, failure to allow set-off would result in double recovery and unjust enrichment); see generally Marketos v. American Employers Ins. Co., 465 Mich. 407, 633 N.W.2d 371 (2001) (affirming trial court’s reduction of amount paid to mortgagee from amount awarded under fire insurance policy).

The payment to the mortgagees never shifted Plaintiff’s burden to prove breach and damages, but merely went to the amount of damages. Nationwide paid debts in Plaintiff’s name in the amount of \$154,125.00. As Plaintiff himself testified, this fully satisfied the first mortgage and paid a substantial portion of the second mortgage on his home. Therefore, he was not damaged to the full value of his dwelling by Nationwide’s failure to pay. Instead, he was only damaged by the difference between the amount paid – debt he no longer has – and the remaining

limit for that type of coverage – the amount due under the policy. Because the payment to the lienholders goes merely to the amount of damages and does not preclude Plaintiff from recovering on his cause of action, it is not an affirmative defense and Nationwide was not required to plead it affirmatively.

Furthermore, the evidence of the payments was uncontested at trial and admitted to by Plaintiff. The jury's confusion as to its obligation to account for these payments is fully evidenced by the jury's question during deliberations as to how to treat the payments made to the lienholders. It rightfully should have subtracted from any contractual amount due the full amount of payments made to the lienholders. Therefore, this court should correct the jury's error by calculating the payments made to Plaintiff's lienholders on his behalf and to Plaintiff himself into the actual amount due under the contract. However, because the verdict is grossly excessive – as argued more fully in Defendant's Memorandum in support of its Motions for new trial absolute, new trial *nisi* remittitur, and JNOV – the jury verdict should be set aside completely and a new trial should be granted as to the breach of contract cause of action

Moreover, even if payments made on behalf of Plaintiff must be pled as an affirmative defense – which they do not – Plaintiff failed to object to evidence of the payments made to Plaintiff's lienholders. In fact, he admitted that the first lien was paid in full and a large portion of the second lien was paid off. Therefore, the issue of setoff was tried by consent. See McCurry v. Keith, 325 S.C. 441, 447, 481 S.E.2d 166, 169 (Ct. App. 1997) (ultimately finding that setoff need not be affirmatively pled, but even if the issue of setoff should have been affirmatively pled, the issue was tried by implied consent pursuant to Rule 15(b), SCRCP); Lee v. Thermal Eng' Corp., 352 S.C. 81, 85, 572 S.E.2d 298, 300 (Ct. App. 2002). Unlike the evidence of consequential and/or special damages, Nationwide's payments to the lienholders

could go to no other issue other than damages and offset, Plaintiff did not object to this evidence and was fully aware of its admission and thereby tried these issues by consent and cannot now challenge their admissibility.

III. The limitation of attorney's fees to one-third of the amount awarded should be based upon the amount due under the insurance policy and not upon any other amount awarded.

South Carolina Code § 38-59-40 authorizes the trial court to award reasonable attorney's fees if the judge finds that the insurer denied the policyholder's claim in bad faith. The statute refers specifically to paying a "claim within ninety days after a demand has been made by the holder of the policy or contract." The statute authorizes attorney's fees solely based upon the breach of contract cause of action, not the bad faith cause. See Nichols, 279 S.C. at 342, 306 S.E.2d at 620 ("We hold that this provision applies only to a breach of contract cause of action and is therefore inapplicable to a tort action.").

This award is limited to one-third of the amount of the award for the breach of contract – i.e. the amount due under the insurance contract. The calculation of consequential damages cannot fall into this award because such damages are not part of the amount legally owed under the contract, but represent bad-faith consequential damages. The Supreme Court made it clear in Nichols that contractual damages in insurance cases are limited to the amount due under the terms of the contract and consequential damages are only available under the bad faith cause of action. As discussed more fully above, Plaintiff chose to clearly separate the two forms of damages in the special verdict form in order to prevent having to choose between either foregoing attorney's fees or foregoing consequential and (potentially) punitive damages. As the Supreme Court held in Nichols, the statute authorizing attorney's fees only applies to actual contractual damages and not consequential damages. Therefore, he can only recover, at most,

one-third of the amount supported under the terms of the contract and by the evidence presented at trial.

Moreover, Plaintiff failed to produce any evidence of attorney's fees at trial. Because no evidence was introduced on the subject, the only recoverable attorney's fees are those authorized by statute. The statute limits that award to one-third of the judgment for the breach of contract action.

CONCLUSION

Plaintiff's post-trial claim for special contractual damages was not properly pled or proved at trial. Nationwide was not put on notice of Plaintiff's claim and did not consent to the issue being tried. Furthermore, Plaintiff failed to produce evidence of any communication relaying Plaintiff's special circumstances to Nationwide at the time of entering the contract. Also, Nationwide's payments made to Plaintiff's lienholders on his behalf go only to the amount of damages and need not be affirmatively pled. Even if the payments must be affirmatively pled, Plaintiff allowed the issue to go to the jury by failing to object to the admission of the payments into evidence. Finally, any attorney's fee award must be limited to the amount rightfully owed under the contract and does not include any consequential damages award.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendant Nationwide Mutual
Fire Insurance Company

Columbia, South Carolina
January 17, 2012

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE 2012 FEB 24 AM 11:15
CASE ACTION NO: 2009-CP-37-768

James D. Fowler,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.



Plaintiff,

COPY

**NATIONWIDE'S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES**

Defendant, Nationwide Mutual Fire Insurance Company ("Nationwide"), submits this Memorandum in Opposition to Plaintiff's Motion for Attorney's Fees and to supplement its previous Motion in Opposition to Plaintiff's Motion for Attorney's fees. By doing so, Nationwide does not waive any of the arguments set forth in its post trial motions including but not limited to the Motions for New Trial Absolute, Motion for New Trial *Nisi* Remittitur, and Motion for JNOV, nor its argument regarding the excessive award or damages under the cause of action for breach of contract.

Nationwide objects to the fees in the requested amount of \$188,985.00 as being unreasonable. Nationwide now submits affidavits from Attorney Perry H. Gravely of Pickens, South Carolina and James W. Logan, Jr. of Anderson, South Carolina regarding the hourly rate requested by Plaintiff. "There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." Blumberg v. Nealco, Inc., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993) (citing Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961)). "Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling." Baron Data Systems, Inc. v.

Lotter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). The court must make “specific findings of fact on the record for each factor” Id. at 494, 427 S.E.2d at 661.

Nationwide would show that nature, extent and difficulty of the legal services rendered did not require any specific specialization or advanced training. Moreover, the professional standing of counsel in this case is similar to that of the attorney submitting affidavits on behalf of Nationwide. Therefore, Nationwide challenges the hourly rate submitted by Plaintiff.

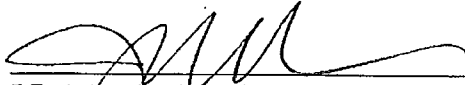
Nationwide would show that the hourly rates submitted are not based on the actual rates which the Plaintiff was obligated to pay by virtue of his retainer agreement, nor any fees actually paid by him. Moreover, the requested hourly rates submitted by Plaintiff are not based upon actual fees charged and collected by Plaintiff’s counsel or any other counsel for similar work. On the contrary, the affidavits submitted by Nationwide contain hourly rates based on fees actually charged by equally competent and experienced counsel for similar legal work in South Carolina and in particular the Tenth Judicial Circuit. Nationwide requests the court to review the itemized bill of Plaintiff’s counsel and utilize a reasonable hourly rate based on the actual fees being charged real clients in similar cases. As to the work performed by subordinate lawyers on Plaintiff’s behalf, Nationwide requests that the hourly rates charged (\$250.00 an hour for associate, \$150.00 for a Lawclerk) be reduced in equal proportion to lead counsel’s rate.

Therefore, based on the factors the court is to consider regarding an award of attorney’s fees, and the evidence regarding actual attorney’s fees charged for similar work, Nationwide requests that the court limit any attorney’s fees awarded to the Plaintiff to no more than \$120,000.00.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to be 'J.R. Murphy', written over a horizontal line.

J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendant, Nationwide Mutual
Fire Insurance Co.

Columbia, South Carolina
February 22, 2012

FILED OCONEE, SC
STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE
CLERK OF COURT
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

2012 FEB 24 AM 11 15

Plaintiff COPY

AFFIDAVIT OF PERRY H. GRAVELY,
ESQUIRE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR ATTORNEY
FEES

PERSONALLY appeared before me, Perry H. Gravely, Esquire who being duly sworn,
deposes and states that:

1. I graduated from the University of South Carolina School of Law in 1986, and was admitted to the South Carolina Bar in November 14, 1986. I am admitted to practice before the State Courts of the State of South Carolina and Federal Court, District of South Carolina. I previously was an attorney with Leatherwood, Walker, Todd and Mann of Greenville and Acker, Welmaker and Johnson of Pickens before opening my own solo firm, The Gravely Law Firm, P.A.

2. My practice involves considerable litigation in all types of Civil matters including negligence, breach of contract, and insurance claims. Most of my litigation practice is in the upper state of South Carolina, particularly in Pickens, Oconee, Anderson and Greenville Counties.

3. I am familiar with the preparation for and trial of insurance coverage claims including breach of contract and bad faith causes of action. This includes the difficulty of the services rendered and the time necessarily expended to prepare, the results accomplished and the professional standing of counsel. I also call the Court's attention to the fees customarily charged in

this area for similar legal services. My normal hourly rate for clients for this type of matters is \$200.00 per hour which I believe to a reasonable rate for this area and this type of case.

SWORN to before me this
21st day of February, 2012

Jane Colwell

Notary Public for South Carolina

My Commission Expires: 8/12/21

Perry H. Gravely
Perry H. Gravely, Esquire

FILED OCONEE, SC
BEVERLY H. WHITEFIELD
STATE OF SOUTH CAROLINA CLERK OF COURT IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE 2012 FEB 24 AM 11:15 CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.



Plaintiff,

COPY

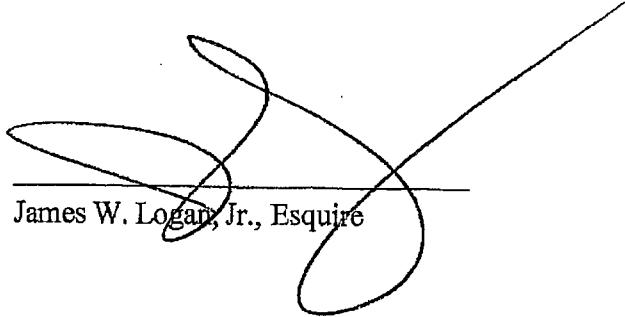
**AFFIDAVIT OF JAMES W. LOGAN, JR.,
ESQUIRE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES**

PERSONALLY APPEARED BEFORE ME, the undersigned, who after being duly sworn, deposes and says:

1. He practices law with the firm of Logan, Jolly & Smith located in Anderson, South Carolina.
2. He obtained his B.A. degree from Clemson University in 1967 and his J.D. from the University of South Carolina School of Law in 1970 where he was a member of the South Carolina Law Review, Editorial Board and the Order of Wig and Robe. He is admitted to practice by the Supreme Court of South Carolina, the District Court for South Carolina and the Fourth Circuit Court of Appeals. He is also a certified circuit court mediator.
3. His practice area is concentrated in general civil litigation with an emphasis on insurance defense and construction/utility litigation.
4. He is a former member of the South Carolina Bar House of Delegates and former President of the Anderson County Bar Association. He has an "AV" rating with Martindale-Hubbell.
5. He is familiar with civil litigation practice in the Tenth judicial circuit and with the attorneys fees charged for civil litigation including insurance defense. Although the rates

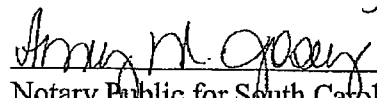
charged on individual cases may vary, he customarily charges an hourly rate between \$140.00 an hour and \$250.00 an hour for the majority of cases which he handles in these areas depending upon the complexity of the case.

FURTHER AFFIANT SAYETH NOT



James W. Logan, Jr., Esquire

S W O R N to and subscribed before me
this 22ND day of February, 2012

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 12/22/18

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF OCONEE	)	IN THE COURT OF COMMON PLEAS
	)	Civil Action 09-CP-37-768
James D. Fowler,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR ATTORNEYS' FEES
Nationwide Mutual Fire	)	
Insurance Company and	)	
Andrew Flanagan,	)	
	)	
Defendants.	)	

Plaintiff respectfully submits this supplemental memorandum in support of plaintiff's motion for attorneys' fees. This motion is filed in order to respond to defendant's Supplemental Memorandum dated February 22, 2010. It is filed with a supplemental affidavit of counsel.

Plaintiff respectfully reaffirms the statements, arguments, and authorities included in plaintiff's memorandum dated December 9, 2011, with the exception of the charge for 0.2 of an hour's work done on September 11, 2010. The total amount charged was \$30, but because the individual was not yet a member of the Bar, a charge of less than \$30 would be appropriate.

**NATURE, EXTENT, AND DIFFICULTY
OF LEGAL SERVICES RENDERED**

Nationwide contends of page 2 of its supplemental memorandum, starting on line 3, that the nature, extent and difficulty of the legal services rendered by plaintiff's counsel did not require any specific specialization or advanced training. The two affidavits submitted on behalf of the defendant referred generally to "civil litigation

including insurance defense" and "insurance coverage claims including breach of contract and bad faith causes of action". Very respectfully, the defendant has apparently misunderstood the challenges facing plaintiff's counsel in this case. The case involved not only breach of an insurance contract and bad faith; it also involved allegations of arson, which required both sides to retain expert witnesses. In addition, it involved defamation and the defense of qualified privilege. The defamation cause of action was challenged unsuccessfully on summary judgment, although the individual defendant changed his testimony at trial and received a defense verdict.

In addition, the defendant would overlook or attempt to minimize the burden put on plaintiff's counsel by the defendant's refusal to respond properly to discovery. This unjustified and repeated refusal or failure to comply with discovery obligations necessitated the filing and prosecution of several motions to compel, all of which were successful.

CONTINGENCY OF COMPENSATION

Defendant's supplemental memorandum and the affidavits submitted in support thereof are premised on a mistaken comparison with attorney's fees charged for insurance defense work. Both of the respected counsel giving affidavits appeared to be primarily defense counsel, working for insurance companies. Although the highest fee mentioned in the affidavits is \$250 per hour, there is no stated recognition of a fact that fees charged to insurance companies are fundamentally different from reasonable fees in other types of work. Bills for fees submitted to insurance companies are generally charged and payment is received on a periodic interim basis. There is generally no wait for one, two, three, or more years before payment at the end of a successful case.

Indeed, the fees are billed and paid without regard to success or failure to win a case. Accordingly, it is perhaps justifiable that such fees be charged at lower rates to insurance companies.

To some degree, there is also a difference in the degree of intensity between the representation of a home owner wiped out by catastrophic fire and the representation of an insurance company. For the latter, it is just another case, one of many cases for the insurance carrier. For the individual victim of a fire, the case is vastly more important and the representation is more strenuous.

BENEFICIAL RESULTS OBTAINED

Neither defendant's original memorandum nor its supplemental memorandum, nor the affidavits, address factor number 6 in the cases, to wit, beneficial results obtained. The defendant seems to forget that its position throughout this matter has been that plaintiff was owed nothing. Defendant's regularly retained fire investigation experts (Mr. Byers) and all of the defendant's on staff witnesses took the somewhat high handed, absolute position that defendant owned nothing.

Almost thirty-four months after the fire, the jury's verdict absolved the plaintiff from responsibility for the fire. In addition, the jury made a substantial award of actual damages and found the insurance company guilty of insurance bad faith. Thus, the plaintiff did receive beneficial results.

OTHER FACTORS

Without prolonging this memorandum, plaintiff respectfully refers to the affidavits of plaintiff's counsel and of Mr. Brandt of the Oconee County Bar, the itemization of time

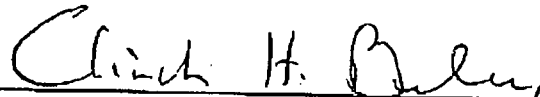
and services rendered, and the record in this case, including but not limited to the jury's verdict that Nationwide was guilty of bad faith.

SUMMARY

Plaintiff recognizes that South Carolina Code Section 38-59-40 limits the amount which may be awarded to the plaintiff for reasonable attorney's fees to one-third of the amount recovered. One-third of the \$504,044 judgment is \$168,148. Plaintiff respectfully submits that an award in this maximum allowable amount is fully justified in this case, and respectfully requests that the Court award the said maximum allowable amount.

Respectfully submitted,

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Columbia, South Carolina 29202
(803)929-0096
Attorney for Plaintiff

February 24, 2012

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
Plaintiff,)
vs.)
Nationwide Mutual Fire)
Insurance Company and)
Andrew Flanagan,)
Defendants.)

**SUPPLEMENTAL AFFIDAVIT
OF PLAINTIFF'S COUNSEL
REGARDING ATTORNEYS' FEES**

PERSONALLY APPEARED Clinch H. Belser, Jr., who being first duly sworn,
deposes and says:

My name is Clinch H. Belser, Jr. I respectfully submit this supplemental affidavit in respect to the Plaintiff's Motion for Attorney's Fees pursuant to South Carolina Code Section 38-59-40 (1976, as amended). It is submitted to respond to certain points in the supplemental memorandum and affidavits submitted by defendant Nationwide Mutual Fire Insurance Company on or about February 22, 2012.

Although I do not know Mr. Gravely, I certainly well remember my law school classmate James W. Logan, Jr. He was an excellent student and, as he says, he was on the Editorial Board of the South Carolina Law Review and a member of the Order of Wig and Robe. Although I did not mention it in my initial affidavit because it was so long ago, I was also a member of the Order of Wig and Robe. As a member of the South Carolina Law Review, I served first as Managing Editor in the spring of 1969 and then as Editor in Chief in the fall of 1969. Similarly, I forgot to mention that for many years I have had an "AV" rating with Martindale-Hubbell, and I am a former member (one term) of the South Carolina Bar House of Delegates. For the past several years, I have served as member of the Resolution of Fee Disputes Board of the South Carolina Bar, and I have served several times as chairman of a panel.

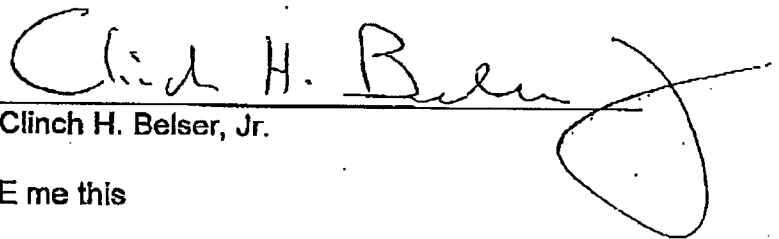
Although I certainly do not know everything there is to know, in my opinion, there are fundamental differences between insurance defense work and plaintiff's work. I do

some of each. Insurance defense work has the advantage of relative certainty of payment, and bills can be submitted and payments received periodically over the course of protracted litigation. Accordingly, lower billing rates are accepted and perhaps justified. In plaintiff's work on a contingency, there is no certainty of payment, much less any possibility of any interim billing and receipts. In this respect, the work on the two sides of a case is not "similar".

As to the matter of "actual fees" being charged real clients in similar cases, I have for a number of years charged regular corporate clients, some with insurance funding, from \$350 per hour to \$285 per hour for litigation defense work. In my opinion, these fees are fair and well justified based upon the quality of the work performed and results achieved. The clients seem to agree, based upon their prompt payment of the bills submitted.

In other cases in recent years involving fire losses, my standard hourly charge has been \$300 per hour.

In reviewing the itemization of our firm charges submitted previously, I note with regret that we inadvertently charged at \$150 per hour the work of Mr. Dillard on September 11, 2009. At that time he was not yet a licensed attorney or officially an associate; therefore, this was error. Mr. Dillard graduated from USC Law School in December of 2009 with two degrees, one was a Juris Doctor and the other was a Master of Public Administration. He was a member of the South Carolina Law Review, among other honors. He stayed with the firm after he was sworn in, and all of his work thereafter was done as a licensed lawyer. The amount charged for his work in September of 2009 was a total of \$30.00, for 0.2 hour, as shown on the itemization.


Clinch H. Belser, Jr.

SWORN TO and SUBSCRIBED BEFORE me this

24th day of February, 2012.


Notary Public for South Carolina
My Commission Expires: 5-23-13

FILED OCONEE, SC
DEVL. OF H. WHITEFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE

2011 MAR -8 P 3:55

CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**RULE 59(E) MOTION TO ALTER OR
AMEND**

**TO: CLINCH H. BELSER, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendants, Nationwide Mutual Fire Insurance Company and Andrew Flanagan, will move under Rule 59(e), South Carolina Rules of Civil Procedure, before the presiding judge of the Oconee County Court of Common Pleas at the Oconee County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order altering or amending the Order Denying Defendant's Post Trial Motions to include an offset to Plaintiff's damages by \$154,125.00, the amount paid to Plaintiff's mortgagees. Failure to award the offset results in a double-recovery for Plaintiff and forces Nationwide to pay twice for a single wrong. The Order, relying upon the standard mortgage clause, results in a clear error of law and results in manifest injustice.

This Motion is based on Rule 59(e), South Carolina Rule of Civil Procedure, and applicable case law, and will be supplemented and supported by a memorandum of law

(SIGNATURE ON FOLLOWING PAGE)

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to read "Wesley B. Sawyer", is written over a horizontal line.

J.R. Murphy, Esquire

E. Raymond Moore, III, Esquire

Wesley B. Sawyer, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendants

Columbia, South Carolina

March 1, 2012

FILED OCONEE, SC
BEVERLY L. WHITFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA
2012 MAR -8 P 3:55
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2009-CP-37-768

James D. Fowler,

Plaintiff,

v.

Nationwide Mut. Fire Ins. Co. and Andrew
Flanagan,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO ALTER OR
AMEND**

Defendant Nationwide Mutual Fire Insurance Company ("Nationwide") submits this memorandum of law in support of its motion to alter or amend the judgment under Rule 59(e) to correct a clear error of law and prevent manifest injustice.

INTRODUCTION

This case was tried before a jury in the Oconee County Court of Common Pleas on November 28, 2011 through December 2, 2011. The Court submitted three causes of action to the jury: (1) breach of contract, (2) bad faith breach of contract and (3) slander. The Court denied motions for directed verdict at the close of all evidence as to the bad faith and slander causes of action. The jury returned a verdict in favor of the Plaintiff on the contract claim in the amount of \$501,444.00 and the bad faith claim in the amount of \$3,000.00 actual damages. The jury found in favor of the Defendants on the slander claim and further found that neither of the Defendants acted in a willful, wanton or reckless manner to support a punitive award.

Nationwide filed post-trial motions for a new trial absolute or new trial *nisi* remittitur as to the breach of contract claim and a judgment non obstante verdicto as to the bad faith claim. Plaintiff filed a motion for attorney's fees. This Court heard arguments on the Defendant's motions on January 17, 2012. The Court allowed thirty (30) days for additional submission on

the Plaintiff's Motion attorneys' fees. The Court entered a written Order Denying Defendant's Post Trial Motions on February 22, 2012, but has yet to rule on the issue of attorney's fees.

The law is unmistakably clear that an insurer who pays an insured's mortgagees and thereby reduces or eliminates debt owed by the insured to the bank is entitled to an offset for those amounts paid. This rule is rooted in the deep-founded prohibition against double recovery. James Fowler received the direct benefit of payment to his mortgagees in the amount of \$154,125.00. Therefore, Nationwide seeks an amendment of the Court's February 22, 2012 Order to remit the damages in the amount of \$154,125.00. Failure to award the offset for payments that were proven and uncontested at trial is a clear error of law and would result in the manifest injustice of penalizing Nationwide twice for a single wrong.¹

ARGUMENT

As the Court's Order currently stands, Fowler receives a double recovery of his insurance coverage for the value of his home. "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). Fowler received payment for the full value of his home when Nationwide paid his first mortgage off in full and a substantial portion of his second mortgage. As a result of those two payments, totaling \$154,125.00, Fowler will never have to repay the principal or interest on that portion of his debts. Fowler also receives \$154,125.00 in hand to do with as he pleases. This amounts to a total recovery of \$308,250.00 for an undisputed contractual amount of only \$154,125.00. Fowler's debts are gone and he gets an additional windfall of \$154,125.00 to rebuild his house.

¹ By this motion and memorandum, Nationwide does not waive any of its other objections and arguments raised during any of the proceedings in this case.

When Nationwide made payments to Fowler's two mortgagees, it did not take an assignment of the notes or in any other way seek to obtain the value of those loans. The payments went directly to the benefit of Fowler, whose debts were permanently reduced as a result of the payments. Fowler admitted this at trial unequivocally. He admitted that the entire amount of the first mortgage was paid off and that a substantial portion of the second mortgage was paid off. He admitted that he is no longer obligated to pay those sums to his mortgagees.

As the Court notes in its Order, these payments were required by the standard mortgage clause. However, the fact that the payments were required regardless of Fowler's conduct does not transform Nationwide's obligations under the policy. "The insurer can deduct payments made to a loss payee, such as a mortgagee." 44 Am. Jur. 2d Insurance § 1494. "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.

Nationwide insured a single property for a single sum of money subject to three interests. Payments for losses under Coverage A and B -- and only those two coverages -- are to "be paid to the mortgagee and [Fowler], as interests appear." Under South Carolina law, the standard mortgage clause used in the Nationwide policy obligates Nationwide to a single limit of coverage to be paid to the various mortgagees or the mortgagor as their interests may appear. Justice Brailsford summarized this allocation as follows:

Upon the occurrence of a covered loss, the rights of the parties under a fire policy insuring mortgage property as that of the owner, with loss payable to a mortgagee as his interest may appear, are markedly different from those which attach when the insurance is exclusively on the mortgagee's interest. In the former case, the owner is the insured and is entitled to indemnity for his loss, either by payment to him of the proceeds of insurance or by credit on the

secured debt of such amount as may be paid to his creditor under the mortgagee clause.

Johnson v. Fidelity & Guar. Ins. Co., 245 S.C. 205, 213, 140 S.E.2d 153, 157 (1965) (Brailsford, J., dissenting). Whether payments are made directly to Fowler or to his mortgagees, the payments satisfy that portion of Nationwide's obligations under the policy and go directly to Fowler's benefit. Any other allocation method gives Fowler a double-portion of coverage for his home and completely ignores Fowler's direct benefit from the payments.

The United States Court of Appeals for the Fourth Circuit held plainly that where an insurer pays an insured's mortgagees, even if it denies coverage for the insured's loss in bad faith, and that payment extinguishes debts owed by the insured, the court must award an offset for that payment. 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. State Farm lost its declaratory action at trial and the jury awarded Barton \$200,000.00 in actual damages and \$35,000.00 punitive damages. 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. Because State Farm chose not to foreclose on the property, and Barton remained the legal and equitable owner of the property after the payments to the mortgagees, 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. (citing 18 Couch on Insurance 2d. § 74:218).

Courts throughout the country award an offset when an insurer fails in its coverage defense but has already made payments to the insured's mortgagees. Recently, the Court of Appeals of Michigan reversed a trial court's refusal to award an offset for payments to the insured's mortgagees after the insurer unsuccessfully defended its denial of coverage based upon alleged arson. Williams v. Auto Club Group Ins. Co., 2011 WL 3689153 (Mich. Ct. App. 2011). In a similar factual and procedural background with this case, the insurer denied coverage under a homeowner's policy when it concluded that the insured intentionally set the fire to collect the insurance proceeds. Under the terms of the mortgage clause, the insurer paid the mortgagees for the damage to the house and the insured "was in fact credited for the [payments], reducing the payoff amount" of the debt. Id. After a jury ruled against the insurer on the arson defense, the court denied the insurer's request for an offset for amounts paid to the insured's mortgagees.

The Court of Appeals reversed, reasoning that failure to award the offset would result in a double recovery for the insured. Id. at *2; see also 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.).

The New York Appellate Division summarized its law on this issue, stating:

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 mortgage 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.

* * *

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) (internal citations omitted); see also 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). See also 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., 177 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, and thus the payment of the loss liquidates both demands against the insurer. . . . In other words, the object and effect of the [standard mortgage clause] adopted was to insure to a limited maximum the amount of loss by fire occasioned to the insurable interests of both the mortgagor and the mortgagee at the time of [the fire].”); 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).

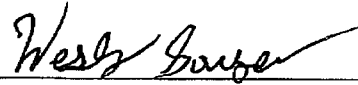
The Court’s Order denying Nationwide’s post trial motion gives Fowler a double-recovery and forces Nationwide to pay twice for a single wrong. South Carolina law is well settled that a plaintiff cannot recover twice for a single injury. Moreover, the authorities are overwhelming that failure to offset payments to mortgagees from the insured’s recovery creates a double-recovery. Therefore, the Court’s Order is clearly erroneous under settled law. Moreover, it is manifestly unjust to require Nationwide to pay twice for a single contractual obligation.

CONCLUSION

For the above-mentioned reasons and without waiving any of the other objections raised at trial or in Nationwide’s post-trial motion, Nationwide respectfully requests that this Court alter

or amend its Order Denying Defendant's Post Trial Motions and remit the contractual damages awarded under the policy by \$154,125.00 to a total of \$374,319.00.

MURPHY & GRANTLAND, P.A.

A handwritten signature in cursive script, appearing to read "Wesley Sawyer", is written over a horizontal line.

J.R. Murphy, Esquire
E. Raymond Moore, III, Esquire
Wesley B. Sawyer, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for the Defendant

Columbia, South Carolina
March 1, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS
Civil Action 09-CP-37-768

James D. Fowler,)
)
Plaintiff,)
)
vs.)
)
Nationwide Mutual Fire)
Insurance Company and)
Andrew Flanagan,)
)
Defendants.)

**PLAINTIFF'S MEMORANDUM IN OPPOSITION
TO DEFENDANT'S RULE 59(e) MOTION
TO ALTER OR AMEND**

Plaintiff respectfully submits this memorandum in opposition defendant's Rule 59(e) Motion to Alter or Amend.

Defendant's motion should be denied, because the Court has previously considered, and correctly ruled upon, the point now raised again by defendant in its Rule 59(e) Motion. The Court did so in the Order Denying Defendant's Post-Trial Motions dated and filed February 22, 2012. There is no need to give defendant another bite at the apple, and no reason to alter or amend the Order.

**PRIOR CONSIDERATIONS OF
DEFENDANT'S NOW REQUESTED OFFSET**

At the trial, defendant made no argument or offer of proof that it was entitled to an offset, and it gave no reason why. This was apparently part of defendant's trial strategy to put all its eggs in one basket. Defendant's position at trial was that defendant owed nothing at all, because plaintiff had set his own house afire. The jury's verdict said not so.

In its post trial motions, defendant asserted, *inter alia*, that the verdict was grossly excessive, on which claimed grounds it wanted a new trial absolute or a new trial *nisi*. This wording is not the same wording as the argument that defendant was entitled to an offset. Defendant's original memorandum in support of its motions dated December 12, 2011, however, in Section II regarding New Trial *Nisi*, mentioned on pages 10 and 11 the specific amounts paid to the two mortgagees and referred to

defendant's being "given a credit for the amounts paid to the mortgagees". Therefore, plaintiff's memorandum in opposition dated December 19, 2011, discussed on pages 8 and 9 the subject of "Payment or Offset", in addition to explaining other reasons why the verdict was within the evidence and should not be disturbed by the Court based on the various new arguments raised by defendant for the first time only after the jury rendered its verdict.

Thereafter, on January 17, 2012, defendants filed a further memorandum entitled Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant Nationwide's Post-Trial Motions. Again, in Section II of this successive memorandum, pages 10-13, defendant argued its position as to an offset.

The Order Denying Defendants' Post-Trial Motions specifically dealt with the subject of defendants' payments to the mortgagees. It noted the specific amount thereof. It also noted that the jury made adjustments and precise calculations in reaching its verdict. The Court correctly refrained from disturbing the verdict, because the verdict was within the evidence and the Court is required to view the evidence in the light most favorable to the nonmoving party.

Very respectfully, there is no need to give defendant another bite at the apple, and there is no reason to alter or amend the Order.

NATIONWIDE MUTUAL INSURANCE COMPANY V. HUNT

The Order Denying Defendants' Post-Trial Motions correctly cites the case of Nationwide Mutual Ins. Co. v. Hunt, 327 S.C. 89, 488 S.E.2d 339 (1997) for the point that the amounts paid to the lien holders were due under "an independent contract for the insurance of the mortgagee's interest". The relevant language of the Nationwide insurance policy in the *Hunt* case is identical to the language of the Nationwide insurance policy in the *Fowler* case at bar. The Court at the hearing January 17, 2012, noted the evidence at trial that Nationwide's representatives made a point of making direct payments to the mortgage holders only. To wit, the checks were not paid jointly to the mortgagees and the insured. The insurance company chose to maintain its position that it was not obligated to pay anything, and it was not going to pay anything,

to Mr. Fowler as the insured. The only payment to Mr. Fowler was the early \$2,000 advance on his claim for the loss of the contents of his house.

There was evidence at trial, which the Court also noted at the January 17 hearing, that Nationwide actually owed more to the mortgagees as the insured parties, than it actually paid to the mortgagees. Indeed, just as Nationwide had not paid Mr. Fowler what Nationwide owed Mr. Fowler under his theory of the case, Nationwide did not even pay the mortgagees what it owed them as insureds under Nationwide's own theory of the case. The payments for which Nationwide now wants an offset, however, were paid to the mortgagees only, and pointedly the payments were not made to Mr. Fowler. So, no offset against what the jury determined Nationwide owed Mr. Fowler is appropriate.

THE VERDICT WAS WITHIN THE EVIDENCE

The most important point now is that, as noted in the Order Denying Defendants' Post-Trial Motions, the verdict was within the evidence presented. Indeed, plaintiff's evidence of damages would support a higher award than the actual verdict, if the jury so found, whether or not the jury gave the defendant credit for the payments made to the mortgages. During its deliberations the jury sent out a question about giving credit for amounts paid. The question could not be answered, but it must be deemed, from the jury's asking of the question and from the precise nature and specific amount of the verdict, that the jury duly considered the payments to the mortgagees and then made appropriate adjustments and precise calculations in determining the amount of the verdict. Just as the Court may not charge on the facts, it is not the role of the Court to make findings of fact on post-trial motions, and the evidence is to be viewed in the light most favorable to the nonmoving party. There is no cause or reason to invade the province of the jury or to disturb the verdict.

INCORPORATION OF AUTHORITIES CITED IN PLAINTIFF'S MEMORANDUM OF DECEMBER 19, 2011

Plaintiff respectfully incorporates by reference and affirms the points and authorities cited on pages 8 and 9 of his Memorandum In Opposition to Defendant

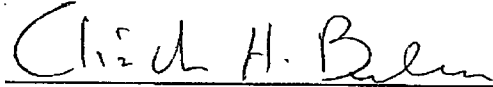
Nationwide's Post Trial Motions. Defendant did not plead, nor offer any proof or argument at trial, that it was entitled to an offset or mandatory counterclaim. Defendant cannot do so now.

SUMMARY

Very respectfully, the plaintiff urges that that the defendant's Rule 59(e) motion should be denied. The defendant put all its eggs in one basket at trial. The request now for an offset is not only untimely in that it comes only after the trial, but it is also duplicative in that it has been before the Court already.

It is respectfully submitted that the verdict, and the judgment thereon, should not be disturbed.

BELSER & BELSER, P.A.



Clinch H. Belser, Jr.
1901 Main Street, Suite 1550
Columbia, South Carolina 29202
(803)929-0096
Attorney for Plaintiff

March 8, 2012

Columbia, South Carolina.

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.

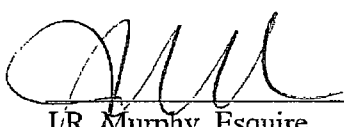
Nationwide Mutual Fire Insurance Company and Andrew Flanagan, ..Defendants,

Of Whom,

Nationwide Mutual Fire Insurance Company, ...Appellant.

NOTICE OF APPEAL

Nationwide Mutual Fire Insurance Company appeals from the jury verdict of December 2, 2011 and Order Granting Attorney's Fees entered on September 13, 2012. Nationwide filed Motions for New Trial or New Trial *Nisi* Remittitur and for Judgment Notwithstanding the Verdict on December 9, 2011 and received written notice of the Order Denying Defendant's Post Trial Motions on February 23, 2012. Nationwide filed a Rule 59(e) Motion to Alter or Amend that order on March 2, 2012 which was denied by the Honorable Alexander S. Macaulay on October 3, 2012. Appellant received written notice of entry of the order denying its Motion to Alter or Amend on October 8, 2012. Appellant also appeals the Order Granting Attorney's Fees entered on September 13, 2012. Appellant received written notice of entry of this order on September 17, 2012.


J.R. Murphy, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Appellant

October 17, 2012

Other Counsel of Record:

Clinch H. Belser, Esquire
Belser & Belser, P.A.
Post Office Box 96
1901 Main Street, Suite 1550
Columbia, SC 29202
Attorney for Respondent



1 State of South) In the Court of Common Pleas
2 Carolina)
3 County of Oconee) Case No: 2009-CP-37-00768

4 James D. Fowler)
5 Plaintiff,) Transcript of Record
6 -vs-) Trial - Volumes 1 and 2
7 Nationwide Mutual) Pages 1 - 170
8 Fire Insurance Co.)
9 and Andrew Flanagan,)
10 Defendants.)

Monday, November 28, 2011
Tuesday, November 29, 2011
Walhalla, South Carolina

11
12
13
14 B e f o r e:

15 The Honorable Alexander S. Macaulay, Judge; and a
16 Jury.

17
18
19 A P P E A R A N C E S:

20 Clinch H. Belser, Jr., Esq., and
21 H. Freeman Belser, Esq.,
Attorneys for the Plaintiff

22 John Robert Murphy, Esq., and
23 E. Raymond Moore, III, Esq.
Attorneys For the Defendants

24
25 Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

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1 ** Start of Requested Certified Transcript of Record **

2 November 28, 2011

3 11:48 p.m.

4 **THE COURT:** Ladies and gentlemen of the Jury panel,
5 we are about to begin the trial of the case of *James D.*
6 *Fowler, Plaintiff, versus Nationwide Mutual Fire*
7 *Insurance Company and Andrew Flanagan, Defendants, Civil*
8 *Action Number 2009-CP-37-768.*

9 The Plaintiff, Mr. Fowler, is represented by
10 Mr. Belser and Mr. Belser; is that correct?

11 **MR. CLINCH BELSER:** Yes, sir, Your Honor.

12 **THE COURT:** If you would, please introduce yourself
13 and your client.

