

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 III**

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- 1 A. Yeah, I agree with that.
- 2 Q. Isn't it true that you know that the ceiling
- 3 collapsed at this house?
- 4 A. That's correct.
- 5 Q. We'll start with the living room here. This is a
- 6 photograph that shows the living room, doesn't it?
- 7 A. Correct.
- 8 Q. Isn't it true that you can see where the ceiling
- 9 collapsed in this area?
- 10 A. Yes.
- 11 Q. And isn't it true that you can see where material
- 12 burned in this particular area right here?
- 13 A. That's correct.
- 14 Q. Okay. And that was material that fell down from
- 15 the ceiling?
- 16 A. That's burning debris that fell to the floor,
- 17 right.
- 18 Q. Okay. From the ceiling?
- 19 A. Right.
- 20 Q. So falling down to the floor?
- 21 A. Right.
- 22 Q. And burned and fell in this particular area right
- 23 here?
- 24 A. Yes.
- 25 Q. Okay. Now, isn't it true that what you just

1 pointed out as being the area where falling materials
2 came down, if you look at this next photograph --

3 I'm not sure of the number, Your Honor, but it's in
4 Defense Exhibit 1 --

5 -- shows what you call a burn pattern in that area?

6 A. That's correct.

7 Q. Okay. So materials fell and burned in this
8 particular area -- isn't that correct, shown on this
9 photograph?

10 A. That's correct.

11 Q. Okay -- and they burned also after you cleaned up,
12 after you cleaned up the debris, you could see where
13 materials burned in that area?

14 A. Yes. But everything above it was burning. Why is
15 not all the carpet in that living room not burned?

16 Q. Well, isn't it true that nothing fell in this
17 particular area right there?

18 A. There's debris there. There's burn debris there.

19 Q. Okay. And just while we're on the subject of
20 falling materials in the house, this was a photograph
21 that's right inside the front door, isn't it?

22 A. No, sir. That's looking from the kitchen around
23 the corner.

24 Q. Okay. And, Mr. Byers, can you see this okay?

25 A. Certainly.

1 Q. Okay. If I'm standing in the kitchen?

2 A. That is correct.

3 Q. Okay. And here's the back windows right there
4 where you say --

5 THE COURT: Mr. Belser, I want to be sure that all
6 the Jurors can see.

7 MR. FREEMAN BELSER: Can everybody see?

8 (Jurors nod heads.)

9 By Mr. Freeman Belser:

10 Q. So I'm standing in the kitchen, that's the
11 backsliding door area. Is that true?

12 A. True.

13 Q. These beams right here, these are beams that
14 collapsed from the ceiling, right?

15 A. Right. Those are the beams that go over the top of
16 the kitchen and the dining room.

17 Q. Okay. Now, Sheetrock is not fire resistant, is it?

18 A. It's a fire retardant. Depending on the thickness
19 of it, it will, it's fire rated. Some of it's rated for
20 an hour. It just depends on the thickness.

21 Q. Okay. And you don't know how thick the Sheetrock
22 was here?

23 A. I think it was five-eighths in there.

24 Q. Okay. And you don't know what type it was?

25 A. It was the regular gypsum type.

1 Q. Okay. Now, isn't it true that there was Sheetrock
2 on the walls as well?

3 A. Yes.

4 Q. So there was Sheetrock on the walls and on the
5 ceiling?

6 A. That's correct.

7 Q. Okay. And so there was Sheetrock on the walls and
8 Sheetrock on the ceiling. Now, the Sheetrock that was
9 on these walls where the studs are, that burned away,
10 didn't it?

11 A. It crumbled.

12 Q. Yeah. And so it's not heat-resistant, it's not
13 gonna withstand heat.

14 A. No, no. It'll fall apart from several, from the
15 damage to it and also from when the Fire Department
16 sprays water in it. It makes a terrible mud, I'll put
17 it to you that way. I've walked in it.

18 Q. Okay. And it's dark?

19 A. It can be dark or it can be white. It just
20 depends.

21 Q. But here it's dark, isn't it?

22 A. Yes.

23 Q. Okay. So the fact that it's dark means that the
24 Sheetrock that was on this wall got hot and it burned
25 and it turned dark and it fell down to the ground?

1 A. That's correct.

2 Q. And that's the exact same thing that happened from
3 the ceiling; isn't that true?

4 A. That's correct.

5 Q. And if you have burning materials that fall down
6 from the ceiling into a clump on the floor and they are
7 already ignited, they're gonna sit there and smolder;
8 isn't that true?

9 A. Yes.

10 Q. Thank you.

11 A. But in this particular case it didn't happen.

12 Q. You don't think it happened?

13 A. No, it didn't happen.

14 Q. Okay.

15 A. The first thing that happened was the fire was on
16 the floor. The second thing is that's when the
17 Sheetrock collapsed after the TV -- and we're talking
18 about the living room area, correct?

19 Q. Yes, sir.

20 A. Okay. In that particular area where the burn
21 pattern was located, that started first. If the
22 Sheetrock came down first, that floor would have been
23 protected and that pattern would not have been there.

24 Q. But your theory would be true, though, if the
25 Sheetrock fell down and there was white protection in

1 that area, isn't it?

2 A. Well, I mean, it all depends, you know, it depends
3 on what stage it came in. But the first thing that came
4 down was the Sheetrock. It's not, but it won't burn.
5 It will crumble but it's not gonna burn. It will turn
6 dark from the other ashes that have fallen in it. But
7 the first thing that came down was the Sheetrock, this
8 house had battled insulation in between the floor joists
9 that came down second, then everything else follows
10 afterwards.

11 Q. Was the Sheetrock hot when it fell from the --

12 A. Yeah, it was hot, but the carpet is not gonna burn,
13 it is not flammable. Any carpet in your house, my
14 house, the carpet we are walking on in this courtroom
15 will not burn. It will melt from heat exposure but it
16 will not support combustion.

17 Q. Okay. So this photograph right here shows that
18 something hot melted that carpet.

19 A. That's correct.

20 Q. Okay.

21 A. And that was an a flammable ignitable liquid.

22 Q. But you never considered that it was materials
23 falling from, the Sheetrock falling from the ceiling?

24 A. Yes, I did. I considered my whole factor in doing
25 this evaluation of the scene. I have to, to give a fair

1 and impartial evaluation of this fire or any other fire
2 that I go to.

3 Q. Now, when you arrived at the scene, you said it was
4 a few days after the fire had taken place?

5 A. That's correct.

6 Q. You said that there had been rain?

7 A. Yes.

8 Q. Do you know how much?

9 A. I do not know how much.

10 Q. Okay. So you took lab samples, because that's what
11 Section 921 calls for; isn't that true?

12 A. That's correct.

13 Q. Okay. I'd like you to turn to Page 54 of the book
14 that I've handed to you.

15 A. 54?

16 Q. Yes, sir.

17 A. Okay.

18 Q. Did you beat me to it again? Are you there?

19 A. Yes.

20 Q. Okay. Now, isn't it true that this paragraph says
21 that, Section 63.7.8 says that (reading): Irregular
22 curved or pool-shaped patterns on floors and floor
23 coverings should not be identified as resulting from
24 ignitable liquids on the basis of visible appearance
25 alone?

- 1 A. That is correct.
- 2 Q. You would agree with that statement?
- 3 A. I agree with it.
- 4 Q. Okay. But the only evidence you had, there's no
- 5 test samples to prove your theory; isn't that true?
- 6 A. That's correct.
- 7 Q. So you are calling this pattern a, resulting from
- 8 ignitable liquids, that's based on your eyes alone?
- 9 A. And 33 years and thousands of fires and experience.
- 10 Q. Okay. But it's based on your visual observation
- 11 alone?
- 12 A. The visual along with the communication damage to
- 13 the surrounding area. I'm talking about the damage that
- 14 the clock received, the damage that the TV received.
- 15 That's a localized damage. It's coming from the floor,
- 16 not from falling debris burning. All that was done
- 17 before the debris came down.
- 18 Q. Okay. Now, Mr. Ross, I'd like you to turn to --
- 19 A. Excuse me?
- 20 Q. I'm sorry, Mr. Byers.
- 21 Turn to Page 3 of your report. Do you have your
- 22 report with you?
- 23 A. Certainly.
- 24 Q. In Page 3 of your report and look at paragraph
- 25 number one which says that -- paragraph number one, let

1 me pull this down -- paragraph number one says that
2 (reading): There were no adverse conditions affecting
3 the scene examination. The scene had not been altered.
4 There were no conditions that affected my final
5 determination of origin and cause.

6 Do you remember saying that?

7 A. Yes, sir, I do.

8 Q. You didn't say anything in your report about how
9 you didn't think that the lab results were gonna produce
10 anything because of the conditions that you talked
11 about?

12 A. That's correct.

13 Q. Okay. And actually what you said was there were no
14 adverse conditions affecting the scene?

15 A. That's correct.

16 Q. Now, you took the lab samples; isn't that correct?

17 A. Yes.

18 Q. And you took them correctly?

19 A. Yes, sir.

20 Q. And Data Resources Laboratories tested those lab
21 samples correctly, too; isn't that correct?

22 A. That's correct.

23 Q. And you took six samples?

24 A. Yes, sir.

25 Q. At a hundred dollars a sample?

1 A. I think that's what he charges.

2 Q. And not a single one detected an ignitable liquid;
3 isn't that true?

4 A. That is true.

5 Q. But you had already decided, I guess, that the fire
6 was intentional and you told that to Mr. Fowler; isn't
7 that true?

8 A. That is correct.

9 Q. And you reported to Mr. Flanagan and Mr. Gilden
10 that you believed the fire was intentional before the
11 samples even came back; isn't that true?

12 A. That's correct.

13 Q. Okay. So the samples didn't really matter to you.

14 A. The sample results, if they had came back for
15 kerosene, only tells me what was introduced into a fire.
16 Yeah, it's nice too for them. But this is not a perfect
17 business. That's why, in fires, the fire destroys the
18 evidence. The water dilutes the evidence. That's one
19 of the things why people set fires.

20 Q. And if we look at the lab samples -- do you have
21 the lab samples attached to your report, sir?

22 A. Let's see. If not, I have it on here.

23 Q. I can give them to you.

24 A. That's all right. I've got a copy of them right
25 here.

1 Q. Now, isn't it true that -- and I'm not gonna go
2 through each one of these samples, but isn't it true
3 that each one said no ignitable liquid detected?

4 A. That is correct.

5 Q. Okay. And then, but what you are relying on saying
6 that doesn't really mean anything to you is the
7 statement at the bottom that says (reading): Note,
8 number 1. Negative samples do not preclude the
9 possibility that ignitable liquids were present at the
10 fire scene?

11 A. That is correct.

12 Q. So you are not saying that it's probable that they
13 were there, you are just saying that there was a
14 possibility that they were there?

15 A. That's correct.

16 Q. And it doesn't preclude the possibility. That's
17 not a very strong statement, is it?

18 A. Strong enough.

19 Q. Okay. But doesn't that kind of sound like a
20 disclaimer?

21 A. I don't know why the chemist did it. It's been
22 like that ever since I've been in this business. Every
23 lab report I've ever seen has got that on it. That,
24 like I said, just because the lab report was negative
25 does not mean that an accelerant wasn't used.

1 Q. It means it's possible that an accelerant was used.

2 A. In this particular case it's more than probable,
3 possible it did happen.

4 Q. Okay. But based on the lab results it's possible?

5 A. Oh, yes.

6 Q. Now, earlier we talked about how you document
7 everything that you do when you charge the insurance
8 company for your time?

9 A. Yes.

10 Q. And you document everything you do as a part of
11 your investigation isn't that true?

12 A. Yes.

13 Q. Okay. Now, if you look at your report, it has the
14 TSI activity sheet. And there are four pages which have
15 everything that you did; isn't that correct?

16 A. It has the general consensus of everything I did,
17 yes.

18 Q. Okay. And you got lab reports back on February the
19 5th of 2009; isn't that true?

20 A. True.

21 Q. Okay. And the last entry in 2009, I'm looking at
22 Page 4 of 4 of the TIS sheet, is dated January 24th,
23 2009?

24 A. That's true.

25 Q. Okay. So isn't it true you didn't even review the

1 lab results?

2 A. Oh, yes, I did.

3 Q. Okay. You didn't charge Nationwide for it.

4 A. That's exactly, that's why it's not on there.

5 Q. Okay. But I thought you said everything that's
6 part of your investigation you put on there.

7 A. Well, I mean, you know, why do I -- I sat there and
8 read the report which took me five minutes. Why do I
9 want to reopen my file and send a bill to Nationwide for
10 five minutes?

11 Q. But you haven't closed the file by the time you
12 read the --

13 A. To redo a report they had the same information I
14 had. So why should I go to the effort of reaffirming
15 with them what they already had?

16 Q. Okay. But there's no reference in your report or
17 your time summary that you evaluated the test results.

18 A. Well, I did. That's what I'm testifying to today.

19 Q. There's nothing in your report or your time sheet?

20 A. That's true. That doesn't mean I didn't review it.

21 Q. Now, I put up the section earlier that says that
22 irregular burn patterns are not uncommon.

23 A. No, they're not uncommon.

24 Q. And that they should not be called pour patterns
25 based on visible evidence alone; is that true?

1 A. That's true.

2 Q. Okay. But you still called the burn patterns that
3 you saw at Mr. Fowler's house pour patterns, didn't you?

4 A. Yes, sir.

5 Q. Okay. I'd like you to turn to Page 56 of the 921
6 document.

7 A. Yes, sir.

8 Q. And Section 6.3.7.8.5 said that (reading): The
9 term pour pattern implies that a liquid has been poured
10 or otherwise distributed and therefore is demonstrative
11 of an intentional act.

12 Do you agree with that statement?

13 A. Yes.

14 Q. (Reading): Because fire patterns resulting from
15 burning ignitable liquids are not visually unique, the
16 use of the term pour patterns in reference to the nature
17 of the pattern should be avoided.

18 Do you agree with that statement?

19 A. Yes.

20 Q. Okay. Now, the next sentence (Reading): The
21 presence of the ignitable liquid should be confirmed by
22 laboratory analysis.

23 Do you agree with that statement?

24 A. Yes.

25 Q. You agree with that statement. But the presence

1 of, but this case you had no way of confirming
2 laboratory analysis, did you?

3 A. That's is correct.

4 Q. So that's a violation of Section 921.

5 A. No, it's not.

6 Q. Why not?

7 A. Because any fire investigator that goes out here,
8 whether he goes to your house, your house, or any of
9 these people on this jury's house, my house, and takes
10 samples and every sample he takes is positive, they need
11 to put him behind the bars because he's softened these
12 samples. What I mean, he's taking and treating these
13 samples so he gets a positive. In this particular
14 case --

15 Q. Put who behind bars?

16 A. Pardon?

17 Q. Put who behind bars?

18 A. Whoever does that. Because no fire investigator is
19 gonna go to a scene and get positive samples from every
20 fire scene he goes to. That's my point. It's not, as I
21 testified repeatedly, the fire damages dilutes the
22 accelerant, the water dilutes it, heat, weather
23 conditions, all these are factors in the collection of
24 debris samples and getting a positive identification
25 from a lab.

1 Q. But you didn't have any lab samples that confirmed
2 your theory and this section says that they should be
3 confirmed by a lab analysis. So you are not matching up
4 with section 921 here, are you?

5 A. I'm doing what is required of me. 921 says you
6 need positive samples. But it doesn't say that I can't
7 call this an incendiary or intentional set fire without
8 them.

9 Q. That's your reading of 921?

10 A. That's exactly right.

11 Q. Okay. Now, in your deposition you were asked about
12 your calling these samples pour patterns. And didn't
13 you agree that was a bad choice of words?

14 A. Well, I mean, I've been in this business 33 years.
15 Originally when I went to basic fire investigation, we
16 were taught pour patterns. What is a pour pattern? A
17 pour pattern where somebody takes a container of
18 kerosene, gasoline, paint thinner, whatever, and pours
19 it on the floor. The only difference today is it's
20 called an ignitable liquid pattern. It's a different
21 term, same meaning. That's all the difference it is.

22 Q. But it's a lot more than just a matter of syntax,
23 isn't it?

24 A. No. It means exactly the same. It's just a
25 different term.

1 Q. But you're calling the irregular burn patterns pour
2 patterns is what allowed Nationwide to deny this claim;
3 isn't that true?

4 A. It probably helped in that, yes.

5 Q. Okay. Now, isn't it true that Section 921 that's
6 mostly words, but it has figures and photographs that
7 are helpful in that kind of understanding what the words
8 mean; isn't that true?

9 A. Yeah.

10 Q. Now I'd like you to turn to figure 6.3 -- this is
11 on Page 57 --

12 A. Okay.

13 Q. And if you look at the photograph -- I'm gonna let
14 y'all see a clearer picture of this in a moment -- but
15 if you look at the photograph that's in the middle of
16 the page closer to the binder.

17 Do you see that photograph?

18 A. Which one are you pointing to?

19 Q. The one you had your finger on.

20 A. Yes.

21 Q. Do you see that photograph, and then you see the
22 photograph that's on the right side of the page at the
23 top?

24 A. Yes.

25 Q. Okay. I'm gonna let the Jury see the book because

1 the picture is a little bit better. I'm looking at that
2 photograph and that photograph. (Publishes to Jury.)

3 Isn't it true that those two photographs look a lot
4 like the living room and the kitchen in Mr. Fowler's
5 house?

6 A. No.

7 Q. Why not?

8 A. In here you got total burn. You got fire damage
9 all the way across.

10 Q. Which one are you talking about?

11 A. The one in the middle of the page to the left.
12 That floor is burned, consistently burned. You don't
13 see clean linoleum like I did in the pictures I took of
14 the kitchen before the debris was removed.

15 Q. But that was clean linoleum after you removed the
16 debris.

17 A. No, no. Look at my pictures.

18 Q. But in those two photographs no ignitable liquid
19 was poured, was there?

20 A. Probably not.

21 Q. Why don't you confirm?

22 A. That is correct.

23 Q. Thank you.

24 A. But, in these two pictures here, just by looking or
25 not knowing what the fire investigator or how they were

1 testing it, it looks like a compartmental fire where the
2 room went before flashover, where you can see the heavy
3 damage along on the window on this other photograph, the
4 fire on the floor, you can see the heavily burnt, on
5 this other photograph you can see the heavily burned
6 studs. This fire went to full involvement.

7 Q. Okay. Now, Mr. Byers, you now testified in your
8 deposition and then here in front of the Jury today
9 maybe on Direct Examination, definitely on Cross, that
10 you attached everything that you had received from the
11 Friendship Fire Department report to your report; isn't
12 that true?

13 A. I thought I did, yes, sir.

14 Q. Okay. And so only one page?

15 A. I only had the one page.

16 Q. Okay. And now, in fact, you haven't seen Page 2
17 until your deposition last August; isn't that true?

18 A. That's correct.

19 Q. Now, if I can hand you Page 1 of the report, what's
20 been marked as Exhibit Number 6. These are Pages 1 and
21 2 of the report. And I would like you to examine Page
22 1, please. And isn't it true that Page 1 of the report
23 says nothing about the fire's potential source of
24 ignition being the kerosene heater?

25 A. That's correct.

1 Q. Okay. Now I'd like you to turn to your report and
2 look at Page 5, paragraph 4. And I've highlighted where
3 it says on the Fire Report he, meaning Chief Wright --
4 are you on the same page? I'm at this Page 5, paragraph
5 4?

6 A. Of my report?

7 Q. Yes, sir. You will see where it says on the Fire
8 Report he's listed the fire's potential source of
9 ignition as the kerosene heater?

10 A. Yes.

11 Q. Okay. But it doesn't say that on Page 1 of the
12 report?

13 A. No, sir.

14 Q. I'd like you to turn to Page 2 of the report. And
15 isn't it true that the Page 2 of the report does say
16 that the potential source of the ignition was the
17 kerosene heater?

18 A. That's correct.

19 Q. Okay. And this was the report -- your report was
20 dictated January 23rd of 2009, wasn't it?

21 A. That's correct.

22 Q. Okay. That was based on everything that you had
23 seen at that time?

24 A. That's correct.

25 Q. And you had received the document you say from the

1 Friendship Fire Department?

2 A. That's correct. No, no. I got the Fire Report
3 from Mr. Fowler.

4 Q. Okay. And isn't it true that the only way that you
5 would have known that the report identified, the only
6 reason you could state in your report that the Fire
7 Department report stated the potential source of origin
8 of the fire was the kerosene heater was by looking at
9 Page 2?

10 A. No, no. I talked with Chief Wright at the
11 Seneca -- he was on duty at the Seneca Fire Department
12 when I called him and we discussed the fire.

13 Q. But that's not what your report says. Your report
14 says that you looked at the Fire Department report.

15 A. Well, I got the information from Chief Wright.

16 Q. Okay. But your report says that the Fire Report is
17 what told you.

18 A. That's what he told me was on the Fire Report.

19 Q. Now, isn't it true, Mr. Byers, that Chief Wright
20 did, in fact, give you both pages --

21 A. I don't know --

22 Q. Let me finish my question.

23 Isn't it true that Chief Wright did, in fact, give
24 you both pages of the report, that you intentionally
25 excluded it from your report, and you have now been

1 untruthful about it three times to try to protect both
2 yourself, your report, and Nationwide?

3 MR. MOORE: Objection. That's an improper
4 question.

5 THE COURT: I'm not sure it is. He can answer yes
6 or no.

7 MR. MOORE: He's asked and answered it.

8 THE COURT: That's not an improper question, it's
9 just that he's asked it too many times. But I don't
10 think he has. I think that's the first time I heard it.

11 Go ahead.

12 Overruled.

13 You can answer it yes or no.

14 By Mr. Freeman Belser:

15 Q. I'll repeat the question to you.

16 A. Please.

17 Q. Now, isn't it true, Mr. Byers, that Chief Wright
18 did, in fact, give you both pages of your report, that
19 you intentionally excluded it from your report, and that
20 you have now been untruthful about it three times to try
21 to protect yourself, your relationship with Nationwide
22 and with Nationwide?

23 A. No, sir, that is not true.

24 THE COURT: Now you can explain your answer if you
25 want.

1 THE WITNESS: The reason being was I never met with
2 Chief Wright. I talked with him on the phone. I never
3 met with him. I've got, the only copy of the prior
4 report I've got was given to me by Mr. Fowler sitting
5 outside there and I got the one page, and that's what I
6 testified to throughout my, this entire matter.

7 By Mr. Freeman Belser:

8 Q. Now I've got just a few more questions. The last
9 topic here.

10 And I'm looking at this photograph which shows what
11 you call -- can you see it okay?

12 A. Yes.

13 Q. What you call a V pattern going up the side of the
14 refrigerator?

15 A. That's correct.

16 Q. And isn't it true that these are wooden members up
17 there?

18 A. No, no. That's Sheetrock.

19 Q. That's Sheetrock?

20 A. That's Sheetrock.

21 Q. And so what you are saying is even though this
22 Sheetrock does not even appear to be burned --

23 A. It's burned.

24 Q. How can you tell?

25 A. Discolorations. It's bleached.

1 Q. Okay. But it looks nothing like the area right
2 behind the kerosene heater, does it?

3 A. No.

4 MR. FREEMAN BELSER: Okay. Beg the Court's
5 indulgence just for a moment, please.

6 THE COURT: Certainly.

7 (Counsel confer.)

8 By Mr. Freeman Belser:

9 Q. Now turn to your report, Page 2 of the report, and
10 this is of your report. Page 5 of the report is your
11 reference -- I'm sorry, I have Page 5 of the report,
12 paragraph 4. This paragraph right there, the fourth
13 paragraph. That references your conversation with Chief
14 Wright?

15 A. Yes.

16 Q. Okay. And nowhere in there do you say that it's
17 Chief Wright's determination that the fire was
18 unintentional, does it?

19 A. No.

20 Q. Okay. And you claim that you had never seen Page 2
21 of the report that says cause of ignition,
22 undetermined -- I'm sorry -- where it says cause of
23 ignition: Unintentional. Isn't that true?

24 A. That's correct.

25 MR. FREEMAN BELSER: Mr. Byers, I have no further

1 questions. Thank you very much.

2 MR. MOORE: Briefly, Your Honor.

3 Redirect Examination By Mr. Moore:

4 Q. Mr. Byers, just because there's been some confusion
5 about Page 5, paragraph 4, of your report and whether
6 you have withheld information from Nationwide, are you
7 aware that Nationwide had both pages, or the front and
8 back, of Chief Wright's report?

9 A. No, I was not aware they had both. I thought there
10 was only the one page. And it's not uncommon that I get
11 only the one-page report from the volunteer Fire
12 Department.

13 Q. Now, did you, are you aware Chief Wright has told
14 us it was a one-page document that was written on the
15 front and on the back?

16 A. No, sir, I wasn't aware of that.

17 Q. Okay. The one that you got from Mr. Fowler, was it
18 a copy or was it the original?

19 A. It was a copy.

20 Q. Okay. And do you know whether Mr. Fowler provided
21 you with a copy front and back or just a one-page copy?

22 A. I had the one-page copy.

23 Q. Okay. Now, with regard to --

24 A. And right there is the copy that I got.

25 Q. Okay. That's the original that you were provided

1 in this case?

2 A. Right. And that's the copy I got.

3 Q. And do you have a second page to go with it?

4 A. No.

5 Q. Now, with regard to withholding Nationwide, didn't
6 you tell Nationwide right here on Page 5, paragraph 4,
7 what the Chief said about the kerosene heater's
8 involvement?

9 A. Yes.

10 MR. MOORE: No further questions. Thank you.

11 THE COURT: Very good.

12 MR. FREEMAN BELSER: Nothing further, Your Honor.

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

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Thank you, sir. All right. I think we
16 need to take a short break. It's been a while. So I'm
17 going to suggest that we take a break. Now, this be
18 your break, so when you're ready to come back, just
19 knock on the door and we'll continue with the case at
20 that time.

21 Again, do not undertake discussion of the case in
22 any way.

23 (Whereupon, the Jury left the courtroom at
24 approximately 11:10 a.m.)

25 MR. MOORE: Your Honor, may Mr. Byers be excused?

1 MR. FREEMAN BELSER: No objection.

2 THE COURT: Without objection you may be excused.

3 Thank you.

4 (Whereupon, the Witness was excused.)

5 THE COURT: Anything from the Plaintiff before we
6 take a break?

7 MR. FREEMAN BELSER: No, sir.

8 THE COURT: From Defense?

9 MR. MURPHY: No, Your Honor.

10 THE COURT: Very good. Thank you. We'll take a
11 short break.

12 (A recess was taken.)

13 THE COURT: Anything from the Plaintiff before we
14 bring the Jury back?

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

16 THE COURT: From the Defense?

17 MR. MOORE: No, Your Honor.

18 THE COURT: Very good. Bring the Jury back.

19 (The Jury entered the courtroom at approximately
20 11:28 a.m.)

21 THE COURT: All right. Let the record reflect the
22 Jury is in the Jury box.

23 We'll now proceed with the Defense case. Call your
24 next witness.

25 MR. MURPHY: Yes, Your Honor. We call Andy

1 Flanagan.

2 Whereupon,

3 Andrew Todd Flanagan

4 Having first been duly sworn, was examined and testified
5 as follows:

6 Direct Examination by Mr. Murphy:

7 THE COURT: All right. If you would please, sir,
8 give us your full name, spelling your last name for the
9 record.

10 THE WITNESS: Andrew Todd Flanagan, it's
11 F-l-a-n-a-g-a-n.

12 THE COURT: Very good. Thank you, sir.

13 You may proceed.

14 By Mr. Murphy:

15 Q. And you go by Andy?

16 A. Yes.

17 Q. Andy, how old are you?

18 A. 38.

19 Q. And tell me, where do you live currently?

20 A. I live in Durham, North Carolina.

21 Q. And are you married?

22 A. I am. I've been married to my wife for eight years
23 now, eight years in November.

24 Q. Do you have any kids yet?

25 A. No kids. It's not in the cards for us yet.

1 Q. All right. Well, tell me a little bit about your
2 background, where you grew up and your life before you
3 went to work for Nationwide.

4 A. Sure. My folks are from a small town in West
5 Virginia. We lived outside of Pittsburgh for a year or
6 two. And when the economy went way sour in the early
7 eighties, we moved south for a better fortune, we lived
8 outside of Charleston for a couple years and then in
9 Columbia where I mostly grew up, from age ten until high
10 school.

11 I went to the University of South Carolina for
12 three years, I managed the Chick-fil-A right there on
13 Harbison Boulevard for ten years, learned a lot of stuff
14 and ate a lot of chicken sandwiches, really. I managed
15 another restaurant right there in Harbison for two
16 years. When that, I was laid off, let go, and sales
17 really weren't what they could have been. I worked at
18 Carolina Children's Home in Columbia for two years in
19 the accounting department. I didn't deal with the kids,
20 that was really -- I saw them getting some help and it
21 was really fulfilling.

22 But I lucked into an insurance job. I got a woman
23 that used to work with me, her dad had an opening and I
24 got hired by Nationwide to be an adjuster.

25 Q. And when was that?

1 A. That was in 2005, in the fall.

2 Q. All right. And what type of position did you work
3 through up until the time you got involved with
4 Mr. Fowler's claim?

5 A. For my first six months I was a claims trainee. I
6 handled all large loss fire claims. I dealt with just
7 the contents portion, taking inventory helping our
8 members price them.

9 After six months, and that was in Columbia, I was
10 promoted and moved to Greenville to work the core claims
11 is what we call them, the water claims that some of you
12 probably had, the smaller claims up to medium
13 complexity. I did that for two years.

14 And then I became a large loss adjuster, where we
15 mostly handled fire claims, large fire claims, and
16 that's the position I was in when I handled Mr. Fowler's
17 claim.

18 Q. Tell me about how you became involved in
19 Mr. Fowler's claim.

20 A. It was January 17th, it was a Saturday. It was
21 Martin Luther King weekend. I had asked off, but I was
22 the low man on the totem pole, so I wasn't off. We went
23 to my in-laws in Athens, Georgia. And I knew it was a
24 gamble going, that I might get a claim, and I knew that
25 if I got a claim, I had to pack up and go.

1 So I was out getting lunch and I had just finished
2 lunch and I got -- we get a text message, two text
3 messages when we get a claim. So I got those, and
4 shortly thereafter I got a call from Sandy Powell who
5 was on call that day, who said that she had spoken with
6 Mr. Fowler and he had a fire at his house and needed
7 some immediate attention.

8 Q. And what was your contact with Mr. Fowler over that
9 weekend and what did you have to do to meet with him?

10 A. I went back to my in-laws' house, I turned on my
11 computer and got his information and contacted
12 Mr. Fowler that afternoon. We set an appointment for
13 the next day, Sunday morning at 9:00. And I called my
14 wife, told her that I had to go, and went back to my
15 house in Mauldin that night, and met Mr. Fowler at 9:00
16 that next morning.

17 Q. Tell me what you did that Sunday when you had met
18 with Mr. Fowler and began working on his claim.

19 A. Sure. The overall is we, to continue the claims
20 process, I explained to him the claims process and where
21 we were. I took my photographs of the dwelling and
22 looked at the dwelling to see if I could, what
23 preliminary findings I had in my investigation.

24 I took a recorded statement from Mr. Fowler about
25 what had happened and about him, and I offered to put

1 him into a hotel immediately. He didn't have any,
2 didn't have any kitchen or bathroom in the gazebo that
3 he was in. I offered to put him in the hotel, and he
4 wasn't interested in that, but I made that known to him
5 and let him know if he changed his mind, we could take
6 care of that quickly. And I wrote him a check for
7 \$2,000 as an advance of the contents portion of his
8 claim. Knowing it was a Sunday, long weekend and he
9 couldn't do anything with that check till Tuesday
10 morning, but I put that in his hands so he was ready to
11 go.

12 Q. Were there any comments that he made to you that
13 morning that stood out to you that day?

14 A. There were a couple. There were a couple. He
15 asked several times if he needed to get an attorney.
16 And that's unusual. Very few of my claims involve an
17 attorney at all. We usually only are involved directly
18 with our policyholder, with our members.

19 He also asked several in-depth questions about the
20 claims process as to how long it was gonna take and how
21 if we were gonna make payments, and those are in my
22 experience unusual for the initial day of the claim.

23 Q. Did you make any decision to involve other people
24 in your investigation at that time?

25 A. I did.

1 Q. Why did you do that?

2 A. I decided to involve two different groups, two
3 different vendors. First I wanted to involve our
4 Special Investigative Unit because this was an unusual
5 claim, there were several unusual factors and I wanted
6 some assistance on the investigation portion of this
7 claim.

8 Q. Did you make any notation about what some of the
9 reasons were to involve Billy Gilden, I guess the
10 investigating involved, but to involve special
11 investigations?

12 A. I did. I did. I wrote in my log -- we are trained
13 to do as much as we can on site to get it right the
14 first time if we can. I sat in Mr. Fowler's driveway on
15 the 18th that Sunday at 12:53 and wrote a log note with
16 the reasons why I was concerned and wanted additional
17 investigation on this claim.

18 The first is about origin and cause. My log note
19 is the fire is of a suspicious nature and could be a
20 kerosene heater that the policyholder leaves running in
21 dwelling at all times.

22 Second, there is no power to the dwelling, and
23 policyholder is effectively living in a furnished gazebo
24 behind his dwelling.

25 Three, financial indicators. A, policyholder

1 recently closed a restaurant he owned in Seneca. B,
2 policyholder is behind on both the mortgages and is
3 considering selling the dwelling. C, policyholder has a
4 new IRS lien against him. And, four, policyholder is
5 asked about settling the claim and asks several times on
6 first inspection if he needs to get a lawyer.

7 Q. Based on those, those are the reasons you put in
8 your log on why you referred the matter to SIU for some
9 assistance with the investigation?

10 A. Yes, sir.

11 Q. And you noted there that consideration selling a
12 dwelling on which he was behind on his payments. Is
13 that a suspicious, something that raises suspicions in
14 the claims process?

15 A. It is. We receive training periodically and often
16 to look for some of the indicators for fraudulent claims
17 one of them is a dwelling is for sale. The reason
18 behind that is, even if it's for sale, you never know
19 when it's gonna sell. When we moved to Greenville from
20 Durham, we had a heck of a hard time selling our house a
21 year and a half ago, and it's not just, I know it's not
22 just me. There's no definite timetable for selling that
23 house.

24 Q. With respect to the first points on the cause and
25 origin aspect, did you make any referral on that aspect

1 of your impressions from your visit to the scene?

2 A. I did. I contacted Jerry Byers from TIS to perform
3 a cause and origin investigation.

4 Q. And was he the only person you were allowed to
5 contact about that?

6 A. No, sir.

7 Q. Does Nationwide use other vendors with respect to
8 cause and origin investigation?

9 A. Yes, sir, there's several other vendors that we
10 use.

11 Q. And have you worked with them also before?

12 A. I have.

13 Q. All right. And does that pretty much sum up what
14 you did on that Sunday while you were at the scene?

15 A. Yes, sir. Yes, sir.

16 Q. Now, what was your next personal involvement in the
17 claim?

18 A. The next time I was personally involved directly
19 with Mr. Fowler was on that Thursday I came to meet him
20 at his house to review his initial contents inventory.

21 Q. That's the personal property, furnishings, clothes,
22 things like that that were lost in the fire?

23 A. Yes, sir.

24 Q. Now, had you had any follow-up from either Billy
25 Gilden or Jerry Byers and was that part of your ongoing

1 investigation of the claim?

2 A. Yes. I followed up with Billy. Billy had called
3 me up on Tuesday to, when he received a referral for his
4 investigation portion. We discussed what the indicators
5 that I had asked him to investigate and he had some of
6 his own investigative ideas that he wanted to follow
7 through with as well. And he told me that he could be
8 out Wednesday to meet with Mr. Fowler and to inspect the
9 dwelling himself. I also told him that Jerry Byers had
10 been hired to perform the cause and origin investigation
11 and he agreed to get in touch with Jerry to see what he
12 could do to help with that investigation.

13 Q. As your investigation proceeded, do you investigate
14 both coverage and damages all at the same time?

15 A. Yeah. Yes, sir. They go together.

16 Q. Why do you do that?

17 A. We have to investigate both coverage and evaluate
18 the damages on every claim. We can't just determine
19 coverage and not determine how much the loss is. We'd
20 never know how much to pay. So on my first initial
21 visit I completed my initial estimates for the repairs
22 or in this case replacement for the dwellings or other
23 things that would be damaged during the replacement
24 process.

25 Q. And is that with regard to some of the various

1 coverages that a homeowners' policy would provide to
2 someone who may have a loss?

3 A. Yes, sir. It included Coverage A, the dwelling;
4 Coverage B, the other structures, landscaping, debris
5 removal. I think that was the extent of what I wrote on
6 the initial visit.

7 Q. And then when you went back Thursday, you tried to
8 also help estimate the contents loss?

9 A. Yes, sir. Mr. Fowler had made a list. He had a
10 good portion of the list handwritten. And then he went
11 through that list and told me those items and I made
12 some of my notes and also took a recording of it to send
13 to our transcriptionist to get it put into a
14 spreadsheet.

15 Q. Were you made aware of Mr. Byers' preliminary
16 conclusions at any point in time?

17 A. I was.

18 Q. How were you made aware of that?

19 A. Jerry called me.

20 Q. And we just heard him at length. And, so without
21 repeating anything, but was it along the lines of what
22 was later contained in his written report and what you
23 heard today?

24 A. Yes. He told me that he saw two origins in the
25 dwelling.

1 Q. Did you all discuss anything regarding the
2 possibility of accelerants being present in the debris
3 sample testing?

4 A. Mr. Byers told me that he didn't smell any
5 accelerants but that wasn't unusual due to the condition
6 of the place that week.

7 Q. What was your expectation at that point about what
8 the test samples might reveal based upon what he told
9 you?

10 A. From what he told me, I didn't expect any, any
11 information from the samples.

12 Q. Now, subsequent to that, did the Nationwide
13 personnel, as you were gathering information, was there
14 a conference held between the various individuals?

15 A. Yes, sir. The next Wednesday we had a lawyers loss
16 conference, a teleconference, we do it by phone because
17 we're spread out. And Michael Madden told you yesterday
18 he's in Duluth and the Director is in Duluth, as well,
19 and I'm in Greenville, and we don't get together to go
20 over those, we do them by phone.

21 Q. Does everyone have access to the same information
22 that's contained in the file, so to speak?

23 A. Yes. Part of preparing for that teleconference is
24 my manager reviewing the file to make sure that all of
25 the investigation that we discussed was in there.

1 Q. And what did you personally do as a result of that
2 conference?

3 A. As a result of that conference I completed a
4 reservations of the rights letter.

5 Q. Tell me briefly what that is.

6 A. That's a notice to our insured, in this case
7 Mr. Fowler, that we are continuing the investigation
8 into this claim as there may be a coverage issue, and we
9 notified him what that coverage issue is, and in this
10 case it was the intentional acts exclusion.

11 Q. And did you send him a letter regarding that?

12 A. I did.

13 Q. And why does Nationwide do that?

14 A. We want to notify him up front that there's a
15 coverage question so that he can provide us with any
16 information that he has to help us decide that.

17 Q. Why not just keep him in the dark?

18 A. It would be unfair to spring that on him at the
19 last second. Not only in large claims, small claims as
20 well. We're instructed to notify our members, our
21 insureds, if there's any coverage issues that we see or
22 may come up. It's not only good customer service, it's
23 being fair as well.

24 Q. What was the basis on which the investigation
25 continued with respect to the coverage aspect of the

1 claim, not the damages?

2 A. We continued the investigation based on the
3 intentional acts exclusion.

4 Q. And how would you go about determining whether that
5 would apply in a situation like this? What factors does
6 Nationwide look at?

7 A. Well, we would look at three things. We would look
8 at motive, opportunity, and an intentionally set fire.

9 Q. And what type of things were investigated to
10 evaluate the potential motive?

11 A. Billy did an intensive financial search into
12 Mr. Fowler's finances, he told you that yesterday. He
13 also talked to the neighbors as part of his
14 investigation as well.

15 Q. And what was the purpose of that?

16 A. To see if there was anybody else around, to see if
17 there was anybody else that could have caused this, to
18 see if there was any -- my granddaddy called them
19 hooligans, ruffians, or anybody else that caused this
20 and Mr. Fowler wouldn't have caused this.

21 Q. And then what else did Mr. Gilden do after the
22 first conference prior to the second conference?

23 A. He performed an examination under oath with
24 Mr. Fowler.

25 Q. And tell me briefly what that consists of.

1 A. It's a recorded interview with a court reporter.
2 Mr. Fowler is sworn to, he is sworn in, and we, I say
3 we. The special investigator, we do a more in-depth
4 discussion. Usually there will be some more
5 documentation or additional things requested to bring in
6 to that interview.

7 Q. Was all of that information provided back to you
8 prior to the second conference call about this fire?

9 A. It was.

10 Q. Now, in terms of the third element, the origin of
11 the fire, whether it was an intentional or accidental
12 fire, what was Nationwide's investigation to evaluate
13 that aspect of the coverage issue? Who did you hire to
14 look into that?

15 A. Jerry Byers. We relied partially on Jerry Byers'
16 report and our investigation to determine that.

17 Q. And, based on the investigation that you reviewed,
18 what conclusion did you personally come to prior to the
19 second large loss conference call?

20 A. I concluded that I was going to suggest denial of
21 this claim under the intentional acts exclusion.

22 Q. Okay. And why is that?

23 A. This, it met the three prongs that we have to
24 provide, we have to meet for that intentional acts
25 exclusion. We had a financial motive, opportunity, and

1 intentionally set fire.

2 Q. Did the debris samples, what role did they play in
3 your determination with respect to that third prong on
4 the intentionally set fire?

5 A. They were considered, but they came back negative
6 and we knew that a negative sample doesn't mean that
7 there's no accelerant involved.

8 Q. Did that test result change Jerry's opinion that he
9 relayed to you and that you relied upon?

10 A. No.

11 Q. Did it affect you or influence your opinion
12 regarding coverage in this case?

13 A. It did not.

14 Q. Now, what did you do after that conference call was
15 concluded with respect to Mr. Fowler's claim?

16 A. I actually received a call from Mr. Fowler early
17 that afternoon. He asked the status of the
18 investigation, and I told him that our investigation was
19 complete. We would be denying his claim under the
20 intentional acts exclusion.

21 Q. Directly to him?

22 A. Directly to him by phone.

23 Q. Is that something that's recommended in the best
24 claims practices?

25 A. It is.

1 Q. Did you follow that up with a written letter
2 advising him of the decision to deny his claim?

3 A. I did.

4 Q. And I believe that was marked Plaintiff's Exhibit
5 7. Is that also something that's recommended in the
6 best claims practices?

7 A. It is.

8 Q. Did you feel as a large loss adjuster that the
9 investigation that was conducted by Nationwide was
10 thorough and sufficient to help you make a proper
11 recommendation on coverage?

12 A. I do.

13 Q. Was there anything else you thought should have
14 been or could have been done prior to the time that you
15 advised Mr. Fowler that his claim was being denied?

16 A. There's nothing else I could say, no.

17 Q. Now I want to ask you, with respect to your contact
18 with the mortgage companies after the claim was denied
19 to Mr. Fowler, can you describe that contact to the
20 Jury?

21 A. Certainly. I contacted first Sue Kaufman
22 (phonetic) with First Citizens, she was in Columbia. I
23 told her that the claim had been denied and that I would
24 be sending a sworn Proof of Loss for her to complete to
25 send back to me. She said, Yes, sir. And I emailed

1 that to her.

2 Q. Was she cooperative?

3 A. She was.

4 Q. Did she ask any questions, any further questions,
5 once you gave her that statement?

6 A. She did not.

7 Q. What about the other mortgage company, Citi
8 Financial? Is that another consumer company?

9 A. It's a finance company. I contacted Daniel Evatt,
10 he was the manager of the Clemson Branch, I believe, and
11 told him that Mr. Fowler's claim was being denied, that
12 I would be sending him a sworn Proof of Loss for him to
13 complete.

14 Q. Was he cooperative in your request that he would
15 have to file a sworn Proof of Loss?

16 A. He was uncooperative. He did not want to complete
17 any paperwork, or -- he was also concerned that his
18 second, the second mortgage, Citi Financial had the
19 second mortgage, wasn't gonna be completely satisfied
20 because the policy limits didn't cover the total amount
21 of the mortgage. He also wanted to know why the claim
22 was being denied and was persistent.

