United States Court of Appeals
For the Eighth Circuit

No. 14-3092

Kirk Manuel

Plaintiff - Appellant

v.

MDOW Insurance Company

Defendant - Appellee

Appeal from United States District Court
for the Eastern District of Arkansas - Helena

Submitted: April 16, 2015
Filed: June 29, 2015

Before MURPHY, COLLOTON, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Kirk Manuel sued his insurance provider, MDOW Insurance Company, after MDOW refused to cover the loss of Manuel's house to a fire. A jury found in favor of MDOW, and Manuel moved for a new trial. The district court[1] denied the motion.

[1]The Honorable Kristine G. Baker, United States District Judge for the Eastern District of Arkansas.

Manuel appeals the denial of his motion and contests the court's admission of certain evidence at trial. We reject his claims and affirm the judgment.[2]

I. Background

On September 14, 2011, Manuel's home burned down while he and his family were vacationing in Las Vegas. Manuel had insured his home through MDOW with a policy providing $150,000 for the house, $75,000 for personal property, and $45,000 for added costs. Manuel filed a claim for the fire, but MDOW denied it. MDOW told Manuel that it believed he or someone acting on his behalf had intentionally set the fire and that Manuel's claim form contained fraudulent information.

Manuel sued MDOW in Arkansas state court for breach of contract, and MDOW removed the case to federal court. During the trial, Richard Eley testified as an expert witness for MDOW. Manuel did not object to Eley's testimony or certification as an expert witness. Eley testified that he had nearly 40 years of experience investigating fires. He opined that someone had intentionally set the fire that destroyed Manuel's home. He reached this conclusion after eliminating other potential causes of the fire and after speaking with Manuel. Counsel for Manuel questioned Eley extensively about his methods, comparing them to those detailed in the National Fire Protection Association 921 Guide for Fire and Explosion Investigations (NFPA 921).[3] Counsel noted that NFPA 921 recommends against

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[2]We have jurisdiction over this appeal under 28 U.S.C. § 1291.

[3]"The NFPA is a nonprofit organization dedicated to fire prevention, and NFPA 921 is a document intended to 'establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents.'" Russell v. Whirlpool Corp., 702 F.3d 450, 454 (8th Cir. 2012) (citing NFPA 921 §1.2.1).

using a "negative corpus" method, which involves "eliminating all ignition sources found, known, or believed to have been present in the area of origin" to prove the fire was set intentionally. NFPA 921 § 18.6.5 (2011). Eley insisted that everything he did "was scientific, and it followed NFPA 921." But Eley also disagreed with some parts of NFPA 921, including its description of negative corpus:

> And what I believe negative corpus would be is if I came into this room and all I had was the light fixtures and the switches and things like that, I did not have a chance to talk to the owner or the last person in, and just from just looking around and saying, well, I don't see anything that could have caused it, well, boom, you know, that in my mind might be negative corpus.
>
> On the other hand, if you do a physical examination of everything in the area where the fire started and you can't find anything in that area that shows evidence that it caused a fire, and then I'm able to talk to the owner, like Mr. Manuel, or whoever the last person was in the house at the time of the fire, and they gave me all the information that I've talked about already from him, that nothing was on, there was no problems, nothing stored in the house of a flammable nature, I believe that goes beyond the negative corpus . . . .

That additional human element, Eley posited, led him to the only possible conclusion: The fire had been intentionally set.

After a three-day trial, a jury returned a special verdict in MDOW's favor after deliberating for only 45 minutes. The jury found that MDOW proved by a preponderance of the evidence that Manuel "either burned his home or caused it to be burned." The jury did not decide whether Manuel had intentionally misrepresented information during the fire investigation.

Manuel then moved for a new trial. He swore in an affidavit that two jurors—Juror W and Juror C—had failed to disclose relationships with five of his

witnesses. Manuel asserted that these two jurors had either actual or implied bias based on these undisclosed relationships. Manuel also attached affidavits from his witnesses. One witness, Corey Watson, said that Juror W is his cousin.[4] Watson, however, did not know Juror W was on the jury until Watson made eye contact with the juror during the trial. According to Watson, the two had attended a family funeral together several weeks before trial. Nicholas Skinner, a named witness who was in the court during the trial but did not testify, said that Juror W had once halted a fight between Skinner and another student when Skinner was in junior high school. Skinner had a knife during the fight. Manuel's son Deangelo Manuel, who did testify at trial, said in his affidavit that Juror W was a coach and teacher at the junior high school and the high school he had attended. Deangelo Manuel also said that his mother, Tawanna Manuel, had once introduced him to Juror W in 2004 or 2005.

Manuel also attached affidavits from two witnesses who said they knew Juror C. Testifying witness Jacqueline Strother said that Juror C was a childhood friend, and the two had attended the same "middle, junior high, and high school." Strother said that Juror C married a man to whom Strother was once engaged. Melissa Cartwright said that Juror C was an art teacher and had taught Cartwright's autistic son. Cartwright said she also had once met Juror C during a meeting with all of Cartwright's son's teachers. She stated in her affidavit that she had testified at the trial; but in fact, neither party called her as a witness, and she never testified.

The district court rejected Manuel's arguments and denied the motion. The court noted that the Eighth Circuit has not adopted an "implied bias" test of juror impartiality. The court concluded that, even under that test, there was insufficient potential bias alleged to warrant a new trial. Although Juror W is a cousin of one witness, the court noted, the evidence showed that they are not "close relatives" as is required to presume bias. Nor had Manuel submitted evidence to establish that any

[4]We note that Juror W's last name is not Watson.

witness was actually biased against him because of a preexisting relationship. Manuel now appeals.

II. Discussion

a. Motion for New Trial

Manuel first argues that the district court wrongly denied his motion for a new trial. He says that the court should have held an evidentiary hearing to determine whether Jurors W and C had actual bias. He asserts that the jurors' undisclosed relationships with some of his witnesses "gives rise to a natural inference" that they were being dishonest about their ties to the case, rather than merely inaccurate about whom in the trial they knew. Alternatively, Manuel implores this court to adopt an implied bias test at least with respect to Juror W, who is a cousin of a witness.

This court reviews the denial of a motion for a new trial for abuse of discretion. Hiser v. XTO Energy, Inc., 768 F.3d 773, 776 (8th Cir. 2014). The question before this court is whether a reasonable person could have reached the same decision, not whether one would have. Id. To receive a new trial based on concealed juror bias, Manuel had to prove "(1) that the juror answered dishonestly, not just inaccurately; (2) that the juror was motivated by partiality; and (3) that the true facts, if known, would have supported striking the juror for cause." United States v. Ruiz, 446 F.3d 762, 770 (8th Cir. 2006); see McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984) (holding that to obtain a new trial based on concealed juror bias, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause").

1. Juror W

For proof of Juror W's bias, Manuel points to more than just his witnesses' affidavits. During jury selection the district court read a list of anticipated witnesses to the potential jurors. The court admonished the jurors to answer counsels' questions honestly and to disclose whether they knew either party or any witness. Juror W explained that he was a retired teacher from Central High School, which at least one potential witness had attended.[5] Specifically, Juror W admitted that he knew Brett Ford, one of Manuel's witnesses, whom he had taught several years earlier. Juror W said he did not believe that relationship would affect his impartiality as a juror. Neither party moved to strike Juror W for cause. Juror W did not disclose a relationship with any other witness. After Tawanna Manuel testified, however, Juror W told the district court that he knew Tawanna from her time in school. He told the court he did not believe that relationship would affect his impartiality. Neither party moved to exclude Juror W.

Manuel asserts that Juror W revealed "his more innocuous relationships" that would not prevent his serving on a jury but did not disclose his relationships with the other witnesses. Manuel cites the affidavits of Skinner and Deangelo Manuel as evidence that Juror W intentionally withheld evidence of his relationships with those witnesses. Manuel says that Juror W's failure during jury selection to identify these other two witnesses as individuals he had known or taught in school establishes a pattern of dishonesty that, if exposed, would have led to a challenge for cause.

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[5]Both Skinner and Deangelo Manuel swore in their affidavits that Juror W also had taught at the junior high school they attended. Deangelo Manuel also swore that Juror W taught at a different high school that Tawanna Manuel had attended. Juror W did not confirm during jury selection whether he had taught at numerous schools; he said only that he had retired from Central High School in 2010.

We disagree with Manuel's assessment of the evidence. First, neither Deangelo Manuel nor Skinner says that Juror W was *his* teacher: Deangelo Manuel says only that Juror W was *a teacher* at his junior high school whom he had once met, and Skinner says Juror W once broke up a fight involving Skinner. Moreover, Skinner did not testify. And there is no evidence that Juror W even saw Skinner or, if he did, recognized him from the fight at the school.

Second, the "pattern" Manuel points to is illusory. As a teacher who had recently retired, Juror W likely taught numerous students over the years. Yet, in their affidavits, neither Deangelo Manuel nor Skinner identified himself as one of Juror W's former students. And, significantly, Juror W told the court about the two former students he *did* recognize, Brett Ford and Tawanna Manuel. Though we are not entirely sure what Manuel means by an "innocuous relationship," we note that Tawanna Manuel is Manuel's ex-wife; and Juror W informed the court and the parties that he had been one of her teachers. Whatever Manuel's definition, it is unclear how the relationship between Juror W and Tawanna Manuel falls into the category of "innocuous," while the purported relationships to Deangelo Manuel and Skinner—whom Juror W apparently did not teach and may not know at all—do not. Rather, the relationship between Juror W and the Plaintiff's ex-wife would seem particularly noteworthy and even more likely to create cause to excuse Juror W. Yet after Juror W informed the court and the parties that he knew Tawanna Manuel, neither party asked that he be excused. Counsel for Manuel expressly stated, "I don't have any problem with him."

Moreover, Juror W's honesty about those relationships suggests he simply did not remember the other witnesses. See Ruiz, 446 F.3d at 770 (noting that a juror's self-disclosure reflects the juror's honesty). We presume that a prospective juror is impartial. See Moran v. Clarke, 443 F.3d 646, 650 (8th Cir. 2006). And Manuel submitted no evidence to counter that presumption or to support his assertions that Juror W dishonestly, rather than inaccurately or mistakenly, answered the questions

during jury selection or was motivated to be partial. See McDonough Power Equip., 464 U.S. at 556.

Manuel also says Juror W's "close familial relationship[]" to one witness, Corey Watson, could have created "negative emotions." Manuel asserts that the district court should have granted a hearing to determine whether that relationship "was close enough to give rise to implied bias."

Though we have never adopted an implied-bias test for juror partiality, we have noted that "prejudice may be implied in certain egregious situations." Sanders v. Norris, 529 F.3d 787, 792 (8th Cir. 2008) (quoting Johnson v. Armontrout, 961 F.2d 748, 756 (8th Cir. 1992)). Implying bias, however, is limited to "extreme situations" in which "the relationship between a prospective juror and some aspect of the litigation . . . [makes it] highly unlikely that the average person could remain impartial in his deliberations." Id. (quoting Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)). Examples of an "extreme situation" include when a "juror is a close relative of one of the participants in the trial or the criminal transaction." Id. at 792–93 (quoting Smith v. Phillips, 455 U.S. 209, 222 (1981) (O'Connor, J., concurring)). We have relied on the examples from Justice O'Connor's concurrence when rejecting a claim of implied juror bias. See id. at 793; United States v. Tucker, 243 F.3d 499, 509 (8th Cir. 2001).