14 **MR. CLINCH BELSER:** Ladies and gentlemen of the
15 Jury, my name is Clinch Belser, and this is my son,
16 Freeman. We represent Mr. James Fowler who is seated
17 back there in the red.

18 **THE COURT:** Thank you.

19 The Defendants, Nationwide Mutual Fire Insurance
20 Company and Andrew Flanagan are represented by
21 Mr. Murphy and Mr. Moore; is that correct?

22 **MR. MURPHY:** Yes, Your Honor.

23 **MR. MOORE:** Yes, sir.

24 **THE COURT:** All right. If you would please
25 introduce yourselves, your law firms, and your clients,

1 or the representative of your clients.

2 MR. MURPHY: Good morning. My name is JR Murphy.
3 I'm with the firm of Murphy & Grantland, and my partner,
4 Ray Moore, is gonna assist me in this case. We
5 represent Nationwide Mutual Fire Insurance Company.

6 The State Claims Manager is Josh Harbert who is
7 seated here in the blue blazer, although he is not a
8 witness in the case. And I also represent Mr. Andrew
9 Flanagan who is seated next to me, who is a party.

10 THE COURT: Very good. Thank you.

11 Mr. Belser, I don't think I asked you about your
12 law firm; if you would please identify that as well.

13 MR. CLINCH BELSER: The name of our law firm is
14 Belser and Belser, and we are actually located in
15 Columbia.

16 THE COURT: Very good. Thank you very much.

17 (Whereupon, the Jury Voir Dire and Jury Selection
18 was reported but not transcribed, after which the
19 following occurred:)

20 THE CLERK: Ladies and gentlemen, as I call your
21 name, please come forward, taking a seat in the Jury
22 box.

23 Number 30 Tracy Culp; Number 53, Victoria Griffin;
24 Number 51, Paul Graber, Number 114, Mark Shepherd;
25 Number 68, David Kelley; Number 64, Susan Jordan; Number

1 49, Jennifer Gordon; Number 10, Miguel Berg; Number 29,
2 Ronda Crumley; Number 81, Kimberly Macaulay; Number 18,
3 Elaine Carver; Number 26, Karen Craig.

4 For the Alternates, Number 137, Adam Wheeler, and
5 Number 8, Earl Beasley.

6 THE COURT: All right. Is there any reason this
7 Jury cannot be sworn for the trial of this case from the
8 Plaintiff?

9 MR. CLINCH BELSER: That's fine, Your Honor. No
10 reason.

11 THE COURT: From the Defense?

12 MR. MURPHY: No, Your Honor.

13 THE COURT: All right, very good.

14 Mr. Graber, I'm going to ask you to serve as the
15 foreman of the Jury, so if you would sit in the first
16 seat in the front row and -- no, not right now. We'll
17 move when we come back.

18 And, Mr. Wheeler, if you would always sit in the
19 seat that you are in.

20 And then, Mr. Beasley, if you would always sit in
21 the seat that you are in.

22 So there are only three reserved seats, the two
23 alternates, I need to know where they are, and also
24 where the foreperson is. Everyone else can sit wherever
25 they want to in the Jury box.

1 Now I'm going to excuse you for the balance of the
2 day, and I'm going to ask you to call back this
3 afternoon. I'll tell you what. Go with the bailiff for
4 a few minutes and I need to take care of the balance of
5 the Jury panel and then I'll let you come back and give
6 you some further instruction. But the main thing is, do
7 not undertake discussion of this case among yourselves
8 in any way.

9 Then I'll call you back.

10 Just have them stay with us for a few more minutes.

11 (Whereupon, the *Fowler v. Nationwide* Jury left the
12 courtroom at approximately 1:42 p.m.)

13 (Discussion off the record among the Court and the
14 remaining jury panel, after which the Jury panel
15 was excused at approximately 1:43 p.m. and
16 instructed to call for further instructions on
17 Tuesday, November 29, 2011, after 6:00 p.m.)

18 THE COURT: I'm going to excuse the Jury for the
19 balance of the day and ask them to come in -- did we
20 decide 11:00 would be convenient to reconvene, or noon?

21 MR. MURPHY: I think that would give us enough time
22 if we do work some today and then we have the pretrial
23 motions *in limine* maybe starting at 9:30, that will give
24 us a little extra time just to --

25 THE COURT: All right.

1 Is that all right, Mr. Belser?

2 MR. CLINCH BELSER: I think that's fine.

3 THE COURT: Okay. So that's what I'll do. I'll
4 bring the Jury back and dismiss them for the balance of
5 the day and ask them to be back at 11:00. But I'll see
6 you two at 9:30 in the morning.

7 All right. Ask the Jury to join us, please.

8 (Whereupon, the Jury entered the courtroom at
9 approximately 1:46 p.m.)

10 THE COURT: All right. Let the record reflect the
11 Jury and Alternates are in the Jury box.

12 Mr. Foreman, ladies and gentlemen of the Jury, I'm
13 going to excuse you for the balance of the day. We, of
14 course, have another trial to hopefully complete today.
15 And we'll start the actual trial of this case at 11:00
16 tomorrow morning. I've got some motions to consider
17 before I take the case that's presented to you for your
18 consideration, in other words, the trial of the case
19 itself. So I'm going to excuse you until 11:00 in the
20 morning, and at 11:00 if you would please come back to
21 the jury room that you were in this afternoon.

22 Preliminary Instructions to the Jury:

23 THE COURT: Now, you were in the courtroom I think
24 when I instructed the last jury, or the first jury, I
25 should say. My instructions throughout the trial of the

1 case are going to be that you are not to undertake
2 discussion of the case with anybody or permit anybody to
3 discuss it with you, including yourselves, among
4 yourselves when you have a break or anything like that.

5 And the reason for that, as I mentioned earlier, is
6 you never know what's going to be the most important
7 part of the case. You need to have an open mind
8 throughout the trial of the case.

9 Now, I tell juries this is the most difficult part
10 of your service as jurors. You're going home tonight
11 and somebody is going to ask you, "What are you doing?"

12 You really don't know that much about the case, but
13 anyway, you're gonna tell them, "I've been drawn on a
14 jury."

15 They'll say, "What's it about?"

16 And you will say, "I can't tell you."

17 And then they'll say, "Well, why not?"

18 And you're gonna say, "Because the Judge said so."

19 And they will probably say something like, "Well,
20 that's ridiculous."

21 I think that you understand this case is very
22 important to everybody who is involved, to all the
23 parties, so it needs to be resolved in a proper fashion,
24 and nobody who is not sitting in that jury box where you
25 are sitting now or who will be with you in that jury

1 room when you come together to deliberate on the verdict
2 in this case can help you. They will not have heard the
3 first bit of testimony or seen the first exhibit or
4 other evidence in this courtroom. All they can do is
5 interfere with the proper resolution of this case.

6 If they insist on discussing the case with you,
7 tell them that I'll be here at about 8:30 in the morning
8 and I'll be glad to explain it to them. But I think you
9 will not have that problem because I think you do
10 understand this is an important case that needs to be
11 resolved in the proper fashion.

12 Again, I look forward to working with you and I'll
13 see you at 11:00 tomorrow morning, that's Tuesday
14 morning, November 29th, at 11:00. Very good.

15 Everyone else remain seated while the Jury retires
16 from the courtroom.

17 (Whereupon, the Jury left the courtroom at
18 approximately 1:48 p.m.)

19 **THE COURT:** All right. Anything from the Plaintiff
20 before we recede for -- well, we're gonna recede for the
21 day from you. I understand you all are going to get
22 together this afternoon?

23 **MR. CLINCH BELSER:** Yes, sir.

24 **MR. MURPHY:** Yes, sir.

25 **THE COURT:** All right. And obviously I'm going to

1 be here, so if there is anything I can help you with,
2 we'll do that. Otherwise, I'll see you at 9:30 in the
3 morning on your motions.

4 MR. CLINCH BELSER: Thank you, Your Honor.

5 MR. MURPHY: Thank you, Your Honor.

6 THE COURT: Anything else, Mr. Belser?

7 MR. CLINCH BELSER: No, Your Honor. Thank you very
8 much.

9 THE COURT: Anything from the Defense?

10 MR. MURPHY: No, sir.

11 THE COURT: Very good. I look forward to working
12 with you.

13 (A luncheon recess occurred.)

14 (Whereupon, the case of *Fowler v. Nationwide* was
15 adjourned for the day, to resume at approximately
16 9:30 a.m. on Tuesday, November 29th, 2011, and the
17 Court heard the start of the first case scheduled
18 for trial this week.)

19 ***

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1 November 29, 2012

2 10:55 a.m.

3 Pretrial Motions:

4 THE COURT: All right. We are about to begin the
5 trial of *James D. Fowler versus Nationwide Mutual Fire*
6 *Insurance Company and Andrew Flanagan*, 2009-CP-37-768.
7 Mistrs Belser and Mr. Dillard on behalf of the
8 Plaintiff and Mr. Murphy and Mr. Moore on behalf of the
9 Defendants.

10 We have drawn a Jury. The Jury hasn't been sworn
11 yet. But we have motions to take up before we do go to
12 the Jury or at least begin the trial.

13 How do you wish to proceed, Mr. Belser?

14 MR. CLINCH BELSER: May it please the Court. There
15 are several motions before Your Honor. The order in
16 which they were filed chronologically are the first two
17 motions by the Defense to exclude portions of some of
18 the testimony of two of the Plaintiff's expert
19 witnesses.

20 And then after that the Plaintiff filed a motion to
21 exclude the testimony of one of the Defendant's experts,
22 Mr. Byers.

23 Yesterday we received another motion from the
24 Defendants to exclude the testimony of the Plaintiff's
25 expert witness regarding unfair, insurance unfair

1 practices.

2 THE COURT: All right. I have met with Counsel in
3 chambers earlier, and I suggested, inasmuch as there is
4 a punitive damages claim, that I would probably
5 bifurcate. But you are talking about actual damages on
6 Unfair Trade Practice?

7 MR. CLINCH BELSER: Well, I said the wrong word.
8 Insurance bad faith.

9 THE COURT: Insurance bad faith, that would be a
10 punitive damage rather than treble?

11 MR. CLINCH BELSER: Well, I believe, though, the
12 cases, we can also get consequential damages which would
13 be beyond the simple provisions of the insurance policy.

14 Our first cause of action is --

15 THE COURT: The reason I'm asking these questions
16 is because I want to try to find out what would be the
17 better and most reasonable course to follow. Now, you
18 mentioned as far as when they were filed, that would
19 be -- is there any reason you couldn't follow that?

20 MR. CLINCH BELSER: That's what I was suggesting.

21 THE COURT: All right. Mr. Murphy, do you have any
22 objection to taking up --

23 MR. MURPHY: No, Your Honor.

24 THE COURT: -- the motions in that order?

25 MR. MURPHY: No, Your Honor, that's fine. That's

1 what we anticipated. And we've got to start somewhere
2 and I don't think it matters if that will be simpler for
3 you.

4 THE COURT: All right.

5 MR. MURPHY: Mr. Moore is gonna argue the two
6 motions relating to the Plaintiff's fire experts. I'm
7 gonna argue the last motion --

8 THE COURT: The one that was filed yesterday?

9 MR. MURPHY: Yes, Your Honor. And it will
10 incorporate some of our objections to designation of
11 deposition material and the grounds are the same, so
12 we'll streamline that for the Court.

13 THE COURT: All right.

14 MR. CLINCH BELSER: Your Honor, before we start, I
15 would like to mention one thing. The motion to exclude
16 the Plaintiff's expert witness on insurance bad faith
17 was served on us yesterday. We had anticipated there
18 might be some motions, so we had with us a basic
19 Memorandum in Opposition to that motion. Because there
20 were some things in the motion which I did not
21 anticipate, I put together some extra comments and got
22 some authorities to hand up with relation to that one
23 aspect of that last motion regarding the insurance bad
24 faith expert, and so I would like to make sure the Court
25 has all the memoranda. We filed one in opposition to

1 both of the --

2 THE COURT: When was it filed, this morning?

3 MR. CLINCH BELSER: Yesterday.

4 THE COURT: All right. So the Motion *in limine* is
5 to Mr. Hesse?

6 MR. MURPHY: Yes, sir. I'm happy for Mr. Belser to
7 hand up anything extra he needs to.

8 THE COURT: All right. But that's the one that
9 we're talking about. And I do have a memorandum in
10 support. Is that the Memorandum that you are referring
11 to of Tom Hesse, Esquire?

12 MR. CLINCH BELSER: Yes, sir.

13 THE COURT: All right. So I do have what you are
14 concerned about. All right. Very good.

15 MR. CLINCH BELSER: Thank you, sir.

16 THE COURT: All right. With that, Mr. Moore?

17 MR. MOORE: Yes, sir. May it please the Court.

18 Your Honor, Ray Moore on behalf of Defendants
19 Nationwide and Flanagan. We have two Motions *in Limine*
20 that were served on November 18th. I apologize I don't
21 have the filing date in front of me. I believe they are
22 in the Court file, however.

23 The Motions pertain to one retained expert witness
24 on behalf of the Plaintiff, Mr. Ross, and with regard to
25 one non-retained witness, the Fire Chief named

1 Mr. Wright, who is proffered to give opinion testimony.
2 as well. And so there are two separate motions directed
3 to these individuals. With the Court's permission I'll
4 take up what I perceive to be the simplest motion first
5 and that is with regard to the Fire Chief, David Wright.

6 Just to give Your Honor -- I know that the Briefs
7 have been submitted and a Pretrial Brief has been
8 submitted. And, of course, this case involves a fire,
9 the aftermath of a fire, the investigation of a fire,
10 and the denial of coverage of an insurance claim based
11 on the fact that the fire was caused by an intentional
12 act on behalf of the insured.

13 Both parties intend to proffer expert testimony
14 with regard to the cause and origin of the fire.
15 Mr. Wright, who is the volunteer Fire Chief for the
16 Friendship Fire Department and who is a paid fireman for
17 the Seneca Fire Department, I believe recently promoted
18 to Captain there, issued a Truck Report, and in his
19 Truck Report actually he gave two of these, and there
20 was some confusion. But he gave two truck reports. And
21 in one of the Truck Reports Chief Wright indicated that
22 after the fire was out, it seemed that it started around
23 the kerosene heater. Your Honor, that report is
24 contained in Exhibit E to our moving papers.

25 We had also attached a second report that was

1 issued, and the narrative that was found on the first,
2 as I understand it, grounds in the first Truck Report
3 was not contained on the second Truck Report.

4 At any rate, because of the indication from Chief
5 Wright that the fire seemed to start around the kerosene
6 heater, we took Mr. Wright's deposition to determine his
7 credentials, his qualifications to render such an
8 opinion, and with regard to the investigation that he
9 undertook to form such an opinion.

10 And, with all due deference to Mr. Wright, who is a
11 long serving member of the Fire Department, he candidly
12 acknowledged that he is not an expert in cause and
13 origin investigation. He acknowledged that he has no
14 training through the NFPA or NAFI with regard to fire
15 investigation.

16 He acknowledged that he had not undertaken or
17 participated in the lengthy investigation that was
18 conducted, had not inspected this heater, but based on
19 three basic observations, including the location of the
20 heater, the extent of damage in Mr. Fowler's living
21 room, and the V pattern that he characterized that he
22 observed in the home, decided that, as he wrote in his
23 report, it seems like it came from the kerosene heater.
24 However, he did not inspect the heater, did not remove
25 the heater; in fact, suggested to Mr. Fowler that the

1 heater be left for further investigation later.

2 Based on Mr. Wright's acknowledgment that he did
3 not perform a full investigation, based on his
4 acknowledgment that he is not an expert in the field,
5 based on his acknowledgment that he was not familiar
6 with NFPA 921, which Your Honor will hear about more
7 extensively later because of the Plaintiff's motion
8 against our expert, we believe that Chief Wright is not
9 qualified to render a cause and origin opinion in this
10 case.

11 Your Honor is probably familiar with the *Watson*
12 case and its latest pronouncement of and clarification
13 of, and the rules regarding expert testimony, the Court
14 has the need for the Court as the gatekeeper to
15 establish the qualifications of an expert. And in the
16 Plaintiff's papers related to Mr. Wright they pointed
17 out to the Court an attempt to cite as authority on
18 their behalf the ironically named *Wright versus Hiester*
19 *Construction Company* case from the Court of Appeals last
20 year, a very similar situation in which Judge Gregory
21 was affirmed by the Court of Appeals for his denial of
22 allowing a Fire Chief to give an opinion on the cause
23 and origin of a fire.

24 And I would offer to the Court that the cases are
25 very similar and would just read -- this is cited, the

1 Wright case is cited in the Plaintiff's papers, but just
2 for the Court's benefit, it's 698 S.E.2d 822.

3 And quoting from the Court of Appeals (reading):

4 We further find no abuse of discretion in the Trial
5 Judge's ultimate refusal to allow Ellis to testify as an
6 expert. According to the record the Trial Judge
7 tentatively qualified Ellis as an expert in fire and
8 origin; however, this qualification was with the proviso
9 that Ellis's investigation was adequate and he reached a
10 definitive conclusion about the cause of the fire based
11 on his perception -- that is Judge Gregory's -- that
12 Ellis did not do an adequately thorough investigation.

13 The Trial Judge stated Ellis did not have a
14 sufficient basis to give an expert opinion as to the
15 cause of the fire. The record supports his finding.

16 Similarly here, Your Honor, we would submit that
17 despite Mr. Wright's lengthy history fighting fires, he
18 does not have a basis by education, training, or
19 otherwise to render cause and origin opinions with
20 regard to how a fire started.

21 Further, just as the proffered expert in the *Wright*
22 case, Mr. Ellis did not have a firm conclusion.
23 Similarly, Mr. Wright in this case does not have a firm
24 conclusion. Rather he has what he characterizes in his
25 report as "it seemed it started around the kerosene

1 heater."

2 Now, part of the concern we have about the
3 admission of this opinion evidence of Mr. Wright is that
4 it puts the imprimatur of the Friendship Fire Department
5 on the evidence, and we believe that the evidence should
6 be presented to the Court from the two retained experts
7 neutrally, so to speak, without the government's seal of
8 approval on one side or the other. And for that
9 additional reason, Your Honor, we believe that it's
10 prejudicial to allow Mr. Wright's opinion.

11 With Your Honor's permission, I would suggest that
12 it may be more appropriate to address the motions one at
13 a time rather than --

14 THE COURT: I think so. You are talking about,
15 when you say motions, you are talking about different
16 witnesses?

17 MR. MOORE: Yes. They are actually filed
18 separately as separate motions.

19 THE COURT: That's what I'm asking. We'll hear the
20 Plaintiff on the Motion *in Limine* as to Chief David
21 Wright.

22 MR. CLINCH BELSER: May it please the Court. May I
23 stand at my desk rather than approach the podium?

24 THE COURT: Certainly.

25 MR. CLINCH BELSER: Your Honor, the Plaintiffs

1 filed a memorandum which has a number of attachments,
2 And I don't want to take anything away from the
3 memorandum, but I won't recite it to you word for word,
4 of course.

5 But the key things are that Chief Wright is a man
6 of many years' experience in fighting fires. He's been
7 31 years with the Friendship Fire Department. For the
8 last 21 years he's been with the Seneca Fire Department
9 as a full-time firefighter. Now, it is true that when
10 he was asked at his deposition whether he held himself
11 out as the cause and origin investigator, he said, No, I
12 don't.

13 His real basis for expertise is his many years of
14 experience. And under the South Carolina Rules of
15 Evidence 702, you don't have to have anything specific.
16 You can have scientific training, technical training, or
17 specialized knowledge, which is experience. It says
18 (reading):

19 A witness is qualified as an expert by knowledge,
20 skill, and experience, training or education may testify
21 in the form of opinion or otherwise.

22 Now, Chief Wright is offered for two purposes. His
23 report is offered for multiple purposes. He's a fact
24 witness because he came to the scene warning of the
25 fire -- the fire was discovered, and the fire started

1 some time during the night because it was discovered at
2 about 8:00 in the morning. 9-1-1 was called by the
3 neighbors. When the Fire Department came, Chief Wright
4 was physically present, looked inside, saw where the
5 latest damage was, he saw the famous V factor which
6 points to where the fire started. The theory there is
7 that the fire starts and grows up against a wire. You
8 can tell by looking at the pictures taken by everybody
9 that the V pattern points right to the location of the
10 kerosene heater. So Chief Wright is gonna be a fact
11 witness as to what he saw. That makes him different
12 from the Fire Chief in the Wright v. Hiester case.

13 Now, he is required as the Chief of the local Fire
14 Department to file monthly reports of each incident,
15 each fire. The citation to the State Fire Marshal
16 Regulations is in our Brief. I'll refer that to you.
17 Just in the very last section -- there are four or five
18 pages -- the very last section says that (reading):

19 The Fire Chief of a local department must make a
20 monthly report finding the facts of the fire and various
21 other things.

22 Now, so the Fire Chief was there as a fact witness
23 as to where the fire burned the most, where the V
24 pattern pointed, and the other things which are required
25 by him to be reported per the State Fire Marshal. The

1 last section says (reading):

2 These reports shall include facts relating to any
3 fire, its cause of origin, property loss, and other
4 pertinent information as prescribed by the Office of the
5 State Fire Marshal in an approved format.

6 The two versions of his Truck Report are in the
7 approved format. This information was required to be
8 submitted. So he's gonna be testifying as an expert and
9 as a fact witness. As a fact witness he was there. As
10 an expert witness he has 31 years of experience in
11 fighting fires. He says he's been to training as to
12 what people in his position are supposed to do. One of
13 the things is making a report to SLED or law enforcement
14 if there's anything suspicious.

15 His deposition, which is cited, says that
16 (reading):

17 We saw nothing suspicious. We would have reported
18 it to SLED if we saw something suspicious.

19 (Whereupon, the Court conferred with the Law Clerk
20 off the record.)

21 THE COURT: Go ahead.

22 MR. CLINCH BELSER: Oh, I'm sorry. I thought there
23 was a little activity.

24 THE COURT: I've learned to do a few things at a
25 time. In fact, I might mention that what you say is a

1 little activity. We have a question from the Jury in
2 that first case which I -- if you think this is a good
3 time to interrupt, I will. I was gonna wait until you
4 were finished.

5 MR. CLINCH BELSER: Well, I've got a little more to
6 do, so we'll be glad to wait. Our Chief Wright is
7 completely different from the Chief Wright in the case
8 cited by the other side.

9 THE COURT: All right. Very good. I'll tell you
10 what, if you could just leave your things there at the
11 table. I'd ask Mr. Dudley and Mr. Pierce to come
12 forward. Leave your things but just ask them to come
13 forward.

14 (Whereupon, the Court had to interrupt the case of
15 *Fowler v. Nationwide* because a note from the Jury
16 was received by the Court in the other trial which
17 was proceeding at the same time at approximately
18 11:16 a.m. and the Court had to deal with matters
19 relating to that trial, after which the following
20 occurred:)

21 THE COURT: But do ask the Jury to join us, please.
22 (Whereupon, the *Fowler v. Nationwide* Jury entered
23 the courtroom at approximately 11:32 a.m.)

24 THE COURT: Mr. Foreman, unfortunately, things seem
25 to be taking a little bit longer than I anticipated. So

1 I thought rather than keep you back in the jury room,
2 I'm going to excuse you until 2:30 because I also
3 have --

4 Oh, wait, that's true. We don't have -- are all
5 the members of the Jury back? All right. I thought
6 there was one that had a medical problem with a family
7 member.

8 THE CLERK: Jennifer Gordon..

9 THE COURT: Ms. Gordon?

10 (There was no response.)

11 THE COURT: All right. Well, that takes care of
12 one problem. I hope if there has been a problem, that
13 it has been resolved. It does appear like we have
14 everyone here. All right. So that makes it a little
15 bit simpler.

16 But still I'm going to have to excuse you till 2:30
17 because I have got a matter scheduled with the Attorney
18 General's Office at 2:00, and they transported prisoners
19 from Columbia, so I need to have that done while they
20 are here. So I'm going to say by 2:30 I should be able
21 to get through it by that time.

22 But also, inasmuch as it was this inconvenience to
23 you, the Clerk advises me that if you would wait a bit
24 of time in the jury room, that we might have vouchers
25 for lunch you can take, and at least you will have a

1 lunch provided for you.

2 Where do they go, the Steak House?

3 THE CLERK: There are several different places on
4 the vouchers that you can go. Steak house is one of
5 them, but the vouchers will show you.

6 THE COURT: The vouchers will show you and you can
7 use those for your lunch.

8 All right. With that I am going to excuse you, and
9 either to go back to the jury room or off on your own,
10 but be back in the jury room at 2:30 and we will start
11 the case at that time. But again I do want to thank you
12 for your patience with the Court and I ask you to come
13 back at that time. Thank you so much.

14 Everyone else remain seated while the Jury retires
15 from the courtroom.

16 (Whereupon, the Jury left the courtroom at
17 approximately 11:35 p.m.)

18 THE COURT: Now we're back on Fowler versus
19 Nationwide. And, Mr. Belser, I think that you were
20 addressing the Defendants' Motion *in limine*, is that
21 correct, as to the cause and origin; is that right?
22 Your limitation is not as a fact witness?

23 MR. MOORE: That's absolutely right. We have no
24 objection and didn't --

25 THE COURT: Well, let me do this. Because motions

1 *in limine* are really advisory in the sense that not only
2 do they have to be renewed at the time any objectionable
3 testimony is proffered at trial, they have to be ruled
4 on at that time. Again, you have to renew it, in other
5 words, as you well know.

6 Since you are not objecting to the factual
7 testimony, and I certainly don't want to invite
8 anything, and if anything was done, I certainly would
9 have taken exception to it, but I would feel more
10 comfortable as well as more definite as far as it being
11 a final decision as far as admissibility to wait until I
12 hear his testimony as to a factual nature.

13 I notice in the *Wright* case -- I finally got the
14 machine to work or whatever -- not me but Matthew -- the
15 problem, I don't want to be too depressing, but all of
16 this technology is wonderful as long as it works, and
17 right now we are having a problem with our printer and I
18 think it's in the whole County system, and there's
19 nothing we can do about it but it does interfere with
20 the finding of quick answers.

21 But the point is at this time I'm going to decline
22 to rule on the motion to limit the testimony except as
23 to this point, that if the Plaintiff, if they reach that
24 point in the testimony where they feel that they will
25 want to proffer the witness as an expert, I will

1 probably ask you to do it out of the presence of the
2 Jury as to what your proffer will be and also give the
3 Defendant at that time an opportunity to cross-examine
4 or Voir Dire that witness as far as expertise all done
5 outside the presence of the Jury. In other words, when
6 you think you are reaching that point, if you would
7 advise the Court and I'll rule on it in that process.

8 THE CLERK: I hate to interrupt, but we still need
9 our juror alternate moved up. Ms. Gordon is not here.

10 THE COURT: How many do we have?

11 THE CLERK: We have 14. We had one young gentleman
12 that was supposed to report for Magistrate's Court today
13 and when he showed his slip downstairs they looked at it
14 wrong or didn't look at it or something and sent him
15 upstairs and put him with this jury.

16 THE COURT: I understand there's a 403 candidate
17 out here. I got to say if it's gonna happen, it will
18 happen in Oconee, and it just happened. All right.
19 I'll tell you what. Excuse the young man but no use to
20 disturb the Jury at this time. Still Mr. Beasley will
21 be seated when they come back at 2:30.

22 (Whereupon, the new Alternate Juror in the *Fowler*
23 *v. Nationwide* case is Earl M. Beasley, Number 108,
24 who replaced Juror Number 49, Jennifer Gordon.)

25 (Whereupon, a verdict was reached in the first case

1 at approximately 12:40 p.m.)

2 THE COURT: And, by the way, we have a verdict in
3 the first case.

4 THE CLERK: That would be another problem. Because
5 I received an email from the Clerk of Court stating that
6 Mr. Pierce came in downstairs, told them that he was
7 going to lunch for 30 minutes and left. I have no phone
8 number for him. He did not leave us a number, unless
9 someone else has a number for him.

10 THE SHERIFF'S DEPUTY: We're not able to locate him
11 in the courthouse. He must be gone.

12 THE COURT: Call Martha's or Pete's or Kay's.

13 All right. All right. Well, the only thing is,
14 we'll just ask the Jury to be patient with us, that we
15 have a scheduling problem right now and we'll be with
16 them as soon as possible. Also, see if somebody could
17 locate him maybe at Martha's.

18 (Discussion off the record.)

19 (Whereupon, the Court considered other matters
20 while awaiting the return of Mr. Pierce.)

21 THE COURT: All right. We're back on the record in
22 *Fowler versus Nationwide* and Mr. Belser, actually, I've
23 already ruled on the first one, so now let's go to the
24 second one. I'm sorry.

25 MR. MOORE: May it please the Court, Your Honor,

1 Nationwide and Mr. Flanagan have filed a second Motion
2 *in limine* with regard to the proffered expert testimony
3 from the Plaintiff's retained cause and origin
4 investigator, Mr. Ross.

5 THE COURT: All right, very well.

6 MR. MOORE: This Motion has two prongs to it and
7 I'll take them up actually in reverse order.

8 The first prong that I would address is the second
9 raised in our papers, and that is that Mr. Ross, it is
10 my understanding when we filed the motion, had purported
11 to review 61 fires that were produced in discovery in
12 which Mr. Byers, our expert, reviewed on behalf of
13 Nationwide over about a four-year period.

14 Now, from their papers that were submitted to me
15 yesterday, I understand that Mr. Ross has apparently
16 evaluated a hundred fires that Mr. Byers, our expert,
17 has evaluated and is prepared to render comments on
18 Mr. Byers' analysis of 100 other fires, including some
19 61 on behalf of Nationwide in which Mr. Byers issued a
20 report. Now, Your Honor, I --

21 THE COURT: Now, did Mr. Ross do any Nationwide
22 investigation?

23 MR. MOORE: No, Your Honor. And, in fact, to my
24 knowledge Mr. Ross was not personally involved in any of
25 these, and was certainly not involved in the 61

1 Nationwide fires. So pursuant to a Court Order
2 previously, Nationwide had produced Mr. Byers' reports
3 in 61 other fires, and we understand from Plaintiff's
4 attorney, who has provided reports from Mr. Ross, that
5 Mr. Ross has gone through these documents and has
6 commented about the investigation that was apparently
7 performed and the merit or lack of merit with regard to
8 the investigation of these 61 fires. The Plaintiff has
9 tabulated that of the 61 over this four-or-so-year
10 period, 14 of them were arson fires, some of them he
11 wants to attack for what was done or not done. Some of
12 the accidental fires, some of the other caused by other
13 sources, the Plaintiff's expert wants to attack our
14 expert's methodology, in these 61 and now as of
15 yesterday 40 more that we don't know where those came
16 from, but there were a hundred listed or identified in
17 the papers.

18 Now, our argument on this is obviously that
19 Mr. Ross does not have a basis, at least on these 61, to
20 comment on what Mr. Byers did or didn't do, what was
21 available to Mr. Byers because Mr. Ross didn't
22 investigate the fires himself.

23 THE COURT: Well, that would be difficult to do,
24 wouldn't it?

25 MR. MOORE: It would be -- ,

1 **THE COURT:** I'm not sure how many experts have
2 actually been at the scene of that accident when they do
3 reconstruction or their evaluation of someone else's
4 reconstruction.

5 **MR. MOORE:** Sure. If we're talking about the
6 central case, this case, that's a different matter. But
7 for Mr. Ross to analyze 61 or 100 other fires that have
8 nothing to do with this case, have nothing to do with
9 our case, this case would then devolve into 61 or 100
10 mini trials where Mr. Ross has to attack Mr. Byers
11 for --

12 **THE COURT:** All right. Let me hear you on that,
13 Mr. Belser, or Mr. Belser, whoever is going to handle
14 this.

15 **MR. CLINCH BELSER:** May it please the Court. We
16 did file a Memorandum about this, and we do stand by
17 what we said in that. But in order not to have to rule
18 an appellate issue, we will withdraw that portion of
19 Ross's proposed testimony about Mr. Byers which deals
20 with other fires. We'll withdraw that.

21 **THE COURT:** All right. Very good.
22 Now, you said there are two prongs.

23 **MR. CLINCH BELSER:** The other prong, I think, is --

24 **THE COURT:** Well, Let's hear from Mr. Moore on
25 that.

1 MR. MOORE: Thank you, Your Honor. The second
2 prong of our argument is with respect to Mr. Ross's
3 opinion in this case on this fire, and that is Mr. Ross
4 has rendered an opinion that the kerosene heater
5 involved in the fire got hot enough that it either
6 caused the degradation of the Sheetrock on the wall
7 behind it to the extent that wall had collapsed and then
8 after that wall had collapsed, the heater over some
9 period of time ignited the wood studs that were behind
10 the Sheetrock. That's one part of his opinion. Before
11 he says the heater got so hot that it could ignite the
12 Sheetrock. That's his opinion about how this fire
13 started.

14 Now, the problem with that, and again touching on
15 the *Watson* case and the reliability problem, the problem
16 with that is there are known temperatures in the science
17 and in the research dealing with fires, and I have
18 brought those sources and authorities with me today that
19 tell us that the temperatures needed to reach the
20 temperature at which Sheetrock would degrade, and it's
21 something like 1,400 degrees, and this 10,000 BTU heater
22 in Mr. Fowler's residence couldn't have reached that
23 temperature.

24 Further, there are temperatures at which Sheetrock,
25 which is a flame-retardant, could ignite and that

1 temperature is --

2 THE COURT: Now, remember, flame-retardant is not
3 flammable.

4 MR. MOORE: You're right. There is science that
5 says that Sheetrock can ignite. The problem is it's
6 somewhere in the neighborhood of a thousand degrees and
7 the research on this heater is that on the back of the
8 heater at its hottest point it gets to somewhere in the
9 neighborhood of 140 degrees. So we're hundreds of
10 degrees away.

11 Now, the interesting thing about Mr. Ross is he
12 acknowledges that it didn't occur from a malfunction of
13 the heater. He's talking about radiant heat off the
14 back of a kerosene heater. It didn't happen in the
15 front, he acknowledges from his testimony, it didn't
16 happen from a malfunction of the heater, it didn't
17 happen from some kind of inappropriate use of gasoline
18 versus kerosene. It happened from natural radiant heat
19 off the back of a heater that either degraded a wall and
20 it would have had to have reached 1,400 degrees to do
21 that, and there's no question that it didn't, or that it
22 would have had to have reached a thousand degrees or
23 thereabouts in order to cause the Sheetrock to ignite.
24 And all of this had to happen within a period --

25 THE COURT: If you'll forgive me, I think you are

1 getting into the weight of his testimony rather than the
2 admissibility of it. Have you challenged his
3 qualifications to make such a determination?

4 MR. MOORE: At this stage we haven't challenged his
5 qualifications. What we were challenging is the
6 reliability prong that goes to the Court's gatekeeping
7 responsibilities under the *Watson* and *Council* (phonetic)
8 cases. And under that analysis the Supreme Court has
9 promulgated in *Watson* and *Council* and Rule 702:
10 (Reading): We find that the reliability of this
11 testimony without some testing -- we've actually had it
12 tested, we've had the research done in response to
13 Mr. Ross's testimony, and it physically can't happen.
14 There is no ---

15 THE COURT: Well, then, that pretty much settles
16 it.

17 MR. MOORE: That's why we think Your Honor should
18 exclude the testimony.

19 THE COURT: Well, I can't say that. I don't know
20 that for a fact.

21 MR. MOORE: Well, what we think is apparent is the
22 that reliability of the testimony --

23 THE COURT: Well, then, the reliability depends
24 upon the testimony, and I haven't heard any testimony --
25 by the way, I did try a fire retardant case one time and

1 it resulted in the late Mr. Arnold becoming one of the
2 largest Plaintiffs' lawyers in South Carolina, if you
3 know anything about Mr. Arnold from Greenville, he was a
4 Farm Bureau attorney, he got on the Plaintiff's side
5 because he had dealt with fire. And the argument about
6 retardant didn't work because, of course, it was a
7 different type of insulation rather than Sheetrock. But
8 the fact is that that's a factual matter. Now, I'll
9 have to hear the testimony to determine whether or not
10 whatever he testifies to is based on reliable
11 information.

12 MR. MOORE: Thank you, Your Honor.

13 MR. CLINCH BELSER: May it please the Court? I
14 gather you are denying his motion based on --

15 THE COURT: At this point it's pretty much on the
16 same thing. I think that motions *in limine* have to be
17 determined based on the record, unless they are
18 something that just goes to the qualifications
19 altogether.

20 MR. CLINCH BELSER: Well, I'd like to just offer at
21 this time with reference to motions that we've already
22 heard and the ones that are gonna come up. The Judge
23 was right on the target when you said this goes to the
24 weight. These are disputes as what the facts are, and
25 just so we are in the record, Mr. Holecek was deposed

1 and he said certain things that boiled down to the fire
2 could have been started as a result of the temperature
3 and the total amount of time. He didn't know what the
4 temperature was or he didn't know what the total amount
5 of time was.

6 THE COURT: You're talking about the Defendant's
7 expert?

8 MR. CLINCH BELSER: Their expert attacking our
9 Mr. Ross. Now, Mr. Ross is gonna say, because he said
10 in his Deposition, that he's aware of the studies, he
11 participated in the tests. He thinks the fire had been
12 there for a number of days and during that portion of
13 time during this winter the thing happens. It's not as
14 clear at all as they are saying now.

15 THE COURT: Again, I understand. But what I'm
16 ruling is I'm denying your Motion *in limine* here based
17 on that particular ground until I hear the testimony.

18 MR. MOORE: Thank you, Your Honor.

19 THE COURT: Very good. All right. Of course,
20 then, I will do this, too. On these experts I am going
21 to request that the parties on both sides, I guess you
22 have a Motion *in Limine* as to their expert?

23 MR. CLINCH BELSER: Yes, sir. It's different from
24 theirs.

25 THE COURT: What I will do is follow the same

1 procedure. Before you proffer the witness as an expert,
2 alert the Court so I can take those matters up outside
3 of the Jury's hearing.

4 MR. CLINCH BELSER: Very good.

5 MR. MURPHY: Your Honor, the one Motion remaining
6 with regard to Mr. Hesse, I would like to address just
7 one aspect of it because I would ask that Counsel be
8 prohibited in opening statement from going into
9 qualifications, it's an undisputed matter whether the
10 *State Farm v. Howard* case precludes certain evidence
11 based on the date that the claim was denied.