23 Q. Did you volunteer any information to him of a
24 personal nature about Mr. Fowler?

25 A. No.

1 Q. I believe that you, in fact, had to write him a
2 letter quoting him chapter and verse about why he would
3 have to submit a Proof of Loss, that was Plaintiff's
4 Exhibit A; is that correct?

5 A. That's correct.

6 Q. Did you have to do that with Sue Kaufman from First
7 Citizens Bank?

8 A. I didn't.

9 Q. Did you get your proof right back from her?

10 A. I did, it was very quickly.

11 Q. Did you ever volunteer any information about why
12 the claim was denied to Mr. Evatt?

13 A. I didn't volunteer it, no, sir.

14 Q. How did it come about that you explained to him --
15 tell me exactly what you told him, though, in response
16 to his persistent questions.

17 A. He, in response to his persistent questions I told
18 him the claim was denied under the intentional acts
19 exclusion and that was the extent of what I could
20 explain to him.

21 Q. Did you ever accuse Mr. Fowler of doing anything or
22 committing any crime to Mr. Evatt?

23 A. No.

24 Q. Did you say anything beyond what you just told this
25 Jury that you told Mr. Evatt?

1 A. No.

2 Q. Was he pleasant to deal with?

3 A. No, sir.

4 Q. When you told him he had to file the proof, did he
5 accept your explanation?

6 A. He did not until he had it in writing.

7 Q. Ultimately were you able to facilitate the payoff
8 of the first mortgage and the payoff of a substantial
9 portion of the second mortgage up to the policy limits
10 of the dwelling limits?

11 A. Yes, sir, up to the Coverage A limits.

12 Q. Was there anything else that was payable under the
13 policy at that time based on the coverage decision that
14 had been made?

15 A. There wasn't. There was no other direct physical
16 damage.

17 Q. Did you prepare an estimate, though, of what it
18 would have cost to rebuild the structure based during
19 your investigation?

20 A. I did, on my initial visit, I didn't know what the
21 cause was or what coverage decision we'd made, so I'd
22 prepared estimates for all the damages that I thought
23 could happen, so that I would be prepared to move
24 forward with the claim if we determined there was
25 coverage.

1 Q. And with respect to rebuilding the dwelling, how do
2 you go about estimating or calculating that?

3 A. We use a software program, it's MSB, three guys'
4 names, I don't know what they are. But we plug in the
5 square footage and a couple other things including
6 finishes and grades of finishes to come up with a
7 replacement cost.

8 Q. And what estimate did that program provide to you
9 that you placed in the claim file?

10 A. It was \$123,000.

11 Q. And then some of the other coverages you did also
12 perform estimates on, were you able to ever complete an
13 estimate on the contents claim?

14 A. We did a partial estimate on the contents claim.
15 When I was there on a Thursday after the fire,
16 Mr. Fowler had, he had a good number of items, but he
17 was clear that he had more items and I understood that
18 he had more items, so we had a good start that day, but
19 it was not conclusive.

20 Q. And then the information he submitted to you
21 regarding that aspect of the claim came in later after
22 the coverage decision had been reported to him?

23 A. That's correct.

24 Q. Did you take any further action on it at that time?

25 A. No. I reviewed it briefly and that was the extent.

1 The claim had been denied at that point and we
2 determined that no payment would be made under Coverage
3 C.

4 Q. And the only submission that you got before this
5 lawsuit was filed was about his contents, not about
6 anything regarding the coverage decision itself; isn't
7 that correct?

8 A. I'm not sure I understand the question.

9 MR. MURPHY: I'll withdraw it.

10 Answer any questions Counsel may have.

11 THE WITNESS: Yes, sir.

12 Cross-Examination by Mr. Clinch Belser:

13 Q. Good afternoon, Mr. Flanagan. Just a couple of
14 quick questions. I think the Jury heard almost enough
15 what I've asked you and what you've responded to me over
16 the last day or so, so I won't bother you with all of
17 that.

18 But just quickly, Mr. Fowler was very cooperative
19 signing all forms and releases you asked him to sign; is
20 that correct?

21 A. Yes, sir. I explained each one, I explained the
22 purpose of each one, and, you know, I had done 130, 140
23 of those of large loss claim, so I explained each
24 knowing what the questions would be and answered the
25 questions on those forms.

1 Q. He had to submit his Proof of Loss within 60 days
2 from January the 18th?

3 A. Yes, sir.

4 Q. Okay. Now, you said that Mr. Fowler got your
5 attention because he asked several times early on
6 whether he needed a lawyer?

7 A. Yes, sir.

8 Q. Was that because you said to him on the first day
9 you were there that you weren't sure that there was a
10 claim?

11 A. No, sir. That's not terminology I would use. The
12 claim occurs when the call center is called and the
13 claim is filed. And we know that. That's the way
14 insurance works and definitely Nationwide works. I
15 don't know what I communicated to Mr. Fowler that he
16 took that there may or may not be a claim. But there
17 was a claim filed and me being on site is proof of that.
18 And we would have to make an investigation into coverage
19 on the claim. There can't be an investigation without a
20 claim.

21 Q. You said something to him, though, which made him
22 concerned that you were not gonna approve coverage or
23 you had to do an investigation on the very first day; is
24 that correct?

25 A. I can't speak for what Mr. Fowler thought. I can

1 only say that I explained to him the claims process as I
2 do on every claim, and I don't know, I don't know where
3 he got there may not be a claim here.

4 Q. Now, you mentioned that one of the factors which
5 made you think there was a reason to investigate further
6 was that the house was for sale?

7 A. Yes, sir.

8 Q. Now, there wasn't any for sale sign up, was there?

9 A. No.

10 Q. And so the house had not been on the market long
11 enough for the homeowner to get concerned that it
12 wouldn't sell; isn't that correct?

13 A. But my log notes are clear that he was considering
14 selling the dwelling. I just want to be sure that we
15 have all that --

16 Q. Of course. Now, you knew from the very first time
17 you met him or the second time or very early on that he
18 was preparing the house for sale; did you not?

19 A. That's what he told me, yes, sir.

20 Q. And it wasn't that it had been on the market very
21 long and had not sold, just he was preparing it to be
22 sold; is that correct?

23 A. That's what he said, yes, sir.

24 Q. And apparently Mr. Gilden learned that, too, you
25 and Mr. Gilden talked about the fact it was being

1 prepared for sale?

2 A. Yes, Mr. Gilden had that in his investigation as
3 well.

4 Q. Now, when you called Ms. Kaufman of First Citizens
5 Bank of the Columbia office and told her that she had to
6 submit a Proof of Loss, did you also tell her the claim
7 was being denied on the intentional acts?

8 A. No, sir.

9 Q. Did you get asked that question when your
10 deposition was taken July the 23rd, 2010?

11 A. I believe I did.

12 Q. You were present yesterday when the deposition was
13 read and that portion where you said that you had told
14 both of the mortgage companies that you were denying the
15 claim for Mr. Fowler because of intentional acts and
16 that that was the same thing as telling him that he had
17 burned the house. Do you remember that portion of your
18 deposition?

19 A. Sir, I do.

20 Q. Do you need to see that, sir?

21 A. I do remember that portion. And I looked back at
22 it, and put a lot of thought into it and a lot of
23 review, and I don't believe I told Mrs. Kaufman this was
24 denied for the intentional acts exclusion. And I know
25 that came up in the deposition but I don't think I was

1 correct on that part. I know for sure that I told
2 Mr. Evatt that.

3 Q. So you were under oath at the deposition; is that
4 correct?

5 A. Yes, sir.

6 Q. And you were prepared for the deposition by
7 Mr. Murphy?

8 A. I was.

9 Q. And that's what your answer was at that time?

10 A. Yes, sir.

11 Q. And your answer today is different about your
12 conversation with Ms. Kaufman?

13 A. Yeah. I spent time reviewing it because I know it
14 was important. I wanted time to go back and look in my
15 notes and think about it. And I didn't have any of the
16 concerns or issues with Mrs. Kaufman and didn't explain
17 to her any about why we were denying this claim..

18 Q. Are you saying today you did say that to Mr. Evatt
19 of Citi Financial?

20 A. I did. I explained to him, I told him specifically
21 that the claim was being denied under the intentional
22 acts exclusion after his persistence in knowing why the
23 claim was being denied.

24 Q. And you do admit that that's the same thing as
25 telling him that Mr. Fowler had ignited the fire at his

1 own house. You still admit that?

2 A. I admitted that in my deposition, yes, sir.

3 Q. Do you still admit that?

4 A. I don't completely agree, but I see where I
5 answered that in the deposition, that's what I said.

6 Q. So you are standing by what you said in your
7 deposition?

8 A. That's what I said in the deposition.

9 Q. Now, very briefly, you said that you had estimated
10 that the cost to rebuild this house would be \$123,193?

11 A. Yes, sir.

12 Q. And do you remember our talking about that in your
13 deposition?

14 A. I do.

15 Q. Before we go back to the deposition, is it true
16 that the way you made that determination was to use this
17 on a computer program and input information which you
18 had on that first or second day of your investigation?

19 A. Yes, sir.

20 Q. That was done the first or second day of the
21 investigation?

22 A. It was the first day when I was on-site.

23 Q. And did you say that you believed at that time that
24 the house was 1,398 square feet and that's what you put
25 into the computer?

- 1 A. I did.
- 2 Q. Does that calculate to 88 dollars per square foot
- 3 for building of the house --
- 4 A. I did read that --
- 5 Q. 13,000 by 1,398, is that roughly what you thought
- 6 the price would be?
- 7 A. If that's the math, yes, sir.
- 8 Q. Did you later learn the house was actually bigger
- 9 than that?
- 10 A. During my deposition you provided a sketch that
- 11 showed it was bigger than that.
- 12 Q. Yes, sir. If you put in the wrong size of a house,
- 13 I mean, the computer program would come out with the
- 14 wrong price, at least because size is one factor?
- 15 A. It would.
- 16 Q. And did you put in any information about the oak
- 17 cabinets or special size?
- 18 A. I addressed the cabinets.
- 19 Q. As best you could?
- 20 A. Sure.
- 21 Q. And did you put in the thickness of the plywood?
- 22 A. Which plywood?
- 23 Q. Not the thickness of the plywood, the thickness of
- 24 the wood which was used for the cabinets.
- 25 A. I addressed the cabinets in the estimate.

1 Q. Did you make the calculation yourself?

2 A. The computer program plugs in, takes in square
3 footage and all the factors that I add in and applies a
4 price for rebuilding that by zip code and with local
5 pricing.

6 Q. If the size of the house according to
7 Mr. Flanagan -- I'm getting all of these names confused.
8 I apologize to you for saying the wrong name -- if
9 Mr. Fowler's house was really 1,722 feet, using your 88
10 dollars per square foot calculations, would that mean
11 that the house really would cost \$151,744.16 using your
12 calculations?

13 A. If that's the math that you figured, on that caveat
14 if you had done the math correctly.

15 Q. Well, if 88 dollars per square foot was not the
16 right per square foot construction cost, and some figure
17 like a hundred dollars per square foot was more
18 accurate, wouldn't that raise the price of
19 reconstruction?

20 A. It would.

21 Q. And does the computer program that you have
22 calculate the cost of debris removal before you can
23 rebuild?

24 A. I did.

25 Q. Now, in your deposition, you had said that you had

1 never personally been in the construction business?

2 A. That's true.

3 Q. And all you relied upon was this computer program

4 which was somewhere within the company or three

5 individuals. Do you remember the names of MSB?

6 A. We also use another program, Xactimate, and I've

7 done training since I've been with Nationwide on repair

8 and rebuilding.

9 Q. So are you prepared to -- well, you already said
10 that you never actually built a house yourself or been
11 in the building industry at all?

12 A. That's true.

13 Q. But you did also say that the, there was, based
14 upon your investigation, it would be necessary to
15 inspect damage to the driveway and to the Koi pond and
16 some other structures which would implicate Coverage B
17 on this policy; is that correct?

18 A. If the rebuilding was actually done, yes.

19 Q. And is it, the calculation of that figure was
20 \$15,500 as part of your pre-settlement authority
21 request?

22 A. Yes.

23 Q. Now, isn't it your position and the company's
24 position that once you denied Mr. Fowler's claim,
25 unofficially or officially, the mortgage company became

1 the insured, took the place of the insured and therefore
2 they had to submit a Proof of Loss themselves?

3 A. That's correct.

4 Q. Now, is it your testimony also that you try to
5 follow the property best claims practices document?

6 A. Yes, sir.

7 Q. Let me show you that document or a copy of it which
8 has been provided to us and ask you to look at Page 5 at
9 the spot which I've marked with this sticker, the line
10 right here, and ask you to read that sentence.

11 A. Sure (reading): This is under investigation.
12 Coverage investigation. Insureds are apprised of all
13 applicable coverages, coverage issues, and of potential
14 excess exposure.

15 Q. Now, you just said a moment ago that Citi Financial
16 became in the position of as an insured because
17 Nationwide had denied Mr. Fowler's claim. Does what you
18 have just read to the Jury indicate that you should have
19 advised Citi Financial as the substitute insured about
20 this extra coverage under Coverage B if the house was
21 repaired?

22 A. No, sir. Mr. Evatt made it pretty clear that they
23 weren't gonna rebuild the house, so no insureds would
24 have incurred any of that damage to Coverage B.

25 Q. Did you tell them that that coverage even existed?

1 A. It wouldn't matter. They weren't gonna rebuild the
2 house.

3 Q. Well, did you tell them about the potential
4 coverage as this manual -- if I can use the word
5 "manual" -- these guidelines tell you you were supposed
6 to advise them?

7 A. Mr. Evatt wasn't concerned about any further
8 coverages.

9 Q. Well, let me ask you to answer my question first
10 and then I'll let you explain whatever you'd like. But
11 is it true that you did not tell Mr. Evatt about the
12 additional coverages?

13 A. No, I didn't tell Mr. Evatt about Coverage B, C, D,
14 landscaping, debris removal, biological deterioration,
15 additional living expense, or any of the other coverages
16 because Mr. Evatt was very clear with me that he was not
17 gonna rebuild that house, that Citi Financial wasn't
18 interested.

19 Q. If you told him that this other coverage existed
20 for debris removal and the other structures and the
21 landscaping, that would run the number that he could get
22 from you up over the limited amount that you paid him
23 which he thought he was gonna get because the basic
24 Coverage A was only 154,000.

25 A. That would only apply if they were gonna rebuild

1 the house.

2 Q. But they might have changed their mind about
3 rebuilding if you told them this was a possibility to
4 get enough money.

5 A. Mr. Evatt wasn't interested in rebuilding the house
6 for Citi Financial. He wasn't. A hundred thousand
7 dollars had gone to First Citizens already. Citi
8 Financial wasn't interested in rebuilding the house.

9 Q. Just to make it clear, you decided not to tell him
10 because you thought he was adamant so you didn't tell
11 him, even though this guideline says that you should
12 tell the insured?

13 A. He made it clear in my business relationship with
14 him that he was not interested in rebuilding that house.

15 THE COURT: Just a minute. I think we have a
16 little problem in the way the process of questioning has
17 been done. Ask a question, Mr. Belser.

18 Answer the question.

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: Then you may explain your answer.

21 THE WITNESS: Yes, sir.

22 THE COURT: Now, if you would, sir, let's put this
23 question to bed.

24 BY MR. BELSER:

25 Q. You did not apprise Mr. Evatt and Citi Financial of

1 all applicable coverages as required, as stated you
2 should do in this matter?

3 A. I did not tell him of Coverage B because he was not
4 interested of rebuilding the house and that would not
5 become an incurred damage.

6 Q. And the only thing you told him was a balance under
7 Coverage A?

8 A. Yes, sir. That's what I told him.

9 THE COURT: Thank you, sir.

10 MR. CLINCH BELSER: Thank you very much.

11 Redirect Examination by Mr. Murphy:

12 Q. Was Coverage B, quote, applicable, end quote, to
13 the Citi Financial claim?

14 A. It was not. Citi Financial was only interested in
15 Coverage A.

16 Q. So was what you did consistent with the best claims
17 practices just read to you?

18 A. It was.

19 MR. MURPHY: Thank you. Nothing further, Your
20 Honor.

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

22 THE WITNESS: Thank you, sir.

23 (Witness leaves stand.)

24 MR. MOORE: May it please the Court, at this time
25 the Defendants would call Mr. John Holecek.

1 Whereupon,

2 John Bruce Holecek,

3 Having first been duly sworn, was examined and testified
4 as follows:

5 Direct Examination by Mr. Moore:

6 MR. MOORE: Please state your full name for the
7 record.

8 THE WITNESS: John Bruce Holecek.

9 THE COURT: Excuse me. Also, if you could spell
10 your name for the record.

11 THE WITNESS: H-o-l-e-c-e-k.

12 THE COURT: Very good. Thank you, sir.

13 By Mr. Moore:

14 Q. Mr. Holecek, could you just give the Jury a very
15 brief personal background about yourself.

16 A. Sure. Well, I'm from South Carolina. I was born
17 in Charleston. I lived in Columbia, South Carolina, all
18 my life pretty much. I'm married, been married about 30
19 years, and I've got two children, a 13-year-old boy in
20 middle school, and a 22-year-old daughter who's serving
21 her Country in the Army.

22 Q. Could you give us a little bit about your
23 professional background?

24 A. Well, I am a mechanical engineer. I am a
25 Registered Professional Engineer in South Carolina and a

1 number of other states. I have worked prior to being in
2 forensics. I've worked building industrial equipment
3 but also building a lot of heating appliances, gas-fired
4 heating appliances, and came to work in the forensics
5 business.

6 Q. You use the term "forensics" and I'm not sure that
7 term has been used in the courtroom. Could you tell the
8 Jury, tell us what forensics means?

9 A. Basically what forensics means is dealing with
10 incidents, things that happened after the fact to try
11 and determine what happened. It's used a lot, of
12 course, in medical things and in shows, and a lot of TV
13 shows and so forth are in regards to forensics.

14 Now, I'm in engineering forensics, so we look at
15 engineering-related things, after maybe there's been a
16 loss, a fire or something, and we try to determine what
17 happened, and sometimes we try and determine why it
18 happened and sometimes why it happened and who's
19 responsible for it.

20 Q. You mentioned a professional engineer. Could you
21 tell us what it means to be a professional engineer in
22 South Carolina?

23 A. Well, to be a professional engineer means that,
24 first means you have certain educational requirements
25 that you have to meet. Generally speaking, that's a

1 four-year degree from an accredited engineering school,
2 like Clemson, South Carolina, schools like that. Beyond
3 that, there's an initial test that you take, that's an
4 eight-hour, all day test, it's pretty tough, that you
5 take when you first get out of school. Then there's a
6 period of time that you actually practice as an engineer
7 under another professional engineer, that's about four
8 years before you're allowed then to take another test,
9 which is a pretty tough test, also, and when you pass
10 that, then you are able to call yourself a professional
11 engineer and things that go with that.

12 Q. In how many states are you registered as a
13 professional engineer?

14 A. I think it's seven, it's right around that number.

15 Q. Do they have tests in every state or do some states
16 have reciprocity?

17 A. They have, the states have reciprocity. You don't
18 have to take the test every time, thank goodness.

19 Q. Now, do you have an advanced degree as well?

20 A. I do. I have a Master's Degree in Engineering from
21 the University of South Carolina.

22 Q. Now, you also have a background in fire cause and
23 origin investigation?

24 A. Yes, sir, I do.

25 Q. And what is your background?

1 A. Well, when I came to work at the Warren Group,
2 basically it's a forensic engineering firm, and getting
3 into that business, it's just a fact that a lot of bad
4 things happen due to fires, so in that business dealing
5 with fires is something that you do a lot.

6 When I came to work at the Warren Group, I actually
7 studied the process of fire investigation under other
8 fire investigators for a period of time. I took some
9 classes in fire investigation and I became a certified
10 fire and explosion investigator. I had to take a test,
11 a class and a test that showed that I had knowledge in
12 that regard and that I was competent to do that. But it
13 allows me to investigate the cause and origin of fires.

14 Q. What is the entity that certifies you as a fire and
15 explosion investigator?

16 A. The National Association of Fire Investigators.

17 Q. Are you a member of any other professional
18 organizations that involve either engineering or fire
19 investigation?

20 A. Yes, sir. I'm a member of the International
21 Association of Arson Investigators and the National Fire
22 Protection Association.

23 Q. Have you been a speaker on topics involving
24 forensic engineering issues or fire cause and origin
25 issues?

1 A. Yes, sir, I have.

2 Q. As it pertains to this case, in what fields do you
3 hold yourself out as an expert witness?

4 A. As an expert witness in matters of mechanical
5 engineering and fire origin and cause investigation.

6 MR. MOORE: Your Honor, at this time I would just
7 refer to the Court's Exhibit, which is Exhibit 5, which
8 contains Mr. Holecek's qualifications, and we won't go
9 through them at length, and we would at the time move to
10 qualify Mr. Holecek as an expert in the field of
11 mechanical engineering and fire cause and origin
12 investigation.

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

14 THE COURT: All right. Without objection, the
15 Witness will be qualified in the field of mechanical
16 engineering and fire cause and origin investigations.
17 Again, this Witness's testimony, as any other Witnesses'
18 testimony, is all for your determination.

19 By Mr. Moore:

20 Q. Mr. Holecek, do you recall when you were first
21 contacted and by whom you were first contacted regarding
22 this case?

23 A. Yes, sir. It was by yourself. And to the best of
24 my recollection it was September, I believe, or maybe
25 even early October, right in that range.

1 Q. And what did I ask you to do in this case?

2 A. You asked me to conduct an investigation and
3 determine whether I felt that a kerosene heater that had
4 been found in Mr. Fowler's home, some problem with it
5 had, in fact, caused fire that burned his home.

6 Q. And in performing your investigation, just very
7 briefly because we will go through it in a little bit
8 more detail, what did you do and what did you review to
9 come to your final opinion?

10 A. Well, I reviewed a number of documents that relate
11 to the matter, depositions, some examination-under-oath
12 documents or transcripts. I looked at photographs and I
13 did research, I did testing, I investigated UL listings
14 for the products, and a number of things like that.

15 Q. Okay. Did you do sufficient research to arrive at
16 an opinion to a reasonable degree of engineering
17 certainty and certainty in the field of cause and origin
18 investigation as to whether the heater in Mr. Fowler's
19 home was involved in this fire?

20 A. Yes, sir, I did.

21 Q. And what was the overall conclusion that you
22 reached?

23 A. That the heater did not cause the fire, that there
24 was some problem with the heater, it didn't cause the
25 fire that burned Mr. Fowler's home.

1 Q. What about a normally operating heater? Was there
2 a possibility in your opinion that a normally operating
3 heater could have caused this fire?

4 A. No, sir, there is not.

5 MR. MOORE: Okay. Your Honor, at this time I would
6 ask if the Witness could step down to the easel.

7 THE COURT: Certainly.

8 (Witness leaves stand.)

9 By Mr. Moore:

10 Q. The first is Defendant's Exhibit 2.1. Could you
11 identify this?

12 A. That is a name plate off the kerosene heater that
13 was found in Mr. Fowler's home.

14 Q. What are the items of significance on this page --
15 excuse me -- on this photograph?

16 A. Well, there are a number of items of significance
17 to me. One, the manufacturer and the model number of
18 it, which enabled me to research the heater to see if
19 there were any re-calls for known problems with this
20 particular heater. The heat generation rate, that's the
21 quantity of energy that the unit would put out in the
22 home.

23 Q. Could I interrupt you? I'm sorry.

24 A. Sure.

25 Q. Because you mentioned the re-call, the research you

1 did. I just want to make sure you answered the
2 question. Did you find any re-calls with regard to this
3 heater?

4 A. No, I did not.

5 Q. Okay. I'm sorry I interrupted you. What else with
6 regard to heat generation was significant?

7 A. Well, the heat generation, that gives the quantity
8 of energy that the heater is capable of putting into a
9 home or to generate. Tank capacity and fuel consumption
10 together would lead you to the heating duration which
11 would tell you how long the heater could run basically
12 on a tank of fuel. The fact that it's UL listed is very
13 important to me as an engineer in evaluating the
14 appliance, also.

15 Q. Let me ask you a few specific questions. With
16 regard to heat generation, can you compare for the Jury
17 the heat generation of a 10,000 BTU heater versus a
18 33,000 heater?

19 A. Well, certainly it's a third. That's pretty simple
20 math. But it's, because it's a lower BTU rating, it's
21 gonna be less likely, you know, to cause overheating in
22 its surroundings, typically.

23 Q. Okay. What about the capacity to heat a 1,700
24 square foot area? Would a 33,000 BTU heater have that
25 capacity?

1 A. A 33,000?

2 Q. Yes, sir.

3 A. It, certainly more so than a 10,000 one, yes, sir.

4 The way I think of that as an engineer is a 10,000 BTU
5 an hour heater like this one is on a ballpark of around
6 a third of the heating capacity that a normal furnace
7 would have in a home like that, whereas a 33,000 BTU an
8 hour furnace would be along the lines of a normal
9 furnace that might be in a home of that size.

10 Q. The tank capacity and fuel consumption, what do
11 those two things tell us with regard to how long this
12 heater can burn?

13 A. Well, basically the fuel consumption is so many
14 gallons per hour. It's a little bit like miles per
15 gallon in your car. If you're gonna go so many miles,
16 that tells you how big a tank of gas you need. But
17 really it's simply that if you have so much fuel in the
18 tank and it's consuming so much fuel per unit of time,
19 per hour, it can only run for so long, in this case
20 about 13 hours.

21 Q. Okay. And if the testimony has been that it would
22 run just below the point where it would smoke, about how
23 long could this kerosene heater run on a single tank of
24 kerosene?

25 A. I wouldn't believe that it would run longer than 13

1 hours, that amount of time or less.

2 Q. Okay. The manufacturer, Hamai. Am I pronouncing
3 that correct, even.

4 A. That sounds good to me.

5 Q. Did you do research on Hamai?

6 A. I did.

7 Q. What research did you do on Hamai?

8 A. Well, I tried to locate them and I put some
9 considerable effort into it, frankly, and I came to
10 realize they no longer make these sorts of heaters. I
11 believe they exist in Japan, but don't have anything to
12 do evidently with kerosene heaters anymore.

13 Q. Did you try to find a heater just like this?

14 A. I did that. I tried to find one. In fact, I found
15 one very similar to it to do some testing.

16 Q. Okay. I'd like to direct your attention to Exhibit
17 2.2. What do we see in this photograph?

18 A. Well, to kind of preface the photograph. One of
19 the things that I did in trying to analyze the situation
20 is to conduct some testing in our laboratory down in
21 Columbia. I searched around and found the closest
22 heater that I could to the heater that was in
23 Mr. Fowler's home. And I obtained it, I set up a test
24 apparatus, basically a wall, carpet, towel, I actually
25 put some vinyl wall covering on it and I ran some tests

1 to see how hot it could get behind it.

2 Q. Okay. Now, was there any significant difference
3 between the characteristics of this heater and
4 Mr. Fowler's heater?

5 A. In my expert engineering opinion, with respect to
6 its ability to generate hot temperatures on the wall
7 behind it and so forth, no.

8 Q. What was the BTU rating on this heater?

9 A. 10,000 BTUs an hour, just like Mr. Fowler's.

10 Q. And what was the relative footprint of this heater
11 versus Mr. Fowler's heater?

12 A. Not exactly the same but very similar. Not enough
13 of a difference to really be appreciable.

14 Q. Was this the closest one that you could find?

15 A. It is.

16 Q. Now, was there a difference in the back of this
17 test heater versus Mr. Fowler's heater?

18 A. There is a little bit of a difference in that. And
19 if you look at this heater, you can see on the very top
20 of it, up here, that this heater doesn't have slots on
21 top of it, and if you look at Mr. Fowler's heater, it
22 does. All that means is that the area that's behind the
23 reflector in this heater, is in this heater is vented
24 out to the back, where in Mr. Fowler's heater it vents
25 upwards. Really, frankly, that difference would make

1 this heater tend to heat up the wall more than

2 Mr. Fowler's heater, not less.

3 Q. All right. Now we talked about the testing that
4 you did. Just very briefly, tell the Jury what you
5 learned, and how many tests did you perform?

6 A. Well, I performed three tests that I actually
7 measured temperatures on. I actually ran the unit more
8 than that just getting familiar with it and so forth.
9 But I ran three tests where I was actually using
10 instrumentation measured temperatures on the wall behind
11 it, within the wall behind it and looking actually at
12 the back of the heater.

13 Q. Okay. Now we're looking at test one. What was
14 this test that you did?

15 A. Basically it was a test I set up and ran for a
16 little over three hours, three and a half hours, I
17 suppose that is, approximately, and I ran the unit
18 basically at full output, and this graph shows the
19 temperatures. You can see the temperatures over here.
20 For instance, up in this area starting at about 80
21 degrees up to 130 and along this horizontal axis is
22 time. It's just a graph of temperature over time.

23 Q. Now, was this an effort to test Mr. Ross's theory
24 about how the fire started?

25 A. Yes, it was.

1 Q. And from reading Mr. Ross's deposition, what did
2 you understand that you were testing, what was his
3 theory that you were testing?

4 A. Well, one of his theories was that it's an
5 excessive amount of heat, or the heater was so close to
6 the wall behind it that it overheated the wall behind
7 it, which, one of his theories was that gypsum board,
8 basically drywall that people are familiar with,
9 deteriorated and actually fell off the wall and then the
10 wood studs that were behind it caught on fire. So
11 that's one of the theories that he had.

12 Q. Before I ask you to undertake this testing and
13 research. Do you have an idea of the temperatures it
14 would take to cause gypsum board to fall off the wall?

15 A. Yes, sir, I do.

16 Q. And what kind of range were you thinking?

17 A. Oh, basically fire exposure conditions, you are
18 talking about like 1,400 degree kind of temperature,
19 very hot.

20 Q. Did you do some research to confirm that opinion
21 that you have?

22 A. I did, yes, sir.

23 Q. What sources did you consult for that?

24 A. Well, I looked at a number of different sources. A
25 particular one is a book called *Forensic Fire*

1 *Reconstruction* by Icove, and DeHaan is one resource that
2 I used. But I knew that already, quite frankly.

3 Q. The DeHaan, the author of another volume that we've
4 talked about, *Kirk's Fire Investigation*?

5 A. Yes, sir.

6 Q. And you consider that to be a reliable source for
7 that kind of information?

8 A. Yes, sir, I do.

9 Q. And did you also explore Mr. Ross's other possible
10 theory in his deposition that somehow the gypsum board
11 ignited?

12 A. Yes, sir, I did.

13 Q. And did you have an idea before I contacted you
14 about the temperatures it would take to ignite gypsum
15 board?

16 A. Yes, sir, I did.

17 Q. And what kind of temperatures are we talking about?

18 A. Well, one of the things to be clear on, is gypsum
19 board itself, the interior material in gypsum board, is
20 basically very similar to Plaster of Paris. It doesn't
21 really burn itself. What burns on gypsum board are the
22 coverings on it. Drywall or gypsum board typically has
23 a paper facing on it, that's what burns. Or, if it has
24 a wall covering, like a vinyl wall covering or paint or
25 something like that, that's really what's gonna burn.

1 Q. Is that why you put some vinyl wall covering on
2 your test heater?

3 A. Yes, sir, it was.

4 Q. Now, what type of temperature did you need to get
5 to ignite the wall covering?

6 A. Typically, on a radiant exposure like this, 600
7 degrees Farenheit, the temperature is quite hot.

8 Q. Okay. And so you measured, at least in test one,
9 what was the highest temperature that your thermocouples
10 measured on the wall or the inside of the wall?

11 A. In test one, around 95 degrees, a little over 95
12 degrees, approaching a hundred, approximately.

13 Q. This blue line, explain what that is actually
14 measuring.

15 A. That is actually the temperature on the back of the
16 heater itself. That's not the wall. That's the metal
17 back of the heater.

18 Q. Okay. So what was about the highest temperatures
19 you were getting right on the back of the heater?

20 A. A little over 130 degrees. Less than 135 degrees.

21 Q. Did your testing reach what could be called a
22 steady state?

23 A. Yes, sir, it did.

24 Q. What does a steady state mean?

25 A. Steady state simply means that things aren't

1 changing anymore. That the temperatures have risen to a
2 point and leveled off and that whatever level you are
3 dealing with isn't variant anymore.

4 Q. Okay. Now, to equate these temperatures on the
5 very back of the heater, can you equate that for us to
6 what we might feel if we might touch a temperature that
7 high?

8 A. Yes, sir, I can. The -- and I've known this for
9 years because I dealt with heating appliances for a long
10 time. Most people, their subjective sort of feeling of
11 what's hot, like you can put your hand on something and
12 go, ooh, that's hot, is around 140 degrees. And people
13 can be scalded by water that's not quite that hot, maybe
14 120 degrees, especially if elderly or young, but most
15 people at around 140 degrees go, ooh, that's hot, they
16 don't want to put their hands on it.

17 Q. Are these temperatures hot enough to ignite
18 drywall?

19 A. No, sir, nowhere near.

20 Q. Are these temperatures hot enough to cause drywall
21 to collapse?

22 A. No, sir, no.

23 Q. If the drywall had somehow collapsed, are these
24 temperatures hot enough to ignite a wood stove behind a
25 wall?

1 A. No, sir, they aren't.

2 Q. You did two other tests as well?

3 A. Yes, sir, I did.

4 Q. Okay. With regard to test number two, what did you
5 do differently at the end -- I'm sorry, I didn't ask
6 this question. When you started your testing, how far
7 from the wall did you set your heater up?

8 A. I set it up at about three inches. I think
9 Mr. Fowler had given a little bit of a range here and I
10 made it the closest, that little distance right here
11 from the back of the heater to the wall was three
12 inches.

13 Q. And, once again, then, did you get the same results
14 for most of the tests of number two?

15 A. Yes, sir, essentially I did.

16 Q. And then at the end of test number two, what did
17 you do to change the configuration?

18 A. Well, you know, as an engineer, I'm thinking of
19 things, well, what if maybe Mr. Fowler's recollection
20 was wrong, maybe it was closer to the wall than he
21 recollected. So I just pushed it up to where the thing
22 was literally, the pan, the little drip pan at the
23 bottom of the heater, was touching the wall. And it
24 made a slight increase in the temperature maybe about 5
25 degrees at one point on the wall but practically

1 speaking not a big difference.

2 Q. Are the temperatures in test number two sufficient
3 to either cause drywall to fall off a wall, cause
4 drywall to ignite or cause wood to ignite?

5 A. No, sir, they're not.

6 Q. I forgot to ask you, would auto emission
7 temperatures, did you also have an idea before I called
8 you about the ranges it would take for wood studs to
9 auto ignite from radiant heat?

10 A. I did. And typically that's 600 degrees at least
11 and higher Fahrenheit.

12 Q. And that's the type of heat we're talking about is
13 radiant heat from the back of the heater; isn't that
14 right?

15 A. That's correct.

16 Q. Now, and, so, you have been assuming that there was
17 no drywall there. Is the heat of the heater from
18 radiant heat up against the stud or very close to a stud
19 sufficient to auto ignite the stud?

20 A. No, sir, it's not.

21 Q. And by how many hundreds of degrees would it be
22 short?

23 A. You are talking about 450 degrees, roughly
24 speaking.

25 Q. And that's assuming that there's no drywall in

1 between?

2 A. That's correct.

3 Q. Did you further document your testing?

4 A. Yes, sir, I did.

5 Q. And what is this Exhibit 2.6?

6 A. This is an ion thermal image of the test setup.

7 And maybe some of you folks have seen this sort of thing
8 before, but really it's a special camera that can look
9 at the radiant energy off of a surface and it can tell
10 the temperature of that surface in a non-contact manner.
11 And really I did this because I wanted to make sure that
12 the places where I put my thermocouples, my temperature
13 measuring devices, that hadn't just sort of by luck or
14 unluck, whichever way you want to look at it, by
15 happenstance picked a particularly cool spot. I just
16 wanted to be sure that I had a good feeling for the
17 temperatures back there.

18 Q. So when we look at this exhibit, we do see that it
19 looks like there may be a hotter spot away from where
20 your thermocouples were?

21 A. That is true. But that is solely the function of
22 the slot. If you'll recall, I said this heater that
23 I've tested with had slots that directed hot air out of
24 the back of it, whereas Mr. Fowler's directed that up.
25 So there is one little difference in it. But that

1 particular, you know, observance or that particular
2 thing wouldn't be the case on Mr. Fowler's heater
3 because it didn't discharge hot air out of the back of
4 it.

5 Q. You said that hot air, that it took the air that's
6 coming out of the back of this heater is not actually
7 from the cabinet, it's from the back of the cabinet
8 compartment, correct?

9 A. That's correct.

10 Q. So using this analysis from the infrared?

11 A. Yes, sir.

12 Q. Were you able to further confirm your conclusion
13 about whether radiant heat from a heater could ignite
14 drywall or stud?

15 A. Yes, sir, I was.

16 Q. And did it confirm it?

17 A. It did confirm it, that no, it couldn't.

18 Q. Okay. I have three photographs. But besides
19 evaluating Mr. Ross's theory, did you also inspect the
20 heater to determine whether there could have been some
21 malfunction in the heater?

22 A. Yes, sir, I did.

23 Q. Okay. Could you explain to the Jury what you
24 found?

25 A. Well, you know, in trying to examine this and

1 investigate whether it was likely that this heater was
2 either malfunctioning or in a normal mode caused a fire
3 I was trying to think of any possible way that the
4 heater could cause a fire, one of which, for instance,
5 was flaring or some sort of over-fired condition that
6 might have existed.

7 Now, if those sorts of problems occur, they
8 typically will leave some indication of that. I'd see
9 soot, typically there's some degree of sooting or
10 warpage, overly oxidized metal on reflector, things like
11 that, that I didn't see in this case.

12 Q. Did you look at the photographs from the fire scene
13 before the heater had been disturbed?

14 A. Yes, I did.

15 Q. Did you see any of the sooting on the --

16 THE COURT REPORTER: I'm sorry. I'm having trouble
17 hearing.

18 (Discussion off the record.)

19 MR. MOORE: I apologize.

20 THE COURT REPORTER: Thank you.

21 By Mr. Moore:

22 Q. Did you see photographs of the heater in
23 Mr. Fowler's residence before it had been disturbed?

24 A. Yes, sir.

25 Q. Okay. And did you see sooting on the heater in

1 these photographs?

2 A. Not in a significant degree that I think would be
3 associated with some malfunction in the heater, no, I
4 did not.

5 Q. Did you perform a test to show what sooting you
6 would expect on a heater if there was combustion right
7 around the base of the heater?

8 A. Yes, I did.

9 Q. Okay. And explain what we see in this photograph
10 to the Jury.

11 A. Basically this is a photograph of a little test I
12 took. It's actually after the test. Basically what I
13 did was I took a pan, a painted pan, and I laid it down
14 on a piece of carpet, and between the pan and the carpet
15 was a towel, and I had taken that towel and put some
16 kerosene on it, but I wrang it out really good. It
17 wasn't dripping kerosene or anything by any stretch. I
18 wrang it out as strong as I could.

19 And I set it up underneath there. I put some
20 bricks on it to kind of give it a little weight such
21 that it was bound like the weight of the kerosene heater
22 would normally cause it to be and I lit it with a match.

23 And, of course, it burned, and it was a flaming
24 combustion and sort of a sooty flaming combustion which
25 left, well, it didn't burn the edge of the pan, it left

1 soot around the edge of the pan and the bricks, the same
2 sides where the side of the heater might be.

3 Q. So what is actually the soot that we see, what is
4 that a product of?

5 A. Well, soot is really a -- what it is, it is the
6 incomplete products of combustion from a fire that's not
7 burning at a good fuel-air ratio, a rich ratio.

8 Q. If this heater had had some problem around it,
9 whether a flare or something like that, would you expect
10 to see soot like that on the heater?

11 A. I would, yes, sir.

12 Q. Now, you also looked at the back of the heater and
13 one of the sides of the heater, correct?

14 A. Correct.

15 Q. And what did the pattern -- do you understand,
16 Mr. Holecek where in Mr. Fowler's residence would have
17 been at this angle? Well, that's a poor question.

18 What room was over here in Mr. Fowler's residence?

19 A. My belief is that corner of the heater would have
20 been directed towards a hall that goes, maybe a short
21 one, that goes towards the kitchen.

22 Q. And did you make an evaluation of whether the
23 patterns on this heater had any role in causing this
24 fire?

25 A. I did make an evaluation of that.

1 Q. And what was your evaluation?

2 A. I don't believe these patterns are, have anything
3 to do with the start of the fire. I believe these
4 patterns all have arisen from exposure to a fire that
5 started somewhere else.

6 Q. And why do you believe that?

7 A. Well, a couple of reasons. One is that -- one, if
8 you look at the -- let's just start with the pattern
9 that's on the side in here. One, there's really no
10 mechanism for the heater itself, and it's not
11 malfunctioning, there's no evidence that this heater
12 malfunctioned. There's no real mechanism for the heater
13 itself to get hot enough to make that kind of pattern.

14 The other thing is that that pattern to me is
15 indicative of a radiant heat exposure, not a heat
16 exposure where something is actually burning in the
17 heater. And the reason I come to that conclusion is if
18 you look at it, look at the edges of the pattern, it's
19 technically what I would call diffuse. It blends out
20 over a considerable area of further degraded paint.

21 Whereas if you contrast that with this pattern, we
22 have a very small area to go from good paint to entirely
23 burned. This in contrast to the other pattern to me
24 came from contact, some hot debris actually fell down
25 and contacted the heater at that point.

1 Q. Now, can you determine that this was debris that
2 was burning when it came down as opposed to debris that
3 came down and spread the fire?

4 A. Yes, sir, I can.

5 Q. And how did you determine that?

6 A. There are a couple of reasons for that. One is
7 that if something had fallen down there to begin with, I
8 know from my testing and I know from my UL standards
9 that this heater was tested to, that that point on the
10 heater would be hot enough to cause a fire, so something
11 combustible that fell down there would not ignite.

12 The other thing is, if I look at this, you can see
13 there's a distance between here and here. If a material
14 had fallen here and burned, you know, embers from it,
15 hot embers and things from it would have fallen down
16 here and created burning or, you know, damaged the pan
17 that's right up underneath. You don't see that. This
18 to me is indicative of there was debris already falling
19 off the wall down in this area at the time that
20 something hot fell down in here and contacted the
21 heater.

22 Q. And was that opinion confirmed by your review of
23 the photographs from the fire scene?

24 A. Yes, sir.

25 Q. I think you can return to the stand at this point.

1 (Witness resumes stand.)

2 Q. Mr. Holecek, I forgot to ask you about testing in
3 front of the heater. Did you also test a theory about
4 whether there could be enough heat, radiant heat from
5 the front of the heater that could have caused a fire?

6 A. Yes, sir, I did.

7 Q. Okay. Did you do your IR photography?

8 A. I did.

9 Q. Did you reach the same conclusion?

10 A. I reached the conclusion that the temperatures of
11 objects, for instance the sofa that was out in front of
12 the heater at Mr. Fowler's house, that would be
13 incapable of igniting that due to the radiant heat off
14 of the heater.

15 Q. You saw photographs of the sofa in the house after
16 the fire as well?

17 A. I did.

18 Q. And what was the significance of those photographs
19 in your opinion?

20 A. Other than the fact that it's not badly burned at
21 all, especially on the exposure of it that faces this
22 heater.

23 Q. Could radiant heat from the front of the heater to
24 either the carpet or the sofa in front of the heater
25 been the cause of this fire?

1 A. No, sir.

2 Q. All right. You also did research with regard to
3 the UL standard for heaters, correct?

4 A. Yes, sir, I did.

5 Q. And why did you do that?

6 A. Well, having dealt with heat producing appliances
7 in the past, I dealt with backyard barbecue grills,
8 commercial cooking appliances, a number of different
9 types of those, and actually infrared gas space heaters,
10 I know that typically heat producing appliances and
11 other forensic engineering jobs that I had are listed to
12 standards, for instance, UL 647 is the standard for
13 kerosene heaters. They have very specific tests and
14 very specific rules that those appliances have to, you
15 know, survive or they have to be able to pass these
16 tests and so forth. But I knew that a lot of those
17 tests or some of those tests involve how hot the
18 appliance gets, how capable it is of igniting things
19 that are around it. That's a common test that you can
20 do on appliances.