Corey Watson said he and Juror W are cousins and had attended a funeral together weeks earlier. Manuel cites United States v. Mitchell, 690 F.3d 137, 145 (3d Cir. 2012), for the proposition that "consanguinity is the classic example of implied bias." That may be so, but we think the familial relationship must resemble something closer than what we have in this case to imply bias. Indeed, the court in Mitchell likewise rejected "the most expansive formulations that categorically presume bias whenever a juror shares any degree of kinship with a party in a case." Id. at 146. That court noted that a distant relative generally "is unlikely to harbor the

sort of prejudice that interferes with the impartial discharge of juror service." Id. We agree with that assessment.

In this case, Watson says simply that he is a cousin of Juror W without specifying whether he and Juror W are first cousins or related more distantly. Watson does not say that he traveled with Juror W to the funeral together, interacted with him while there, or communicated with him since. And Watson said it was not until he was on the stand and made eye contact with Juror W that he realized he knew Juror W. As for Juror W himself, there is nothing in the record to suggest he recognized Watson by name or appearance. These facts do not suggest that Watson is a "close relative" of Juror W or that their relationship made it "highly unlikely" that Juror W could not remain impartial. Manuel offers nothing to show that the familial relationship between Juror W and Watson was sufficiently close to "engender negative emotions," as Manuel suggests. As the district court properly concluded, this is not an "extreme case" in which bias should be implied.

2. Juror C

As he did regarding Juror W, Manuel asserts that Juror C's actions during trial provide additional evidence of bias. During Jacqueline Strother's testimony, Juror C mouthed to the district judge that she knew Strother. After Strother's testimony, and outside the presence of the jury, Juror C explained that the two went to school together but had not remained friends. Juror C said she saw Strother where Strother worked about one year before the trial. She said she did not believe that relationship would affect her jury service. When given the opportunity, neither party questioned Juror C about this relationship or moved for her removal. Juror C also taught the son of another named witness, Melissa Cartwright, who ultimately did not testify at the trial. Manuel says Juror C's failure to disclose these relationships suggests that she harbored actual bias against those witnesses and, thus, against Manuel.

Again, we disagree with Manuel's interpretation of the evidence. Strother said that Juror C married a man to whom Strother was engaged when Strother was 18 years old. But Strother does not say that she ended her engagement because of Juror C's involvement or that Juror C is now her "rival," as Manuel words it. Her affidavit provides no added description of her relationship with Juror C other than that the two were "childhood friends" and attended the same schools. And even if there is unspoken ill-will between these two, Manuel points to nothing in the record to suggest Juror C has an actual bias against *Manuel* or that her adverse relationship with Strother led her to vote in favor of MDOW. See United States v. Gianakos, 415 F.3d 912, 923 (8th Cir. 2005) (affirming district court's denial of motion to replace juror because defendant provided no evidence that the juror was biased *against him*).

And, like Juror W had, Juror C informed the court and the parties that she recognized Strother after Strother entered the courtroom to testify. Juror C acknowledged the childhood relationship they had but said she did not believe it would affect her partiality. Juror C's self-disclosure suggests her honesty, not an intent to deceive. See Ruiz, 446 F.3d at 770. Moreover, Manuel did not move to strike Juror C or note any concern about her remaining on the jury after she revealed her past with Strother. See Crimm v. Mo. Pac. R.R. Co., 750 F.2d 703, 708 (8th Cir. 1984) (rejecting claim of juror bias because during voir dire appellant expressly agreed to keep juror on panel). As for Melissa Cartwright, she did not testify at trial, though she swore in her affidavit that she did. Again, Manuel has failed to present any evidence to support the conclusion that Juror C's relationship with these two witnesses showed improper bias.

Because there is no evidence that either juror had an actual bias against Manuel, or that the circumstances presented an "extreme situation" from which we could imply bias, we conclude that the district court properly denied the motion for a new trial. Also, we conclude that the district court acted within its discretion to deny an evidentiary hearing on this issue. See United States v. White Bull, 646 F.3d

1082, 1095 (8th Cir. 2011) (noting that district court should grant evidentiary hearing only if allegations of misconduct are substantiated and serious). Manuel's only evidence of bias, other than the information the jurors themselves offered at trial, was the affidavits provided by his witnesses. These affidavits are bereft of detail to suggest a hearing would have provided the court more evidence of a serious issue of misconduct. Such skeletal assertions are not enough to warrant an evidentiary hearing. Cf. United States v. Schoppert, 362 F.3d 451, 459 (8th Cir. 2004) (noting that party seeking evidentiary hearing on claim of jury taint "needs to make a showing that his allegation is credible and that the prejudice alleged is serious enough to warrant whatever action is requested").

b. Fire Science Expert Testimony

Manuel next argues that the district court erred by allowing the testimony of MDOW's expert witness, Richard Eley. Manuel says the court should have rejected Eley's testimony because, Manuel insists, Eley relied on the "negative corpus" method that NFPA 921 has rejected to determine the cause of the fire. Manuel asserts that the jury's verdict rested on this improper testimony, without which there is no evidence that the fire was set intentionally.

Manuel did not move *in limine* to exclude Eley's expert testimony, nor did he object to the admission of Eley's testimony during the trial. Thus, our review is for plain error. See Olson v. Ford Motor Co., 481 F.3d 619, 626–27 (8th Cir. 2007). This court has qualified NFPA 921 as "'a reliable method endorsed by a professional organization'" for determining the cause of a fire. Russell, 702 F.3d at 455 (quoting Fireman's Fund Ins. Co. v. Canon U.S.A., Inc., 394 F.3d 1054, 1058–59 (8th Cir. 2005)). Following NFPA 921 is not the only method of fire investigation that we have approved. Id. But if an expert purports to have followed NFPA 921, he must have followed it reliably, or his testimony may be excluded. Id. (citing cases).

During direct examination, Eley did not acknowledge NFPA 921 nor did he say he followed it. Counsel for Manuel first mentioned NFPA 921 on cross examination and asked Eley whether he followed NFPA 921. Eley responded that his method "was scientific, and it followed NFPA 921." But Eley also testified that he considered NFPA 921 "a guide" and "not accurate in every case." He explained that his method of investigating this fire was not "negative corpus" as NFPA 921 defines it. Instead, he conducted "a physical examination of everything in the area where the fire started" and then talked to Manuel. Manuel told Eley "that nothing was on, there was no problems, nothing stored in the house of a flammable nature." It was only with Manuel's added information, Eley testified, that he was able to conclude that the fire was incendiary.

We have some concern about Eley's testimony. On direct examination, he did not say that he followed NFPA 921 when conducting his investigation; but later, on cross examination he said that his investigation did follow that guide. Eley also testified at trial that he disagreed with the NFPA 921 definition of negative corpus and said he did not apply negative corpus methodology as he understood it. He then proceeded to supply his own definition of negative corpus, as well as a description of why he believed the methodology he used in the investigation of the Manuel fire was *not* negative corpus. But the only difference Eley gave between NFPA 921's description of negative corpus and his own applied method was the "human element" of speaking to Manuel about the condition of his home before he had left for Las Vegas. And Manuel told Eley only that no appliances were left on and nothing flammable was left in the house, allowing Eley to eliminate those additional potential sources of the fire's origin. Viewed in this way, the additional information Eley relied on does not "go[] beyond the negative corpus" as Eley purported.

But even with these concerns, the admission of Eley's testimony did not amount to plain error for two reasons. First, Eley determined the origin of the fire based on his observations at the scene and nearly 40 years of experience investigating

fires. We have held that an expert may base his final determination of a fire's cause on those two factors. See Russell, 702 F.3d at 457; Shuck v. CNH America, 498 F.3d 868, 875 (8th Cir. 2007); Hickerson v. Pride Mobility Prods. Corp., 470 F.3d 1252, 1257 (8th Cir. 2006). Eley testified that after speaking with Manuel, he examined the house while taking photographs of the damage. He determined that the area of origin was in the southeast corner of the house near the kitchen where the damage was heaviest because, as he explained, "it burns hotter there. It burned longer there, the combustible materials would." The wall studs also were missing, a sign of intense heat; there was oxidation on one side of the stove and refrigerator, suggesting the direction of the flames; and the wiring had melted and shorted. Because Manuel assured Eley that nothing had been left on, there were no problems in the house, and no new appliances were in the home, Eley concluded that the fire had been set intentionally.

Second, despite framing his argument on appeal as one against Eley's expert opinion, Manuel's actual argument is that the jury should not have credited Eley's testimony. Manuel did not object to any part of Eley's testimony describing his methodology, his qualifications as an expert witness, or his observations and ultimate conclusions. Instead, Manuel chose to cross examine Eley by pointing out possible inconsistencies between the methods Eley used and what NFPA 921 prescribes. In particular, the jury heard how Eley defined "negative corpus" and that his definition differed from that in NFPA 921. It is possible the jury could have found that Eley's definition was no different than the NFPA 921 definition, that he improperly applied negative corpus methodology, and that MDOW had failed to offer any evidence that the fire was intentional. That is likely the result Manuel had in mind when adopting his strategy of challenging Eley's testimony through cross examination rather than a motion to exclude his expert testimony. Yet despite the vigorous cross examination, the jury apparently credited Eley's testimony sufficiently to find in favor of MDOW. Thus, even if Eley's conclusion regarding the source of the fire was improper under NFPA 921's definition of negative corpus, we

cannot conclude that allowing his testimony, without any objection from Manuel, prejudiced Manuel and thus constituted plain error. See Rush v. Smith, 56 F.3d 918, 922 (8th Cir. 1995) (noting that under plain-error review, an error without objection "is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice").

III. Conclusion

For the reasons discussed above, we affirm the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO.: 14-3092

KIRK MANUEL,

Plaintiff-Appellant,

v.

MDOW INSURANCE COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS - HELENA
NO. 2:12-CV-00035-KGB

OPENING BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE

Kirk Manuel owned a house in Arkansas that caught fire while he and his family were on vacation in Las Vegas. MDOW Insurance Company denied Mr. Manuel's claim under his policy, and he brought suit for breach of contract. During trial, MDOW's expert opined that the fire was intentionally set based on "process of elimination" of other possible causes. MDOW prevailed. The jury found that Mr. Manuel either intentionally burned or caused his home to be burned.

After trial, Mr. Manuel discovered that two jurors knew a number of his witnesses. Juror W, a teacher, caught one of Manuel's witnesses fighting in school with a knife. Juror W was also cousin of another one of Manuel's witnesses, and coached and taught Mr. Manuel's son, Deangelo Manuel, who testified at trial. Mr. Manuel also discovered that another juror, Juror C, was married to a man who was once engaged to another one of Mr. Manuel's witnesses. Neither juror disclosed their relationships with these witnesses to the district court. Mr. Manuel filed a motion for new trial. The district court denied the motion without holding a hearing.