12 THE COURT: Please. I guess I need to hear that
13 one.

14 MR. MURPHY: Yes, Your Honor.

15 THE COURT: By the way, I hate to be a killjoy, but
16 I do follow the Rule as far as opening statements. I
17 don't want to hear the argument in an opening statement.
18 If the first person stands up and says, "It was a dark
19 and lonely night," they'll sit down. Let's just talk
20 about what the theory of the case is and what your
21 defense is.

22 MR. MURPHY: This will also help us if we address
23 this because it applies to the objections that we raise
24 to certain portions of the Flanagan and Madden
25 Depositions and several exhibits from those Depositions.

1 But the issue is this. In this case of *State Farm v.*
2 *Howard* that was a case alleging the wrongful denial of a
3 PIP claim against State Farm. And when the lawsuit was
4 tried over that PIP claim, the Plaintiff introduced
5 evidence that had occurred after the claim had been
6 denied, additional, what I would call post-denial
7 conduct.

8 In this case there were some additional activities
9 that occurred after the claim had been denied that were
10 testified to by Mr. Hesse as he claims evidence of bad
11 faith and those have two problems. One, they're not
12 related to the denial of the claim. He admitted that.
13 Secondly, it occurred after the claim had already been
14 denied. And the case law is clear from *State Farm v.*
15 *Howard*, also from the *Varnadore* case, actually cited
16 *Nationwide v. Varnadore*, it says evidence when an
17 insurance company is liable for bad faith must be judged
18 by the evidence before it at the time it denied the
19 claim. And the element is the refusal to pay benefits,
20 not the refusal to turn over a report or the refusal
21 extend the deadline after the claim had already been
22 denied. And this says that, the Supreme Court says that
23 evidence that arises after the denial of the claim is
24 not relevant to the propriety of the conduct of the
25 insurer at the time of its refusal.

1 And so I'm asking that Mr. Hesse and these
2 deposition excerpts be limited to the conduct of
3 Nationwide up to and including the date of denial and
4 not with respect to any activities that occurred after
5 the claim had been denied.

6 **THE COURT:** Well, don't I understand. There was
7 also an allegation about going to the finance companies
8 after the claim was denied and he took action?

9 **MR. MURPHY:** I'm not objecting to that in my
10 presentation or my objections and request for additional
11 deposition testimony. As to those exhibits I do not
12 object because I understand there is a slander claim and
13 it is relevant to the slander claim and I understand
14 they are alleging that a slander occurred afterward.
15 But several of the other specifics, which are failing to
16 turn over a report, failing to extend a deadline after
17 it had already been denied, cause and origin report back
18 and forth from Mr. Belser, that evidence that conduct
19 could constitute bad faith is irrelevant in light of
20 *State Farm v. Howard* because a decision had already been
21 made, so I would just ask that counsel not be allowed to
22 address those.

23 And then lastly, Your Honor, there's one contact
24 with the Oconee County Deputy about would he be
25 interested by one of our investigators. I believe that

1 falls into the prohibition of non prosecution set forth
 2 in *Brown versus Allstate* recently by the Court of
 3 Appeals. Any conversation between Nationwide and law
 4 enforcement didn't amount to anything that would be
 5 inferred as evidence of non prosecution, and, of course,
 6 evidence of non prosecution is not admissible in this
 7 type of case. That's one specification from Mr. Hesse.
 8 And then the others have to do with some post-denial
 9 conduct which I think we set within my brief which I
 10 kept within your five-page rule on my motion.

11 THE COURT: All right, Mr. Belser.

12 MR. CLINCH BELSER: May it please the Court? I
 13 need to address what Mr. Murphy is saying right now
 14 because it is not covered in our memorandum. I had no
 15 idea that this argument would be made.

16 THE COURT: You are -- the post-denial evidence and
 17 testimony or whatever is not covered?

18 MR. CLINCH BELSER: Yes, sir. The *Howard* case
 19 dealt with not mere post-denial conduct. The *Howard*
 20 case in which you got a copy --

21 THE COURT: Just give me the cite on it if you
 22 would, please.

23 MR. CLINCH BELSER: (Pauses.)

24 MR. MURPHY: I'll be glad to hand you my copy.

25 THE COURT: Just give me the cite. It's on the

1 front, the cite.

2 MR. MURPHY: Oh. It is 316 S.C. 445, 450 S.E.2d,
3 582.

4 THE COURT: Okay. 316 S.C. 445.

5 MR. MURPHY: Right.

6 MR. CLINCH BELSER: In the *Howard* case there was
7 Cross-Examination of the claims adjuster about certain
8 conduct by the claims adjuster after the lawsuit was
9 filed, things which were done which would slow down the
10 lawsuit and were dilatory to prosecute.

11 THE COURT: You mean discovery?

12 MR. CLINCH BELSER: It was post-litigation. That's
13 always the rule. What happens before the lawsuit is
14 always different from what happens after the lawsuit.
15 In the *Howard* case, which is a 1994 case, does have some
16 dictum with Mr. Murphy's cites but the actual holding of
17 the case that was irrelevant to the lawsuit which is
18 part of a bad-faith claim is what happened after the
19 lawsuit. There are discovery motions you can make,
20 there are motions to compel.

21 THE COURT: Sanctions and the like. The Rule 36.

22 MR. CLINCH BELSER: In our case we had to file a
23 Motion to Compel twice to get some of this material.
24 We're not suing for damage from that because we
25 exercised the remedies we had under the Rules to make

1 them produce what they're supposed to produce if
2 relevant. Our case deals with the claims process. One
3 goes from the receipt of the claim --

4 **THE COURT:** And this particular case is not related
5 to any other cases?

6 **MR. CLINCH BELSER:** Just Mr. Fowler's case. Our
7 claim here is that the fire occurred. The Defendants
8 sent Mr. Flanagan there. He did certain things, he did
9 an insufficient investigation. Then he did certain
10 things in reference to ignoring the report which he
11 received from the Friendship Fire Department, did
12 certain things with reference to contacting finance
13 companies. He refused to give Mr. Fowler extra time to
14 complete the proof of loss; and, when we sent it in, he
15 sent it right back. All these things are part of the
16 claims process.

17 **THE COURT:** They are also alleged in your
18 Complaint, are they not? At least the 60 days and the
19 90 days? I mean, I have gone through the pleadings.

20 **MR. CLINCH BELSER:** We didn't do a complete fact
21 pleading but the breach of the --

22 **THE COURT:** What I'm talking about is one of the
23 things that you have as I understand post the prejudice
24 of being surprised about something. What I'm saying is
25 that I look at the pleadings and the pleadings did

1 relate to matters that are outside, that followed the
2 determination.

3 MR. CLINCH BELSER: Yes, sir. And all this came up
4 before Judge McIntosh in November of last year, and most
5 of these things were discussed at that time and are
6 specifically mentioned in his Order which was filed June
7 the 3rd of 2011. These things --

8 THE COURT: All right. I'll look at that Order.

9 MR. CLINCH BELSER: -- relate to the claim.

10 Now, I'd like to just say this. We do not have a
11 separate cause of action for going to the Police
12 Department and saying that we're gonna, we think this
13 guy lit the fire and the Sheriff says come back when you
14 got your test samples. The investigator never went back
15 after the test samples came back negative, all six of
16 them were negative. They went to the finance companies
17 and told them that they were denying the claim because
18 of the intentional acts exclusion for coverage, and
19 Mr. Flanagan in his deposition just specifically
20 admitted he knew this was, quote, the same thing as
21 saying Mr. Fowler lit the fire himself. He knew this
22 was the same as accusing Mr. Fowler of arson. All of
23 these things are part of the claims process. And in
24 Mr. Flanagan's deposition he said he was gonna require
25 Mr. Fowler to submit the proof of loss anyway if he

1 wanted to pursue, push the claim so that the claims
2 process is what we are talking about. All this occurred
3 before the lawsuit was ever filed and has been discussed
4 in the case for literally two and a half years.

5 THE COURT: And you said that the case that you
6 were relying on, are they would be relying on, *Victor*,
7 is a '74 case?

8 MR. CLINCH BELSER: '94. And since that time there
9 have been numerous cases which are, well, the *Varnadore*
10 case in which -- Mr. Murphy cites the *Nichols* case. If
11 the insurance demonstrates bad faith or unreasonable
12 action in processing the claim. He doesn't say
13 processing the claim up to a premature denial. The
14 whole point of our case is Mr. Flanagan decided when he
15 got there on the first day after the fire that this
16 gentleman, he thought had motive, and we can move it
17 wasn't motive, and opportunity and go after incendiary
18 fraud. He made his decision too soon and did not
19 discharge the duties of an insurance company to do a
20 reasonable investigation and to pursue leads. That's
21 what this case is all about.

22 The business about the request for the cause of
23 origin report is also part of the claims process.
24 Mr. Byers was retained to do his investigation to try to
25 see whether there was evidence of whether it was

1 incendiary. Mr. Fowler participated fully, cooperated
2 fully with everything. He disputed the result and
3 wanted a copy and Mr. Flanagan said on the instructions
4 of his claims manager, Mr. Madden, that we're not gonna
5 give it to you. Mr. Madden told Mr. Flanagan [sic], We
6 won't give any of it to you, you'll get it in discovery
7 if you file a lawsuit. That's a quote from some of
8 these claims notes produced pursuant to Court Order.

9 THE COURT: Well, I'm looking at the Defendants'
10 answers, particularly paragraphs 13, where they show
11 that the investigation and adjustment claim was
12 necessary and was conducted. Also the 17 and 18 refer
13 to -- well, those are denied.

14 MR. MURPHY: Your Honor, I'm not arguing that we're
15 prejudiced by not knowing about those being claimed.
16 What I'm saying is that the case law restricts the
17 proof.

18 THE COURT: I'll have to look at the case law that
19 says that anything that happens after the incident or
20 giving rise to the cause of action is not admissible.

21 MR. MURPHY: I would just say very briefly under
22 the discussion in the first four headnotes together, the
23 rule of law in *Howard* is that evidence that arises after
24 the denial of the claim is not relevant to the conduct
25 of the insured's point of his refusal. Then it says:

1 Thus, testimony concerning the adjuster's handling of
2 the claim after the litigation commenced was irrelevant.
3 The rule of law is a point of denial in that particular
4 case. The comment it even happened even after
5 litigation. It goes --

6 THE COURT: Well, it sounds like it was limited to
7 after litigation. I'm sorry. Otherwise I treat the
8 Courts the same as I do the Legislature. They don't say
9 I things that are unnecessary.

10 MR. MURPHY: Well, I would just point out that back
11 in the *Varnadore* case which was about ten years earlier
12 in '86 the Court in that case ---

13 THE COURT: What's the cite on *Varnadore*?

14 MR. MURPHY: The cite on *Varnadore* is 289 S.C. 155,
15 and in that case applying the *Nichols* elements the Judge
16 charged the Jury that there is no bad faith and such is
17 a matter depending upon circumstances existing when
18 liability is declined. So that rule of law in how you
19 establish the *Nichols* four elements, which includes the
20 wrongful refusal to pay a claim, has to be judged by the
21 evidence before the insurance company at the time of its
22 refusal, and that's the denial in this case.

23 THE COURT: Well, didn't you say, Mr. Murphy, they
24 could do whatever they want? It didn't rise to bad
25 faith?

1 **MR. MURPHY:** Nothing further than they did that
2 involved a refusal to pay benefits under the claim.
3 These are ancillary matters, half of them instigated by
4 Mr. Belser writing and requesting things, which I
5 assume, I don't know if he's gonna take the stand or
6 not, but their actual denial, the decision is when they
7 denied the claim --

8 **THE COURT:** If I understand it, there is a bright
9 line in this case?

10 **MR. MURPHY:** Yes. The claim was denied.

11 **THE COURT:** Once the claim was denied, then nothing
12 else was relevant?

13 **MR. MURPHY:** That's our position, Your Honor.

14 **THE COURT:** Very good. I'll look at the cases and
15 see what I find.

16 **MR. CLINCH BELSER:** Your Honor, the only other
17 thing I'd like to say -- I've got the *Varnadore* case and
18 the other ones. But the way the Jury can understand
19 what was the good faith or the bad faith of the
20 insurance company in prematurely closing down its
21 investigation and trying to rely simply upon its own
22 investigation, the only way the Jury can see what's in
23 the mind of the insurance company is to see what they
24 did. And all the things which we have been talking
25 about show, and we certainly will argue, I don't plan to

1 testify, but we're gonna argue that all these things
2 showed the lack of *bona fide* and spirit of bad faith and
3 spirit of fair play with your policyholder. So that was
4 just to throw light on that. And they should be
5 admissible for that purpose.

6 As I said before, we are not seeking any damages
7 for what they told the Deputy Sheriff because the Deputy
8 Sheriff didn't do anything. That's not a separate cause
9 of action. We're also not suing for damages --

10 THE COURT: Excuse me. You do allege in, of
11 course, the second cause of action, done without
12 reasonable cause and bad faith and the fourth cause of
13 action, slander *per se* says implied or imputed arson
14 involving a crime of moral turpitude, which would be
15 malice and deemed as false.

16 All right. Again, somehow I have a problem with a
17 bright line. I think that the causes of action that are
18 pled do suggest that you do look at the entire process.
19 Of course, I agree with matters as to what is proper
20 actions after litigation to be handled by the Rules and
21 the sanctions provided by those Rules and that would be
22 irrelevant.

23 All right. I'll look at *Howard* and *Varnadore* and I
24 think you say *Nichols* is referred to and is cited in one
25 of those.

1 All right. Very good. Now, I'm going to excuse
2 you all until 2:30 -- any more? Any more?

3 MR. MURPHY: Yes, Your Honor. The other aspect of
4 Mr. Hesse, in line with your other ruling, we'll just
5 take that up when he takes the stand. We're not waiving
6 that, but it has to do not with his credentials but with
7 the nature of some of his testimony as being legal
8 conclusions invading the Jury's province. And there are
9 some cases, in fact, some involving Professor Freeman,
10 although no one would quibble with his qualifications,
11 but one might quibble with the --

12 THE COURT: Was that the one out of Hampton County,
13 Hampton or Allendale?

14 MR. MURPHY: I believe it was. It was in the
15 papers. So we did raise that. But in keeping with how
16 you handle that, we'll wait until he comes to testify.

17 THE COURT: Very good. Thank you.

18 MR. CLINCH BELSER: If it please the Court?

19 THE COURT: All right. Now you have a motion, too?

20 MR. CLINCH BELSER: I'd like to hand up another
21 case which is relevant to what we talked about because
22 we didn't talk about it, but it's the *Mixson versus*
23 *American Loyalty Insurance Company*, it's a 2002 case,
24 562 S.E.2d 659, 349 S.C. 394.

25 This is the one which refers to other cases and the

1 Varnadore case which we've already cited. But that says
2 the insurance company cannot rely simply on its own
3 investigation to say they had reasonable cause to deny a
4 claim. That implies that obviously you can look beyond
5 that.

6 THE COURT: All right. I don't have the case. It
7 does help, though, if you could give me the cites on the
8 cases you are relying, and also the headnotes, if you
9 could. But if it's a Judge Anderson opinion.

10 MR. MURPHY: I think Howard was 1, 2, 3, and 4, all
11 right there together.

12 THE COURT: All right. Anything else before we
13 come back at 2:30 on this one?

14 MR. CLINCH BELSER: No, sir.

15 THE COURT: All right. I hope to finish up before
16 2:30, so y'all be available as soon as I can finish with
17 the Attorney General, that will be at 2:00.

18 MR. MURPHY: Yes, sir.

19 THE COURT: Very good. Thank you, sir. And now
20 we've got the other jury's verdict. Is everybody here?

21 (Whereupon, everyone was now present for the
22 reading of the verdict of the Jury on the first
23 case at 12:18 p.m. The verdict of the Jury was
24 read and post-trial motions were heard, after which
25 hearings on other unrelated matters were heard,

1 after which the matter of Fowler v. Nationwide
2 resumed.)
3 (Plaintiff's Ex. # 1, letter dated 3-2-09 from Mr.
4 Flanagan to Mr. Belser, was marked for
5 identification.)
6 (Plaintiff's Ex. # 2, letter dated 3-16-09 from
7 Mr. Belser to Mr. Flanagan was marked for
8 identification.)
9 (Plaintiff's Ex. # 3, letter dated 3-19-09 from
10 Mr. Flanagan to Mr. Belser, was marked for
11 identification.)
12 (Plaintiff's Ex. # 4, letter dated 2-11-09 from
13 Mr. Flanagan to Mr. Fowler, was marked for
14 identification.)
15 (Plaintiff's Ex. # 5, 2-4-09 sample results, was
16 marked for identification.)
17 (Plaintiff's Ex. # 6, 1-17-09 preliminary Truck
18 Report, was marked for identification.)
19 (Plaintiff's Ex. # 7, emails dated 2-19-09 and
20 2-10-09, were marked for identification.)
21 (Plaintiff's Ex. # 8, letter dated 2-19-09 from Mr.
22 Flanagan to Citi Financial, was marked for
23 identification.)
24 (Plaintiff's Ex. # 9, 2-23-09 Sworn Statement in
25 Proof of Loss, was marked for identification.)

1 (Plaintiff's Ex. # 10, emails dated 3-13-09 and
2 2-16-09, were marked for identification.)
3 (Plaintiff's Ex. # 11, Nationwide Internal
4 Document (depo # 22), was marked for
5 identification.)
6 (Plaintiff's Ex. # 12, Nationwide Internal Document
7 (Depo # 23), was marked for identification.)
8 (Plaintiff's Ex. # 13, Nationwide Internal Document
9 (Depo # 24), was marked for identification.)
10 (Plaintiff's Ex. # 14, Nationwide Internal Document
11 (Depo # 27), was marked for identification.)
12 (Plaintiff's Ex. # 15, Nationwide Internal Document
13 (Depo # 29), was marked for identification.)
14 (Plaintiff's Ex. # 16, 10-17-09 final Truck Report,
15 was marked for identification.)
16 (Plaintiff's Ex. # 17, Plaintiff's pre-fire photos,
17 was marked for identification.)
18 (Plaintiff's Ex. # 18, Plaintiff's sketch of floor
19 plan, was marked for identification.)
20 (Plaintiff's Ex. # 19, Plaintiff's sketch of floor
21 plan, was marked for identification.)
22 (** NOTE ** There is no Plaintiff's Ex. # 20 **)
23 (Plaintiff's Ex. # 21, 1-18-09 Nationwide forms,
24 was marked for identification.)
25 (Plaintiff's Ex. # 22, 1-23-09 letter Flanagan to

1 Fowler, was marked for identification.)
2 (Plaintiff's Ex. # 23, 1-28-09 letter Gilden to
3 Fowler, was marked for identification.)
4 (Plaintiff's Ex. # 24 2-11-09 letter Flanagan to
5 Fowler, was marked for identification.)
6 (Plaintiff's Ex. #25, 3-13-09 Sworn Statement,
7 Proof of Loss, was marked for identification.)
8 (Plaintiff's Ex. # 26, Plaintiff's Rule 1006
9 Summary, was marked for identification.)
10 (Plaintiff's Ex. # 27, Byers' sketch of Plaintiff's
11 floor plan, was marked for identification.)
12 (Plaintiff's Ex. # 28, Ross's photographs, was
13 marked for identification.)
14 (Plaintiff's Ex. # 29, Byers' photographs, was
15 marked for identification.)
16 (Plaintiff's Ex. # 30, Nationwide Property Loss
17 Report Form, was marked for identification.)
18 (Plaintiff's Ex. # 31, 2-19 & 2-20-09 emails
19 Flanagan, Madden, was marked for identification.)
20 (Plaintiff's Ex. # 32, 2-13 & 2-16-09 emails
21 Flanagan, Madden, was marked for identification.)
22 (Plaintiff's Ex. # 33, Nationwide Internal document
23 (Depo 7), was marked for identification.)
24 (Plaintiff's Ex. # 34, Nationwide Internal document
25 (Depo 8), was marked for identification.)

1 (Plaintiff's Ex. # 35, Nationwide Internal document
2 (Depo 11), was marked for identification.)
3 (Plaintiff's Ex. # 36, Nationwide Internal Document
4 (Depo 12), was marked for identification.)
5 (Plaintiff's Ex. # 37, Nationwide Internal Document
6 (Depo 13), was marked for identification.)
7 (Plaintiff's Ex. # 38, Nationwide Property Best
8 Claims Practices, was marked for identification.)
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1 **Afternoon Proceedings**

2 **2:48 p.m.**

3 **THE COURT:** All right. Is the Plaintiff ready?

4 **MR. CLINCH BELSER:** Yes, sir.

5 **THE COURT:** Is the Defense ready?

6 **MR. MURPHY:** Yes, Your Honor.

7 **THE COURT:** All right. It's already been a long
8 day.

9 All right. I was asking about the exhibits and I
10 remembered that there are certain exhibits, depending on
11 my ruling on what the law is as to bad faith and the bad
12 faith cause of action. And I have reviewed *Varnadore*,
13 *Nichols*, *Howard*, and also *Mixson*. Does the Plaintiff
14 have any other authorities I should consider?

15 **MR. CLINCH BELSER:** The only other cases which come
16 to mind is the recent case of *Mitchell versus Fortis*
17 *Insurance Company*, it's a 2009 Supreme Court case, 686
18 S.E.2d 176, 385 S.C. 570. It was the bad faith case
19 involving health insurance. A young man's claim was
20 denied because the insurance company felt that he had
21 HIV. After the denial the insured and his lawyer I
22 think later kept submitting information which proved
23 that the man did not have HIV when he applied for his
24 insurance.

25 **THE COURT:** He was denied insurance?

1 MR. CLINCH BELSER: The claim was denied for that
2 reason, and there was a lot of evidence about the
3 efforts of the parties --

4 THE COURT: So you don't have the headnote there
5 that you are particularly relying on?

6 MR. CLINCH BELSER: I'm sorry, I do not.

7 THE COURT: Was it in the review of *Gambrell*
8 criteria or requirements?

9 MR. CLINCH BELSER: Your Honor, I don't have a copy
10 of it. But I do remember the case. It was an insurance
11 bad faith case which was a pretty large verdict,
12 actually.

13 THE COURT: Well, the thing is, that's where they
14 reviewed the *Gambrell* criteria or requirements on
15 punitive damages for --

16 MR. CLINCH BELSER: Yes, sir, I think they did
17 that.

18 THE COURT: -- review.

19 MR. CLINCH BELSER: The reason I mentioned it --

20 THE COURT: Well, is there anything that you can
21 give me -- go ahead, let me just hear your argument on
22 it. You say it is relevant. Now, what's the prong,
23 sir?

24 MR. CLINCH BELSER: The elements of bad faith
25 included the fact that the insurance company refused to

1 reconsider --

2 THE COURT: They had already denied it?

3 MR. CLINCH BELSER: They denied it once, and there
4 was a lot of communication back and forth.

5 THE COURT: And this was prior to litigation?

6 MR. CLINCH BELSER: All this was prior to
7 litigation.

8 THE COURT: In other words, the denial was not the
9 operative event, it was under litigation?

10 MR. CLINCH BELSER: It was the original denial
11 followed up by the refusal to reconsider the denial in
12 spite of more evidence presented, and the conduct of the
13 parties --

14 THE COURT: All right. Anything else?

15 (There was no response.)

16 THE COURT: All right. Mr. Murphy, what do you
17 have to say? First of all, do you have any other...

18 MR. MURPHY: I don't have any other. I think *State*
19 *Farm v. Howard* is the case on point where that was the
20 issue to guide the trial courts in what evidence to
21 allow what evidence and what not to. I don't recall the
22 *Fortis* case, but I believe that was the post-punitive
23 damages review. That's why I didn't cite it in my
24 Brief. But there would have been a big difference where
25 if there had been additional evidence considered and it

1 was reconsidered and re-denied. In this case there was
2 no reconsideration because nothing was submitted on
3 behalf of Mr. Fowler until he filed his lawsuit. He
4 requested some things, but he did not submit his own
5 expert report or submit any new evidence or evidence
6 that hadn't been considered until he came up with his
7 expert during the pendency of this litigation. So I
8 think it would be distinguishable in that fact and it
9 would be different if we're using the denial of the
10 claim because that is what *Nichols* makes actionable is
11 the reasonable basis for the denial of the claim, was a
12 refusal to pay benefits. There was no reconsideration
13 or resubmission of anything in this case. I don't think
14 that's disputed. It questions four things --

15 THE COURT: Well, you know, and this is what I
16 spent my -- no, I'm not through. I need to redirect
17 your attention. I've read *Howard*, and, unfortunately,
18 the statement in *Howard* appears to be different because
19 the contention in *Howard* was the company contends the
20 Trial Judge erred in allowing Cross-Examination of its
21 adjuster concerning her handling of the claim after the
22 litigation commenced. So anything else dealing with the
23 testimony concerning the adjuster's handling of the
24 claim after litigation commenced was relevant, and I
25 agree with that.

1 But anything dealing with it that was denied, I
2 don't know if that would be relevant to what the Court
3 has reported at the time. And the reason I say that,
4 I'm trying to see if we can't get this record somewhat
5 in order here.

6 But looking at -- well, for example, *Nichols* is
7 another one that is cited as authority for that
8 statement.

9 (The Court conferred with the law clerk off the
10 record.)

11 **THE COURT:** Yes. *Varnadore* I think it is --
12 right -- *Varnadore*, where Judge Peeples, I think it was
13 Judge Peeples -- no, it was Judge Rushing -- charged,
14 and what the Court does there in *Varnadore*, the
15 statement is, and this is Headnote 2, the Trial Judge
16 correctly instructed the law of *Nichols*, but they don't
17 cite the law of *Nichols*. They don't quote it. What
18 they quote is Judge Rushing's charge. He charged the
19 Jury (reading):

20 One, quote, the Plaintiff must prove that there was
21 no reasonable basis to support their decision of an
22 insurance company to deny certain insurance benefits,
23 close quotes; and two, that, quote, if there is any
24 reasonable ground to claim there is no bad faith and
25 such is a matter depending upon circumstances existing,

1 then liability is declined, close quotes.

2 Again, and that was not what was at issue in that
3 case. In fact, in addressing it, the Court
4 characterized the law -- now, this is on Headnote 1,
5 (reading): The law of governing the issue of bad faith
6 by an insurer in processing is to ensure the claim is
7 stated in the clearest language in *Nichols*.

8 And so I don't know -- and the reason I say this,
9 to say that it is the bright line or denying the claim
10 and that all things are cut off goes into the face of --
11 (The Court conferred with the law clerk off the
12 record.)

13 THE COURT: All right. And this is from *Varnadore*
14 again, I'm sorry. There (reading): Nationwide contends
15 that the issue of bad faith should not have been
16 submitted to the Jury and argues that from its own
17 investigation a reasonable basis was found to deny the
18 claim, thereby entitling Nationwide to a directed
19 verdict.

20 And in addressing that again the Supreme Court
21 said, disposition is not tenable, and then it gives the
22 policy reasons.

23 First, it binds the insured to the findings and
24 conclusions of the insured's own independent
25 investigation.

1 Next, it effectually insulates the insurer from
2 liability. And, finally, it forecloses a jury from
3 consideration of the insured's evidence of bad faith.

4 I don't find that there is a bright line. I think
5 that the bright line doesn't stop with the denial of the
6 claim, but continues on until the insured finds that
7 that is unfortunately the case and has no other
8 alternative but to bring an action because, again, I
9 think the Court in one of the cases -- and doing all my
10 research over an abbreviated lunch didn't help -- but,
11 Oh, again, this is *Nichols*, a policy statement.

12 (Reading):

13 Absent the threat of tort action, meaning the
14 bad-faith claim, an insurance company can, with complete
15 impunity, deny any claim that he wish, whether valid or
16 not, during the ensuing period of litigation after such
17 denial.

18 I would find that that is, as I say, not the
19 holding of the cases cited, and with all due deference
20 to Judge Peeples, I think he might have been a little
21 generous in his reliance on the language of *Nichols* in
22 order to create his charge in that case. So, therefore,
23 I'm going to deny the motion to exclude evidence up to
24 the institution of the action, I think at that time, or
25 institution of litigation, because at that time, of

1 course, the rules governing discovery and good faith
2 would apply -- not good faith but the rules concerning
3 good practice of counsel who are involved in litigation.

4 All right. So I'm denying your motion I think was
5 to exclude, and you had no motion, yours was in
6 opposition, so the motion to exclude was denied.

7 All right. I understand that's supposed to free up
8 some exhibits? How many? Well, let's do this. How
9 many more exhibits are contested, subject to the Court's
10 ruling, of course?

11 MR. FREEMAN BELSER: Your Honor, the only other
12 exhibits from the Plaintiff's side that I believe are
13 not contested are the report that was prepared by Chief
14 David Wright, and he'll be here this afternoon. He may
15 be here right now. And so I think in accordance with
16 your rulings earlier about the motion to exclude Chief
17 Wright, I think that those will be addressed at that
18 time.

19 THE COURT: All right, very good. We'll do it in
20 the context of the Motion *in limine*, then, not to
21 exclusion but *in limine*. Limiting the testimony.

22 MR. CLINCH BELSER: Chief Wright is expected to be
23 our third --

24 THE COURT: I know you both are Belser's but the
25 Rule provides only one on one point. Now is this going

1 to be the elder Belser?

2 MR. CLINCH BELSER: I'm often known as the elder
3 Belser, that is right. Sometimes people lose a
4 generation or two.

5 THE COURT: I've known the family for a while.

6 MR. CLINCH BELSER: I was gonna add something
7 different.

8 THE COURT: That's why I'm asking. In other words,
9 I don't want to --

10 MR. CLINCH BELSER: Chief Wright is gonna be a fact
11 witness, like I said this morning, and we're going to
12 talk about the report not as an expert opinion but as a
13 fact that was issued because he's required to do that,
14 what did he see when he was there on the date of the
15 fire and all of that.

16 THE COURT: Do I understand that the contentious
17 language is actually a part of the report?

18 MR. CLINCH BELSER: Yes, sir. Your Honor, I
19 believe that the problem could all be solved by some
20 jury instructions which we've handed before and you
21 probably have in your standard set of instructions
22 anyway. But it's up to the Jury to give whatever weight
23 it wants to of all the experts, whether they're --

24 THE COURT: Well, again, that's sort of a back-door
25 way of having him qualified as an expert. Let's follow

1 my little scenario if we could. When you get to that
2 point where you think that you're gonna be relying on
3 something that requires an opinion, even if it is a
4 stated opinion in some report, let me know and I'll
5 judge the testimony at that time --

6 MR. CLINCH BELSER: Very good.

7 THE COURT: -- out of the presence of the Jury.

8 It's better to keep the animal in the barn rather
9 than trying to catch it out in the yard.

10 MR. MURPHY: Yes, Your Honor. And just maybe for
11 clarity with our Court Reporter, the report is listed as
12 Exhibit 6, 16, and 20, and I understand that those, we
13 have objected so those are not in evidence at this time.

14 THE COURT: All right. Is that 16 through 20?

15 MR. MURPHY: No. Six, comma, 16 and 20.

16 THE COURT: All right. Just a moment. So
17 Plaintiff's Exhibits Numbers 6, 16, and 20 are objected
18 to?

19 MR. MURPHY: That's correct.

20 THE COURT: But only, but I mean it can be, that's
21 what they've been identified as?

22 MR. MURPHY: That's correct. In other words, we,
23 just to let the Court Reporter know what exhibits would
24 be in evidence, and then, if I understand your ruling
25 that you just gave on the post-denial, that if you are

1 going to allow it, that would be Exhibits 1, 2, 3, 10,
2 31, 32, and 33, we would still raise our objection based
3 on *State Farm v. Howard*, but we understand your ruling
4 and we understand those may be now allowed in evidence.

5 THE COURT: All right. Let's do that if we can now
6 just so that the record will be clear as to your
7 objection to my ruling and also, first of all, I'm going
8 to leave my Plaintiff's Exhibits for identification 6,
9 16, and 20, where they are now and will not be admitted
10 until they are, a proper proffer is made as to the
11 admissibility, not as to the accuracy or validity.

12 As far as Exhibits, Plaintiff's Exhibits 1, 2, 3,
13 10, 31, 32, and 33, they are admitted over the objection
14 of the Defendant, subject to my ruling as to being
15 admissible, so they will not be excluded as requested by
16 the Motion that I've overruled, Defendant's motion I've
17 overruled.

18 (Plaintiff's Exhibits numbers 1, 2, 3, 10, 31, 32,
19 and 33 were received in evidence over the objection
20 of the Defendants.)

21 THE COURT: Now, that takes us to how many can we
22 go ahead and say that they are admitted without
23 objection, both Plaintiff and the Defendant, if any, so
24 that the parties can use the references to the exhibits
25 in their opening statements or however they would?

1 **MR. MOORE:** Your Honor, I believe there are four
2 Defense Exhibits that have not been marked numerically
3 yet. They are two curriculum vitae of two experts and
4 two reports of our two experts.

5 **THE COURT:** Well, is there any reason not to have
6 them marked for identification?

7 **MR. MOORE:** I could do that.

8 **THE COURT:** Well, let's do that. I mean, that's
9 what we're talking about.

10 How long will it take you to get them up to the
11 Court Reporter?

12 **MR. MOORE:** Two and a half minutes.

13 **THE COURT:** Well, while you're at your two and a
14 half minutes, let me talk to Mr. Belser and your
15 colleague, Mr. Murphy.

16 Are there other Plaintiff's Exhibits that we could
17 acknowledge on the record as being admitted without
18 objection?

19 **MR. MURPHY:** I believe so. We have 1 through 38.
20 You've mentioned the ones you have admitted over
21 objection. There are three that we have just marked for
22 identification. So all that remain between 1 and 38
23 other than 6, 16, and 20 which are marked for
24 identification only, we don't have an objection to and
25 they can be admitted into the record.

1 THE COURT: And then we'll see about the Defense
2 Exhibits in a moment.

3 MR. MURPHY: Yes, sir.

4 (Discussion off the record.)

5 THE COURT: All right. Let's do go off the record
6 while the Court Reporter marks those.

7 (Defendants' Exhibit 1.1 through 1.25, selected

8 Byers photographs, were marked for identification.)

9 (Defendants' Ex. # 2.1 through 2.12, Mr. Holecek's
10 photo's and charts, were marked for
11 identification.)

12 (Defendant's Ex. # 3, Byers report, was marked for
13 identification.)

14 (Defendants' Ex. # 4, Byers CV, was marked for
15 identification.)

16 (Defendants' Ex. # 5, Holecek CV, was marked for
17 identification.)

18 (Defendants' Ex. # 6, Holecek Summary of Opinions
19 dated 10-27-11, was marked for identification.)

20 THE COURT: Back on the record in *James D. Fowler*
21 *versus Nationwide Mutual et al.*

22 All right. I've asked the parties to identify
23 those exhibits that will be admitted without objection.
24 It is my understanding that the Plaintiff's Exhibits
25 numbers 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15,

1 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31,
2 32, 33, 34, 35, 36, 37, 38 admitted without objection.

3 6, 16, and 20 will remain for identification
4 purposes without being admitted.

5 MR. MURPHY: Your Honor, just to be clear, I think
6 you admitted several over the objection.

7 THE COURT: But the post-denial exhibits. In
8 addition those exhibits that were admitted without
9 objection, I would include it, unfortunately, I see that
10 now, were Plaintiff's Exhibits Number 1, 2, 3, 10, 31,
11 32 and 33 actually were admitted over the objection of
12 the Defendants subject to, or were made subject to the
13 Court's ruling on their Motion to Exclude being denied.
14 And so those are in evidence now but over the objection
15 of the Defendants.

16 Now, were there any Exhibits, Defense Exhibits that
17 were admitted without objection?

18 MR. MOORE: Yes, Your Honor. I believe it's 1
19 through 3 without objection and 4 through of 6 marked
20 for identification only.

21 THE COURT: Defendant's Exhibits 1, 2, 3 are
22 admitted without objection. Defendant's 4, 5 and 6
23 remain admitted but solely for identification purposes,
24 subject to being admitted upon proper proof --

25 MR. FREEMAN BELSER: That's correct, Your Honor.

1 THE COURT: -- of admissibility.

2 (Defendant's Ex. # 1 was received in evidence.)

3 (Defendant's Ex. # 2 was received in evidence.)

4 (Defendant's Ex. # 3 was received in evidence.)

5 THE COURT: Anything else from the Plaintiff before
6 we bring the Jury in swear them and start the trial?

7 MR. CLINCH BELSER: Nothing, Your Honor.

8 THE COURT: From the Defense?

9 MR. MURPHY: No, Your Honor.

10 THE COURT: If you were in here with the other
11 jury, I usually try to break about 5:00. The reason for
12 that is that people usually have other things they have
13 to do at 5:00, pick up children, many things. So I
14 would ask you to sort of judge your time and your
15 witnesses. I don't like to break a witness, in other
16 words, start a witness's testimony and then break for
17 the day. So I suggest if you've got a long witness, let
18 the Court know and I'll decide if we can go beyond or
19 not. So let me know if the witness you'll be taking up
20 close to 5:00 is going to maybe go beyond, and we'll see
21 if maybe there's another witness we can take to break
22 earlier.

23 I do like to finish the testimony so I will go
24 beyond 5:00 for that purpose, but I don't like to go too
25 much if I don't have to.

1 All right. Anything further from the Plaintiff?

2 MR. CLINCH BELSER: Nothing, Your Honor, thank you.

3 THE COURT: Anything further from the Defendant?

4 MR. MURPHY: No, Your Honor.

5 THE COURT: Ask the Jury to join us, please.

6 (The Jury entered the courtroom at approximately
7 3:26 p.m.)

8 THE COURT: Mr. Beasley, I'm going to ask you to
9 move down to the vacant chair. No. Mr. Beasley will
10 move over. There's a way we had to fill the vacancy on
11 the Jury which -- again thank you for your patience. It
12 hasn't all been without a certain benefit. Because we
13 have I think helped as far as administration of the
14 exhibits and things like that so we will not have to
15 have any more interruption than absolutely necessary.

16 All right. With that, Madam Clerk, if you would
17 please swear the Jury.

18 (Whereupon, the Jury was sworn.)

19 THE COURT: Mr. Foreman, ladies and gentlemen of
20 the Jury, before the case begins I would like to tell
21 you a little bit of how we will proceed in this case.
22 While the status of foreperson is the same as any other
23 juror, the foreperson acts as the spokesperson for the
24 trial jury. It is the responsibility of the foreperson
25 to preside over the trial jury's deliberations when you

1 retire to reach a decision on the issues of the case.
2 As the Jury deliberates its verdict, the foreperson has
3 a duty to see that each juror has a full and fair
4 opportunity to express his or her opinions and views on
5 all aspects of the case.