21 Q. And were you able to determine whether there was,
22 in fact, a UL standard in place when this heater would
23 have been manufactured?

24 A. Yes, sir, I was.

25 Q. And did you determine?

1 A. I determined that there was a standard that applied
2 and that this heater had, in fact, been tested for that
3 standard.

4 Q. Did you confirm that the UL listing Hamai heater at
5 Mr. Fowler's residence was a legitimate listing?

6 A. Yes, I did. I actually called UL and made sure
7 that it was. There have been occasions where people put
8 counterfeit UL labels on things, but that's not the case
9 here.

10 Q. And so based on the UL standard, did you determine
11 whether this heater, Mr. Fowler's heater, despite your
12 testing or despite your belief before I even called you,
13 that it would have had the capacity, that if it was UL
14 certified, to ignite either the Sheetrock or the stud or
15 cause the Sheetrock to ignite or any of the other
16 scenarios?

17 A. Well, just, really the UL standard or the fact that
18 the devices listed to the UL standard, once I got the
19 standard and read it, it puts a limit on how hot the
20 surfaces on the heater can be. The UL standard doesn't
21 allow the surfaces, for instance, the back of the
22 heater, to be any more than 90 degrees above the ambient
23 temperature, the temperature at which it is being
24 tested, which is 75 degrees according to the UL
25 standard. What that does, is it takes 75 degrees and

1 you add 90 to that, that says 165 degrees is the hottest
2 that the back of that heater could possibly be and still
3 be UL listed. So what it did is it put a limit. Even
4 though I was not able to test Mr. Fowler's heater
5 because, well, it's gone through a fire, and I couldn't
6 get a Hamal heater, it told me that there was no way
7 that the surface, the rear surface of that heater could
8 possibly have been more than 165 degrees.

9 Q. You have evaluated Mr. Ross's theories about the
10 wall ball (phonetic) and also the wall ignite; is that
11 right?

12 A. I did.

13 Q. Did you also place a thermocouple within the wall
14 to determine if there were temperatures on the stud that
15 would be sufficient for the stud to auto ignite through
16 radiant heat?

17 A. I did do that.

18 Q. And what were the temperatures on the stud within
19 the wall?

20 A. Really not very different from the wall itself.
21 They're essentially the same. Maybe a degree or so
22 cooler, but certainly nowhere near the temperatures
23 necessary to auto ignite.

24 Q. And you also tested theories about the towel or the
25 carpet igniting?

1 A. I did.

2 Q. And did you determine whether that was a
3 possibility?

4 A. I did determine that, in fact, that was not a
5 possibility, that would not have occurred.

6 Q. And you examined flare-ups from the heater and
7 material walls and did you rule those out as well?

8 A. I did.

9 MR. MOORE: One moment. Beg the Court's
10 indulgence, please.

11 THE COURT: Certainly.

12 (Counsel confer.)

13 By Mr. Moore:

14 Q. Mr. Holecek, after all of your research, after your
15 testing, and after your inspection of this heater, did
16 you come to a reasonable -- or did you come to an
17 opinion to a reasonable degree of engineering certainty
18 whether or not this heater was involved in the fire?

19 A. Yes, sir, I did.

20 Q. And what was that opinion?

21 A. That this heater did not, either through
22 malfunction or through normal function, did not cause
23 this fire.

24 Q. Did you address the overall questions of what, in
25 fact, did cause this fire?

- 1 A. No, sir, I did not.
- 2 Q. Why not?
- 3 A. I wasn't asked to do that.
- 4 MR. MOORE: Thank you, sir. Answer any questions
- 5 Mr. Belser might have.
- 6 Cross-Examination by Mr. Freeman Belser:
- 7 Q. Good afternoon, Mr. Holecek.
- 8 A. Good afternoon.
- 9 Q. We haven't met before but I've got a few questions
- 10 for you if you don't mind.
- 11 A. I don't mind in the least.
- 12 Q. Isn't it true that a substantial amount of your
- 13 work is for insurance companies?
- 14 A. No, sir, but that's not unusual. It has no meaning
- 15 to me.
- 16 Q. Because insurance companies can pay their bills,
- 17 right?
- 18 A. Yes, sir, insurance companies do pay our bills.
- 19 Q. And you have worked with Mr. Moore before, correct?
- 20 A. I have worked with Mr. Moore before.
- 21 Q. Now I would like to talk about Sheetrock or
- 22 drywall. Isn't it true that drywall is not fire
- 23 resistant?
- 24 A. Well, no, I don't agree with that. It is not fire
- 25 resistant?

1 Q. Now, like in this particular case, have you seen
2 the photographs of the where the drywall has fallen off
3 the wall and there are just the exposed studs?

4 A. Yes, sir, I have.

5 Q. So isn't it true that with sufficient heat drywall
6 will dry out and crumble and it will also burn?

7 A. Well, no, sir, I don't think -- you don't have that
8 quite right. And the truth of that is this. That
9 drywall is a fire-resistant material, and, in fact, it
10 is used for the very purpose that it is fire-resistant.
11 It chemically has water bound up in it, and it takes a
12 lot of energy to take that water out of that drywall.
13 And because of that it has a very good tendency to be
14 fire-resistant.

15 Now, a lot of times if you look at a home that has
16 been through a fire, you will see drywall off of the
17 walls. And sometimes in a very hot fire in an area that
18 has had a lot of fire exposure, yeah, it will fall. As
19 I indicated earlier, those typically require actual fire
20 exposures, where temperatures are like 1,400 degrees. A
21 lot of times firemen will pull drywall down in a search
22 for a fire extinguisher, so you've got to really look at
23 that.

24 Q. So you are saying the firemen in this case pulled
25 down the drywall?

- 1 A. I would be amazed if they didn't. They do it in
2 almost all cases, sir.
- 3 Q. Okay. So you think that all the drywall that fell
4 down in this house was pulled down by the firemen?
- 5 A. I didn't say that, no, sir.
- 6 Q. Now, isn't it true that when somebody is decorating
7 a house, that they do put wall coverings on drywall?
- 8 A. They do.
- 9 Q. Okay. So there's paint or some type of, I guess,
10 wallpaper or any type of wall covering; isn't that
11 correct?
- 12 A. That could be.
- 13 Q. That's usually what people do, right?
- 14 A. They often do.
- 15 Q. And those materials, wall coverings, do ignite,
16 those are combustible.
- 17 A. They are combustible.
- 18 Q. Because they contain hydrocarbons?
- 19 A. Well, they are combustible, that's correct.
- 20 Q. Okay. If their Sheetrock, which has paint over it,
21 falls from the ceiling, the first thing it's gonna
22 touch, if it's hot enough, the first thing it's gonna
23 touch are those combustible paints, isn't that true?
- 24 A. I think you said if drywall falls from the ceiling?
- 25 Q. Uh-huh. Yeah. If the paint is on the side you can

1 see, if it falls down, then the combustible portion is
2 gonna be covered up -- the Sheetrock is not combustible,
3 as you say, then the combustible portion is gonna be in
4 direct contact with what's on the ground; isn't that
5 true?

6 A. Well, the lower surface of it would, it would make
7 sense that that would be the first thing to contact the
8 ground if it falls flat.

9 Q. And if it's hot enough, then what's gonna happen is
10 it's gonna sit there and it's gonna melt the carpet;
11 isn't that true?

12 A. Well, that would be specific to a certain
13 situation. I believe that that could occur if it's hot
14 enough.

15 Q. If the hot enough combustible material hits the
16 carpet, it's gonna melt the carpet; isn't that true?

17 A. If it is massive enough and hot enough to melt the
18 carpet, yes, it would.

19 Q. And I believe your testing was you didn't use the
20 Hamai kerosene heater; isn't that true?

21 A. That's correct.

22 Q. Okay. And basically what you were testing was, if
23 we get the charts, was that you had heat on the Y axis
24 going up and then you had time on the X axis going
25 almost perpendicular, right?

- 1 A. Correct, on my graph, yes, sir.
- 2 Q. Yes, sir. And it looks like all of your testing
- 3 was -- the bottom is in minutes, isn't it?
- 4 A. Yes, sir.
- 5 Q. Okay. So 405 minutes. That's about how many hours
- 6 or so. That's about seven hours?
- 7 A. Yeah, I think so.
- 8 Q. Okay. So this one was seven hours?
- 9 A. Yes.
- 10 Q. This one was the wall and heater temperature which
- 11 is really what we're talking about here. You tested
- 12 that for three and a half hours; isn't that true?
- 13 A. One specific test, yeah.
- 14 Q. Okay. And this other specific test was 210 minutes
- 15 which was three and a half?
- 16 A. Three and a half hours, approximately. Yes, sir.
- 17 But I think it's important to realize that after a
- 18 certain period of time the temperature is stabilized and
- 19 there's no mechanism for it to change. You can let it
- 20 run indefinitely and those temperatures are just gonna
- 21 steady out or stay the same.
- 22 Q. And you said that if the Hamai kerosene heater that
- 23 was in Mr. Fowler's house met the UL standards, it would
- 24 have gotten up to 165 degrees?
- 25 A. No, I did not say that it would have gotten up to.

1 165 degrees. I said that it could not have gotten
2 hotter than that. My belief is it would be considerably
3 cooler than that.

4 Q. Okay. But 165 degrees is the hottest it could have
5 possibly been?

6 A. That's correct.

7 Q. But you didn't do testing at all with this
8 particular kerosene heater, did you?

9 A. No, sir. I would have taken that to be
10 potentially considered a destructive test on the heater,
11 so I did not, no, sir.

12 Q. And you said that drywall has, isn't it about 50
13 percent moisture content?

14 A. You know, I honestly don't know. You mean on per
15 volume or per pounds of mass basis?

16 Q. Either way.

17 A. It may well be. I don't know that for a fact. But
18 I do know this. Drywall is calcium sulfate dihydrate.
19 Two water molecules bound to a calcium sulfate molecule.
20 It has a lot of water in it put it that way. That's
21 what gives it its fire resistance.

22 Q. Is it fair to say, just to summarize your opinion,
23 that under the right conditions, that under a function
24 of heat and time, that that could cause a wall and the
25 drywall and the wooden materials to ignite, but that

1 there weren't the right conditions here?

2 A. Well, what you have to realize, sir, is there some
3 temperature at which drywall will ignite? Yes. Is
4 there some temperature at which wood will ignite? Yes.
5 But this heater isn't capable of generating those is
6 really what it boils down to.

7 Q. But just it's a function of heat and time; isn't
8 that correct?

9 A. Only to the extent that you exceed certain
10 threshold values. You can leave it there forever and if
11 it's not hot enough to ignite it, it won't ignite it.
12 It won't get hot enough for that to occur. It's a
13 little bit, an analogy would be say an ice cube. If
14 you've got an ice cube sitting in a freezer at 30
15 degrees, you can wait a long, long time and it's never
16 gonna melt. If you put it into a refrigerator that's 34
17 degrees, it will melt. It'll go slow, it'll take time.
18 But then if you put it in an oven, it will melt fast.
19 The point being you have to go over that threshold of 32
20 degrees of ice before you start to actually have that
21 happen.

22 Q. Do you remember your deposition taken on November
23 the 1st, 2011?

24 A. I do.

25 Q. I'd like to hand this up to the Court but I'd like

1 to ask you first. Do you remember when you were asked
2 (reading): In laymen's terms, that the more heat you
3 have, then the less time is required to degrade drywall
4 than to make a fire ensue?

5 A. Yes.

6 Q. And that the opposite is true?

7 A. Well, I do, I do recall my line of questioning and
8 my response. But I believe if you'll look at the
9 record, you'll see that prior to that statement, I
10 indicated that you would have to exceed certain
11 threshold values before that has any meaning.

12 MR. FREEMAN BELSER: I'd like to hand up the
13 original deposition transcript of Mr. Holecek.

14 THE COURT: Let the record reflect the Court is
15 opening the Original Deposition of John Holecek dated
16 November the 4th, 2011, in Columbia.

17 By Mr. Freeman Belser:

18 Q. Mr. Holecek, I'd like for you to turn to Page 26.
19 I'll read my question starting Line 25:

20 Question: The higher the heat, the lower the time.
21 And, vice versa, the lower the heat, the longer the
22 time. Is that what you are saying?

23 Read your answer beginning on Line 5.

24 A. Well, sir, I can read that, but what I would really
25 prefer to do --

1 Q. Just a moment. I'd like --

2 THE COURT: Just a moment. Answer the question,
3 which in this instance is can you read it, and then, if
4 you would, once you do that, then you may explain your
5 answer.

6 THE WITNESS: All right.

7 THE COURT: Very good. Thank you.

8 MR. MOORE: Your Honor, this is not proper
9 impeachment. Mr. Holecek hasn't changed an answer that
10 he previously gave. There is no dispute as to what he's
11 answered so far.

12 THE COURT: Well, what are you talking about?

13 MR. MOORE: I'm talking about Mr. Belser's
14 attempting to impeach the Witness with --

15 THE COURT: Is he using the prior inconsistent
16 statement?

17 MR. FREEMAN BELSER: Well, yes, sir, Your Honor.

18 THE COURT: Okay. Well, what's the inconsistent
19 statement?

20 MR. FREEMAN BELSER: Well, the inconsistent --

21 THE COURT: Well, actually, I think there's enough
22 of a question there. I'm gonna overrule your objection.

23 You may proceed.

24 By Mr. Freeman Belser:

25 Q. Okay. So let me read the question again.

1 The question: The higher the heat, the lower the
2 time, and vice versa; the lower the heat, the longer the
3 time. Is that what you are saying?

4 And please read your answer beginning on Line 5.

5 A. Well, my answer on Line 5 was: That, in laymen's
6 terms, is a reasonable statement. Yes, sir, that's
7 pretty much true.

8 But I would like to qualify that you have taken
9 that out of the context of the preceding statement I had
10 made right before that, and I don't believe it's proper,
11 that you give a proper understanding of my intent in
12 answering that question with leaving that prior
13 statement out of it.

14 Q. Okay. Now, isn't it true that you testified in
15 your deposition that with sufficient exposure to heat
16 that the damage to the -- like if the heater was sitting
17 right next to the wall and the wall was damaged, that
18 that damage could be barely perceptible?

19 A. I don't, no, sir, I don't recall saying that.

20 Q. I'd like you to turn to Page 22 of your deposition.

21 A. Would you mind repeating that question for me,
22 please.

23 Q. Sure. If the heater was hot enough, what would the
24 wall look like? Would there be any visual damage, any
25 damage that anybody walking by would be able to visually

1 see?

2 And your answer to that question was: The damage
3 could be, could range from being barely perceptible to
4 something greater than that.

5 Do you remember that?

6 A. Well, we can look at the record and go with that.
7 But I believe that that would be on a continuum of
8 different levels of heat exposure from basically an
9 inconsequential amount to an amount that would
10 potentially ignite something.

11 Q. I guess we all need to look back at the record.
12 Would you agree that the damage to the wall could be
13 barely perceptible?

14 A. No, I don't agree with that. Not damage that is of
15 substance that is a result of potentially of something
16 igniting or drywall falling off or something like that,
17 no.

18 Q. All right. I would like for you to please turn to
19 Page 22 of your deposition.

20 A. All right, sir.

21 Q. And the question was, I'm gonna read the question
22 beginning on Line 12: What type of damage would be
23 noticeable before the fire?

24 And then I would like for you to please read your
25 answer beginning on 16.

1 A. Yes, sir.

2 Well, evidently -- I think the other thing is again
3 you are taking this out of context, but in any case I
4 will read to you specifically my answer out of context.

5 Well, evidently none sufficient to have met the
6 notice of Mr. Fowler. That damage could range anywhere
7 from something barely perceptible to wall finishings
8 blistering, burning, coming off, gypsum board burning.
9 There's a broad sort of continuum for damage that could
10 occur.

11 But is it proper for me to explain the meaning of
12 that? I would like to.

13 Q. Go ahead and explain.

14 A. Okay. The meaning of that, and I was asked prior
15 to that about, you know, the heater being in place for a
16 considerable period of time, and I had used that as a
17 basis that if the heater had been hot enough to actually
18 cause, for instance, the things that Mr. Ross had said,
19 the gypsum board to fall off the wall, the wood to
20 ignite behind it and so forth, that I believe he would
21 see, have seen prior to that actually occurring damage
22 on the wall. And it's my belief and opinion prior to,
23 once the gypsum actually...board falling off or wood and
24 wall igniting.

25 Q. But if they could range from being barely

1 perceptible to something more extensive?

2 A. No, not damage. Damage that is going to result in
3 the kinds of things that Mr. Ross has opined about,
4 drywall falling off, wood catching fire and so forth,
5 no, I don't believe that. But you would see some sort
6 of perceptible damage to the wall before those events
7 actually occurred.

8 Q. All right. Mr. Holecek, you got involved in this
9 case about 60 days ago; isn't that correct?

10 A. Approximately, sir.

11 Q. And you were only asked to investigate and use your
12 credentials as an expert as a mechanical engineer and
13 also as an expert in the field of fire cause and origin
14 investigation to investigate Mr. Ross's theory; isn't
15 that correct?

16 A. Well, as I said earlier, sir, it wasn't investigate
17 Mr. Ross's theory. It was conduct an investigation and
18 determine whether I felt the kerosene heater that was
19 found in Mr. Fowler's home, either through a malfunction
20 or through normal operation, could cause a fire at
21 Mr. Fowler's house.

22 Q. Okay. So you weren't paid to determine why the
23 fire started and what caused it?

24 A. I was not asked to do that, no, sir.

25 Q. And you were not asked to evaluate Mr. Byers'

1 opinion in any way?

2 A. No, I was not.

3 Q. And you have no opinion whatsoever as to whether
4 this fire was of an incendiary origin?

5 A. No.

6 Q. So no opinion as to whether it was incendiary in
7 origin?

8 A. No.

9 Q. Now, Mr. Holecek, you have never been to 328 Frank
10 Gaillard Road, have you?

11 A. No, sir, I have not.

12 Q. And you've never operated this particular heater
13 that was in Mr. Fowler's house, you never seen that
14 operate, have you?

15 A. No.

16 Q. Now, you've never spoken with Chief David Wright
17 from the Friendship Fire Department, have you?

18 A. Not in this particular case. I do recollect on an
19 old case a while back I had met him, but --

20 Q. But not as a part of your investigation in this
21 case did you call him and ask him what he saw and what
22 he observed and what he reported on his report?

23 A. Well, I read what he reported on his report, I
24 looked at that, and I read his deposition. But, no, I
25 did not call him and talk to him.

1 Q. Okay. So, if you've not talked to him, you are not
2 aware he saw the fire venting above, in the center of
3 the house which was above the wall that burned out,
4 which was above, which was right where the V pattern,
5 which was above where the kerosene heater was. You were
6 not aware of that, were you?

7 A. No. He actually said that in his deposition.

8 Q. So you are aware of that?

9 A. Yes, I am aware of that.

10 Q. Now, just briefly here I'd like to talk about 921.
11 We've heard a lot about 921 this week. I've got a copy
12 of 921 which is the 2008 edition. Let me hand it to
13 you. Is that the edition that was in effect at the time
14 of this fire?

15 A. Yes, sir, it would have been.

16 Q. Okay. And isn't it true that 921 is the
17 well-recognized standard for fire investigators?

18 A. Yes, sir, it is.

19 Q. And it's used and respected by professional fire
20 investigators?

21 A. Yes, sir, it is.

22 Q. And it's what, in fact, you use and follow?

23 A. It is.

24 Q. And you personally agree with 921 and you are also
25 a member of the National Fire, NFPA?

1 A. Yes.

2 Q. What does NFPA stand for?

3 A. National Fire Protection Association.

4 Q. Okay. Isn't it true -- I'd like you to turn to
5 section 6.3.7.8.5 found on Page 56.

6 A. Yes, sir.

7 Q. Is that the same thing projected on the screen?

8 A. Yes, sir, it appears to be.

9 Q. Do you agree with the following statement

10 (Reading):

11 The term pour pattern implies that a liquid has
12 been poured or otherwise distributed and therefore is
13 demonstrative of an intentional act.

14 Do you agree with that?

15 A. Yes, sir, I would agree to that, I would agree to
16 that.

17 Q. Okay. The next sentence (reading):

18 Because fire patterns resulting from burning
19 ignitable liquids are not visually unique, the use of
20 the term pour pattern in reference to the nature of the
21 pattern should be avoided.

22 Would you agree with that?

23 A. I mean, ultimately pour pattern is ultimately just
24 a word, but yes, sir -- or two words technically, but
25 yes, sir, I do, I agree with that.

1 Q. You agree with that? Now, in the sentence with the
2 brackets around it (reading):

3 The presence of ignitable liquid should be
4 confirmed by laboratory analysis.

5 Do you agree with that?

6 A. I believe that an attempt should be made to do
7 that, yes, sir.

8 Q. Okay. That an attempt should be made and then
9 should be confirmed. That's different from attempt
10 should be made, isn't it?

11 A. Well, it is what it says. It should be confirmed
12 by laboratory analysis, yes. I mean, it's not always
13 the case that it will be confirmed by laboratory
14 analysis.

15 Q. Okay. But it should be confirmed. That's the
16 standard. That's the guidebook you use?

17 A. Yes, I believe so.

18 Q. Okay. And you believe in this particular case the
19 lab samples were negative?

20 A. Yes, sir. But that doesn't necessarily preclude
21 the potential or the reality that an ignitable liquid
22 may be used in a fire.

23 Q. I'd like to hand you a photograph which is number
24 36 in Doug Ross's photographs and ask if you have ever
25 seen that photograph.

1 A. Yes.

2 Q. And does that show the half of a V pattern?

3 A. Okay. And that does show, it shows the remnant of
4 a wood stud, and I believe this to be wood stud that was
5 right behind the heater.

6 Q. And the V pattern, is it your understanding that
7 half V points directly to where the kerosene heater was?

8 A. Well, it points towards that in the house, but I
9 think if you also look at this stud from the other
10 plane, you can see there also is another pattern behind
11 the area of the stud away from where the heater was.

12 Q. But one shows it is pointed right towards the
13 heater?

14 A. Certainly, sir. That's just one little piece of
15 the stud, and I think if you looked at it in the other
16 plane, you would see that it also shows a V pattern
17 pointed away from the heater.

18 MR. FREEMAN BELSER: The Jury has already seen that
19 photograph (shows briefly to Jury).

20 By Mr. Freeman Belser:

21 Q. Now, just real quickly, talk about the concept of
22 the two separate and unrelated fires. Are you familiar
23 with the concept of two separate and unrelated fires?

24 A. Yes, sir, I do, and if you have a specific
25 question, I'll be glad to answer it.

1 Q. Isn't it true that there could be two separate and
2 unrelated fires as a result of material, a drop down
3 fire burning materials falling from the ceiling to the
4 floor?

5 A. Well, in that case in a logical sense they wouldn't
6 be truly unrelated, they would have come ultimately from
7 the same fire.

8 Q. So, but just because there are two separate fire
9 locations, that could be the result of things falling
10 from the ceiling?

11 A. It could.

12 Q. So qualify that they're related but should be
13 separate.

14 Okay. Are you familiar with Page 184?

15 A. I'm familiar with it.

16 Q. Okay. The section, do you agree with Section
17 22.2.1.2 Subsection 4, which says (reading):

18 Separate fires that are not caused by multiple
19 deliberate ignitions can result from the following:
20 Fire spread by falling flaming materials, i.e., drop
21 downs such as curtains?

22 A. I am familiar with that.

23 Q. Do you agree with that statement?

24 A. And the analysis of that is a function that every
25 fire investigator goes through on a specific scene. I

1 mean, it may be two separate fires. You really have to
2 analyze that on the scene.

3 Q. Okay. And is it your understanding the roof
4 collapsed at Mr. Fowler's house?

5 A. Yes, sir.

6 Q. And is it your understanding that a large quantity
7 of materials fell from the ceiling, fell from the attic
8 down into the kitchen?

9 A. My understanding from the record is that there were
10 some materials up there that fell, yes, sir.

11 Q. And is it your understanding that the curtains also
12 fell in the living room?

13 A. I believe I recollect having read something in that
14 regard.

15 Q. Now, were you here for Mr. Byers' testimony?

16 A. No, sir, I was not.

17 Q. Now, isn't it true that you have had just very
18 brief conversations with them?

19 A. I've had essentially almost no conversations with
20 him.

21 Q. You've had almost no conversations with him?

22 A. Right. Now, when he dropped the heater off at our
23 lab, he just dropped it by our lab, I actually was sort
24 of on the way out the door and I talked to him for maybe
25 a minute or two as he transferred that heater to us and

1 that's basically it.

2 Q. Now, Mr. Holecek, we're almost finished with this
3 case and we're gonna have closing arguments and we're
4 gonna discuss whether this fire was of an incendiary
5 origin. I just want to make sure that you are offering
6 no opinion whatsoever in any way, shape, or form that
7 this fire was of an incendiary origin.

8 A. Sir, the only thing I was asked to do and the only
9 real opinion I have was to determine whether the
10 kerosene heater caused the fire, which I believe clearly
11 it did not. Beyond that I don't have an opinion with
12 regard to whether it's incendiary or not.

13 Q. So your answer to that is no?

14 A. Is no.

15 Q. Is no. Okay. And you also were asked to determine
16 in any way, shape, or form what the cause and origin of
17 this fire was, weren't you?

18 A. No, sir, I was not.

19 Q. Okay. When talking about that later on, you don't
20 have any opinion as to the fire's cause and origin?

21 A. Only to the extent that the cause of the fire was
22 some problem or normal operation of the kerosene heater,
23 no, sir, I don't.

24 MR. FREEMAN BELSER: No further questions.

25 THE COURT: Re-exam?

1 MR. MOORE: No questions, Your Honor.

2 THE COURT: All right. You may step down. Any
3 objection to the Witness being excused?

4 MR. MOORE: Thank you, Your Honor. No objection.

5 MR. FREEMAN BELSER: No objection.

6 THE COURT: Thank you, sir.

7 (Whereupon, the Witness was excused.)

8 MR. MOORE: The Defendants will rest.

9 MR. CLINCH BELSER: No reply.

10 THE COURT: Ladies and gentlemen, that concludes
11 the testimony and evidence. We now, though, have the
12 argument by Counsel and then the charge on the law.
13 After that the case will be given to you for your
14 deliberations. It's 1:15.

15 Do we have vouchers?

16 THE CLERK: They're in the break room.

17 THE COURT: If you don't mind, I'm gonna ask y'all
18 to go to lunch. I've got to go over some things with
19 the attorneys before the case is given to you, so I'm
20 gonna ask you to be back at 2:30. That gives us a
21 little more than an hour to finish what we need to do
22 and also maybe have lunch ourselves, or at least a
23 snack. So with that I'll excuse you to 2:30.

24 Now, remember, do not undertake the discussion of
25 this case among yourselves or permit anyone to discuss

1 it with you. Thank you very much and I'll see you back
2 at 2:30.

3 (Whereupon, the Jury left the courtroom at
4 approximately 1:20 p.m.)

5 THE COURT: One thing, to answer your objection or
6 whatever, a prior inconsistent statement either has to
7 be acknowledged, yes, I said it, and then it can be
8 explained. He didn't quite get around to the yes
9 answer. Yes, I don't know, or maybe I meant to say
10 something else. I think it's *State v. Johnson*. I'll
11 find it if you need it. It has to be an adoption of it.

12 And we had one witness today, I think it was
13 Mr. Byers or somebody else says I said it but on
14 reflection it's something else, but that's not an
15 inconsistency. All right. But that's just for the
16 record.

17 Now let's take a short break. What I do is even
18 while I am on the break, as soon as you get back I want
19 to go through the charges. Y'all put together pretty
20 much I guess you would say complementary charges; in
21 other words, they cover the issues and you both seem to
22 be relying on Judge Anderson.

23 MR. MURPHY: I get chastised by my associates for
24 doing that but he's pretty good.

25 THE COURT: He always gives you a thorough opinion.

1 MR. MURPHY: Erudite.

2 THE COURT: Superfluous or erudite or redundant.

3 But the point is, let's do that when you get back
4 and hopefully get that out of the way. I'm probably
5 gonna be following most of your requests.

6 MR. CLINCH BELSER: Your Honor, as a slight
7 incidental matter, I know we gave you a copy of our
8 proposed charges and I think we gave them to JR but we
9 haven't got them from JR.

10 MR. MURPHY: We didn't --

11 THE COURT: Well, this is the time we exchange them
12 when we go to the Jury. Before we get into them how
13 about doing that.

14 (Discussion off the record.)

15 THE COURT: All right. Each party has the other
16 party's charges requested.

17 MR. CLINCH BELSER: We're not quite done reading
18 them. We're going through them as fast as we can.

19 THE COURT: As soon as you're finished, let me
20 know.

21 All right. Off the record.

22 (Discussion off the record.)

23 THE COURT: When you're ready, let me know.

24 MR. MURPHY: Your Honor, while they're looking one
25 moment, I just wanted for the record to protect, to make

1 a motion for directed verdict at the close of the entire
2 case.

3 THE COURT: Excuse me.

4 MR. MURPHY: I'm just gonna rely on the grounds
5 that we discussed last night and at the end of the
6 Plaintiff's case, and I have nothing further to submit
7 since we argued and ruled upon unless you want me to
8 restate the grounds.

9 THE COURT: For the record the Court has heard the
10 Defense case and I still feel that there's sufficient
11 evidence to go forward on three causes of action that
12 the Jury is to consider.

13 MR. MURPHY: To make sure I'm protected, Your
14 Honor, also that would include the Motion for a Directed
15 Verdict as well as the claim for punitive damages under
16 their second or third cause of action as I understand
17 the Verdict Form or how it is gonna be submitted to the
18 Jury.

19 THE COURT: Again, I think there is sufficient
20 evidence to go forward on the breach of insurance
21 contract, bad faith, breach of insurance contract, and
22 slander *per se*.

23 And if the Jury does find -- of course, it will be
24 the Jury's decision whether or not there is clear and
25 convincing evidence of willful, wanton, and reckless

1 conduct, and if the Jury does so decide, then punitive
2 damages will be submitted.

3 MR. BELSER: For the record, we'd like to make a
4 counter-Motion because we think that, at least as to the
5 slander cause of action, because it's clear at least
6 from the sworn testimony of the gentleman at his
7 deposition. Well, I guess --

8 THE COURT: No. I think both of them are -- you've
9 got their affirmative defenses are privileged and
10 permissive. So I think there is sufficient evidence to
11 go forward not only on your causes of actions but also
12 on the affirmative defenses.

13 MR. CLINCH BELSER: I don't mean to argue, if it
14 please the Court.

15 THE COURT: No, no. For the record, though, so
16 your Motion for Directed Verdict is denied as is the
17 Defendant's Motion for Directed Verdict.

18 All right. Now are we ready? Plaintiffs ready to
19 go through the charges?

20 MR. BELSER: Yes, sir.

21 THE COURT: Defense ready?

22 MR. MURPHY: Yes, sir.

23 Charge Conference:

24 THE COURT: Starting with -- and again I'll refer
25 to a request, I'm doing it by page number, and so if

1 there are more than one page to the request, then the
2 page numbers will be skipped to get back, keep them in
3 sequential order as to pages.

4 MR. BELSER: Which one are you going to do first,
5 Your Honor?

6 THE COURT: The first one I have is the Ervin's
7 request 25-7, which is the elements of the breach of
8 insurance contract.

9 MR. BELSER: Is that from the Defense side or from
10 the Plaintiff's side?

11 THE COURT: Plaintiff's side. I go with the
12 Plaintiff's first. You've got them identified as breach
13 of insurance contract, general.

14 MR. BELSER: All right. We have an index and the
15 numbers are on the left side of that and then --

16 THE COURT: Well, the thing is -- I think I can put
17 two figures in my mind at the same time. All right.
18 Let's do that, then. That's good. Because they did
19 give us the charge themselves numbered.

20 All right. Starting again from the Plaintiff's
21 Request to Charge Number 1, that will be covered.

22 Plaintiff's charge on Breach of Contract defined, I
23 will confer that but it will be my own. If you will
24 forgive me, I've done breach of contract cases enough.

25 MR. CLINCH BELSER: Thank you very much.

1 THE COURT: Well, you've got it still covered well,
2 but it will probably, it will still be mine.

3 On Number 3, I'll charge.

4 Number 4, Breach of Contract, General Defenses.

5 MR. MURPHY: Your Honor, it's a very lengthy
6 charge. I don't think we've raised failure to comply
7 with condition and we've raised exclusion.

8 THE COURT: What do you have to say about that,
9 Mr. Belser.

10 MR. CLINCH BELSER: Well, we had anticipated that
11 at some point --

12 THE COURT: Well, there's nothing in the record
13 about them not interfering with your performance, is
14 there?

15 MR. CLINCH BELSER: Well, some of the deposition
16 testimony of Mr. Madden dealt with the fact that if we
17 would agree that if we don't give them the money, he
18 can't comply possibly with the conditions that he buys,
19 he purchases the property and that it never conflicts.
20 That he couldn't comply with various provisions if he
21 didn't have the money.

22 THE COURT: Well, yeah, but under the contract he
23 was required to replace --

24 MR. BELSER: There was some language in the policy
25 which says if he's got a place, something before he'll

1 be paid anything more than the ACV, the testimony was
2 intended to show that he couldn't, he didn't have any
3 money, that he couldn't do that. The Defendant had not
4 honored the contract and given him the money to --

5 THE COURT: All right. Let's see. I thought I
6 had...

7 All right. I'll put that one in.

8 Well, let me see. That's a defense, really.

9 MR. MURPHY: It kind of is. But I think what
10 they're saying is we can't come in and argue that since
11 he didn't replace the contents, for example, that he
12 can't get replacement cost coverage.

13 THE COURT: Well, keep it simple. You can argue
14 that as far as a part of your breach that the resulting
15 damages, didn't have the money to do it and they even
16 required that you do it.

17 MR. MURPHY: We didn't offer any evidence to
18 indicate it was anything less than the limits, whether
19 it was ACV or replacement costs. I think that's why
20 probably, in an effort to streamline things, we haven't
21 argued that. I think the other coverages that were
22 payable could be that. They have not been incurred, but
23 obviously if he is entitled to coverage, I think the
24 estimates were there and I think the evidence was
25 sufficient, so --

1 THE COURT: If I hear anything in the argument to
2 even suggest that somebody has been prevented
3 performance, then you can count on it.

4 So that's Number 4 under consideration.

5 Now, Performance By Non Breaching Party, there's no
6 defense or allegation about the Plaintiff not having to
7 perform other than the exclusion.

8 MR. MURPHY: Yes, sir.

9 THE COURT: But, in fact, Mr. Belser was able to
10 get the Proof of Loss in in time, so you're not using
11 any of those as non performance.

12 MR. CLINCH BELSER: I'll be glad to shorten
13 anything at this point that Mr. Murphy --

14 THE COURT: I'm not gonna charge 5.

15 6, I've got damages on contract. Of course, on
16 insurance contract you've got a question of -- well,
17 you're not limited to the terms of the policy, nor to
18 the policy limits.

19 MR. MURPHY: I believe it would be under the
20 insurance policy, Your Honor.

21 THE COURT: Oh, right. Oh, wait a minute. Let's
22 see.

23 MR. CLINCH BELSER: I agree with Mr. Murphy that on
24 Cause of Action Number 1, Breach of Contract, that's the
25 most that we could probably get, but on the bad faith,

1 you can get consequential damages.

2 MR. MURPHY: Consequential, but not additional
3 benefits.

4 THE COURT: No. That's what I got. I'm sorry.

5 MR. MURPHY: Okay.

6 THE COURT: I'm trying to catch up too quick. No.
7 Consequential on the bad faith but only on the terms of
8 the policy.

9 MR. MURPHY: Yes, sir.

10 THE COURT: But now it has to be the terms of the
11 policy or whatever.

12 MR. MURPHY: Okay. All right.

13 THE COURT: 8, what do you say about that,
14 Mr. Murphy, 7 and 8?

15 MR. MURPHY: Yes. They border on being common on
16 the facts. That was my concern for them. I don't
17 really disagree that the living expenses are as defined
18 in the process. They have to be something subject to
19 the limits and terms of the policy. It's almost asking
20 the Judge to explain what the policy requires. I think
21 you just say, I think you have to charge you are
22 entitled to any damages flowing from the breach. I
23 think it's up to Counsel to read the policy to the Jury
24 and tell them that.

25 THE COURT: I guess that's gonna be another one of

1 those things where I'm gonna have to listen to your
2 argument. Because I pretty much charged 7 and 8 and 9,
3 too.

4 MR. MURPHY: I felt, Your Honor, 9 might be a
5 comment on the facts because there's a couple things.
6 Failure to advance necessary funds to rebuild. The
7 insurer did pay all of the funds that were available to
8 rebuild, but they went straight to the mortgage company.
9 I don't anticipate saying anything about the contents
10 because we didn't introduce any evidence --

11 THE COURT: Well, first of all, you satisfied the
12 first mortgage so their interest in replacement will be
13 satisfied. But, unfortunately, you didn't have
14 sufficient funds available to --

15 MR. MURPHY: Well, the problem I have it says the
16 full amount to replace the residence may be awarded.
17 It's got to be subject to the terms of the policy. So
18 that's where it gets into a comment on the facts. They
19 can't give them the full amount to replace the residence
20 under the contract. They can give them the full amount
21 of coverage that would be available under the contract
22 if they find in his favor and then they would have to
23 determine what that would be. But there would be some
24 testimony of a general nature that might make a cost to
25 rebuild or replace the residence to make it more than

1 what the policy would provide even under the replacement
2 cost provision. And again, you may not argue that and
3 again, that wouldn't have to be there. But that would
4 be erroneous, I guess.

5 THE COURT: Why don't we do this. What I'll do is
6 not cover it and let you argue it.

7 MR. MURPHY: Yes, sir.

8 THE COURT: Because there is testimony in the
9 record about he couldn't do it because he didn't have
10 the funds. And as far as, I can't, I don't understand
11 insurance contracts, either.

12 MR. MURPHY: I mean, I think it's like any other
13 contract --

14 THE COURT: I'm gonna leave it up to the attorneys
15 to argue it.

16 MR. MURPHY: Okay. That's on Number 9?

17 THE COURT: Right.

18 MR. MURPHY: Okay. And I would just say that to me
19 that's the same thing, and in 7 and 8 aren't quite as
20 common, but they are entitled to the damages under the
21 contract and it's up to us to explain to the Jury what
22 that is or not and for the Court to review it.

23 THE COURT: I do remember testimony, I think, on
24 Cross-Examination, they thought that was reasonable.

25 MR. MURPHY: Sure. We're not disputing that.

1 THE COURT: Very good. All right. So we have on
2 the, so 7, 8, and 9, I'll decline to charge.

3 Prejudgment interest is from me.

4 MR. MURPHY: That's what I thought.

5 THE COURT: Good faith and fair dealing, number
6 10 -- no, not 10, 11, I'll cover that.

7 12, good faith and fair dealing, I'm gonna cover
8 that. I'll charge that. Or in some fashion. I think I
9 have that.

10 Number 13 is covered. It's not gonna be covered as
11 lengthy as here. You'll have to forgive me. I have
12 great admiration for the Federal Courts, particularly
13 the Fifth Circuit, but I'd just rather not --

14 MR. MURPHY: And I believe *Trimper* was actually a
15 *Tyger River* case, and that's why some of those elements
16 may not be applicable under a *Nichols* first-party
17 bad-faith standard.

18 THE COURT: Was it *Nichols* that said that bad faith
19 is just another example of the corollary of *Tyger River*?

20 MR. MURPHY: *Nichols* adopted it from *Tyger River*,
21 but the elements are different because duties are a
22 little different; it had to do with the duties to settle
23 a claim against your insured versus a third party.

24 THE COURT: Well, forgive me for doing it, but it's
25 what you call the Battle of Copenhagen defense that when

1. Captain Nelson, Admiral then, was in charge of the
2. squadron to go see if the French Fleet was in
3. Copenhagen. He got to the mouth of the bay or whatever
4. and signaled back to the fleet that he didn't see any
5. French Fleet, so the Admiral in charge of the whole
6. thing authorized him to go in.

7. Of course, the Fleet was there and there was a
8. terrific battle, but the only thing is he was
9. successful. And, of course, he was also honest because
10. he did not see the French Fleet. By that time he had
11. been blind in one eye and he put up his periscope to his
12. blind eye. So I think it's astute to investigate
13. because if you don't investigate, of course you're not
14. gonna find anything else. I'll note your objection to
15. Number 13.

16. MR. BELSER: May it please the Court, with
17. reference to Number 13 -- this is from our office, and I
18. reviewed a couple versions of these, but this is from
19. Judge Ervin's Requests to Charge, but I don't think we
20. mean to ask you to read the case name to the Jury, and I
21. see that's in this...

22. THE COURT: I don't read the case name. I was just
23. saying if it was the Fifth Circuit and I would probably
24. not...

25. MR. MURPHY: That's covered in your general charge

1 on bad faith.

2 THE COURT: I think that they have the duty to
3 investigate because I find that that is.

4 All right. 14.

5 MR. MURPHY: Your Honor, I wasn't sure with the way
6 you were gonna bifurcate how you would handle that. But
7 certainly with respect to the -- I don't know if that's
8 covered by your general charge about the actual damages
9 they can recover and then you're just gonna talk to them
10 about the finding of recklessness versus instructing
11 them about punitive damages. I'm not sure how you do
12 that.

13 THE COURT: I'm not gonna define punitive, but I
14 think I have to in those causes of action of punitive
15 when I speak of damages, I'm gonna have to say that you
16 have actual damages and you have consequential damages
17 in the bad faith and then bad faith in the slander *per*
18 *se* you have punitive. But I'm not going to define them.
19 I am going to define damages, though, just to give them
20 an idea that it's something that eventually they could
21 consider. And I hope that the verdict form will clarify
22 that. Because the only thing I'm gonna send first is
23 the verdict form that I got that I gave you the other
24 day that has just the first questions.

25 MR. MURPHY: I think that other than the bottom

1 paragraph on 14-1, this is probably a pretty decent
2 charge about laying down the burden of proof on punitive
3 damages. The only thing that's in there that's a
4 description of what punitive damages are, and perhaps
5 the one after that, before you can award punitive,
6 because they will have known that. But that's the only
7 one, other than the definition, I think that goes
8 through there.

9 THE COURT: All right. Well, actually, all right.
10 In the bad faith charge I'll take out any reference to
11 punitive damages.

12 MR. MURPHY: I thought -- I mean, I know you're
13 gonna ask them if they get to that to consider --

14 THE COURT: I'm gonna have to ask them about --

15 MR. MURPHY: -- and other than the definition there
16 at the bottom, this charge explains what that is, define
17 recklessness, so it's not bad, actually, I guess is what
18 I'm saying.

19 THE COURT: The bottom, the last paragraph?

20 MR. MURPHY: Yeah. It just said punitive damages
21 implied or given by way of punishment and all that. So
22 that I thought you said you weren't gonna perhaps define
23 punitive damage for them but maybe talk about this is
24 something that could be awarded if they find by clear
25 and convincing evidence reckless conduct which is kind

1 of the last paragraph on page 14-2.

2 THE COURT: Well, let me ask you this. Your
3 objection is what?

4 MR. MURPHY: I was just telling you, since it was
5 their charge, I assume they agree with it. I was just
6 saying that based on what you just said, other than the
7 definition there of punitive damages, I just thought
8 this charge goes through the damages that are
9 recoverable for bad faith and the standard for later
10 determination, if any, of punitive damages.

11 THE COURT: All right. What I'll do is take out
12 the -- all right. I'll cover it, but I'm not planning
13 to have an exhaustive explanation of punitive damages.
14 Just the fact that under these two causes of action they
15 are entitled to punitive damages and also what the
16 standard is. All right. Let's see what else.

17 15. Arson defense charge.

18 16. Motive --

19 MR. MURPHY: Your Honor, on 15, we submitted a
20 charge on arson which I believe is taken directly from
21 the case. I think that this charge Number 15 adds a
22 phrase that's not in the original.

23 THE COURT: Which one is that?

24 MR. MURPHY: Ours is Number 4, I believe. And it
25 says, ours says that a charge under South Carolina law

1 an insurance company can prevail on an arson defense
2 based solely on circumstantial evidence. They added as
3 an instruction. But the first sentence I'm not aware of
4 that being part of the charge. I think that's an
5 addition and they added in the phrase about the insured
6 caused the fire.