The district court erred in two respects. First, it erred in denying the motion for new trial without holding a hearing. Second, the district court plainly erred when it allowed MDOW to rely on an expert opinion founded on the unscientific and discredited "negative corpus" theory of determining the cause of a fire. Mr. Manuel believes that oral argument would assist the Court and requests 15 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee MDOW Insurance Company is a wholly-owned, direct or indirect subsidiary of Columbia Lloyds Insurance Company, a privately held company. (DCD 7). No publicly held corporation owns ten percent or more of the stock of MDOW Insurance Company. *Id.*

Plaintiff-Appellant Kirk Manuel is an individual with no corporate ties that bring him within the purview of Federal Rule of Appellate Procedure 26.1.

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STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Arkansas had subject matter jurisdiction under 28 U.S.C. § 1332 because (1) Kirk Manuel is a citizen[1] of the State of Arkansas; (2) MDOW is an insurance company incorporated under the laws of the State of Texas; and (3) the amount in controversy exceeds $75,000, exclusive of interest and costs. (App. 9); 28 U.S.C. § 1332(a).

Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over the judgment entered on April 24, 2014. (DCD 70). On May 21, 2014, Mr. Manuel filed a motion for new trial (App. 19), which was denied on July 29, 2014 (App. 33). Mr. Manuel timely noticed this appeal on August 27, 2014. (DCD 82); FED. R. APP. P. 4(a)(4)(A)(v). This appeal is from a final judgment that disposed of all issues pending in the district court.

[1] The Notice of Removal actually states that Mr. Manuel is a "resident" of the State of Arkansas. (App. 9). "When it comes to diversity jurisdiction, the words 'resident' and 'citizen' are not interchangeable." *Reece v. Bank of New York Mellon*, 760 F. 3d 771, 777 (8th Cir. 2014). Allegations of residence, as opposed to citizenship, are insufficient to invoke diversity jurisdiction. *Id*. Nevertheless, Mr. Manuel attested to undersigned counsel that he was an Arkansas citizen both when the case commenced and when MDOW removed it to federal court. Accordingly, this Court may "exercise [its] discretion to deem the defective pleadings properly amended." *Id*. at 778.

ISSUES PRESENTED FOR REVIEW

ISSUE: Did the district court err when it denied Mr. Manuel's Motion for New Trial without holding an evidentiary hearing?

ISSUE II: Did the district court plainly err when it permitted MDOW's expert to offer an opinion using the scientifically-discredited "negative corpus" method for determining the cause of the fire?

- *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)
- *United States v. Tucker*, 137 F. 3d 1016 (1998)
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

STATEMENT OF THE CASE

This case arises out of a fire that occurred September 14, 2011, at 6360 Phillips 300 Road, West Helena, Arkansas. (DCD 50 at 1; DCD 49 at 1). Mr. Manuel owned the residence that was destroyed by the fire. *Id*. At the time of the fire, Mr. Manuel and his family were on vacation in Las Vegas. (DCD 89, TR. Vol. 1, p. 61-62).

The parties did not dispute that Mr. Manuel had purchased a home insurance policy that provided $150,000 in coverage for the residence, $75,000 for personal property, and $45,000 for additional living costs. (DCD 50 at 1; DCD 49 at 1). *Id.* However, MDOW denied Mr. Manuel's claims under the policy. *Id*. According to MDOW, the fire arose because of intentional acts committed by Mr. Manuel or

someone acting on his behalf. *Id*. MDOW also asserted that Mr. Manuel fraudulently misrepresented material facts on his claim form. *Id*.

Mr. Manuel brought a breach of contract action against MDOW in the circuit court of Phillips County, Arkansas. (App. 9). MDOW removed the case to the United Stated District Court for the Eastern District of Arkansas on February 28, 2012. *Id.* The trial commenced on April 9, 2014. (DCD 60).

During jury selection, the district court asked the potential jurors whether anyone knew any of the prospective witnesses for either party. (DCD 92, TR. Vol. 1-A, p. 12-14). One prospective juror, Juror W, admitted that during his career as a teacher he taught, Brett Ford, a witness for Mr. Manuel; however, he claimed that his relationship with Mr. Ford would not impact his ability to serve as a juror. *Id*. at 13. Neither Juror W, nor any of the other potential jurors, disclosed the existence of a relationship with any other witnesses for either party. *Id*. at 12-14.

The district court concluded the jury selection by asking the jury pool by the following questions:

> Can you think of any other matter which you should call to the Court's attention which might have some bearing upon your qualification to serve as a juror? In other words, we haven't asked it, but you are sitting there thinking, if only they had asked this, I would have said I'm not the right person to hear this case. Anyone? . . . I'm going to ask that question in a slightly different way. If you were one of the parties in this case, do you know of any reason why you would not be satisfied to have the case tried by someone in your frame of mind?

Id. at 29. None of the jurors responded. *Id*.

During trial, MDOW presented no evidence that Mr. Manuel or anyone he knew actually committed arson. Instead, MDOW relied on its expert, Richard Eley, who opined that someone intentionally set the fire. (App. 38-133). Mr. Eley testified that he arrived at his opinion through a "process of elimination." *Id.* at 44, 50.

Mr. Eley elaborated as follows:

> There was nothing on, no appliances. There was no physical evidence that any of those appliances failed and caused the fire. The electrical wiring did exactly what I would have expected it to do. After looking at 8,000 fires, when you have a fire of that magnitude, it's going to short and melt that wire in the area where it starts. And beyond that, there's not going to be any.
>
> I had a conversation with Mr. Manuel. And he told me that nothing was left on, no problems with anything in the house, had no idea how the fire could have started, no new appliances or anything of that nature that had been installed in there right before the fire. So based on all of that information that I obtained from the homeowner, as well as what I found from my own fire scene examination, I determined that the fire should be classified as an incendiary fire, an intentionally set fire.

Id. at 50-51.

On cross-examination, counsel for Mr. Manuel confronted the witness National Fire Protection Association ("NFPA") 921 Guide for Fire and Explosion Investigations, which prohibits the formation of opinions based on the "negative corpus" method of determining the ignition of a fire. *Id.* at 105. According to the NFPA, the negative corpus method is defined as the "process of determining the

ignition source for a fire by eliminating all ignition sources found, known or believed to have been present, and then claiming such methodology is a proof of an ignition source for which there is no evidence." *Id.* at 113-14 (quoting NFPA 921 § 18.6.5 (2011)).

Counsel for Mr. Manuel further cross-examined Mr. Eley with the NFPA's admonition that the "use of the *process of elimination*," is "not consistent with the scientific method, is inappropriate and should not be used because it generates untestable hypotheses and may result in incorrect determinations of the ignition source." *Id.* (emphasis added) (quoting NFPA 921 § 18.6.5 (2011)). That is because this method "may result in incorrect determinations of the ignition source and first fuel ignited." *Id.* at 106. "Any hypothesis formulated for the causal factors, first fuel, ignition source and ignition sequence must be based on facts. Those facts are derived from evidence, observation, calculation, experiments and the laws of science. Speculative information cannot be included." *Id.*

Mr. Eley conceded that he formed his opinion based on the process of elimination, but claimed that he followed NFPA 921: "Everything I did was scientific, and it followed NFPA 921." *Id.* at 104. Counsel then inquired as to what source Mr. Eley used to form his opinion about negative corpus. In response Mr. Eley explained:

> I guess there's not a book. It's my opinion of what negative corpus is as opposed to what I think you are trying to get at from using

> 921. And what I believe negative corpus would be is if I came into this room and all I had was the light fixtures and the switches and things like that, I did not have a chance to talk to the owner or the last person in, and just from just looking around and saying, well, I don't see anything that could have caused it, well, boom, you know, that in my mind might be negative corpus.
>
> On the other hand, if you do a physical examination of everything in the area where the fire started and you can't find anything in that area that shows evidence that it caused a fire, and then I'm able to talk to the owner, like Mr. Manuel, or whoever the last person was in the house at the time of the fire, and they gave me all the information that I've talked about already from him, that nothing was on, there was no problems, nothing stored in the house of a flammable nature, I believe that goes beyond the negative corpus, because you are now putting a human element at least for information in the hypothesis that you are trying to formulate and when you can say you can look at all of the physical evidence and say there's nothing there that could have caused the fire. And then Mr. Manuel pretty much tells me the same thing, there's nothing that he knows of that he's had any problems with that he's had work done on that could have caused the fire accidentally. To me, you can only reach one conclusion. It had to be an intentionally set fire.

Id. at 284-85.

On re-cross examination, counsel for Mr. Manuel again consulted NFPA 921 to confront Mr. Eley on the basis for his conclusion:

> 'In the circumstances where all hypothesized fire causes have been eliminated and the investigator is left with no hypothesis that is evidenced by the facts of the investigation, the *only choice for the investigator is to opine that the fire cause remains undetermined*. It is improper to base hypotheses on the absence of any supportive evidence. It is improper to opine a specific ignition source that has no evidence to support it, even though all other hypothesized sources were eliminated.'
>
> Mr. Eley, that's exactly what you did.

Id. at 114 (emphasis added). Mr. Eley once again responded by disputing that he

used negative corpus in arriving at his conclusion that the fire was intentionally set. *Id*.

MDOW did not dispute that Mr. Manuel and his family were in Las Vegas when the house caught fire. However, MDOW attempted to raise an inference that Mr. Manuel had a financial motive for setting the fire. To do so, it highlighted Mr. Manuel's monetary difficulties stemming from: (1) his bankruptcy; (2) the closure of his bail bond business; and (3) his pending divorce at the time. (DCD 91, TR. Vol. 3, p. 369). According to MDOW, those were "three big red flags." *Id.*

MDOW also sought to highlight purported inconsistencies in Mr. Manuel's divorce pleadings, his bankruptcy filing, and his claim form. MDOW called Mr. Manuel's ex-wife, Tawanna Manuel, to discuss the divorce proceedings. (App. 116). After the conclusion of her testimony, Juror W informed the district court that he knew Mrs. Manuel from her time in school. (App. 132). Juror W averred that his knowledge of Ms. Manuel would not cause him any difficulty in fairly participating in the trial. (App. 132-33). Juror W did not disclose that he knew any other witnesses for Mr. Manuel. *Id*.

After the close of evidence and closing arguments, the jury returned a verdict in favor of MDOW. (DCD 69, Verdict). In its special verdict, the jury found that "MDOW Insurance Company proved by a preponderance of the evidence that Mr. Manuel either burned his home or caused it to be burned." (DCD 69, Verdict, p. 1).

The jury did not reach the second question, whether Mr. Manuel intentionally concealed or misrepresented material facts during the investigation of the fire at his home, or the amount of damages Mr. Manuel suffered. *Id.* at 2-3.

On May 21, 2014, Mr. Manuel filed a Motion for New Trial. (App. 19). Mr. Manuel averred that two jurors failed to disclose their relationships with five of his witnesses, even though the Court made specific inquiry into such relationships during jury selection. *Id*. Mr. Manuel supported the motion with his own affidavit, in which he alleged that he did not know that the jurors knew his witnesses during jury selection. (App. 21).

Mr. Manuel also attached the affidavit of Corey Watson, one of his testifying witnesses. (App. 23). Mr. Watson stated that Juror W was his cousin, and that the two of them attended the funeral of his grandmother several weeks before trial. *Id*. Mr. Watson averred that he made eye contact with Juror W during trial, at which point he realized that he was related to the juror. *Id*.