6 From time to time it may be necessary to send you
7 out to take care of learn legal matters. When you
8 return to the courtroom, please, Mr. Foreman if you
9 would make sure that all members of the Jury are ready
10 to come back together. The reason for that is from this
11 point on you must make up your minds and your decision
12 based on the testimony and evidence received from this
13 witness stand and also the exhibits introduced in the
14 courtroom and all other evidence as well in this
15 courtroom, and for that reason it is absolutely
16 essential that all members of the Jury has the same
17 opportunity to hear the same testimony and to see the
18 same exhibits and other evidence that's introduced in
19 the courtroom. So, therefore, if somebody is not quite
20 ready to come back, wait until we're all ready to come
21 back at the same time.

22 Now, as far as the trial is concerned, the first
23 thing that will happen is that the attorney for the
24 Plaintiff -- the Plaintiff is the individual that
25 brought the action -- the Plaintiff's attorneys will

1 make an opening statement which will be followed by a
2 similar statement by the Defense Attorney. These
3 opening statements are not arguments. Arguments will
4 come at the conclusion of the case. The purpose of the
5 opening statement is for each party to state the facts
6 they intend to prove and the theory of their case.
7 Following the opening statement, each side will present
8 its evidence with the Plaintiff once again going first.
9 The evidence may take many forms. It may be testimony,
10 stipulations, documents, models, photographs, and the
11 like. You should pay close attention to all the
12 evidence which is presented by each party because you,
13 the Jury, are the sole finders of the facts in this case
14 and no one else will be permitted to weigh that evidence
15 and render a verdict based on it except you.

16 When the evidence has been presented, the attorneys
17 will make their closing arguments. Unlike the opening
18 statements, these will be true arguments. That is, each
19 side will emphasize certain portions of the evidence and
20 try to persuade you and get you to agree with them as to
21 their version of the facts.

22 After their arguments are finished, then I will
23 explain to you the law which applies to the case. You
24 will then retire to the jury room to consider the facts
25 and law, and then, once you have done so, you will

1 return a verdict in favor of one side or the other.

2 Now, there are a few additional comments I need to
3 make before the case begins. First, as I mentioned
4 earlier, although I am the only person who can tell you
5 what the law is, you and you alone are the only ones who
6 can determine the facts. I do not have the right to
7 indicate how I may feel about the evidence presented,
8 and throughout this trial it will be my intention to act
9 impartially each party.

10 Now, second, from time to time an attorney may
11 object to some bit of testimony or evidence which the
12 other side is seeking to present. As in sports,
13 business, or other structured activities, there are
14 certain rules that both sides must obey in presenting
15 evidence. These rules have a definite purpose, to
16 ensure that the information you receive is the most
17 trustworthy and reliable evidence available. An
18 objection is a procedure we use for an attorney to call
19 a possible violation of the Rules to the Court's
20 attention and for this reason you should not hold the
21 objection against his client nor should you conclude
22 from my ruling on the objection that I favor one side or
23 the other.

24 Finally, I would ask you to pay the closest
25 attention possible to the evidence presented to you. I

1 would ask that you do not take notes, because if the
2 note taker makes an error, those notes can be more
3 detrimental than helpful during the deliberations. The
4 time-tested system is for each of you to listen
5 carefully, and I'm confident each of you will.

6 Now, when I suggest that you do not take notes, the
7 reason for that is, it has been my experience if you
8 take notes we have a tendency to concentrate on the
9 note, in other words, we want to be sure we write down
10 what we think we hear and by doing that we are
11 distracted from the actual evidence and presentation
12 happening in the courtroom at the time. Also and more
13 importantly, if we do miss something that we think was
14 said and we didn't hear it or we hear something that
15 maybe wasn't said, we write down the note in error, then
16 it can be more detrimental than helpful, because we all
17 know that if somebody holds up a piece of paper and
18 says, well, I've got it written down here, that pretty
19 much controls the question. Therefore, the better
20 method for me is if you do have a question about the
21 testimony, the evidence, we can replay it or you can
22 rely on your other members of the Jury as to what they
23 have heard or understood the testimony to be and see if
24 that does persuade you as to the correct or accurate
25 testimony.

1 I use for an example why you do not want to take a
2 chance on either admitting a word or hearing a word that
3 wasn't there. If you use the word "not." If you either
4 miss it when you are writing down, you miss the word
5 "not," or if whether for some reason you think the "not"
6 was a part of a statement, it changes the evidence
7 altogether. So, therefore, I would suggest not to take
8 notes.

9 Now, having said all of that, I do take notes.
10 It's not do as I say, not do as I do. The idea is that
11 you and I have entirely different purposes in this
12 courtroom. You and you alone are the only ones who can
13 determine the weight, the value and the truth of the
14 evidence. I'm not concerned about the importance or the
15 value of the evidence at all. I'm concerned just about
16 whether or not certain things that are required of our
17 procedures in law are followed, so I am only jotting
18 down what occurs. You were the ones who will decide the
19 significance of what is done. With that I'll recognize
20 Mr. Belser.

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

22 THE COURT: Mr. Belser.

23 Opening Statement on Behalf of the Plaintiff:

24 MR. CLINCH BELSER: Thank you, Your Honor, and
25 thank you, Mr. Foreman and members of the Jury. I'd

1 like to thank the system for allowing us to make an
2 opening statement in this case. It's an important
3 opportunity. Because it's the chance for the lawyers
4 for both sides, not only me for the Plaintiff but
5 Mr. Murphy for the Defendant, to introduce to you three
6 things. First we'll introduce ourselves, and number two
7 we'll introduce our clients, and number three we want to
8 introduce the case to you and its outlines so you will
9 know in general what it is about from the beginning so
10 you will know what to look for when the evidence is
11 presented piece by piece.

12 As you can already tell, these proceedings take a
13 while and we won't be done by 5:00 today or by 5:00
14 tomorrow or maybe 5:00 the next day. But the purpose
15 of -- don't hold me to that -- but the purpose is to
16 give you an outline of what this case is about so you
17 will know what to look for.

18 Now, to introduce myself. My name is Clinch Belser
19 and this is my son, Freeman Belser. Our office is in
20 Columbia, but we've try cases together over the last
21 seven years not only Columbia, but in Saluda, Chester
22 among other places. We are the Plaintiffs, and number
23 two, Plaintiff's counsel.

24 In this case I'd like to introduce our client. We
25 are proud to represent Mr. James Fowler who lives in

1 Seneca. He actually lives on the shores of Lake
2 Hartwell. His address is on Frank Gaillard Road and
3 he's lived there since 1979, first in a mobile home when
4 he bought the property, and later in a house he built
5 himself based upon his construction experience over a
6 period of years and he's lived there in that same
7 location since 1998.

8 Now, Mr. Fowler is divorced now but his two sons
9 and his daughters and their children, his grandchildren,
10 have visited him in the house in question many times and
11 you will see photographs of the family in the house.
12 It's not so much a picture of the family but that's how
13 he got those photographs.

14 Now, third I want to introduce the kiddies. As the
15 Judge has already said, what the lawyers say throughout
16 this is not evidence. The Judge will ask you to listen
17 to all the evidence before you start to make any
18 decisions about what's right, what's wrong, what's
19 missing, what's there, what's there extra. But you
20 should listen to all the evidence before you make any
21 decisions. And this is not argument. Right now I'm not
22 trying to persuade you of anything. I just want to tell
23 you what to look for. I'm going to outline the pieces
24 of the facts we intend to show and at the end talk about
25 our legal theories which apply to the facts which we

1 think you will find.

2 So, what is this case about? First off, this is a
3 case about Mr. Fowler. You will see and hear evidence
4 that he built the house himself where he now lives using
5 high quality materials and putting in some special
6 features. You'll see that he's lived in the house with
7 special collections of things he likes for about ten
8 years in this same house. You will also receive
9 evidence about a disastrous fire which destroyed the
10 house and the contents on a bitter cold winter night
11 January 17th, 2009, almost three years ago.

12 You will see and hear evidence that Mr. Fowler
13 discovered the fire, and when he did, he went to a house
14 next door and spoke to his neighbors Sue Bright and
15 Oscar Bright who are here as witnesses and asked them
16 for help to get the fire out.

17 You will see and hear evidence that the brave
18 volunteers of the Friendship Fire Department acted very
19 quickly and put out the fire in the course of a few
20 hours. You will hear testimony from Chief David Wright
21 who is not only the Chief of the Friendship Fire
22 Department but he's also a full-time Captain now with
23 the Seneca Fire Department, and you will hear from him
24 his observations of what he saw when he was there on the
25 day of the fire, January 17th, 2009. He was not only

1 the Chief, he's a working Chief Wright, he was right
2 there with the other men who were putting out the fire.
3 You will hear from him that he heard about the classic V
4 pattern. You might not have heard about the V pattern,
5 but the V pattern is something you will hear about what
6 that means because the Chief will tell you he saw the
7 classic V pattern in the burned wood of the house
8 showing where the fire started small and gradually built
9 up. He personally saw the V pattern and where that
10 point is to the location of the fire.

11 He will also testify where he saw the greatest
12 damage in the house. Now, the house was totally
13 destroyed but that doesn't mean little tiny pieces of
14 ash the first day. It destroyed beyond being repaired.
15 But he will tell you about where the damage was and
16 where the greatest damage was and what that means about
17 the location of where the fire started.

18 He will also tell you that when he arrived at the
19 fire within a few minutes of the 9-1-1 call, he saw
20 where the fire was reaching the roof. The fire had
21 apparently been burning for a while, but by the time
22 that it was discovered it was doing a lot of damage.
23 And by the time the Fire Department got there very
24 quickly he cut a hole in the roof and he could tell
25 where the fire was heaviest because that's where the

1 fire had broken out of the house.

2 Now, he will also tell you that all these points,
3 the greatest damage, the V pattern pointing and the
4 breach in the roof pointed to a location near a Kerosun
5 heater, a kerosene heater that was in the house, keeping
6 the house warm on this cold, bitter night. You will see
7 that all that pointed to the fire and his observation
8 pointed out to right where the kerosene heater was. He
9 will also tell you it was not in either of the two areas
10 which were identified by the fire investigator hired by
11 Nationwide Insurance.

12 The Chief will also tell you that he is required to
13 make a report to the State Fire Marshal, and he will
14 tell you about what he did and what he said on that. He
15 will also testify that he gave a copy of this report to
16 Mr. Fowler on the day of the fire and said, here, this
17 is for your insurance company. He will also say that
18 based on what he observed on the morning of the fire
19 being discovered and being put out, that he saw nothing
20 suspicious, nothing to make him want to report this to
21 SLED as required to do in his capacity as a local Fire
22 Chief pursuant to state law and regulation.

23 Now, that's part of the case. The other part of
24 the case is about Nationwide Mutual Fire Insurance
25 Company, the on-the-ground claims adjuster, Andrew

1 Flanagan, the named Defendant in this case, the claims
2 manager, Michael Madden, who controlled everything from
3 Atlanta, and how they, the company, Mr. Flanagan and
4 Mr. Madden, unfairly and unreasonably mistreated
5 Mr. Fowler as a policyholder. So you will see and hear
6 evidence that Nationwide admits that Mr. Fowler had a
7 policy on the home which covered fire. They admit that
8 the policy had been in effect for almost a year and was
9 actually a renewal of a policy that Mr. Fowler had had
10 on the same house for about seven years. They will also
11 admit that all the premiums had been paid and the policy
12 was in full force and effect on the date for the night
13 when the fire start and the morning when it burned down
14 the rest of the house.

15 You will also hear a description of the provisions
16 it has and what benefits it was supposed to pay. It was
17 actually a pretty good seeming policy. It was called an
18 elite policy. That might be one of the more boring
19 parts of the case, going over the policy and its terms,
20 but we have to do that because the Judge says you need
21 to decide the evidence -- listen to the evidence and
22 decide the case based on what you see in evidence, you
23 can't just forget that, so we've got to put it in.

24 Now, you will also see and hear evidence that on
25 the day after the fire which was the first visit to see

1 Mr. Fowler that Mr. Flanagan, the adjuster, said very
2 coolly he was not sure there was even a claim. You will
3 also see and hear evidence on that first visit, January
4 the 18th, the next day, 2009, Mr. Flanagan asked
5 Mr. Fowler for information and he asked him a lot of
6 information about a lot of stuff and asked him to sign
7 six or seven forms and releases. You will also see
8 those forms and releases and you will hear evidence that
9 Mr. Fowler cooperated completely and fully with the
10 insurance company. You will also see and hear evidence
11 that Mr. Flanagan took the position on the first day he
12 felt Mr. Fowler set the fire to his own house and he set
13 out to get evidence. And you will see and hear evidence
14 that, if successful, this effort to get evidence would
15 have allowed Mr. Flanagan to properly avoid paying
16 Mr. Fowler, or Nationwide to avoid paying Mr. Fowler for
17 all the classes of benefits under his policy.

18 Now, you will also see and hear evidence that
19 Mr. Flanagan hired both a special investigator on
20 Nationwide's staff, Mr. Gilden, and a so-called
21 independent fire investigator, one that Nationwide used
22 59 times in the previous 48 months. You will also see
23 and hear evidence that no matter what these
24 investigations found, Mr. Flanagan individually and for
25 Nationwide never changed their feeling that Mr. Fowler

1 had set the fire and it was a set fire which they didn't
2 have to pay for.

3 Now, you will see and hear evidence that the
4 special investigator, Mr. Flanagan [sic], took one
5 recorded statement and then another recorded statement
6 and then they told Mr. Fowler that he had to submit to
7 an examination under oath with a court reporter present.
8 And you will see and hear evidence that they accused him
9 of having set the fire and he had the right to a lawyer
10 come with him during the examination under oath. You
11 will see and hear evidence that Mr. Fowler went to the
12 examination under oath without a lawyer. You will see
13 and hear evidence that Mr. Fowler always strongly denied
14 that he lit the fire and said so at the examination
15 under oath. And you will see evidence at the
16 examination under oath he offered to take a polygraph.

17 You will also see and hear evidence that the fire
18 investigator named Mr. Byers took two days working on
19 this particular investigation rather than the normal one
20 day and that you will see and hear evidence that his
21 bill was \$2,814. You will see and hear evidence in the
22 logs that this was much higher than his usual bill of a
23 thousand to two thousand dollars. And you will see very
24 important evidence that Mr. Byers visually, just using
25 his eyes, identified two places on the floor in the home

1 as having what he called, quote, pour patterns, end
2 quote, and he gave his written theory that this meant
3 that somebody had poured accelerant and fuel to light
4 the fire.

5 Now, you will see other very important evidence
6 that Mr. Byers, at a cost of \$100 per sample, scooped up
7 some of the debris from the fire and dust and other
8 pieces of soot which had not been fully consumed in
9 order to try to find evidence that those places on the
10 floor were actually pour patterns to prove his theory.
11 You will find he did this in six places.

12 You will see and hear that he had complete access
13 to the house so he could pick whatever six places or
14 whatever places he wanted to get his theory proven.
15 Then you will see and hear evidence that he sent these,
16 all of these six samples to an independent laboratory.
17 Then you will see the results of the laboratory reports
18 which came back and said that all six were negative, no
19 ignitable fluid detected. So all six to prove the
20 theory, not there.

21 Now, you will also see in evidence Mr. Byers'
22 report, but you will see that he did not even mention in
23 his report that the test results were negative. The
24 conclusion, floor patterns, he did test samples but he
25 didn't mention they came back negative.

1 You will also see and hear evidence that he didn't
2 even wait for the results to come back before he wrote
3 the report and sent it in. And you will also see and
4 hear evidence that he did not go back and supplement the
5 report with any reference to the negative test results
6 or explain why he felt that six negative test results
7 were not important.

8 Now, going back to the special investigator,
9 Mr. Gilden. You will see and hear evidence that
10 Mr. Gilden heard Mr. Byers' theory and went to the
11 Ocone County Sheriff's Department. And you will see
12 evidence the Sheriff's Detective said to come back when
13 they got the test results and Mr. Gilden agreed to do
14 so. You will see and hear evidence that Mr. Gilden made
15 this contact with the Sheriff on the instructions of
16 Mr. Madden and his team. Then you will see and hear
17 evidence he did not go back to the Sheriff when the test
18 results were negative.

19 You will see and hear very important evidence that
20 Mr. Byers, he was the fire investigator, his procedures
21 were not in accordance with the publication of the
22 National Fire Protection Association Publication Number
23 921. You will hear 921 a lot during these next couple
24 days. And you will see and hear evidence that
25 Publication 921 is the recognized industry standard for

1 fire investigators.

2 You will see and hear evidence that 921
3 specifically says that burn patterns are not -- from
4 accelerants are not visually different from other causes
5 such as falling debris when a roof falls down. You will
6 see the language of Publication 921 that burn pattern
7 should not be identified just on visual appearance, and
8 you will see and hear evidence that this publication
9 says that testing for accelerants should be done before
10 the term pour patterns is used. That's enough for right
11 now that you will hear about Mr. Byers.

12 You will also hear that there was another
13 investigator, Mr. Doug Ross, he was a SLED agent for 31
14 years, certified fire investigator and an instructor
15 from Greenville Tech. He's looked at the site, he's
16 looked at all the photos, he's looked at Mr. Byers'
17 report and all the evidence, and you will see and hear
18 evidence from Mr. Ross that he agrees with Chief
19 Wright's observation about the V pattern that shows in
20 the pictures, you can see where the heaviest damage was
21 because the wall studs were gone behind where the
22 kerosene heater was.

23 And you will see and hear further important
24 evidence that Mr. Ross found evidence of where the fire
25 did start, right behind the kerosene heater on that

1 wall. The most significant thing is that he found that
2 Mr. Byers, who did not follow the national industry
3 standards for making his report was wrong, that the two
4 pour patterns which he identified, one down one hole,
5 one another place, could not have been where the fire
6 was because that's not where the V pointed and that's
7 not the heavy damage was, and the pictures which will be
8 explained to you which are absolutely clear as to where
9 the V is and where the heavy damage was.

10 Now, I talked about the pictures. The pictures
11 which will show this are not only the pictures that
12 Mr. Ross took when he was there, but also the various
13 pictures which Mr. Byers took when he was at
14 Mr. Flanagan's instance very early on.

15 Now let's go back to these negative test results.
16 You will see and hear evidence, some of it right out of
17 Mr. Flanagan's sworn deposition testimony, when
18 Mr. Fowler found out, he wanted to get a copy of the
19 report and asked about the test results. You will see
20 and hear other evidence that Mr. Flanagan said to
21 Mr. Fowler the test results did not change his feelings
22 that Mr. Fowler had lit the fire and he was gonna deny
23 the claim.

24 You will also see and hear very important evidence
25 that Mr. Flanagan knew that according to South Carolina

1 law he was required to pay the bank and the mortgage
2 company for their mortgages on the home no matter what
3 he decided to do about Mr. Fowler's claim. And you will
4 hear evidence on the Nationwide logs of this computer
5 for this claims investigation that Mr. Flanagan found
6 out within two or three days of the fire because of the
7 form Mr. Fowler had signed exactly what the payoff to
8 the mortgages was to the penny, some and some dollars,
9 point point point. So he knew that.

10 But you will also see and hear evidence in the form
11 of the sworn testimony of Mr. Flanagan at his deposition
12 taken after this case was started, that he telephoned
13 both the bank and the mortgage companies and told both
14 of them that Nationwide was denying Mr. Fowler's claim
15 that the reason was because of the intentional acts
16 exclusion and that they would need to submit a proof of
17 loss. You will also hear in his deposition under oath
18 that he knew that this was, quote, the same thing as
19 saying that Mr. Fowler set the fire himself, end quote.
20 And you will also see and hear evidence this is the same
21 thing as accusing Mr. Fowler of a crime, a felony, and
22 saying this to strangers who did not need to be told
23 this, even if it was true and provable, but it wasn't.

24 You will see and hear further evidence that
25 Mr. Fowler has always denied that he burned his house, a

1 home he had built for himself. You will see that he
2 asked for a copy of Mr. Byers' report so he could
3 disprove it or argue with it. And you will see and hear
4 very important evidence that Mr. Flanagan, the on-site
5 adjuster, asked Mr. Madden, the claims boss in Atlanta,
6 how much of the report to give him, and you will then
7 see evidence that Mr. Madden told Mr. Flanagan not to
8 give him any of the report because the report was,
9 quote, Nationwide's property, end quote, and because he
10 could get a copy, quote, in discovery end quote if he
11 filed a lawsuit. Discovery is depositions. Now, this
12 is the same thing as saying, Don't give the policyholder
13 a copy of the report unless and until he files a
14 lawsuit. You will see and hear evidence and you are
15 hearing it right now that Nationwide got what it was
16 asking for. This lawsuit was filed, it had to be filed,
17 and Mr. Fowler got the report and you will see the
18 report.

19 You will also see and hear evidence that this same
20 claims manager, Mr. Madden, also treated the mortgage
21 companies in the same or similar way. This be somewhat
22 boring with the details, but you will see that the
23 policy had several different coverages. Coverage A
24 which covered the house itself. Coverage B covered
25 other structural property, like there was a gazebo and

1 there was a garage and there was a driveway. It also
2 had Coverage C which covered the contents, the
3 furniture, furnishings, kitchen pots and pans,
4 everything that you have to run a house. It also had
5 Coverage D which was for alternate living expenses which
6 most policies have which give the homeowner money for
7 while the house is being fixed. It also had a rider for
8 debris removal and landscaping because those are often
9 damaged in a fire.

10 Now, you will also see and hear evidence from
11 Nationwide's own claims adjustment file that
12 Mr. Flanagan saw his own investigation there was damage
13 in the fish pond that Mr. Fowler had, and it would also
14 be damage of the driveway and landscaping and repairs
15 when the building was done. You will also see these log
16 entries and evidence which says that Mr. Flanagan asks
17 Mr. Madden for permission to pay under Coverage B --
18 Coverage B was for other structures, not the house, but
19 the gazebo and other things -- and that you will see and
20 hear evidence in the log entries themselves that
21 Mr. Madden instructed Mr. Flanagan not to make any
22 payment under Coverage B unless the mortgages asked for
23 it.

24 You will also see and hear evidence that the
25 mortgage companies were not told the coverage existed

1 and you will see and hear evidence they did not ask to
2 pay on Coverage B, they didn't know about it. And you
3 will see and hear evidence that Nationwide did not pay
4 what Mr. Flanagan saw was covered damages and asked for
5 permission to pay.

6 Now, you will also see and hear evidence that
7 Mr. Flanagan wrote an official denial letter to
8 Mr. Fowler on February the 11th of 2009. But you will
9 also see that when he was out there that first day,
10 January the 18th, 2009, he had told Mr. Fowler, You have
11 to fill out a proof of loss on the inventory of all the
12 contents of your house and you had to do that within 60
13 days. You will see documentary evidence and hear oral
14 testimony of an admission by Mr. Flanagan that he was
15 asked for a little extra time to file the proof of loss,
16 and he refused. But, when it was compiled by Mr. Fowler
17 with help from his friend and other people and it was
18 submitted on time within 60 days, it was immediately
19 returned by Mr. Flanagan saying, I told you this was
20 denied, we are rejecting your proof of loss.

21 Now, another very important piece of evidence, or
22 series of piece of evidence you will see and hear is
23 that the whole reason why Nationwide got off this trek
24 trying to deny the claim of Mr. Fowler was they thought
25 that he had a motive to burn this house down because he

1 had some debts and he was behind a couple months on his
2 mortgage. But you will also see and hear that
3 Mr. Fowler had freely admitted this in the beginning,
4 and you will also see and hear evidence that Mr. Fowler
5 had arranged with his mortgage companies that he would
6 sell the house and that he was actually in the process
7 of preparing the house for sale, and you will see and
8 hear evidence that Mr. Flanagan, Mr. Madden and the
9 company knew this, they never checked it out or disputed
10 it, but they also never changed their opinion that
11 Mr. Fowler had a motive to burn this house down that he
12 had built.

13 But you will also see that they never changed their
14 opinion when they knew that burning it down would make
15 it impossible to sell the house and that their theory
16 was disproved by that very fact they knew. The fact
17 that they knew it was in their log.

18 Now, you will hear and see evidence that
19 Mr. Flanagan's actions as an individual and his letters
20 and his slanderous oral words to the bankers were not
21 his acts alone. They were acts of Nationwide as a
22 company, because every action he took was approved by
23 Mr. Madden. You will see the log entries in the
24 computer logs saying, Here's what I want to do. Can I
25 do it?

1 Yes, do it.

2 And this was not just the action of one individual.
3 It was the action of a company treating a policyholder
4 like this.

5 And you will also see evidence that this same type
6 of thing can happen to other Nationwide policyholders
7 because these bad actions we've talked about, possibly
8 with the exception of slander, are standard Nationwide
9 company policies.

10 Now, one final thing before I get into the law
11 about this to explain our theory. You will see and hear
12 evidence on this cold night of the fire Mr. Fowler was
13 actually sleeping in one of the other structures on the
14 property, not the house itself, and you will see that he
15 was sleeping in the gazebo to stay warm. And you will
16 see and hear evidence that the reason for this was that
17 the gazebo had electrical power, but the power to the
18 main house had been cut off by Mr. Fowler because he had
19 disputed some high charges, very high electric charges
20 with Blue Ridge Electric Cooperative, and he couldn't
21 get it worked out and he said, Turn it off.

22 The house itself was still used for bathing and so
23 forth even when it was cold, and it was used for
24 sleeping and all home activities when it was not too
25 cold. You will see and hear evidence that on the night

1 of the fire it was extremely cold and that Mr. Fowler
2 had his old Kerosun heater turned just below full heat
3 to keep the house warm enough so the pipes would not
4 freeze.

5 You will also see and hear evidence that he had
6 some electric cords, drop cords running from the gazebo
7 on his own meter, he was paying that meter, to the house
8 to run his coffee machine and other appliances when he
9 was over there. He was over there when it was too cold
10 to sleep.

11 Now, this is not the entire history of Nationwide
12 and the way Mr. Madden mistreated Mr. Fowler as a
13 policyholder who not only paid premiums but also had a
14 loss. You will hear more evidence of that.

15 But I want to take a few minutes now to introduce
16 the legal theory, or the legal basis for this case. As
17 the Judge has already said, at the appropriate time he
18 will instruct you about the law of the case. The first
19 cause of action -- there are three main causes of
20 action -- the first cause of action is the basic cause
21 of action for breach of contract. The idea is that
22 Nationwide had a contract in the form of its insurance
23 policy and it's broken the promises to pay these certain
24 coverages as I've mentioned before and you will see when
25 you get the policy.

1 Now, on this theory the Plaintiff must prove that
2 there was a policy and that it was in full force and
3 effect and that there was a loss that had not been paid.
4 Nationwide as the insurance company showed it had valid
5 reason not to pay and that he actually did light the
6 fire.

7 The second cause of action for the Jury to consider
8 is called insurance bad faith. The Judge will instruct
9 you the details of this. But the idea is the insurance
10 company has not only failed to pay what it should have
11 paid, but has done so unreasonably and done so in
12 violation of the implied covenant, which the Judge will
13 talk to you about, the implied covenant of good faith
14 and fair dealing. This implied covenant provision is in
15 every contract there is, but it's particularly true of
16 insurance policies; of this case, secondarily it is
17 about a breach of the implied covenant of good faith and
18 fair dealing, and that's what all of these things I've
19 been reciting relate to.

20 That deals with the investigation process, the
21 decision making process, and paying what is done. And
22 also, how did you treat your policyholder? The Judge
23 will explain the details of this and what damages can be
24 awarded over and above what the policy specifically
25 says.

1 Now, the third cause of action for the Jury to
2 consider is called slander or oral defamation. A basic
3 point of a slander cause of action is that the
4 Defendant, Mr. Flanagan, acting individually and on
5 behalf of the company, both of them responsible, falsely
6 accused, falsely accused, Mr. Fowler of committing the
7 crime of arson. And another element is we have to show
8 that it was told not just to Mr. Fowler but to some
9 third party. We have to show that they were false
10 statements, because if there's proof that it was true,
11 then the Plaintiff loses.

12 And we also need to show that this false statement
13 hurt his reputation and his good name, which the Judge
14 will instruct you about this. This is presumed when the
15 false statement is an accusation of a commission of a
16 crime. And the slander cause of action also relates to
17 the bad faith part, we talked about that before.

18 Now, as I said earlier, you will hear evidence or
19 see evidence of different things. The Judge alluded to
20 this very briefly. But what types of evidence are
21 there? There are numerous types. But in this case some
22 of the evidence you will get was obtained in pretrial
23 discovery, which you heard that phrase about how you get
24 the report, but that's Depositions, Requests for
25 Admissions and Interrogatories and things like that.

1 You can ask stuff to narrow the issues so that we don't
2 have to have such a long, detailed, call your witnesses
3 to testify live when you don't know how long that's
4 going to take. But the Plaintiff has the burden of
5 putting in all this evidence because the Judge has told
6 you that you can only decide the case based upon what
7 you see in evidence. So we're gonna try to fulfill that
8 obligation and that duty.

9 But there will be, we have some Requests for
10 Admissions, and some things have been admitted. We sent
11 some interrogatories and some things have been answered.
12 We take some things out of dispute. There's sworn
13 testimony in pretrial depositions as to key facts, so
14 those things are no longer subject to dispute.
15 Unfortunately, some of the depositions are lengthy so
16 they test your strength to sit through it and your ears
17 and different parts of your body to sit there and listen
18 to all the stuff. We'll try to make it interesting when
19 we read it to you.

20 You will also see the insurance policy. You will
21 also, of course, get sworn testimony from witnesses on
22 the witness stand. You will also see many, many
23 photographs which show the V and other things. Some
24 were taken by Mr. Byers, some were taken by Mr. Ross.
25 And you will see some pictures which were, as I said

1 before, are pictures of the family, which were inside
2 pictures of Christmas, family events like that, so you
3 will be able to see pictures of the family and in the
4 background you'll be able to see the cabinets and the
5 grandfather clock and the quality of the rugs and the
6 quality of the pictures because the family is in the
7 picture and that's in the background.

8 You'll see photos of the V factor which I talked
9 about. You'll also get copies of many of these internal
10 logs called the adjustment log notes. And you will see
11 copies of letters which were sent to Mr. Fowler and you
12 will see copies of letters which were sent to other
13 people.

14 You will also see a copy of the report by the
15 Fairfield [sic] Fire Department. You will also
16 laboratory test results, which were all negative; you
17 will get those. You will also see a very important
18 Nationwide internal document entitled, quote, Property
19 Loss Report Form, end quote, as discussed in the
20 deposition testimony, probably also later, which shows
21 this elite policy benefits exceed \$500,000 if, under
22 certain circumstances.

23 Now, the Judge will explain the law that applies to
24 this case and the types of evidence and the duties and
25 the powers of the Jury. We've already talked about that

1 some.

2 Thank you very much for your participation in this
3 very important case.

4 MR. MURPHY: Your Honor, may it please the Court?

5 THE COURT: Mr. Murphy?

6 MR. MURPHY: Thank you, Your Honor.

7 Opening Statement on Behalf of the Defendants:

8 MR. MURPHY: Well, good afternoon. I've gotten to
9 the point where I'm not sure if it's morning or
10 afternoon but I know one thing. Y'all have been very
11 patient already and we're just getting started, and I
12 thank you for it. And it's something that it's
13 difficult to ask a Jury to leave their regular lives and
14 patiently listen to two sides who can't resolve a
15 dispute that they have. But that's what you agreed to
16 do by taking your oath, and I know you will do it well
17 based on what I've seen so far.

18 My name is JR Murphy. I represent Nationwide
19 Mutual Fire Insurance Company, who the company is
20 represented by the current state claims manager, Josh
21 Harbert. Josh used to live down the road in Anderson,
22 but he lives down in the flatlands of the Pee Dee now.
23 And Andrew Flanagan, or Andy to me, and if I slip, I
24 apologize, Andy actually handled this case. He lived in
25 Greenville-Simpsonville area when he worked here as

1 what's known as a large-loss property adjuster handling
2 house fires and things like this. Things that are
3 investigated routinely. Things that are rarely denied.
4 And so he is here. He now lives now up in the
5 Raleigh-Durham area and he's a manager on property
6 claims but not involving large loss where he was an
7 adjuster, so he has become manager of a different level.

8 My partner, Ray Moore, is here to assist me in the
9 trial of the case. And I just appreciate your patience.
10 As you noticed already, we get to go second, we get to
11 go second a lot. And I just encourage you to keep doing
12 the things you've been doing but keep an open mind and
13 as you hear everything that is presented to you, to be
14 able to kind of separate the wheat and the chaff, that's
15 kind of what you're gonna have to do this week. You're
16 gonna have to take the things that are believable and
17 hold on to them and the things that don't make sense and
18 kind of agree that they don't make sense.

19 Now, I don't want to give you a blow-by-blow,
20 hour-by-hour, day-by-day overview of this case. But
21 there are a few things that you need to know. This was
22 a fire that was apparently discovered by Mr. Fowler and
23 no one else, and it was called in to the Police
24 Department and reported to Nationwide. Mr. Flanagan was
25 assigned this claim, that's the normal way things are

1 handled, and he made a telephone contact with Mr. Fowler
2 that same day. This was on a weekend, this was on MLK
3 holiday weekend several years ago, almost three years
4 ago now. And he even arranged to come all the way back
5 from where he was out of town with his family to meet
6 with Mr. Fowler and conduct a preliminary investigation
7 on that Sunday.

8 He discovered a rather strange thing that I think
9 factored into why there's no accidental explanation for
10 this fire, and that is the main house, the house that
11 was burned, was disconnected from any power source. It
12 had been, the power had been shut off apparently by
13 Mr. Fowler. He also learned that day that Mr. Fowler
14 was in financial difficulty, was several months behind
15 on both of his mortgages, and so those made Andy decide
16 he needed to get some help to determine what might have
17 caused this fire, and he retained a man named Jerry
18 Byers, and you will hear from Jerry and his credentials
19 and his wealth of experience in fire investigation, to
20 come and investigate and determine what might have
21 caused the fire.

22 Now, in a structure that has no electrical power to
23 it, other than some drop cords that ran in, and a
24 kerosene heater that was apparently being used to keep
25 the pipes from freezing, it significantly narrowed the

1 possibilities of an accidental loss. And Jerry Byers
2 spent two full days, as if there's something wrong with
3 being thorough, to determine whether either of those two
4 potential accidental causes had actually caused this
5 fire. And he came to the conclusion that neither one of
6 them did cause the fire based on his investigation
7 primarily digging through all the way down to the base
8 level.

9 And you will see a lot of photographic evidence and
10 things in this case. I want to show just you an example
11 of one of the photos that you'll have to see. We're
12 gonna make you all CSI experts this week if we can.

13 But you can recognize that this is a linoleum
14 floor. This is debris that's been scooted back and
15 piled up. And you can see along here, the evidence will
16 show and Mr. Byers will testify where the burn pattern
17 originated, and then these drops originating from the
18 splatter that came from a source known as an accelerant.

19 And so you will have to determine those types of
20 things and what's believable and what's not as you
21 analyze evidence as we go along in this case. And
22 that's why unlike something general that we're all
23 familiar with like maybe someone who fell in a store or
24 an automobile accident or something like that, this is
25 something that probably none of you and not many of us

1 deal with on a daily basis. So it will require that.

2 And as you look at that, and something I'll mention
3 in a minute is evaluating the credibility of things
4 people are telling you this week. The witnesses. What
5 I say as a lawyer, what Mr. Belser says, those are not
6 evidence. We want to portray the evidence. We want to
7 submit to you what the evidence will show. But you will
8 have to hear the witnesses or you will have to view
9 these exhibits in the nature of photographs and
10 documents to get to the bottom of it, to get to the
11 truth.

12 Well, Mr. Byers did that investigation, dug down
13 and gave those opinions to Nationwide. He did take some
14 debris samples that were sent to the lab. Linoleum is
15 not a porous substance he mentioned to Billy Gilden
16 early on. The evidence will show that it was difficult
17 to take a sample there, in other words, difficult to
18 find a positive sample because it's not porous, it
19 allows it to stay on the surface and burn off.

20 And he mentioned to Andy that he didn't smell
21 accelerants, while it wasn't always necessary to
22 absolutely rule it out, that's giving an indication that
23 there might not have been. So it was no surprise when
24 the lab results came back negative. You will hear that
25 fires can be started with accelerants but no accelerants

1 turn up in the trace samples. You'll hear evidence and
2 you know from your common sense that fires can be
3 started with things other than liquid flammables.

4 And so you'll need to consider all of the evidence
5 because of the three issues that Nationwide is required
6 to prove in this case, there's gonna be expert testimony
7 on one of them. This case on the contract. There's no
8 dispute that Mr. Fowler had a contract. No dispute
9 there was a fire. No dispute that he had certain
10 coverages. But the policy, like all homeowners'
11 policies, do not provide benefits if the insured, in
12 this case Mr. Fowler, caused intentionally the loss.

13 Now, there's no surveillance tape or eyewitness or
14 admission under a big bright spotlight that Mr. Fowler
15 did this. But the law allows Nationwide to establish
16 that through circumstantial evidence. I guess if we
17 were in here all day and we knew it might snow, I doubt
18 it, but we might, and we didn't see it snow, but when we
19 went out, our cars were covered with snow, that's
20 circumstantial evidence that it snowed.

21 In order to prove an intentional loss in a fire
22 case, an insurance company, and the Judge will charge
23 you this at the end, must establish that the insured had
24 the motive and the opportunity to cause the loss; and
25 that the loss is a fancy way of saying was intentional,

1 it was a set fire. And Nationwide did a normal,
2 thorough investigation, hiring an expert to help
3 Mr. Flanagan and his management that he reported to, to
4 determine whether the fire was intentional, and then
5 using his own investigation including the interviewing
6 of Mr. Fowler and then obtaining his financial records,
7 which Mr. Fowler was forthcoming with, that not only did
8 Mr. Fowler have significant financial difficulties,
9 including being behind on two mortgages, almost \$5,000
10 three months each; that he had at least six accounts
11 sent for collection the 12 to 24 months before this
12 fire; that he had several judgments entered against him;
13 that he had a tax lien against him; and that he had
14 endured two failed businesses, one of his son, and one
15 of his own restaurant, and those losses totaled probably
16 more than forty or fifty thousand dollars. That he had
17 no income coming in. And that he wasn't even living in
18 this house that burned, he was living in this gazebo
19 because he had shut the power off to the house.

20 He's the only person that was there, he's the
21 person who discovered it. There's no evidence of anyone
22 coming or going, trucks pulling out of his driveway in
23 the middle of the night or anything like that. That's
24 not a disputed fact.