7 THE COURT: All right. Mr. Belser?

8 MR. CLINCH BELSER: Your Honor, number one, I think
9 that Charge 15 is a correct statement of the law. It's
10 not an exact quote from *Brown versus Allstate*. I didn't
11 actually personally prepare this, but I read it a couple
12 times, like I said. I think it's an accurate statement
13 of law, so we would like that to go in as it is. I'm
14 not quite sure what Mr. Murphy was saying about his
15 Charge Number 4. What number is that on yours?

16 MR. MURPHY: Page 4.

17 (Counsel confer.)

18 THE COURT: All right. There are two things. You
19 got your 15 -- or is it 17? No, 15, 17 and 18.

20 MR. MURPHY: Your Honor, his 15 is a correct
21 statement, so I withdraw my objection. I misread the
22 case trying to do it so quickly.

23 THE COURT: Well, anyway, I'm going to charge 15,
24 17, and 18 because, and the burden of proving, of
25 course, is on the insured.

1 And 19 is *Flynn*, too, if I'm not mistaken.

2 THE COURT REPORTER: I'm sorry. 19 is what?

3 THE COURT: *Flynn*, F-l-y-n-n, versus Nationwide.

4 THE COURT REPORTER: That's all I need. Thank you.

5 MR. MURPHY: Your Honor, my only objection would be
6 I'm not sure what that's about and what it's for.

7 THE COURT: What's that?

8 MR. MURPHY: I'm not sure we have any unimpeached
9 testimony in the case. But I'm not sure what the charge
10 is. If it's covered in your general charge about
11 evidence and what they can consider and things like
12 that. I've never seen that charge in any case I've
13 tried in my career. I'm not sure what it means. And it
14 looks like a comment -- you know, it could be inferred
15 as a comment on the facts.

16 THE COURT: Well, I've read *Flynn*, and I had a
17 little something to do with preparing the charges so
18 that they did reflect what I found. Let's see if I can
19 give you -- let's see. All right. This is the way I
20 write it (Reading):

21 Evidence relied upon by an insurer to establish
22 arson cannot be equally consistent with the proposition
23 that it was not arson. In fact, it cannot be
24 established by circumstances which are perfectly
25 consistent with direct and unimpeached testimony that

1 the fact did not exist -- does not exist.

2 That's pretty much taken from *Flynn* so I'm gonna
3 leave that in. And you can just say that is not
4 unimpeached testimony, it's all a matter of a question
5 for you.

6 All right. Where are we down to?

7 MR. MURPHY: Well, Your Honor, I guess just on
8 that. I mean, that could be taken just because someone
9 says they didn't do it and there is no eyewitness
10 testimony, that could mislead the Jury. I'm not sure
11 it's instruction for a jury so I'll just note my
12 objection.

13 THE COURT: Note your objection. Because otherwise
14 you're going to have to talk to another Court because I
15 think I pretty much adopted the language from *Flynn*.

16 MR. MURPHY: Sure.

17 THE COURT: Let's see. Now we're down to your --
18 and 20, I think that's, I'm gonna charge it.

19 Now we're down to Defamation, 21. I'm going to
20 cover that.

21 22, I'll cover it. It won't be verbatim.

22 I don't know about 2, 3, 4, but that is a standard
23 *per se*. I think it just puts it in the context of how
24 serious it is.

25 24, and also we had, somebody had testimony about

1 it, if I'm not mistaken. Oh, I think it was about a
2 check. It was not a crime of moral turpitude, it was
3 insufficient funds.

4 25, I think that's correct on...

5 MR. BELSER: Yes, sir, Your Honor.

6 THE COURT: And it doesn't have to -- it's nominal
7 or consumed.

8 26 I'll cover.

9 MR. MURPHY: Your Honor, just on 25. They used the
10 word general. I'll have to look at my charge. I
11 thought it was nominal damages need not be proven. But
12 I'm not sure. It could be general. Maybe I'm confusing
13 general and specific with nominal.

14 THE COURT: All right. As I say, I think that when
15 we say general damages, they are nominal damages, but
16 then the idea is that they do not have to establish them
17 with mathematical certainty and they are not the same as
18 actual damages. So, I've got it covered. I'm just
19 trying to find it right now. My charge is about 25
20 pages, so we understand what we are trying to deal with.
21 But if you have any exception to it, it's noted.

22 MR. MURPHY: I just thought that I would probably
23 get a charge on nominal damages, and to get beyond
24 nominal damages they would have to prove special
25 damages. And I think as long as they get a charge on

1 nominal damages, I think that's fine with me.

2 THE COURT: Well, I do, I've got general damages.
3 I'm just trying to find it if I can right now. I'm
4 gonna charge Number 33.

5 34. Punitive Damages.

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

7 THE COURT: Why don't you -- have you gotten -- as
8 far as punitive damages I'll cover 34. I have the
9 charge for punitive damages. I do understand that we
10 don't necessary have to cover *Gambrell*, but I do give
11 them those elements. And but as yet I haven't done
12 anything about financial divisions because I understand
13 we were waiting to find out if that was gonna be an
14 issue or not.

15 As far as liability to a principal or a
16 corporation, I usually, and I do have a charge here
17 about a corporation being treated the same as an
18 individual. And I think I probably will cover principal
19 and agency.

20 MR. CLINCH BELSER: Yes, sir. The allegation to
21 that is it seems that Mr. Flanagan did, was completely
22 authorized and was directed by the company. And to the
23 extent he did something and we hold Nationwide did
24 there, too.

25 Your Honor, may it please the Court, did we skip

1 over 26?

2 THE COURT: We probably skipped over a whole bunch,
3 yes, sir. And I'm gonna charge my own. I'm gonna cover
4 26 and 27 and -- 25, 26, and 27, and 28. It will still
5 be covered, but it won't be, might not be just what you
6 want so I'll note your objection on my failure to charge
7 them.

8 Now let's see if we can get something done with
9 the -- I've covered the expert witnesses, general
10 conflicting and...

11 Direct and circumstantial evidence will be covered.

12 And these are the Defendants. I'm going through
13 them.

14 Page 4, Deposition will be covered.

15 5, Expert Witness will be covered.

16 Conflict of Expert Witnesses will be covered.

17 Payment of Expert witnesses is covered.

18 I'm gonna cover your charge on what's necessary for
19 circumstantial evidence as far as what you have to
20 establish for incendiary origin and opportunity and
21 motive.

22 Number 12 is gonna be covered. I say 12. I think
23 I was confusing Plaintiff's 12. I think that's what I
24 covered in Plaintiff's 12.

25 All right. This is Page 9, Bad-Faith Factors.

1 MR. MURPHY: I think you said you would cover those
2 with your charge.

3 THE COURT: Right, I will cover those.

4 Breach of Insurance Contract Elements, I will cover
5 that.

6 Defamation, I'll cover that.

7 Hurt feelings, that doesn't apply to hurt feelings.

8 That defines slander, I'll cover that. Actual or
9 *per se*, as I say, I'll cover it.

10 Defamation elements I'll cover.

11 I'll cover the common law presumption.

12 Defense of privilege, conditional qualified I'll
13 cover. Not maybe to that extent.

14 And truth, obviously I'll cover that.

15 And, well, these are the mitigators.

16 MR. MURPHY: We'll withdraw that, Your Honor.

17 We're not arguing that.

18 THE COURT: Defense of mitigation?

19 MR. MURPHY: No, we'll withdraw that.

20 THE COURT: And Speculative Damages, that's covered
21 in the General Actual Damages.

22 All right, gentlemen. You've got, what, ten
23 minutes?

24 And do realize that after the charge I might put
25 something else in, but if you are keeping up with it,

1 the things that you are concerned about, at least the
2 subject, let me know and I'll...

3 MR. BELSER: May it please the Court? I might have
4 missed this, but did you deal with Plaintiff's Requests
5 29, 30, 31 and 32?

6 THE COURT: I think I am going to charge those.
7 That's in defamation.

8 MR. BELSER: I don't think any of these are
9 unusual, they're just right out of the book, but we
10 would like to have those covered.

11 THE COURT: All right. Let's see. No. I charge
12 the defamation need not be direct and may be made by
13 insinuation. I do strike the example of defamation *per*
14 se as a thief, and then I do give the charge on
15 innuendo.

16 All right. Next? (No response.)

17 Well, y'all enjoy your lunch and I'll see you all
18 here close to 2:00. Now, the thing is none of the staff
19 has had anything to eat. So we'll have to see if they
20 can. All right. We'll stand at ease.

21 MR. CLINCH BELSER: Thank you, Your Honor.

22 (A luncheon recess occurred from 2:25 p.m. until
23 approximately 2:54 p.m.)

24

25

1 Afternoon Session

2 2:54 p.m.

3 THE COURT: All right. Is the Plaintiff ready to
4 go to the Jury?

5 MR. BELSER: Yes, Your Honor.

6 THE COURT: Defense ready?

7 MR. MURPHY: Yes, Your Honor. I didn't know if you
8 wanted us to abide by any clock time or not. I wanted
9 to inquire. I'm usually pretty brief, but --

10 THE COURT: Well, I was gonna say, you know, a
11 preacher has usually got a pretty good time frame. It's
12 been a lengthy case. I hope that we can sum it up in
13 time enough for the Jury to have a chance to reasonably
14 contemplate it. But no, I had no restrictions. I think
15 the rule says two hours, but I don't think you want to
16 do that.

17 All right. Anything else from the Defense?

18 MR. MURPHY: No, Your Honor.

19 THE COURT: Ask the Jury to join us, please.

20 (The Jury entered the courtroom at approximately
21 2:55 p.m.)

22 THE COURT: All right. Let the record reflect that
23 the Jury is in the Jury box.

24 Mr. Foreman, ladies and gentlemen of the Jury, we
25 will conclude the trial of this case with argument by

1 Counsel. The Plaintiff has the burden of proof on the
2 Plaintiff's relief and will go first and the Defense
3 will argue and then the Plaintiff will close.

4 I recognize Mr. Belser for his argument.

5 MR. CLINCH BELSER: May it please the Court, Your
6 Honor?

7 THE COURT: Mr. Belser.

8 MR. CLINCH BELSER: Thank you, Your Honor.

9 Closing Statement on Behalf of the Plaintiff:

10 MR. CLINCH BELSER: Mr. Foreman and members of the
11 Jury, it's a privilege for me to make this closing
12 statement on behalf of Mr. James Fowler. I'm gonna have
13 to read some of this because I want to make it precise.
14 I apologize for that. I'll try to speak clearly. I'm
15 not going to go through all the evidence. It might seem
16 like there's been so much evidence and so many pictures
17 and so many documents and so many log notes that you
18 probably thought that's the best thing I've ever said,
19 was I'm not gonna go through all of it, I'm just gonna
20 go through some of it.

21 And I wanted was just to say a little bit about
22 what I said on Tuesday. This is a case about Mr. Fowler
23 and what he had and what he lost. It's also a case
24 about Nationwide and what they did and didn't do in good
25 faith, or in bad faith or in investigating this and

1 deciding not to pay Mr. Fowler's claim.

2 Now shortly we're gonna talk about some things in
3 more detail like, number one, Chief Wright's report on
4 the day of the fire. He made that when he was there,
5 the smoke was still coming up, I guess, and his
6 observations on the report he was required to make to
7 the State Fire Marshal that the fire started near the
8 Kerosun heater and his, the note that it was
9 unintentional.

10 We'll also talk about the Chief's reasons for
11 making these observations of the facts. One is the
12 classic V pattern that you've heard about from all the
13 people. It's in the 921 book, and it's something that
14 Chief Wright used in his experience, it's something that
15 Mr. Ross talked about, and Mr. Holecek today can be
16 added to the list of people who favor a 921 approach.

17 He also looked at the area of the greatest damage.
18 He said that there were three things that the Chief said
19 he saw. One was the area right below where he saw the
20 fire coming out of the roof when he approached, he saw
21 the V pattern under the Kerosun heater and he saw the
22 area of the greatest damage around the heater. We'll
23 talk more about that.

24 We're also gonna talk about the negative test
25 results. \$600 was spent to get this laboratory analysis

1 by an independent agent. We put the independent man on
2 the side of the Plaintiff here to testify as to whether
3 there was any incendiary fire.

4 And last, very briefly, we're gonna talk about the
5 numerous acts and omissions by the claims investigators
6 for Nationwide in which they not only violated the
7 implied covenant which means implied provision of every
8 contract for good faith and fair dealing, but also, as
9 you've heard, some of their own claims practices in
10 their own manual.

11 Now we need to discuss first the legal claim work
12 about this case. The Judge is the one who will give you
13 instructions as to what the law is. You heard that 17
14 times already just like everything else about 17 times.
15 But he is the one who is gonna tell you what the law is.
16 He will also tell you to evaluate the credibility of the
17 witnesses based on what you saw and heard from the
18 witness stand. He will also tell you to use your common
19 sense. He will also suggest that you look at all the
20 evidence, photographs, and the documents, et cetera.

21 So, as we get into the evaluation of this case,
22 what are the three claims of the Plaintiff? Here we are
23 again. Number one is the breach of contract. The
24 company did not pay for the policy. Number two, this
25 was an example of insurance bad faith. And, number

1 three, there was this slander *per se*, the oral
2 defamation of Mr. Fowler by Mr. Flanagan when he went to
3 talk to the finance company that Mr. Fowler's claim was
4 being denied because of the intentional acts. You've
5 heard the deposition testimony that he realized this was
6 the same thing as saying to this stranger, who did not
7 need to know anything about this case, other than he had
8 to get his money by paying off that mortgage.

9 Now, going to the first cause of action, the breach
10 of the contract and breach of the insurance policy.
11 There are a few things that technically must be proved,
12 it puts the burden on the Plaintiff, that's one of the
13 reasons why the Plaintiff's Counsel goes first, I've got
14 to prove -- witnesses and exhibits have to prove, not
15 me -- have to prove that there was a contract that was
16 in full force and effect, and there was fire loss, and
17 Nationwide has not paid.

18 The first three things have been pretty much
19 admitted, but we have to prove them anyway, because as
20 the Judge told you earlier, and we tell you again, you
21 can only decide this case upon what you see in evidence,
22 so we have to go through this. We've been here since
23 Tuesday, but we have to do this.

24 What the Jury, as the Jury recalls, there is no
25 dispute about that. These are basically admitted. But

1 the real issue is whether Nationwide is entitled to
2 avoid paying because Mr. Fowler, they say, lit a fire.
3 So, the secondary issue is to how much is payable to
4 Mr. Fowler pursuant to the coverages provided by the
5 policy if he's entitled to recover at all.

6 Now, in summary, we need to ask the question, what
7 evidence is presented by the two sides on the question
8 of whether James Fowler burned his home? On this issue
9 the Judge will instruct you that the insurance company
10 has the burden of proof that he did that. For that they
11 relied completely on the opinion of Mr. Jerry Byers,
12 their hired insurance company investigator, and the
13 investigation of their staff that shows that Mr. Fowler
14 had a motive to burn his own house.

15 On the other side, Mr. Fowler has adamantly denied
16 from the very first that he set the fire, and he has
17 shown to the satisfaction of the insurance company
18 according to their own logs, because he was actually in
19 the process of preparing this house for sale. Now, the
20 idea he was preparing it for sale is completely
21 inconsistent with the idea that he would burn it. But
22 the insurance company has never taken that into account
23 or ever gave him any credit.

24 Now, Mr. Fowler also relies, and we knew this was
25 coming, upon the observations and in the report of Chief

1 David Wright of the Friendship Fire Department; and he
2 also relies upon the findings of Doug Ross. A lot of
3 what Doug Ross and the Chief say is backed up this
4 morning by Mr. Holecek who says 921 is what you're
5 supposed to follow. That's what you've got to decide is
6 whether Mr. Fowler lit the fire. That's the big picture
7 of what the evidence is on both sides.

8 But I want to talk about a phrase that you're gonna
9 hear I know from my adversary counsel, Mr. Murphy, a
10 lot, and the Judge will instruct you about the details
11 of this. But he's gonna say that the insurance company
12 wins if it can show three things: that Mr. Fowler as a
13 policyholder had a motive to burn the house. We don't
14 think he can prove that. But they want to show
15 something on the claim of motive.

16 Number two, they want to show his opportunity,
17 motive and opportunity to burn it. The third thing is
18 that the fire itself is a set fire.

19 Now, the Judge, as I've said, is gonna give you
20 instructions about that as to what that really means.
21 But basically that means you will hear an instruction on
22 circumstantial evidence, which basically means that the
23 insurance company does not need to have an eyewitness or
24 it does not need to have a confession, it does not need
25 to have fingerprints, it doesn't have to have something

1 like that. All he can use in circumstantial evidence
2 are those three points, at the least, if you believe
3 that that proves Mr. Fowler actually lit the fire. They
4 have to prove to your satisfaction based upon all the
5 evidence that he actually lit the fire, not just that
6 they have arguments that there's opportunity, there's
7 motive, and there's the fire.

8 Now, although we've got to cover all these points
9 for us, the Plaintiff, to prove a case, we'll try to
10 limit that as an issue. There's never been an argument
11 as to whether Mr. Fowler had the opportunity. He was
12 there asleep. He wasn't anywhere else and there wasn't
13 anybody else there, so that's not really been an issue.

14 But there are real questions about the motive. And
15 there's real questions about Mr. Byers.

16 The word "crazy" came out when we were talking
17 about, isn't it crazy to think that a man would burn his
18 own house right while he's in the process of preparing
19 it for sale. This is not the situation where it hasn't
20 been on the market a long time, he was desperate he
21 wasn't gonna be able to sell it, so he burnt it. He was
22 just getting it ready for sale. It was a house on the
23 lake. There's no reason to think he would do that.
24 That is, even though it's not a legal word, crazy to
25 think he would do that.

1 So the fact that they can't prove that goes to
2 another point which is coming up, and that is whether
3 they're acting in good faith or bad faith, continuing to
4 say that throughout their investigation in 2009 which is
5 almost three years ago.

6 Let's talk about now the third point that there was
7 an incendiary fire. Let's look again at the people who
8 say there was an incendiary fire and those who offered
9 evidence to you that there was not an incendiary fire.
10 Mr. Byers on one side, alone. He is on one side, alone.

11 On the other side is Mr. Ross and Chief Wright and
12 today I added to my notes Mr. Holecek because he
13 supports the use of the 921 document as the way you had
14 to do it. I'm not good enough, I'm an old-fashioned
15 guy, got handwritten notes, etc., I can't put on the
16 screen quickly enough all those sections. But you read
17 the sections that were up here before and you will have
18 access to them.

19 921 says (reading): You are not supposed to call
20 something a burn pattern or suggest that it was an
21 incendiary fire unless you can corroborate by laboratory
22 tests.

23 That's the industry standard. That's what
24 everybody does, Mr. Holecek included. The Chief knows
25 about some things, but everybody knows about the need to

1 have accelerants found in order to corroborate what you
2 think you see. What you think you see is not under
3 industry standards an appropriate basis to say it was
4 actually a pour pattern.

5 Now let's talk about all of that because the Judge
6 is gonna tell you to use your common sense. What we've
7 got is two sides and they've both got hired experts.
8 Some people might laugh and say, Well, you get what you
9 pay for. If you want someone, you can get an expert and
10 you've got two guys on both sides. Both have years of
11 experience and they talk about being in the same class
12 years ago when they both started at the Fire Academy.

13 But we submit with respect for your consideration
14 that Mr. Ross is correct and is more credible and
15 trustworthy because he's a teacher and a trainer and
16 that's how he got in this business in the first place.
17 He was called by one of his students to come over and
18 get involved and help Mr. Fowler. Actually, I was the
19 one that ended up hiring him, but he actually got to my
20 attention -- I had never met him before -- because one
21 of his students respected him and said, Come over and
22 help.

23 Number two, Mr. Ross uses the classic V factor
24 analysis which is supported by the 921, and Chief
25 Wright, with his 30-plus years of experience also uses

1 the V factor analysis. Number three, Mr. Ross follows
2 the industry standard, I'm not gonna go over that again
3 and again. But also, number four, as you heard the
4 testimony of Mr. Ross and the Judge tells you to, you be
5 the judges of the evidence, and don't take my word for
6 it and don't take Mr. Murphy's word for it, you remember
7 the evidence but I'm asking you to just consider
8 Mr. Ross used his pictures he took, and there's a bunch
9 of pictures that he took, you will have a chance to look
10 at all of these. He used also all the pictures that
11 Mr. Byers had taken. And in the pictures that both of
12 them had taken you can see the V factor.

13 You can also see on both these pictures, and I'm
14 gonna go over these in a moment, the area of the greater
15 damage. All of this suggests that the fire started
16 right at the heater. He wasn't there to see the smoke
17 coming out the roof. Chief Wright asks that. Mr. Ross
18 talks about those factors.

19 Now, Mr. Ross also uses these two factors to -- and
20 this is perhaps the most important thing -- to eliminate
21 the possibility that Mr. Byers alleged two separate
22 fires theory to be correct. He eliminates the
23 possibility, that's correct. Because -- I'll show you
24 in a moment -- the pictures that both of them take show
25 you the area of greatest damage was right behind where

1 the heater was in the living room. There's a room that
2 the heater was right there and that's right below where
3 the smoke was coming out the roof.

4 But the photographs show that there was no similar
5 V pattern over where Mr. Ross puts a pour pattern over
6 in the living room near the sliding glass doors. There
7 just wasn't a V pattern over there. And also the damage
8 over there is not anywhere near the complete and total
9 wiping out of the wall as the Chief testified to right
10 where the kerosene heater was.

11 He also is able to explain that the reason for
12 Mr. Byers' error is that the kitchen was the
13 secondary -- second separate fire. It's a secondary
14 fire. In a few minutes we'll talk about exactly what
15 these pictures show about that.

16 So let's contrast all those factors in favor of
17 Mr. Ross being the right one even though he was hired by
18 one side. Mr. Byers, number one, works only for
19 insurance companies and he says that's because they pay
20 him.

21 And, number two, he's worked for Nationwide 59
22 times in a 48-month period before this particular
23 investigation. That's more than once a month. They're
24 a regular part of his budget.

25 Number three, he says he's not bound by 921. He's

1 not, and he's admittedly not following industry
2 standards, which Mr. Holecek said this morning, Mr. Ross
3 said this morning. He said he follows it but he doesn't
4 have to. That's really the same thing as saying "I'll
5 follow it if it helps me, but I forget about it if it
6 doesn't do what I want to say."

7 Now, you heard the testimony this morning.
8 Mr. Byers did not even mention the V factor in his
9 report. Everybody else talks about the V factor. He
10 doesn't use the V factor.

11 Number five, he did not even wait for the lab
12 results before he submitted this opinion. He wrote his
13 opinion: I think I see visually a pour pattern. Sent
14 it off for the lab. He didn't wait for the results
15 before he committed himself forever to that one opinion.
16 When he got the lab results, he didn't go back and add
17 anything to his report or either mention it or explain
18 away why that was significant.

19 Seven, he did not include Page 2 or the flip side
20 of Chief Wright's report in his report. That was part
21 of the discussion this morning. He apparently had it
22 because he purported to quote from it, but he didn't put
23 the key part of Chief Wright's report in his report.
24 That's the part which shows that the local official who
25 is required by the State Marshal found and observed on

1 the day of the fire when it was still hot and smokey
2 that it was located near the kerosene heater for the
3 reasons we've just talked about.

4 Now, Chief David Wright has been attacked as being
5 not a competent fire expert. They praised him for being
6 a nice guy, which he is a nice guy; they praised him for
7 being an experienced firefighter, which is true; but
8 they completely disregard and disrespect him as a person
9 with any experience to identify and observe what the
10 State Marshal requires him to observe.

11 But I suggest if you think about what he said, and
12 look at what the evidence in the case is, he has plenty
13 of common sense, he has plenty of experience to do his
14 job, plenty of common sense and experience to make this
15 report, and plenty of common sense and experience to
16 answer the key question in this case. And that is: Is
17 there any reason to suspect arson? Because he's
18 required to investigate that and report it to SLED if
19 so.

20 Now, he said that he was aware, like everybody else
21 is aware now, that the power was off essentially at the
22 main house because of this dispute with Blue Ridge. And
23 so that was a suspicion, so he decided to go back and
24 look. He and his men looked around and they concluded
25 that day when everything was mostly, completely fresh,

1 if there's any smell of accelerants, that's the time it
2 would be there; if there's anything to see, that's the
3 most logical time for it to be there. He did that
4 because he was alert, doing what he was supposed to do,
5 and he did it.

6 Now, he answered the key question: Is there any
7 reason to suspect arson? The answer is no and we talked
8 about how he went about that.

9 Now, it's important also to look at the big picture
10 and say, who are the independent people who have looked
11 at this? As I said before, you can be a skeptic or a
12 cynic and say Well, there are two sides, they hired
13 their own experts, they both got one.

14 But who are the two independent people who looked
15 at this? Number one was Chief Wright, of course. We
16 talked about that.

17 But number two was the independent laboratory which
18 analyzed six debris samples that Mr. Byers made from the
19 six spots that he wanted, they came down and said, no
20 evidence of ignitable fluids.

21 Now, you've heard today, and I think some yesterday
22 that it doesn't make any difference about the lab tests.
23 Mr. Byers, I've been doing it 40 years. I know what I
24 see when I see it. And the other said, Well, I've
25 investigated plenty of claims, it doesn't make any

1 difference because factors of rain and pesticides, et
2 cetera.

3 But the importance of the lab tests is shown by a
4 number of things. You'll get tired of me moving my
5 fingers.

6 But, number one, the NFPA 921 says it's important.

7 Number two, Nationwide is obviously trying to save
8 money, invested \$600 into that.

9 Number three, and this is more important than the
10 stuff you've already heard, Nationwide refused the
11 request to give the report or the test results to
12 Mr. Fowler or to me unless, unless he filed a lawsuit.
13 Now, you remember we talked about reports and getting
14 inside their logs, we had to get, see what they said to
15 each other, see what they were doing when this is all
16 happening? They may or might not have known that we
17 would be here today. But their own internal documents
18 say, Don't give it to him unless he files a lawsuit. If
19 they were so proud of this, they would have given it to
20 him.

21 Now, the other thing that tells us that there's
22 significance of these lab results is that Mr. Gilden,
23 who has a law enforcement background, I guess, and went
24 to see his friend at the Oconee County Sheriff's
25 Department and says, We've got some suspicions and we're

1 getting the lab results. Detective Lyles says, Good.

2 Call back when you get the lab results.

3 Well, what did Mr. Gilden do when the lab results

4 came back? Nothing. He didn't go back. He just said

5 that's not important. Well, it was important until it

6 came out negative.

7 So the testimony that you have heard in court that

8 it wasn't important should be shocking.

9 Now I want to show you just a few photographs, and

10 I promise to talk faster if I can without twisting my

11 tongue, but I'm not gonna go through all these pictures,

12 but I want to just tell you that you will have access to

13 all this evidence over here.

14 These are the photographs of the house which show

15 the quality of the contents, and the cute kids, but it's

16 really not about the kids but it also shows you about

17 the background contents. There are pictures after

18 pictures. These are Mr. Byers' photographs -- he might

19 have charged by the photograph to get his full \$800.

20 You will also have these photographs from Mr. Ross, I

21 guess he charged picture by picture, too. But these are

22 lots of photographs that you will see.

23 But I want to show you three in particular. This

24 I'll hold very briefly. Wish me luck. I've never done

25 this before. Whoops. (Shows to jury.)

1 This is the picture of the stub of a stud in the
2 wall right behind where the kerosene heater was. This
3 shows the V factor pointing down from right to where the
4 heater was. This is a particularly important picture.
5 It is photograph 36 in that book right there.

6 Now, another picture that you will find in Exhibit
7 28, photo 36, is this picture right here. This is a
8 picture of the other end of the wall from where the last
9 one was. This is down near the grandfather clock. One
10 of the key points that Chief Wright said and Mr. Ross
11 has listed was the area of the greatest damage was where
12 you can find the firewood burned the longest and did the
13 most damage.

14 This area right here is quite obviously one of the
15 separate independent burn spots that Mr. Byers talks
16 about. Well, we suggest to you that if he was right,
17 this part of the wall would be burned down like this
18 one. So the area of greatest damage would -- this
19 picture is what this one looked like if Mr. Byers was
20 right. So these two pictures are very, very important.
21 And you will find them if you take all the time to go
22 through there.

23 Now, the other picture I want to show you is one in
24 which I think is one of the Defense Exhibits, but I'm
25 not sure, it might be part of theirs. But this is a

1 photograph of the refrigerator in the kitchen.
2 Mr. Byers says that there was the V pattern right there.
3 Now, you heard that testimony that's been discussed
4 before. But if you look at this wall right here, the
5 refrigerator, all of this stuff, if there really had
6 been an accelerant poured near that and it really had
7 been poured right there, it, too, would look a lot more
8 like this. There is only one spot where this damage is
9 like that.

10 And specifically the two spots that Mr. Byers
11 pointed out are not anywhere like that. And then he had
12 six chances to find accelerant, and he didn't find that
13 there, either. So his theory obviously is disproved by
14 the photographs.

15 So, some of all that, among other things, the
16 Defendant cannot prove that Mr. Fowler burned his house
17 because he didn't, so the exclusion in the insurance
18 policy for intentional acts does not apply. So
19 Nationwide owes under this policy.

20 Now, the Judge will instruct you -- this is a
21 matter of law -- that the Defendant has failed to
22 qualify to void the policy because of the intentional
23 act that there are no cumulative damages under a simple
24 breach of contract case. But he will also instruct you
25 that if it's, if the actions of Nationwide have made it

1 impossible for Mr. Fowler to do something which the
2 policy would seem to require him to do before he can get
3 paid, like have the money, replace all your contents
4 when you get paid in part, then when you replace them,
5 you get more money, if that can't be done because of the
6 actions of Nationwide, then Mr. Fowler is entitled to
7 the money he would be entitled to without losing on that
8 ground.

9 Now, as to the second cause of action called
10 insurance bad faith, a longer name for it with longer
11 words, but simply the question is, have the Plaintiffs
12 shown that the errors and actions or omissions by the
13 insurance company amount to insurance bad faith? Now,
14 we suggest to you that during that long, long Deposition
15 we read of Mr. Flanagan and the reading of the
16 Deposition of Mr. Mike Madden's Deposition showed that
17 they have done things that are in violations for general
18 industry standards for insurance adjusters and also
19 they've violated their own procedures a number of ways.
20 And I hesitate to go into this detail. I'm not gonna
21 tell you which witness said what. Both of them
22 essentially admit that Mr. Flanagan was doing exactly
23 what Mr. Madden said -- he didn't give him the
24 insurance, the C&O Report, and that he wouldn't give him
25 the heater unless he hired an expert and they refused to

1 grant him an extension of time to submit the property
2 loss, and they went to the Sheriff before they had the
3 test results, and so forth and so on.

4 Now, we had the gentleman come up from, that funny
5 talking fellow from Charleston, Tom Hesse who is a
6 lawyer now, a Judge now, who had spent 23 years in the
7 insurance industry as a claims adjuster and claims
8 supervisor, and now he's a defense lawyer representing
9 insurance companies. He testified, and I just want you
10 to remember what he said.

11 He said what the industry is supposed to do and he
12 gave examples. I won't repeat them because these were
13 what he read, which were violations of those standards.

14 Now, the Judge will also instruct you that it's up
15 to you. You don't have to believe Mr. Hesse, you
16 certainly can't believe me because I am not testifying.
17 You are the ones who can judge from your common sense
18 and the Judge will instruct you as to the law whether
19 there was a violation of the insurance company's
20 obligations under the implied covenant of good faith and
21 fair dealing.

22 The insurance company says now that we had a basis
23 for the denial; therefore, we can't be guilty of bad
24 faith. We had some basis. We were wrong maybe but not
25 guilty of bad faith. The Judge will give you

1 instructions but I want you to listen to them, of
2 course, but listen to what he says about the duty of an
3 insurance company to do a reasonable investigation, and
4 reasonable means actually doing an investigation and
5 responding to what you find, reconsidering where
6 necessary and being reasonable and an honest
7 investigation of what's happened here. They are not
8 able to say, We thought he was guilty of arson, we hired
9 an expert which gave us a report and he says so, and
10 that's all we have to do, we're not guilty of anything.
11 You're not bound by whether their evaluation of whether
12 their investigation was sufficient. You are entitled to
13 look at all the facts and circumstances and decide
14 whether what they did was reasonable.

15 Now, obviously we want you to believe that it was
16 almost a pretext on their part, that they did not really
17 do what they were supposed to do.

18 Now I want to talk quickly about the slander *per se*
19 charge. This is made out completely by the sworn
20 testimony of Mr. Fowler -- sworn testimony of
21 Mr. Flanagan at his own Deposition a year or so ago. He
22 admitted, because, of course, we had his log notes, and
23 asked him, and give him credit for honestly answering
24 "yes," I did talk to the man at Citi Financial, I did
25 tell him that we were denying the claim for intentional

1 acts, and he admitted that that's the same thing as
2 saying that we're accusing the man of lighting his own
3 fire.

4 He also admitted in the Deposition that, We knew
5 that was arson. Putting all those admitted facts
6 together -- he was wiggling on the stand about whether
7 he said that to the lady at First Citizens. But, to his
8 credit, that is what he said at his Deposition, so that
9 is actually what happened.

10 So our case is based upon reading their log notes
11 and asking them to confirm it and they did confirm it.
12 That's enough. An admission by a party is a confession.
13 It's higher proof than circumstantial evidence because
14 you have to draw conclusions from circumstantial
15 evidence, but an admission or a confession is the total
16 truth.

17 Now, you are going to be confronted shortly with a
18 claim by the Defense that what Mr. Flanagan said was
19 true. And truth is a defense to a slander cause of
20 action. But the Judge will instruct you that it's up to
21 you to decide what was really being conveyed by the
22 words which we use. And it's not sufficient. The Judge
23 is not gonna say this directly, but I'm asking you to
24 listen to what he says and realize that it's not okay
25 for the Defendant to say, I believe you're a crook. I'm

1 accusing you of larceny. He denied it, he has claimed,
2 because he's an arsonist. That really says he is an
3 arsonist. That's not really truth when you say, That is
4 why he did it. You can't protect yourself, that's my
5 belief. That's what we did for that reason. You've got
6 to prove that the reason is there, and the Judge will
7 instruct you about that.

8 Once again, I refer to you the Deposition of
9 Mr. Flanagan where he admitted where he realizes what he
10 said was the same thing as accusing him of larceny.

11 So the question is what you do about that? If you
12 find that the Plaintiff is entitled to win on this
13 simply because there is a sufficient confession there,
14 the Judge will instruct you that you are to presume
15 damages by the mere fact of accusing somebody of a
16 crime. This is a special kind of slander, it's called
17 slander *per se*. If you accuse somebody of a crime, the
18 law considers that proof of some damages. You decide
19 what's appropriate under some damages, and Mr. Fowler is
20 not required to come in here and say I lost this
21 contract or I didn't get this loan or some specific
22 thing. Damage to a person's reputation is something
23 that the law presumes. It's up to the members of the
24 Jury to decide whether that's worth a dollar, a hundred
25 dollars, whatever sum, ten thousand dollars, whatever

1 number, you decide what that's worth. But you notice
2 there's been no evidence that he couldn't get a loan or
3 lost a job or anything like that. That's not required.
4 We don't know for sure that that could ever be done because
5 the testimony was Mr. Evatt didn't say anything about
6 it. He's enough of a sensible businessman, he's not
7 gonna talk to a customer and say, Well, I think you're
8 the arsonist. They'd never lend him any more money.

9 All of this goes back to whether you can believe
10 Mr. Byers and his immediate conclusion that this was an
11 arsonist, but the truth that Mr. Fowler was an arsonist
12 depends upon your believing Mr. Byers or Mr. Ross, Chief
13 Wright or Mr. Holecek to hand over James Fowler.
14 Mr. Byers is the linchpin of the whole case for the
15 Defense, because if he can prove that Mr. Fowler really
16 did light the fire, that would be true and they would
17 get the exclusion. So the whole case depends on
18 Mr. Byers being right or Mr. Ross being right, or
19 Mr. Fowler being right, or the Chief being right. So,
20 like I said, we wind up, who's on my side. We suggest
21 to you that the whole case for the Defense side falls
22 down with the weaknesses which I just suggested on
23 Mr. Byers' part.

24 I'm gonna turn now to damages and have another
25 common sense comment with you. In these days and times

1 and in this State many people simply do not like the
2 filing of lawsuits. This really, I think, means people
3 do not like frivolous, unnecessary lawsuits. South
4 Carolina has always had courts and juries and laws to
5 protect citizens and have had laws and courts and juries
6 to protect homeowners, it has laws and courts and juries
7 to protect people who have legitimate grievances. It
8 has laws and courts and juries to prevent individuals or
9 companies of any size from breaching their contracts,
10 from treating citizens of South Carolina unfairly or
11 trying to take advantage of the weak or vulnerable for
12 whatever reason.

13 If you remember, if Nationwide had done a
14 reasonable investigation and given Mr. Fowler what he
15 was due under his policy for the fire loss, no lawsuit
16 would be necessary. Probably, if Nationwide had not
17 done things like refusing to give him a copy of his
18 Cause and Origin Report, which they put so much
19 assurance on right now, unless he filed a lawsuit, we
20 wouldn't have to be here right now.

21 If Nationwide had done a lot of other things, like
22 paying the claim promptly, then no lawsuit would have
23 been necessary. But we are here today because that is
24 exactly what Nationwide did. So please do not have any
25 reservations that looking at this carefully you are

1 giving one of your fellow citizens of Oconee County what
2 he is due and do what is proper for this company for
3 what it's done.

4 Now, I will say the record clearly shows that
5 Nationwide knew they would probably be sued. Well, I
6 guess they figured that they wouldn't get sued, but they
7 knew that if they did get sued, they would have to give
8 over what he was asking for in an understandable,
9 reasonable way. In saying, Where's your report? I want
10 to talk about it.

11 Mr. Madden was asked by Mr. Flanagan -- once again,
12 I think Mr. Flanagan is not really a bad guy in this
13 because he said the loss, how much shall I give him?
14 All, some, what will I do? Mr. Madden says, Don't give
15 him any of it unless he files a lawsuit, and at that
16 time he'll get it in discovery. And discovery is a
17 legal word for people who get sued and file lawsuits,
18 all these Interrogatories, all these Depositions, all
19 these Subpoenas. That's discovery. He'll get it in
20 that process. So they well knew we might be here today.

21 Now let's talk a little bit about Oconee County
22 again. Nationwide has had a very strange attitude about
23 what it was gonna do with Chief Wright. They
24 disregarded his report because they did not find what
25 they wanted. They went to the Sheriffs because before

1 they got their negative test results to report
2 suspicious actions. But when Detective Lyles said, Come
3 on back when you got them, they forgot about it, because
4 I'm not sure they thought what Mr. Lyles would do based
5 upon the first report, but that's not a proper respect
6 for law enforcement, either.

7 Now, what do his actions show about not just their
8 attitude towards the officials here, but what does it
9 show towards their policyholder? Mr. Fowler,
10 interesting guy, got a pet parrot, colorful restaurant.
11 But he's entitled to get paid. And what's been the
12 attitude of this company towards this policyholder when
13 he not only paid premiums all these years, but when he
14 actually had a claim?

15 Then Mr. Gilden, who you will remember testified
16 yesterday afternoon, I think, called upon the neighbors,
17 the Brights -- he called them the Bryants -- but he
18 called on Sue Bright, who has been around here, she
19 said, I'll say 30-plus, I'm not sure what she said,
20 30-plus, she's been here a long time.

21 He asked her for some information because he was
22 investigating, and she told him right then that
23 Mr. Fowler had come over there and they called 9-1-1,
24 and he ran off to try to get things done. They
25 disregard that. They disregarded what Mrs. Bright had

1 to say. All the Depositions said they knew that, that
2 he tried to get help to put out the fire just like they
3 knew he was trying to sell the house to pay his debts.

4 When you talk to Oscar Bright, 30 years plus two,
5 Mr. Bright said he didn't like the insinuations that
6 were being made and he asked Mr. Gilden to leave.

7 Now, very quickly I want to talk about damages in
8 this context. Number one, you will be able to see this
9 document, which is the Property Loss Report Form. This
10 is the one which has all the different coverages, to the
11 house, for the contents, for the landscaping, all three
12 numbers are right here, and the bottom numbers said on
13 Tuesday as the total costs payable is \$523,333 if all
14 the conditions are met. That's not the right number to
15 start with because they paid \$154,000 to the mortgage
16 companies, so if you subtract that from 523, you got
17 about \$380,000 left. You do the math. But everything
18 was touched.

19 And in this document it talks about having
20 estimates in the trial. Here the restoration will be
21 six months, exactly in the log; debris removal exactly
22 estimated in the log exceeds the limits. Liners ripped.
23 Pond was a total loss. The amount payable under the
24 premium policies -- and like I said before, the Judge
25 will tell you you are the judges of the testimony. I

1 hope that they're right. I wouldn't tell you if I
2 thought they were wrong. But you are not required to
3 take my numbers or do my math.

4 But the testimony by Mr. Madden was that there is a
5 \$30,825 amount payable over the \$154,000 if the house
6 was rebuilt, which is what Mr. Fowler wants to do, and
7 it costs that much. Some of you may have more
8 experience in actual construction than I do, more than
9 each other.

10 Mr. Fowler had many more years' experience than I.
11 He supervised -- he built this house the first time. He
12 knows the materials. He also supervised residential
13 jobs, commercial jobs, industrial jobs. He thinks it
14 would cost him more than a hundred dollars per square
15 foot to build that house. That's an estimate. He had
16 no money to pay somebody, to hire them. But if the size
17 of the house is really, as Mr. Fowler says, 1,722, we're
18 talking about \$170,000 or more, if it's a hundred
19 dollars or more, not just 154. And the policy under
20 this action paid under the policy, there's enough money,
21 more to be paid under Coverage A.

22 Now, the testimony which you will recall -- I'm not
23 gonna put another piece of paper in front of you -- but
24 under the other structures, the testimony was that there
25 was another \$15,500 to be estimated by Mr. Flanagan at

1 the time, that's what it cost to fix the other
2 structures.

3 On the contents, this comes up lots of ways. You
4 will see this exhibit that Ms. Bronda Yarbrough
5 explained, this is her handwriting. I can sympathize
6 with somebody with better handwriting; my handwriting,
7 too. But this document was submitted by Mr. Fowler
8 within 60 days and they knew they got it in 60 days and
9 they sent it right back: We already denied this claim.
10 We're rejecting this. They don't have any proof that he
11 broke the law.

12 We respectfully ask you to consider whether these
13 numbers are right. What's the total? The total
14 testified is \$142,610.75. That is more than the
15 coverage. The coverage is only \$114,692. It's on this
16 form. I can't remember, if you can't remember it,
17 that's where you find it. So he's entitled to that
18 \$114,692 plus the 5 percent debris removal, you heard
19 the cost of the removal of the debris, the debris
20 removal cost cannot be way over \$5,735 on that.

21 This document shows that the estimate for fixing
22 the landscaping is more than the \$7,706. Do you
23 remember that testimony? Look at this Exhibit Number,
24 it's Plaintiff's Trial Exhibit 30. It's got figure 1
25 for Deposition. This is your score card for figuring

1 out what you remember per the testimony, how much should
2 Mr. Fowler be paid under the first cause of action,
3 which is the biggest contract. It's not \$523,000, it's
4 less than that, but it's certainly more than nothing.

5 Now, we talked about the damages you can award for
6 slander.

7 The last thing I want to talk about is the damages
8 for bad faith. Listen closely when the Judge reads the
9 instruction about insurance bad faith, because if you
10 find that the Defendant is guilty of insurance bad faith
11 because of all the reasons we've talked about, too much,
12 you can give Mr. Fowler extra damages as long as he --
13 because those are called consequential damages, not just
14 the direct damages, the lack of payment of the contract,
15 if you think it's been a hardship for him to be in that
16 gazebo for 34 months already, with some more time to
17 come, if he gets the money to build it, he testified he
18 thought he would take about another six or seven months
19 or he thought it would take a year to build that house.
20 So you can give him, I think the figure is \$1,400 a
21 month for a similar house in this community, multiply
22 \$1,400 a month times however many months you think it
23 would be between January of 2009 and when you think it's
24 likely he'll get back in the house. It's already been
25 34 months. It'll be 34 months plus 12. You do the

1 math. It's up to you to believe what the facts are
2 based on the testimony.