In addition, Mr. Manuel submitted the affidavit of Nicholas Skinner, a potential witness, who was named on Manuel's witness list. (App. 25). Skinner watched the proceedings and recognized Juror W, but ultimately did not testify during trial. *Id*. Mr. Skinner stated in his affidavit that Juror W once broke up a fight between Mr. Skinner and another youth. *Id.* Mr. Skinner had a knife, and Juror W sent Skinner to the office. *Id.*

Mr. Manuel's son, Deangelo Manuel, who testified on behalf of Mr. Manuel, also provided an affidavit. (App. 27). Deangelo stated that he knew Juror W personally, because Juror W served as his coach and teacher in both junior high and high school. *Id.* Deangelo also stated that Juror W knew his mother, and that one day Tawanna Manuel introduced Deangelo as her son to Juror W. *Id.*

Another witness who testified for Mr. Manuel, Jacqueline Strother, provided an affidavit alleging yet another connection to a sitting juror. (App. 29). Ms. Strother testified in the affidavit that Juror C was a childhood friend, with whom she attended middle school, junior high, and high school. *Id.* Ms. Strother additionally stated that Juror C married a man to whom Ms. Strother was betrothed to marry when she was 18 years old. *Id.*

Finally, Mr. Manuel provided the affidavit of Melissa Cartwright, who testified for Mr. Manuel. (App. 31). Ms. Cartwright stated that she, too, had a relationship with Juror C, because Juror C served at that time as the high school art teacher for Ms. Cartwright's autistic son. *Id.* According to Ms. Cartwright, Juror C participated in formulating her son's special education plan. *Id.*

In his brief in support of the motion for new trial, Mr. Manuel noted the two jurors concealed their relationships to his witnesses. He argued that concealed juror bias is a recognized ground for a new trial, and maintained that Juror W's "repeated failure . . . to disclose to the Court his relationships with [Mr. Manuel's] witnesses,

combined with his willingness to disclose to the Court his relationship with [MDOW's] key witness," Tawanna Manuel, demonstrated "actual bias" against Mr. Manuel. (DCD 73, p. 7). Mr. Manuel claimed that, if he had known of Juror W's connections to his witnesses, he would have asked to strike this juror for cause. *Id.*

Mr. Manuel similarly argued that the "repeated failure" of Juror C to "disclose to the Court her relationships with [Mr. Manuel's] witnesses shows actual bias against" him. *Id.* Mr. Manuel likewise asserted that if he knew of Juror C's relationships, he would have tried to remove her for cause. *Id.* Mr. Manuel asserted that, in light of the actual bias of these witnesses, he should be granted a new trial. *Id.* at 8.

In addition to the claim that these jurors had actual bias, Mr. Manuel argued that the jurors had an "implied bias" against him. *Id*. at 8. According to Mr. Manuel, under the "implied bias" test, even if a party is "unable to prove a juror's incorrect response to a material question was intentional," the party "may introduce evidence demonstrating bias on the part of a juror who gave an incorrect but not intentionally dishonest answer during *voir dire*." *Id*. at 9 (quoting *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998)).

Mr. Manuel argued that Juror W failed to reveal a close familial relationship with Corey Watson, and noted that relatives "can have bad relationships with one another and harbor bad feelings." *Id*. at 10. Mr. Manuel asserted that the failure to

disclose this close familial relationship with a witness gives rise to an inference of implied bias, particularly since Juror W did inform the district court that he knew one of MDOW's witnesses, Mr. Manuel's ex-wife, Tawanna Manuel. *Id.* Mr. Manuel additionally argued that Juror W was a witness to a criminal transaction involving Mr. Skinner, because Juror W broke up a fight and caught Skinner with a knife. *Id*. Therefore, Mr. Manuel maintained that Juror W met the test for implied bias. *Id*.

Mr. Manuel also claimed that Juror C met the test for implied bias against him. *Id*. Mr. Manuel observed that the "relationship between a wife and her husband's former fiancé is very probably fraught with issues of dysfunction." *Id*. at 10. Thus, Mr. Manuel argued that the district court could "imply concealed juror bias" from Juror C's failure to tell the district court she knew Ms. Strother. *Id*.

The district court rejected these arguments. (App. 34). The district court accepted Mr. Manuel's allegations as true, but found that he did not meet "the high evidentiary burden" to "grant a new trial or even to merit [the district court] conducting a hearing on his request for a new trial." (App. 36). With respect to his claim of implied bias, the district court observed that this Court has never expressly adopted the "implied bias" test, but found that, even if it were to use the implied bias test, Mr. Manuel had not "alleged any extreme case of bias here." *Id*. Therefore, the district court denied the Motion for New Trial. (App. 37). This appeal follows.

SUMMARY OF THE ARGUMENT

The district court committed two reversible errors. First, the district court erred when it denied Mr. Manuel's motion for new trial without conducting an evidentiary hearing. A litigant is entitled to a new trial when (1) a juror answers *voir dire* questions dishonestly, not just inaccurately; (2) the juror was motivated by partiality; and (3) that the true facts, if known, would have supported striking the juror for cause. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984).

Mr. Manuel alleged that two jurors demonstrated partiality by dishonestly answering questions in jury selection. Juror W concealed a close familial relationship with one of Mr. Manuel's witnesses, failed to disclose that he coached and taught Mr. Manuel's own son throughout junior high and high school, and never mentioned that he witnessed a criminal act on the part of another of Mr. Manuel's witnesses. Juror C, likewise, concealed the fact that Ms. Strothers was a former rival for the affection of her husband, and failed to disclose that, at the time of trial, she taught an autistic son of one of Mr. Manuel's other witnesses.

Concealing these relationships is evidence of both dishonesty and partiality, particularly in the case of Juror W, who disclosed unobjectionable ties to two other witnesses, but failed to disclose closer relationships with three of Manuel's witnesses. Mr. Manuel would have moved to strike both jurors for cause had he

known the true facts. Therefore, Mr. Manuel met the test for a new trial under *McDonough*. Even if Mr. Manuel failed the *McDonough* test, remand would still be appropriate under the "implied bias" test because Juror W was a cousin of a participant, and consanguinity is the classic example of implied bias. Thus, at the very least, Mr. Manuel was entitled to an evidentiary hearing to allow him to establish juror bias.

The district court also plainly erred when it allowed Mr. Eley to offer an opinion based on the "negative corpus" method for determining the cause of a fire. This error was plain: counsel for Mr. Manuel confronted the witness with NFPA 921, the same source that the expert claimed to apply in conducting his analysis. Though the expert claimed not to rely on negative corpus, his own testimony established that his opinion rested on this methodology. The district court, as an evidentiary gatekeeper, should have stricken this discredited, unscientific and unreliable expert testimony.

This error affected Mr. Manuel's substantial rights. But for Mr. Eley's testimony, MDOW adduced no evidence that the fire was intentionally set, let alone caused by Mr. Manuel, who was in Las Vegas with his family at the time of ignition. Finally, affirming solely on the basis of inadmissible expert testimony would result in a miscarriage of justice. Thus, this Court should reverse the plain error and remand this case for a new trial.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. MANUEL'S MOTION FOR NEW TRIAL WITHOUT CONDUCTING AN EVIDENTIARY HEARING.

A. Standard of Review

This court reviews the denial of a motion for new trial under the abuse of discretion standard. *United States v. Tucker*, 137 F.3d 1016, 1030 (8th Cir. 1998) ("*Tucker I*"). The "district court has broad discretion in handling allegations that jurors have not answered *voir dire* questions honestly," and this Court should ordinarily "defer to its discretion in deciding whether a post-trial hearing is necessary." *Id.* "That discretion is not unlimited, however, and a movant who makes a sufficient showing of *McDonough*-type irregularities is entitled to the court's help in getting to the bottom of the matter." *Id.*

Courts apply the *de novo* standard of review where the movant raises a claim of implied juror bias. *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012). "Because implied bias deals in categories prescribed by law, the question whether a juror's bias may be implied is a legal question, not a matter of discretion for the trial court." *Id.*

B. Argument on the Merits

The district court abused its discretion when it denied Mr. Manuel's request for a new trial without holding an evidentiary hearing. Under *McDonough*, a party

is entitled to a new trial when (1) a juror answers *voir dire* questions dishonestly, not just inaccurately; (2) the juror was motivated by partiality; and (3) that the true facts, if known, would have supported striking the juror for cause. *See McDonough*, 464 U.S. at 556; *see also Tucker I*, 137 F.3d at 1030.

In most cases, the "honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring). "A court *must* excuse a prospective juror if actual bias is discovered during *voir dire*. Bias can be revealed by a juror's express admission of that fact, but more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977) (emphasis added).

Thus, as in *Allsup*, most circuit courts of appeals have presumed or implied bias in exceptional cases where a juror has such a close relation to a case that he or she should be deemed biased without regard to subjective state of mind or "actual bias." *See generally McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring) and 558 (Brennan, J., concurring in judgment); *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring); *United States v. Tucker*, 243 F.3d 499 (8th Cir. 2001) ("*Tucker II*") (collecting cases and discussing presumed or implied bias, but declining to decide whether to adopt test); *see also Mitchell*, 690 F.3d at 144 (3d Cir. 2012) ("most Courts of Appeals endorse the view that the implied bias doctrine

retains its vitality"). In any case, a "movant who makes a sufficient showing of *McDonough*-type irregularities is entitled to the court's help in getting to the bottom of the matter." *Tucker I*, 137 F.3d at 1030.

On the facts of this case, the district court should have, at the very least, held an evidentiary hearing. *Tucker I* is instructive. The defendant in *Tucker I* filed a motion for a new trial after he learned that one of the jurors had failed to disclose during *voir dire* that she was engaged to marry a former state prisoner to whom the defendant, as governor, denied clemency. The defendant's motion contained detailed factual allegations of the juror's relationship to the former prisoner, and included an allegation that the juror had received extraneous evidence from a third-party during trial. *Tucker I*, 137 F.3d at 1023-25.

The district court conducted a hearing on the matter, but limited the scope of the hearing to the extraneous evidence issue and did not allow the defendant to put on evidence relating to the concealed juror bias claim. *Id*. at 1026. On appeal, this Court held that the defendant made a sufficient showing to entitle him to a *McDonough* "concealed juror bias hearing" and remanded the case so that the district court could hold such a hearing. *Id*. at 1028.

Here, as in *Tucker I*, Mr. Manuel alleged specific facts that could give rise to a finding of "actual bias," but was not allowed to explore the bias of Juror W and Juror C through an evidentiary hearing. Specifically, Mr. Manuel claimed that Juror

W concealed the fact that he was the cousin of one of Mr. Manuel's witnesses, and that weeks before trial, they both attended a family funeral together. As Mr. Manuel noted in his brief on this point, close familial relationships sometimes engender negative emotions, so an evidentiary hearing was necessary to allow Mr. Manuel to explore whether or not this juror harbored actual bias against Mr. Manuel or his witness.

Not only did Juror W fail to disclose this close familial relationship, he also failed to disclose the fact that (1) he coached and taught Mr. Manuel's son, who testified during the trial; and (2) he broke up a fight involving a knife carried by another witness for Mr. Manuel, which, as noted, is a criminal act. These instances of dishonesty establish a pattern of dissembling: Juror W failed to disclose a relationship with *three separate witnesses*, a pattern, which, if exposed, would undoubtedly have given rise to a challenge for cause.