25 And so, as you Judge the case on the first cause of

1 it action, whether the insurance policy should pay for
2 this loss, over and above what they've already paid,
3 Nationwide did pay off the full amount of the dwelling
4 coverage to the mortgage companies -- that's one way to
5 get out of financial difficulty is to have your
6 mortgages paid off -- one was not paid in full because
7 his mortgages was slightly more than the amount of
8 coverage he had, but the full limit was paid.
9 Nationwide also gave him an advance of \$2,000 while they
10 were investigating this.

11 Now, they investigated and issued the denial about
12 26 days, a little bit less than a month after the fire.
13 I personally think that is a good thing so people are
14 not strung out if the investigation can be completed,
15 and it was, and you will see how thorough it was. Andy
16 Flanagan did not make these decisions as some rogue
17 adjuster just doing what he thought. He got counsel and
18 oversight from his manager who had 30 years' experience,
19 and he involved other people within Nationwide who were
20 quite experienced and you will see who investigate many
21 claims but deny very few. No, Mr. Fowler was not picked
22 out or mistreated any differently than any other
23 insured.

24 However, the evidence was sufficient for Nationwide
25 to deny the claim. There's two parts that go along with

1 that. One is whether Nationwide is, in fact, correct
2 and we'll let you decide that issue whether or not there
3 was motive, opportunity, and an intentionally set fire.
4 And, if so, there would be no benefits in addition to
5 what had already been paid.

6 But a corollary to that was not only was Nationwide
7 wrong, they were in bad faith. They didn't even have a
8 clue or a prayer or a shred of evidence to take the
9 position that Nationwide did. As you go through this
10 case, please analyze whether the people from Nationwide
11 had a reasonable basis to come to the conclusions and
12 take the position on the policy refusing to pay
13 Mr. Fowler, whether that was reasonable, whether there
14 was a basis in fact for it. This is the law. Was there
15 a basis in fact for these three things to be met? And I
16 submit to you not only was there a basis, but there was
17 actual proof that it was more likely than not. In civil
18 cases that is the burden of proof.

19 And I had in closing just a list of a few things I
20 ask you all to keep in mind and I touched on a few.
21 Burden of proof is one of them. The burden of proof
22 with respect to these three issues is Nationwide's. On
23 everything else it's the Plaintiff's. Usually it's the
24 Plaintiff's. But since there was a policy, the policies
25 are written and the law is such that when you are going

1 to deny a claim based on an intentional act, the
2 insurance company has to prove that. But the standard
3 by which an insurance company has to prove this
4 exclusion is called a preponderance, which is a big way
5 of saying more likely than not. You probably heard that
6 if you're served -- I know that some of you have
7 indicated in Voir Dire indicated they served before.
8 But it just means that it's more likely than not. Is it
9 more likely than not that Mr. Fowler, who obviously had
10 a motive and an opportunity, also sustained a loss that
11 resulted from an intentionally set fire? We don't have
12 to prove that it's more likely he did it. The law will
13 impose that on him if it's intentionally set, and he had
14 motive and opportunity. Those are the three elements,
15 and it is beyond a reasonable doubt.

16 Credibility is something that all of us know from
17 our life experiences and our common sense when someone
18 is trying to sell us something. And we need to just
19 think about reasons why someone might not give it to us
20 straight. They might have a financial interest in the
21 outcome or some type of bias.

22 Their testimony may seem farfetched, and I think
23 some of the expert testimony on how this fire started is
24 gonna seem extremely farfetched. In fact, Mr. Ross, who
25 was hired by the Plaintiffs to process this lawsuit, his

1 testimony is the only person that I hired in this case,
2 I got involved after the lawsuit was filed and hired an
3 engineer to discuss the theory that will be espoused by
4 Mr. Ross.

5 His name is John Holecek and he tested an exemplar
6 here to determine whether or not it could put off enough
7 heat to simply catch the wall on fire. And you will see
8 that his opinion and his test results would show that
9 the heat would be hundreds, hundreds of degrees below
10 what would be necessary.

11 So that is the type of thing where you can judge
12 someone's credibility when they tell you something that
13 makes no sense that has been scientifically disproven.

14 There are a lot of issues that don't go to motive,
15 opportunity, or incendiary origin in this case about the
16 handling of the claim. I call those red herrings.
17 They're designed to get someone off the trail. Maybe
18 they're a rabbit trail or whatever. Please avoid the
19 invitation to go down those and focus on whether
20 Nationwide had reasonable basis of these three as you
21 consider the evidence. And things like "wouldn't give
22 me a report" which is just a standard way that
23 Nationwide conducts claims, and it all occurred after
24 the claim had been denied anyway, the Judge will charge
25 you it was what was in Nationwide's possession and what

1 they did at the time the claim was denied, it is for
2 your decision about whether they acted fairly, in good
3 faith, or acted in bad faith.

4 I appreciate your patience, as I've mention many
5 times. It probably won't be the last time I mention it
6 because we do have a lot of ground to cover in the next
7 couple of days. But I thank you for your attention and
8 I look forward to my opportunity to speak to you again
9 at the end of the case. Thank you.

10 THE COURT: Could I see counsel at sidebar please?
11 (Discussion at sidebar.)

12 THE COURT: All right. Mr. Foreman, ladies and
13 gentlemen of the Jury, I might also mention that one of
14 the policies I have is that we usually break about 5:00.
15 The reason for that is it's been my experience also that
16 we have two lives, one begins early in the morning and
17 goes until about 5:00 and then at 5:00 we have a
18 different one that seems to go on forever. We have
19 family responsibilities and other things that we have to
20 do. So rather than interrupt your lives any further
21 than we have to, I usually break about 5:00.

22 My understanding today is that we have one
23 stipulation that will be read in the record to you and
24 then we might have two witnesses that will be what we
25 call short witnesses that the examination will not be

1 lengthy. So with that I recognize Mr. Belser for his
2 presentation.

3 Publication to Jury of Defendants' Responses to
4 Plaintiff's Requests for Admissions:

5 MR. CLINCH BELSER: May it please the Court, I'd
6 like to start with a publication of the Defendants'
7 Responses to Plaintiff's Requests for Admissions. In
8 normal fashion I'm going to read first the question and
9 then the response. I'll only read the ones which were
10 admitted.

11 But, ladies and gentlemen of the Jury, in July of
12 2011 the Defendants admitted the following Requests For
13 Admissions. (Reading):

14 On or about February 19th, 2008, for value
15 received, Nationwide Mutual Fire Insurance Company
16 issued to James D. Fowler, the Plaintiff, its policy
17 number 61 39 H0 787845 insuring the Plaintiff's
18 residence at 328 Frank Gaillard Road, Seneca, South
19 Carolina, with the zip noted. And that was admitted.

20 The second question: Was the insurance policy with
21 the same number, 61 39 H0 78785, was in full force and
22 effect on January 17, 2009? And that was admitted.

23 The third one is: On the morning of January 17th,
24 2009, the Plaintiff's said residence was destroyed by
25 fire, the dwelling being a total loss and the

1 Plaintiff's personal property therein also being
2 destroyed or rendered useless during the fire?

3 And the Answer was: Admitted as to the residence,
4 unable to admit or deny as to all Plaintiff's personal
5 property.

6 The sixth question was: The Defendants hired
7 Mr. Jerry B. Byers and Technical Investigations &
8 Services, Inc., to do a cause and origin investigation
9 of the fire and authorized the expenditure of \$600.00
10 for a laboratory analysis of debris samples taken at the
11 fire site by Mr. Byers, a standard procedure in fire
12 investigations. And that was admitted.

13 Number 7: The laboratory analysis of all six of
14 the debris samples resulted in "negative" results, to
15 wit, "No ignitable liquid detected." And that's
16 admitted.

17 Number 8: Mr. Flanagan, individually and as agent
18 for Nationwide, was aware that the results from the
19 tests of the debris samples were negative before and at
20 the time he denied Mr. Fowler's claim. And that was
21 admitted.

22 Number 9 is: Mr. Flanagan, individually and as
23 agent for Nationwide, was told by Mr. Byers that
24 Mr. Byers did not smell any accelerants at the fire
25 site. And that was admitted.

1 *** End of Reading ***

2 MR. CLINCH BELSER: Your Honor, we are ready to
3 call our first live witness.

4 THE COURT: Very good.

5 MR. CLINCH BELSER: Your Honor, at this time I
6 would like to call Ms. Sue Bright.

7 Whereupon,

8 Sue Bright

9 Having been first duly sworn, was examined and
10 testified as follows:

11 Direct Examination by Mr. Clinch Belser.

12 THE COURT: If you would please, ma'am, give us
13 your name for the record, spelling your last name.

14 THE WITNESS: Sue Lynn Bright, B-r-i-g-h-t.

15 MR. CLINCH BELSER: Ms. Bright, I'm gonna ask you
16 some questions and I'll try to speak loudly enough so
17 that you hear me clearly. If I don't do so
18 successfully, would you please tell me to speak up. And
19 in like vein, I would like for you to speak loudly
20 enough so that the Court Reporter can hear what you are
21 saying and also all members of the Jury.

22 By Mr. Belser:

23 Q. Ms. Bright, what is your address?

24 A. 324 Frank Gaillard Road.

25 Q. Is that in Seneca?

- 1 A. It's in Seneca.
- 2 Q. And are you married?
- 3 A. Yes.
- 4 Q. What is your husband's name?
- 5 A. Oscar Bright.
- 6 Q. And you have given us your address. Where is that
- 7 in relationship to the home and house and lot of
- 8 Mr. James Fowler?
- 9 A. That's next door to the home of Mr. Fowler.
- 10 Q. Are you employed now?
- 11 A. No.
- 12 Q. Have you been employed in the past?
- 13 A. Yes.
- 14 Q. What was your occupation?
- 15 A. I was, I worked with the Department of Highways and
- 16 Public Transportation. I was in engineering. My job
- 17 was over the final plans of the roads and bridges
- 18 constructed in Oconee.
- 19 Q. How long have you and Mr. Bright lived at 324 Frank
- 20 Gaillard Road?
- 21 A. 32 years.
- 22 Q. Do you and Mr. Bright know Mr. Fowler?
- 23 A. Yes.
- 24 Q. How long have you known him, approximately?
- 25 A. Approximately, well, since he's moved in next door.

1 Q. How well do you know him?

2 A. As a neighbor. We do not visit much. We talk, you
3 know, across the yard. And I know he's there if I
4 needed anything, I could call him immediately.

5 Q. Do you know anything about the building of his
6 home?

7 A. Yes, I do.

8 Q. Please tell the members of the Jury what you know
9 about the building of Mr. Fowler's home.

10 A. Mr. Fowler built his home himself working after he
11 got off his regular job in the afternoons and on
12 weekends. He did practically all the work himself.

13 Q. Did you have a chance to observe the work as it was
14 going on?

15 A. Oh, yes.

16 Q. Can you describe the quality of the construction
17 performed by Mr. Fowler on his own home?

18 A. Very good. He took pains in building it correctly.

19 Q. Can you describe the condition of his yard around
20 the house?

21 A. Most of the time it was well kept. With children,
22 though, you can imagine.

23 Q. Have you ever been a visitor inside Mr. Fowler's
24 house?

25 A. I have been in his house maybe two or three times.

1 Q. Can you describe the quality, the contents of his
2 house, before the fire of course?

3 A. Well, he had nice furniture. In fact, he had a
4 real nice grandfather clock that I had admired.

5 Q. Did you notice the cabinetry?

6 A. Well-built, nice.

7 Q. And the furniture? Again, what was the condition
8 of the contents?

9 A. It was always clean.

10 Q. Now I would like to direct your attention to the
11 early morning of January 17th, 2009 the day that
12 Mr. Fowler's house burned. How did the fire come to
13 your attention?

14 A. I had gotten up, I had put my coffee on, and I had
15 called my sister and I was talking with her. And there
16 was a bam on the door. It just wasn't a knock, it was
17 a bam. And I ran to the door and he was standing there
18 and he looked like he was upset. And I said, Jim,
19 what's the matter?

20 He said, Call the Fire Department. My house is on
21 fire.

22 And he took off and ran back off my deck I had to
23 go through the living room to the front door to find
24 out the house number because they're not in consecutive
25 order. And he told me 328. Then I came back and

1 called 9-1-1 and then went and woke my husband up.

2 Q. And what did you do in response to his request for
3 help?

4 A. I called 9-1-1 and give them the address and they
5 were there, to me it seemed like forever, but they were
6 there within just a few minutes.

7 Q. Did you see the fire trucks arrive?

8 A. Oh, yes.

9 Q. And tell the members of the Jury what you saw after
10 the fire trucks got there from where you were.

11 A. From where they were parked in our yard on the road
12 in his yard, there were several fire trucks came, and
13 they went to work immediately, but the flames were
14 coming out the roof at the time when they got there.
15 When I first looked at the house, all there was was
16 just some smoke, but when the Fire Department got
17 there, there was flames.

18 Q. Did you have discussions with any of the
19 firefighters?

20 A. Not that I recall.

21 Q. Did you talk to any of the insurance people the
22 next day or at any time?

23 A. No, I didn't.

24 Q. Did you ever meet a man named William Gilden who
25 came to your house?

1 A. It seems like there was a man came there but he
2 talked mostly to my husband.

3 Q. Oh, okay. Were you present when he was talking to
4 your husband?

5 A. Probably -- I remember him being there. I don't
6 know whether I was ever involved in the conversation or
7 whether I even stayed in the room or not.

8 Q. All right. On another subject. Have you had very
9 much contact with Mr. Fowler since the fire?

10 A. From time to time.

11 Q. How does that occur?

12 A. Well, he'll either call or I'll call out there for
13 some reason and we've discussed, you know, the fire.
14 He would let me know --

15 Q. Don't repeat anything he might say because that
16 would be hearsay.

17 A. No.

18 Q. But can you say from your observations of
19 Mr. Fowler what effect the fire and the loss of his
20 home has had on him?

21 A. Oh, yes. He is very upset with it.

22 Q. Do you have any reason to think that Mr. Fowler
23 would have burned his own house down, the one that he
24 built?

25 MR. MURPHY: Objection, Your Honor; this is mere

Examination by
Attorney J.R. Murphy

1 speculation.

2 THE COURT: Objection sustained.

3 MR. CLINCH BELSER: I have no further questions of
4 this witness.

5 THE COURT: Very well.

6 I might note that, as I mentioned, there are Rules
7 of Evidence and we don't ask questions that are beyond
8 the knowledge or the experience of individuals. And
9 when you ask for an opinion, usually that person has to
10 have some sort of expertise or something to be qualified
11 to give their opinion. And witnesses unless they are
12 experts are limited to their own knowledge, in other
13 words, what they see, hear, touch, and things of that
14 nature. And these rules, of course, apply to both the
15 Plaintiff and Defendant.

16 All right. You may proceed.

17 Cross-Examination by Mr. Murphy:

18 Q. You lived next door, but you didn't see anybody
19 else coming or going the night before or the morning
20 that Mr. Fowler came to your door to advise you that
21 his house was on fire?

22 A. No, I didn't.

23 Q. You are not aware of anybody menacing around or
24 hanging around in the neighborhood on the day or two
25 before this fire or anything like that?

1 A. Nothing.

2 Q. Nothing unusual?

3 A. Huh-uh.

4 Q. Did you know that Mr. Fowler was living in his
5 gazebo during the time of the fire?

6 A. Yes, I did.

7 Q. And when the trucks came, they put a lot of water
8 on the fire to try to put that fire out, didn't they?

9 A. They, tried, yes, sir.

10 MR. MURPHY: Nothing further.

11 MR. CLINCH BELSER: No further questions.

12 THE COURT: All right. You may step down, ma'am.

13 Thank you, ma'am.

14 (Witness leaves stand.)

15 MR. CLINCH BELSER: Your Honor, at this time the
16 Plaintiff would call Mr. Oscar Bright.

17 Whereupon,

18 Oscar Bright

19 Having been first duly sworn, was examined and
20 testified as follows:

21 Direct Examination by Mr. Clinch Belser:

22 THE COURT: If you would please give us your full
23 name for the record, spelling your last name.

24 THE WITNESS: Oscar Bright, B-r-i-g-h-t.

25 THE COURT: Very good. Thank you, sir.

1 By Mr. Belser:

2 Q. Mr. Bright, I'm going to ask you to do the same as
3 I asked Mrs. Bright. I'm going to try to speak loudly
4 enough for you to hear my questions. If I don't
5 succeed, please tell me to speak up, and I'll ask you
6 to speak loudly enough so the members of the Jury can
7 hear as well.

8 Mr. Bright, what is your address for the record?

9 A. 324 Frank Gaillard Road.

10 Q. And are you married?

11 A. Yes.

12 Q. What is your wife's name?

13 A. Sue Ellen Bright.

14 Q. Is she the lady who just testified?

15 A. Yes.

16 Q. Where is your house located in relation to the
17 house and lot owned by Mr. James Fowler?

18 A. On the west side, he's on the east side, and then
19 we're right next door.

20 Q. Are you employed now, Mr. Bright?

21 A. No, sir.

22 Q. Were you employed in the past?

23 A. Yes.

24 Q. Where were you employed?

25 A. I was employed by JP Stevens, the Seneca plant.

- 1 Q. How long were you employed by JP Stevens, sir?
- 2 A. 39 years.
- 3 Q. How long have you and Mrs. Bright lived at 324
- 4 Frank Gaillard Road to the best of your recollection?
- 5 A. Ever since October 9th -- 19th, 1978.
- 6 Q. How long have you known Mr. James Fowler, your
- 7 next-door neighbor?
- 8 A. After he moved in, we got acquainted. I don't know
- 9 what year that was, but it was just a year or so after
- 10 we had moved down.
- 11 Q. What do you know about the building of his house?
- 12 A. Well, I had watched him build it, or looked at it
- 13 as he built it, and he did a good job.
- 14 Q. When did he do the building?
- 15 A. Well, he did it mostly -- he would do it in the
- 16 afternoon when he got home from work and then on the
- 17 weekend if he was not working he applied himself to it
- 18 Saturday, maybe Sunday.
- 19 Q. Were you able to observe his building methods?
- 20 A. Yes. He, he built it well.
- 21 Q. And were you able to observe the materials he used
- 22 in the house?
- 23 A. I would say it was quality material that he used.
- 24 Q. Have you ever been a visitor inside his house
- 25 before the fire?

1 A. Yes.

2 Q. Can you describe the inside of the house before the
3 fire?

4 A. Well, you know, I remember I was impressed by the
5 large room he had. The cabinets, he had really done a
6 great job on the cabinets. I had an aisle and like
7 cabinets and a bar in between it. It was real good.

8 Q. Do you recall the material from which the cabinets
9 were built, what they were made out of?

10 A. Not really. I can't say. It look to me like it
11 was some type of birch, I'm not sure about that now.

12 Q. It was wood.

13 A. Yes, sir.

14 Q. You just don't know what kind, you think it was
15 birch. Is that what you said?

16 A. Yes.

17 Q. Can you describe the other contents of the house
18 besides the cabinets?

19 A. Not really I can't. To describe them, I really
20 couldn't tell you.

21 Q. Do you recall the early morning of January 17,
22 2009, almost three years ago, when Mr. Fowler's house
23 burnt?

24 A. Yes, sir.

25 Q. How did the fire come to your attention that

1 morning?

2 A. Well my wife -- I was still laying in bed and she
3 had been up for some time, and she came in there and
4 told me that Jim's house was on fire, to get up. And
5 so I got up and I got my clothes on and everything. I
6 wanted to be sure there was something I could do to
7 help him. The first responders, that's what I call
8 them, on the fire they had already arrived, some of
9 them, and the fire truck came in, they was putting out
10 a hose.

11 Q. Were up able to observe the firefighting from up
12 close?

13 A. From a distance, yes. I would say they had
14 probably I'd say about three or four trucks there and
15 some of these first responders is what I call them to
16 come out and see what it's like. They were on top when
17 I went out there and looked they had men all over the
18 house.

19 Q. Did you ever have any contact -- were you ever
20 contacted by any of the insurance company adjusters?

21 A. It seems like that one did come one day and was
22 asking me some questions about it, and I don't know
23 whether -- he might have come into the house, I'm not
24 sure of that. He was wanting to know some things
25 about, about -- he was insinuating some things so I

1 couldn't really tell him anything, because knowing Jim,
2 he was a good fella, so I couldn't tell him something I
3 didn't know.

4 Q. Did this insurance man know after talking with you
5 that Mr. Fowler had come to you asking your wife to
6 call the fire people?

7 A. I'm not sure of that. But I do know that, I heard
8 the conversation between my wife and Jim, and I know
9 that she did call.

10 Q. You say you heard the conversation between Jim
11 Fowler and your wife?

12 A. Yeah. I heard Jim and I heard my wife talk to him,
13 and I was still about half asleep though. Then I laid
14 in bed and she told me you can get out of bed.

15 Q. Had you had very much contact with Mr. Fowler since
16 the fire?

17 A. Well, we talk. He'll come over to the house
18 sometimes. I'll be out in the yard or I'll go by him
19 or we'll go down to the lake and get together and talk
20 about things.

21 Q. Can you see from your observation of Mr. Fowler and
22 your contact with him what effect the fire and the loss
23 of his home has had on him?

24 A. Do you mind repeating that, please.

25 Q. Can you say what effect -- from your observation of

1 Mr. Fowler and your contact with him, can you say what
2 the effect of the fire and the loss of your home has
3 been on him?

4 A. It took a lot out of him. He was real upset over
5 it and everything, and he was, I know he was wanting to
6 get things straightened out so he could do some things.
7 I know he feels real bad.

8 MR. CLINCH BELSER: Thank you very much. I have no
9 more questions. Mr. Murphy may ask you some questions.

10 MR. MURPHY: No questions, Your Honor.

11 THE COURT: Very good. You may step down. Thank
12 you, sir.

13 (Witness leaves stand.)

14 THE COURT: All right. Mr. Belser, Mr. Murphy, I
15 think this would be a good time to break for today.

16 MR. CLINCH BELSER: May Mr. and Mrs. Bright be
17 excused for the rest of the trial?

18 THE COURT: Without objection, you may be excused,
19 and I do thank you for being with us today.

20 (Whereupon, Mr. Oscar Bright and Mrs. Sue Bright
21 were excused for the remainder the trial.)

22 THE COURT: Mr. Foreman, ladies and gentlemen of
23 the Jury, that does include the testimony and evidence
24 for today, but, of course, we're gonna reconvene
25 tomorrow morning. I might ask, I don't have as busy a

1 day tomorrow as I did today. But I might need a little
2 extra time to look at some things in my office so I
3 would suggest that perhaps -- well, let's do 9:00, 9:30
4 or 10:00. But what time would you like to start in the
5 morning? We'll do a little work this afternoon to see
6 if we can't expedite some matters without having you
7 wait on us. So what time would you like?

8 THE FOREMAN: 10:00.

9 THE COURT: 10:00 is perfect. Thank you so much.
10 I do appreciate that. With that, of course, I'll excuse
11 you for the evening. I think I explained to you the
12 last time that you are not to discuss this case with
13 anyone or permit anyone to discuss it with you. I was
14 here before 8:30 this morning. I had no one waiting on
15 me and tonight I hope you have a good evening without
16 any interruptions. But please be assured that, just as
17 I said, you are not to undertake discussion of it, no
18 one is to interfere with your duty as jurors because
19 this is a very important case to everybody involved and
20 this case needs to be resolved in the proper fashion so
21 I do thank you. With that you are excused for the
22 evening until 10:00 in the morning, and come back to the
23 jury room that we'll be using.

24 (Whereupon, the Jury left the courtroom at
25 approximately 5:00 p.m.)

1 THE COURT: All right. I want like to maybe, if
2 the next witness is gonna be Chief Wright, to have his
3 testimony proffered so I can make a ruling on whether or
4 not he will be able to give something other than just
5 the factual...

6 MR. CLINCH BELSER: Yes, sir. Chief Wright is here
7 and he's come and he's ready to testify.

8 THE COURT: Well, let's take a very short break
9 because some of us have been at this a little bit. If
10 I'm interfering with anybody, including the Chief, that
11 will be fine and we can do it at some other time. But I
12 think we would both be better prepared if we know what
13 we're going to be facing tomorrow.

14 MR. CLINCH BELSER: Well, after the break we can
15 have the Chief come and just go through his testimony.

16 THE COURT: Very good. Just proffer it and of
17 course you can do your Voir Dire if necessary. Very
18 good. We'll take a very short break and come back on
19 the bench for ten minutes.

20 MR. CLINCH BELSER: Yes, sir. Thank you.

21 THE COURT: Thank you.

22 (A recess was taken.)

23 THE COURT: All right. As I understand, what we
24 will do at this time is proffer the testimony of I trust
25 will be the next witness tomorrow, but we will have the

Examination by

Attorney Clinch Belser

1 proffer this afternoon for the purpose of determining
2 whether or not the witness will be qualified as an
3 expert so we might get his opinion.

4 Mr. Belser, if you would like, you may call your
5 witness.

6 MR. CLINCH BELSER: Your Honor, at this point the
7 Plaintiff calls Chief David Wright --

8 THE COURT: Very good.

9 MR. CLINCH BELSER: -- of the Friendship Fire
10 Department. While this gentleman is approaching the
11 bench, this gentleman is a fact witness, as well.

12 THE COURT: Well, again. Do as much as you need to
13 do with your factual testimony. But I think really what
14 I want to do is to have the witness either qualified or
15 not as far as being opinion testimony and, of course,
16 the major thing will be your direct on the qualification
17 and then, of course, Mr. Murphy's Voir Dire of the
18 witness for the purposes of challenging qualifications.

19 MR. CLINCH BELSER: Yes, sir, that's fine.

20 THE COURT: Very good.

21 Whereupon,

22 David Wright

23 Having been first duly sworn, was examined and
24 testified as follows:

25 Direct Examination by Mr. Clinch Belser:

1 THE COURT: If you would please, sir, give us your
2 full name, spelling your last name for the record.

3 THE WITNESS: David Wright, W-r-i-g-h-t.

4 By Mr. Belser:

5 Q. Chief Wright, will you state for the record your
6 age first?

7 A. 46.

8 Q. And what is your address?

9 A. 440 Pumper Drive, Seneca.

10 Q. How long have you lived in Seneca?

11 A. All my life.

12 Q. What is your primary occupation?

13 A. Firefighter, Captain of the Seneca Fire Department.

14 Q. How long have you been with the Seneca Fire
15 Department?

16 A. 22 years.

17 Q. And what is your current position?

18 A. Captain.

19 Q. Okay. What training have you had in connection
20 with working with the Seneca Fire Department in terms
21 of firefighting and other fire-related...

22 A. Well, I've been through the Firefighters National
23 Certification, stuff like that.

24 Q. Please be more detailed, if you would, so Judge
25 Macaulay can understand your full extent of your

1 training as the Chief and your prior duties at the
2 Seneca Fire Department..

3 A. Well, just command classes and I've had arson
4 detection for the first responder and that's as far as
5 I've ever went. I never got any classes as far as
6 arson or anything.

7 Q. Where were those classes taken?

8 A. Most of them are in Oconee County but through the
9 South Carolina Fire Academy.

10 Q. How many courses have you had in arson detection?

11 A. It would just be that one, that's just the
12 awareness class.

13 Q. And when was that?

14 A. Five or six years ago.

15 Q. And what does arson awareness mean?

16 A. Well, it's just to sort of teach you what to look
17 for or try to look for. You can't always pick it out.
18 It teaches you not to move things around no more than
19 you have to so that if somebody does have to come in
20 and do an investigation, the stuff is where it was, all
21 the like couch and chairs and stuff like that is pretty
22 much where it was when the fire started.

23 Q. Are you given training in what to look for which
24 might be an indicator of arson?

25 A. No. Just eyes, and just if I smell anything,

1 accelerants.

2 Q. And just so the record is clear, what do you mean
3 by accelerants?

4 A. Flammable, gas, kerosenes, just stuff like that,
5 diesel fuel.

6 Q. And how long a course was that training course?

7 A. It was a 16-hour class.

8 Q. And that was administered at the Oconee County --
9 where was it?

10 A. It was actually held at the Friendship Fire
11 Department, but the Fire Academy taught the class.

12 Q. And what Fire Academy do you mean?

13 A. South Carolina Fire Academy.

14 Q. Can you tell us more about the South Carolina Fire
15 Academy? What is that organization of people who work
16 for fire departments or does it involve other people?

17 A. Well, it's where you go to get all these classes
18 and they actually got a recruit program where if you
19 send somebody down there for eight weeks, they actually
20 got most of the classes they would need on how to fight
21 fires.

22 Q. How many fires in a normal year does the Seneca
23 Fire Department fight?

24 A. Actual fires?

25 Q. (Nodded head.) Approximately.

1 A. It's hard to say. A hundred or so. And we have
2 over a thousand calls, but all of them is not actual
3 fires.

4 Q. Do you have any reporting responsibilities in your
5 role as Captain at the Seneca Fire Department
6 reporting.

7 About fires and what you found?

8 A. Just fill out the same reporting system that we
9 have at Friendship. It's the same program, just fill
10 out that report and make sure it's done the best the
11 way it's supposed to be done.

12 Q. And what is that program? There's been some
13 discussion of it, but I need you to testify as a
14 witness about what it is.

15 A. The name of it's fire house program. That's just
16 the name of it. It's where you put it in, you report
17 it to the State, you email it to the State. At one
18 time we made copies on disc and sent it to the County
19 and they sent it to the State as far as I know, but we
20 actually send it to the State now through email.

21 Q. "We"?

22 A. NIFERS, this is the national program, it's not just
23 a State program.

24 Q. Are you saying that every time there's a fire the
25 highest officer involved with fighting the fire is

1 supposed to make a report to the State or national as
2 well? What does the report deal with?

3 A. It's just you have to have the person's name that
4 was involved, address, what kind of call it was, and
5 just different things like for the State so they can
6 keep records. There's even a place if they had smoke
7 detectors, if they was actually activated and all that
8 kind of stuff so you can get stats, and you can put
9 property loss on it so that they can have a stats as to
10 how much property was lost that year.

11 Q. You mentioned the same report done by the
12 Friendship Fire Department. Let's talk about the
13 Friendship Fire Department in a moment. What is your
14 association with the Friendship Fire Department for the
15 record?

16 A. I'm Chief.

17 Q. And where is the Friendship Fire Department
18 located?

19 A. 1307 Friendship Road, Seneca.

20 Q. And is it a volunteer Fire Department?

21 A. It's strictly volunteer.

22 Q. What area does it serve, how large of a geographic
23 area, approximately?

24 A. I'm not sure. We're pretty close to the center of
25 our territory, so we don't go five miles either

1 direction so it's within a five-mile radius of the
2 station.

3 Q. How long have you been the Chief of Friendship Fire
4 Department?

5 A. January it will be 18 years.

6 Q. How many members does the Friendship Fire
7 Department have?

8 A. 17.

9 Q. And is anybody paid?

10 A. No.

11 Q. How many fires does the Friendship Fire Department
12 handle in an average year, or a recent year, last year?

13 A. It was a little over 150 calls, but as far as
14 fires, grass fires, house fires, stuff like that,
15 probably 20, all those combined. Structure fires are,
16 I think we average normally around -- that's not a
17 total loss but fire in a structure we average around
18 three a year.

19 Q. What sort of records or reports does the Friendship
20 Fire Department make?

21 A. The same as Seneca.

22 Q. To whom are those reports made?

23 A. They're all sent by email to the County and the
24 State Fire Marshal's Office.

25 Q. Is there any official connection between the

1 Friendship Fire Department and the County of or City of
2 Seneca?

3 A. What do you mean?

4 Q. Are you independent of those or are you --

5 A. We are, we are a part of the County. We are not
6 nothing to do with Seneca.

7 Q. Earlier we talked about these reports, and we've
8 have an example up in front of the Judge in a few
9 minutes to look at them. Who signs those reports?

10 A. Whoever makes them.

11 Q. And do you recall the fire at 328 Frank Gaillard
12 Road in Seneca on January the 17th of 2009?

13 A. Yes, I do.

14 Q. Were you involved in fighting that fire?

15 A. I was until another truck got there.

16 Q. Please explain to the Judge now when you got first
17 involved with that fire.

18 A. Well, when I first got there I was actually driving
19 one of the trucks, I was the second end truck.

20 Q. What was the condition of the house, of the fire
21 when you were approaching?

22 A. Well, there was flames -- do you want me to just
23 keep talking?

24 Q. What was the condition of the house as you drove
25 up?

1 A. As we drove up it had just broke through the roof I
2 believe of flames. And between the time we got out of
3 the truck and got from the truck to the house the see
4 the flames.

5 Q. Were there any special or unusual aspects of the
6 fire or what it took to fight it?

7 A. Well, we couldn't go through the front door because
8 of the ceiling fell, there was a beam in there, and
9 that beam had fell. We didn't know that at the time,
10 we just knew we couldn't get in. So we had to actually
11 go around and go in another door, we had to work our
12 way around the house and find another door.

13 Q. Can you describe what portion of the roof had the
14 fire coming out?

15 A. Like a living room or something?

16 Q. Yes.

17 A. It was front door, left side of the door, left side
18 of the living room.

19 Q. Now, what was the condition of the house when the
20 fire had been put out, how bad was the damage?

21 A. The fire damage was pretty extensive in the living
22 room, the kitchen area, and there was another room
23 across from the kitchen seems like behind where that
24 heater was. That was a lot of fire damage, and I think
25 a lot of the rest of it was heat and smoke damage

1 mostly, I believe.

2 Q. Did you have a chance to observe the damage in
3 detail on the day of the fire?

4 A. Yes.

5 Q. Are you familiar with the term V factor or V
6 pattern?

7 A. V pattern is what I call it.

8 Q. Can you explain that to His Honor?

9 A. Yes. Over the years just listening to other people
10 that have taught me things. A V pattern is just like
11 if you start a fire at the bottom of something, as the
12 flames goes up it just goes out like this as it goes
13 up. But normally, if you can find a good V pattern,
14 that normally points right down to the fire.

15 MR. CLINCH BELSER: Let the record reflect the
16 witness gestured with his hands to show the figure of a
17 V.

18 THE COURT: Very good.

19 THE WITNESS: That's stuff I picked up on being in
20 the service for 31 years I've been with people that
21 actually by investigation that's the only way I know it.
22 By Mr. Belser:

23 Q. Did you observe a V pattern at this fire January
24 the 17th, 2009?

25 A. Yes. I mean half a V pattern. On the other side

1 there wasn't nothing before the corner was gone.

2 Q. Where was it?

3 A. About, around here, area where that beam was at,
4 that's the reason the beam fell at that corner that was
5 supposed to be holding a beam burnt completely away or
6 burnt enough to where it give out.

7 Q. Where was the V pattern in relation -- or what wall
8 was it on?

9 A. If you went in the front door, it would be to the
10 left; if he was going to the kitchen, it would be to
11 the right as he went in the kitchen. That's the best I
12 recall. There was a bunch of mess on the floor so it
13 was hard to tell.

14 Q. And what did you say about a heater?

15 A. It was a Kerosun heater or a kerosene heater right
16 there in that area. That's what made this.

17 Q. Did you make any observations about where the
18 damage was the heaviest when you were there on the day
19 of the fire?

20 A. It looked like to me that that corner right there
21 where the beam fell was right there under that heater
22 and a lot of that was burnt and gone, ceiling, wall,
23 everything, and that would be adjacent behind the
24 heater.

25 Q. What did you say about half of a V?

1 A. Because, you know, it was sort of like when you
2 walk through the kitchen, all that was gone. It wasn't
3 nothing there, it was like a doorway. That's what I'm
4 saying. It went like this, but there wasn't nothing
5 there for the V to keep going. That's the best I can
6 recall. See what I'm saying?

7 Q. And where was that V in relationship to where you
8 had seen the fire coming out of the roof?

9 A. Right below it.

10 Q. Right below it?

11 A. Uh-huh.

12 Q. And where was the V in relationship to where this
13 heaviest -- I'll withdraw that question?

14 Do these three observations about the V pattern,
15 the fire coming out of the roof and the heaviest damage
16 have significance to you in your work as the Chief in
17 making these reports you just mentioned?

18 A. Yes. I mean, that's, we was there a good while
19 making sure everything was out. As I said before, we
20 don't like to have to go back and put them out again,
21 so we always try to make sure everything is out. So we
22 had time to look and that's most of the extent that we
23 could find was right there.

24 Q. And this may be repetitive. Why are those three
25 things important in your making the report?

1 A. Well, I mean, the State requires us to try to come
2 up with something, and if we think it's suspicious
3 we're supposed to call SLED. If there's a death
4 involved, then it's automatic to call SLED. I didn't
5 smell anything or see anything to me that made me think
6 to call SLED, and that's what we always do to get a
7 proper investigation.

8 Q. What would you have done if you had seen something
9 suspicious?

10 A. Called SLED. I'd have called the County Fire Chief
11 and he would have took care of getting SLED.

12 Q. Earlier you mentioned making a report. Let me show
13 you a document which was marked earlier as Plaintiff
14 trial exhibit -- well, it's got a number of things on
15 it -- I think it's Plaintiff's Trial Exhibit Number 16.
16 I ask you to look at that and identify that for the
17 record.

18 Your Honor, I'm informed that the screen for the
19 projector is down so I can't put this up.

20 MR. MURPHY: You can use the wall.

21 THE COURT: Okay. Well, what I'd like to do, then,
22 is project onto the screen so you can see what he's
23 talking about and then ask him whether this on this wall
24 is the same as what he's got and then we can go through
25 the testimony in that fashion.

1 THE CLERK: We can put it on this one.

2 THE COURT: It's right behind him.

3 THE CLERK: And then you can use this to zoom up.

4 MR. CLINCH BELSER: Any help anybody can do for me
5 to use this technology is welcome.

6 THE COURT: You can just move it around.

7 By Mr. Belser:

8 Q. Chief, would you look at the screen behind you and
9 tell the Judge whether what you see on the screen is --

10 THE COURT: Now, this is Plaintiff's Exhibit 16 for
11 identification?

12 MR. CLINCH BELSER: Yes, sir. I don't know that I
13 can get that whole thing on there.

14 THE CLERK: You can. I just zoomed in on it so you
15 could read it better. But you can go back out.

16 MR. CLINCH BELSER: Judge, is that visible to you
17 or would you like for me to hand you another copy?

18 THE COURT: I'm good.

19 MR. CLINCH BELSER: Okay.

20 By Mr. Belser:

21 Q. Chief, what is this document which has been marked
22 as Exhibit 16? If you could look at the one in front
23 of you. It would be easier for you to read, probably.

24 A. This is what we call the Truck Report. And the
25 reason ---

1 THE COURT: Excuse me. What report?

2 THE WITNESS: The Truck Report.

3 THE COURT: T-r-u-c-k. Thank you, sir.

4 A. This is normally not what we give a person, but our
5 computer had crashed and it took forever to get another
6 one from the County, and we got it fixed, and then
7 before we could get it started again, it crashed so bad
8 we couldn't even replace it. That's the reason we got
9 this copy.