3 Now, the last thing I'm gonna say is that when you
4 get the verdict form, this will be your first chance to
5 say what you think. You will get the verdict form from
6 the Judge that's gonna be more or less standard. It
7 will list the three causes of action and it will say, We
8 find for the Plaintiff in the amount of X damages,
9 actual damages, one, two, three. And then the last page
10 will say, If you find that the proof is clear and
11 convincing, that's more than the burden of proof,
12 sometimes I see Judges say the burden of proof, if it
13 tips over like this, that's the preponderance of the
14 evidence. It's not the same thing as proof beyond a
15 reasonable doubt. Clear and convincing is somewhere
16 between those. If it is clear that the proof is there
17 and it convinces you that the Defendant's actions are
18 willful, wanton, and in reckless disregard of the
19 Plaintiff, say yes because that will take us to another
20 stage. If you say you don't believe it's clear and
21 convincing, from all the documents, the pictures and the
22 Depositions, if you don't believe it's not clear, all
23 this is not clear, you can say no. But it's not just
24 the two questions. It's clear and convincing and is the
25 conduct of the Defendant willful, wanton, and reckless

1 and in reckless disregard of the Plaintiff's rights. We
2 want you to say yes for that.

3 So we ask after you have reviewed the evidence,
4 heard enough from me, and you heard Mr. Murphy and you
5 heard the Judge's instructions, award the Plaintiff
6 actual damages on all three causes of action as I
7 discussed, and that you say yes on the last page, the
8 evidence was clear and convincing, based upon the
9 depositions, et cetera, that the Defendant's actions are
10 in that category.

11 I'm sorry I talked so long, I'm sorry I talked so
12 slow. I'm sorry I mumbled. But I do want you to think
13 about the evidence you've heard and your common sense
14 you think really is the fair and just thing to do. And
15 verdict means just saying the truth. Thank you.

16 MR. MURPHY: May it please the Court?

17 THE COURT: Mr. Murphy.

18 MR. MURPHY: I beg the Jury's indulgence just to
19 rearrange momentarily, Your Honor. You figure you
20 waited this long, give me 20 more seconds, right?
21 Closing Statement on behalf of the Defendants:

22 MR. MURPHY: Wow. Y'all are a real interesting
23 Jury. We've asked you to do a lot. I told you it seems
24 like a long time ago that you had some very difficult
25 things to do this week, and one was just to be patient

1 just in the comings and goings and you've done that.
2 Some of you have gone above and beyond the call of duty
3 it seems like. You had to carry out your duties to
4 wait, because, as you noticed, my clients didn't begin
5 to put up their evidence until late yesterday, well into
6 the week of the trial. So I thank you for that.

7 We've done some other things. We've tried to give
8 you a crash course on fire investigation, claims
9 handling, and things that we expect you to just have it
10 cold. I think you all are up to the task. I think you
11 paid attention and I think you heard the wheat and you
12 heard the chaff, and I think you will do a fantastic job
13 resolving this dispute. That is really what it is.

14 I guess back in the old days people drew pistols at
15 ten paces and that settled it, but that's not a very
16 satisfactory system. Now when individuals and their
17 insurance company can't agree on what should be done,
18 what the law requires, we have an opportunity to come in
19 and let you all resolve those disputes. The Judge plays
20 his role as we explained to you, and you play your role,
21 which is a very, very important role.

22 There's one question that you're gonna have to
23 answer, among many. But the one that you can't get away
24 from is, How did this house catch on fire? We're gonna
25 talk a lot about that in a moment, but hopefully not

1 exhaustively. I want to review with you, and I don't
2 have it with me, but you're gonna get a three-page jury
3 verdict form. And I must be wired up kind of crazy.
4 I'm gonna work from the back to the front just to give
5 you an overview as you go through it.

6 It is entirely your prerogative, Mr. Foreman and
7 ladies and gentlemen, as to how you decide it. But in
8 my mind I like to work from the easiest to the hardest
9 issues. And the easiest is gonna be on the last page
10 where you are gonna be asked to decide whether by clear
11 and convincing evidence Andy Flanagan or Nationwide
12 carried about in a willful, wanton, and reckless manner.

13 We've just spent four days here seeing how
14 thoroughly they investigated the claim, how much
15 experience they had, how they looked at every angle of
16 it. And Andy has been sued for half a sentence that he
17 admits to stating. That is so far short from willful,
18 wanton, or reckless conduct, it bears no further
19 explanation from me.

20 On the second page of the verdict form will be the
21 two causes of action, one, slander *per se*, and one known
22 as bad faith. I'd like to talk a little bit about the
23 slander because I take it a little personally when you
24 represent someone like I have and you get to know them,
25 you identify with them. We identify with each other a

1 little bit just from the conduct of this trial. I
2 notice you never did get a better seat over there, and I
3 apologize for my partner's big shoulders being in your
4 way half the week. Some of y'all did switch around. We
5 pay attention. Y'all go back and tell stories about us,
6 too. I know. It's not my first one. I hope it's been
7 a good experience. It has been a difficult week, it's a
8 long week and we're not done yet, but let me move ahead.

9 Andy has been sued because of the persistent
10 questions of a lending company manager who would not
11 cooperate with him, and he used the word because of the
12 intentional act exclusion after he was questioned about
13 why is the claim being denied.

14 Now, you know that Andy is being truthful about
15 that because in the record was the letter he had to
16 write to the guy to get him to just send in a Proof of
17 Loss, something that's done all the time. You heard
18 even Mr. Hesse acknowledge that. You heard that First
19 Citizens didn't have any trouble with that and that's
20 probably the difference between a bank like First
21 Citizens and a company like Citi Financial. But because
22 he pushed Andy and was being uncooperative, Andy said
23 that.

24 But let me ask you this. Would it have made any
25 difference if he simply said because the claim has been

1 denied? Would Mr. Evatt have taken any different
2 connotation? Would that convey anything different? It
3 wouldn't have.

4 Mr. Evatt didn't come here. Mr. Evatt didn't tell
5 you how offensive or out of line the statement was.
6 There was no evidence anyone else heard any statements
7 from Andy. He didn't put it on Facebook or Twitter. It
8 was a private phone call with a legitimate business
9 interest between two people. And if it's anything
10 wrong, I don't think it's wrong at all because as a
11 matter of fact, the denial letter says, The claim is
12 being denied because of the intentional act exclusion.
13 There was certainly no intent to disparage Mr. Fowler to
14 anyone. If there was, why wouldn't there be person
15 after person after person who came in here and said, You
16 wouldn't believe what those Nationwide people said, you
17 wouldn't believe what Andy Flanagan said. And there was
18 not.

19 And, in fact, to the contrary, we know that
20 Mr. Evatt renegotiated the loan after the partial
21 payoff. And the admission, although Mr. Fowler didn't
22 want to admit it, after I showed him his Deposition,
23 that no one there ever treated him any differently.

24 So the Judge is gonna charge you a bunch of law.
25 But the bottom line is Andy didn't say anything with the

1 intent to harm anyone, he didn't harm anyone, and if he
2 said something that would have been acceptable, it would
3 have conveyed the same meaning. And so he did not step
4 out of bounds in that innocent conversation in a private
5 telephone conversation. And I am very serious about
6 this. I ask you to find in his favor about that claim.
7 I think that's a very important claim. There's no
8 damage. But the Judge is gonna instruct you to award
9 nominal damages based on what they claim. But it's very
10 important for my client's sake, and I ask you to award
11 your verdict under slander *per se* for the Defendants.
12 No one else at Nationwide said anything. They're there
13 because Andy was on the job doing his job in the best
14 professional way that he could. So I ask you to check
15 for the Defendant on the slander *per se* cause of action.
16 There is certainly nothing to believe that the statement
17 was made willfully, wantonly, or recklessly.

18 Now, the other claim that will be on the second
19 page is whether Nationwide was unreasonable and acted in
20 bad faith in denying Mr. Fowler's claim. That's
21 separate and apart from whether Nationwide has proved
22 that the policy does not provide coverage for this loss
23 and we'll talk about that in a moment. This is just
24 whether or not Nationwide was right to take that
25 position in terms of did they have a reasonable basis.

1 And the same law as it protects individuals if they
2 can't get justice protects people like Nationwide if
3 they get sued for the right of their conclusions and the
4 right for their position under the policy. If they just
5 did it and said, you know, the most we can lose is this
6 contract amount, you know, we'll make him get a lawyer,
7 that's where the law comes from. The insurance company
8 can't just sit back on the money for no reason, do
9 nothing, wait till you get sued, put you through the
10 ringer, and then say, no, the most we can lose is the
11 contract. But that's on this end of the spectrum.

12 And what Nationwide handled, how they handled this
13 case is on this end of the spectrum and I would like to
14 go through that with you.

15 Because the Plaintiff put forth a \$250-an-hour
16 witness who had billed \$6,000 even before he gave a
17 Deposition, and he never got to one specific item in
18 Nationwide's recommended claims practices. He just kept
19 saying the things he didn't like weren't fair. And most
20 of the things he talked about had nothing to do with the
21 issues in this case. The issue that Nationwide should
22 be judged upon is whether they had a sufficient
23 investigation that revealed information of motive,
24 opportunity, and incendiary origin.

25 You saw over the last couple of days the very

1 extensive investigation -- and, by the way, which is one
2 of the things Nationwide wants its people to do. You
3 heard the evidence that was uncovered in the multiple
4 recorded interviews and the conversations and the Credit
5 Bureau research of the financial issues.

6 Opportunity was never in dispute. Yet, Mr. Gilden
7 made sure that a neighbor didn't say, you know, by the
8 way, there was some truck that came screeching out of
9 there at 4:00 in the morning and I don't think
10 Mr. Fowler saw that truck before. Even though there was
11 never really a dispute, they didn't jump to a
12 conclusion. I think I heard that "rush to judgment"
13 phrase a lot. A rush to judgment would be, well, he's
14 living there alone, that's all we need to do. No. He
15 canvassed one neighbor, a neighbor in Alabama, they were
16 not there; the Brights, they didn't see anything
17 unusual. So that's to eliminate whether some other
18 explanation and whether someone else may have had
19 opportunity.

20 And then the incendiary origin was based on a
21 complete, two-day examination by a highly experienced
22 fire investigator.

23 Mr. Hesse never offered one complaint, and he even
24 said, I'm not the expert on incendiary origin so I can't
25 tell you whether it was reasonable or not to believe

1 that the fire was of an incendiary origin. He also was
2 the only person in this courtroom who does not
3 understand the relative impact of negative debris
4 samples. All of you all know it, even though this is
5 the first case you've ever come across it, based upon
6 the explanation after explanation after explanation.
7 The Chief, Doug Ross, Jerry Byers, John Holecek, Billy
8 Gilden, Mike Madden, Andy Flanagan. Anybody who's ever
9 been involved in fire claims, either as an investigator,
10 first responder, an insurance claims person, and now 12
11 Jurors of Oconee County understand that the absence of a
12 positive sample is not conclusive. It has to be taken
13 into account with all of the other evidence.

14 But yet Mr. Hesse said he didn't know. He came all
15 the way up here to sit in judgment of Nationwide and he
16 didn't know that. Mike Madden said that's common
17 knowledge of anybody who has any expertise and
18 experience, not even expertise, any experience with fire
19 claims. Some of the things that he complained of,
20 because he couldn't find anything in the actual
21 investigation that occurs in the first 26 days before
22 the claim was denied, that was thorough and complete,
23 were things that happened afterwards that had or, or
24 and, had no bearing on that claims decision.

25 The contact with the Deputy which Billy Gilden

1 explained was just to see whether local law enforcement
2 was already involved.

3 Failing to provide the report. What I heard a few
4 moments ago, Well, we give them Jerry Byers' report so
5 he'll go away. Mr. Fowler was fully informed of what
6 Jerry Byers' conclusions were and he called him an
7 idiot. I don't think he would have just gone away if he
8 had have gotten that piece of paper. He had no evidence
9 that any other insurance company provides their work
10 product, the fruits of their investigation, until
11 litigation is pending because the rules of court require
12 that they would have to produce it like this, which
13 Nationwide did.

14 The offer to give a polygraph, which is inherently
15 unreliable, not admissible in court, not used by any
16 insurance company that anyone testified to, that's just
17 what we call a red herring, all of these things. I
18 think that's a term that goes back a little bit before
19 my time. I think it goes back to the fox hunting days,
20 and because the hounds had the advantage over the fox,
21 the hunters to make it a little more sporting would take
22 a fish, put it across the trail, and the dogs would pick
23 up on that and kind of throw them off the scent. Get
24 them away from the main issue.

25 Lawyers shouldn't do that. They should keep you

1 focused on what the issues are and that's what I've
2 tried to do in this case. But these red herrings are
3 about getting a report and taking a polygraph. An
4 extension after the claim had been denied and no one had
5 raised that issue with Mr. Fowler. Yes, he could have
6 given an extension, but Andy explained that he didn't
7 think he needed to because the claim had been denied.
8 And requesting the Proof of Loss from Citi Financial,
9 which, of course, you'll see, as required under the
10 policy, the letter had to be written, and they got one
11 pretty quickly back, so those are all complete red
12 herrings.

13 The things that Mr. Hesse said was that there was
14 not, that negative samples were not considered or
15 discussed, which you've heard that Billy Gilden talked
16 with Jerry about before the test results came back and
17 knew that they might be difficult because there was a
18 linoleum floor. Andy was aware that they might come
19 back negative because Jerry didn't smell them. I said,
20 you know, they might be there, but I didn't smell any,
21 so chances are, you know, the inference would be that
22 chances are they won't be there. And everyone who
23 testified with any experience in fire claims knows the
24 relative weight of that. It's not that it's important.
25 But Mr. Ross said it best. He said, Will they give your

1 case a boost? That's all it is. The reverse of that is
2 not true. The absence of accelerants does not mean that
3 there couldn't possibly have been an intentionally set
4 fire. And we'll talk about why that is a little more.

5 But Mr. Hesse just said that wasn't documented.
6 Well, why would you document common knowledge that
7 everyone would know, all of the experts agreed it's
8 common knowledge, but Mr. Hesse, who's been in the
9 insurance business one way or another for 40 years, is
10 the only person in this courtroom who didn't know. It
11 is amazing what getting \$250 an hour will do to your
12 memory.

13 He says that perhaps the investigation was
14 incomplete. We're gonna talk in just a moment about how
15 thorough and complete it actually was. But one of the
16 things he said was they ignored the Friendship Fire
17 Department report. But then he recanted. They didn't
18 ignore it. They considered it. But it is what it is.
19 It's a Truck Report from a first responder.

20 And we'll talk about Chief Wright because what was
21 interesting with Chief Wright, who is an excellent
22 firefighter, is that when he just took a little bit of
23 time on the stand to look at a few photos, he started
24 acknowledging that there was a little bit more than what
25 he had seen.

1 He acknowledged that this burn pattern right here
2 was the other half of the V that he saw on the wall that
3 was adjacent to it. The burn up this wall coming from
4 the kitchen and the burn up this wall. And everyone
5 agreed this wall burned from the back. That little
6 stud, that would be like me trying to look at the
7 courtroom right here. Why don't we step back a little
8 bit and look at the whole picture, see the whole Jury.
9 That stud is what was left a result of a fire that
10 burned through here and through here and up. The area
11 that's not burned is Sheetrock, which we all learned
12 this week doesn't burn like wood does. That's why the
13 fire went up and got in the wood. And, as we're gonna
14 talk in minute, of course, that was being sucked up from
15 an open attic door.

16 But Chief Wright acknowledged that's the other half
17 of the V. So his report was not determined -- was not
18 ignored.

19 The sale of the house. When we talk about motive,
20 the sale of the house, it wasn't that Nationwide didn't
21 know the house was being prepared or considered for
22 sale, it was that they didn't follow up with the lenders
23 to confirm that. Nationwide accepted that fact at face
24 value. Would you need to call Ms. Kaufman or Mr. Evatt
25 and say, Did you really tell Mr. Fowler to sell the

1 house? That's what he says is bad faith. That we,
2 Mr. Fowler said he was preparing to sell the house
3 because we talked with the lenders. You heard him when
4 he testified. I Cross-Examined him about that.

5 Okay. He's preparing a house for sale. A house is
6 being prepared for sale that burns makes the claim more
7 suspicious, not less, and we'll talk about that in a
8 moment. But that's what Nationwide was accused of doing
9 wrong.

10 Now, Mr. Hesse, abstention or not, taking sides on
11 what? The only real issue was is, did Nationwide have a
12 reasonable basis and have sufficient information to
13 believe that Mr. Fowler had motive and opportunity, and
14 really only motive is the only one that's even being
15 disputed. They've submitted they had evidence on
16 opportunity. And did they do a sufficient investigation
17 to determine that the fire was of an incendiary origin?
18 And Mr. Hesse came all the way up here to not tell you
19 whether or not Nationwide had a reasonable basis on it,
20 he took no opinion on that.

21 Well, I'm glad he did that because it's not his
22 opinion that matters, it's your opinion. You heard all
23 the evidence. At a minimum Nationwide did a very
24 thorough investigation. They did it promptly. Here are
25 some of the things that they did:

1 They did a site inspection -- well, they made
2 telephone contact the first day. And these claims
3 practices, the philosophy is to strive for claims
4 service that is fast, fair, and friendly, while
5 recognizing the need for the independent judgment of the
6 claims associate in resolving claim based on each
7 claim's specific facts and own merits.

8 That the one in a hundred or less than 1 percent of
9 the claims where coverage may be denied has to be
10 reserved to the independent judgment of the claims
11 associate as long as he gives fast, fair, and friendly
12 service. That's the goal.

13 Andy's on a weekend trip with his wife, but he
14 makes the call, low man on the totem pole, comes back to
15 Mauldin that Saturday night and gets to the site the
16 next day. He does a walkaround, he takes photographs,
17 he interviews Mr. Fowler, he gets a lot of information,
18 observes some things that are suspicious in terms of an
19 insurance claim, things that had to be checked out.

20 House had no power. A house with no power that
21 catches on fire is highly unusual.

22 The financial difficulty that Mr. Fowler explained.

23 The fact he might be preparing the house for sale.

24 The fact there didn't appear to be any other
25 person.

1 So he did all that on day two. He involved Jerry
2 Byers. Jerry Byers took 150 photographs and took a full
3 two days on the scene. How could that be said not to be
4 a thorough and complete investigation? What else could
5 you do? Stay out there a month?

6 He did a follow-up on the scope of the contents
7 continuing to investigate and analyze and estimate and
8 analyze the damages while the coverage issues were being
9 explored. All the personnel had access to the
10 information that was being uncovered.

11 Then Billy Gilden did a second investigation. He
12 interviewed some witnesses, he did a courthouse records
13 search, he did a credit bureau search, he observed part
14 of the Cause and Origin Investigation by Mr. Byers to
15 glean more information, to make sure he understood where
16 Mr. Byers was coming from. I'll tell you, Mr. Byers is
17 quite affable. I'm sure spending the day with him at
18 the scene would be quite educational and even for
19 someone as experienced already as Billy Gilden.

20 So in terms of making a decision and getting
21 information, you're talking about people that had the
22 information, that had a basis to do what they ended up
23 doing. Whether they were right or wrong is not the
24 issue under a bad faith cause of action. It's just
25 whether or not they had a sufficient, reasonable basis

1 to believe that their position was correct. And no one
2 from Nationwide doesn't believe it's correct; they still
3 believe it correct today because it is correct today.
4 It was correct then and it is correct now, and it
5 certainly was reasonable.

6 And he took the follow-up Examination under Oath to
7 make sure they got the most detail, to make sure they
8 hadn't missed anything that was done. Mr. Fowler was
9 apprised that the coverage was being investigated so no
10 one took him by surprise, pulled a fast one on him. He
11 was advised orally and he was followed up with a written
12 letter so there would be no dispute later about what the
13 exact basis was and to protect Mr. Fowler so that
14 Nationwide didn't say, No, no, we told you it was this
15 reason we denied it. It was in black and white, it was
16 in the record, and it was done.

17 Mr. Hesse never got off just being unfair. But if
18 you listen to some of the best claims practices,
19 essential information is obtained during initial contact
20 with customers. Yes. Claims handling processes are
21 discussed with all appropriate parties. Yes.
22 Appropriate claims forms are discussed and distributed
23 to relevant parties (Mr. Fowler) at the time of initial
24 contact. Yes. Claims documents are secured. Yes. All
25 contacts and attempts are documented in the file logs.

1 They were. All contacts are scheduled according to the
2 facts of the case, who you get involved. The claims
3 associates should promptly respond to all communications
4 as appropriate. Yes. Claims personnel are well
5 informed about the policy interpretations. Yes. You've
6 heard them say that's it. And the Judge is gonna tell
7 you they knew what they were supposed to decide when
8 they were interpreting the policy. And I could go on
9 and on and on and on.

10 If Nationwide was in bad faith, Mr. Hesse should
11 have been the one to go on and on and on and on about
12 all the things that weren't done. But the truth is this
13 claim was well investigated in a professional and
14 courteous way. Mr. Fowler disagrees with the decision
15 and that's his right. That's why he can come here today
16 and ask you to side with him and say, Nationwide was
17 wrong. I didn't burn the house. I'm entitled to the
18 policy that I paid for.

19 But Nationwide also has the right to come here and
20 say, We're right, this was an intentional act, and this
21 policy does not provide coverage so long as Nationwide
22 has a reasonable basis for that position. And I would
23 submit to you that there is really no question
24 whatsoever that Nationwide had a reasonable basis for
25 its position based on a thorough investigation of the

1 claim.

2 And so on the second page of the verdict form, and
3 this is a much easier thing for you to decide even than
4 starting on the first, but it's up to you entirely. But
5 I just, in my view there's no question about it, and
6 that would be a verdict for Defendant Nationwide under
7 the bad-faith cause of action.

8 Now, that leaves us with the breach of contract
9 claim in which Nationwide, because it was a policy
10 exclusion, must prove to you the three elements by
11 circumstantial evidence that the fire was intentionally
12 set by Mr. Fowler. We do not have an admission, we do
13 not have a surveillance tape, we do not have an
14 eyewitness.

15 So the Court allows, because otherwise someone
16 living out in the country, and if you have to have that
17 you could never get out, anything could be burned as
18 long as it could be burned without anyone seeing you and
19 you would never admit it. So the law understands that.
20 And the law says circumstantially an insurance company
21 can prove that the fire was intentionally set if it can
22 show that the fire itself was of an incendiary origin,
23 or an intentionally set fire, and that the insured had
24 the motive and the opportunity to set the fire.
25 Opportunity is not an issue. So we have motive and

1 incendiary origin.

2 Let's talk about motive. Mr. Fowler was in
3 significant financial distress, primarily because of his
4 two failed businesses, one in which he was the silent
5 partner, although I don't know if it's your son as a
6 partner how silent you would remain. But he lost
7 \$40,000. He never got a dime back. He drained his
8 retirement account to do that. It was a costly venture
9 to him. And I believe that a couple of the judgments on
10 that that were paid off increased the indebtedness on
11 his house, a place he loves, a place he never wanted to
12 leave. He had no money, no bank accounts, no savings.
13 At the time of the loss he had no money, I guess
14 whatever he had in his mattress or his wallet. He had
15 no money to speak of, not a single bank account, his
16 401(k) was gone.

17 He'd had a credit card cancelled on him, he had had
18 six other accounts sent for collections, and he had a
19 tax lien. He had no current income and he had no
20 prospects. Now that standing alone is motive. Someone
21 in that financial situation, if they can reduce their
22 indebtedness, if the loss pays their indebtedness,
23 that's motive. That's it.

24 But in this case it's offered that that would be
25 crazy. Why would Mr. Fowler burn the house he built

1 with his own hands when he was preparing to sell it? As
2 if in 2009, in the middle of the worst real estate
3 downturn any of us had ever seen in our lives, just like
4 putting a up house for sale is gonna solve your problems
5 like that. That's basically what they're saying. Oh,
6 it was solved. It was gonna be -- it was solved. The
7 house was gonna be put on the market and everything
8 would be fine.

9 Well, everything wouldn't have been fine and
10 there's a few reasons for that. Houses sometimes don't
11 sell at all. And if the sale is because your lender
12 suggests it because you are already three months behind
13 on both of your mortgages, they're probably not gonna
14 give you as much time to sell it as if you decide, I
15 just kind of want to move back to the city, I think I'll
16 put my house up for sale. There's a whole different
17 suspicion level between somebody who just, you just
18 happen to find out, well, actually, we were just getting
19 ready to move and this is really a shame. Now we got to
20 deal with this. Not behind. Not out of work. Not out
21 of money. Not in over their head. That wouldn't be
22 suspicious.

23 But when someone has no prospects -- and you heard
24 Mr. Fowler. I was gonna sell my house to pay my debts.
25 That's a lot easier said than done and magnify that by

1 ten at least in this economy.

2 The second thing is sometimes houses don't sell
3 quickly enough. Houses don't sell for enough money.
4 And what is the one thing that selling your house
5 requires you to do, no matter who you are? If you are
6 selling your house, if you get your house foreclosed on,
7 or you deed it back over to the banks, you leave. But,
8 if you have a fire loss, the insurance company has to
9 pay those mortgages and you get to stay. If that isn't
10 motive, I don't know what it is. This man built the
11 house. He said he never wanted to live anywhere else.

12 You know, desperate times and desperate
13 circumstances require, you know, they can cause the
14 nicest person to consider a desperate measure. And
15 that's what happened. Fowler is not a criminal, he is
16 not an evil person. But he, if you weigh out the
17 options, in his shoes, the attachment that he had, the
18 value of the land, he was already living in the gazebo,
19 he had no power on because, for whatever reason. He's
20 still there. He's able to get by. That's the one thing
21 that he wanted to make sure of. He stayed there like 30
22 years. If I get this claim paid, I can rebuild it,
23 start over again and get by.

24 If he moved, if he sold that house, where would he
25 ever get another lake house, a piece of property like

1 that? He's 60 years old, out of work, no money, no
2 credit. Only chance. It's his only chance. And
3 desperate situations can cause even a good man to
4 consider a desperate measure.

5 Let's talk about the last issue. Was this a set
6 fire? What's interesting is that David Wright, a fine
7 fireman, who when he looked at this picture even for a
8 few moments acknowledged that there was a lot more in
9 this scene than what he saw on his fire suppression
10 efforts. His conclusions are simply just not, not what
11 this case is about.

12 He said that he saw half a V and when he studied
13 this photo, he saw the other half. He admitted he could
14 make no correlation between the heater and the fire and
15 it just seemed to him that that was the area. And, yes,
16 there was a lot of heavy burning in that area. There
17 was a lot of heavy burning from this point where the
18 fire started, once it got on these walls -- and I'm
19 gonna show you a picture in a minute -- the burning
20 underneath all these cabinets just burned right across.
21 And just, when it spread out, the first thing it did was
22 this wall. And which direction is it gonna burn? It's
23 gonna burn this way. The picture of the stud? Every
24 witness who looked at this said, yes, the burning
25 pattern indicates came from behind. The V pattern came

1 from the kitchen and behind because the face of that
2 stud facing the wall that the Sheetrock behind the
3 heater was nailed into was the best condition. And it's
4 one little stud. You have to get back and look at the
5 whole scene.

6 So, Chief Wright acknowledged that, but he also
7 said that wall was burned through from the kitchen. He
8 was honest about the fact that he did not perform a
9 cause and origin investigation. I think his quote was,
10 I leave it for the investigators. He acknowledged the
11 photograph showed two separate points of origin.

12 What would Plaintiff say if Chief Wright's report
13 had "intentional" on there, and Nationwide said, Oop,
14 that's all we need to do. Cancel Jerry. It says
15 "intentional." We don't need to investigate any
16 further. We don't need to dig through this debris. We
17 don't need to consider any other evidence. The Chief
18 made that observation. That's ironclad. This case is
19 over.

20 Would that be bad faith? It probably would be.
21 So, yes, Nationwide considered Chief Wright's
22 investigation and what he found at the scene. Those
23 things are important. For example, the power cords that
24 were coming through the house were arcing during the
25 fire suppression indicating that they had not shorted

1 out and started the fire. And, of course, nobody has
2 tied these power cords to the fire. This was not an
3 electrical fire from these power cords. That's admitted
4 and undisputed.

5 So, he did provide important information, it was
6 considered. But he was not put in as an expert, he
7 admitted he wasn't an expert, he didn't do the
8 investigation and looking at some photographs and he
9 realized that, wow, you know, there was a little bit
10 more than met the eye when I just kind of looked in
11 there. And he wasn't trying to come in here and give
12 any kind of conclusive opinion. He filled out the
13 report, that's what it looked like to him.

14 That's what it might look like to any of us that
15 just walked through there that was untrained. But after
16 we've seen all the evidence, we knew there was a little
17 bit more to it. And let me show you some of the things
18 of the more to it in just a moment.

19 But before I do, the Plaintiff's only theory is
20 that a little 10,000 BTU kerosene heater got so hot that
21 the wall just melted away, the studs had ignited, and
22 the house caught on fire, and I think we all know after
23 you saw a very, very good presentation from John Holecsek
24 today, that that kerosene heater could still be burning
25 today at a temperature necessary to just set on fire.

1 If it could get that hot, it would be, there would be
2 deaths all over the place. People walking by melting
3 their hands to it. If I stood there to get warm after I
4 came in, I might catch on fire. And I'm a cold-hearted
5 person, I guess, representing an insurance company, so
6 it would take a lot. It wouldn't do it.

7 It's preposterous. Let's be honest. It's just
8 seriously flawed. There was no scientific testing.
9 That's why we hired Mr. Holecek, just to make sure that
10 you knew the science of that opinion was seriously
11 flawed. Mr. Ross admitted that if a heater was
12 two-thirds full of fuel, and everybody who tested it
13 said it was, then his theory was completely flawed. It
14 would have to have been bone dry, and it wasn't bone
15 dry, and it wasn't bone dry, so he excluded his own
16 opinion.

17 He admitted in addition to Chief Wright that that
18 damaged stud, photographs 33 through 36, that the
19 burning came behind the wall. He acknowledged that the
20 burn patterns in the living room -- let's put them in
21 the right order that I move them or they get to the
22 wrong order -- the burning pattern in the living here
23 was not from the curtains here.

24 I'm sorry, Madam Court Reporter.

25 This was something different. You see the

1 irregularity of this burn pattern, and Jerry explained
2 it fully to you, I'm not going to go over it again. All
3 Mr. Ross could say was, Well, it must have fallen from
4 the attic. Of course, then he said the same thing in
5 the kitchen. It's kind of like "the dog ate my
6 homework" if you've got no other excuse you can think
7 of.

8 The heater had no defect. It had fuel in it.
9 Mr. Ross even tried, if I hadn't hired John Holecek, to
10 give you the opinion that the heater was a 33,000 BTU
11 heater, which is more than three times what it really
12 was, but even that, a 33,000 BTU heater, wouldn't get
13 anywhere near a combustible temperature.

14 If all you have, if you have a house that has drop
15 cords and a kerosene heater, that's your only chance for
16 this fire to be accidental. There's nothing else.
17 There's three choices. The drop cords? No. Both sides
18 agree it wasn't the drop cords. The kerosene heater?
19 Completely refuted.

20 What's left? What's left? There's only one thing
21 left and that's that this was a set fire. Now, that's a
22 difficult thing to do. It's hard to believe. Because
23 nice people, you just can't imagine they would do it.
24 But if you look at the total situation, if you look at
25 the financial condition and the only way out to keep the

1 property, and the undisputed evidence of an incendiary
2 origin, it only reads to one conclusion. There were two
3 points of origin.

4 The kitchen was even admitted by Mr. Ross to be the
5 result of accelerants. This is in the hallway going
6 back toward this part of the house. This, these dark
7 circles you heard, if something fell out of the attic,
8 it would run out. If something was poured, and you may
9 have done this to yourself, it splatters a little bit.
10 That's splatter. Anything that falls would burn
11 uniformly.

12 Mr. Ross admitted that was accelerant, with a
13 negative sample, mind you, that kind of disputes how
14 important the samples are because Mr. Ross even said
15 that's accelerant. He just thinks it came from the
16 attic. You have to look at not just the irregular burn
17 pattern but I think what was called the communication
18 damage. In other words, the whole picture. If you have
19 a funky looking burn pattern that from that area
20 spreads. This is from the refrigerator which again is
21 right here. You see it burning from low to high. You
22 say underneath this baseboard where my dog loves to lick
23 anything she could get her tongue on, burning from low
24 to high. Kind of like a bay hair cut. That is more
25 than just a visual inspection of this. So, if the

1 standard says don't do it by this alone, that's why you
2 look at the communicative damage -- I'm using a big
3 word -- but, you know, the spread. You see that from
4 where that irregular burn pattern is it went from low to
5 high. You see that in the kitchen that big oak table,
6 that went low to high. That's right in the area before
7 it was cleaned up where this pattern is, and you see a
8 clear line of demarcation -- another big word -- at the
9 edge of the pattern that's a little drop around where
10 the table was. Something fell in? Why would that be
11 there?

12 When you look at how the damage grew from the spot,
13 you're not looking just at the spot. You're seeing how
14 the damage spread, you're seeing where it came from and
15 where it went, that it burned low to high. That it
16 burned not only up this hallway where the attic door was
17 down, which by itself would be a very suspicious thing.
18 It burned this way, and there's the double V. It's
19 burning on what will ever be burned. It burned all
20 along underneath here. You see it right here. It burns
21 all along here. When it gets to that wall, there's
22 nowhere else to burn, so it starts burning that way.

23 Nationwide did its best to analyze what happened,
24 as accurate as they could. They want to be right. They
25 rarely deny claims. But this claim was properly denied.

1 The difficult thing for the 12 of you to consider, but
2 when you consider the evidence that you saw, the
3 evidence of motive, the evidence of the origin of this
4 fire, I ask you to come to the conclusion that this was
5 an incendiary fire, that Mr. Fowler did have the motive
6 and the opportunity to set it, and the breach of
7 contract cause of action, as well as the others we
8 discussed should be in favor of the Defendants. Thank
9 you.

10 THE COURT: Mr. Belser?

11 Further Closing Statement on Behalf of the Plaintiff:

12 MR. BELSER: May it please the Court, I have some
13 comments directed just to what Mr. Murphy said. I'll
14 try to make it as brief as I can in view of the hour, my
15 voice, everybody's ears, and everything else.

16 Now, Mr. Murphy has done a good job with this very
17 tough case. But I want to comment on a couple points.
18 One, he says, he argues there's no harm that resulted to
19 Mr. Fowler by being accused of arson. I guess if his
20 accusation was that Mr. Flanagan committed arson or
21 Mr. Murphy committed arson, he would feel differently
22 about whether there is a harm of somebody being accused
23 of a crime.

24 Number two, he says that Mr. Hesse only said things
25 were not fair. He sort of dumbed down Mr. Hesse's

1 testimony. But the Jury needs to recall more about what
2 Mr. Hesse did say. He talked about industry standards
3 and he talked about the analysis of the insurance
4 company's own acts. Remember the testimony, don't
5 listen to argument. What I say is not evidence, what
6 Mr. Murphy says is equally far from evidence. But
7 please remember what you can of the actual evidence
8 about what Mr. Hesse did say.

9 Now, there's gonna be a specific instruction which
10 comes up in cases like this where there are expert
11 witnesses. Mr. Murphy must have forgotten and you're
12 gonna be instructed that it's okay to pay experts. The
13 Judge is gonna give you a specific instruction -- he's
14 trying to attack Mr. Hesse because he charged money and
15 that's gonna be something that the Judge will address
16 specifically. Maybe Mr. Murphy forgets that Mr. Byers
17 certainly charged money. We admit that Mr. Ross was
18 paid money. Professionals charge and that's not a
19 reason for you to rule against them or to think less of
20 them. Listen to what they said. Do you understand what
21 they said? Did what they say make sense? The Judge
22 will ask you to use your own experience and your own
23 common sense and ask you to make sure your own decision
24 with whatever guidance you get from the experts.

25 Mr. Hesse did say when he was asked by Mr. Murphy

1 whether these things which occurred after the February
2 11th denial letter affected the denial. Well, it's sort
3 of obvious that if there's a premature denial, because
4 they've not done their investigation, they haven't
5 handled things properly, they didn't question Mr. Byers
6 when he said this, they didn't question all kinds of
7 stuff, they didn't question the bank, they didn't
8 question Mr. Fowler, that they can't cut off your
9 evaluation of the whole claims process by saying, We
10 sent the denial letter and after that it doesn't make
11 any difference. The Judge will instruct you about that.
12 Please don't think that I'm testifying. I'm not
13 testifying. I'm not a witness. But you did hear the
14 witnesses.

15 The other thing I want you to think about when you
16 deal with these things that occurred after the premature
17 denial letter of February the 11th is that these actions
18 by the insurance company towards or against its
19 policyholder throw light on the attitude of the
20 insurance company throughout the process. Part of your
21 evidence you should consider is whether the company was
22 acting in good faith or in bad faith, whether they were
23 dealing fairly or not. That's what part of the
24 relevance is. But the process did not end on February
25 the 11th.

1 Now, Mr. Gilden, I think, admitted that he was not
2 a lawyer. He was talking about polygraph tests not
3 being admissible in court. But members of the Jury will
4 remember the testimony of Mr. Hesse, who was in the
5 insurance industry for 20 years before he became a
6 lawyer and continues to represent insurance companies.
7 I guess he wasn't representing Nationwide. But he
8 testified about a case in which there had been agreement
9 of the parties to use a polygraph test to decide the
10 case. So there had been no other witnesses, no actual
11 witnesses to talk about that. But don't think that
12 Mr. Hesse's comment about the offer of the polygraph
13 test by Mr. Fowler is not significant.

14 It is significant for several reasons. One is that
15 if he had lit the fire, presumably he would fail a
16 polygraph, presumably, maybe not perfectly, but he
17 wouldn't offer. That's what Mr. Hesse was saying. An
18 innocent man would offer to take a polygraph test, a
19 guilty man would not. So there are two things. You
20 could use that in your evaluation of whether Mr. Fowler
21 did light the fire, but you can also consider what
22 Mr. Hesse was saying, that is that this insurance
23 company didn't consider anything that was contrary to
24 this preconceived notion that this man lit the fire and
25 they didn't have to pay him.

1 Now, Mr. Murphy argued that Mr. Hesse abstained on
2 a key issue in this case. Well, it is true that the
3 issue in the case is whether Mr. Fowler lit the fire.
4 Mr. Hesse was not an eyewitness. He also was not a
5 cause and origin fire expert, he wasn't called for that.
6 He was called as an insurance person who knows what
7 claims practices are supposed to be, and what the
8 industry standards are, so it would be really a bad
9 thing had he said, Oh, yes, I've got an opinion about
10 the cause and origin, because that's not his expertise.
11 He didn't go across the line, he stayed right where he
12 was, he stayed right within his expertise. You are
13 requested to consider he said from an
14 inside-the-industry view as to what this insurance
15 company should do and did do, and did not do that they
16 should have done, both.

17 Mr. Murphy made a really interesting argument that
18 Nationwide did do some investigation and all the things
19 you have to do once you open your file. The complaint
20 is not that Nationwide did no investigation. The Judge
21 will instruct you that they must do a reasonable
22 investigation and they must follow procedures to make an
23 honest decision based upon what the evidence is that
24 they uncover as to whether the man really is guilty of
25 arson and should be denied his payment.

1 Today, Mr. Flanagan admitted again that he had not
2 properly informed Citi Financial about all the
3 coverages. He did admit that he failed to move
4 properly, but he did admit that he didn't tell what the
5 problems were, and that testimony ran this morning.

6 And one final thing which I'm sorry that I really
7 need to say, but the Judge will instruct you again that
8 lawyers are not witnesses. We offer arguments. When
9 lawyers say, I don't think such and such, that's making
10 themselves a witness, that's violating their line. So,
11 when Mr. Murphy says to you what he thought about this
12 stuff, then he was a witness. That's not proper
13 testimony, that's only argument. You cannot consider
14 what he thinks as testimony because that's against the
15 Rules.

16 Mr. Murphy was trying to make nice if you know what
17 that phrase means. When he said Mr. Fowler was a nice
18 guy, not a bad guy, just a desperate man. But what this
19 case is about is a very not nice accusation that
20 Mr. Fowler is an arsonist.

21 And the final -- Defense Counsel's attempt to try
22 to soften up the situation, the final argument is
23 sufficient to say what the accusation is, accusing
24 Mr. Fowler of arson is a very serious crime, a very
25 serious offense, and a serious violation and that's why

1 we're here today.

2 And I want to make one more point about

3 Mr. Holecek. You heard him testify most recently. He
4 might be the easiest person for you to remember.

5 Mr. Holecek did not do long-term testing, three and a
6 half hours, seven hours, so his tests do not really
7 apply to a heater of any sort which has been in
8 operation on high for several days if not several weeks
9 during the winter.

10 The Defense says over and over that the heater was
11 lit at 6:00 the afternoon before. The testimony is it
12 was refilled in the afternoon so it could keep being
13 burned at a high temperature, it had been burned for
14 several days, I can't remember exactly, but what you
15 remember is better. How long was it heating there
16 drying out that water out of the plaster that winter and
17 that week? We're not talking about the eight-hour or
18 seven-hour time. We were talking about the winter and
19 week. That's whatever it was. We are talking about a
20 drying out process. Mr. Holecek did say in his
21 Deposition and he ultimately admitted today it is the
22 process, we were talking about the heat and the length
23 of time and that's how it works.

24 Now, it's not a process of something catching on
25 fire like a spark or a match. It's the drying out

1 process. So don't be led astray. I don't want to use
2 the word red herring because I don't know what that is,
3 either. It had to have happened from 6:00 one night to
4 8:00 the next morning.

5 The other thing is the fire was not discovered
6 until the morning, but that's not when it started. It
7 started earlier and it got going, so their calculations
8 of how long it would be misses the point completely.
9 But thank you very much for your consideration. We
10 appreciate your verdict.

11 THE COURT: Mr. Foreman, ladies and gentlemen of
12 the Jury, obviously you have been sitting there for a
13 while, and I still have to charge you -- I'm almost
14 afraid to estimate it -- it will take maybe 15, 20
15 minutes.

16 Also, it's about 5:00 and so it will go beyond 5:00
17 and if you want the case tonight, you might want to make
18 some telephone calls. And so I'm going to ask you to
19 take a recess or a short break. And we've got some
20 telephones. Use one in the judge's conference room and
21 we'll find some others to be sure you get a chance.
22 Let's break and come back and I'll finish the charge.

23 Again, please do not undertake discussion of the
24 case among yourselves in any way. Thank you very much.

25 (Whereupon, the Jury left the courtroom at

1 approximately 4:50 p.m.)

2 THE COURT: Anything from the Plaintiff before we
3 take a break?

4 MR. BELSER: No, Your Honor.

5 THE COURT: From the Defense?

6 MR. MURPHY: No, Your Honor.

7 (A recess was taken.)

8 THE COURT: Anything from the Plaintiff?

9 MR. BELSER: No, Your Honor.

10 THE COURT: From the Defense?

11 MR. MURPHY: No, Your Honor.

12 THE COURT: All right. Ask the Jury to join us,
13 please.

14 (The Jury entered the courtroom at approximately
15 5:15 p.m.)

16 THE COURT: Let the record reflect the Jury is in
17 the Jury box.

18

19 The Court's Charge to the Jury:

20

21 THE COURT: Mr. Foreman, ladies and gentlemen of
22 the Jury, it now becomes my duty to charge you which
23 simply means to instruct you as to the law that applies
24 to this case. This is an action in which the Plaintiff
25 alleges or claims that he has suffered injuries or

1 damages for which the Defendant is responsible in
2 damages.

3 By the Constitution and law of South Carolina you,
4 the Jury, are the sole judges of the facts and evidence
5 in the case. For that reason I am not permitted to
6 suggest any opinion or feeling I may have as to the
7 facts and evidence, nor am I permitted to indicate how I
8 may feel about the merits of the case, or which party
9 should prevail, and I do not do so.

10 Moreover, you are the sole judges of what the
11 testimony was and not the arguments of Counsel which is
12 not evidence. In determining what the facts are in the
13 case, you must necessarily pass upon the credibility
14 which simply means the believability of the Witnesses
15 and the value of the weight to be given to their
16 testimony. You alone must decide the force and effect
17 and the truth of the testimony.