However, this same juror was candid about his more innocuous relationships with Tawanna Manuel and Brett Ford, relationships that would not prevent him from sitting on the jury. This gives rise to a natural inference that Juror W was (1) dishonest about his ties to the case, but sought to remain on the jury; (2) his dishonesty is evidence of actual bias against Mr. Manuel; and (3) Mr. Manuel would have attempted to strike this juror for cause if the true facts were known.

The same can be said with respect to Juror C, who failed to disclose her

relationship to a life-long friend, who, as it happened, was once engaged to marry her husband. The record does not reveal Juror C's true feelings about Ms. Strother, but common sense dictates that this juror could harbor actual bias against her former rival at trial. Juror C also failed to disclose that she taught the autistic son of another witness. Thus, as in the case of Juror W, Mr. Manuel made a "sufficient showing of *McDonough*-type irregularities" to require the "court's help in getting to the bottom of the matter." *Tucker I*, 137 F.3d at 1030.

Finally, though this Court has not decided whether to adopt an implied bias test, Mr. Manuel alleged sufficient facts under Third Circuit precedent to warrant remand for an evidentiary hearing on whether Juror W had a sufficiently close relationship with a participant to presume bias. *United States v. Mitchell*, 690 F.3d 137 (3d Cir. 2012). In *Mitchell*, the defendant claimed that a juror failed to disclose that he was the cousin of the prosecutor. The Third Circuit noted that "consanguinity is the classic example of implied bias," and, even under plain error review, found that a remand was necessary for a determination as to whether the relationship was close enough to give rise to implied bias. *Id*. at 145, 147. This Court should reach the same conclusion here because Juror W and a witness to the proceedings were cousins, who attended a funeral together weeks before trial. Accordingly, the district court erred when it denied Mr. Manuel's motion without holding a hearing.

II. THE DISTRICT COURT PLAINLY ERRED WHEN IT PERMITTED MDOW TO RELY ON AN EXPERT OPINION FORMED USING THE DISCREDITED AND UNSCIENTIFIC "NEGATIVE CORPUS" METHODOLOGY.

A. Standard of Review

"A district court enjoys wide discretion in ruling on the admissibility of proffered evidence, and evidentiary rulings should only be overturned if there was a clear and prejudicial abuse of discretion." *Cole v. Homier Distributing Co., Inc.*, 599 F. 3d 856, 865 (8th Cir. 2010). However, where a party fails to raise an objection, this Court's review is limited to plain error. *McKnight v. Johnson Controls, Inc.*, 36 F. 3d 1396 (8th Cir. 1994). "Under plain error review, an error not identified by a contemporaneous objection is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if left uncorrected." *Rush v. Smith*, 56 F.3d 918, 922 (8th Cir.1995) (en banc).

B. Argument on the Merits

The district court plainly erred when it permitted Mr. Eley to rely on the "negative corpus" method for determining the cause of a fire. Federal Rule of Evidence 702, which governs the admissibility of expert testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and

methods to the facts of the case.

FED. R. EVID. 702.

"The main purpose of *Daubert* exclusion is to prevent juries from being swayed by dubious scientific testimony." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011). Thus, the district court must serve as a "gatekeeper," that ensures an "expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999)). Though a district court is given considerable latitude in determining whether an expert meets these requirements, the "assumption of the gatekeeper role is mandatory, not discretionary." *Russell v. Whirlpool Corp.*, 702 F. 3d 450, 456 (8th Cir. 2012) (citing *Daubert*, 509 U.S. at 592-93).

NFPA 921 qualifies as "a reliable method endorsed by a professional organization." *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d 1054, 1058-59 (8th Cir. 2005). While NFPA 921 is not the only reliable way to investigate a fire, this Court's precedent establishes that "an expert who purports to follow NFPA 921 must apply its contents reliably." *Russell*, 702 F. 3d at 455 (citing *Presley v. Lakewood Eng'g*, 553 F.3d 638, 645 (8th Cir. 2009) and *Fireman's Fund Ins. Co. v. Canon U.S.A., Inc.*, 394 F.3d at 1058-59).

In *Presley*, for example, an expert claimed he followed NFPA 921, but conducted no testing to support his theory of ignition. *Presley*, 553 F.3d at 645. The

district court found the expert did not apply NFPA 921 reliably because the treatise "requires that hypotheses of fire origin must be carefully examined against empirical data obtained from fire scene analysis and appropriate testing." *Id.* This Court affirmed the exclusion of his expert testimony. *Id.*

Here, Mr. Eley purported to apply NFPA 921, but did so in an unreliable fashion, because his opinion was derived from the discredited "negative corpus" methodology. NFPA 921 § 18.6.5 (2011), provides:

> The process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no evidence of its existence, is referred to by some investigators as "negative corpus." Negative corpus has typically been used in classifying fires as incendiary, although the process has also been used to characterize fires classified as accidental. *This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited. Any hypotheses formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis*.

NFPA 921 § 18.6.5 (2011) (emphasis added).

Mr. Eley testified that he arrived at his opinion through a "process of elimination." *Id.* at 221; 227. He explained that:

> There was nothing on, no appliances. There was no physical evidence that any of those appliances failed and caused the fire. The electrical wiring did exactly what I would have expected it to do. After looking at 8,000 fires, when you have a fire of that magnitude, it's going

> to short and melt that wire in the area where it starts. And beyond that, there's not going to be any.
>
> I had a conversation with Mr. Manuel. And he told me that nothing was left on, no problems with anything in the house, had no idea how the fire could have started, no new appliances or anything of that nature that had been installed in there right before the fire. So based on all of that information that I obtained from the homeowner, as well as what I found from my own fire scene examination, I determined that the fire should be classified as an incendiary fire, an intentionally set fire.

Id. at 227-28.

There is no principled way of distinguishing Mr. Eley's method from negative corpus, which is characterized as the inappropriate use of process of elimination. Mr. Eley repeatedly described his own method as "process of elimination." He also stated that, "when you go by a process of elimination, you eliminate everything except an incendiary fire cause." (App. 93).

The problem with this method, as recognized in NFPA 921, is that there is simply no way to test Mr. Eley's hypothesis that someone intentionally set the fire. NFPA 921 § 18.6.5 (2011) (negative corpus "generates un-testable hypotheses"); *see also Daubert*, 509 U.S. at 593 (a "key question" to theory reliability is "whether it can be (and has been) tested"). For this reason, the "application of negative corpus as the sole basis for a finding of arson violates [Rule] 702." *People v. Pruitt*, No.

313065, 2014 WL 1320253 (Mich. Ct. App. Apr. 1, 2014).[2]

Based on the foregoing, it is clear that the district court erred, and it erred plainly when it abdicated its gatekeeping function and permitted unreliable expert testimony to reach the jury. It is equally clear that the error prejudiced Mr. Manuel's the substantial rights. But for Mr. Eley's testimony, MDOW adduced no evidence that the fire was intentionally set, let alone caused by Mr. Manuel, who was in Las Vegas with his family at the time of ignition. Thus, the jury verdict rests entirely on inadmissible speculation masquerading as expert testimony. Affirming on this basis would be a miscarriage of justice. Accordingly, this Court should reverse the entry of judgment and remand for a new trial.

[2] Michigan Rule of Evidence 702 does not materially differ from the federal standard under Rule 702. *Compare* MICH. R. EVID. 702 *with* FED. R. EVID. 702. "In fact, the trial court's obligation under MRE 702 is even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a precondition to admissibility." *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 408 n.46 (Mich. 2004).

CONCLUSION

Based upon the foregoing arguments and legal authority, Plaintiff-Appellant, KIRK MANUEL, respectfully requests that this Honorable Court vacate the entry of judgment and remand this matter for further proceedings.

DATED this 8th day of December, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2014, I filed the foregoing with the Clerk of the Court and served opposing counsel with a copy via CM/ECF.

/s/ Andrew B. Greenlee
Andrew B. Greenlee, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). I FURTHER CERTIFY that, pursuant to Eighth Circuit Rule 28A(h)(2), the Opening Brief and addendum have been scanned for viruses and that the documents are virus-free.

/s/ Andrew B. Greenlee
Andrew B. Greenlee, Esquire

CASE NO. 14-3092

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KIRK MANUEL, *APPELLANT*

v.

MDOW INSURANCE COMPANY, *APPELLEE*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
HELENA DIVISION

BRIEF OF THE APPELLEE

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SUMMARY OF THE CASE

This litigation arises from MDOW Insurance Company's denial of Kirk Manuel's insurance claim following a fire at his residence on the basis that Manuel either burned the home or caused it to be burned and intentionally concealed or misrepresented material facts during MDOW's investigation of the claim.

During trial, MDOW presented evidence in support of its defenses to its denial of Manuel's claim, including testimony from an origin and cause expert that the fire was incendiary in origin. Manuel did not object to this testimony at trial but now seeks a finding that its admission was plain error.

The Jury rendered a unanimous verdict in favor of MDOW. Manuel then filed a Motion for New Trial, predicated on alleged concealed jury bias. The District Court found that Manuel did not meet his evidentiary burden to warrant a new trial or an evidentiary hearing on the Motion. Manuel appeals this ruling.

MDOW believes that oral argument of no more than 15 minutes per side would assist the Court in resolving the issues on appeal.

CORPORATE DISCLOSURE STATEMENT

MDOW Insurance Company states it is a wholly-owned, direct or indirect subsidiary of Columbia Lloyds Insurance Company, a privately held company. No publicly held corporation owns ten percent or more of the stock of MDOW Insurance Company.

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- *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998).

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- *Russell v. Whirlpool Corp.*, 702 F.3d 450 (8th Cir. 2012).
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- *Hickerson v. Pride Mobility Prods. Corp.*, 470 F.3d 1252 (8th Cir. 2006).

STATEMENT OF FACTS

On September 14, 2011, Manuel's residence was destroyed by fire. *See* App. 12. At the time of the fire, Manuel's residence was insured under a homeowner's insurance policy issued by MDOW Insurance Company ("MDOW"). *See* App. 12. Manuel brought a breach of contract claim against MDOW arising from its denial of his claim following the fire. App. 12. MDOW denied the claim on the basis that Manuel burned his home or caused it to be burned and intentionally concealed or misrepresented material facts during the investigation of the claim. Sep. App. 2-3.

During jury selection, the Court informed the potential jury panel that the parties were entitled to a trial before a fair, unbiased and impartial jury. Sep. App. 24. The Court further informed the panel that the attorneys wanted to know about their relationship to the parties or their attorneys, any personal interest they may have in the case, and anything that might make them prejudiced for or against a party. Sep. App. 24. The Court then read out a list of anticipated witnesses and asked the panel whether they had a business relationship, social relationship, familial relationship, or any sort of tie

or connection to the potential witnesses. Sep. App. 32-33. At that point in the trial, no juror indicated that he or she had any connection with prospective witnesses Deangelo Manuel, Corey Watson, Jacqueline Strother, Nicholas Skinner, Melissa Cartwright, or Tawanna Manuel. Sep. App. 33. Juror W, who Mr. Manuel contends on appeal should have been struck for cause, did indicate he did know potential witness Brett Ford because he taught him in high school. Sep. App. 34. At this point, Juror W informed the Court and the parties that he retired from teaching in 2010 and he believed he may have taught Ford in around 2007 or 2008. Sep. App. 34. He stated that there was nothing about his relationship with Ford that would make it difficult for him to listen to the evidence that is presented and decide the case based on the evidence and the law, being fair and impartial to both sides. Sep. App. 34. Manuel did not move to strike Juror W on the basis of this relationship.