10 By Mr. Belser:

11 Q. Is the form itself the standard form, the only
12 thing done that's different from what's usually done is
13 it's handwritten instead of --

14 A. Yes. If the computer had been up, it would have
15 been a computer printout. But everything on this
16 second page, which is actually the reverse side. In
17 order that we had to make copies, this was a back copy
18 of this side. So it would be the same, you just type
19 in the numbers here in the computer and everything
20 would have come up.

21 Q. So earlier I think you said you'd fill in the name
22 of the homeowner the address and various information
23 about the fire and your observations of the fire while
24 you are there. Correct?

25 A. Yes.

1 Q. And it's a form which has a front and a back?

2 A. Yes, sir. It's one page, a front and a back
3 normally.

4 Q. And the second page of this is what's on the back
5 of the regular form?

6 A. Yes.

7 Q. Now, are you the one who filled out this report?
8 There's a signature on the front --

9 A. I know I did the front for sure. I'm pretty sure I
10 did all of it. It looks like my handwriting. That is
11 my initial right there on the first part, so...

12 Q. All right. This report, just to be repetitive for
13 the Judge's full understanding of it, this is
14 information you collect so you can comply with your
15 duty to submit the form to the State?

16 A. Yes.

17 Q. And you do this based upon the training you had in
18 arson detection and the other things, and the 40
19 years', 30 years' experience you've had in the
20 department?

21 A. Yes. That's just stating what we all have to do.

22 Q. And what training do you receive or what equipment
23 or information do you have in order to complete these
24 forms with the numbers?

25 A. We got a book. You go back, it's a NIFERS book. I

1 don't know what that means.

2 Q. National?

3 A. I know but I can't hardly say. I can't hardly talk
4 today. But you go back and look in the book, which you
5 know the stuff that's normal, like a 111 is a structure
6 fire, which I wrote "house fire" but it would come up
7 as a structure fire, type it in. And but once you get
8 on down, that's the first one right there, you have to
9 look it up in that book or you won't know.

10 Q. All right. And these are observations of facts
11 that you saw when you were there on the day of the
12 fire?

13 A. Yes. Except the living room.

14 Q. Let's go to the middle of the page where it says
15 Admission: Area of origin, Page 30, and then there's a
16 blank. What's that about?

17 A. Again, I'm not sure. I'm on Page 30.

18 Q. It's in the middle of the page.

19 A. Where?

20 Q. A phrase that's type Ignition, colon, Area of
21 Origin, Page 30, and then there's a blank and there
22 appears to be written 14 living room?

23 A. If you typed it in the computer, it would come up
24 living room.

25 Q. And how did you go about making that entry? Does

1 that relate to the V factor?

2 A. Yeah. Where I seen the V pattern and the heater
3 and the most damage. I mean, it was just the most
4 damage.

5 Q. Now, the other things say Undetermined until you
6 get down to Cause of Ignition on Page 34 and then
7 you've got written there Unintentional. How did you
8 make that entry, Unintentional?

9 A. I think what it would come up as if you put it in
10 the computer, it would come up Unintentional Accident
11 after investigation. And I put -- I never, I didn't
12 see anything that made it look like it was intentional,
13 that was the reason I did that, based on just what I
14 seen.

15 Q. Skipping down to the bottom there's an section that
16 says Narrative and then there's some handwriting there.
17 The second paragraph it says: After the fire was out
18 it seemed that it started around the kerosene heater.

19 What's the basis of that entry? I think you
20 already said so, but just for the record, what do you
21 --

22 A. Just narrative. You type in on the computer, it
23 would have the narrative. That's just like the first
24 part up there of what we did when we got there and all
25 that, what we seen, and I just put that down there just

1 in a case like this three years later I can remember
2 what I said is basically all that is.

3 Q. The basis of that was the three things, the V
4 factor, the area of greatest damage was right below
5 the --

6 A. Yeah. All three of them things is what made me
7 point to that area, yes, sir.

8 Q. All right. Now let me show you another copy of
9 what appears to be the same document that's marked as
10 Plaintiff's Trial Exhibit Number 6, which looks like
11 it's the same form in an earlier stage with not quite
12 as many things filled in. Can you identify that for
13 the record?

14 A. The only thing I can -- like I said, there was two
15 filled out on the scene because we didn't have no way
16 of making no copy. So the best I remember we filled
17 out two on the scene so we could give Mr. Fowler one
18 before we left, or he carried one back, I don't
19 remember exactly. But you can tell that they were both
20 filled out. And stuff, you know, like I said, this is
21 our Truck Report, so stuff that didn't really pertain
22 to the fire that he needed to know I didn't fill out,
23 like who drove the trucks and who responded to the
24 call. This to me looked like the one I should have
25 give him. The narrative is not on it because I didn't

1 have it on that yet because it wasn't done yet until we
2 got back to the station.

3 Q. This copy that I've handed you, is what's on the
4 screen an accurate projection of what you have in your
5 hand?

6 A. Yes.

7 THE COURT: What's that?

8 MR. CLINCH BELSER: This is Plaintiff's Trial
9 Exhibit Number 6. It's a earlier version of Number 16.
10 By Mr. Belser:

11 Q. Just to kind of speed us along, this you think was
12 given to Mr. Fowler on the day before you left the
13 scene, and the other one was when you had a chance to
14 fill it out once you got back to the station and had a
15 chance to fill it out putting in all the names?

16 A. I can't promise you if I give it to him right then
17 and there or if I carried it back to him, but we always
18 try to get together and discuss that stuff on the
19 scene, and we did that when we got back. And this copy
20 right here was probably given to one of the
21 investigators afterwards, that's the reason it's
22 different. But I do know that I gave him one the day
23 of, and this is probably it. The reason I saw that is
24 because I didn't go to all the trouble of checking
25 everybody's name and I didn't put up who was on the

1 truck.

2 THE COURT: Let the record reflect I am holding
3 Exhibit Number 6 and this is the one I gave to him,
4 meaning Mr. Fowler.

5 THE WITNESS: I think so because we cleaned up the
6 writing a little bit.

7 By Mr. Belser:

8 Q. Now, I think you said this before. Is there any
9 indication that there was any smell which might be
10 associated with a set fire on this particular fire?

11 A. I didn't smell anything and I asked everybody in
12 there did they smell anything. When I found out the
13 power was off, that's when I told everybody to make
14 sure everything is, you know, be careful and if you see
15 anything, let me know. They said they didn't smell
16 anything. I went in afterwards and I didn't smell
17 anything.

18 Q. Were you on scenes where you did smell accelerants?

19 A. Yes.

20 Q. Please describe what that is, what that smells
21 like.

22 A. Well, I mean, just like when you're filling up your
23 car, or if it's strong enough. If you can't get it out
24 before it burns completely up, you can still smell it,
25 just like gas poured off on something, or kerosene or

1 whatever, if it hasn't burned it up before you get
2 there, you could still smell it.

3 MR. CLINCH BELSER: Your Honor, at this point we
4 would make the proffer of this witness as a fact
5 witness, what he did himself and his report and his
6 conclusions based upon his numerous experience and
7 training, and when he talked about from his personal
8 observation right there, it's different from the report
9 in the *Wright versus Hiester* case where the guy didn't
10 do a complete investigation.

11 THE COURT: So you are proffering him as an expert
12 on...

13 MR. CLINCH BELSER: Well, because the report is a
14 required report by state law --

15 THE COURT: I think the report comes in and I think
16 his explanation of the report comes in. But where I
17 have a problem is when we get to, and I guess like Judge
18 Gregory, the reason that he did not qualify him as an
19 expert so he could give his opinion as an expert on the
20 fire and origin was because an investigation was, that
21 was going to be based on an investigation that was
22 adequate and reached, and that he reached a definitive
23 conclusion about the cause.

24 MR. CLINCH BELSER: Yes, sir.

25 THE COURT: In other words, it has to be an

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1 adequate investigation as well as a conclusion.

2 MR. CLINCH BELSER: I won't recite the testimony
3 which you have heard.

4 THE COURT: But that is what you are relying on.

5 MR. CLINCH BELSER: I'm saying this is a thorough
6 investigation by a man that has been in the fire,
7 firefighting and fire reporting for over 30 years.

8 THE COURT: You are moving for his qualification as
9 an expert in fire and origin?

10 MR. CLINCH BELSER: All I really want to do is make
11 sure that the whole report gets in evidence.

12 THE COURT: The report comes in. As I understand
13 it was made as a public record required by law?

14 MR. CLINCH BELSER: Yes, sir. Section 8 on the
15 hearsay exceptions.

16 MR. MOORE: Your Honor, may I be heard?

17 THE COURT: Yes, sir. Are you gonna do the Voir
18 Dire, too?

19 MR. MOORE: Well, first I would like to question
20 the Witness with regard to his qualifications.

21 THE COURT: That's what Voir Dire is.

22 MR. MOORE: Yes, sir.

23 Voir Dire Examination by Mr. Moore:

24 Q. Chief Wright, it's good to see you again.

25 THE COURT: I'm not -- in fact, I guess I ought to

1 say that I'm not necessarily interested in his factual
2 testimony. I can't change the facts of what he's
3 saying. But as far as whether or not he qualifies as an
4 expert.

5 MR. MOORE: Yes, Your Honor. That's what I intend
6 to focus on.

7 THE COURT: Very good.

8 MR. MOORE: Thank you.

9 By Mr. Moore:

10 Q. Mr. Wright, Chief Wright -- do you prefer to be
11 referred to in your capacity as Chief of Friendship or
12 Captain?

13 A. You can just call me my name. It doesn't matter to
14 me.

15 Q. I'll go with Chief, since that's easier for me.
16 Chief.

17 A. Seneca is not involved in this, so that's...

18 Q. Thank you. Chief Wright, you don't hold yourself
19 out as an expert in fire cause and origin
20 investigation, do you?

21 A. No, I don't.

22 Q. And we talked about what you characterize as arson
23 awareness training, but you haven't had any other
24 training besides that in fire cause and origin
25 investigation, correct?

- 1 A. No.
- 2 Q. You haven't had any training through NFPA?
- 3 A. No.
- 4 Q. Are you familiar with NFPA?
- 5 A. Some of it.
- 6 Q. Now, we talked in your deposition about NFPA 921
- 7 the *Guides For Fire and Explosion Investigations*. You
- 8 were not familiar with that, correct?
- 9 A. Not completely, no.
- 10 Q. Certainly the investigation that you undertook
- 11 didn't purport to follow NFPA 921; is that correct?
- 12 A. Yeah.
- 13 Q. Okay. No one on your crew in this fire had any
- 14 fire investigation training, correct?
- 15 A. I don't think so, not then.
- 16 Q. Now, you talked about the training that you did get
- 17 in the arson awareness, and one of the things I
- 18 understood you to say was that you were supposed to not
- 19 move items around?
- 20 A. As much as you possibly can.
- 21 Q. Okay. And is that something that you did in this
- 22 case is you tried to not move things around?
- 23 A. The best we can, but I think the heater was moved.
- 24 Q. Okay. You didn't touch the heater yourself?
- 25 A. I didn't.

- 1 Q. You didn't inspect the heater?
- 2 A. No.
- 3 Q. You didn't attempt to determine whether or not the
- 4 heater was on at the time of the fire?
- 5 A. No. I did not check it.
- 6 Q. And you didn't dig out any of the rest of the fire
- 7 scene itself to find burn patterns; is that right?
- 8 A. No.
- 9 Q. So, when you left the scene, the debris that had
- 10 fallen was left in place for investigators to come
- 11 behind you?
- 12 A. Yes.
- 13 Q. And you did not participate in a multi-day dig-out
- 14 of the fire scene with other investigators?
- 15 A. No. We was not even aware they was there.
- 16 Q. You talked a little bit about the smell and that
- 17 you did not recognize the smell, but you understand
- 18 that the smell is not necessarily indicative of whether
- 19 accelerant was there at the time. There are many
- 20 factors that can eliminate the smell of the accelerant?
- 21 A. Yes.
- 22 Q. You collected no evidence?
- 23 A. No.
- 24 Q. You conducted no interviews?
- 25 A. Nothing except talked to Mr. Fowler.

1 Q. Okay. And ultimately you reached the conclusion in
2 this report that the start of the fire was -- that the
3 cause of the fire was undetermined but you thought it
4 seemed like the heater was involved based on Exhibit
5 Number 16?

6 A. Yes. That's the word I used, I mean, it was
7 undetermined because it really seemed like it.

8 Q. You did not reach a definitive conclusion to a
9 reasonable degree of certainty that it was, in fact,
10 the heater, did you?

11 A. No.

12 MR. MOORE: Your Honor, based on this testimony
13 from Chief Wright, we believe that the opinion portions
14 of the report should not be admitted --

15 THE COURT: Well, again -- all right, go ahead.

16 MR. MOORE: Similarly, Your Honor, if I could offer
17 this analogy to a report from a Highway Patrol Officer
18 or evidence -- well, to a report from a Highway Patrol
19 Officer, certainly his observations would be admissible
20 but his conclusion, his opinion would not be admissible
21 unless the officer had a valid traffic accident
22 reconstruction expertise.

23 THE COURT: How about drunken driving?

24 MR. MOORE: Well, certain facts that that Officer
25 observed, certain data that that Officer observed may be

1 admissible, but I don't believe an Officer would be
2 permitted --

3 THE COURT: All right. Thank you. I understand
4 your objection.

5 Anything else from you, Mr. Belser?

6 MR. CLINCH BELSER: Your Honor, there's a specific
7 sentence in South Carolina Rules of Evidence Rule 803
8 that says, in the reports section at the end of the
9 general section, saying that they are admissible.
10 Accident required by Statute Code Section 55-5-120 are
11 not admissible as evidence of negligence or due care in
12 an action for damages. That specificity of that takes
13 it outside the general rule and more reasoning would be
14 aided by reading that special sentence at the end of
15 subsection 8. It is not analogous because the Rule
16 specifically deals with the Highway Department, an
17 accident, of course, and this is different.

18 THE COURT: Look at the proviso in 803-8.

19 MR. CLINCH BELSER: The proviso says (reading):
20 Investigative opinions, judgments, and conclusions are
21 not admissible.

22 MR. MOORE: And that's what we rely on, Your Honor.

23 MR. CLINCH BELSER: This is not a note. This is an
24 official report required by statute as much as a note,
25 an investigative note. This is a report as required by

1 the code section which is cited in our Brief this
2 morning.

3 **THE COURT:** Well, it's almost like somebody once
4 said, hoisted on your own batard. If it's not
5 considered an investigative note involving opinions,
6 judgments, or conclusions, then it becomes just a
7 factual statement. It has no opinion because he's not
8 qualified to an opinion. He's already said he doesn't
9 know what's in the books and he hadn't been to the
10 schools except for that one course. So obviously if
11 he's not qualified to give an opinion, he can't give an
12 opinion so that must not be an opinion.

13 **MR. MOORE:** But clearly these statements in the
14 report are opinion.

15 **THE COURT:** You can only give an opinion if you are
16 qualified.

17 **MR. MOORE:** That's my point.

18 **THE COURT:** Because otherwise it comes down to
19 credibility.

20 **MR. MOORE:** My point, Your Honor, is that they are
21 opinion statements by its very nature contained in the
22 report. They are opinions that Chief Wright is not
23 qualified to give as a cause and origin.

24 **THE COURT:** And so, therefore, it's not the opinion
25 that it is excluded.

1 MR. MOORE: It seems that --

2 THE COURT: Well, I tell you what we're going to
3 do. First of all, I do find that it is a report that he
4 was required to make. And I think I'm going to leave it
5 as to the report. I don't find -- and I'm persuaded
6 that he is not subject to giving opinions as to fire and
7 origin, but I do find that as a lay witness, obviously
8 he's had 18 years as a Chief of the Friendship
9 Department, and he's had 22 years in the Seneca Fire
10 Department.

11 He went to the scene. He investigated the scene.
12 Apparently after they returned from the scene they got
13 together after the fire and discussed with all the
14 members at the scene, he remembered, none of them
15 remembered smelling anything about accelerants, and the
16 power was off, and all of these things were done. This
17 was just an account of what he did.

18 And it's gonna be a matter of credibility is
19 whether you can dismiss what a person who does a hundred
20 calls a year and for 18 years and 22 years as to what he
21 observes is of no significance. So I'm going to --
22 again, I'm not going to qualify him as an expert, in
23 other words, to give an opinion. But again, I am going
24 to suggest that his report has a certain trustworthiness
25 in that it was not intended for any sort of criminal

1 investigation or anything of that nature.

2 In fact, as in *Varnadore*, the Court noted there
3 that the volunteer Fire Department was called and
4 *Varnadore* was interviewed by the scene at the Highway
5 Department and no charges were filed. So I think that's
6 what the report speaks of, that there is no opinion that
7 would require action, because I think also his testimony
8 was that if there was a suspicious nature, whatever, he
9 would have reported it or been required to report it.

10 And I also might note that we have a history here
11 in South Carolina giving our public officials some
12 credibility in the sense that the *State v. Ramey*, 221
13 S.C. 10, (1952), a law enforcement officer that I happen
14 to know, I went to work for him later in his years, of
15 course, who could not read or write was permitted, so
16 obviously he hadn't read any textbooks or anything, was
17 permitted to testify as to whether a person was drunk or
18 sober on a given occasion. So up there they did note
19 that it comes down to credibility more than learning.
20 And when I say learning, I'm not talking about learning
21 that you don't get after 18 years' experience or 22
22 years' experience, but learning that we get in our
23 pursuit of knowledge and books.

24 All right. So I'm not gonna qualify him as an
25 expert in the area of fire and its origin. I will

1 permit him to file his report that was required. Very
2 good.

3 MR. CLINCH BELSER: Very good. Thank you.

4 MR. MOORE: May it please the Court, I'd just
5 request --

6 THE COURT: Oh, by the way, I note your objection
7 to my ruling, too.

8 MR. MOORE: Thank you. I understand Your Honor's
9 ruling with regard to admission of the report. I would
10 request that Your Honor redact the opinion portions of
11 the report inasmuch as we do believe that they contain
12 opinions which go to the cause and origin and that the
13 Plaintiffs have stipulated in their papers in this case
14 that this is beyond --

15 THE COURT: Well, again, please, Mr. Moore,
16 understand I'm making my ruling on the record here, not
17 on what discussions or anything else might have taken
18 place. The testimony that I've heard, I would perhaps
19 agree that he is not entitled to give an opinion and
20 that's what he was doing. In fact, it sounds like it
21 was a collective report made, and that the worst thing
22 you've got in there that "seemed that."

23 MR. MOORE: Correct.

24 THE COURT: And I think that goes to the weight of
25 it rather than its admissibility even under the Rules

1 because I don't find that it is the type of opinion that
2 is to be excluded from police reports and the like.

3 MR. MOORE: Thank you, Your Honor.

4 THE COURT: Yes, sir. You're quite welcome. But
5 also I do note your objection to my ruling on the report
6 coming in in its entirety as well as -- now, that will
7 be 6 and 16?

8 MR. CLINCH BELSER: And one other. One is a
9 duplicate, so...

10 THE COURT: Let's just have one of them.

11 MR. MOORE: Thank you.

12 MR. CLINCH BELSER: There are two of them. One is
13 the early version.

14 THE COURT: You've got three, I think. Didn't you
15 tell me that, when we were doing the exhibits, you had a
16 6, a 20, and a 16? Now, are all three different?

17 MR. CLINCH BELSER: No, sir. There are only two
18 different ones. It might be simpler if we just used the
19 other 6 and 16 and forget about 20.

20 THE COURT: All right.

21 (Whereupon, Plaintiff's Exhibit Number 20 for
22 identification was removed from the list of
23 exhibits.)

24 MR. CLINCH BELSER: I'm advised that clears up all
25 the questions about the exhibits.

1 THE COURT: I think it does, subject to the
2 objections on my ruling.

3 MR. MOORE: That's right. We still have three
4 exhibits that they have not agreed to, but they have
5 only been marked for identification.

6 THE COURT: Well, how about that? Y'all haven't
7 agreed to any of the 38?

8 MR. CLINCH BELSER: No. We've agreed to all except
9 for those three defense exhibits.

10 Is that correct?

11 THE COURT: Is that correct?

12 MR. MOORE: Yes, Your Honor.

13 THE COURT: Let me look through my notes.

14 MR. MOORE: As Your Honor may recall, we marked
15 Exhibits 4 through 6 for identification only, and they
16 were going to be addressed through the witnesses at a
17 later time. Those will be two of our witnesses we would
18 put up in our case.

19 THE COURT: Oh, the four I think that you hadn't
20 agreed to. Those were for ID. Those are the CDs and
21 the reports?

22 MR. MOORE: Yes, sir.

23 MR. CLINCH BELSER: We withdrew our objection to
24 the Byers report because, as they say, such as that was
25 they had that in their contemplation when they were

1 MR. MURPHY: I'll let Mr. Moore address that. My
2 next two had to do with the next two witnesses which
3 would be by publication of deposition.

4 THE COURT: Very well. Go ahead and do that.

5 MR. MURPHY: I just wanted to put this in. We
6 discussed that in the Motion *in limine* regarding the
7 post-denial conduct as being not admissible under *State*
8 *Farm v. Howard* and also being irrelevant to whether the
9 insurance company acted in good faith at the time of its
10 decision, and contained in there, and that way I won't
11 have to object to it --

12 THE COURT: All right. As I said, though, as far
13 as that issue is concerned, I do feel that more has been
14 read into Judge Rushing's trial charge than the law
15 implies or the law might allow, you might say, so
16 therefore I do feel that anything up to the filing of
17 the litigation would be admissible.

18 Now, as far as, take me through what you found on
19 expert witnesses and statements.

20 MR. MOORE: Your Honor, I don't have any additional
21 authority other than --

22 THE COURT: All right. Have you looked at *State v.*
23 *Morris*?

24 MR. MOORE: No, I had not looked at *State v.*
25 *Morris*, Your Honor.

1 THE COURT: *State v. Morris*, and that's 376 S.C.
2 189, 2008. There, the, there was a bankruptcy
3 examiner's report that reveals that -- or the
4 examination revealed that the report contains a great
5 deal of investigative opinions, legal analysis, and
6 potential conclusions, and the Court there excluded it
7 under 803(8) because of the South Carolina Rule that
8 says that any opinions or conclusions would be
9 inadmissible. So I'm gonna reverse unless, Mr. Belser,
10 unless you have something that restates the Rule as
11 found in *State v. Morris*.

12 MR. CLINCH BELSER: Well, Your Honor, I didn't
13 anticipate that to be the Rule 803 -- Rule 803, Section
14 8, would not apply to a bankruptcy examiner because a
15 bankruptcy examiner is not a public officer or agent.
16 He's a bankruptcy witness, he's an investigator in the
17 court. And he's not within the language of this Rule.

18 THE COURT: Well, let me just read from the
19 Court's, further reading from the Court's opinion.
20 (Reading):

21 Appellant's argument regarding the public records
22 or reports exceptions to the hearsay rule is in our view
23 misguided. 803(8) specifically provides that, quote,
24 investigative notes involving opinions, judgments, or
25 conclusions are not admissible.

1 And there the Trial Judge excluded it under 803(8)
2 for that reason and the Supreme Court affirmed it. So I
3 find that it is applicable. And, in fact, the notes do,
4 803(8) says that is a distinction between the Federal
5 Rules and State Rules. So I'm excluding the statement.

6 Now, however, anything else, Mr. Moore or
7 Mr. Belser?

8 MR. CLINCH BELSER: Well, maybe I should wait until
9 you finish your "however." I'm unclear because the
10 Chief will be allowed to testify factually as to what he
11 observed. Wait for the "however."

12 THE COURT: Wait for the "however," wait for the
13 other shoe. However, he is gonna be able to testify as
14 a fact witness. And to be candid with you, I'm not
15 certain that *Hiester* controls his testimony as an
16 expert, but I'm gonna give that to the Defendant because
17 I do feel that he had a little more extensive
18 investigation apparently than Judge Gregory found the
19 Fire Chief in *Hiester* did.

20 However, one of the other things was that it
21 required that he have a decisive opinion as to the cause
22 of the fire, and, of course, that's not here. So,
23 therefore, I think out of an abundance of caution I will
24 not qualify him as an expert unless his testimony, live
25 testimony does otherwise.

1 However, I'm surprised that no one remembered Rule
2 701 (reading): If the witness is not testifying as an
3 expert, the witness's testimony in the form of opinions
4 or inferences is limited to those opinions or inferences
5 which are rationally based on the perception of the
6 witness or helpful to a clear understanding of the
7 witness's testimony or the determination of a fact in
8 issue, and do not require special knowledge, skill,
9 experience, or training, which is for an expert.

10 So if he's not an expert, then he's a lay witness
11 and his testimony would not be based on any special
12 knowledge, skills, experience, or training, and he would
13 therefore be able to testify as to what he found as a
14 fact witness, someone who actually examined. And you
15 used the analogy of the traffic policeman who cannot be
16 qualified as an accident reconstruction expert, but most
17 definitely he can testify as to the length of the skid
18 marks, where they began and where they ended, he can
19 testify to where the debris was on the highway, as to
20 whether the flames came out of the roof in this case,
21 and all the other. So with that I find that his report
22 doesn't come in under 808(3) [sic], but his testimony
23 comes in under 701.

24 Noted objections by everyone.

25 MR. CLINCH BELSER: I think I understand, but just

1 so that I don't make a mistake in five minutes. We've
2 offered the Chief as a fact witness and we'll try as
3 best we can to repeat questions and answers, not
4 verbatim of course, from yesterday. That's what we
5 intend to prove.

6 THE COURT: Well, yesterday the proffer was as an
7 expert witness, and based on that it did not qualify
8 him. So you are open today.

9 MR. CLINCH BELSER: Just so that we don't have any
10 awkward thing in front of the Jury, I want to make sure
11 Mr. Belser and I understand what the Judge has already
12 told me.

13 What I'm saying is very simply, is he can testify
14 as a lay witness based on his examination or his
15 investigation and he can give his opinion or inferences
16 which are rationally based on the perception of the
17 witness as a fact witness.

18 MR. CLINCH BELSER: So it would seem to me that he
19 has training and experience, that he went there and
20 looked at it, saw about the V pattern and all about
21 that.

22 THE COURT: He can testify to that.

23 MR. CLINCH BELSER: All about that with where the V
24 pattern pointed to where the fire started and all of
25 that. That's rationally based on what he did and ---

1 THE COURT: Exactly. That's why I used the analogy
2 that Mr. Moore used yesterday about the traffic accident
3 investigator.

4 MR. CLINCH BELSER: And one other aspect of the
5 case is if we have his, can we take him through the, his
6 report, the truck report?

7 THE COURT: I think so in this case. It's
8 interesting, because I understand we have two exhibits,
9 one is 16 and one is 6. One is done before he went back
10 to the Fire Department and with the other fireman filled
11 out the opinion and conclusion section.

12 MR. CLINCH BELSER: Well, actually, Your Honor, may
13 it please the Court, the only thing he added later was
14 the names of all the people who were there and the
15 narrative, but he did check off the location and the
16 unintentional --

17 THE COURT: Well, what I was handed yesterday as
18 Exhibit 16 has everything, and what I was handed
19 yesterday as 6 has nothing below --

20 MR. CLINCH BELSER: It has no narrative at the very
21 bottom.

22 THE COURT: That's what I'm saying. That's where
23 the objectionable material is.

24 MR. MOORE: Partially. And, of course, Your Honor,
25 the finding that it was the unintentional fire we

1 believe was also an opinion.

2 THE COURT: Well, now, as I understand it, those
3 are the -- and, of course, if this is established on the
4 testimony, we can go ahead and resolve it now. He is
5 limited to certain responses or answers by his schedule
6 or whatever the manual is that they use to fill out this
7 form; is that correct?

8 MR. CLINCH BELSER: He has to fill out those things
9 which he did fill out on the site --

10 THE COURT: But he's also limited to his answers.

11 MR. CLINCH BELSER: Yes.

12 THE COURT: All right. Now, that's what I'm
13 saying. Now, if that's the case, obviously he's just
14 doing his report and it does not have any more than as
15 he would find something.

16 MR. CLINCH BELSER: Yes, sir.

17 THE COURT: And if it's in error, of course, that's
18 the way you describe it. So what I'm gonna suggest to
19 you, and noting your objection to his having written in
20 "Cause of Ignition," he has "Page 34" which apparently
21 is a reference to his manual that he uses to process
22 this, is undetermined, it's just as it is under the item
23 before the item "first ignited, undetermined." Those
24 apparently are just factual matters that he has to
25 establish, not any sort of expertise required other than

1 either he knows what it is or he doesn't know what it
2 is.

3 MR. CLINCH BELSER: May it please the Court, maybe
4 this would be for the benefit of --

5 THE COURT: What I'm saying, Mr. Belser, is I'm
6 going to permit you to use Exhibit Number 6 but not
7 Exhibit Number 16.

8 MR. CLINCH BELSER: That's what I just said. We'll
9 do the first one and not the second one so there won't
10 be any problem.

11 THE COURT: Exactly. Very well. All right.
12 Anything else?

13 MR. CLINCH BELSER: We'll note our objection but
14 we'll proceed in accordance with --

15 THE COURT: I am noting your objections to me to
16 even using 6.

17 MR. MOORE: Not in its entirety. The opinion parts
18 we believe, notwithstanding the requirement that he
19 complete a portion of the report --

20 THE COURT: Well, let me ask you something. How is
21 an opinion undetermined?

22 MR. MOORE: It's unintentional --

23 THE COURT: Oh, unintentional.

24 MR. MOORE: -- so it's an opinion at that point of
25 Mr. Wright that it was either an intentional fire as

1 Nationwide contends or that it was an unintentional fire
2 as the Plaintiff contends.

3 THE COURT: Well, I'll note your objection, maybe
4 well taken, but I think it's a bit more of a difference
5 than a --

6 MR. MOORE: And a concern again is that it puts the
7 premature on the Fire Chief on the opinion as opposed to
8 the two retained experts who have come to opposing
9 conclusions.

10 THE COURT: Well, unfortunately, I can't do
11 anything about government, but we authorize these people
12 to do a job and then we give them a process to do that
13 job. And I'll try to let them do their job and our
14 taxpayers get the benefit of their work without
15 violating any Rules of Evidence. And I find that,
16 again, even under lay witnesses, if you will forgive me,
17 their testimony is limited to opinions or emphasis which
18 are rationally based on the perception of the witness.
19 So I find that they would not even violate the Rules of
20 Evidence as such.

21 All right. Anything else? I noted your objection.
22 You don't want anything in that hurts your case --

23 -- and you want everything in.

24 Now, anything left for the Plaintiff before we
25 bring the Jury in?

1 MR. CLINCH BELSER: Two things. One is with
2 reference to the deposition we read later, I handed up
3 to your law clerk a copy of designations which
4 incorporate what the Plaintiffs put in and what the
5 Defendants want to add and marks it so that I think your
6 clerk understands, and I think I've given a copy of that
7 also to Mr. Murphy.

8 The only other thing is from the standpoint, when
9 we call the Chief in in a few minutes and do this one
10 exhibit, I would like to have permission to have
11 Mr. Freeman Belser, my son, to sit at this chair and do
12 the actual objection.

13 THE COURT: Knowing our age and expertise, it's
14 probably well recommended to have someone of another
15 generation.

16 MR. CLINCH BELSER: At the appropriate time, then.
17 Shall we just wait until the Jury comes back?

18 THE COURT: Yes. We'll just wait. Of course, you
19 will have to be re-sworn and all that.

20 All right. Anything further from the --

21 Do you need a break?

22 THE COURT REPORTER: Yes, sir, a real quick one.

23 THE COURT: Sure, sure.

24 All right. We'll take a very short break.

25 (A recess was taken.)

1 THE COURT: Anything from the Plaintiff?

2 MR. CLINCH BELSER: No, we're fine, thank you.

3 THE COURT: Anything from the Defense?

4 MR. MURPHY: No, sir.

5 THE COURT: All right. Ask the Jury to join us,
6 please.

7 (The Jury entered the courtroom at approximately
8 10:25 a.m.)

9 THE COURT: All right. Let the record reflect that
10 the Jury and all the alternates now are in the Jury box.

11 Mr. Foreman, ladies and gentlemen of the Jury, I
12 apologize about the delay. I had hoped to begin right
13 at the hour, but I had some matters I had to complete
14 and I do appreciate your patience with the Court.

15 With that I'll recognize Mr. Belser for his next
16 witness.

17 MR. CLINCH BELSER: May it please the Court, the
18 Plaintiff would now call Chief David Wright.

19 (Whereupon, the Witness, Chief David Wright, was
20 sworn by the Deputy Clerk of Court.)

21 THE COURT: If you would, sir, please give us your
22 full name for the record, spelling your last name.

23 THE WITNESS: David Wright, W-r-i-g-h-t.

24 THE COURT: Very good. Thank you, sir.

25

1 Whereupon,
2 David Wright,
3 after first having been duly sworn, testified as
4 follows:
5 Direct Examination by Mr. Belser:
6 Q. Mr. Wright, will you state first your age?
7 A. 46.
8 Q. And what is your address, please, sir?
9 A. 440 Pumper Drive, Seneca.
10 Q. How long have you lived in Seneca?
11 A. All my life.
12 Q. What is your primary occupation?
13 A. I'm a firefighter for the City of Seneca.
14 Q. How long have you been with the City of Seneca Fire
15 Department?
16 A. A little over 22 years.
17 Q. What is your current position there?
18 A. Captain.
19 Q. And will you explain briefly to the members of the
20 Jury what training you had in connection with your
21 service at the Seneca Fire Department and what your
22 position is and your past positions. Let's go through
23 your training.
24 A. Pretty much training for being a firefighter. I've
25 had some officer classes recently, but as far as just,

1 that's mainly the kind of training I've always taken is
2 responding to calls.

3 Q. Where is the training given?

4 A. At the, it's through the South Carolina Fire
5 Academy, but they come to Oconee County and each station
6 if you request it to do the training there. Unless it's
7 something you have to go back to Columbia for to finish
8 up like for a live burn or something, you have to go to
9 Columbia.

10 Q. So most of your training has been in Seneca?

11 A. In Oconee County, yes.

12 Q. How often have you been to training in Columbia as
13 you say you sometimes do?

14 A. Probably five or six times.

15 Q. And would you explain to the Jury what the South
16 Carolina Fire Academy is that you mentioned a moment
17 ago?

18 A. It's just they train the firefighters. They have
19 a, you can take it class by class or they do have a
20 recruiting class that you can take that's eight weeks
21 long, sort of like the Police Academy. You stay all
22 week for eight weeks and you get most of your training
23 before you come back. I took it class by class over the
24 years.

25 Q. And what are the steps through which you progress

- 1 to get to be the Captain or the different levels?
- 2 A. Firefighters, Sergeant, Lieutenant, Captain.
- 3 Q. Now, briefly, how many fires in an average year
- 4 have you fought as a member of the Seneca Fire
- 5 Department?
- 6 A. Actual fires?
- 7 Q. Well, please explain what would make more sense?
- 8 A. Fighting a fire, as far as, you know, as far as the
- 9 station itself, you know, as far as my shift, probably
- 10 two or three or maybe four. The station as a whole may
- 11 have more than that.
- 12 Q. Okay. Do you have any reporting responsibilities
- 13 as the Captain now at the Seneca Fire Department?
- 14 A. My responsibility for the reporting is just to make
- 15 sure that they get filled out and look over them and see
- 16 if they're filled out, you know, properly and make sure
- 17 there's no errors and things like that. I don't
- 18 actually have to fill them out.
- 19 Q. What, what reports does the Seneca Fire Department
- 20 make?
- 21 A. The, an entrance report that's just a report for
- 22 every call that you have stating what the call was what
- 23 you did on the call, things like that.
- 24 Q. What agency or authority is that report submitted
- 25 to after every fire?

1 A. The State Fire Marshal's Office.

2 Q. Do you fill those out when you're the person
3 affected with a particular fire?

4 A. Yes.

5 Q. Now, are you also associated with the Friendship
6 Fire Department?

7 A. Yes, I am.

8 Q. Would you explain to the ladies and gentlemen of
9 the Jury what the Friendship Fire Department is?

10 A. The Friendship Fire Department is a voluntary
11 organization. We are associated with the County.

12 Q. And where is the station located?

13 A. It's at 1307 Friendship Road, Seneca.

14 Q. What size area, geographic area does it serve?

15 A. About a five-mile radius.

16 Q. What is your current position at the Friendship
17 Fire Department?

18 A. I'm the Chief.

19 Q. And how long have you been the Chief?

20 A. In January it will be 18 years.

21 Q. How many members does the Friendship Fire
22 Department have?

23 A. 17.

24 Q. Does anybody get paid?

25 A. No, they don't, nobody gets paid.

1 Q. How many fires does the Friendship Fire Department
2 handle on a yearly basis on average?

3 A. Fires or calls?

4 Q. Well, please explain the difference.

5 A. Well, we could have like car wrecks, fire alarms
6 and things like that. That's usually about between 150
7 and 200 calls. As far as actual structure fires, you
8 know, we might average three or four a year, but not
9 necessarily to the extent that we're talking about today
10 is just like a kitchen fire or something like that,
11 that's not considered a structure fire.

12 Q. Do you have reporting responsibilities as the Chief
13 at the Friendship Fire Department?

14 A. Yes. I mean, the same thing. I go over and make
15 sure they filled out everything on the report and make
16 sure that they did it right according to the book that
17 they give us to go by.

18 Q. What sort of training have you received, either
19 formal or informal, in order to complete one of these
20 reports to be submitted to the State Fire Marshal?

21 A. Well, there's no necessarily training on how to do
22 it. It's just they've gotten more and more over the
23 years. It used to be it was just a piece of paper you
24 filled out and sent it to the County. But there's no
25 official training. It's just years of doing it.

1 Q. How many years have you been doing these reports?

2 A. If you go, I guess you can say I have put. I've
3 been a member of Friendship for 31 years, so I guess,
4 you know, any time during the year I might put in three
5 or four, so I guess you could say 31 years.

6 Q. When something is submitted by the Friendship Fire
7 Department to the State per these rules, who actually
8 signs the report?