18 In making this decision there are many things you
19 may and should take into consideration such as the
20 appearance and manner of the Witness on the stand,
21 sometimes referred to as the demeanor of the Witness.
22 Was the Witness forthright or hesitant? Was the
23 Witness's testimony consistent with other testimony and
24 statements of the Witness or did it contain
25 discrepancies? What was the ability of the Witness to

1 know the facts about which he or she testified? Did the
2 Witness have a cause or a reason to be biased or
3 prejudiced in favor of the testimony he or she gave?
4 Was the testimony of the Witness corroborated or made
5 stronger by other testimony and evidence, or was it made
6 weaker or impeached by such other testimony and
7 evidence?

8 As jurors you have a right to believe a small
9 portion of a Witness's testimony and discard the larger
10 or vice versa. You may believe all of a Witness's
11 testimony or none. You may believe the testimony of a
12 single Witness against that of many Witnesses or the
13 other way around. Most certainly, you do not determine
14 the matter of credibility or believability by counting
15 up the number of Witnesses who may have testified on
16 behalf of the parties.

17 Now, the Rules of Evidence ordinarily do not permit
18 Witnesses to testify to opinions or conclusions. An
19 exception for this rule exists for Witnesses we call
20 expert Witnesses. A Witness who by education and
21 experience has become expert in some art, science, or
22 profession may give an opinion as to the subject the
23 Witness claims to be an expert in. You should consider
24 any expert opinion given by a Witness and, like any
25 other evidence, give it the same weight as you think it

1 deserves. If you decide that an expert Witness's
2 opinion is not based on sufficient education and
3 experience, or if you decide that the reasons given in
4 support of the opinion are not sound, or that the
5 opinion is outweighed by other evidence, you may
6 disregard the opinion entirely. Expert testimony is to
7 be given no greater weight than any other Witness's
8 simply because the Witness is an expert. You do not
9 have to accept an expert's opinion even though it is
10 uncontradicted.

11 In this case there has been a conflict in the
12 testimony of expert Witnesses. To that end you must
13 weigh one expert's opinion against that of the other and
14 you must consider the reasons given by one as compared
15 to those of the other. You should consider the relative
16 credibility and knowledge of the experts who have
17 testified. Therefore, you should find in favor of that
18 expert testimony which in your opinion is entitled to
19 the greater weight.

20 When an expert Witness is called by either a
21 Plaintiff or a Defendant, he expects to be paid and
22 should be paid. You should not take into consideration
23 the fact the Witness is paid unless there is some
24 evidence or circumstances appearing from the evidence
25 which would fully and reasonably convince you that the

1 testimony of the Witness has been influenced because of
2 the sum which has been paid as a witness.

3 During the trial of the case we have had testimony
4 by way of Depositions of Witnesses taken outside of the
5 courtroom. That Witness may or may not appear
6 personally before you. The Deposition was taken in a
7 manner prescribed by law and you may consider the
8 Deposition just as if the Witness was here upon the
9 stand testifying. Taking this Deposition testimony in
10 connection with all the other testimony, you assess the
11 credibility of the Witness from anything that is in the
12 record that will aid you in doing so. Consider the
13 Deposition evidence along with the other testimony of
14 the Witnesses who have appeared in person and you
15 determine from all of the evidence in the case whether
16 the Witnesses present or by Deposition or whether by
17 exhibits in the case what the truth of this controversy
18 is according to the facts as you find them to be and
19 then apply the law as I give it to you.

20 Throughout this entire process you have but one
21 single objective, and that is to seek the truth
22 regardless from what Witness the testimony may have
23 come.

24 Now, I remind you during the trial you and I have
25 certain duties to perform. As the Trial Judge it is my

1 responsibility to preside over the trial of this case
2 and I also have the duty to rule on the admissibility of
3 the evidence offered during the trial. You are to
4 consider only the evidence before you. If there was any
5 testimony ordered stricken from the record during the
6 trial, you must disregard that testimony. You are to
7 consider only the testimony which has been presented
8 from the witness stand and any exhibits which may have
9 been made a part of the record in this case and any
10 stipulations of Counsel.

11 I have the additional duty to charge you the law
12 applicable to the case. It is your duty as jurors to
13 accept and apply the law as I state it to you. If you
14 think you have an idea as to what the law is or what the
15 law ought to be and it does not agree with what I tell
16 you the law is, you must disregard that idea because you
17 are sworn to accept the law and apply the law exactly as
18 I state it to you.

19 In every case tried in court before a jury, the
20 Jury becomes the sole and exclusive judge of the facts.
21 The Trial Judge cannot comment or make any statement
22 about the facts of the case. Since you are the sole
23 judges of the facts, do not think by anything I have
24 said during the trial that I have any opinion about the
25 facts in this case. The law does not allow me to have

1 an opinion about the facts.

2 Now, the burden of proof in this case is by a
3 preponderance of the evidence. A preponderance of the
4 evidence simply means the greater weight of the
5 evidence. It is evidence which as a whole shows that a
6 fact sought to be proved is more likely true than not
7 true. Of course, there is no way to weigh evidence,
8 except through the exercise of your good common sense
9 and judgment. It is entirely a mental process, and the
10 evidence to which you should give the most consideration
11 is that which convinces you of its truth regardless of
12 from whom or what source it comes.

13 The preponderance of the evidence is not determined
14 by the number of Witnesses. Instead it must be
15 determined by the greater weight of all of the evidence.

16 Now, there are two types of evidence generally
17 presented during a trial: direct evidence and
18 circumstantial evidence. Direct evidence is the
19 testimony of a person who claims to have actual
20 knowledge of a fact, such as an eyewitness. It is
21 evidence which immediately establishes the main fact to
22 be proven.

23 Circumstantial evidence is proof of a chain of
24 facts and circumstances indicating the existence of a
25 fact. It is evidence which immediately establishes

1 collateral facts from which the main fact may be
2 inferred. Circumstantial evidence is based on an
3 inference and not on personal knowledge or observation.
4 It is proof that does not actually establish the fact in
5 question, but that asserts or describes something else
6 from which you may either reasonably infer the truth of
7 the fact or at least reasonably infer an increase in the
8 probability that the fact is true.

9 For circumstantial evidence to be sufficient to
10 warrant a finding of fact, the circumstances must lead
11 to that fact with reasonable certainty. The facts and
12 circumstances should be considered in light of ordinary
13 experience and common sense. The existence of a fact
14 cannot be based on speculation, surmise, or conjecture.
15 The law makes absolutely no distinction between the
16 weight to be given to either direct or circumstantial
17 evidence, nor is a greater degree of certainty required
18 of circumstantial evidence than of direct evidence.

19 Now, the Plaintiff alleges three causes of action.
20 First, breach of insurance contract. Second, bad faith
21 breach of an insurance contract. And third, slander *per*
22 *se*.

23 In order for the Plaintiff to recover on the basis
24 of a breach of an insurance contract, the Plaintiff must
25 prove by the preponderance of the evidence three

1 essential elements: One, that the parties entered into
2 a binding contract by which the Defendant in return for
3 the Plaintiff's timely payment of insurance premiums
4 agreed to provide insurance to the Plaintiff.

5 Two, that the Defendant breached or unjustly failed
6 to perform the contract.

7 And, three, the Plaintiff suffered damages as a
8 direct and proximate result of the Defendant's breach of
9 the contract.

10 The provisions of an insurance contract are to be
11 liberally construed in favor of the insured and strictly
12 construed against the company which prepared the policy.
13 The first thing that the Plaintiff must prove by the
14 preponderance or the greater weight of the evidence is
15 that the parties entered a binding contract. A contract
16 is an obligation arising from an actual agreement of the
17 parties involved. A contract exists where there is an
18 agreement between two or more persons upon sufficient
19 consideration either to do or not to do a particular
20 act. In other words, there must be an offer and
21 acceptance accompanied by valuable consideration.

22 Next, the Plaintiffs must show by a preponderance
23 or greater weight of the evidence that the Defendant
24 unjustifiably breached the contract. The word "breach"
25 means the failure without legal excuse to perform any

1 promise that forms in whole or part of the contract.
2 This includes the refusal of a party to recognize the
3 existence of the contract or the doing of something
4 inconsistent with the existence of a contract. A party
5 breaches a contract when a party does not perform as
6 agreed under the contract by failing to carry out a
7 term, promise, or condition of a contract.

8 The damages recoverable for a breach of an
9 insurance contract are those which follow as the natural
10 consequence of the breach. All of those damages which
11 may be reasonably supposed to have been within the
12 contemplation of the parties at the time the contract
13 was entered into. Generally the damage to which one is
14 entitled for breach are those which arise naturally from
15 the breach or those which reasonably are supposed to
16 have been within the contemplation of the parties at the
17 time the contract was entered into.

18 The party that has been injured by the breach of
19 the contract is entitled to recover the amount of its
20 loss. The two parties are made in the contract which
21 one of them has broken the damages which the other party
22 is to expect to receive in respect to such breach of
23 contract to be made fairly and reasonably considered to
24 arise naturally according to the course of things or the
25 breach of the contract itself or such damages as may

1 reasonably be supposed to have been within contemplation
2 of the parties at the time who made it as a probable
3 result of the breach.

4 Actual damages are damages to compensate the
5 Plaintiff and put him as closely as possible in the same
6 position he would have been had there been no breach of
7 the contract. In other words, actual damages are actual
8 losses and expenses which the Plaintiff has suffered
9 because the Defendant breached the contract.

10 In every contract there exists an unspoken but
11 legally enforceable promise of good faith and fair
12 dealing. The unspoken promise is the implied covenant
13 of good faith and fair dealing. However, there is no
14 breach of the implied covenant of good faith and fair
15 dealing where a party to a contract has done what the
16 provisions of the contract expressly give him the right
17 to do.

18 Under South Carolina law an insured may assert a
19 cause of action for breach of implied covenants of good
20 faith and fair dealing. This obligation includes a
21 good-faith duty to investigate a claim under an
22 insurance policy. In order to recover for breach of
23 contract with good faith and fair dealing, the Plaintiff
24 must prove, one, the existence of a mutually binding
25 contract of insurance between the Plaintiff and the

1 Defendant. The refusal by the insurer to pay benefits
2 due under the contract to the Plaintiff resulting from
3 the insurer's bad faith or unreasonable acts in breach
4 of the implied covenant of good faith and fair dealing
5 in the contract and that such breach causes damages to
6 the insured.

7 If an insured can demonstrate bad faith or
8 unreasonable acts in processing a claim under a mutually
9 binding insurance contract, he can recover in a separate
10 action for that bad faith. The Plaintiff must prove
11 that there was no reasonable basis to support the
12 decision of the insurance company to deny certain
13 insurance benefits, and that if there is any reasonable
14 ground for contesting the claim, there was a bad faith
15 in processing the claim, such as a matter depending upon
16 the circumstances of the processing of the claim.

17 Bad faith is not the result of an honest mistake or
18 judgment, a matter of a wrongful or fraudulent act, or
19 one undertaken with a lack of good faith or reasonable
20 cause or justification.

21 You should consider the following factors when
22 evaluating the bad faith cause of action. The presence
23 of -- one, the presence or absence of an investigation
24 of the claim by the insurance company. Two, the
25 presence or absence of communication between the

1 insurance company and the insured. And three, the
2 presence or absence of intention to compromise or settle
3 the claim. Responsibilities under the insurance
4 company's conduct in light of the totality of the
5 circumstances and by how the matter appeared to the
6 insurance company is judged by a reasonable and prudent
7 man seeking to determine the facts of the controversy,
8 which it was his duty in good faith to investigate.

9 Now, there are many factors you may consider in
10 what constitutes bad faith in determining whether or not
11 the actions of the Defendant insurance company amounted
12 to bad faith. You must determine whether the actions of
13 the Defendant insurance company were unreasonable or
14 without substantial basis and therefore not in good
15 faith. There are a number of factors that you may
16 consider.

17 If you find from the evidence that there was a *bona*
18 *fide* dispute between the insurance company and the
19 Plaintiff as to the loss, you may consider whether or
20 not the insurance company's actions were justified in
21 refusing to pay the claim. However, if you find the
22 evidence to the contrary, or converse is true, that is
23 to say there was no *bona fide* dispute between the
24 parties as to the loss, the insurance company
25 arbitrarily, without any reasonable or substantial

1 basis, refused to pay the loss claim by the Plaintiff as
2 being proper, then that would be one factor indicating
3 that the Defendant insurance company was done in bad
4 faith towards the insured.

5 If you find that the action of the insurance
6 company was without any reasonable or substantial basis
7 and the Defendant insurance company acted arbitrarily
8 and refused to pay the loss claimed by the Plaintiff,
9 then you would be justified in finding the -- excuse
10 me -- then you would find that it was justified, then
11 you would be justified in finding that the Defendant did
12 act in bad faith and bad faith is not implied by mere
13 refusal to pay -- excuse me -- by mere refusal to pay a
14 disputed claim, nor by the fact that an insured deemed
15 it necessary to employ an attorney to represent him in
16 regard to the claim.

17 Another factor that may be considered in
18 determining whether that constitutes bad faith is if
19 there was a frivolous or unfounded refusal in law or in
20 fact to pay a loss according to the insurance contract
21 after a legal and proper demand was made by the insured.
22 Where it is alleged that an insurance company acted in
23 bad faith towards the insured, one fact you may consider
24 is whether the insurance company's actions were with or
25 without a substantial and reasonable basis and not in

1 good faith. I charge you that if you find that there is
2 a substantial and reasonable basis of the actions of the
3 insurance company, that the insurance company would not
4 have acted in bad faith.

5 Conversely, if you find that the insurance company
6 did not have a substantial and reasonable basis for its
7 actions, then the insurance company would have been
8 acting in bad faith.

9 I hereby charge you that if you find a contract
10 existed and you also find Plaintiff has established a
11 bad-faith refusal to pay benefits under that insurance
12 contract, then you may award Plaintiff actual and
13 consequential damages.

14 Consequential damages, in this instance, are those
15 damages that flow as a natural consequence and proximate
16 result of the breach. Therefore, if a reasonable person
17 is in the insurer's position with its knowledge, could
18 have reasonably foreseen the additional damages
19 resulting from the refusal to pay a claim under the
20 contract, those damages are recoverable. If the
21 Plaintiff has demonstrated bad faith or unreasonable
22 refusal by the insurance company to pay benefits under a
23 mutually binding insurance contract, he can recover
24 damages not limited to the face amount of the contract.

25 The third cause of action is defamation. The tort

1 of defamation allows a Plaintiff to recover injury to
2 his or her reputation. As a result of the Defendant's
3 communications to others, the false message about the
4 Plaintiff, the focus of defamation is not to hurt the
5 defamed person's feelings but on the injury to his
6 reputation.

7 Defamatory communications take two forms, either
8 libel or slander. This case involves an allegation of
9 slander. An action of slander is based on the violation
10 of a person's right to enjoy his good reputation,
11 unimpaired by false or defamatory attacks. Slander is a
12 spoken defamation. Slander consists of the publication
13 of defamatory matter by spoken words, defamatory
14 gestures, or by any form of communication other than
15 those as a part of the written libel.

16 Slander is actionable *per se* when the Defendant's
17 alleged defamatory statements charge the Plaintiff with
18 one of five acts or characteristics. One, commission of
19 a crime of moral turpitude. Two -- slander is
20 actionable *per se*, that is as a matter of fact, when the
21 defendant's alleged defamatory statements charge the
22 Plaintiff with one of five types of acts or
23 characteristics. One, the commission of a crime of
24 moral turpitude. Two, contraction of a loathsome
25 disease; three, adultery; four, unchastity; or five,

1 unfitness in one's business or profession.

2 Arson is considered a crime of moral turpitude.

3 In a case of slander *per se*, general damages need
4 not be proven by the Plaintiff because the damages are
5 presumed. To recover for defamation the Plaintiff must
6 establish by a preponderance of the evidence that there
7 was a false and defamatory statement by the Defendant
8 concerning the Plaintiff.

9 Two, an unprivileged publication by the Defendant
10 to a third party.

11 Three, on the Defendant's part in publishing this
12 statement.

13 Or, four, either actionability of the statement
14 irrespective of special harm or the existence of special
15 harm to the Plaintiff caused by the publication. The
16 communication is defamatory if it intends to harm the
17 reputation of another or to lower him in the estimation
18 of the community or to deter third persons from
19 associating or dealing with him.

20 In determining the defamatory character of
21 language, the meaning of which is clear or otherwise
22 determined, the social station of the parties in the
23 community, the current standards of moral and social
24 conduct prevalent therein, and the business,
25 professional or calling of the important factors an

1 invitation made defamatory as applied to one person at a
2 given time and place -- excuse me -- an invitation may
3 be defined defamatory as applied to one person at a
4 given time and place, although it would not be
5 derogatory at a another person at a different time or at
6 a different place.

7 To determine whether the words were defamatory, you
8 should ask yourselves whether, taken as a whole, the
9 words tend to diminish the respectability of the
10 Plaintiff and to expose him to disgrace and ill repute.
11 The defamatory statement must be false. One who
12 publishes a defamatory statement of fact is not subject
13 to liability, but defamation if the statement is true.
14 To create liability for defamation that must be the
15 publication of a matter that is both defamatory and
16 false. There can be no recovery in definition for a
17 statement in fact that is true. Although the statement
18 is made for no good purpose, is inspired by ill will
19 toward the person about whom it was published, and is
20 made solely for the purpose of harming him, the truth of
21 the matter published is an absolute defense. A
22 sufficient defense is made out where the evidence
23 establishes the statement is substantially true. A
24 defamatory communication is presumed to be false under
25 the common law. The Plaintiff does not have the burden

1 of proving a falsity. However, truth can be asserted as
2 an affirmative defense, the burden of proof of which is
3 upon the Defendant. The defamatory meaning of the
4 message that's stated may be obvious on the face of the
5 statement, in which case the statement is defamatory *per*
6 *se.* The statement which is defamatory *per se* or on its
7 face if its defamatory meaning is apparent in the
8 language itself. It must be susceptible of only one
9 meaning, that being the defamatory one. If innocent
10 construction can fairly made of a statement, it cannot
11 be defamatory *per se.*

12 Defamation need not be accomplished in a direct
13 manner. And insinuation may be defamatory. A mere
14 insinuation is as actionable as a positive assertion if
15 it is false and malicious in its meaning as plain.
16 Words are not actionable by their plain and ordinary
17 meaning and cannot be made by innuendo, or where words
18 used are capable of different meanings, one of which is
19 defamatory, you must ascertain the sense in which they
20 were published and decide which meaning was, in fact,
21 desired conveyed, considering the surrounding
22 circumstances from which the defamatory meaning may be
23 inferred. To render the defamatory statement
24 actionable, it's not necessary that the false charge be
25 made in a direct, open and positive manner. A mere

1 insinuation is actionable as a positive assertion if it
2 is false and malicious and the meaning is plain.

3 When the defamation is actionable, general damages
4 are presumed and not needed to be proven by the
5 Plaintiff. The very essence of an action for defamation
6 is that the Plaintiff has suffered damages as the result
7 of the injurious effect of the defamation upon his
8 reputation. Actual proof of damages is not required
9 where defamation is actionable *per se*.

10 If a defamation is actionable *per se*, then the law
11 presumes the Defendant acted with common law actual
12 malice and the Defendant [sic] suffered general damages.
13 Such defamation is actionable without proof as special
14 damages. Words actionable *per se* carry with them the
15 presumption is that actual damages to reputation and
16 character directly and proximately resulted therefrom,
17 and it is not necessary to allege or prove any actual or
18 special damages. For the Plaintiff to recover the
19 actual damages for the injury the statement has caused
20 him, these damages include, one, injury to reputation
21 and standing in the community; two, embarrassment;
22 three, personal humiliation, and language and suffering;
23 and five, wounded feelings caused by injury to
24 reputation.

25 If Plaintiff proves he is entitled to special

1 damages, he may recover as special damages any expense
2 or loss of value that may be attributed to the
3 slanderous statement. Specific damages consist of
4 special specific identifiable economic or material
5 losses to the Plaintiff as a result of the defamation.
6 Special damages are tangible losses or injury to the
7 Plaintiff's property, business, occupation, or
8 profession which are capable of being assessed
9 monetarily. Special damages are the manifestation of
10 injuries to reputation which is computable in money or
11 capable of being assessed in monetary value.

12 General damages include such things as injury to
13 reputation, mental suffering, hurt feelings, and other
14 similar type of injuries which are incapable of definite
15 money valuation. Special damages are tangible losses or
16 injury to Plaintiff's property, business, occupation, or
17 profession being assessed monetarily, which would result
18 in injury to Plaintiff's reputation.

19 A principal or a corporation is liable for the acts
20 of his agent, servant, or employee while the agent,
21 servant, or employee is acting within the scope of his
22 authority.

23 In this case the Defendant alleges certain defenses
24 to the Plaintiff's causes of action. The Defendant
25 alleges arson as a defense to the breach of contract

1 action and to the bad-faith breach of contract action.
2 In this case the Defendant maintains it had the right to
3 deny coverage based on an arson defense. To prove arson
4 an insurer must demonstrate by a preponderance of the
5 evidence that the fire was of an incendiary origin, that
6 the insured caused the fire.

7 The insurer can prevail in an arson defense based
8 solely on the circumstantial evidence if he shows that
9 the fire was of an incendiary origin, that is,
10 intentionally set, and that the Plaintiff had both the
11 opportunity and the motive to set the fire.

12 The insurer has the good-faith duty to investigate
13 the claim. Insured claim of arson based on mere
14 suspicion does not provide a reasonable basis for denial
15 of conference. In deciding whether the Plaintiff had
16 sufficient motive to set the fire, you must consider all
17 of the evidence presented in the case, including but not
18 limited to the evidence about the Plaintiff's financial
19 condition, the evidence about the economic impact of
20 burning the property, and the evidence about the
21 Plaintiff's attitude toward the property.

22 Evidence relied upon by an insurer to establish
23 arson cannot be equally consistent with the proposition
24 that it was not arson. A fact cannot be established by
25 circumstances which are perfectly consistent with direct

1 and unimpeached testimony that the fact does not exist.

2 The insurer bears the burden of establishing the
3 applicability of policy exclusions. Insurance policy
4 exclusions are construed most strongly against the
5 insurance company.

6 The Defense also alleges to the action of
7 defamation, slander *per se*, two defenses. The first
8 defense is called qualified privilege. Even if you find
9 the Defendant made a false and defamatory statement
10 about the claim and published it to a third party, not
11 all defamatory statements published to a third party are
12 actionable.

13 The law recognizes that certain types of statements
14 and communications on certain subjects of privilege may
15 be made regardless of their truth or falsity. A
16 privilege is an immunity granted to some person or group
17 of persons which is not enjoyed by others. As a term
18 was used in this case, privileged communication is one
19 which is made on such an occasion that the speaker will
20 not be held responsible in an action for slander. A
21 privileged communication is, under defamation law, is a
22 certain communication which except for the occasion or
23 on which the circumstances or under which it was made
24 would be defamatory and actionable.

25 In a defamation action the Defendant may assert the

1 affirmative defense of conditional qualified privilege.
2 In this case the Defendant claims the affirmative
3 defense of qualified privilege. The burden is upon the
4 Defendant to establish the defense by a preponderance of
5 the evidence.

6 What is meant by the defense of qualified
7 privilege? A communication made in good faith on any
8 subject matter in which the person communicating has an
9 interest, a duty, is qualified as a privilege if made to
10 a person with a corresponding interest and duty, even
11 though it contains matter which without this privilege
12 would be actionable, and although the duty is not a
13 legal one but only a moral or social duty of imperfect
14 obligation.

15 When a defamation is made in good faith and the
16 proper motives, the Defendant may claim a qualified
17 condition of privilege. The privilege exists if the
18 Defendant directly or reasonably believes that some
19 important interest of his own or a third party's is
20 threatened. A qualified privilege may exist where the
21 parties have a common business interest. However, the
22 qualified privilege exists only when the publication has
23 occurred in a proper manner and to proper parties only.

24 Where the occasion gives rise to a qualified
25 privilege, there's a *prima facie* presumption to rebut

1 them as malice. *Prima facie* refers to a fact presumed
2 to be true unless proved by some evidence to the
3 contrary. Even if a privilege existed the Defendant may
4 still be liable if a privilege exists, a Defendant may
5 still be liable for defamation if he abuses the
6 privilege by exceeding the scope of the privilege and
7 making defamatory statements to persons who do not need
8 to have it in order to further his interests protected
9 by the privilege, or he may use the defamatory statement
10 by common law actual malice.

11 Once it has been proven by the Defendant that the
12 communication was protected by the qualified privilege,
13 the burden of proof shifts back to the Plaintiff to
14 prove either the scope of the privilege is exceeded or
15 the defamatory statement was made without malice.

16 First, the Defendant is liable for the defamatory
17 statement if the scope of the privilege exceeds. When
18 determining whether the privilege was abused, you should
19 consider whether the Defendant acted in good faith in
20 making the statement, the scope of the statement was
21 properly limited, the statement was said only to the
22 proper parties, publication went beyond the occasion
23 required, and the statement was defamatory.

24 The protection of a qualified privilege may be lost
25 by the manner of an exercise of the privilege if the

1 defamatory matters are published to persons other than
2 from those whom the privilege extends. The publisher
3 must not wander about beyond the scope of the occasion
4 and privilege does not protect any unnecessary
5 defamation.

6 You must decide whether the publication went too
7 far beyond that occasion required, resulting in the loss
8 of that qualified privilege.

9 To prove actual malice the Plaintiff must show that
10 the Defendant was actuated by ill will in what he did
11 with the design to causally and wantonly injure the
12 Plaintiff, or that the statements were with reckless
13 disregard as to show a conscious disregard of the
14 Plaintiff's rights, you may find the existence of actual
15 malice from the language or the communication itself as
16 well as from the extrinsic evidence.

17 There is no actual malice if the Defendant had a
18 good-faith belief that the statement was true and one
19 may in good faith without malice or probable cause
20 believe that it is true. The falsity of the
21 communication does not destroy the privilege.

22 If you find the Defendant exceeded the scope of the
23 privilege by publication to persons not in need of it or
24 to further the interest protected by the privilege, you
25 must find the Defendant lost the protection of the

1 privilege. Even if you do not find the Defendant
2 exceeded the scope of the privilege but you do find the
3 Defendant made the defamatory statements with actual
4 malice, then you must still find the Defendant lost the
5 protection of the privilege.

6 However, if you find that the Defendant did not
7 exceed the scope of the privilege, and did not make the
8 defamatory statements with actual malice, then the
9 qualified privilege is intact and you must find in favor
10 of the Defendant.

11 The second defense of defamation of slander *per se*
12 action is that the statement made by the Defendant was
13 the truth. The Defendant claims the words he spoke were
14 the truth. Truth is an affirmative defense in the law.
15 The Defendant must prove this defense by the greater
16 weight or preponderance of the evidence a sufficient
17 defense is made where the evidence establishes the
18 statements were substantially true.

19 It is not necessary to establish the literal truth
20 or the precise statements made. Slight inaccuracies of
21 expression are immaterial provided the defamatory charge
22 is true in substance. The Defendant need not justify
23 every word of the statement so long as the statement's
24 substance or gist is proved true. The statements must
25 be viewed in their entirety. Variances in any material

1 particulars may be disregarded. The test is whether the
2 statements are made would have a different effect in the
3 mind of the hearer than the truth would have produced.
4 You must determine what the evidence presented from the
5 truth was and compare that with the statements which you
6 find were made by the Defendant, considering the
7 statements according to the ordinary meaning of the
8 language used.

9 If you find there was no substantial difference
10 between the statements and the truth, then the Defendant
11 has established the defense of truth. If you find the
12 statements differ in substantial respects from the
13 truth, then the defense of truth has not been made.

14 Now, ladies and gentlemen of the Jury, you have
15 been selected as fair and impartial jurors sworn to
16 impartially try and determine the facts of this case and
17 when you comply with your oath to do so, then no one
18 will have a right to criticize your verdict and you will
19 have fully discharged your duties as jurors.

20 You should not be influenced by opinions or
21 expressions of opinions, if any, you may have heard on
22 the outside. You are to decide this case according to
23 the testimony you've heard from the lips of the sworn
24 Witnesses, along with the other evidence that may have
25 been introduced. You must not consider as evidence any

1 statements made by Counsel during the trial. However,
2 if Counsel have stipulated to any fact, or any fact has
3 been admitted by Counsel, you are to regard that fact as
4 having been conclusively proved as to the party or
5 parties making the stipulation or admission.

6 As to those questions to which an objection has
7 been sustained, you must not speculate as to what the
8 answer might have been or what the reason for the
9 objection was. You must never speculate to the true any
10 insinuation suggested by a question asked of a Witness.
11 A question is not evidence, and may be considered only
12 as it supplies meaning to the answer.

13 As I said earlier, you are the judges of the facts
14 in this case, and you are to determine whether the
15 burden of proof has been met as to claims made by the
16 Plaintiff and as to the defenses raised by the
17 Defendants based on the testimony and evidence presented
18 during the trial and the law as I gave it to you. Under
19 the oath you took you swore to try this case based only
20 and solely on the testimony, evidence, and law presented
21 and heard in this courtroom. It is your duty to lay
22 aside all bias and prejudice or sympathy you may have in
23 reaching your verdict. You have no friends to reward or
24 enemies to punish in this case.

25 I might note that the word "verdict" comes from the

1 Latin term "veredicto" which means to speak the truth.
2 Abide by your oath and return a verdict which speaks the
3 truth.

4 Now, Mr. Foreman, I have prepared a verdict form
5 for you to use in the deliberations of the Jury. As you
6 will note, it says, Verdict, section 1. On the first
7 cause of action, breach of contract, We, the Jury,
8 unanimously find. Now, whatever verdict it is, it must
9 be unanimous. All 12 members of the Jury must agree.
10 However, Mr. Foreman, you are the one to check the
11 appropriate blank.

12 And there are two possible verdicts on the first
13 cause of action for breach of contract: We, the Jury,
14 unanimously find for the Plaintiff, James D. Fowler, and
15 against the Defendant, Nationwide Mutual Fire Insurance
16 Company, actual damages in the amount of blank dollars.

17 If that's your verdict, you will write it out, and
18 you have to agree unanimously on the amount of damages,
19 as well. You would write the amount out in words and
20 not figures like you would do a check. You can't put
21 the numbers in the parentheses. Or, the other verdict
22 that you could have is: We, the Jury, unanimously find
23 for the Defendant, Nationwide Mutual Fire Insurance
24 Company. Whichever, Mr. Foreman, as I say, is the
25 unanimous verdict for the Jury, you would check the

1 appropriate blank and fill in any appropriate lines or
2 information as required.

3 On the second cause of action, bad-faith breach of
4 an insurance contract, again, you've got two possible
5 verdicts, but whichever verdict it is, it must be
6 unanimous. We, the Jury, unanimously find for the
7 Plaintiff, James D. Fowler, and against the Defendant,
8 Nationwide Mutual Fire Insurance Company, actual damages
9 in the amount of blank dollars. The same way. Whatever
10 amount you agree on on that cause of action, it has to
11 be done in words and not figures. Or, if your unanimous
12 verdict is for the Defendant, Nationwide Mutual Fire
13 Insurance Company, you would check that blank.

14 And on the third cause of action, again, you have
15 two possible verdicts: We, the Jury, unanimously find
16 for the Plaintiff, James D. Fowler, and against the
17 Defendant, Nationwide Mutual Fire Insurance Company and
18 Andrew Flanagan, actual damages in the amount of blank
19 dollars; or, for the Defendant, Nationwide Mutual Fire
20 Insurance Company and Andrew Flanagan. Whichever
21 verdict it is, of course, it has to be unanimous, and
22 you would check the appropriate blank.

23 Now, this case also has the potential of other
24 considerations, and one of them is whether or not --
25 we'll go to the third page. If in section one you found

1 the Defendants on the second and third causes of action,
2 in other words, if you found for the Defendant on the
3 second and third causes of action, which would be the
4 causes of action on the second page, which is bad-faith
5 breach of the insurance contract or slander *per se*, if
6 you found for the Defendants on those causes of action,
7 then you would stop and go no further. However, if in
8 section one you found for the Plaintiff in either the
9 second or third causes of action, go on and you would do
10 section two. Section two advised: If you find that the
11 Plaintiff on either the second or third causes of
12 action, section one, then: Do you as a jury unanimously
13 find by clear and convincing evidence that the conduct
14 of the Defendants in either of those causes of actions
15 were willful, wanton, or reckless, disregarding the
16 Plaintiff's rights?

17 Now, under our law, willful, wanton, and reckless
18 have a particular meaning. First of all, you would have
19 to provide this by clear and convincing evidence, which
20 is, and clear and convincing evidence is provided by our
21 Statute to be of a higher burden than just the
22 preponderance of the evidence that you decide on the
23 other. Clear and convincing evidence is more than just
24 a preponderance or greater weight of the evidence which
25 requires only proof which persuades you that party's

1 claim is more likely true than not true.

2 On the other hand, clear and convincing proof is
3 not as high a standard as the burden of proof in
4 criminal cases, which is beyond a reasonable doubt.
5 Clear and convincing proof leaves no substantial doubt
6 in your mind. It means that evidence is not ambiguous,
7 doubtful, equivocal or contradictory. Convincing means
8 persuasive, a proof of argument causing one to believe
9 the truth of what is asserted. Clear and convincing
10 proof establishes in your mind not only that the fact is
11 probable, not only that fact is probable, but is highly
12 possible. And in that regard you would have to
13 determine whether or not the actions were reckless,
14 willful, or wanton.

15 Recklessness is distinguished from negligence or
16 the failure to use good care, or negligence, as I say,
17 is carelessness, a failure, omission or commission to
18 exercise due care as a person with ordinary reason and
19 prudence would exercise in the same circumstance. Or
20 negligence, as I say, is carelessness, mutual commission
21 to exercise due care as a person with ordinary reason
22 and prudence would exercise in the same circumstance.

23 Recklessness is a higher degree of culpability or
24 fault. Responsibility. Recklessness signifies a
25 conscious failure to exercise due care. Recklessness is

1 a conscious indifference to the rights of the Plaintiff,
2 reckless disregard to the rights of the Plaintiff.
3 Recklessness is an awareness of wrongful conduct and a
4 continuation to act regardless of the consequences.

5 The test to determine whether an action may be
6 deemed reckless, willful, or wanton is whether it has
7 been committed in such a manner and under such
8 circumstances that a person of ordinary reason and
9 prudence would have been conscious of it as an invasion
10 of the rights of an injured party.

11 Do remember if you find that the actions of the
12 Defendants were reckless, willful, or wanton in any of
13 those two causes of action on the second page, either
14 the breach of, bad-faith breach of an insurance contract
15 or slander *per se*, that that must be determined by clear
16 and convincing evidence which is more than just
17 preponderance of the evidence, which has to be of a
18 higher degree of proof.

19 And if you do find that, you would go to the
20 question that, section two. If you found the Plaintiff
21 on either the second or third causes of action in
22 section one above, then do you find, do you, the Jury,
23 unanimously find by clear and convincing evidence that
24 the conduct of the Defendants were in willful, wanton,
25 and reckless disregard of the Plaintiff's rights? If

1 you also find that you do, you check "yes." If you find
2 that, no, it does not rise to that level, or no, it was
3 not such a willful, wanton, or reckless disregard of the
4 Plaintiff's rights, then you would check "no."

5 In both of these cases, in other words, there are
6 two separate verdicts that you will be given. Now, the
7 first has to do with the three causes of action. And
8 that's to conclude on page 2. And you sign your name
9 after you have completed the first questions. If you
10 find, as I say, on the third page in section 1 you found
11 the Plaintiff on either the second or third cause of
12 action, then you would go to the second part to
13 determine whether or not the actions that you found, if
14 any, were willful, wanton, or reckless, and if so,
15 that's established by clear and convincing evidence,
16 whatever your verdict is on that and then check the
17 third page and sign again your name.

18 Again I'm gonna have to ask you to hand over the
19 verdict form and I'll send it back to you along with the
20 exhibits. Do not begin your deliberations until you get
21 your exhibits and the verdict form. This will take me
22 just a few minutes. Once the bailiff brings you the
23 exhibits and the verdict forms you may begin your
24 deliberations. Once you reach your verdict on all three
25 causes of action and have appropriately completed the

1 third page, knock on the door and return and we'll
2 receive your verdict. Please retire to the jury room at
3 this time.

4 Everyone else remain seated while the Jury retires
5 from the courtroom.

6 (Whereupon, the Jury left the courtroom at
7 approximately 6:05 p.m.)

8 THE COURT: Any exceptions or requests from the
9 Plaintiff?

10 MR. BELSER: No, Your Honor. Thank you.

11 THE COURT: From the Defendant?

12 MR. MURPHY: I think just to be protected.

13 Plaintiff's 19 was charged. I'm not sure -- that charge
14 was one sentence so it's obviously just a very minor
15 charge. Just to protect on the record. It had to do
16 about circumstances and unimpeached testimony and all
17 that.

18 THE COURT: Right. It was charged and it was from
19 *Flynn versus Nationwide*. I used the two-sentence
20 statement in *Flynn versus Nationwide*.

21 MR. MURPHY: Yes, sir.

22 THE COURT: If I didn't, your objection is noted.

23 MR. MURPHY: Thank you, Your Honor.

24 (Discussion off the record.)

25 (Whereupon, the Jury started their deliberations at

1 approximately 6:08 p.m.)

2 (Whereupon, there was a note from the Jury at

3 approximately 7:50 p.m.)

4 THE COURT: Back on the record in *Fowler versus*
5 *Nationwide, et al.* I have a note from the Jury:

6 Judge: Question 1. Why does Coverage D subtotal
7 on Property Loss Report Form, Exhibit 30, equal Coverage
8 A?

9 Question 2. Are previous Nationwide payments to be
10 taken out of award amounts?

11 Thank you, he signed the foreman of the Jury.

12 All right. Anything from the Plaintiff?

13 MR. BELSER: I know the answer to those questions
14 but I don't know how you want to deal with it.

15 THE COURT: That's why I'm asking. I don't know
16 either so I'm asking. Anything from the Defendant?

17 MR. MURPHY: Well, I know on Coverage D, the limit
18 is the same but I think the only evidence would be a
19 significantly lower number. We didn't charge those
20 components. Remember, we talked about that. We didn't
21 charge them about what ALE represents. I don't think
22 you can just answer the question for them. I think you,
23 on the payment taken out. I think that question, I mean
24 the evidence was that they'd already paid that.

25 THE COURT: They paid it to -- again, I think -- if

1 there is anything done, that's gonna be done, something
2 with a set-off or a credit type thing.

3 MR. BELSER: I think what's been paid is the 154
4 plus \$2,000 advance on the contents C.

5 THE COURT: And, as I say, the first impression in
6 these questions is that there's nothing you can say.
7 The record is complete unless you've got some sort of
8 stipulation you want to add. And I would have to
9 instruct the Jury that they would just have to decide
10 that the issues based on the record that has been
11 presented to them, and if there is something
12 particularly they want us to do as far as replaying some
13 sort of testimony or something like that, we can do
14 that, but we can't add to the record without an
15 agreement. I'm not gonna tell them it's an agreement,
16 just once the record is closed, then that's what we have
17 to use and what we either leave out in charges or
18 argument is going to have to, unfortunately, be for
19 their determination. I'm not gonna tell them about the
20 argument and charge. I'm just gonna say I can't handle
21 it.

22 MR. MURPHY: I'm torn because it probably would
23 help them but I understand the limitations that the
24 Court has. I don't know if you want to give us a minute
25 to see if we want to try to come up with something or

1 not.

2 THE COURT: No. I do. I mean, anything would be
3 of help.

4 MR. MURPHY: Give us a couple minutes.

5 THE COURT: We'll stand in recess for a while.

6 (Discussion off the record.)

7 (Counsel confer.)

8 MR. BELSER: Your Honor, we were talking about -- I
9 don't know that we can answer those questions. There's
10 stuff in the record about it and the policy is in the
11 record, the declarations are in the record. It might be
12 kind of cruel and unusual punishment, upward of what
13 we've already done to this jury, to read a 35-page
14 insurance policy, but it's in the declarations.

15 THE COURT: You know, again, let's face it. We
16 can't retry the case. And so I think the best
17 instruction, and it was -- they got a lot to consider
18 already without considering more. So I would suggest
19 that I do give what I'll call the standard instruction
20 that we have to make a decision based on the record as
21 it is and was presented and it can't be amplified or
22 added to.

23 And if there's something that they don't have, I
24 mean, in other words, part of the record is testimony or
25 something like that, we'll be glad to see if we can find

1 it if they know what it is. Of course, I don't know how
2 to find so much of this. This was about the terms of
3 the contract. I don't know where -- well, there was --
4 I don't know. Let's just leave it simple and see if
5 they can't muddle through one way or the other.

6 All right. Anything from the Plaintiff?

7 MR. BELSER: Nothing, Your Honor, thank you.

8 THE COURT: From Defense?

9 MR. MURPHY: No, Your Honor.

10 THE COURT: All right. Ask the Jury to join us,
11 please.

12 Of course, one of the things, if I should question,
13 why the coverage subtotal is less before whatever it is
14 on the policy, I can't charge on the facts.

15 MR. MURPHY: Unless we agreed we couldn't do
16 anything.

17 THE COURT: That's the best thing to do.

18 (The Jury entered the courtroom at approximately
19 8:03 p.m.)

20 THE COURT: All right. Let the record reflect the
21 Jury is in the Jury box.

22 Mr. Foreman, I've been provided a note with two
23 questions from the Jury.

24 Question one. Why does Coverage D subtotal on
25 Property Loss Report Form, Exhibit 30, equal Coverage A?

1 Question two. Are previous Nationwide payments to
2 be taken out of award amounts? Signed by the Foreman.

3 Mr. Foreman, ladies and gentlemen of the Jury, you
4 have to decide the case based on the record as it is. I
5 can't add to it, I can't -- in fact, if you remember, I
6 said that you were the sole judges of the facts and I
7 can't even comment on the facts so I couldn't answer the
8 questions. You must find the answer in the record as it
9 is. And if there's something in particular that you
10 could direct us to a piece, portion of the testimony
11 that you think might have the answer, we'll replay the
12 testimony, but this has been four days and that would be
13 difficult to find. I would suggest that you use the 12
14 collective recollections of the members of the Jury to
15 determine it. Again, you have to make your decision
16 based on the testimony and exhibits and evidence as you
17 have them now. And again, when the attorneys say that
18 their side, the Plaintiff, rests and then the Defense
19 rests, that means that's the end of the testimony and
20 evidence.

21 So with that I'm gonna have to ask you to retire --
22 unless there's some specific thing you have -- ask you
23 to retire to the jury room to continue your
24 deliberations.

25 (Whereupon, the Jury left the courtroom at

1 approximately 8:05 p.m.)

2 THE COURT: Is there anything from the Plaintiff?

3 MR. BELSER: Nothing, Your Honor, thank you.

4 THE COURT: Anything from the Defense?

5 MR. MURPHY: No, Your Honor, thank you.

6 (Whereupon, the jury returned to the jury room to
7 continue their deliberations, after which there was
8 a verdict from the Jury at 8:50 p.m.)

9 THE COURT: The Jury has got a verdict. Anything
10 from the Plaintiff before we bring the Jury back?

11 MR. BELSER: Nothing, Your Honor, thank you.

12 THE COURT: From the Defense?

13 MR. MURPHY: No, sir.

14 THE COURT: Very good.

15 Ask the Jury to join us, please.

16 (The Jury entered the courtroom at approximately
17 8:53 p.m.)

18 THE COURT: Mr. Foreman, I understand the Jury has
19 reached a verdict?

20 THE FOREMAN: Yes, sir.

21 THE COURT: If you would please hand it up to the
22 Bailiff.

23 All right. Case Number 2009-CP-37-768, *James D.*
24 *Fowler, Plaintiff, versus Nationwide Mutual Fire*
25 *Insurance Company and Andrew Flanagan.* Section one, on

1 the first cause of action, breach of contract. We, the
2 Jury, unanimously find for the Plaintiff, James D.
3 Fowler, against the Defendant, Nationwide Mutual Fire
4 Insurance Company, actual damages in the amount of
5 \$501,444.