Preliminary instructions were then given by the Court, during which the Court informed the jury that they must keep their mind open and free of outside information. Sep. App. 70. The Court informed the jury that only in this way will they be able to decide the case fairly

based solely on the evidence and the instructions on the law and that, if they decide the case on anything else, they will have done an injustice. Sep. App. 70.

During trial, the jury heard testimony from a number of witnesses regarding Manuel's financial motive for causing the fire, discrepancies in the contents he claimed were damaged by the fire, and circumstances regarding Manuel and his family's location and activities at the time of the fire. In addition, the jury heard testimony from MDOW's origin and cause expert, Rick Eley. App. 44. Eley conducted the fire investigation at issue on September 20, 2011. App. 44. He testified that, based on his examination and investigation, the fire originated in the floor area of the southeast corner of the home and was incendiary in origin. App. 46 & 50-51. He testified that this opinion was based on his observation of the area that sustained the most significant damage, arc mapping, his observation of oxidation patterns, his examination of the home's appliances that ruled them out as a potential cause, and his elimination of the home's electrical wiring as a potential cause. App. 45-46, 50, 53, 60-70. Eley testified that, through his investigation, he eliminated every potential cause of the fire except incendiarism. App. 98. Manuel

cross-examined Eley on his position that Eley impermissibly employed "negative corpus" but never sought to exclude or strike Eley's testimony on these grounds. *See* App. 108.

Following the three-day jury trial, twelve jurors unanimously concluded that MDOW Insurance Company proved by a preponderance of the evidence that Kirk Manuel either burned his home or caused it to be burned. *See* Sep. App. 6.

Manuel filed a Motion for New Trial predicated on a theory of concealed jury bias. *See* App. 19. The Motion submitted affidavits of Manuel's witnesses who claimed to have previously undisclosed relationships with two juror members. Significantly, two of the witnesses that Manuel predicated his Motion for New Trial on, Nicholas Skinner and Melissa Cartwright, were not even called to testify at trial. App. 25. Another witness claimed to have known Juror W because he was a coach and teacher at his high school and he was introduced to the juror by his mother. App. 132. During trial, this juror acknowledged his knowledge of this witness' mother and yet, counsel for Mr. Manuel confirmed he nonetheless had no problem with the jury. App. 132-133. The Motion for New Trial was also predicated on witness Jackqueline

Strother's claim that she went to school with Juror C. App. 29. After Strother's testimony, a different juror informed the Judge that she had recognized Strother during her testimony. Sep. App. 126-127. This juror informed the Court and Mr. Manuel that, like Juror C, she had gone to school with Ms. Strother. Sep. App. 128. Counsel for Mr. Manuel informed the Court that he did not have any problem with this juror. Sep. App. 128.

On July 29, 2014, the Court entered an Order denying Manuel's Motion for New Trial. *See* App. 34-37. The Court held that Mr. Manuel did not meet the high evidentiary burden to grant a new trial or even to merit this Court's conducting a hearing on his request for a new trial. *See* App. 34-37. The Court also held that, even were it to adopt the implied bias test, Manuel has not alleged any extreme case of bias here. *See* App. 34-37.

SUMMARY OF THE ARGUMENT

The Jury Verdict rendered in favor of MDOW, finding that MDOW proved by a preponderance of the evidence that Kirk Manuel either burned his home or caused it to be burned, should be affirmed as the District Court committed no reversible error.

In the present case, the District Court did not abuse its broad discretion when it found that Manuel did not meet the high evidentiary burden set forth in *McDonough* and *Tucker I* to grant a new trial or even to merit the Court conducting a hearing on his request for a new trial. It properly found that the affidavits relied upon by Manuel in support of his Motion for New Trial failed to make a sufficient showing of *McDonough*-type irregularities to require an evidentiary hearing to further address the issue. The trial testimony of the witnesses alleged to have undisclosed relationships with two jurors, the tenuous nature of these alleged relationships, and the parties' handling of the comparable witness/juror relationships that were not concealed reveal that the alleged relationships were remote, casual, and do not provide any proof that, even if true, the jurors had concealed bias, actual or implied,

sufficient to warrant a finding that the case was not tried to an impartial jury and should be re-tried.

In addition, the District Court committed no plain error as a result of the admission of the testimony of MDOW's origin and cause expert, Rick Eley. Notably, no objection to this testimony was made at trial. Regardless, the opinion testimony of Rick Eley satisfied the standards of reliability and relevancy required for admissibility. In this regard, Eley's opinions were based on an investigation that was in conformance with generally accepted fire science methodology and investigation practice which has been confirmed by the Eighth Circuit as being acceptable. Further, any criticisms of regarding Eley's opinion do not give rise to plain error as a result of their admission because the very criticisms were utilized during a vigorous cross-examination of Eley.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion When It Denied Mr. Manuel's Motion for New Trial Without Conducting An Evidentiary Hearing

The District Court did not abuse its discretion when it concluded that Manuel failed to meet his evidentiary burden to prove concealed juror bias in order to grant a new trial or even to merit the Court conducting a hearing on his request for a new trial. *See* App. 34-37.

The issue of concealed juror bias was addressed by the United States Supreme Court in *McDonough Power Equipment v. Greenwood*, 446 U.S. 548 (1984). In *McDonough*, the Court noted that "a litigant is entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power Equip. v. Greenwood*, 446 U.S. 548, 553 (1984) (quoting *Brown v. United States*, 411 U.S. 223, 231-232 (1973)). The Court further noted that "[t]rials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials" and "[i]t seems doubtful that our judicial system would have the resources to provide litigants with perfect trials, were they possible, and still keep abreast of its constantly increasing caseload." *McDonough Power*

Equip., 446 U.S. at 553 (1984). In addition, the Court stated that, to invalidate the result of a trial "because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give" and "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voire dire examination." *Id.* at 558.

Thus, pursuant to the standard set forth in *McDonough*, the Eighth Circuit has held that "a party seeking a new trial on the basis of a concealed juror bias must prove three things: (1) that the juror answered dishonestly, not just inaccurately; (2) that the juror was motivated by partiality; and (3) that the true facts, if known, would have supporting striking the juror for cause." *United States v. Ruiz*, 446 F.3d 762, 770 (8th Cir. 2006) (citing M*cDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)). *See also Lopez v. Aramark Unif. & Career Apparel, Inc.*, 417 F. Supp. 2d 1062, 1068 (N.D. Iowa 2006) (this standard "requires consideration of whether or not the juror could have honestly believed that no response to the pertinent voire dire question

was required" and or "whether the answer (or presumably, the lack of an answer), was reasonable").

This standard recognizes that, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). It is also worth noting that "courts presume that a prospective juror is impartial, and a party seeking to strike a venire member for cause must show that the prospective juror is unable to lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court." *Moran v. Clarke*, 443 F.3d 646, 650 (8th Cir. 2006). "Essentially, to fail this standard, a juror must profess his inability to be impartial and resist any attempt to rehabilitate his position." *Id.* at 650-651. "To challenge for cause, a party must show actual partiality growing out of the nature and circumstances of the particular case." *United States v. Tucker*, 137 F.3d 1016, 1029 (8th Cir. 1998) (Tucker I) (quoting *United States v. Bascope-Zurita*, 68 F.3d 1057, 1063 (8th Cir. 1995)).

The Eighth Circuit has recognized the need to "afford a large measure of deference to the trial judge's judgment" in "refusing to grant an evidentiary hearing" on a motion for new trial predicated on concealed juror bias. *See Walzer v. St. Joseph State Hosp.*, 231 F.3d 1108, 1113 (8th Cir. 2001). In this regard, "[a] district court is not obligated to conduct an evidentiary hearing each time there is a possibility of juror bias." *United States v. White Bull*, 646 F.3d 1082, 1095 (8th Cir. 2011); *Lopez v. Aramark Unif. & Career Apparel, Inc.*, 417 F. Supp. 2d 1062, 1067 (N.D. Iowa 2006) (citing *United States v. Caldwell*, 83 F.3d 954, 957 (8th Cir. 1996) ("The mere fact that post-verdict allegations of juror bias or misconduct are made does not automatically entitle the moving party to an evidentiary hearing"). "Rather, in considering whether an evidentiary hearing is necessary, a district court should consider numerous factors, including 'the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source.'" *White Bull*, 646 F.3d at 1095 (quoting *United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993)). *See also United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998) (Tucker I) ("The district court has broad discretion in handling allegations that

jurors have not answered voir dire questions honestly" and the Eighth Circuit "defer[s] to its discretion in deciding whether a post-trial hearing is necessary"). Such a determination of "whether an allegation of juror misconduct based on concealed bias even warrants further investigation" is necessary because "[n]eedless post-trial interviews of jurors" could "impede the deliberation process of the jury or lead to juror harassment" and would "seriously threaten the effectiveness and undermine our current jury system." *Lopez*, 417 F. Supp. 2d at 1067 ("[L]imitations on judicial resources preclude the courts from ferreting out every allegation of possible bias or guaranteeing perfection during trial").

A movant must, therefore, make "a sufficient showing of *McDonough*-type irregularities" to be entitled "to the court's help in getting to the bottom of the matter." *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998) (Tucker I). If, however, "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *United States v. Tucker*, 243 F.3d 499, 506 (8th

Cir. 2001) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)).

In the present case, the District Court did not abuse its broad discretion when it found that Manuel did not meet the high evidentiary burden set forth in *McDonough* and *Tucker I* to grant a new trial or even to merit the Court conducting a hearing on his request for a new trial. *See* App. 36. It properly found that the affidavits relied upon by Manuel in support of his Motion for New Trial failed to make a sufficient showing of *McDonough*-type irregularities to require an evidentiary hearing to further address the issue.

Manuel's Motion is predicated on his contention that two jurors allegedly failed to disclose to the Court their relationships with five of Mr. Manuel's witnesses (two of whom were never even called to testify at trial). A closer look at the circumstances at issue, including the trial testimony of the witnesses, the parties' handling of the witness/juror relationships that were revealed, and the tenuous nature of the alleged relationships between the witnesses and the jury members reveal that the alleged relationships were remote, casual, and do not provide any proof that, even if true, the jurors had concealed bias, actual or implied,

sufficient to warrant a finding that the case was not tried to an impartial jury and should be re-tried. Nor do they establish that the jurors in question actually responded to questioning regarding their knowledge of prospective witnesses in a dishonest manner or in an attempt to deceive the Court, as there is no evidence that the two jurors at issue knew or recalled having any connection with Manuel's witnesses.

Further, there is no evidence that, even if the jurors' responses to this questioning were dishonest, the dishonesty was motivated by partiality. Rather, it is highly probable that the responses were motivated by the jurors' lack of recollection of any connection or relationship with the witnesses being identified by name. Even assuming the witnesses did recall the relationships, however, none of the relationships are of the kind that would in any way suggest that the jurors gave inaccurate answers at voire dire because of partiality, rather than for some reason that is irrelevant to the fairness of the trial. Manuel has no evidence, nor is there any inclination that he could have utilized an evidentiary hearing to obtain evidence that either of the two jurors at issue were motivated by partiality towards MDOW or

against Manuel or that, if the alleged contacts were made known, the jurors would have been struck for cause.