9 A. The person that filled the report out.

10 Q. Is that sometimes you, Chief?

11 A. Yes.

12 Q. Now, do you recall the fire at 328 Frank Gaillard
13 Road in Seneca on January 17th, 2009?

14 A. Yes.

15 Q. Were you personally involved in fighting the fire?

16 A. At the beginning until I could get enough help so
17 that I could get back up there and do my Chief in
18 command.

19 Q. When did you first get involved in that fire?

20 A. On the initial hose line.

21 Q. Was that about 8:00 in the morning?

22 A. Yeah. Just whatever time that was.

23 Q. How did you find out about the fire?

24 A. They all called us out on our pagers.

25 Q. Is that from the 9-1-1 service?

1 A. The 9-1-1 center, yes.

2 Q. Please explain briefly to the members of the Jury
3 how that works. When the 9-1-1 call comes, how does the
4 local Fire Department get notified?

5 A. Well, the call comes in to them on 9-1-1 and then
6 they get all the information they need to get. And they
7 probably, well, they are probably calling us out while
8 still getting the information once they hear something
9 like house fires, stuff like that, and it comes
10 immediately across the pager and then we hear where it's
11 at.

12 Q. And when you hear where it's at, what do you do?

13 A. Go get to the station as quick as you can and get
14 the trucks there.

15 Q. Do you remember what you saw when you arrived at
16 the fire, as you approached the fire?

17 A. I was in the second, in the truck that came in
18 second. When I arrived, they all, there was flames
19 coming out the roof.

20 Q. Do you remember what part of the roof was where the
21 flames were coming out?

22 A. To the left of halfway.

23 Q. Excuse me. How many men and fire trucks were
24 involved in fighting this particular fire?

25 A. It's hard to say as far as people because I don't

1 keep up with other stations, but we did call three
2 stations for backup, and it should have been probably at
3 least six trucks there depending on the -- we get two
4 automatic backups, which would be Seneca Fire Department
5 and Crossroads, that area. I had requested Oakway for
6 their tanker because I knew there were no hydrants in
7 that area, so we wanted as much water as we could get
8 because I could see the smoke before I got there.

9 Q. Now, when you described in general terms the
10 fighting of the fire, what happened when you arrived,
11 what you saw and what happened, not perfectly step by
12 step, but just so the Jury understands the story?

13 A. Well, like I said, I was in the second truck. So
14 when I pulled up, the first truck was there and the guy,
15 the driver of that truck was already out getting his air
16 pack on. And there was another person there in a
17 personal vehicle that actually got there first. He was
18 putting an air pack on, also. And when I got there, the
19 first thing I did was put on the air pack, which is a
20 breathing apparatus on your back.

21 And then we -- I don't know who pulled the hose
22 off, if it was one of them or what. But when I got
23 around my truck with my pack on, there was all three of
24 us going to the front door, water was already charged,
25 and we could not get in the front door. At the time we

1 didn't know why, but we had to back out and start
2 pulling around to find another way in. And we went by
3 windows, we put water on the fire going by the windows,
4 and we worked our way around and went in the side door
5 and we found out later why we couldn't get in the front
6 door.

7 Q. And what was that reason that you couldn't get in
8 the front door?

9 A. We couldn't get in the front door because
10 apparently by the time we got there or by the time we
11 left the trucks and got to the front door, in that time
12 the ceiling, the roof fell in, which was a beam, an I
13 beam and that roof and I beam was laying at an angle and
14 the ceiling stuff like that was preventing the door from
15 opening up. We could get in but couldn't go anywhere.

16 Q. How long did it take to fight the fire to the point
17 the fire was put out, roughly?

18 A. You are talking about completely out or it's not
19 progressing?

20 Q. Please explain the details to the members of the
21 Jury better than I can ask the questions.

22 A. I would think a little longer because we had to
23 back out. But I would say maybe 15 to 20 to keep it
24 from progressing. Progressing means the fire is moving,
25 I mean, completely burning. I mean, we got it stopped

1 from burning anything it hadn't already burnt. Probably
2 15 to 20 minutes.

3 Q. And did you stay around after that?

4 A. Oh, we stayed around for a good while to make sure
5 that it was out so we wouldn't have to come back for
6 anything.

7 Q. After the fire was put out and you stayed long
8 enough to make sure it didn't restart, what was the
9 condition of the house in general? How badly was it
10 damaged?

11 A. Fire-wise, the living room, the kitchen, and some
12 room that was behind the living room on that same side
13 across from the kitchen was burnt pretty bad. There was
14 smoke and, from the best I can remember, there was smoke
15 and heat damage that messed up the rest of the house, so
16 the whole house was damaged in some kind of way.

17 Q. On that day of the fire did you have a chance to
18 observe the damage in detail as to where it was, where
19 it was worst?

20 A. We went in and looked and went to where the most
21 heavily damaged was, and --

22 Q. Where was the most heavily damaged?

23 A. The heavily damaged was to the left of the front
24 door. Going towards the kitchen there was a living room
25 and it was as you go into the -- I don't recall if it

1 was a door or just an opening, but it was like where you
2 went from the living room to the kitchen. The post on
3 the edge of the opening there was completely burned
4 away, or was maybe not completely burned away, but it
5 was burned enough to where it fell, and that's what let
6 the beam fall and let the roof fall. When that beam
7 fell, the roof had to fall, and that was where the most
8 damage that we could tell was.

9 Q. Are you familiar with the phrase "V pattern"?

10 A. Yes.

11 Q. Can you explain to the Jury what the V factor or V
12 pattern is?

13 A. Ever since I've been in the fire service, the few
14 times I've been around people who do inspections or
15 investigations, they call a V pattern, it's a V shape
16 that points down to where the fire originated, and as it
17 comes up the wall, it spreads out in like a V as it
18 comes up.

19 Q. And were you able to observe a V pattern or a
20 portion of a V pattern at this house?

21 A. Yes, it seemed to me to be it was a V pattern.

22 Q. Please explain to the members of the Jury where the
23 V pattern was located.

24 A. To the right of the door or opening as you go into
25 the kitchen. The right side of the V pattern was

1 completely there, but the left side was, you know, there
2 was nothing left for it to go because there was an
3 opening.

4 Q. And where was that in relationship to the place in
5 the roof where you had seen the fire?

6 A. Right above it.

7 Q. And where was that in relationship to the most
8 heavily damaged area?

9 A. The most heavily damaged area was right there in
10 that area right straight above where the fire first
11 broke through the roof.

12 Q. You've talked about the fire coming out of the
13 roof, the V pattern and the damage and the heaviest
14 area. What do these three observations that you made on
15 the day of the fire when you were there, what do they,
16 how important are they to you when you make your reports
17 as you've just described?

18 A. Well, they're very important.

19 Q. Please explain --

20 A. To me I mean --

21 Q. -- please explain to the members of the Jury why
22 that's important.

23 A. Well, we're supposed to investigate every fire, not
24 like an investigator, but we're supposed to look at
25 every fire and determine if we need to call SLED or not.

1 Q. Under what circumstances would you call SLED?

2 A. Is if we suspect arson or if, you know, in any kind
3 of way, or if there's a death involved.

4 Q. If you do see something suspicious like that, what
5 are you supposed to do?

6 A. Well, at that time I would have called SLED. It's
7 different now. Now we would call the County Fire Chief
8 now. But I would have called SLED if I seen anything
9 that made me think that it was set on fire on purpose.
10 I would call SLED to do their official investigation.

11 Q. Did you see anything of that sort in this
12 particular fire on January 17th, 2009?

13 A. I didn't see or smell anything that made me think
14 that it was intentional, no.

15 Q. You mentioned the word "smell." What is the
16 significance of "smell"?

17 A. If you smell like accelerant, gas, diesel fuel,
18 anything, lighter fluid, anything that's flammable that
19 you know...

20 Q. Is that something that you are trained by
21 experience and classroom work?

22 A. Just experience, that's what I always, you know,
23 try to smell once everything is calmed down and it
24 smokes out to where I could smell it, that's just
25 experience, that's what I've always done there. That's

1 what everybody does.

2 Q. After the fire of January the 17th of 2009, did you
3 make a report on this particular fire in accordance with
4 the State Regulations we just talked about?

5 A. Yes, sir.

6 Q. I would like to show you a document which has been
7 marked in the court as Plaintiff's Exhibit Number 6 and
8 ask you to look at it and take a moment to make sure you
9 know what it is and then please explain to the members
10 of the Jury what that is.

11 A. This is the truck report. This is the report that
12 stays on the truck that we fill out and get all the
13 information we can instead of just using a notepad.
14 That way if somebody has to leave, because it's got
15 names on here, we could check it off, or they have to go
16 back to work, we don't miss them or forget about them or
17 something.

18 The reason that this one was used is at the time
19 our computer had crashed. It, y'all would have had a
20 computer printout if that hadn't have happened. We did
21 get it back and the information was on there, but I had
22 already give you all this and stuff like that and didn't
23 know if you needed it or not. And after we did get it
24 back, about a month later it crashed completely and all
25 information was gone, so this is all we got to rely on

1 now.

2 Q. Do you recognize that now as the document which you
3 filled out on the morning of the fire following the
4 instructions you have to make certain factual
5 observations about what you saw?

6 A. Yes.

7 Q. All right. I would like to ask you if you will
8 look at the screen, and my son has got a copy of
9 something on the screen, and would you look at it and
10 confirm for the Jury that what they see on the screen is
11 what you are looking at?

12 A. Yes.

13 Q. Okay.

14 MR. CLINCH BELSER: I can see that, but I know what
15 it says. Can the members of the Jury see that well
16 enough?

17 The Jury has indicated they can read it.

18 By Mr. Belser:

19 Q. Chief Wright, this report, which is in a form which
20 has the information which is required to be reported
21 pursuant to state regulations, will you go from the top
22 of the report down and identify what your entries are on
23 this front -- well, first off, is this a one-page
24 document or a two-page document?

25 A. It's two pages but it's on the front and back.

1 Q. What's on the screen is the front of the page; is
2 that correct?

3 A. Yes.

4 Q. If you would go through the top part of this and
5 indicate what you recorded as facts that day.

6 A. Well, as far as the time is concerned, we called
7 the dispatch to get the times, they recorded the times
8 for us. And the call number up there, that was, that
9 was the eleventh call that we had that year.

10 Q. Was that the red light on the case number?

11 A. That's the eleventh call of the year for us. And
12 S-A-T is Saturday. 8:03 is what the dispatch told us
13 they called us, and we arrived on scene at 8:11 and we
14 stayed out there until 12:55 is when we cleared up.
15 That right there is mutual aid, Seneca, Crossroads and
16 Oakway, and that's just received.

17 Q. What is the portion of the file, the form which
18 I'm...

19 A. That's just house, you check off what it was.
20 That's the address of the call, and that's Mr. Fowler's
21 name and his address and then his name again that says
22 occupant and it had on there owner, and it says it's the
23 same, and that's the cell phone number he gave us.

24 Q. And there's a cell phone number. And whose
25 signature is this one?

- 1 A. That is mine.
- 2 Q. All right. Let's turn to the flip side of what's
- 3 the second page for you, and just for the record if you
- 4 would just say what is on the screen, if you would
- 5 explain to the Jury is the correct copy on the screen of
- 6 what you actually have. Is this a correct copy, sir?
- 7 A. Uh-huh. I wrote out this stuff because I was
- 8 giving it to Mr. Fowler. We don't normally write it out
- 9 like that because we just put it in the computer. When
- 10 you put it in the computer, it comes up structure fire,
- 11 that 111 is structure fire, and I wrote out house fire.
- 12 That right there, number 11 means extinguishment and the
- 13 86 is investigate.
- 14 Q. 86 is what, sir?
- 15 A. Or our part of it, what we call investigate.
- 16 Q. Now, the next entry is the one which I've got the
- 17 red light on. What is that?
- 18 A. 419, single family dwelling.
- 19 Q. And then?
- 20 A. The number of buildings involved, one.
- 21 Q. All right. And go right on down there towards the
- 22 middle of the page. I put the red light on the word
- 23 Ignition: Area of fire. Will you discuss what that one
- 24 is and what you wrote in there?
- 25 A. Area of origin, which is where the fire started or

1 seemed to have started, apparently that should be number
2 14 is what we put in, and I don't know how it would come
3 up, but I put living room, and it would be whatever the
4 computer calls the living room.

5 Item first ignited: Undetermined.

6 And type of material first ignited: Undetermined.

7 Q. How about the next one?

8 A. The next one says Cause of Ignition, and I've got
9 Unintentional there, because I did not see anything that
10 would make it to me. That's just my opinion. I didn't
11 see or smell anything, like I said before.

12 Q. All right. What's the next one?

13 A. Factors contributing to Ignition, I put in
14 undetermined.

15 Q. What's the next one, Human Factors?

16 A. Human Factors, which I personally don't really
17 understand that, the book don't make it clear to me. I
18 put N/A.

19 Q. And what's left of that?

20 A. Equipment involved in Ignition. I put heater.

21 Q. This may be somewhat repetitive, but why did you
22 put heater as your finding, which you were required to
23 make by State regulations, on that one?

24 A. I put that there because that was at the bottom of
25 the V pattern.

1 Q. And this will take a second. Where was the heater
2 and what kind of heater was it that you are talking
3 about?

4 A. It was a kerosene or Karosun, however people say
5 it.

6 Q. And where was it in connection with the V pattern?

7 A. The V pattern was behind it on the wall.

8 Q. And how far had the wall been from where the heater
9 was?

10 A. It was actually real close to the wall. I can't
11 remember exactly, you know, exact, but it was within a
12 foot or so of the wall at least.

13 Q. And where was this heater located in relationship
14 to where you had seen the fire coming through the roof?

15 A. It was right below it.

16 Q. And where was the heater located in connection with
17 where you observed the greatest damage?

18 A. Sitting right there in it.

19 Q. And was the heater still in place when you had been
20 making these observations which you described before?

21 A. I think somebody, I don't know exactly who or how,
22 it got moved, but it got picked up and removed later.

23 Q. Not that morning, was it?

24 A. During the fire? I'm talking about while we was
25 there. I'm not sure. I don't think it did. We try our

1 best not to move things. I'm not sure if we moved it or
2 not, but I don't think we did.

3 Q. Now, the next one is Equipment Power Source?

4 A. I put kerosene.

5 Q. And what does the kerosene relate to?

6 A. That power source would be, you know, to the heater
7 and that's what powered the heater. And it was a
8 portable heater, that's the reason it says portable
9 right there.

10 And Fire Suppression Factors means us having
11 problems getting the fire put out, to the best of my
12 knowledge, and we put none. You know, the ceiling did
13 fall in and hindered us a little bit, but that didn't
14 really stop us from putting the fire out.

15 Q. Thank you very much. I think we can turn the
16 lights back on.

17 Now, Chief, before we got into the details
18 discussion of the report which had been on the screen,
19 you said you made this out on the day of the fire to do
20 something with it. What was your reason for making it
21 out, to do that day at the fire site?

22 A. This paper?

23 Q. Yes, sir.

24 A. Like I said, I knew that we was not gonna be able
25 to get him a computer printout that day, so we filled it

1 out and I gave it to him that day so that he could give
2 it to his insurance company.

3 Q. Gave it to him, being Mr. Fowler?

4 A. Yes, sir.

5 Q. So he could give it to his insurance company?

6 A. Yes.

7 Q. Is that standard procedure?

8 A. Yes. We always, if they have insurance and they
9 want one, most insurance companies do. If we have any
10 kind, it can even be a vehicle fire, any kind of a fire.
11 we have, we give them a copy of the report for their
12 insurance company.

13 Q. The last questions I deal with is the smell factor.
14 You say -- there's nothing on the report about smell
15 which we've gone through. Please explain to the members
16 of the Jury again about the smell. Looking for smell
17 which might relate to the factors you're supposed to
18 report on to the State?

19 A. You know, what made us smell around is because it
20 didn't have power on in the house, and we was just
21 trying to see if we could tell how it started, so if we
22 found any reason for it, to call SLED to do an official
23 investigation to determine how it started. We usually
24 leave that up to, you know, the insurance company is
25 gonna do their own investigating. So if there's not a

1 death involved and you don't have any kind of, if you
2 don't know that, if you don't think that there, maybe it
3 was arson, SLED seems not to want to, you know, they're
4 so busy and they only have so many people, and they want
5 to have sufficient reason for coming. And we really
6 tried to make sure that there was not a smell of
7 anything before we left because it didn't have power on
8 in the house, we wanted to make sure.

9 Q. So you were looking for a particular reason to find
10 any reason for suspicion and you found none?

11 A. I found nothing and the other guys didn't find
12 anything that made us want to call SLED.

13 Q. Have you been to other fires where you did smell
14 accelerants --

15 A. Oh, yes, sir.

16 Q. -- on the date of the fire?

17 A. Of course, when you're in there fighting the fire
18 with air packs on, you can't smell anything. But I have
19 been to other fires, in Seneca right there especially,
20 to where when you get done and start doing, you looked
21 through it and what we call an investigation to look to
22 see if we could figure out how to start it, I've been to
23 fires before where you could smell before you got in the
24 house.

25 Q. So you were looking this time for a particular

1 reason, but you found nothing this time so you did not
2 make any kind of report in this particular fire?

3 A. No, sir.

4 MR. CLINCH BELSER: Thank you very much, Chief.

5 There may be questions from Mr. Moore.

6 Cross-Examination by Mr. Moore:

7 Q. Good morning, Chief Wright. Good to see you again
8 and congratulations on your recent promotion to Captain.

9 I do have some follow-up questions for you. First
10 I'd like to ask you a few questions about the fire
11 fighting activities that day. It's my understanding
12 that you were dispatched at 8:03; is that correct?

13 A. Yes.

14 Q. And that you arrived approximately eight minutes
15 later?

16 A. That's what they gave us when we called for our
17 times.

18 Q. Okay. And that's how you complete the report is
19 the information from dispatch, correct?

20 A. Yes.

21 Q. And so you have no idea how long the fire had been
22 going prior to 8:03; is that right?

23 A. Yes.

24 Q. But when you got there, you noted it was already
25 venting through the roof?

- 1 A. Yes.
- 2 Q. And you could see smoke coming through the roof
- 3 even before you arrived in the cul-de-sac; is that
- 4 right?
- 5 A. We could see smoke.
- 6 Q. Okay. Did you have any idea how long this fire had
- 7 been going when you got there?
- 8 A. No, sir.
- 9 Q. Now, you fought it for about 15 to 20 minutes of
- 10 what I would describe as hard fire-fighting?
- 11 A. Yes.
- 12 Q. You had about 20 men on this call all together?
- 13 A. Yes.
- 14 Q. Three or four trucks on this call?
- 15 A. Yes.
- 16 Q. How many hoses?
- 17 A. Two.
- 18 Q. Two hoses. And ---
- 19 A. Hooked up to the first truck.
- 20 Q. And where were you putting the water: the front and
- 21 the back or just the front?
- 22 A. Well, you know, we always pull off two, one is
- 23 mainly for safety, but until we got inside, we was
- 24 spraying water, you know, through windows. And once you
- 25 get inside you do not spray water through the windows

1 any more, because it would push fire on the firefighters.
2 So I would say that there wasn't but one used once they
3 were inside.

4 Q. Okay. But prior to entering the structure you were
5 putting water through the windows; is that right?

6 A. Yes.

7 Q. The mantra that I've heard before is put the wet
8 stuff on the red stuff.

9 A. I mean, there wasn't no water sprayed in there, you
10 know, they would have to see fire before we sprayed it
11 in there. They would have to see it in there first.

12 Q. Okay. As you attempted to enter the structure from
13 the side, you learned that the power was disconnected to
14 the structure; is that right?

15 A. No. We didn't know the power was off until later
16 on when somebody from the inside called and asked me did
17 I have the power off. Because that's the reason I said
18 that once we got enough people there for me to back out
19 and do my duties, I'll usually make sure that the power
20 is off, I mean, that the meter has to be pulled or
21 whatever needs to be done, that's one of the duties that
22 I took on myself because of lack of manpower. And the
23 best I can remember, though, I think I had already
24 spoken, well, after I backed out to Mr. Fowler and he
25 told me no power on in the house. At that time I don't

1 think I even had a chance to pull the meter yet.

2 Q. Okay. So you were informed, then, that there was
3 no power before your men entered the structure; is that
4 right?

5 A. No, sir.

6 Q. You had not been informed. Okay.

7 A. One of them called me to make sure I had the power
8 off.

9 Q. Is that because one of your men realized that there
10 was some arcing when water was splashed on the drop
11 cords that were in the house?

12 A. Yeah. They thought that they had witnessed some
13 arcing and heard some arcing.

14 Q. And the arcing suggested to you and your men that
15 there was still power running on those drop cords that
16 were in the house, correct?

17 A. Yes.

18 Q. Okay. And that caused you to verify that you
19 needed to not only ensure the power to the house was out
20 but that the alternate power to the gazebo was
21 disconnected, correct?

22 A. I did not disconnect the meter at the gazebo.

23 Q. What did you do to ensure that the power was cut
24 off to the drop cords running inside? Did you have
25 Mr. Fowler --

1 A. I'm not sure. There's a possibility I asked him to
2 go unplug them or something like that. But they didn't
3 ask us any more, they didn't keep hollering that they
4 had power on the house, so we got it off somehow.

5 Q. Okay. You recall that there were some steps taken
6 to make sure that there was no power from the drop cords
7 going into the house?

8 A. No.

9 Q. Okay. Let me ask you some questions about the
10 smell, and I know Mr. Belser asked you about the smell.
11 You started to investigate the smell because you
12 realized that with limited -- with no power in the house
13 there were really limited means to set the fire; is that
14 right?

15 A. Yes.

16 Q. Okay. And you understand that there are many
17 factors that can dissipate the smell of an accelerant in
18 a fire?

19 A. Yes.

20 Q. The combustion itself can dissipate the smell; is
21 that right?

22 A. Yes.

23 Q. The amount of accelerant that's used can dissipate
24 the smell?

25 A. Yes.

1 Q. The length of the time that the fire burns can
2 dissipate it?

3 A. Yes.

4 Q. Okay. Of course, the water you put on it can
5 dissipate it?

6 A. Yes.

7 Q. Okay. So, you understand that you can have a set
8 incendiary fire without being able to smell accelerants?

9 A. Yes.

10 Q. Okay. Reaching your ultimate conclusion that you
11 reported in this matter was this fire was undetermined;
12 isn't that right?

13 A. Yes, sir.

14 Q. You were back in service by a little bit before
15 1:00 that day; is that right?

16 A. Yes.

17 Q. And you didn't come back and continue any
18 investigation; is that right?

19 A. No, sir.

20 Q. You didn't come back with any of the investigators
21 in this case?

22 A. No, sir. To my knowledge two of them, I think the
23 best I recall, I thought I was talking to the same one
24 but I think I was actually talking to two different
25 ones. They actually called me and asked me some

1 questions but they didn't ask me to come over there, and
2 it sounded like to me, just by the way they was talking,
3 they was finished when they called me.

4 Q. At least one of them that you were unsure about the
5 cause of the fire?

6 A. Yes. Because I'm not.

7 Q. You didn't collect any evidence at the fire scene;
8 is that right?

9 A. No, sir.

10 Q. And frankly, your job is to protect people and
11 property as the Fire Chief, correct?

12 A. Yes.

13 Q. You don't hold yourself out or you don't feel like
14 it's your job to conduct a thorough investigation of the
15 fire. Correct?

16 A. Well, because I'm not trained to do that, I mean,
17 and it's not really, you know, if it's over our head,
18 we're supposed to call SLED.

19 Q. Right. Let me direct your attention to what's
20 previously been admitted exhibit 27. And I'll just
21 represent to you that this is a diagram, a not-to-scale
22 diagram of the home. And this was completed by
23 Mr. Byers. Have you seen this before?

24 A. That?

25 Q. Yes, sir.

- 1 A. No.
- 2 Q. Can you identify it? Can you recognize this as the
3 general layout of Mr. Fowler's house?
- 4 A. Based on the front door and the side door and the
5 living room and kitchen, it does.
- 6 Q. Okay. And just to make sure, you told us a little
7 bit earlier that you saw the fire venting through the
8 roof a little bit to the left of the center; is that
9 right?
- 10 A. Yeah. A little bit left to the front door for
11 sure, and then based on that it's not left of the
12 center, but that's what I thought.
- 13 Q. Okay. And when you finally looked around after the
14 fire, you saw what you have characterized as a half V
15 pattern? Is that a fair recollection?
- 16 A. Yes. I can show you right there why I say that.
- 17 Q. Okay. I just wanted to make sure the V that you
18 are talking about started at this corner and went up and
19 out towards the back; is that right?
- 20 A. The half that I could see, yes.
- 21 Q. Yes, sir. Okay. And did you look around for any
22 other V patterns? Did you look for the other half of
23 the V, if I can be facetious?
- 24 A. Well, not the other half, because the other half
25 would have been that walkthrough area right there. And

1 I did not notice any more anywhere else.

2 Q. Okay. Did you look in the kitchen for V patterns?

3 A. Not necessarily V patterns so much where the
4 ceiling and everything else had failed. We did not do
5 any digging if that's what you are getting at.

6 Q. Okay. This is a photograph contained in Mr. Byers'
7 photographs which are marked and admitted as Defendant's
8 Exhibit 1. Do you see this, do you recall this view of
9 the kitchen? Is that close enough for you, sir?

10 A. Yes. I'm just trying to figure out where it's at.

11 Q. Okay. Do you see the refrigerator?

12 A. Is that standing looking back towards the living
13 room?

14 Q. Yes. Does the orientation of the refrigerator
15 here, the attic here, and the ceiling give you an idea
16 of where you are looking from in this picture?

17 A. You have the refrigerator, that's from the kitchen.

18 Q. Okay. Do you see the V pattern in this picture
19 from the bottom of the refrigerator up to where the
20 attic was?

21 A. Yes.

22 Q. Did you see that on the day that you investigated
23 the fire?

24 A. Didn't notice it, no.

25 Q. The bottom of this V is on the floor of the

1 kitchen; isn't that correct?

2 A. It looks like it, yes.

3 Q. Could that be the other half of the V that you saw
4 in the living room?

5 A. If I could tell exactly where the living room was
6 actually at, I could say that, but not knowing exactly
7 how I'm turned, I can't.

8 Q. Okay. One of the things that you have --

9 THE COURT: What is that exhibit number again?

10 MR. MOORE: Your Honor, this is contained in the
11 packet that is in Exhibit Number 1.

12 THE COURT: Does it have a separate...

13 MR. MOORE: It does not have a separate. I could
14 further identify it because it's included twice.

15 THE COURT: Oh, that's all right. Just for the
16 record so the record will reflect what the witness is
17 being asked.

18 MR. MOORE: I'm almost done and we'll have the
19 subnumber identified momentarily.

20 THE COURT: Very good.

21 MR. MOORE: Thank you, sir.

22 THE WITNESS: That first drawing you showed me of
23 the house, does that show me where the refrigerator
24 would sit?

25 MR. MOORE: Thank you. That's a good suggestion.

1 By Mr. Moore:

2 Q. Chief Wright, do you see Exhibit 27?

3 A. Yes.

4 Q. Does that help you from Defendant's Exhibit 1 as
5 oriented?

6 A. Yes.

7 Q. Okay. And now you see that this V in this
8 photograph is centered from the kitchen floor. Correct?

9 A. Yes.

10 Q. Okay. We talked about some of your training as a
11 Fire Chief, but you've had an instructive class training
12 session on arson suspicion, correct?

13 A. They call it arson detection for the first
14 responder. And that's just an awareness class as a
15 weekend class and it's mainly, the best I can remember
16 it, it's been a while since I took it, the way I would
17 explain some of this is to look and smell and don't move
18 no more than you have to so that the investigators, if
19 they have to reconstruct it, they don't have to try to
20 put it back.

21 Q. You didn't move any of the debris off the floor in
22 the kitchen, did you?

23 A. No, sir.

24 Q. You didn't move any of the debris off the floor in
25 the living room, did you?

1 A. No, sir.

2 Q. One of the things you learned in that class was
3 that if you have multiple points of origin, it strongly
4 suggests an arson fire, correct?

5 A. Yes.

6 MR. MOORE: That's all. Thank you, sir.

7 THE COURT: Re-exam?

8 MR. CLINCH BELSER: May it please the Court.

9 Redirect Examination by Mr. Belser:

10 Q. Looking at the second exhibit which you, no
11 subnumber yet, isn't it true that there was a lot of
12 debris which fell into the kitchen before the roof
13 collapsed?

14 A. The best I can remember there was an attic space at
15 the end of the house.

16 Q. Yes, sir.

17 A. And some of that stuff, we had to get up there to
18 move it around to make sure we had hot spots is what we
19 called them, you know, those smoldering fires, and some
20 of that kind of stuff fell through when the ceiling came
21 in.

22 Q. So holding my hand above this kitchen area to see
23 if the attic fell below down next the kitchen floor and
24 other parts of this kitchen area?

25 A. Yes, sir. Some of the ceiling fell in there.

1 Q. On the day of the fire you did not move anything
2 because you saw --

3 A. Not other than to get the fire out, no.

4 Q. Did you smell around in this area where the kitchen
5 is located?

6 A. Yes.

7 Q. And so you smelled -- going back to the first
8 exhibit, the front porch is located near the bottom
9 right section of this Exhibit Number, the first exhibit
10 introduced, the chart, and you say that you saw the fire
11 coming out of the roof above, I mean to the left of the
12 door; is that correct?

13 A. Yes.

14 Q. And does this drawing show where the front door is?

15 A. Yes.

16 Q. And this area where it says Kerosun heater is that
17 below the area where the fire was coming out of the
18 roof?

19 A. Yes.

20 Q. And I've got my finger on what appears to be what
21 used to be a wall right above the words kerosene above
22 the eave, kerosene. Here is a line to the heater. Is
23 that where the heater was as you recall?

24 A. Yes.

25 Q. And right above that is where the fire was coming

1 out of the roof; is that correct?

2 A. Yes.

3 Q. Now, there's another wall to the left of where the
4 heater is. What was the condition of this wall right
5 here that I'm drawing my finger up and down on?

6 A. The best I recall, it was pretty much burnt pretty
7 much through, and that post in the corner right there
8 where you walk through the kitchen was burned bad enough
9 to fall and that's where it let the beam fall.

10 Q. Do I have my finger accurately pointing to the
11 corner that you said was burned away?

12 A. The beam apparently was set on and it fell, it
13 looks like it was in the middle of the house.

14 Q. And the V that you describe that you saw was a
15 significant V on the day of the fire on this wall right
16 here; is that correct?

17 A. Yes.

18 Q. And the missing half, the V which you didn't see,
19 would have been up here, except there was an open
20 walkway; is that correct?

21 A. Yes.

22 MR. MOORE: Objection, Your Honor. "Where a V
23 would have been" calls for speculation.

24 MR. CLINCH BELSER: Well, it was responsive to --

25 THE COURT: Forgive me. As far as I know, V's have

1 only two parts, and you got one part you are talking
2 about a V. There's not too much speculation that there
3 has to be another one.

4 So I overrule your objection.

5 By Mr. Belser:

6 Q. Well, if you are talking about this wall right
7 here, which, as you face that wall from anywhere in
8 here, which way did you see the V pointing? To the
9 right where the wall was?

10 A. If I was looking at the heater?

11 Q. Yes, sir.

12 A. It would be to the right going towards the back
13 wall.

14 Q. So the V was going this direction and the point was
15 going right down to where the heater is?

16 A. That area, yes.

17 MR. CLINCH BELSER: Thank you very much.

18 MR. MOORE: Nothing further, Your Honor.

19 MR. CLINCH BELSER: Nothing further. May the Chief
20 be excused?

21 THE COURT: Any objection?

22 MR. MOORE: No objection.

23 THE COURT: All right. Without objection the Chief
24 will be excused. Thank you very much, sir. And thank
25 you for your service.

1 THE WITNESS: May I stay?

2 THE COURT: Yes, sir, you can stay. Just you are
3 no longer under subpoena.

4 (Witness leaves stand.)

5 MR. CLINCH BELSER: At this time the Plaintiff
6 would call Ms. Bronda Yarbrough.

7 (Whereupon, the Witness, Bronda Yarborough, was
8 sworn by the Deputy Clerk of Court.)

9 THE COURT: Ma'am, if you would please give us your
10 full name, spelling your last name for the record.

11 THE WITNESS: Bronda Gail Yarbrough,
12 Y-a-r-b-r-o-u-g-h.

13 THE COURT: Thank you, ma'am.

14 You may proceed.

15 Whereupon,

16 Bronda Yarbrough,

17 after first having been duly sworn, testified as
18 follows:

19 Direct Examination by Mr. Belser:

20 Q. What is your age, please?

21 A. 58.

22 Q. How long have you lived in Ocone -- you live in --
23 where do you live?

24 A. I live in Seneca.

25 Q. How long have you lived in Ocone County?

- 1 A. All my life.
- 2 Q. Do you know Mr. James Fowler?
- 3 A. Yes, I do.
- 4 Q. And how long have you known Mr. Fowler?
- 5 A. I met James in 1997.
- 6 Q. Do you know the other members of his family?
- 7 A. Yes, I do.
- 8 Q. And does he know members of your family?
- 9 A. Yes.
- 10 Q. Would you describe briefly your relationship,
11 family relationship between your family, his family?
- 12 A. James and I are real good friends. We met by a
13 mutual friend. And my mom really took to James and she
14 kind of adopted him into our family. So he's just a
15 member of the family.
- 16 Q. How many members are there in your family?
- 17 A. Total there were seven. My oldest brother is
18 deceased.
- 19 Q. Now, is one of your brothers' name Michael?
- 20 A. Yes, sir.
- 21 Q. How old is Michael?
- 22 A. He is 54.
- 23 Q. And is he employed?
- 24 A. No, sir. He's disabled.
- 25 Q. What is his medical condition?

- 1 A. He's a severe diabetic and he has congestive heart
2 failure and kidney failure.
- 3 Q. Where do you live now?
- 4 A. At the present I stay with James.
- 5 Q. And where does Michael live?
- 6 A. Well, since he got out of the hospital, I've had to
7 bring him to James's place.
- 8 Q. And how long have you been living with Michael and
9 James at Mr. James Fowler's house?
- 10 A. Well, I lived with my mother for four years. Let
11 me explain this. She was blind and disabled. So I took
12 care of her and along with my brother. And...
- 13 Q. Where is that house located?
- 14 A. Pardon?
- 15 Q. Where is your mother's house located?
- 16 A. It's in Long Creek, South Carolina, and it's about
17 35 miles from here. And my car is torn up so therefore
18 I have to stay with James because he takes me back and
19 forth to work and he helps me with my brother.
- 20 Q. So you and James Fowler and Michael all lived at
21 James's gazebo?
- 22 A. At the present, yes.
- 23 Q. And how long has that been going on?
- 24 A. I've been there since October. I did -- my mother
25 passed away a year ago, and so I didn't have anyplace to

1 stay, so I stayed with my daughter. Well, they moved to
2 Moncks Corner in October, so I've been staying with
3 James since my car has been torn up since he can help me
4 with transportation.

5 Q. October of 2011, just last month?

6 A. Yes, sir.

7 Q. And where do you work?

8 A. I work at BASF.

9 Q. How long have you worked at BASF?

10 A. Six years.

11 Q. What is your job there?

12 A. I'm a lab technician. I work six in the afternoon
13 till six in the morning, 12-hour shifts two days on and
14 two days off and every other weekend.

15 Q. How do your work hours fit in with the fact that
16 you and James and Michael all live in that small gazebo?

17 A. It gets kind of complicated sometimes. We have a
18 sleeping quarters downstairs and two sleeping -- well,
19 actually my brother stays upstairs since he can't walk
20 very good. And so I sleep in the same room as my
21 brother.

22 Q. Now, are you married now?

23 A. No, sir.

24 Q. Are you divorced?

25 A. Yes, sir.

- 1 Q. Do you have any children from your marriage?
- 2 A. I have three.
- 3 Q. Where do they live?
- 4 A. My oldest lives in Moncks Corner, my middle child
- 5 lives in Clemson, and my youngest lives in Greenville.
- 6 Q. Did you work with Mr. Fowler at his restaurant in
- 7 Seneca?
- 8 A. I helped James some in his restaurant, yes.
- 9 Q. What was your role?
- 10 A. Occasionally I'd make desserts or some of the
- 11 breads or just clean up mainly.
- 12 Q. Did you have any dollar investment in the
- 13 restaurant?
- 14 A. No, sir.
- 15 Q. Did you have any financial loss when the restaurant
- 16 closed?
- 17 A. No, sir.
- 18 Q. And yet before the fire on January the 17th of
- 19 2009, had you ever been to Mr. Fowler's place on Lake
- 20 Hartwell?
- 21 A. Yes, sir.
- 22 Q. And how often had you been there before the fire?
- 23 A. Do you mean just prior that week or over the years?
- 24 Q. Let's just say over the years first and then that
- 25 weekend.

1 A. Over the years I would see him two or three times a
2 week.

3 Q. And what about that week before the fire?

4 A. Um, I guess I may have saw him maybe twice.

5 Q. When you were there over the period of time on the
6 frequency you mentioned, what were the circumstances of
7 those visits?

8 A. I would just go check on him or, you know, we would
9 go out to eat.

10 Q. Were you ever in the house?

11 A. Yes, sir.

12 Q. The house now, not the gazebo.

13 A. Yes, sir.

14 Q. You were in the house?

15 A. Yes.

16 Q. Would you describe the house and its contents in
17 general terms?

18 A. It was nice, clean. His furniture was nice
19 furniture. A beautiful grandfather clock. It was just
20 a nice home.

21 Q. Okay. Can you describe the general quality of the
22 contents?

23 A. It was good quality. James liked quality stuff
24 because he didn't like to replace things.

25 Q. And since he was living there alone, a man in

- 1 charge, what was the general condition?
- 2 A. Well, surprisingly, James is clean. It was well
- 3 kept.
- 4 Q. At this time I'd like to show you some photographs
- 5 which are already marked as Plaintiff's Exhibit Trial 17
- 6 and ask you if you will take a look at it and tell the
- 7 members of the Jury what that is in general without
- 8 going picture by picture yet.
- 9 A. Just the first one?
- 10 Q. No. Are those pictures of the house?
- 11 A. Yes, sir.
- 12 Q. Where do those pictures come from?
- 13 A. I had taken these pictures on different occasions,
- 14 like holidays or when his daughter, which lives in
- 15 Texas, had come over; and these were like birthdays and
- 16 Christmas and 4th of July, I guess.
- 17 Q. So those are just pictures that you took during the
- 18 course of the year before the fire of family events with
- 19 family members in it?
- 20 A. Yes, sir.
- 21 Q. Let me let you look at the screen and let me get
- 22 you to focus, tell me as best you can whether the
- 23 picture on the screen is the same picture you are
- 24 looking at?
- 25 A. Yes, sir, it is.