6 On the second cause of action, bad-faith breach of
7 insurance contract, we, the Jury, unanimously find for
8 the Plaintiff, James D. Fowler, against the Defendant,
9 Nationwide Mutual Fire Insurance Company, actual damages
10 in the amount of \$3,000.

11 On the third cause of action slander *per se*, we,
12 the Jury, unanimously find for the Defendants,
13 Nationwide Mutual Fire Insurance Company and Andrew
14 Flanagan. Signed Paul R. Graber, Foreperson, Walhalla,
15 South Carolina, December the 2nd, 2011.

16 Section two. If you found for the Plaintiff on
17 either the second or third causes of action in section
18 one above, do you, the Jury, unanimously find by clear
19 and convincing evidence that the conduct of the
20 Defendants was willful, wanton, and reckless disregard
21 of the Plaintiff's rights? Answer: No. Signed again,
22 by Paul R. Graber, Foreperson, Walhalla, South Carolina,
23 December the 2nd, 2011.

24 Mr. Foreman, ladies and gentlemen of the Jury, are
25 those your verdicts on each of the causes of action that

1 you were given on your verdict form and are they still
2 your verdicts? If so, raise your right hand.

3 Very good. Let the record reflect that the Jury
4 affirms each of the verdicts.

5 All right. Anything from the Plaintiff before I
6 dismiss the Jury?

7 MR. BELSER: No, sir. Thank you very much.

8 THE COURT: Anything from the Defendant?

9 MR. MURPHY: No, Your Honor.

10 THE COURT: Very good. Thank you very much.

11 Mr. Foreman, ladies and gentlemen of the Jury, the
12 Court is never interested in a verdict, only how that
13 verdict is reached. And it's obvious, especially
14 considering the hour of the evening, not the day, but
15 also throughout the trial of this case, and this is the
16 fourth day at least of trial and you were drawn on
17 Monday. But the fact is that I've noticed -- and by the
18 way, it looks like I'm doing everything but pay
19 attention up here, I've developed a certain knack of
20 keeping up with what's going on in the courtroom, and
21 I'm satisfied you have given the Plaintiff and the
22 Defendants a fair and impartial trial.

23 I've watched how you paid careful and close
24 attention to not only the testimony as well as the
25 arguments of counsel but the charge on the law. It's a

1 complicated case but you have done your duty well and
2 Oconee County as well as the judicial system of South
3 Carolina and our system of justice is in your debt.

4 I might note that as far as how important you are
5 as a jury, I think that Winston Churchill, the Prime
6 Minister of Great Britain during the Second World War
7 made an observation that no greater duty can a citizen
8 perform in peacetime than that as a juror because you
9 are the backbone of our system of justice and I thank
10 you for it.

11 I wish there was something I could do for you. The
12 only thing that I can say is that if you remember on
13 Monday when I qualified the Jury, I asked if any member
14 of the Jury panel had served on a jury in the last three
15 years. At least you won't have to serve for another
16 three years. At least you understand what goes on in a
17 courtroom and in our system that we have for delivering
18 justice, and I thank you for it.

19 Madam Clerk, I understand that you have been able
20 to prepare some documents for us?

21 THE CLERK: Yes.

22 THE COURT: All right. Just meet them in the jury
23 room.

24 THE CLERK: Yes.

25 THE COURT: And again, I do want to thank you not

1 only for your service but also for your patience with
2 the Court, and I thank you and I hope you have a good
3 weekend, what's left of it. A little late start. Very
4 good. Thank you so much and I wish you well.

5 (Whereupon, the Jury left the courtroom at
6 approximately 9:00 p.m.)

7 THE COURT: Anything from the Plaintiff?

8 MR. BELSER: Nothing, but thank you very much.

9 THE COURT: Well, let me ask you. You still have
10 one cause of action left; is that right?

11 MR. BELSER: We do. I forgot about that, frankly.
12 Well, that's correct. I apologize. We do have a cause
13 of action. They did find bad faith. We would ask the
14 Court to give us time to submit --

15 THE COURT: Well, that's what I was gonna do and
16 that's the reason I was asking. I want to be sure that
17 we take care of everything at one time. I'm gonna give
18 both sides at least ten days to submit any post-trial
19 Motions to include the second cause of action for the
20 Court.

21 MR. BELSER: The second cause of action is before
22 the Court at the end of the time, I think there's a
23 limit of --

24 THE COURT: 90 days.

25 MR. BELSER: No. It would be more than 90 days.

1 THE COURT: I don't know. The thing is, let's do
2 this if you don't mind. I'm gonna just give the parties
3 ten days to file whatever Motions, and then, of course,
4 if the cause of action has any time limit, I'll be
5 covered by that.

6 MR. BELSER: I thought the 90-day time limit
7 applied in this way.

8 THE COURT: After the demand.

9 MR. BELSER: After the demand.

10 THE COURT: Just as long as you are covered in the
11 ten days for everything that we need to, in other words,
12 I don't want to have anything dribbling in later.

13 MR. MURPHY: I was gonna ask for that.

14 THE COURT: Whatever Motions you have.

15 MR. MURPHY: I was gonna ask for that, Your Honor.
16 Obviously the verdict is completely inconsistent with
17 the evidence, at least on damages. We lost on the
18 breach of contract, that's on the record. But the
19 damages, so we'll reserve that.

20 THE COURT: The thing is, now, if you would --
21 well, you file whatever you want to, but as much help as
22 you can to the Court, and obviously we're gonna have
23 something else to be heard on it regardless. By the
24 way, I do want to thank all the attorneys. Y'all have
25 been here since Monday and so you know this has been an

1 interesting week.

2 And, of course, I think that's a Chinese curse that
3 may you live an interesting life. Not that this was a
4 curse, but I can tell you the first part wasn't a fun
5 thing. But the point is I do want to thank all of you
6 because you tried what I consider a very difficult case.
7 And you did it very professionally and I thank you for
8 it. And I'll look forward to hearing from you. Thank
9 you. All right.

10 MR. FREEMAN BELSER: Thank you.

11 THE COURT: The Court of Common Pleas for Oconee
12 County is adjourned *sine die*.

13 (Court adjourned at 9:05 p.m.)

14 (Court's Ex. # 2A Original Deposition of Andrew
15 Flanagan and Errata Sheet, was marked for
16 identification.)

17 (Court's Ex. # 3A, Original Deposition of Michael
18 K. Madden, was marked for identification.)

19 (Court's Ex. # 4, Original Deposition of Douglas
20 Ross, was marked for identification.)

21 (Court's Ex. # 5, Original Deposition of James
22 Dorsey Fowler, was marked for identification.)

23 (Court's Ex. # 6, note from Jury dated December 1,
24 2011, was marked for identification.)

25 (Court's Ex. # 7, Original Deposition of William H.

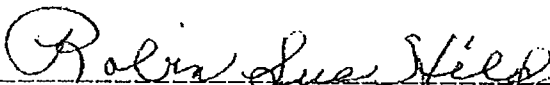
1 Gilden, was marked for identification.)
2 (Court's Ex. # 8, Original Deposition of John
3 Holecek, was marked for identification.)
4 (Court's Ex. # 9, formerly, Defendant's Exhibit 4
5 for identification, was marked for identification.)
6 (Court's Ex. # 10, formerly Defendant's Exhibit 5
7 for identification, was marked for identification.)
8 (Court's Ex. # 11, formerly Defendant's Exhibit 6
9 for identification, was marked for identification.)
10 (Court's Ex. # 12, Note from Jury during
11 deliberations, was marked for identification.)
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Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR,
Official Court Reporter for the Tenth Judicial Circuit
of the State of South Carolina, do hereby certify that
the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and the
evidence introduced in the Trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Oconee County, South Carolina, on the 2nd day of
December, 2011, Pages 729 through 1043.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

April 19, 2013


Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

PLAINTIFF'S

EXHIBIT 9

FRIENDSHIP FIRE DEPARTMENT TRUCK REPORTMonth 1 Day 17 Year 09 Day of Week SatCall# 11Time 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: () () () () () ()

37205

Mutual Aid ID# 52 Seneca 37313 14 Crossroads 37203 Corinth 37202 Oakway 37209 Clemson 39302Given 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 Ga. Hard RdOwners Name James D Fowler Address 328 Frank Ga. Hard RdOccupants Name James D Fowler Address SameOwners 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 ➔

PLAINTIFF'S
TRIAL
EXHIBIT # 6

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 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 household | 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

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 1203

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

Mutual Aid ID# Seneca 37313 14 14 Crossroads 37203 Corinth 37202 Oakway 37209 Clemson 39302
Given or Received remember GPM size _____

Type Of Fire: _____ Person In Charge DW Back Up Call # 14

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

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 Jimmy Fowler Address Same

Occupants Name _____ Address _____

Owners Phone # _____ Occupants Phone # Cell 498 9636

Vehicle Tag # _____ Make _____ Year _____ Ser # _____

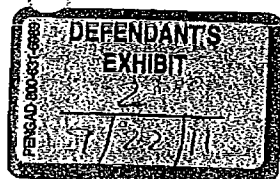
Mobile Home: Year _____ Make _____ ID # _____ Ser # _____

Members Responding To Call

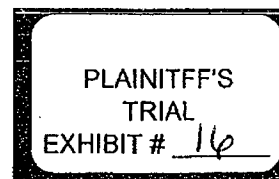
☒ David Wright	☐ Tracy Long	☐ Chad Durham	☐ Matthew Newton
☒ Walter Lee	☐ Bry Durham	☐ Brian Phillips	☒ Austin O'Kelley
☒ Favion Skelton	☐ Moe Merritt	☒ Michael Rice	☒ Nate Gaver Sta. 3
☒ William Merritt II	☒ Robert Sparks	☒ Glenn Mitchell	☒ Jonathon Elliott
☐ Duane Lowe	☐ Danny Newton	☒ Jarred Sparks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

Member Making Report: [Signature]

Over For All Calls ➡



1239



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 _____
Defector: 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 N/A | 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

"I certify that the attached document, comprising of 38 pages are true and correct copies for policy number 61 39 ho 787 845 as of 1-17-09."

Constance Fuller
Signature

34 09
Date



HOMEOWNER POLICY DECLARATIONS

Non-Assessable

Page 1 of 3

These Declarations are a part of the policy named above and identified by policy number below. They supersede any Declarations issued earlier. Your Homeowner Policy will provide the insurance described in this policy in return for the premium and compliance with all applicable policy provisions. See policy for details regarding the other coverages and additional coverage options.

Policy Number:
61 39 HO 787845

Issued:
FEB 19, 2008

Policyholder:
(Named Insured)
JAMES D FOWLER
328 FRANK GAILLIARD
RD
SENECA SC 29678-5316

Policy Period From:

MAR 16, 2008 to MAR 16, 2009 but only if the required premium for this period has been paid, and only for annual renewal periods if premiums are paid as required. Each period begins and ends at 12:01 A.M. standard time at the Residence Premises.

The Following Change(s) Have Been Made To Your Policy:

The limit of liability for Section I Coverage A Dwelling is revised.

Residence Premises Information:

JAMES D FOWLER
328 FRANK GAILLIARD
RD
SENECA
SC 29678-5316

ONE FAMILY
FRAME DWELLING
YEAR OF CONSTRUCTION 1998

PROTECTION CLASS 5
RATED PROTECTION CLASS 5
INSIDE CITY OR FIRE DIST
FIRE DISTRICT 0015
PROTECTION TERRITORY 034
OCONEE COUNTY

SECTION I

Property Coverages	Limits Of Liability	Deductible: \$500 ALL PERILS
COVERAGE-A-DWELLING	\$ 147,700	In case of a loss under Section I, we cover only that part of each loss over the deductible stated.
COVERAGE-B-OTHER STRUCTURES	\$ 44,190	
COVERAGE-C-PERSONAL PROPERTY	\$ 109,910	
COVERAGE-D-LOSS OF USE	\$ 147,700	

SECTION II

Liability Coverages	Limits Of Liability
COVERAGE-E-PERSONAL LIABILITY FOR EACH OCCURRENCE: PROPERTY DAMAGE AND BODILY INJURY	\$ 100,000
COVERAGE-F-MEDICAL PAYMENTS TO OTHERS EACH PERSON	\$ 1,000

H5300

FRAME: H 08

1242

HOMEOWNER POLICY DECLARATIONS

Page 2 of 3

OTHER COVERAGES/OPTIONS APPLICABLE

See Policy or Endorsements for details regarding the Other Coverages and Options that apply to your policy.

Other Coverages	Limits of Liability	
INFLATION PROTECTION	APPLIES	
BOECKH INDEX 0545.3		
BIOLOGICAL DETERIORATION/DAMAGE CLEAN UP	\$	5,000
FIRE DEPARTMENT SERVICE CHARGE	\$	500
CREDIT CARD - FORGERY	\$	1,000

Options Applicable		
OPTION-J-EXTENDED REPLACEMENT COST	APPLIES	
PERSONAL PROPERTY	APPLIES	
OPTION-K-REPLACEMENT COST PLUS	APPLIES	
DWELLING	APPLIES	
OPTION-L-PROTECTIVE DEVICE CREDIT	APPLIES	
LOCAL FIRE OR SMOKE ALARM SYSTEMS		
FIRE EXTINGUISHERS		
DEADBOLT LOCKS ON ALL EXTERIOR ENTRYWAYS		
OPTION R-BROAD WATER BACKUP	\$	5,000
WATER BACKUP DEDUCTIBLE \$500		

SPECIAL PROVISIONS

STATE OF SOUTH CAROLINA VALUATION CLAUSE, VALUE OF DWELLING IS \$ 147,700

PREMIUM SUMMARY

Premium Based On	Premium Amount	
POLICY PREMIUM	\$	999.00
WATER BACKUP	\$	20.00
Annual Renewal Premium	\$	1,019.00

Annual Renewal Premium Includes Discounts For:

CLAIM FREE
LONG TERM
HOME PROTECTIVE DEVICE

IMPORTANT NOTICE

The property insured on this policy is located in territory 034. The average percent of the premium in this territory that is related to the perils of wind and hail (including tornado and hurricane) is 24.3%. This information is provided in accordance with the South Carolina Act 290, the Insurance Market Reformation Act, of 2004.

FORMS and ENDORSEMENTS MADE PART OF POLICY

HO 39-A
H-6145

Homeowners Policy
Amendatory Endorsement



HOMEOWNER POLICY DECLARATIONS

Non-Assessable
Page 3 of 3

Policy Number:
61 39 HO 787845

Policyholder:
(Named Insured)
JAMES FOWLER

Issued:
FEB 19, 2008

Policy Period From:
MAR 16, 2008 TO MAR 16, 2009

ADDITIONAL INTERESTS

FIRST MORTGAGEE

FIRST CITIZENS MRTG
SERV DIV
ISAOA ATIMA
PO BOX 11757
COLUMBIA SC 29211-1757

SECOND MORTGAGEE

CITIFINANCIAL
ISAOA ATIMA
906 TIGER BLVD # 5
CLEMSON SC 29631-1499
LOAN #200329

Issued By: NATIONWIDE MUTUAL FIRE INSURANCE COMPANY
Countersigned At: RALEIGH, NC
Prior Declaration Issued: AUG 06, 2007

Home Office - Columbus, Ohio
By: STANLEY G NIX

IMPORTANT PHONE NUMBERS

Nationwide 24-Hour Claims Number: 1-800-421-3535

For QUESTIONS About Your Policy, Call Your NATIONWIDE AGENT: STANLEY G NIX
864-638-5844

For Hearing Impaired: TTY 1-800-622-2421

Nationwide Regional Office: 1-800-835-7975



amendatory endorsement- insuring agreement

Please attach this important addition to your policy.

It is agreed that the policy is amended as follows:

Under the Insuring Agreement, the second paragraph is deleted and replaced by the following:

The applicable limits of liability and optional coverages you have chosen are shown on the Declarations. We may change the amount of coverage shown on the Declarations Page to reflect current costs and values when reconstruction cost estimates are conducted or when the policy renews. To maintain an appropriate amount of coverage, it is your duty to advise us of additions, alterations, or renovations to your dwelling. This policy applies only to loss which occurs while the policy is in force.

All other provisions of the policy apply.

This endorsement is issued by the company shown on the Declarations as the issuing company.

Nationwide Mutual Insurance Company and Affiliated Companies
One Nationwide Plaza Columbus, OH 43215-2220
Hearing or Voice Impaired: 1-800-622-2421 (TTY only)
nationwide.com

Nationwide and the Nationwide framemark are federally registered service marks of Nationwide Mutual Insurance Company

THIS POLICY MAY CONTAIN A SEPARATE DEDUCTIBLE FOR HURRICANE OR WIND/HAIL LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU. THE EXAMPLE ON PAGE A1 ILLUSTRATES HOW THE DEDUCTIBLE MIGHT AFFECT YOU.

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How Your Wind/Hail or Hurricane Deductible is Applied

The wind/hail deductible or hurricane deductible is on your Declarations page if it applies to this policy.

If you have a wind/hail deductible, the events that trigger application of this deductible are: wind, wind gust, hail, rain, tornadoes, cyclones, or snow.

If you have a hurricane deductible, the events that trigger application of this deductible are a hurricane, as defined in the Hurricane Coverage and Deductible Provision endorsement.

The hurricane deductible does not apply to any storm not declared by the National Hurricane Center/Tropical Prediction Center.

The deductible is based on a percentage of your Coverage A dwelling limit. Your deductible amount is determined by multiplying the percentage deductible by the Coverage A-Dwelling limit of liability at the time of loss. The resulting dollar amount is your deductible. The deductible applies to the total of all covered loss under Coverage A—Dwelling, Coverage B—Other Structures, Coverage C—Personal Property, and Other Coverages.

As mentioned earlier, the percentage deductible is on the Declarations page. The following are examples of how the deductible is applied:

These examples assume that at the time of loss, the Coverage A-Dwelling limit of liability is \$100,000 and the percentage deductible is 1%, with the resulting deductible amount being \$1000 ($1\% \times \$100,000$).

- Your dwelling loss is \$15,000 and your personal property loss is \$5,000 for a total loss of \$20,000. You are responsible for the first \$1000 of the loss due to the deductible. Nationwide is responsible for the balance of the loss or \$19,000.
- Your dwelling loss is \$500 and there is no personal property loss. You are responsible for the first \$1000 of the loss. Since the total loss amount is less than the deductible, you would be responsible for the loss.

This example is the same whether your policy has a Hurricane Deductible or a Wind/Hail Deductible.

Insuring Agreement

We will provide the insurance described in this policy, which includes the Declarations and attached endorsements or schedules, in return for the premium and fees, and compliance with all the policy provisions.

The applicable limits of liability and optional coverages you have chosen are shown on the Declarations. This policy applies only to loss which occurs while the policy is in force.

Definitions

Certain words and phrases used in this policy are defined as follows:

1. "WE", "US" and "OUR" refer to the company shown on the Declarations as the Issuing company.
2. "YOU" and "YOUR" refer to the named insured shown in this policy who resides at the residence premises. These terms also mean your spouse who resides at the same residence premises.
3. "BUSINESS" includes trade, profession, occupation, or employment including self-employment, performed on a full-time, part-time, or temporary basis. Business also includes any occasional business pursuits of an insured, including ownership of rental property. It includes home care services regularly provided to a person or persons, other than insureds or insureds' relatives, for which there is monetary or other compensation. A mutual exchange of home care services is not considered compensation. Exceptions, if any, are noted on the Declarations.

4. "INSURED" means you and the following if residents of your household at the residence premises:
 - a) your relatives.
 - b) any other person under age 21 and in the care of you or your relatives.
5. "INSURED LOCATION" means:
 - a) the residence premises.
 - b) the part of any other premises, structures, and grounds used by you as a residence and shown in the policy; also any of these acquired by you during the policy period for your use as a residence.
 - c) a premises you use with premises defined in 5. a) or 5. b).
 - d) a part of a premises, not owned by an insured, where an insured is temporarily living.
 - e) vacant land, other than farm land, owned by or rented to an insured.
 - f) land, other than farm land, owned by or rented to an insured on which a one or two-family dwelling is being built as a residence for an insured.
 - g) cemetery plots or burial vaults of an insured.
 - h) a part of a premises rented on occasion to an insured for purposes other than business.
6. "MOTOR VEHICLE" means:
 - a) a motorized land vehicle or conveyance, including motorized bicycles or mopeds, designed for travel on public roads or subject to motor vehicle registration.
 - b) a trailer or semi-trailer designed for travel on public roads and subject to motor vehicle registration.
 - c) any vehicle while being towed by or carried on a vehicle defined in 6. a) or 6. b).
7. "RESIDENCE PREMISES" means the one, two, three or four-family dwelling, other structures and grounds located at the mailing address shown on the Declarations unless otherwise indicated.
8. "AIRCRAFT" means any machine or device capable of atmospheric flight, except models.
9. "ACTUAL CASH VALUE" means the amount it would cost to repair or replace covered property with material of like kind and quality, less allowance for physical deterioration and depreciation, including obsolescence.
10. "FOUNDATION" means a building's substructure including substructural walls, i.e., basement walls, crawl space walls, etc.
11. "BIOLOGICAL DETERIORATION OR DAMAGE" meaning damage or decomposition, breakdown, and/or decay of manmade or natural material due to the presence of fungi, algae, lichens, slime, mold, bacteria, wet or dry rot, and any by-products of these organisms, however produced. Fungi as used above include, but are not limited to: yeasts, mold, mildew, rust, smuts, or fleshy fungi such as mushrooms, puffballs and coral fungi.

Other words are also defined. All defined words are in bold print.



Section I *Property Coverages*

Coverage Agreements

COVERAGE A — DWELLING

We cover:

1. the dwelling on the residence premises used mainly as your private residence, including attached structures and attached wall-to-wall carpeting.
2. materials or supplies on or adjacent to the residence premises for use in construction, alteration or repair of:
 - a) the dwelling; or
 - b) Coverage B — Other Structures.

We do not cover land or the replacement, rebuilding, restoration, stabilization or value of such land.

COVERAGE B — OTHER STRUCTURES

We cover other structures on the residence premises. They must be separated from the dwelling by clear space. Structures connected to the dwelling by only a fence, utility line, or similar connection are considered other structures.

We do not cover:

1. other structures used in whole or in part for business purposes.
2. other structures rented or held for rental to anyone, unless used solely as a private garage.
3. land or the replacement, rebuilding, restoration, stabilization or value of such land.

COVERAGE C — PERSONAL PROPERTY

We cover personal property owned or used by an insured at the residence premises. At your request, we will cover personal property owned by others. It must be on the part of the residence premises occupied by an insured. This extension of coverage does not increase the limit of liability.

Our limit of liability for personal property while away from the residence premises is 10 percent of the limit of liability for Coverage C or \$1,000, whichever is greater. This 10 percent limitation does not apply to personal property:

1. removed from the residence premises due to a covered loss;
2. in transit to and from, or while in a newly acquired principal residence for 30 days. The 30 days start right after you begin to move the property; or
3. stored in a commercial storage facility up to 180 days. The 180 days start when you begin to move the property. A commercial storage facility does not include a self-storage unit.

SPECIAL LIMITS OF LIABILITY. Certain property is subject to special limits which do not increase the personal property limits of liability. The special limit, shown below for each numbered category, is the total limit for each loss for all property in that category.

Section I — Property Coverages

The following special limits apply only to theft losses:

1. \$1,000 for jewelry, watches, furs, and precious and semi-precious stones.
2. \$1,000 for guns, including accessories.
3. \$1,000 for cameras (film, digital or video), including accessories. It does not include cameras used in business.
4. \$2,500 for silverware, silver-plated ware, goldware, gold-plated ware, and pewterware.
5. \$1,000 for tools not used in business. This limit does not apply to lawn and garden tools used to service the residence premises.

The following special limits apply to all covered losses:

6. \$200 for money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins, stored value cards, smart cards, gift certificates and medals.
7. \$1,000 for securities, accounts, bills, deeds, documents, evidences of debt, letters of credit, notes other than bank notes, passports, stamps and tickets.
8. \$3,000 for computers, including hardware and software accessories, operating software, application software or other similar software, which can be replaced with like kind and quality on the retail market. This includes electronic storage media such as, but not limited to, tapes or diskettes. Stored data is not covered.
9. \$500 for business property on the residence premises except computers including their hardware and software described above.
10. \$1,000 for watercraft and outboard motors, including trailers, furnishings and equipment.
11. \$1,000 for utility type trailers not used with watercraft.
12. \$1,000 for manuscripts, regardless of the medium.

PROPERTY NOT COVERED. We do not cover:

1. articles separately described and specifically insured in this or any other insurance.
2. animals, birds or fish.
3. house or travel trailers.
4. motor vehicles or all other motorized land conveyances including the following, whether furnished by the manufacturer or an individual:
 - a) their parts or equipment, whether attached to or separated from the motor vehicle or motorized land conveyance; or
 - b) accessory equipment; or
 - c) any device or instrument, including accessories or antennas, for the transmitting, receiving, recording or reproduction of sound or picture which can be operated by the power from the electrical system of the motor vehicle or motorized land conveyance. Tapes, discs, reels, cassettes or similar items, including carrying cases for any of these, while in a motorized land vehicle shall not be considered accessory equipment. The most we will pay is \$200 in any one loss, regardless of the number of such items. The loss must be caused by a covered peril.

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

- a) used solely to service the insured's residence;
 - b) designed to assist the handicapped; or
 - c) a motorized golf cart while being operated to or from, or on the premises of a golf course.
5. aircraft and parts.
 6. property of roomers, boarders, and other tenants. Personal property, at the residence premises, belonging to roomers and boarders related to an insured is covered.

7. property in an apartment regularly rented or held for rental to others by an insured.
8. property rented or held for rental to others away from the residence premises.
9. business property away from the residence premises.

COVERAGE D — LOSS OF USE

We cover, subject to the coverage limit which is the total limit, all of the following:

1. **Additional Living Expense.** If a covered loss requires you to leave the residence 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; and
2. **Fair Rental Value.** If a loss covered under this section requires occupants to leave that part of the residence premises rented to others or held for rental, we will pay its fair rental value. Payment will be for the shortest time required to repair or replace this part of the premises. This does not include expense that does not continue while the part of the residence premises is uninhabitable. 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; and
3. **Prohibited Use.** If a civil authority prohibits your use of the residence premises because of direct damage to neighboring premises by a peril insured against in this policy, we will pay the resulting loss, for up to two weeks while use is prohibited, for:
 - a) Additional Living Expense; and
 - b) Fair Rental Value.

We do not cover loss or expense due to cancellation of a lease or agreement.

This coverage does not apply to an insured's business, whether conducted on or off any insured location.

No deductible applies to this coverage.

Additional Property Coverages

These additional property coverages are subject to the policy deductible except as noted. In no event will the deductible be applied more than once to any one loss.

1. **Debris Removal.** We will pay reasonable expense you incur removing debris of covered property, if the peril causing the loss is covered. This includes debris of trees that cause damage to covered property or covered structures, or that obstruct access to covered structures if such access is necessary to repair or replace the structure. We will pay only to move away from, or off of, covered property or covered structures, the debris of trees that cause damage to covered property or restrict access. An additional five (5) percent of the limit of liability for the damaged property will be available when the amount payable for the property loss plus the debris removal expense exceeds the limit of liability.
2. **Live Tree Debris Removal.** In the event of a loss, we will also pay the reasonable expense you incur for the removal of live tree debris from the residence premises, that does not cause damage to covered property or covered structures. The most we will pay is \$500, regardless of the number of trees requiring removal, for any one loss. Loss must be the result of a Coverage C Peril Insured Against. This is an additional amount of coverage.

Section I — Property Coverages

3. **Reasonable Repairs.** We will pay reasonable cost you incur for necessary repairs made solely to protect covered property from further damage, if the peril causing the loss is covered. This expense is included in the limit of liability applying to the damaged property.
4. **Trees, Shrubs, Plants, and Lawns.** We cover trees, shrubs, plants, or lawns on the residence premises for loss caused by the following perils: fire and lightning; explosion; riot and civil commotion; aircraft; vehicles not owned or operated by a resident of the residence premises; vandalism or malicious mischief; collapse of a building; or, theft. Liability is limited to five (5) percent of the Coverage A limit of liability for all trees, shrubs, plants and lawns. It is limited to \$500 for one tree, shrub or plant. This coverage may increase the limit of liability.
We do not cover property grown for business purposes.
5. **Fire Department Service Charge.** We will pay up to the amount stated on the Declarations for your liability under contract or agreement for customary fire department charges. This applies when the charges result from the fire department being called to save or protect covered property from a covered peril. No deductible applies to this coverage.
6. **Property Removed.** Covered property removed from a premises because it is in danger from a covered peril is covered for direct loss from any cause. The property is covered while being removed and for 30 days while removed. After 30 days the property is covered for direct loss from a peril insured against. This does not change the coverage limit.
7. **Credit Card, Electronic Fund Transfer Card, Access Device and Forgery Coverage.** We will pay up to the amount stated on the Declarations for:
 - a) the legal obligation of an insured to pay theft or unauthorized use of credit cards (including Electronic Fund Transfer Cards or Access Devices) issued to or registered in an insured's name. However, we do not cover use by a resident of your household, a person entrusted with the credit card (Electronic Fund Transfer Card or Access Device), or any person if an insured has not complied with all terms and conditions under which the credit card (Electronic Fund Transfer Card or Access Device) is issued.
 - b) loss to an insured caused by forgery or alteration of a check or negotiable instrument.
 - c) loss to an insured through good faith acceptance of counterfeit United States or Canadian paper currency.

All losses resulting from a series of acts committed by any one person or groups of persons or in which any one person or groups of persons is concerned or implicated is considered one loss. This is regardless of the period of time over which the acts occur.

We do not cover loss arising out of the business pursuits, or dishonesty of an insured. We do not cover loss arising out of identity theft or identity fraud including a covered act as outlined in subsections a), b), or c) of this section.

No deductible applies to this coverage.

We may make any investigation and settle any claim or suit as we decide is appropriate. Our obligation to defend a claim or suit ends when the amount we pay for the loss equals our limit of liability.

If a claim is made or a suit is brought against an insured for liability under the Credit Card, Electronic Fund Transfer Card, Access Device and Forgery Coverage, we will provide defense at our expense by counsel of our choice.

We may defend at our expense an insured or an insured's bank against a suit for the enforcement of payment under the forgery coverage.

Our duty to defend does not apply to identity theft or identity fraud.

8. **Inflation Protection Coverage.** If the Declarations show this coverage applies, we will adjust the limit of liability on the Declarations for Section I — Coverages. The limit of liability will change as the appropriate Index, shown on the Declarations, changes.

We will compare the latest available Index to the Index as of the effective date of this policy. We will adjust the limit of liability by the percentage change in the Index. It is further agreed that the premium for this policy at the next anniversary date shall be for the adjusted limits of liability.

If you request a change in the dwelling limit of liability, the effective date of this coverage will be amended to the effective date of that change.

This coverage will not reduce our limit of liability during the current policy period below that for which premium has been paid.

9. **Consequential Loss.** We cover insured personal property in a building at the residence premises for loss due to temperature change resulting from power interruption. There must be damage to the residence premises caused by a covered peril.

10. **Refrigerated Property.** If a power interruption occurs, off the residence premises, we will pay up to a maximum of \$500 for loss of contents in a freezer or refrigerator due to temperature changes. You must use all reasonable means to protect the covered property from damage or this coverage is void.

11. **Lock Replacement.** We will pay up to \$100 to replace the exterior door locks on your residence premises with deadbolt locks or to rekey the lock cylinders of existing deadbolt locks, whichever is less. This coverage applies only if the keys to your residence premises are stolen.

No deductible applies to this coverage.

12. **Collapse.** We cover direct physical loss to covered property described in Coverages A, B and C caused by the complete collapse of a building structure or any part of a building structure. Collapse means an abrupt falling down or caving in of a building or other structure or any part of a building or other structure with the result that it cannot be occupied for its intended purpose. A building or other structure or part of a building or other structure is not considered in a state of collapse if:

- a) it is standing but in danger of falling down or caving in;
- b) it is standing but has separated from any other part of the building;
- c) it is standing even if it shows signs of settling, cracking, shifting, bulging, sagging, bowing, bending, leaning, shrinkage, or expansion.

The collapse must be sudden and accidental and caused by one or more of the following:

- a) one of the Coverage C — Personal Property perils insured against;
- b) hidden decay of a supporting or weight bearing building structural member;
- c) hidden insect or vermin damage of a supporting or weight bearing building structural member;
- d) weight of:
 - (1) contents, equipment, animals or people; or
 - (2) rain, ice, sleet or snow which collects on the roof; or
- e) defective material or methods used in the construction, repair or remodeling or renovation if the collapse occurs in the course of work being done.

The presence of any decay, insect or vermin damage must be unknown to an insured prior to collapse.

Loss to an awning, fence, patio, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf, or dock is not included under items b), c), d), or e) unless the loss is a direct result of the collapse of a building.

The limit of liability applying to the covered property is not increased by this coverage.

Section I — Property Coverages

- 13. Household Supplies.** We will pay up to a maximum of five (5) percent of the Coverage A — Dwelling coverage limit for direct physical loss to property described in Coverages A and B arising out of any interior or exterior presence, use, discharge, dispersal, release, migration, seepage, leakage, or escape of household supplies on the residence premises. Household supplies includes items currently in use or in your possession at the residence premises, in normal household quantities such as household cleaning supplies, pesticides, and other similar items.

Section I — Property Exclusion 1.j) does not apply to any loss covered under this Additional Property Coverage, Household Supplies. In no event, however, will we ever cover:

- a) loss arising out of materials containing asbestos, lead, formaldehyde, fuel or petroleum products; or
 - b) any fee, assessment or expense of any governmental authority; or
 - c) loss arising out of household supplies possessed or used:
 - (1) for business purposes;
 - (2) for illegal purposes;
 - (3) by contractors; or
 - (4) on driveways or walkways.
- 14. Biological Deterioration or Damage Clean Up and Removal.** In the event that a covered cause of loss results in biological deterioration or damage to property covered under Coverages A, B, and C, we will pay, up to the amount shown on the Declarations, for:
- a) the cost to clean up, remove and dispose of the biological deterioration or damage to covered property;
 - b) the cost to tear out and replace any part of the building or other covered property needed to gain access to the biological deterioration or damage;
 - c) the cost of testing which is performed in the course of clean up and removal of the biological deterioration or damage from the residence premises; and
 - d) additional living expenses you may incur, as outlined under Coverage D, that results from items a), b) or c) above.

The coverage amount shown on the Declarations for this Additional Property Coverage is the most we will pay for all loss or costs payable under this Additional Coverage. Such costs are payable only if you report the biological deterioration or damage to us within 180 days of having first discovered the biological deterioration or damage.

The covered cause of loss that causes or results in biological deterioration or damage to covered property must have occurred during the policy period.

This is an additional amount of coverage.

Perils Insured Against

(Section I)

Covered Causes of Loss

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We cover accidental direct physical loss to property described in Coverages A and B except for losses excluded under Section I – Property Exclusions.

COVERAGE C – PERSONAL PROPERTY

We cover accidental direct physical loss to property described in Coverage C caused by the following perils except for losses excluded under Section I – Property Exclusions:

1. fire or lightning.
2. windstorm or hail.
Direct loss caused by rain, snow, sleet, sand or dust driven through roof or wall openings made by direct action of wind, hail, or other insured peril is covered. This peril includes loss to:
 - a) rowboats and canoes inside or outside a building.
 - b) other watercraft and outboard motors, including their trailers, furnishings, and equipment, while inside a fully enclosed building.
3. explosion.
4. riot or civil commotion.
5. aircraft, missiles propelled and spacecraft.
6. vehicles.
7. sudden and accidental damage from smoke. This does not include loss due to smoke from farm or industrial operations.
8. vandalism and malicious mischief.
This peril does not include loss to property on the residence premises if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling under construction is not considered vacant.
9. theft, including attempted theft. Loss of property from a known location when it is likely the property was stolen is covered. Loss of precious or semi-precious stones from their settings is not covered. This peril does not include loss caused by any theft:
 - a) committed by an insured.
 - b) in or to a dwelling under construction, or of materials and supplies for use in the construction, until the dwelling is completed and occupied.
 - c) of money, securities, stamps, jewelry, watches, gems, articles of gold, silver, or platinum from any part of a residence premises usually occupied solely by an insured while rented to other than an insured.

Section I — Perils Insured Against

This peril does not include loss caused by theft that occurs away from the residence premises of:

- a) property while at any other residence owned by, rented to, or occupied by an insured, except while an insured is temporarily living there. Property of an insured student is covered at a residence away from home if the student has been there within 45 days prior to the loss.
- b) trailers and campers.
- c) watercraft and outboard motors, including their furnishings and equipment.

10. falling objects. This peril does not include loss to:

- a) property in a building, unless the roof or an exterior wall of the building is first damaged by a falling object.
- b) the falling object itself.

11. weight of ice, snow, or sleet which causes damage to property in a building.

12. accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance. This peril does not include loss:

- a) caused by or resulting from water that backs up from outside the dwelling's plumbing system and enters through sewers or drains; or water entering or overflowing a sump pump, sump pump well or other system designed to remove subsurface water drained from the foundation area except as may be provided elsewhere in this policy or by endorsement.
- b) due to continuous or repeated seepage or leakage of water, steam or moisture which occurs over a period of time and results in deterioration, corrosion, or rust.
- c) due to freezing except as provided by the peril of freezing.
- d) to the system or appliance from which the water, steam or moisture escaped.

13. accidental electrical damage to electrical appliances, devices, fixtures and wiring. This peril does not include loss to transistors and tubes including picture tubes.

14. sudden and accidental tearing apart, cracking, bursting, burning or bulging of:

- a) a steam or water heating system.
- b) a fire protective sprinkler system.
- c) an air conditioning system.
- d) an appliance for heating water.

Freezing is not covered under this peril.

15. freezing of a plumbing, heating, air conditioning, or automatic fire protective sprinkler system or of a household appliance. This peril does not include loss on the residence premises while unoccupied, vacant or under construction unless you have used reasonable care to:

- a) maintain heat in the building; or
- b) shut off the water supply and drain the system and appliances of water.

Property Exclusions

(Section I)

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.

- a) **Earth Movement and Volcanic Eruption.** Earth movement means: earth movement due to natural or unnatural causes, including mine subsidence; earthquake; landslide; mudslide; earth shifting, rising or sinking. Volcanic eruption means: eruption; or discharge from a volcano.

Resulting direct loss by fire, explosion, theft or breakage of glass which is part of the building is covered.

- b) **Water or damage caused by water-borne material.** Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

- (1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.

- (2) water or water-borne material which: —

- (a) backs up through sewers or drains from outside the dwelling's plumbing system; or

- (b) overflows a sump pump, sump pump well or other system designed to remove subsurface water or water-borne material from the foundation area.

- (3) water or water-borne material below the surface of the ground, including water or water-borne material which exerts pressure on, seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, or other structure.

Resulting direct loss by fire, explosion, or theft is covered.

- c) **Neglect,** meaning neglect of the insured to use all reasonable means to save and preserve property at the time of and after a loss, or when property is endangered by a covered peril.
- d) **War or Warlike Acts.** This includes insurrection, rebellion or revolution. Discharge of a nuclear weapon is considered a warlike act even if accidental.
- e) **Nuclear Hazard,** meaning any nuclear reaction, discharge, radiation, or radioactive contamination, all whether controlled or not or however caused, and any consequence of any of these. Loss caused by nuclear hazard is not considered loss caused by fire, smoke, or explosion, whether these perils are specifically named in or otherwise included as a covered peril in Section I.
- f) **Increased Hazard,** meaning any loss occurring while hazard is increased by a means within the control and knowledge of an insured.
- g) **Intentional Acts,** meaning loss resulting from an act committed by or at the direction of an insured that may reasonably be expected to result from such acts, or is the intended result from such acts. Intentional acts include criminal acts. Such acts exclude coverage for all insureds.
- h) **Ordinance or Law,** meaning enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure.
- i) **Collapse,** except as provided by Section I — Additional Property Coverages — Collapse.

Section I — Property Exclusions

- j) Contamination or Pollution, meaning any interior or exterior presence or use, discharge, dispersal, release, migration, seepage, leakage, or escape of:
 - (1) solid, liquid, gaseous, or thermal irritants or contaminants, except smoke arising solely from a hostile fire or the sudden and accidental discharge from a fireplace or furnace;
 - (2) vapors, soot, fumes, acids, alkalis, toxic chemicals, toxic liquids, toxic gases, or waste;
 - (3) fuel oil and other petroleum products; or
 - (4) any other waste materials or other irritants, contaminants or pollutants.
 - k) Loss Assessments, unless, optional loss assessment coverage is purchased; and then only up to the limit of liability shown for that optional coverage.
 - l) Government Acts, meaning any loss caused by seizure, destruction, or confiscation by order of any government or public entity.

Loss caused by acts ordered by any government or public entity at the time of a fire to prevent its spread is covered if the loss caused by fire would be covered under this policy.
 - m) Biological deterioration or damage, except as provided by Section I — Additional Property Coverages — Biological Deterioration or Damage Clean Up and Removal.
2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:
- a) A fault, weakness, defect or inadequacy in the:
 - (1) specifications, planning, zoning;
 - (2) design, workmanship, construction, materials;
 - (3) surveying, grading, backfilling;
 - (4) development or maintenance;of any property on or off the residence premises, whether intended or not.
 - b) Acts or decisions of any person, group, organization or governmental body, whether intentional, negligent, wrongful or without fault. This includes the conduct or failure to act or decide by any of the aforementioned.
 - c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1. of this Section.
3. We do not cover loss to property described in Coverages A and B resulting directly from any of the following:
- a) freezing of a plumbing, heating, air conditioning or automatic fire protection sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing.

This exclusion applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:

 - (1) maintain heat in the building; or
 - (2) shut off the water supply and drained the system and appliance of water.
 - b) freezing, thawing, pressure or weight of water, snow or ice, whether driven by wind or not, to a:
 - (1) fence, pavement, patio or swimming pool;
 - (2) foundation, retaining wall, or bulkhead; or
 - (3) pier, wharf or dock.

- c) theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is completed and occupied.
- d) vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling under construction is not considered vacant.
- e) continuous or repeated seepage or leakage of water or steam over a period of time from a heating, air conditioning or automatic protective sprinkler system; household appliance; or plumbing system that results in deterioration or rust. Continuous or repeated seepage or leakage from, within, or around any shower stall, shower tub, tub installation or other plumbing fixture, including their walls, ceilings or floors, is also excluded.

If loss caused by water or steam is not otherwise excluded, we will cover the cost of tearing out and replacing any part of the building necessary to repair or replace the system or appliance. We do not cover loss to the system or appliance from which the water or steam escaped.

- f)
 - (1) wear and tear, marring, deterioration;
 - (2) inherent vice, latent defect, mechanical breakdown;
 - (3) smog, rust;
 - (4) smoke from agricultural smudging or industrial operations;
 - (5) release, discharge, or dispersal of contaminants or pollutants;
 - (6) settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings;
 - (7) birds, vermin, rodents, insects or domestic animals. Resulting breakage of glass constituting part of a covered building is covered;
 - (8) root growth, movement or action;
 - (9) mismatch of color between undamaged material and new material used to replace faded, weathered or oxidized damaged material; or
 - (10) mismatch between undamaged material and new material used to repair or replace damaged material due to outdated, obsolete or discontinued products.

If any of items f)(1) through (8) cause water to escape from a plumbing, heating, air conditioning or fire protective sprinkler system or household appliance, we cover loss caused by the water not otherwise excluded. We also cover the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which the water escaped.

Under exclusions 3.a) through 3.f), any loss that follows is covered unless it is specifically excluded.