Following a three-day jury trial, twelve jurors unanimously concluded that MDOW Insurance Company proved by a preponderance of the evidence that Kirk Manuel has either burned his home or caused it to be burned. *See* Sep. App. 6. Before this trial began, the Court concluded voire dire. During this process, the Court informed the potential jury panel that each and all of the parties are entitled to a trial before a fair, unbiased and impartial jury. Sep. App. 24. The Court informed the jury that the purpose of voire dire is for the Court to determine whether any prospective juror should be excused for cause and to enable counsel for the parties to exercise their individual judgment with respect to peremptory challenges. Sep. App. 24. The Court further informed the panel that the attorneys wanted to know about their relationship to the parties or their attorneys, any personal interest they may have in the case, and anything that might make them prejudiced for or against a party. Sep. App. 24.

After reading a statement regarding the case, the Court asked the panel if anyone had heard or read anything about the case and no juror

responded that he/she had. Sep. App. 29-30. The Court asked if anyone had communicated with the panel in any way about the case and no juror indicated that anyone had. Sep. App. 30. No potential juror indicated that they or their immediate family was acquainted with or related to the Manuel or his attorney. Sep. App. 30-31. Likewise, no juror indicated that he/she or any member of his/her immediately family had any business or other relationship or connection with Mr. Manuel. Sep. App. 32.

The Court then read out a list of anticipated witnesses and asked the panel whether they had a business relationship, social relationship, familial relationship, or any sort of tie or connection to the potential witnesses. Sep. App. 32-33. At that point in the trial, no juror indicated that he or she had any connection with prospective witnesses Deangelo Manuel, Corey Watson, Jacqueline Strother, Nicholas Skinner, Melissa Cartwright, or Tawanna Manuel. Sep. App. 33. Significantly, however, at that time, Juror W, who Mr. Manuel contends on appeal should have been struck for cause, indicated he did know potential witness Brett Ford because he taught him in high school. Sep. App. 34. At this point, Juror W informed the Court and the parties that

he retired from teaching in 2010 and he believed he may have taught Ford in around 2007 or 2008. Sep. App. 34. He stated that there was nothing about his relationship with Ford that would make it difficult for him to listen to the evidence that is presented and decide the case based on the evidence and the law, being fair and impartial to both sides. Sep. App. 34. Contrary to Mr. Manuel's assertion otherwise, this disclosure indicates both that there was no intentional dishonesty or any failure of Juror W to identify other potential witnesses he may have become acquainted with throughout his teaching career and that Juror W did not conceal any potential relationships because he was motivated by partiality. Manuel did not move to strike Juror W for cause or otherwise utilize a peremptory challenge on Juror W on the basis of this disclosure, which also indicates, contrary to Manuel's assertion otherwise, that he would not have moved to strike Juror W on the basis of any other recognized teacher-student relationship with other witnesses.

Plaintiff's attorney was given an opportunity to question the jury panel. Sep. App. 41-43. Following this, the Court asked the jury if they could think of any other matter not already asked by the Court or the

parties which might have some bearing upon their qualification to serve as jurors. Sep. App. 50. Once the panel was selected, Plaintiff and Defendant indicated that the jury was satisfactory to them. Sep. App. 59.

Preliminary instructions were then given by the Court, during which the Court informed the jury that they must keep their mind open and free of outside information. Sep. App. 70. The Court informed the jury that only in this way will they be able to decide the case fairly based solely on the evidence and the instructions on the law and that, if they decide the case on anything else, they will have done an injustice. Sep. App. 70.

Significantly, two of the witnesses that Manuel predicated his Motion for New Trial on, Nicholas Skinner and Melissa Cartwright, were not even called to testify at trial. App. 25. Skinner claimed that Juror W taught him in Junior High School and once broke up a fight in which Skinner was involved. App. 25. Because Skinner did not ultimately testify at trial, it cannot be said that, if he had, Juror W would not have recognized him and informed the Court (as he had done with another prospective witness). Further, because Skinner did not

ultimately testify at trial, any alleged tenuous relationship such as a distant student/teacher relationship cannot be said to have given rise to any partiality on the part of Juror W. Likewise, Cartwright claimed that Juror C was one of her son's teachers. App. 31. Even if Cartwright had testified, which she did not, there is no indication that this relationship would have given rise to partiality of Juror C for MDOW or against Mr. Manuel, nor is there any indication that this relationship would have given rise to cause to strike Juror C.

Manuel's Motion for New Trial is also predicated on Mr. Manuel's son's contention that he knew Juror W because Juror W was a coach and teacher at the junior high and high school he attended. App. 27. DeAngelo Manuel contends that he was introduced to Juror W by his mother in 2004 or 2005, nearly ten years prior to the trial at issue. App. 27. Like the relationship between Skinner and Juror W, there is nothing about this relationship that would suggest any partiality on the part of Juror W. Notably, during trial, Juror W acknowledged his knowledge of DeAngelo's mother, who was called as a witness for MDOW. App. 132. Juror W informed the Court that he had known of Ms. Manuel since she finished school and that he did not believe

anything about the relationship would make it difficult for him to listen to the evidence in the case and make a decision that is fair and impartial to both sides. App. 133. Counsel for Mr. Manuel stated that he had no follow-up questions for the juror and did not "have any problem with him." App. 133. Thus, this recognized relationship between Juror W and DeAngelo Manuel's mother made no difference to Manuel. Deangelo Manuel's contentions in this regard make no showing that Juror W answered dishonestly; that he was motivated by partiality; or that, if it had been known that Juror W had this knowledge of DeAngelo Manuel, it would have supported striking Juror W for cause. *See United States v. Davis*, 690 F.3d 912, 927 (8th Cir. 2012) (finding a juror's self-disclosure of a relationship with a witness upon recognizing the witness as a reflection of the juror's honesty and as evidence that foils the movant's "unsupported claim or partiality").

Manuel's Motion for New Trial was also predicated in part on his contention that Juror W was the cousin of witness Corey Watson. App. 23. In support of the Motion, Manuel submitted an Affidavit from Watson in which he contended that Juror W was his cousin and that, weeks before trial, they both attended Watson's grandmother's funeral.

App. 23. This is insufficient evidence to necessitate a new trial for several reasons. First, a look at Watson's testimony at trial reveals that he testified that he helped Mr. Manuel move into the home at issue before it burned and regarding certain items of personal property he observed during the move. Sep. App. 72-74. It was not disputed by MDOW at trial that Manuel moved some property into the home at issue although some of the particular items that were claimed to have been moved were disputed. Second, there is no basis for the contention that, even assuming Juror W recognized Corey Watson as his cousin, this would have motivated Juror W to be impartial in a case between Mr. Manuel and MDOW Insurance Company. Finally, the circumstances of this case indicate that, even if Juror W had disclosed that Watson was his cousin, it would not have supported striking the juror for cause. Not only is this revealed by the incidental nature of Watson's testimony, but it is also revealed by the fact that Juror W disclosed that he knew Mr. Manuel's ex-wife during trial and Mr. Manuel and his attorney indicated that this arguably more significant relationship made no difference to them. It is, therefore, hard to argue

that, had Manuel known that Juror W was the cousin of Cory Watson, he would have successfully moved to strike him for cause.

Finally, Manuel's Motion for New Trial was predicated on witness Jacqueline Strother's claim that she went to school with Juror C and that Juror C married a man she was engaged to when she was 18-years old. App. 29. At trial, there was testimony that Strother did landscaping work for Mr. Manuel. Sep. App. 118. Strother testified that, while at work at a gas station, she was notified about the fire at issue in the litigation. Sep. App. 118-119. She testified that she later decided to call Mr. Manuel to make sure he had been told about the fire. Sep. App. 119. She also testified that she later went to check on the house and saw some people present so she again called Mr. Manuel and told him he may want to contact the Sheriff. Sep. App. 120. Given the nature of this testimony, any potential distant/not current friendship between Strother and Juror C does not give rise to a basis for a new trial.

In this regard, it is significant that, after Strother's testimony, a different juror informed the Judge that she had recognized Strother during her testimony. Sep. App. 126-127. This juror informed the

Court and Mr. Manuel that, like Juror C, she had gone to school with Ms. Strother. Sep. App. 128. Counsel for Mr. Manuel informed the Court that he did not have any problem with this juror. Sep. App. 128. This indicates that Juror C did not answer dishonestly or even inaccurately when she did not indicate she knew of Ms. Strother during voire dire. Further, there is no evidence that the fact that Juror C might have been acquainted with Strother in the past or that she married someone Strother was once engaged to would cause her to be partial towards MDOW or against Mr. Manuel. In addition, the fact that Manuel did not move to strike the other juror despite her having gone to school with Strother further indicates that, if it had been known that Juror C had also gone to school with Strother, she would not have been struck for cause.

As these circumstances reveal, despite Manuel's lack of concern regarding tenuous witness relationships with jurors during the course of the trial that he was aware of, after a unanimous verdict in MDOW's favor was rendered, Manuel sought to identify, through himself and his own witnesses, other alleged relationships of a comparable nature in order to claim the existence of juror bias and untruthfulness. However,

nothing regarding the alleged relationships, disclosed by affidavits of Appellant, two testifying witnesses, and two non-testifying witnesses trigger the required showing to warrant an evidentiary hearing or a new trial.

Finally, the District Court did not abuse its discretion in holding that, even if implied bias is sometimes applicable, it did not warrant a new trial or an evidentiary hearing in this case because the circumstances relating to the alleged relationships between the jurors and witnesses were not "extreme," "extraordinary," or "exceptional." *See* App. 34-37. The Court properly recognized that, "[a]lthough one juror and one witness are allegedly cousins," there were not "'close relatives' such that a new trial would be warranted under the implied bias test." *See* App. 34-37.

While Eighth Circuit law has been "inconsistent as to whether juror bias may ever be presumed," it is clear that, even if it could be in this Circuit, such a presumption would not be warranted given the tenuous relationships at issue in this case. *See Sanders v. Norris*, 529 F.3d 787, 792 (8th Cir. 2008). In *Sanders*, the Court found that, even if it assumed "that juror bias may sometimes be presumed as a matter of

law," it "concluded that the circumstances here cannot support such a presumption." *Sanders*, 529 F.3d at 792. The circumstances at issue in *Sanders* involved a juror who, unlike the jurors at issue in this case who allegedly had distant/tenuous acquaintances with witnesses, was a coroner who was "present in that capacity when the police recovered the bodies of the victims of the crimes for which [defendant] was tried," "arranged for autopsies of the bodies," and, "as a mortician," "conducted the funeral of the victim to whom he was distantly related by marriage." *Id.* Despite the ties of the juror which are more significant than those ties at issue in the present case, bias was not presumed.

In so holding, the Court recognized that, "[i]n those circuits that recognize the principle of implied bias, resort to it has been limited 'to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Sanders v. Norris*, 529 F.3d 787, 792 (8th Cir. 2008) (quoting *Peterson v. Miller*, 854 F.2d 656, 664 (4th Cir. 1988)). Examples of "exceptional or extreme situations" where implied bias may be found are where "the juror is an actual employee of the

prosecuting agency," "the juror is a *close* relative of one of the participants in the trial or the criminal transaction, or" "the juror was a witness or somehow involved in the criminal transaction." *Sanders*, 529 F.3d at 792-93 (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

None of these situations exist here and the District Court's denial of Manuel's Motion for New Trial was proper.