1 Q. Now, I don't know whether it's very clear, but
2 we'll do the best we can. Is there any way that you can
3 describe this picture? I'll try to ---

4 THE COURT: Is there any way that we can identify
5 the exhibit?

6 MR. CLINCH BELSER: This is Exhibit Number 17.

7 THE COURT: Very well.

8 MR. CLINCH BELSER: It has --

9 THE COURT: It's just the number marked. That's
10 all I need.

11 MR. CLINCH BELSER: Yes, sir.

12 By Mr. Belser:

13 Q. Now, let's do the best we can do with the lighting,
14 but, Ms. Yarbrough, look at this and tell me what you
15 see in this picture. Who is this person in the picture?

16 A. That's his grandson, Philip.

17 Q. All right. Do you see any other people in the
18 picture right now?

19 A. No, sir. The parrot, that was either the baby or
20 Charlie.

21 Q. Did Mr. Fowler have a pet parrot?

22 A. Yes, sir.

23 Q. What is this back in the corner?

24 A. That's his grandfather clock.

25 Q. Do you know the history, how long he's had it, et

1 cetera?

2 A. Yes, I do. He had bought the clock for his
3 ex-wife's birthday or Christmas, and circumstance
4 happened and he and she separated but he kept the clock.

5 Q. All right. And can you see the drapes?

6 A. Yes, sir.

7 Q. Can you describe so the ladies on the Jury can
8 understand about the drapes?

9 A. Those were country, I guess you would call them
10 country frilled ruffled drapes. But they were heavy
11 drapes sheers behind them, but they were heavy drapes.

12 Q. Is the red light on sheers now?

13 A. Yes, sir.

14 Q. And this is the drapes or, as my wife says,
15 curtains?

16 A. Yes. The darker part is the curtains and the
17 other, the white with the little design is sheers, and
18 then there's a side window that has sheers, that's a
19 side window, yes, sir.

20 Q. What was this piece of furniture right here?

21 A. That was his console TV.

22 Q. Can you see what's on top of the TV? The Jury will
23 have the benefit of having the actual pictures in the
24 jury room later, but so if you will describe what these
25 items are on top of the TV?

1 A. He had a collection of lighthouses, and I think his
2 dish box and maybe a VCR. But he had pictures of
3 children also sitting there. And but mainly his
4 lighthouses collection.

5 Q. What kind of lighthouse collection do you mean?

6 A. Pardon?

7 Q. What kind of lighthouse collection do you mean?

8 A. It was just a selection of different lighthouses,
9 they were collectible items. And he had some also in,
10 it was, the grandfather clock is a curio clock, and it
11 also had collectible lighthouses in it.

12 Q. I can't see the furniture very well. But if you
13 can identify this piece of furniture where the parrot
14 is?

15 A. That was sitting in the great room closer to the
16 TV, but it was a love seat, a reclining love seat.

17 Q. Do you remember the quality of that piece of
18 furniture?

19 A. Yes. Actually, it looked just like it did when it
20 come out of the store. It was in real good condition.

21 Q. What was over on the other side of this area?

22 A. There was a recliner and an oak coffee table, and
23 behind that was a three sectioned, well, a
24 three-cushioned sofa.

25 Q. Going over to the wall upon which the grandfather

1 clock sits between the wall and the sheers of the small
2 window, what was on the wall?

3 A. That is a picture of -- that right there where your
4 pointer is is a mirror, it had a shelf on it with
5 lighthouses on it. And the things beside it was
6 pictures of his children as they had, some of them had
7 grown up. I think a picture of his daughter when she
8 was a baby maybe was that big picture.

9 Q. What was this, what was below this picture to the
10 left of the mirror?

11 A. I'm not sure exactly what was sitting there then,
12 but there used to be a little round table that sat
13 there.

14 Q. All right. Let's go to the next picture. I think
15 Exhibit Number 17, who are the people?

16 A. That there is his grandson, Brandon.

17 Q. That's a different grandson than the other one?
18 That's a different grandson?

19 A. A different grandson, yes, sir. And that's his
20 daughter and her boyfriend.

21 Q. And does that show the oak table you mentioned
22 before.

23 A. Yes, sir.

24 Q. And this shows -- what is that in the corner?

25 A. That's his end tables which was oak, also; and his

1 lamps that were horses. I'd never seen anything like
2 them before.

3 Q. What is this white object?

4 A. That was a picture of one of his children. I'm not
5 sure.

6 Q. What was on the wall behind the sofa?

7 A. That was like wall decoration. Those on either
8 side there were little mirrors.

9 Q. What is this piece of furniture in the far right
10 side of the picture?

11 A. It's the other end table.

12 Q. What sort of rugs were on the floor?

13 A. He had a rural rug on top of his carpet. It was a
14 charge (phonetic) rug.

15 Q. This, it has the red light on the carpet at the
16 center bottom of the picture? I mean that's the rug?

17 A. Yes, sir.

18 Q. And this is the carpet?

19 A. Yes, sir.

20 Q. Can you describe the carpet?

21 A. The carpet was fairly new. It looked new. And,
22 but he kept the rug down because the kids come in and
23 out and he wanted to keep it from being stained up, I
24 guess.

25 Q. Is there anything else you can see in this picture

- 1 which would be helpful for the Jury to understand what's
2 there?
- 3 A. The recliner -- that was the couch, yeah, that was
4 the couch.
- 5 Q. His daughter is sitting on the couch?
- 6 A. Yeah, that's the recliner, yes, sir. And then in
7 front of Brandon, the grandson, there was the love seat,
8 so --
- 9 Q. So I correctly have the red light on --
- 10 A. Yes, sir.
- 11 Q. -- the corner of the love seat?
- 12 A. That's someone's knees, but that was where the love
13 seat was sitting, yes, sir.
- 14 Q. Okay. Let's look at the next picture in Exhibit
15 Number 17. Who are the people in this picture?
- 16 A. That's James Fowler and that's his grandson, that's
17 James' grandson.
- 18 Q. Who is the person in the back?
- 19 A. I think that was his son's girlfriend, I'm not
20 sure. I think her name was Amanda.
- 21 Q. And what is this in the left side of the picture?
- 22 A. That was his Christmas tree that we had put up.
- 23 Q. Do you remember which, what year that was?
- 24 A. No, sir, I do not.
- 25 Q. Within a couple years of the --

- 1 A. Within the -- yes.
- 2 Q. The fire was in 2009. That's almost two years ago.
- 3 But before that, how much would you estimate this
- 4 Christmas was?
- 5 A. I'm not sure.
- 6 Q. What are these chairs?
- 7 A. That's his dining room. It was an oak dining room
- 8 set.
- 9 Q. Do you remember how many chairs it was?
- 10 A. I think he had eight chairs that went with that
- 11 because the table made a big banquet table, it had two
- 12 leaves that went in it.
- 13 Q. All right. This corner between the wall, what is
- 14 the wall on this side of the corner?
- 15 A. That wall was as you're in the living room, and
- 16 that's from the same wall where the TV was on and that's
- 17 the round table that I was talking about.
- 18 Q. What's above that?
- 19 A. That whole wall had a lot of pictures of his
- 20 children and grand kids.
- 21 Q. As you go around -- excuse me. Go ahead.
- 22 A. And the children and grandchildren.
- 23 Q. If you come from the back of the house towards this
- 24 corner and then make a right turn, what's back that
- 25 direction?

- 1 A. Amanda, the girlfriend standing, is sitting or
2 standing in the kitchen, she's leaned up against the
3 bar. But at that corner those were bi-fold mirrored
4 doors and there was a pantry there.
- 5 Q. Here (indicating)?
- 6 A. Yes, sir.
- 7 Q. All right. Just within a few feet?
- 8 A. There at the corner, yes, sir.
- 9 Q. Anything else you would like to comment on for the
10 benefit of the Jury?
- 11 A. Well, you can see in the kitchen the oak cabinets
12 that he had.
- 13 Q. Was that an oak at the middle of the top?
- 14 A. Yes, sir. And then he had surrounding cabinets on
15 the other side that were outside this picture.
- 16 Q. Let's go to the next picture. Number 4, Exhibit
17 Number 17. Who are the people in this picture right
18 here?
- 19 A. That is Meg -- no, Morgan.
- 20 Q. And who is this right here?
- 21 A. And that's Candy, his daughter. And I think that
22 might be his son, Jimmy.
- 23 Q. What do you see in this picture on the left?
- 24 A. That was the china cabinet.
- 25 Q. What was that made from?

1 A. It was oak.

2 Q. What are these items on the ledge?

3 A. It was a lighthouse set, it was glasses, and it was
4 a boat that had a lighthouse salt and pepper shakers
5 that went with it.

6 Q. What was above the ledge at the top of your
7 cabinet?

8 A. They were shelves that had the dishes that matched
9 the little boat and the lighthouses.

10 Q. What, what's back in this far right side upper
11 right hand of the picture?

12 A. That was where, as you come in the front door
13 there, to the right there's little bay windows, and
14 those were the bay windows, and that's normally where
15 the dining room chairs and tables sat. But we had moved
16 it over and put the Christmas tree there. You can
17 barely see the tree where your light is.

18 Q. Is that where it is?

19 A. Well, the tree was there, yes, sir.

20 Q. What is in the foreground?

21 A. That was one of his grandchildren. They were all
22 opening their gifts, so we had a big mess.

23 Q. Let's turn to the next picture then, please.

24 A. (Complies.)

25 Q. All right. Who is in this picture?

1 A. That's Amanda. And...

2 Q. Is that the only person?

3 A. No. The person in the front here with the braids,
4 that was me. I have since cut my hair. And that's
5 showing the kitchen at an opposite angle. You're
6 looking at the opposite side of the kitchen.

7 Q. This is you with the braid, I'm sorry.

8 A. Yes, sir.

9 Q. Now, what's behind Amanda?

10 A. That's the opposite side of the kitchen. That was
11 the cabinets that James had built actually himself, and
12 it was like a horseshoe-type kitchen.

13 (Discussion off the record.)

14 MR. CLINCH BELSER: Your Honor, I apologize for the
15 delay. I apologize to everybody but not only was I
16 shaking the red light but I burned out the battery on
17 the light. We'll have to use words to describe what we
18 are talking about.

19 By Mr. Belser:

20 Q. What else is in this picture, Ms. Yarbrough?

21 A. He had, he had collectibles on top of these
22 cabinets. He had different copper type cans and molds.
23 He also had a picture and glasses. I'm not sure if it
24 was like lemonade or a tea pitcher, it was with matching
25 glass also. And I think on the other side he had some

- 1 collectible, it was like reproduction, but it was
2 prohibition bottles.
- 3 Q. What about the bottles?
- 4 A. They were, I think they were replicas, but it was
5 like prohibition liquor bottles, but they weren't the
6 real thing. I think they were like...
- 7 Q. Those were collectors' items, as well, for some
8 people?
- 9 A. Yes, sir.
- 10 Q. Is there anything else in the picture which you
11 think we should mention?
- 12 A. Other than his collectibles and the cabinets. I
13 mean...
- 14 Q. We already talked about that?
- 15 A. Yes, sir.
- 16 Q. Let's turn to the next picture, which would be
17 picture number 5.
- 18 A. That's just showing the same area ---
- 19 Q. Who's the lady in the picture?
- 20 A. That is me.
- 21 Q. Okay. And what year --
- 22 A. That was either at one of the kids' birthday
23 parties or either... because that was a container of
24 candy I had brought over for the kids.
- 25 Q. Right there?

- 1 A. Yes, sir.
- 2 Q. All right. What are those things right there? Are
- 3 those cabinets?
- 4 A. Yes, sir. That was his kitchen cabinets, yes, sir.
- 5 Q. What were those made out of?
- 6 A. They were solid oak.
- 7 Q. What about the, below the sink?
- 8 A. Those were the base cabinets and they were solid
- 9 oaks, also. And the stove right beside it was the trash
- 10 compactor, the next thing over.
- 11 Q. Do you remember much, anything about the curtains
- 12 or the drapes in front of the kitchen sink?
- 13 A. They were nice, just normal kitchen --
- 14 Q. What is this along here?
- 15 A. That was a, I guess it connected the cabinets, and
- 16 it helped the light fixture above the sink, but it also
- 17 had little bears or elephants. I can't remember what
- 18 was up there attached.
- 19 Q. And is there something in the front, in the
- 20 foreground here?
- 21 A. Yes. There was a table right behind me in the
- 22 middle of the kitchen.
- 23 Q. All right. What was the table made out of?
- 24 A. At the time of the house, when it burned, it was
- 25 solid oak. It had four chairs.

- 1 Q. Let's turn to the next picture. Who are the
2 people?
- 3 A. That's his grandchildren, Megan and Morgan, and
4 that was his daughter.
- 5 Q. On the far right?
- 6 A. Yes, sir.
- 7 Q. And who was this?
- 8 A. That was me.
- 9 Q. And what's going on in this picture?
- 10 A. That was one of the kids' birthday.
- 11 Q. What is the birthday cake on?
- 12 A. That's a wooden table that he had moved over to the
13 breakfast area to put -- he had a little round oak table
14 there in the kitchen that replaced that. But that is a,
15 I think it was made out of pine, I'm not sure.
- 16 Q. All right. And the kitchen or the living room or
17 what room?
- 18 A. It would have been in the kitchen at the time this
19 picture was made, yes, sir.
- 20 Q. What's behind this grandchild in the back?
- 21 A. That was the cabinets where the sink and the
22 dishwasher and the stove, that same...
- 23 Q. Let's turn to the -- is there anything else in this
24 picture of significance?
- 25 A. No.

- 1 Q. All right. Who are the people in this picture?
- 2 A. More of his grand kids.
- 3 Q. Same ones?
- 4 A. I'm not sure exactly which one that one is.
- 5 Q. What's the piece of furniture in the back behind
- 6 the TV?
- 7 A. That's the base cabinets that sit beside the
- 8 refrigerator and come out to the -- well, the opposite
- 9 side of where the sink and the stove are, the opposite
- 10 side of the kitchen.
- 11 Q. What room is in back of there?
- 12 A. That's still the kitchen right there.
- 13 Q. All right. Okay. Let's look at the next picture
- 14 please.
- 15 MR. CLINCH BELSER: Last picture?
- 16 MR. FREEMAN BELSER: Yes, sir.
- 17 MR. CLINCH BELSER: Okay. Thank you very much. I
- 18 think we can turn the lights back on.
- 19 By Mr. Belser:
- 20 Q. Do you know about the fire which occurred in
- 21 Mr. Fowler's house on January the 17th of 2009?
- 22 A. Yes, sir.
- 23 Q. When did you first hear about the fire?
- 24 A. I'm not sure, exactly sure about the time. But
- 25 James called me and asked me would I come and get his

1 parrot because he was afraid that the smoke would, maybe
2 the adjacent building would catch fire where the bird
3 was.

4 Q. What did you do when you heard from James?

5 A. I immediately got to the car and got to his house.
6 But I had to walk across a field to get to his house
7 because it had so many fire trucks.

8 Q. What did you do when you got that far?

9 A. I did walk across the field and I went to the
10 neighbors. I saw Sue Bright, she was standing in her
11 driveway, and I went there and asked her if James was
12 okay. And she told me yes, that he was with Oscar, and
13 they were looking at the house while the guys were
14 trying to get the fire out.

15 Q. The fire it was still going when you got there?

16 A. Yes, sir.

17 Q. Were you involved in any way with the
18 fire-fighting?

19 A. No, sir.

20 Q. Were you involved in any way with the insurance
21 investigators who came the next day and several days
22 after that?

23 A. As, as far as speaking with them other than saying
24 hello, and on one occasion I did help James read off
25 some, some of his contents.

- 1 Q. Did you see anything that the fire, I mean that the
2 insurance representatives did in those couple days right
3 after the fire?
- 4 A. Do you mean as far as?
- 5 Q. First of all, did you ever meet Mr. Flanagan?
- 6 A. Yes, I did.
- 7 Q. Did you ever meet Mr. Byers?
- 8 A. Yes, I did.
- 9 Q. Did you ever see them do anything in connection
10 with the investigation?
- 11 A. Well, Mr. Flanagan, he did go in and investigate
12 that day and he told James that, because I had went over
13 to take James food that morning or get him, to take him
14 to get something to eat. And he told him that he could
15 investigate, he could do it himself, you know, that he
16 didn't need to come in or help him or anything.
- 17 Q. Mr. Flanagan told Mr. Fowler?
- 18 A. That he would do it himself.
- 19 Q. Mr. Flanagan would do it himself?
- 20 A. Yes, sir.
- 21 Q. What about Mr. Byers?
- 22 A. Mr. Byers, on another occasion I had went over and
23 Mr. Byers was in the house, and then it was getting
24 late, and that, I don't know which day it was, but he
25 did come into the gazebo and talk to us a few minutes

1 and said that he was leaving. And he proceeded to tell
2 us about how he had become an investigator and then he
3 proceeded to tell us that, that some people put gasoline
4 and kerosene and something. And James told him --

5 Q. Let's stop there.

6 A. Okay.

7 Q. You are not allowed to say what someone said.

8 A. Yes, sir.

9 Q. This is hearsay.

10 A. Okay.

11 Q. But what did you see Mr. -- did you see Mr. --

12 A. Well, he did take the heater and set it out on the
13 back steps that particular day and he proceeded to clean
14 the heater up. When I say clean it up, he had on gloves
15 and he had paper towels and he had left a mess and we
16 picked up the paper towels and things to keep them from
17 blowing around in the yard.

18 But another occasion, it may have been the next
19 day, I had went to James's house and Mr. Byers had the
20 heater on the back of his truck, and he had the whole
21 front tore apart, and his gloves and his towels and
22 things was laying on the ground and on his truck. But
23 he was under what we call the boat shed which is like a
24 carport. And when I approached, he comes racing out
25 from under the boat shed. And he quickly said, Oh, I'm

- 1 hunting something to cut samples with, I've lost my
2 knife. I offered to give him my scissors, I had some
3 large scissors, and I offered to give him my scissors to
4 cut his samples. And I did, I went and got the scissors
5 and gave them to him. And then I went on to see James.
- 6 Q. Now I'd like to skip forward. After the
7 fire-fighting was done and after the investigations were
8 done, do you know anything about the removal of the fire
9 debris after the fire loss, the cinders and the broken
10 down house?
- 11 A. The broken down house? Yes, sir. It sat there for
12 several months. But it began to smell. And James and
13 I, along with his son, tore the rest of the house down
14 and we removed it.
- 15 Q. How long did that take?
- 16 A. It took quite a while. I would say it took maybe
17 two to three weeks, just us, because we didn't have any
18 kind of equipment to do move it, and we used James's
19 truck to move it.
- 20 Q. Whose truck?
- 21 A. James'.
- 22 Q. And that was done by Mr. Fowler and by you and by
23 one of Mr. Fowler's sons. Which son was it?
- 24 A. Jimmy.
- 25 Q. Do you know where Mr. Fowler has lived since the

1 fire?

2 A. He's lived in his gazebo, which is a two-story
3 gazebo. And actually that was like a game room for the
4 grand kids. It had a pool table and a TV and a VCR for
5 the kids at the time.

6 Q. How many rooms are on each floor?

7 A. There's two floors, and there's just one room on
8 either floor.

9 Q. Now, how has the two of you and your brother
10 Michael in October of this year -- was Mr. Fowler there
11 by himself?

12 A. Yes, sir.

13 Q. How has he gone about doing that, if you know, in
14 terms of --

15 A. It's been really hard on him. But along with my
16 help, and my mother when she was living, and, but mainly
17 me, I've helped him through it. But it's been kind of
18 rough on him.

19 Q. Does the gazebo have electric power?

20 A. Yes, sir.

21 Q. Does it have water service?

22 A. No, sir.

23 Q. And without getting into anything indelicate, what
24 does he have to do about the lack of plumbing?

25 A. When he would take a shower or had to use the

1 bathroom or whatever, the neighbors had gave him a key
2 to their house and so he could take a shower there or
3 either he would come to my house and shower.

4 Q. You're talking about Mr. and Mrs. Bright?

5 A. No, sir. This is the neighbors on the opposite
6 side. They live in Alabama most of the time and this is
7 a summer home for them.

8 Q. What has been the effect on James, because of being
9 out of his house since January of 2009, that year, the
10 next year, and most of this year?

11 A. What effect has it had?

12 Q. Yes.

13 A. It's really been hard on him, he's really been
14 upset, you know, and the fact that he can't have all of
15 his kids come in because he has such a large family with
16 his stepchildren and grand kids. And normally they are
17 in and out of the house, there was someone there all the
18 time. But now it's hard because he only gets to see
19 them when he goes to see them.

20 Q. What about his personality?

21 A. His personality has changed, and not in a real bad
22 way, but he seems real depressed most of the time.

23 Q. What about his attitude and ability to enjoy life?

24 A. Well, not very well.

25 Q. Where was James actually living before the fire?

1 A. He, on the days that it was warmer he stayed in his
2 house because the heater kept it warm. And, like I
3 said, he has a parrot and the parrot had more room to
4 fly around because she does not want to be caged, she
5 does not like to be caged up. And so she had room to
6 fly in the house so when it was warm he stayed in there.
7 But when it was cold, the gazebo had central air and
8 heat and he would go out there and stay.

9 Q. Do you recall approximately when it was he had to
10 start using the gazebo?

11 A. I'm not sure. I'm not sure. Because I lived with
12 my mom most of the time and I just called him so I
13 didn't know exactly what place he was in.

14 Q. Is it difficult for James living in the gazebo all
15 the time since the fire burnt the house versus what he
16 was using the gazebo before on a part-time basis?

17 A. Yes. Before he had, you know -- well, all of his
18 personal things was in the house, you know. Everything
19 he had he lost, you know? As far as clothing and things
20 like that, he doesn't have. We've replaced some but not
21 all. And as far as the facilities, he has moved a stove
22 in, but he has no plumbing in there, you know.

23 Q. Has he made arrangements to put substitute plumbing
24 in himself?

25 A. Yes, sir. He did on, where the house was, on one

1 of the areas that the bathroom was, he built a bath
2 house; and so he does have some plumbing, yes, sir.

3 Q. On another subject going back. You were here
4 during the earlier testimony. There was reference to
5 Mr. Fowler having some debts. And do you know what
6 Mr. Fowler's plans were for the house before the fire?

7 A. I know like a couple weeks or so before the fire, I
8 believe, his son and he were repairing and fixing the
9 house because he said that there was a possibility that
10 he would --

11 MR. MURPHY: Objection, Your Honor --

12 MR. CLINCH BELSER: Don't repeat what he said but
13 just things that you saw.

14 MR. MURPHY: -- the question begs for hearsay.

15 THE COURT: She avoided it so far, so as long as
16 she tells what she saw and knows of her own knowledge,
17 then I overrule that.

18 MR. MURPHY: I think that the question -- her
19 answer started out fine, and the question being what
20 were someone else's plans kind of begs for either
21 speculation or hearsay ---

22 MR. CLINCH BELSER: I'll rephrase the question and
23 start the question over a different way.

24 THE COURT: And, by the way, ladies and gentlemen
25 of the Jury, you heard the objection hearsay. Hearsay

1 is just what the term implies. It's saying what we
2 think we heard somebody else say. In other words, the
3 reason we don't usually permit it, except under certain
4 exceptions, is because unless the person who said it is
5 the one who is being questioned about it, you don't know
6 exactly what they said. In other words, we might miss
7 something, like I was talking about notes. Or it might
8 be taken out of context. We don't know the context of
9 what was said. So, therefore, that's the reason that we
10 usually don't permit hearsay.

11 So an objection has been made, I think it was an
12 anticipatory objection, and Mr. Belser said he would
13 restate his question.

14 By the way, as I just said earlier, the Rules of
15 Evidence as to hearsay and other requirements apply to
16 both the Plaintiff and the Defendant.

17 You may proceed.

18 By Mr. Belser:

19 Q. Ms. Yarbrough, did you personally observe
20 Mr. Fowler doing anything with the house --

21 A. They were cleaning up --

22 Q. -- before the fire?

23 A. They were cleaning up the property and repairing
24 the house, yes, sir.

25 Q. Who was doing that?

1 A. He and his son.

2 Q. Now, have you been able to observe anything about
3 the effect of the fire and the inability to sell the
4 house upon Mr. Fowler's attitude and enjoyment of life?

5 A. Well, if the house hadn't burned and he was able to
6 sell it, he would have been a lot better off. But as it
7 is right now, all he has to offer is a lot.

8 Q. How did that affect his attitude and personality?

9 A. It's really been, it's really been hard on him.
10 He's been very upset over it.

11 Q. Now, on another subject. Have you had any part in
12 helping your friend, Mr. Fowler, submit a claim for the
13 loss of the contents, the burned contents of the house?

14 A. Pardon me?

15 Q. Have you had any part in helping him put together a
16 list of items which were burned in the fire for
17 submission to the insurance company?

18 A. Yes, sir.

19 Q. What has been your part in that?

20 A. Well, I couldn't read his handwriting, and so he
21 would tell me what it was and I would write whatever he
22 told me to write. So I helped him prepare the list by
23 him telling me what it was.

24 MR. CLINCH BELSER: Just very quickly. I don't
25 want to spend too much time with this Witness.

1 By Mr. Belser:

2 Q. But I show you now Plaintiff's Trial Exhibit 25 and
3 ask you if you have ever seen that exhibit before?

4 A. Yes, sir, I saw that.

5 Q. And is this is a multipage document?

6 A. Yes, sir.

7 Q. Are there are lists in the back?

8 A. Yes, sir.

9 Q. And whose handwriting are on the final pages?

10 A. Those are mine.

11 MR. CLINCH BELSER: This is actually in the record
12 but I don't intend to have any further questions about
13 it right now so I'll put it back.

14 THE COURT: Very good.

15 Ladies and gentlemen, that is one of the reasons
16 that we have taken some delay. I have asked and the
17 attorneys have been good enough to help us mark the
18 exhibits before we started the trial. And so you will
19 get all of these exhibits at the time that you begin
20 your deliberations. But they are admitted into
21 evidence.

22 By Mr. Belser:

23 Q. Now, there has been reference in the case to the
24 accusation made by Nationwide and Mr. Flanagan that
25 Mr. Fowler had lit the fire himself.

1 Do you know Mr. Fowler well enough to know what
2 effect that accusation has had on his personality and
3 his enjoyment of life?

4 A. To be accused of something he didn't do, it's
5 really took a toll on him. His friends, he doesn't
6 socialize much with his friends because he's afraid
7 that, you know, they're gonna think the worst of him.
8 And it's just, it's really been hard, you know, because
9 he thinks people look at him in a different light.

10 MR. CLINCH BELSER: I have no further questions.
11 Please answer any questions Counsel --

12 THE COURT: I'll tell you what. Let's take a very
13 short break and then we'll continue with the
14 examination. I would like to finish this Witness before
15 lunch if we could. So again, we're gonna take a short
16 break. Do not undertake discussion of the case in any
17 way. This is your break, so when you are ready to come
18 back, just knock on the door and when you're ready to
19 come back, we'll continue the trial.

20 (Whereupon, the Jury left the courtroom at
21 approximately 12:03 p.m.)

22 THE COURT: Anything from the Plaintiff before we
23 take a break?

24 MR. CLINCH BELSER: No, thank you, sir.

25 THE COURT: From the Defense?

1 MR. MURPHY: No, Your Honor, except just an
2 instruction perhaps that the Witness is...
3 THE COURT: Oh, All right.
4 You do understand, Ms. Yarbrough, that you are now
5 under oath and so you cannot discuss your testimony with
6 anybody?
7 THE WITNESS: Yes, sir.
8 THE COURT: Very good. Thank you, ma'am.
9 (Witness leaves witness stand.)
10 MR. MURPHY: Nothing further, Your Honor. Could we
11 be at ease for a moment?
12 THE COURT: Certainly.
13 MR. MURPHY: Thank you, sir.
14 (A recess was taken.)
15 THE COURT: All right. You understand you are
16 still under oath?
17 THE WITNESS: Yes, sir.
18 THE COURT: Very good.
19 Is the Plaintiff ready?
20 MR. CLINCH BELSER: The Plaintiff is ready, Your
21 Honor.
22 THE COURT: Defense ready?
23 MR. MURPHY: Yes, sir.
24 THE COURT: Ask the Jury to join us, please.
25 (The Jury entered the courtroom at approximately

- 1 12:16 p.m.)
- 2 THE COURT: All right. Let the record reflect the
- 3 Jury is in the Jury box along with the Alternate.
- 4 All right. You may proceed with your
- 5 Cross-Examination.
- 6 MR. MURPHY: May it please the Court, Your Honor.
- 7 Cross-Examination by Mr. Murphy:
- 8 Q. I guess it's good afternoon, Ms. Yarbrough.
- 9 I want to ask you a few things just regarding you
- 10 and Mr. Fowler. And not to be junior-highish about it,
- 11 I guess, about it, but I mean I guess y'all date, do
- 12 things socially, things like that. Would that be
- 13 correct?
- 14 A. I guess. Whatever friends do. I mean, James is my
- 15 best friend. What can I say?
- 16 Q. And I know one of the things y'all, I think he told
- 17 me one time y'all used to go to Harrah's, even up
- 18 shortly before the fire, would go up to Harrah's and
- 19 play the slots and things?
- 20 A. Yes.
- 21 Q. Now, he says you are the real gambler of the two?
- 22 A. Well, I'm not sure.
- 23 Q. But that's something y'all would do together?
- 24 A. Yes, sir.
- 25 Q. Now I want to ask you one thing really just briefly

1 about the photographs. The birthday cake table is what
2 it looks like, if you want to flip in there. I think
3 it's Page 7. That pine table that's in the kitchen.

4 A. Yes, sir.

5 Q. That table wasn't there when the fire occurred, was
6 it?

7 A. No, sir. It was in the breakfast area.

8 Q. Okay. Because the oak table was the one that was
9 actually on the kitchen side of the bar; is that
10 correct?

11 A. He had two oak tables. One was a small oak table
12 which fit, and it had four chairs that fit in the
13 kitchen where this table was, and then he had his dining
14 room table which sat on the opposite side of the bar,
15 yes, sir.

16 Q. Now, prior to the fire occurring, Mr. Fowler had
17 turned off the power to the main house. You were aware
18 of that?

19 A. Yes, sir.

20 Q. And it had been four or five months prior to the
21 fire, correct?

22 A. I'm not sure, but close, yes.

23 Q. You couldn't really entertain family in a house
24 without power, could you?

25 A. No, sir.

- 1 Q. And he was living in the gazebo because it still
2 had power, it had lights, it had heat?
- 3 A. Yes, sir.
- 4 Q. He loves that lake, doesn't he?
- 5 A. Well, it's his home.
- 6 Q. He's been there 30 years?
- 7 A. Yes, sir.
- 8 Q. And he would never want to live anywhere else,
9 would he?
- 10 A. I guess -- I mean, I can't say for him. I'm not
11 sure.
- 12 Q. Okay. But he's living there with you and your
13 disabled brother instead of moving somewhere larger,
14 more suitable, where the three of you could look after
15 each other?
- 16 A. James lives there. I'm temporarily staying there.
17 And I have no choice but to have my brother there
18 because I don't have transportation and James helps me
19 with my brother.
- 20 Q. Now, do you have personal knowledge of the extent
21 of Mr. Fowler's financial difficulty prior to this fire?
- 22 A. I'm, I'm not sure. I know some of his problems.
23 He had told me about his talking with the bank about the
24 possibility of selling his house.
- 25 Q. When you are behind with the bank, you either have

- 1 to sell the house or they'll foreclose on it, won't
2 they?
- 3 A. I guess, yes, sir.
- 4 Q. I mean, that's really the only two options. I
5 mean, they might work with you if you had a chance to
6 sell it, but if it doesn't sell, you've either got to
7 give it to them or they'll go to court and take it from
8 you?
- 9 A. Yes, sir.
- 10 Q. Either way you don't get to stay at the lake, do
11 you?
- 12 A. Yes, sir, that's true.
- 13 Q. You got to pack up and move somewhere else, don't
14 you?
- 15 A. I guess, yes, sir.
- 16 Q. But because this fire occurred, Mr. Fowler is still
17 at the lake.
- 18 A. Yes, sir.
- 19 Q. Almost three years.
- 20 A. I don't think he has any place else to go.
- 21 Q. Now, but if he had sold his house or had it
22 foreclosed on, he would have had to go somewhere else,
23 wouldn't he?
- 24 A. Yes, sir.
- 25 Q. And that's the last thing in the world he would

- 1 ever want to do, isn't it?
- 2 A. That I couldn't answer. I'm not sure.
- 3 Q. Well, you know that both his son's business that he
- 4 sunk a lot of money into and his own restaurant business
- 5 both failed?
- 6 A. Yes, sir.
- 7 Q. He lost all of his savings, all of his retirement
- 8 accounts, all of his money because of those two
- 9 ventures?
- 10 A. Yes, sir.
- 11 Q. He had no job and no income coming in from the time
- 12 he closed his restaurant in 2008 until the time of this
- 13 fire?
- 14 A. I'm not sure.
- 15 Q. Now, still being at the lake, he could use his
- 16 dock?
- 17 A. Yeah.
- 18 Q. He's still got his boat, the little sailboat?
- 19 A. He doesn't have a sailboat.
- 20 Q. Did he sell that?
- 21 A. No, sir. It was his son's.
- 22 Q. All right. If his son brought it there, they could
- 23 use it?
- 24 A. I'm not -- I don't know.
- 25 Q. Either way.

- 1 A. I've never seen it on the water.
- 2 Q. He still has his fish and his Koi pond out there in
3 the yard?
- 4 A. No, sir.
- 5 Q. Okay. And so because he's still been living there
6 since the fire, you in your circumstances with your
7 brother have had a place where you could go since he
8 helps you and you help him?
- 9 A. Yes, sir.
- 10 Q. Okay. Now, you did have brief dealings with
11 Mr. Flanagan coming to and from the residence over
12 there?
- 13 A. Yes, sir.
- 14 Q. And in your dealings and your interaction with him
15 he was always professional and courteous to you, wasn't
16 he?
- 17 A. Yes.
- 18 MR. MURPHY: All right. Well, thank you very much.
- 19 THE COURT: Redirect?
- 20 MR. CLINCH BELSER: May it please the Court, just
21 one question.
- 22 Redirect Examination by Mr. Belser:
- 23 Q. With reference to Mr. Murphy's questions about
24 Mr. Fowler could have been foreclosed or could have
25 sold, and had to leave the house at the lake, tell us

1 again what you saw Mr. Fowler doing just before the fire
2 with his son at the house.

3 A. He was preparing and moving and cleaning up the
4 property, and they had some French doors that they were
5 preparing to put in where the sliding doors were, to
6 replace those doors, and I guess in preparation, in
7 order to get it ready for sale if he had to.

8 Q. That's what you personally saw?

9 A. That's what I personally saw, yes, sir.

10 MR. CLINCH BELSER: Thank you very much. No
11 further questions.

12 THE COURT: Very well. You may step down. Thank
13 you very much.

14 (Whereupon, the Witness left the witness stand at
15 approximately 12:25 p.m.)

16 THE COURT: Gentlemen, let me see you at sidebar,
17 please.

18 (Discussion at sidebar.)

19 THE COURT: Mr. Foreman, ladies and gentlemen of
20 the Jury, the next witness will actually be the
21 Deposition of a witness that was taken at another time.
22 Remember, though, that the Witness is under oath and the
23 attorneys are both there. It's just taken at a
24 different place for use here at trial.

25 And what we will do is --

1 Mr. Dillard is the reader?

2 MR. CLINCH BELSER: Yes, sir. Yes, Your Honor.

3 THE COURT: All right. Mr. Dillard will read the
4 transcript.

5 Now, will the attorneys ask the questions?

6 MR. CLINCH BELSER: May it please the Court. I
7 think that most of the questions which were recorded and
8 are gonna be read are the questions which I asked, maybe
9 one or two that Mr. Murphy asked. But my proposal was
10 that I would read the questions and have Mr. Dillard,
11 playing the part of Mr. Flanagan, read the answers.

12 THE COURT: All right. Is that, Mr. Murphy...

13 MR. MURPHY: That's satisfactory. That doesn't
14 matter to me.

15 THE COURT: Very well. Let's do that. That's the
16 usual course. I just wanted to be sure.

17 MR. CLINCH BELSER: There were some exhibits which
18 have been marked as exhibits in this case which were
19 exhibits in the Deposition, and so I'll try to, as I
20 read "I show you exhibit number whatever it is" I'll try
21 to read the exact words, but Freeman will be putting up
22 the document on the screen.

23 THE COURT: All right.

24 MR. CLINCH BELSER: But it may have a different
25 number.

1 THE COURT: I know that. But the main thing is it
2 will be referenced into the deposition.

3 But as I say, remember, although someone else will
4 be reading the testimony, but it is a live witness under
5 oath and just as it would be here in the courtroom, but
6 taken at a different time and a different place.

7 MR. CLINCH BELSER: May it please the Court, I
8 think at this time I need to hand up the original sealed
9 copies of the Depositions and hand those to the Clerk.
10 There was an errata sheet which is in a separate sealed
11 box.

12 THE COURT: Very good. Thank you.

13 All right. Let the record reflect that the Court
14 has been provided the original transcript of the
15 Deposition of Andrew T. Flanagan taken in July of 2010
16 in Columbia, South Carolina, together with an errata
17 sheet dated September the 25th, 2010.

18 All right. You may proceed.

19 MR. CLINCH BELSER: May it please the Court, one
20 other just administrative matter. I've handed the
21 transcript to you and the Clerk. I have a piece of
22 paper which designates the pages and the lines which we
23 want to have read, and also we also put on that the
24 additions to what's being read by Mr. Murphy and his
25 team for inclusion to read all at one time, to go right

1 straight through.

2 THE COURT: Very good. Except when you get to
3 Mr. Murphy's questions.

4 MR. CLINCH BELSER: I'll indicate that somebody
5 else read his.

6 THE COURT: Then he will read his. Very well. You
7 may proceed.

8 (Discussion off the record.)

9 THE COURT: Have you filed the excerpts of the
10 Deposition --

11 MR. CLINCH BELSER: Yes, sir.

12 THE COURT: -- with the Clerk or with the Court
13 Reporter?

14 MR. CLINCH BELSER: Well, I sent them to you...

15 THE COURT: All right. We'll have them marked.

16 In fact, you can mark them now if you'd like.

17 (Marked for identification was Court's Exhibit 2,
18 they'll be put together since they're both excerpts
19 of the Deposition of Andrew Flanagan.)

20 THE COURT: They have now been marked as Court's
21 Exhibits Number 2. They're together. They'll be put
22 together since they are both schedules, so I stapled
23 them together.

24 MR. CLINCH BELSER: I want to apologize for all
25 these administrative matters. I handed up to your clerk