Property Conditions

(Section I)

1. **Insurable Interest and Limit of Liability.** Even if more than one person has an insurable interest in the property covered, we will not be liable:
 - a) to the insured for more than the insured's interest.
 - b) for more than the limit of liability.
2. **Deductible.** The deductible amount shown on the Declarations or endorsements attached to this policy is the amount of loss paid by the insured. We pay for covered loss above the deductible amount.
3. **Your Duties after Loss.** In case of loss, you must:
 - a) give immediate notice to us or our agent; and also to the police in case of theft. In case of loss under the credit card coverage, also notify the credit card (Electronic Fund Transfer Card) company. If loss is caused by or results from the peril of hail, loss must be reported to us or our agent within 6 months of the loss event.
 - b) protect the property from further damage. You must make repairs required to protect the property and keep a record of repair expenses.
 - c) as often as we reasonably require:
 - (1) show us the damaged property; and
 - (2) provide records and documents we request and permit us to make copies.
 - (3) submit to examinations under oath and sign same. At your or our request, the exams will be conducted separately and not in the presence of any other persons except legal representation.
 - d) submit to us, within 60 days after we request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
 - (1) the time and cause of loss.
 - (2) interest of the insured and all others in the property involved and all liens on the property.
 - (3) other insurance that may cover the loss.
 - (4) changes in title or occupancy of the property during the term of the policy.
 - (5) specifications of any damaged property and detailed estimates for repair of damage.
 - (6) a list of damaged personal property showing in detail the quantity, description, actual cash value, and amount of loss. Attach all bills and receipts that support the figures.
 - (7) receipts for additional living expenses and records supporting the fair rental value loss.
 - (8) evidence or affidavit supporting a claim under the Credit Card, Electronic Fund Transfer Card, Access Device and Forgery Coverage. It should state the amount and cause of loss.
4. **Loss Settlement.** Covered losses will be settled, up to the applicable limit of liability, by us paying:
 - a) actual cash value at the time of loss, the amount not to exceed actual cash value, needed to repair or replace:
 - (1) personal property and structures that are not buildings;
 - (2) carpeting (including wall-to-wall) and cloth awnings;

Section I – Property Conditions

- (3) outdoor antennas, whether or not attached to the building;
 - (4) home appliances, unless built in as a part of the dwelling.
 - b) the cost to repair or replace without deduction for depreciation for buildings in Coverage A or B based on equivalent construction and use on the same premises except:
 - (1) we will pay no more than the actual cash value of the damage until the repair or replacement is made when the cost to repair or replace the damage is more than \$1,000 or more than 5 percent of the amount of insurance in this policy on the building, whichever is less.
 - (2) when you claim loss or damage to buildings on an actual cash value basis. You may make claim within 180 days after the loss for any added loss based on the cost to repair or replace.
 - (3) if you choose not to repair or replace, we will pay only the actual cash value of the damaged building, not to exceed the applicable limit of liability.
5. **Loss Payment.** We will pay all losses as outlined in the above Loss Settlement Condition 4. subject to the following:
- a) In case of loss to a pair or set, we may elect to:
 - (1) repair or replace a part to restore the pair or set to its value before the loss; or
 - (2) pay the difference between actual cash value of the property before and after the loss.
 - b) At our option, we may repair or replace any part of the damaged property with equivalent property, providing we give you written notice within 30 days after receiving your signed, sworn proof of loss.
 - c) We will pay you unless some other person is named in this policy to receive payment. Payment will be made within 60 days after we receive your proof of loss and:
 - (1) reach agreement with you; or
 - (2) there is an entry of a final judgment; or
 - (3) there is a filing of an appraisal award with us.
 - d) After we have paid for a loss by theft or disappearance of covered property, we have the right to all or part of any recovered property. You must protect these rights and inform us of any recovery. If you wish to retain the recovered property, our loss payment will be adjusted by the value of such property.
 - e) After we have paid for a loss, we have the right to all or part of any salvageable property. We may permit you to keep the damaged property but we will reduce the amount of the loss paid to you by the value of the retained damaged property.
6. **Appraisal.** If you and we fail to agree on the amount of loss, either can demand that the amount be set by appraisal. If either makes a written demand for appraisal, each will select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. The two appraisers will then select a competent, impartial umpire. If the two appraisers cannot agree on an umpire within 15 days, you or we can ask a judge of a court of record in the state where the residence premises is located to select a competent, impartial umpire.

The appraisers will then set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of the loss. If the appraisers fail to agree within a reasonable time, they will submit their differences to the umpire. Written agreement signed by any two of these three will set the amount of the loss. Each appraiser will be paid by the party selecting that appraiser. Other expenses of the appraisal and the compensation of the umpire

will be paid equally by you and us. Any fees for expert witnesses or attorneys will be paid by the party who hires them. Neither the umpire nor the appraisers will have a financial interest that is conditioned on the outcome of the specific matter for which they are called to serve.

This is not a provision providing for or requiring arbitration. The appraisers and umpire are only authorized to determine the actual cash value, replacement cost, or cost to repair the property that is the subject of the claim. They are not authorized to determine coverage, exclusions, conditions, forfeiture provisions, conditions precedent, or any other contractual issues that may exist between you and us. The appraisal award cannot be used by either you or us in any proceeding concerning coverage, exclusions, forfeiture provisions, conditions precedent, or other contractual issues. However, once contractual liability is admitted or determined, the appraisal award is binding upon you and us. This appraisal process and authority granted to the appraisers and the umpire can only be expanded or modified by written mutual consent signed by you and us.

7. **Other Insurance.** If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.
8. **Suit Against Us.** No action can be brought against us unless there has been full compliance with the policy provisions. Any action must be started within three years after the date of loss or damage.
9. **Abandonment of Property.** We need not accept property abandoned by an insured.
10. **Mortgage Clause.** The word "mortgagee" includes trustee. If a mortgagee is named in this policy, a loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order or precedence of the mortgages. If we deny your claim, that denial will not apply to a valid claim of the mortgagee. If the mortgagee:
 - a) notifies us of change in ownership, occupancy, or substantial change in risk of which the mortgagee is aware.
 - b) pays premium due under this policy on our demand, if you neglected to pay the premium.
 - c) submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Your Duties after Loss, Loss Payment, Appraisal, and Suit Against Us apply to the mortgagee.

If we cancel the policy, we will notify the mortgagee at least 10 days before the cancellation takes effect. If we pay the mortgagee for loss and deny payment to you:

- a) we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or
 - b) at our option, we may pay to the mortgagee the whole principal on the mortgage plus accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt. Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.
11. **No Benefit to Bailee.** This insurance does not benefit a person or organization that is caring for or handling your property for a fee.
 12. **Glass Replacement.** We will replace covered glass using safety glazing materials when required by ordinance or law.



Section II

Liability Coverages

ADDITIONAL DEFINITIONS APPLICABLE TO THESE COVERAGES

For purposes of these coverages only:

1. "BODILY INJURY" means bodily harm, including resulting care, sickness or disease, loss of services or death. Bodily injury does not include emotional distress, mental anguish, humiliation, mental distress or injury, or any similar injury unless the direct result of bodily harm.
2. "PROPERTY DAMAGE" means physical injury to or destruction of tangible property. This includes its resulting loss of use.
3. "RESIDENCE EMPLOYEE" means an employee of an insured who performs duties in connection with maintenance or use of the residence premises. This includes household or domestic services or similar duties elsewhere not in connection with the business of an insured.
4. "OCCURRENCE" means bodily injury or property damage resulting from an accident, including continuous or repeated exposure to the same general condition. The occurrence must be during the policy period.
5. "INSURED" means you and the following persons if residents of your household at the residence premises:
 - a) your relatives;
 - b) any other person under age 21 and in the care of you or your relatives;
 - c) a person or entity legally responsible for animals or covered watercraft that are either owned by or in the custody of an insured. A person or entity using or having custody of these animals or watercraft in the course of business, or without permission of the owner, is not an insured.
 - d) any person operating, utilizing, or maintaining a covered vehicle while engaged in your employment or that of an insured.

Coverage Agreements

COVERAGE E – PERSONAL LIABILITY

We will pay damages an insured is legally obligated to pay due to an occurrence resulting from negligent personal acts or negligence arising out of the ownership, maintenance or use of real or personal property. We will provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit. Our duty to defend a claim or suit ends when the amount we pay for damages equals our limit of liability.

This coverage is excess over other valid and collectible insurance. It does not apply to insurance written as excess over the applicable limits of liability.

COVERAGE F — MEDICAL PAYMENTS TO OTHERS

We will pay the necessary medical and funeral expenses incurred within three years after an accident causing bodily injury. This coverage does not apply to you. It does not apply to regular residents of your household. It does apply to residence employees. Payment under this coverage is not an admission of our or an insured's liability. This coverage applies as follows:

1. to a person on the insured location with consent of an insured.
2. to a person off the insured location, if the bodily injury:
 - a) arises out of a condition in the insured location.
 - b) is caused by the activities of an insured.
 - c) is caused by a residence employee of an insured.
 - d) is caused by an animal owned by or in the care of an insured.

Additional Liability Coverages

We will pay the following in addition to the limits of liability. These additional coverages are not subject to the Section II Liability Exclusions.

1. **Claims Expenses.** We will pay:
 - a) expenses we incur and costs taxed against an insured in a legal action we defend.
 - b) premiums on bonds required in a suit we defend. This does not include bond amounts greater than the Coverage E limit of liability. We are not obligated to apply for or furnish a bond.
 - c) reasonable expenses incurred by an insured at our request. This includes actual loss of earnings (but not loss of other income) up to \$100 per day for assisting us in the defense of a claim or suit.
 - d) post-judgment interest. This must accrue after entry of the judgment. It must accrue before we pay or deposit in court that part of the judgment which does not exceed the coverage that applies.
2. **First Aid Expenses.** We will pay expenses for first aid to others incurred by an insured for bodily injury covered under this policy. We will not pay for first aid to you or any other insured.
3. **Damage to Property of Others.** We will pay for property damage to property of others caused by an insured regardless of legal liability. We will pay up to \$1,000 per occurrence, but not more than the smallest of the replacement cost or the cost to repair the damaged property. We will not pay for property damage:
 - a) to property covered under Section I.
 - b) caused intentionally by an insured who is age 13 or older.
 - c) to property owned by or rented to an insured, a tenant of an insured, or a resident in your household.
 - d) arising out of:
 - (1) business pursuits.
 - (2) an act or omission in connection with a premises owned, rented, or controlled by an insured, other than an insured location.
 - (3) the ownership, maintenance or use of a motor vehicle, aircraft, or watercraft.

Liability Exclusions

(Section II)

1. Coverage E — Personal Liability and Coverage F — Medical Payments to Others do not apply to bodily injury or property damage:

a) caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct.

This exclusion 1.a) does not apply to corporal punishment of pupils.

b) caused by or resulting from an act or omission which is criminal in nature and committed by an insured.

This exclusion 1.b) applies regardless of whether the insured is actually charged with, or convicted of a crime.

c) arising out of business pursuits of an insured.

This exclusion 1.c) does not apply to:

(1) activities normally considered non-business.

(2) occasional or part time self-employed business pursuits of an insured under age 19 years old (age 23 if a full-time student).

(3) an office, school, studio, barber or beauty shop on the residence premises if noted on the Declarations.

(4) home care services provided by or at the direction of an insured on or from the residence premises if noted on the Declarations.

d) arising out of the rental or holding for rental of any part of any premises by an insured. Exceptions, if any, are noted on the Declarations.

This exclusion 1.d) does not apply to the rental or holding for rental of part of your residence premises:

(1) occasionally for the exclusive use as a residence.

(2) unless intended as a residence by more than two roomers or boarders.

(3) as a private garage.

e) arising out of any professional liability except teaching.

f) arising out of premises owned or rented to an insured but not an insured location.

This exclusion 1.f) does not apply to bodily injury to any residence employee arising out of and in the course of employment by an insured.

g) arising out of the ownership, maintenance or use of, or loading or unloading of; entrustment or the negligent supervision by an insured of; or statutorily imposed liability on an insured related to the use of:

(1) an aircraft.

(2) a motor vehicle or all other motorized land conveyance owned by or operated by, or rented or loaned to an insured.

This exclusion 1.g)(2) does not apply to:

(a) a vehicle owned by an insured and designed for recreation off public roads while on an insured location.

Section II — Liability Exclusions

- (b) a motorized golf cart while being operated to or from, or on the premises of a golf course.
- (c) a vehicle not subject to motor vehicle registration which is:
 - i) used to service an insured's residence; or
 - ii) designed for assisting the handicapped.
- (d) a vehicle in dead storage on an insured location. Dead storage means physically prepared for long term storage.
- (e) a boat, camp, home or utility trailer not being towed or carried on a vehicle defined in general Definition 6.a).
- (f) bodily injury to any residence employee arising out of and in the course of employment by an insured.
- (3) a watercraft owned or operated by, or rented or loaned to an insured:
 - (a) if the watercraft is a personal watercraft powered by an internal combustion engine and utilizing a water jet pump or has inboard, inboard-outdrive or outboard motor power of more than 50 horsepower.
 - (b) if it is a sailing vessel, with or without auxiliary power, 26 feet or more in overall length.
 - (c) while rented to others.
 - (d) while being used to carry persons or property for a fee.
 - (e) while being used without an insured's permission.
 - (f) while being used in an official race or speed test. This exclusion does not apply to sailboats.
 - (g) if it is an airboat, air cushion or similar type watercraft.

This exclusion 1.g)(3) does not apply:

- (1) while the watercraft is stored.
- (2) when an insured rents or borrows a nonowned outboard motor boat for eight (8) or less consecutive days.
- (3) to bodily injury to any residence employee arising out of and in the course of employment by an insured.
- h) caused by war or warlike acts, including insurrection, rebellion or revolution. Discharge of a nuclear weapon is a warlike act, even if accidental.
- i) resulting from an insured transmitting a communicable disease.
- j) arising from the ingestion, inhalation or absorption of lead or lead compounds.
- k) arising out of any interior or exterior presence, use, discharge, dispersal, release, migration, seepage or escape of:
 - (1) solid, liquid, gaseous, or thermal irritants or contaminants, including smoke (except smoke arising solely from a hostile fire or the sudden and accidental discharge from a fireplace or furnace), vapors, soot, fumes, acids, alkalis, toxic chemicals and wastes, toxic liquids or toxic gases;
 - (2) fuel oil and other petroleum products; or
 - (3) any other waste materials or other irritants, contaminants or pollutants.

This exclusion 1.k) does not apply to bodily injury arising out of routine lawn and garden care of an insured location.

- l) resulting from acts or omissions relating directly or indirectly to sexual molestation, physical or mental abuse, harassment, including sexual harassment, whether actual, alleged or threatened.

- m) resulting from the use, sale, manufacture, delivery, transfer or possession by a person of a controlled substance(s) as defined by Federal Food and Drug Law (21 U.S.C.A Sections 811 and 812). Controlled substances include but are not limited to: cocaine; LSD; marijuana; and all narcotic drugs.

This exclusion 1.m) does not apply to the legitimate use of prescription drugs by a person following orders of a licensed physician.

- n) bodily injury to a person eligible to receive any benefits required to be provided or voluntarily provided by any insured under:

- (1) a workers' compensation;
- (2) an unemployment compensation;
- (3) a non-occupational or occupational disease;
- (4) a disability benefits;

or any similar law.

- o) caused by any of the following animals owned by or in the care of an insured:

- (1) the following types of pure bred dogs or a mix breed including one of these types:

- (a) American Staffordshire Terriers, American Pit Bull Terriers, or Staffordshire Bull Terriers, all commonly known as Pit Bulls;
- (b) Doberman Pinschers;
- (c) Rottweilers;
- (d) Chow Chows; or
- (e) Presa Canarios;

- (2) wolf hybrids;

- (3) dogs that have been trained to attack persons, property or other animals; or dogs that have been trained to guard persons or property.

- (4) any dog, used in any manner, as a fighting dog or bred specifically for fighting.

- (5) any dog with a prior history of:

- (a) causing bodily injury to a person; or
- (b) attacking or biting another animal;

established through insurance claims records, or through the records of local public safety, law enforcement or other similar regulatory agency.

- p) arising out of biological deterioration or damage.

2. Coverage E — Personal Liability does not apply to:

- a) liability under any loss assessment contract or agreement unless optional loss assessment coverage is purchased; and then only up to the limit of liability shown for that optional coverage.

- b) liability assumed under any unwritten contract or agreement, or by contract or agreement in connection with any business of an insured.

- c) property damage to property owned, produced or distributed by an insured.

- d) property damage to property rented to, occupied or used by, or in the care of an insured.

This exclusion 2.d) does not apply to property damage:

- (1) caused by fire, smoke, or explosion; or

- (2) to house furnishings or premises rented to, occupied or used by or in the care of an insured for which the insured is legally liable.

Section II — Liability Exclusions

- e) **bodily injury or property damage for which an insured under this policy is also an insured under a nuclear energy liability policy; or would be an insured but for its termination upon exhaustion of its limit of liability.**
 - f) **bodily injury to an insured as defined in Section II — Liability Definitions 5.a) and 5.b).**
3. **Coverage F — Medical Payments to Others does not apply to bodily injury:**
- a) **to a residence employee if it occurs off the insured location. It does apply if the bodily injury arises out of the residence employee's employment by an insured.**
 - b) **from a nuclear reaction, radiation or radioactive contamination, or a consequence of any of these. It does not matter that these are controlled or uncontrolled.**

Liability Conditions

(Section II)

1. **Limits of Liability.** Our total liability under Coverage E for all damages resulting from one occurrence will not exceed the limit for Coverage E shown on the Declarations. This is true regardless of the number of insureds, claims made or persons injured.
Our total liability under Coverage F for all medical expense for bodily injury to one person resulting from one accident will not exceed the limit for Coverage F shown on the Declarations.
2. **Severability of Insurance.** This insurance applies separately to each insured. This condition does not increase our limit of liability for one occurrence.
3. **Duties after Loss.** In case of a loss, you must perform the following duties. You must cooperate with us in seeing that these duties are performed.
 - a) give notice to us or our agent as soon as practicable setting forth:
 - (1) identity of the policy and insured.
 - (2) time, place, and facts of the accident or occurrence.
 - (3) names and addresses of the claimants and witnesses.
 - b) immediately forward to us every document relating to the accident or occurrence.
 - c) at our request, assist in:
 - (1) making settlement.
 - (2) enforcing a right of contribution or indemnity against a person or entity who may be liable to an insured.
 - (3) conducting suits, and attending hearings and trials.
 - (4) giving evidence and asking witnesses to attend.
 - d) under the coverage — Damage to Property of Others:
 - (1) submit to us, within 60 days after the loss, a sworn proof of loss; and
 - (2) exhibit the damaged property, if within the insured's control.
 - e) the insured shall not, except at the insured's own cost, voluntarily make a payment, assume an obligation, or incur an expense other than for first aid to others at the time of the bodily injury.
4. **Duties of an Injured Person — Coverage F — Medical Payments to Others.** The injured person or someone on behalf of the injured person will:
 - a) give us written proof of claim, under oath if required, as soon as possible.
 - b) authorize us to obtain copies of medical reports and records. The injured person will submit to physical examination by a physician we select. This may be as often as we require with good reason.
5. **Suit Against Us.** No action can be brought against us unless there has been full compliance with the policy provisions. No one has a right to join us as party to an action against an insured. No action with respect to Coverage E can be brought against us until the obligation of the insured has been determined by final judgment or agreement signed by us.
6. **Bankruptcy of an Insured.** Bankruptcy or insolvency of an insured will not relieve us of our obligations under this policy.

Policy Coverage Options

Option D. Silverware. The coverage and limits of liability for silverware, silver-plated ware, goldware, gold-plated ware and pewterware is amended as follows:

We will pay for accidental direct physical loss except that caused by:

1. wear and tear, mechanical breakdown or gradual deterioration.
2. renovating or repairing, rust, dampness or temperature extremes.
3. Inherent defect or faulty manufacture, insect or vermin.
4. breakage, marring, scratching, or denting; unless caused by fire, thieves or vehicular accident.
5. losses excluded under Section I — Property Exclusions that apply to personal property.

This option's limit of liability is shown on the Declarations. Other than loss by theft, it is in addition to the Coverage C — Personal Property limit of liability for losses by a Coverage C — Personal Property Perils Insured Against. It is the total limit for loss by:

1. theft; or
2. a covered peril other than the Coverage C — Personal Property Perils Insured Against.

Option E. Tools. The special limit of liability applying to tools is increased to the amount shown on the Declarations.

Option F. Money. The special limit of liability on money, bank notes, bullion, gold (other than goldware), silver (other than silverware), platinum, coins, stored value cards, smart cards, gift certificates and medals is increased to the amount shown on the Declarations.

Option G. Securities. The special limit of liability on securities, accounts, bills, deeds, documents, evidences of debt, letters of credit, notes other than bank notes, passports, stamps and tickets is increased to the amount shown on the Declarations.

Option H. Computers. The special limit of liability on computers, including hardware and software accessories is increased to the amount shown on the Declarations.

Option I. Business Property. The special limit of liability on business property is increased to the amount shown on the Declarations. It includes up to \$250 of coverage for business property off the residence premises.

Option J. Extended Replacement Cost Coverage. Option J does not increase the policy's limit of liability.

1. Loss to the following property shall be settled at replacement cost or the full cost to repair without deduction for depreciation:

- a) property covered under Coverage C — Personal Property.
- b) outdoor antennas, carpeting (including wall-to-wall), home appliances, and awnings.

"Replacement cost" means the cost, at the time of loss, of a new article identical to the one damaged or stolen. When the identical article is no longer available, replacement cost shall mean the cost of a new article similar to that damaged or stolen. It must be of comparable quality and usefulness.

Our liability for loss under this coverage shall be the lesser of:

- a) replacement cost at the time of loss;
- b) full cost of repair;

- c) any special limits of liability described in this policy or attached by endorsement; or
- d) our cost to repair or replace any part of the damaged or stolen property with equivalent property.

We will not pay more than the actual cash value of the damaged or stolen property until it has been repaired or replaced.

2. You may elect not to repair or replace some or all of the damaged or stolen property. In this event, settlement will be based on the smallest of the repair cost, replacement cost, any special limit of liability that applies or the actual cash value of those items. If you later decide to repair or replace those items, you may make an additional claim within 180 days after the loss for any difference between the amount paid and the amount payable if repaired or replaced. The actual repair or replacement of the property need not be completed within the 180 days, but payment will not be made until proof of repair or replacement is provided to us.

3. This coverage does not apply to:

- a) manuscripts, antiques or fine arts which by their inherent nature cannot be replaced with new articles.
- b) memorabilia, souvenirs, collectors' items, and other items whose age and history contribute substantially to their value.
- c) property not maintained in good or workable order.
- d) property which is obsolete or useless to you at the time of loss.

The actual cash value provisions of this policy apply to the preceding items 3.a) through 3.d).

Option K. Replacement Cost Plus (Dwelling) (Increased Coverage A Limit). When a loss covered by this policy occurs to the dwelling in which you live, located at the residence premises, we will settle losses, subject to applicable deductibles, according to the policy provisions.

If the amount actually and necessarily spent to repair or replace the dwelling is more than the Coverage A — Dwelling Limit of Liability, we will pay up to a maximum of an additional 20% of the Coverage A limit for the additional cost. This additional amount applies only to the dwelling insured under this policy identified as the residence premises on the Declarations. This coverage does not increase or affect any other coverage limit or limit of liability in this policy. This additional payment is subject to the following provisions:

SPECIAL CONDITIONS:

You must:

1. insure the dwelling in which you live, located at the residence premises, to 100% of the cost to repair or replace it; and
2. accept the annual adjustment in the Coverage A — Dwelling limit of liability due to Inflation Protection Coverage and pay the premium charged; and
3. notify us within 90 days of the start of any physical improvements or additions which increase the replacement cost value of your dwelling by \$5,000 or more and pay any additional premium due.

You must comply with these special conditions or we will pay no more than the policy limit in effect on the date of loss, less applicable deductibles.

ORDINANCE OR LAW EXCLUSION

The additional amount provided by this option does not cover any increased cost resulting from enforcement of any ordinance or law regulating the construction, use or repair of any property, or requiring the tearing down of any property, including the cost of removing such debris.

Option L. Protective Device Credit. For a premium credit, we acknowledge the installation of qualified protection devices on the residence premises.

You agree to:

1. maintain these devices in working order; and
2. notify us promptly, of any changes made in the devices or if they are removed.

Option M. Personal Injury Coverage under Coverage E — Personal Liability, the definition of bodily injury is amended to include personal injury.

Personal Injury means injury as a result of:

1. false arrest, false imprisonment, wrongful eviction, or wrongful entry;
2. wrongful detention, malicious prosecution, or humiliation;
3. libel, slander, defamation of character, or
4. invasion of rights of privacy.

Section II — Liability Exclusions do not apply to personal injury. Personal injury coverage does not apply to:

1. liability assumed by an insured under a contract or agreement;
2. injury caused by violation of a penal law or ordinance if committed by or with the knowledge or consent of an insured;
3. injury sustained by a person as a result of an offense directly or indirectly related to that person's employment by the insured;
4. injury arising out of or in connection with business pursuits of an insured;
5. injury arising out of any professional liability;
6. injury resulting from an insured transmitting a communicable disease, including injury arising from the possibility of such transmission;
7. civic or public activities performed for pay, other than reimbursement of expenses, by an insured; or
8. injury to an insured as defined in general Definitions 4.a) and 4.b).

Option N. Loss Assessment Coverage.

We agree to pay your share of an assessment charged against all members of the Association. "Association" means the management body of the property owners. They must have common property interest with you. The common property must be part of the housing development where you live, as shown on the Declarations. We will pay up to the limit, shown for this option on the Declarations, in effect at the time of the loss which results in an assessment.

The assessment must be the result of:

1. a direct loss to property collectively owned by the Association. It must be caused by a peril covered under Section I of this policy;

2. an event of the type covered by Section II of this policy; or
3. damages the Association is legally obligated to pay due to personal injury as a result of:
 - a) false arrest, false imprisonment, wrongful eviction, or wrongful entry;
 - b) wrongful detention, malicious prosecution, misrepresentation, or humiliation;
 - c) libel, slander, defamation of character; or
 - d) invasion of rights of privacy.

This coverage is excess over other valid and collectible insurance covering the Association. Loss under subparagraph 1. is subject to the Section I deductible shown on the Declarations.

Option O. Building Ordinance or Law Coverage.

We agree to cover the increased cost resulting from any ordinance or law regulating the:

1. construction;
2. repair;
3. renovation;
4. remodeling; or
5. demolition;

of covered building structures damaged by a Peril Insured Against.

LIMIT OF PAYMENT

The amount of ordinance or law coverage is shown on the Declarations. It is a percentage of the Coverage A — Limit of Liability shown on the Declarations at the time of loss. This is additional coverage.

The damaged or destroyed building structure must be repaired or replaced at the residence premises.

SPECIAL EXCLUSIONS

We will not pay costs:

1. required to replace, repair, regrade, remove, stabilize, change the contour of, or otherwise alter land, unless under or immediately surrounding the damaged building structure;
2. resulting from the enforcement of any ordinance or law involving construction, repair, remodeling or demolition of that portion of the undamaged building structure.

However, this exclusion does not apply if the total damage to the covered building structure is more than 50% of the building's replacement cost, less any ordinance or law expenses, at the time of the loss.

Option P. Limited Water Back up of Sewers or Drains Coverage. We will pay up to a maximum of \$5,000 for all damage to:

1. the Coverage A — Dwelling; and
2. the following personal property:
 - a) clothes washers and dryers;
 - b) food freezers and the food in them;
 - c) refrigerators;

- d) ranges;
- e) portable dishwashers; and
- f) dehumidifiers;

caused by or resulting from water or water-borne material which:

- a) backs up through sewers or drains from outside the dwelling's plumbing system; or
- b) overflows from a sump pump, sump pump well or other system designed to remove subsurface water or water-borne material from the foundation area.

EXCLUSIONS

We do not cover:

- 1. other personal property not specified above;
- 2. loss caused by the negligence of an Insured; or
- 3. if the loss occurs or is in progress within the first five (5) days of the inception of this coverage unless added at renewal.

All other damage resulting from water or water-borne material not mentioned above is excluded as stated in Section I — Property Exclusion 1.b).

DEDUCTIBLE

We will pay for that part of the covered loss that is above the Section I — Deductible shown on the Declarations, or \$500, whichever is greater.

All other provisions of this policy, including Section I — Deductible, apply.

Option Q. Earthquake and Volcanic Eruption Coverage. We insure for direct physical loss to property covered under Section I — Property Coverages caused by earthquake or volcanic eruption. Volcanic eruption means:

- 1. eruption;
- 2. explosion; or
- 3. discharge;

from a volcano.

One or more earthquake shocks or volcanic eruptions that occur within a 72-hour period will constitute a single earthquake or volcanic eruption.

This coverage does not increase the limits of liability stated in the policy.

DEDUCTIBLE

The earthquake and volcanic eruption deductibles are shown on the Declarations. It replaces any other deductible provision in this policy for covered earthquake and volcanic eruption loss.

We will pay only that part of the loss over the earthquake deductible percentage shown on the Declarations. The percent deductible applies separately to each coverage limit and applies separately to loss under each Section I coverage. This includes Building Additions and Alterations Coverage if included in the policy. The deductible amount will not be less than the earthquake dollar deductible on the Declarations for any one loss.

SPECIAL EXCLUSIONS

We do not cover loss resulting directly or indirectly from flood of any nature or tidal wave, whether caused by, resulting from, contributed to, or aggravated by earthquake or volcanic eruption.

Option R. Broad Water Back up of Sewers or Drains Coverage. We will pay up to the limit of liability, shown on the Declarations for this option, at the time of loss, for direct damage to covered property caused by or resulting from water or water-borne material which:

1. backs up through sewers or drains from outside the dwelling's plumbing system; or
2. overflows from a sump pump, sump pump well or other system designed to remove subsurface water or water-borne material from the foundation area.

This is the most we will pay for all covered property under Coverage A — Dwelling, Coverage B — Other Structures and Coverage C — Personal Property.

EXCLUSIONS

We do not cover:

1. loss caused by the negligence of an insured; or
2. If the loss occurs or is in progress within the first five days of the inception of this coverage unless added at renewal.

All other damage resulting from water or water-borne material not mentioned above is excluded as stated in Section I — Property Exclusion 1.b).

DEDUCTIBLE

We will pay for that part of the covered loss that is above the Section I — Deductible shown on the Declarations or \$500, whichever is greater.

All other provisions of this policy, including Section I — Deductible, apply.



General Policy Conditions

1. HOW YOUR POLICY MAY BE CHANGED

- a) Any part of this policy, which may be in conflict with statutes of the state in which this policy is issued, is hereby amended to conform.
- b) Any insured will automatically have the benefit of any broadening of coverage in this policy, as of the effective date of the change, provided it does not require more premium.
- c) A waiver or change of a part of this policy must be in writing by us to be valid. Our request for an appraisal or examination does not waive our rights.
- d) The premium for the coverage provided by this policy and attached endorsements is based on information in our possession. Any change or correction in this information will allow us to make an adjustment of the premium.

2. CONCEALMENT OR FRAUD

- a) This policy is void as to all insureds if you or any other insured has intentionally misrepresented any material fact or circumstance which would have caused us not to issue or renew this policy.
- b) This policy does not provide coverage for all insureds if you or any other insured, either before or after a loss, has:
 - (1) Intentionally concealed or misrepresented any material fact or circumstance; or
 - (2) committed any fraud or made false statements relating to such loss.

3. RENEWAL

This policy is written for a specific policy period as shown on the Declarations. We will renew it for successive policy periods subject to the following conditions:

- a) Renewal will be in accordance with the policy forms, rules, rates and rating plan in use by us at the time.
- b) All premiums, premium installment payments and fees must be paid when due.
- c) Prior to the expiration of a policy period for which premium has been paid, we will mail a notice to the named insured for the premium required to renew or maintain the policy in effect. We will mail this notice to the address last known to us.
- d) You agree to an interior inspection of your home by one of our representatives to determine your continued eligibility. Such inspection will not be performed more than once a year with prior advance notice. Failure to allow an interior inspection in accordance with these terms may result in nonrenewal of your policy.

4. NON-RENEWAL

- a) At the end of each policy period, we will have the right to refuse to renew this policy.
- b) If we elect not to renew, we will mail written notice to the named insured, at the address shown in this policy, at least 30 days before the renewal date of this policy. The notice will include the precise reason for nonrenewal. Proof of mailing shall be proof of notice.
- c) For nonpayment of renewal premium, coverage will terminate without notice at the end of the last policy period for which premium was paid.

5. CANCELLATION DURING POLICY PERIOD

Any named insured may cancel this policy at any time by returning it to us or by notifying us in writing of the future date cancellation is to take effect.

We may cancel this policy only for the reasons stated in this condition by notifying the named insured in writing of the date cancellation takes effect. This cancellation notice will be mailed to the named insured at the address shown in the policy. The notice will include the precise reason for cancellation. Proof of mailing will be proof of notice.

- a) When premium has not been paid, whether payable to us or our agent or under a finance or credit plan, we may cancel at any time by giving notice at least 10 days before cancellation takes effect.
- b) When this policy has been in effect 90 days or less and is not a renewal with us, we may cancel for any reason by giving notice at least 30 days before cancellation takes effect.
- c) When this policy has been in effect for more than 90 days, or at any time if it is a renewal, we may cancel if:
 - (1) there has been a material misrepresentation of fact which if known to us would have caused us not to issue this policy, or caused us to issue or renew this policy at a higher premium;
 - (2) the risk has changed substantially since the policy was issued; or
 - (3) the property or other interest has been transferred to another person, unless the transfer is permissible under the terms of this policy.
 - (4) there have been substantial breaches of contractual duties, conditions, or warranties; or
 - (5) there has been a loss of our reinsurance covering all or a significant portion of the particular policy insured, or where continuation of the policy would imperil our solvency or place us in violation of the laws of South Carolina.

This can be done by giving notice at least 30 days before cancellation takes effect.

- d) When this policy is written for a period longer than one year, we may cancel for any reason at its anniversary by giving notice at least 30 days before cancellation takes effect.

When this policy is cancelled, the premium for the period from the date of cancellation to the premium payment date will be refunded. The return premium will be pro rata. If the return premium is not refunded with the notice of cancellation or when the policy is returned to us, we will refund it within a reasonable time after cancellation takes effect.

6. POLICY TRANSFER

This policy may be transferred to another only with our written consent.

7. SUBROGATION

- a) When we have paid you for a loss covered under this policy and you also receive payment for the same loss from another person, entity or organization, the amount received will be held by you in trust for us and reimbursed to us to the extent of our payment.
- b) An insured may, before loss occurs, waive in writing all rights of recovery against any person. The insured will provide us with proof of the waiver, when requested by us. If not waived, when we pay a loss, an insured's right to recover from someone else becomes ours up to the amount we paid. An insured must protect these rights and help us enforce them. This condition does not apply to "Medical Payments to Others" or the "Damage to Property of Others" protection.

8. DEATH

If you die, we continue to insure:

- a) the legal representative of the deceased, only with respect to the premises and property of the deceased covered under this policy at the time of death.
- b) a member of your household who is an insured at the time of death, but only while a resident of the residence premises.
- c) with respect to your property, the person having proper custody of the property until appointment of a legal representative.

9. ADDITIONAL INSURED - NON OCCUPANT

An additional insured may be named in this policy. The additional insured's interest in the residence premises is protected under Coverage A and Coverage B. The additional insured is also protected under Coverage E for liability from the ownership, maintenance, or use of the residence premises. This provision does not increase the amount of insurance.

10. OPTIONAL PAYMENT OF PREMIUM IN INSTALLMENTS

The first named insured may pay the premium for this policy in installments, under the terms and conditions approved where required by the Department of Insurance. For each separate installment payment there is an installment premium payment charge. Your agent or sales representative can provide more information.

11. DIVIDENDS

The first named insured is entitled to any dividends which are declared by the Board of Directors and are applicable to coverages in this policy.

MUTUAL POLICY CONDITIONS

(Applicable only to policies issued by Nationwide Mutual Insurance Company — Nationwide Mutual Fire Insurance Company.)

If this policy is issued by Nationwide Mutual Insurance Company or Nationwide Mutual Fire Insurance Company, the first named insured is a member of the company issuing the policy while this or any other policy issued by one of these two companies is in force. While a member, the first named insured is entitled to one vote only — regardless of the number of policies issued to the first named insured — either in person or by proxy at meetings of members of said company.

The annual meeting of members of the Nationwide Mutual Insurance Company will be held at the Home Office at Columbus, Ohio, at 10 a.m. on the first Thursday of April. The annual meeting of members of the Nationwide Mutual Fire Insurance Company will be held at the Home Office at Columbus, Ohio, at 9:30 a.m. on the first Thursday in April. If the Board of Directors of either of the above companies should elect to change the time or place of meeting, that company will mail notice of the change to the first named insured at the address last known to it. The company will mail this notice at least 10 days in advance of the meeting date.

This policy is non-assessable, meaning the first named insured is not subject to any assessment beyond the premiums the above companies require for each policy term.

IN WITNESS WHEREOF: Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, or Nationwide Property and Casualty Insurance Company, whichever is the issuing company as shown in the Declarations, has caused this policy to be signed by its President and Secretary, and countersigned as may be required by a duly authorized representative of the company.

Patricia B. Hattler

Secretary

Stephen J. Hammer

President

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company

De Robinette

President

Nationwide Property and Casualty Insurance Company



Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Property and Casualty Insurance Company
Home Office: Columbus, Ohio 43215-2220

Property Loss Report Form

7/13/2009

Date of This Summary:	1/17/2009 0:00
Policy/Claim Number:	6139HO787845
Insured's Last Name:	Fowler
Date of Loss:	01/17/09
Date Claim Reported:	01/17/09
Date of First Contact:	01/17/09
Date of First Inspection:	01/18/09
Loss Location (City, County & State):	Seneca, Oconee County, SC

1. Claims Associate:	Flanagan	a. Agent:	Stanley Nix

2. Insured Information:	Mr. Fowler lives in the dwelling by himself. He had a restaurant in Seneca that he closed on November 24, 2008, due to the economic downturn. He states that he built the dwelling himself, with the exception of laying the concrete slab. He has owned the lot since 1979. PH is currently working with his son in the landscaping business.

3. Policy Type & Coverage Info:	Policy is an elite/no39a, active at the time of loss, history of 1099. Deductible: 600 Options: j: Contents RC K: Dwelling replacement cost plus 20% Theft

a. Inception Date:	03/16/89
b. Deductible:	\$500
c. Dwelling Age:	11 years
d. Electrical Service	150
e. Signed Application:	requested from agent.
f. MSB Calculation	123103
g. Insured to Value	y
h. Secured Account	offered
i. Ft. to Hydrant	NA - rural area
j. SIU Referred?	yes
k. Early Term Loss?	No

Dwelling Policy - Automatic Increase Calculator	
Effective Date:	
Loss Date:	
Auto Increase %:	
Coverage A Limit:	
Coverage B Limit:	
Amt. of Increase COV A:	\$0
Amt. of Increase COV B:	\$0
New Coverage A Limit:	\$0
New Coverage B Limit:	\$0

4. Policy Limits:	ED:	546.3
	LD:	669.0
	ED-LD Factor:	1.0436

	Limit	ED-LD	Sub Total	GRC	Total Limit
Coverage A:	\$147,700	\$8,426	\$156,126	\$30,826	\$186,952
Coverage B:	\$44,190	\$1,923	\$46,113		\$48,113
Coverage C:	\$100,910	\$4,782	\$114,692		\$114,692
Coverage D:	\$147,700	\$8,426	\$156,126		\$156,126

Additional Coverages:	Debris Removal %:	5%			
	Dwelling:	\$7,708		\$7,708	\$7,708
	Detached Structures:	\$2,306		\$2,306	\$2,306
	Contents:	\$5,735		\$5,735	\$5,735
	Landscaping:	5%		\$7,708	\$7,708
	Ordinance & Law:				
	Structure:	\$0		\$0	\$0
	Detached Structures:	\$0		\$0	\$0
	Guaranteed RC %:	20%			
Total Policy Limit for All Coverages					\$623,333

Property Loss Report Form

7/13/2009

5. Financials	
a. Mortgage Information:	First Citizens, second mortgage with City Financial. Per PH, mortgages have approx \$170,000 outstanding.
b. Credit Information:	Ran James Fowler in Transunion for credit report. 2-Public record(s) 6-Collection(s) 7-Negative Account(s)
c. Prior Carrier Info:	na
6. Risk:	
	Dwelling is approx 1398 sf, one story on a concrete slab, with 25 year comp shingles, a front porch, side deck, and back deck. There is a large, heated gazebo in the back yard, and a carport in the front of the dwelling. Interior is drywall with carpet and vinyl floors, dwelling is of average grade. Electric is 150v. 3 bedrooms, 2 full baths. Vinyl siding with a small portion of wood shakes on the front of the dwelling. Adverse risks: 1. There is no electricity in the dwelling, as PH had it cut off. PH runs power cords from the gazebo to the dwelling to run the refrigerator and washer/dryer. 2. PH uses a kerosene heater extensively. 3. Large piles of debris around the lot 4. The foundation of the 2 story gazebo is cracked, and the concrete blocks it sits on have shifted. Risk report filed by Xactimate checklist.
a. Previous losses last 5 years:	1 wind claim, unrelated
7. Loss Description:	
	Extensive fire damage to the dwelling.
8. Investigation - C&O:	
	Investigation by SIU and C&O by TIS, Jerry Byers. The fire was discovered to be a set fire, with at least 2 different points of origin.

Property Loss Report Form

7/13/2009

9. Subrogation:	Unclear at this time
10. Salvage	
a. Structure:	There does not appear to be any salvage to the dwelling
b. Contents:	Some minor possible salvage to contents that are in the master bedroom. Due to extensive damage of the dwelling, CA was unable to enter this room.
11. Adjustments: Cov A	Dwelling is a total loss. Policy limits for coverage A will be paid. All that remains to the dwelling is the walls at one end of the dwelling.
Cov B:	Extensive damage to a lot pond in the front of the dwelling. The pond runs the entire length of the dwelling, and will have to be taken apart and replaced as the liner is ripped. Boulders will have to be removed and reset. Xactimate estimate in log.
Cov C:	All items in the dwelling were destroyed. Inventory was taken on site with PH, and priced by HO pricing program. Xactimate estimate is in log.
Cov D	Period of restoration should be approx 6 months. Xactimate estimate is in log.
DEBRIS REMOVAL	Xactimate estimate in log exceeds HOSUP limits
Landscaping	Damage to some trees and bushes around the dwelling that would have to be removed to replace dwelling.
OTHER HOSUP	

Property Loss Report Form

7/13/2009

Coverage	Policy Limit	Current PSA	PSA Request	Current Reserve	Reserve Request	Total Paid To Date
Coverage A	\$154,125					
NW Estimate			\$154,125		\$154,125	
A REQUEST TOTAL		\$0	\$154,125	\$0	\$154,125	\$0.00
Coverage B	\$48,113					
Xactimate estimate			\$16,600		\$25,000	
B REQUEST TOTAL		\$0	\$16,600	\$0	\$25,000	\$0.00
Coverage C	\$114,692					
Advance			\$2,000		\$75,000	
C REQUEST TOTAL		\$0	\$2,000	\$0	\$75,000	\$0.00
Coverage D	\$154,125					
					\$20,000	
D REQUEST TOTAL		\$0	\$0	\$0	\$20,000	\$0.00
HOSUP						
Debris Removal					\$7,800	
Landscaping					\$7,800	
Ordinance of Law						
RC Plus %	\$30,825					
HOSUP TOTAL	\$30,825	\$0	\$0	\$0	\$15,600	\$0.00
Total	\$499,880	\$0	\$171,625	\$0	\$289,725	\$0
Closing Remarks:						

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Attorneys for Appellant

October 4, 2013

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

RECEIVED

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SC Court of Appeals

James D. Fowler, ...Respondent,

v.

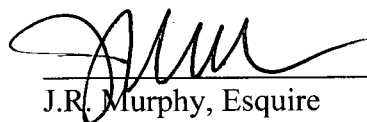
Nationwide Mutual Fire Insurance Company and Andrew Flanagan, ..Defendants,

Of Whom,

Nationwide Mutual Fire Insurance Company, ...Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on James D. Fowler by depositing a copy of it in the United States Mail, postage prepaid, on October 8, 2013, addressed to his attorney of record, Clinch H. Belser, Esquire, 1901 Main Street, Suite 1550, Columbia, South Carolina 29202.



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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,

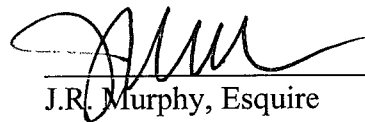
v.

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

Of Whom,
Nationwide Mutual Fire Insurance Company, ...Appellant.

PROOF OF SERVICE

I certify that I have served the Record on Appeal on James D. Fowler by depositing a copy of it in the United States Mail, postage prepaid, on October 8, 2013, addressed to his attorney of record, Clinch H. Belser, Esquire, 1901 Main Street, Suite 1550, Columbia, South Carolina 29202.



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