II. The District Court Did Not Commit Plain Error When it Admitted The Testimony of MDOW's Expert

Where there is no objection at trial, "the claim of error is forfeited" and the Court of Appeals reviews "only for plain error." *Young v. Allstate Ins. Co.*, 759 F.3d 836, 841 (8th Cir. 2014). In order to obtain relief under this standard, the appellant "must show that an obvious error affected their substantial rights and that the error seriously affected the integrity, fairness, or public reputation of judicial proceedings—a standard that is especially stringent in a civil case." *Id*. "Plain error is a stringently limited standard of review, especially in the civil context, and must result in a miscarriage of justice in order to compel reversal." *Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, (8th Cir. 2012) (quoting *Schaub v. VonWald*, 638 F.3d 905, 925 (8th Cir. 2011)).

Under the circumstances of this case, there was no obvious error in the admission of the testimony of origin and cause expert Rick Eley. In fact, his opinions satisfied that standards of reliability and relevancy required for admissibility. Further, even if there were any error in the admission of his testimony, it would not give rise to grounds for reversal under the plain error standard of review because it did not substantially effect Manuel's rights in light of the cross-examination of Eley and the admission of testimony from investigating fire department personnel.

"Under Federal Rule of Evidence 702, an expert opinion is admissible if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Presley v. Lakewood Eng'g & Mfg. Co.*, 553 F.3d 638, 643 (8th Cir. 2009). "The main purpose of *Daubert* exclusion is to prevent juries from being swayed by dubious scientific testimony." *Russell v. Whirlpool Corp.*, 702 F.3d 450, 456 (8th Cir. 2012) (quoting *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 665 F.3d 604, 613 (8th Cir. 2011)). "When making the reliability and relevancy determinations, a district

court may consider: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review or publication; (3) whether the theory or technique has a known or potential error rate and standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted in the scientific community." *Russell*, 702 F.3d at 456. "This evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands." *Id.* (quoting *Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005)). "There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant." *Russell*, 702 F.3d at 456-57 (8th Cir. 2012) (quoting *Unrein*, 394 F.3d at 1011).

Three Eighth Circuit cases are particularly instructive in revealing the admissibility of Eley's testimony as they approve of the methods and investigation underlying Eley's opinions. In *Russell*, the Eighth Circuit recognized that, "[i]n the context of fire investigations, [it] held expert opinions formed on the basis of observations and experience may meet this reliability threshold." *Russell v. Whirlpool*

Corp., 702 F.3d 450, 457 (8th Cir. 2012). In that case, the Eighth Circuit rejected the defendant's contention that plaintiff's cause and origin expert "did not use a sufficiently reliable methodology. *Id.* at 452. The expert, a certified fire investigator, formulated his opinion after he interviewed the homeowner "regarding several possible causes of the fire, including an external wood burning stove, the house's hot water system, [the homeowner's] smoking habits, candles and other open flames, space heaters, and flammable chemicals." *Id.* at 453. The expert "then walked around the house twice, taking photographs the second time." *Id.* "He examined the remaining studs left on the concrete wall in the basement" and noticed "the studs in the middle part of the wall were more significantly burned than those on the sides of the house," which led him to believe "the middle of the house was a 'suspect area.'" *Id*. The expert "found and examined several appliances, including the backup electric furnace, washer and dryer, and air handling unit, but could not find any identifiable fire patterns." *Id*. "He noticed nothing unusual about the internal wiring in the house and eliminated the circuit breaker panel as a potential cause." *Id*. The expert "found the stove and microwave, and after examining them,

noticed they were damaged more heavily on their left sides, as viewed from the front." *Id.* He determined from the homeowner that the refrigerator had been on the left of the stove and microwave, which suggested to him that "the fire spread from the refrigerator to the adjacent appliances, burning their left sides first and thereby causing greater damage." *Id.* The damage to the refrigerator indicated that it "burned longer and hotter than the other appliances." *Id.* "After considering all these factors, [the expert] concluded the fire started in the refrigerator." *Id.* The district court denied the defendant's motion to exclude the expert's opinion under *Daubert*. *Id*. at 454.

On appeal, defendant argued that the expert's testimony was inadmissible for two reasons: (1) his "failure to employ NFPA 921 automatically subjects his expert opinion to exclusion;" and (2) his "failure to use any scientific methodology for his origin-and-cause investigation makes his opinions unreliable." *Russell v. Whirlpool Corp.*, 702 F.3d 450, 455 (8th Cir. 2012). The Eighth Circuit rejected defendant's arguments. It held that the "analytical gap between the existing evidence and the opinion [the expert] offered is not so great as to require exclusion." *Id.* at 457-58. The Court found that the

defendant's arguments were "better addressed to the jury regarding the weight to be afforded [the expert's] opinion, rather than to the district court on the question of admissibility." *Id.* at 458.

In *Shuck*, the Eighth Circuit held that experts "used reliable methods when they 'observed the relevant evidence, applied their specialized knowledge, and systematically included or excluded possible theories of causation.'" *Russell v. Whirlpool Corp.*, 702 F.3d 450, 457 (8th Cir. 2012) (quoting *Shuck v. CNH America*, 498 F.3d 868, 875 (8th Cir. 2007)). The Court found that "observations coupled with expertise generally may form the basis of an admissible expert opinion." *Shuck*, 498 F.3d at 875. The Court held that the defendant's "complaints about the plaintiffs' experts are more properly directed to the jury and to the weight to be accorded the experts' opinions rather than to the question of admissibility" and that the "district court did not abuse its discretion in admitting the challenged testimony." *Id.* (noting that the *Fireman's Fund* case stands for the "general proposition that testing, if performed, must be appropriate in the circumstances and must actually prove what the experts claim it proves").

In a final comparable case, the Court rejected the defendant's argument that the expert's "conclusion a motorized power scooter caused a house fire as too speculative because the expert failed to eliminate other potential ignition sources" and found "nothing unreliable in the expert's methodology, in which he considered burn patterns, identified a point of origin, and eliminated as many alternative causes of the fire as possible." *Russell v. Whirlpool Corp.*, 702 F.3d 450, 457 (8th Cir. 2012) (discussing *Hickerson v. Pride Mobility Prods. Corp.*, 470 F.3d 1252, 1257 (8th Cir. 2006)).

In the present case, Eley's opinions were admissible because his investigation was in conformance with generally accepted fire science methodology and investigation practice and his methodology and bases for his opinion were sufficiently reliable. The admissibility of Eley's opinions are confirmed by the Court's holdings in *Russell*, *Shuck*, and *Hickerson*.

Rick Eley has been a fire investigator since 1976. App. 39. Prior to that, he worked in the criminal investigation division of the Williamson County Sherriff's department in Franklin, Tennessee for around two years. App 40. In this role, he investigated fires. App. 40.

From 1976 to 1978, he also worked with the State of Tennessee Fire Prevention Bureau and, during that time, all of his time was spent doing fire investigations. App. 40. Since 1989, he has taught fire science at the Shelby Community College. App. 41. He also serves as an instructor at the Arkansas Fire Training Academy and the Tennessee Fire Training Academy. App. 41-42. He spends at least 40 hours a year receiving training in fire science. App. 42. He is on the education committee for the National Fire Protection Association. App. 43. He has investigated around 8,000 fires in his career. App. 43. In this regard, it does not appear that even Appellant questions Eley's qualifications or experience.

Eley conducted the fire investigation at issue on September 20, 2011. App. 44. At that time, Mr. Manuel was present. App. 44-45. Mr. Manuel told him that he left town on September 10, 2011, that he had left nothing on in the house, that he had locked and secured the house, and that he was the only one who had a key. App. 45. Manuel also told him that he had experienced no electrical or mechanical problems and that he did not store any type of flammable or combustible liquids in the house. App. 45.

After talking with Manuel, Eley examined the exterior of the property. App. 45. He examined an automobile that was sitting on the left side of the house and was heavily damaged by the fire and determined from his examination that the fire did not start in the car itself. App. 45. Eley is certified through the National Association of Fire Investigators to do automobile fire investigations. App. 53. After examining the exterior, Eley examined the inside of the house. App. 45. From this examination, he was able to determine that the area of origin was the southeast corner of the home. Appellant's Appendix 46. In support of this determination, Eley testified that, based upon his experience, the area of the heaviest amount of damage will be the area where the fire started because the fire burns hotter and longer there. App. 47. Eley's examination of the area of origin revealed that all of the vertical wall studs and flooring were gone and, in other areas, the floor was still relatively intact and many of the vertical wall studs were still intact. App. 48.

In addition, Eley's opinions were based on his observation of oxidation on the sides of appliances facing the area of origin. App. 48-49. He testified that this was another sign of the direction where the

fire originated. App. 48-49. For example, Eley testified that there was oxidation on the side of the water heater facing where he believed the fire spread from and that there was more oxidation on the water heater's base, which indicated that the fire started at or near the floor level. App. 56.

Further, Eley testified that he used a process called arc mapping to examine the home's electrical wiring. App. 49. He found that the wiring near the area of origin had warped, whereas it had not in other areas of the house. App. 49. This supported his conclusion that the area of origin was in the southeast corner of the home. App. 49.

Eley testified that, once he determined the area of origin, he was able, through a process of elimination, to determine the cause of the fire. App. 50. In this regard, Eley examined all the home's appliances and found no physical evidence that any of the appliances had caused the fire. App. 50. Specifically, he examined the combination control valve, baffler, and regulator on the water heater and saw no damage that would be consistent with causing the fire. App. 60-61. From this examination, he was able to eliminate the water heater as a cause of the fire. App. 61. He similarly examined the stove, washer and dryer,

freezer, computer, refrigerator, and furnace, and eliminated them as potential causes of the fire. App. 64-65 & 69-70. He further testified that the electrical wiring did exactly what he would have expected it to do, short and melt the wire in the area where it starts. Appellant's Appendix 50. In addition to his examination, he also relied upon Mr. Manuel's belief that nothing was left on in the house, he had not had any problems in the house, and no new appliances had been installed before the fire occurred. App. 50.

Based on the information he obtained from Mr. Manuel as well as what he found from his own fire scene investigation, he determined that the fire should be classified as an incendiary fire. App. 50-51. Specifically, he determined that someone intentionally set the fire on the floor level of the living room area in the southeast corner of the house. App. 109.

Eley testified that this opinion was confirmed because it was the area where the most damage was, it was the area where there was arcing, and it was the area supported by the oxidation patterns. App. 109-110. Eley further testified that this opinion was supported by the physical evidence discussed in the NFPA. App. 112. He testified he

arrived at this conclusion by testing alternative hypothesis involving potential ignition sources and that his conclusion was consistent with all facts discovered during his examination of the fire loss. App. 112-113. These exact methods for determining the origin and cause of the fire have, as discussed above, previously been determined to be admissible by the Eighth Circuit and, as a result, there was no plain error in the admission of Eley's opinions derived from these methods in this case.

Thus, unlike the *Presley* case relied upon by Manuel, this is not a case the experts did no testing in compliance with NFPA 921, which requires that fire theories involving an appliance be substantiated by testing of exemplar applies. *Presley v. Lakewood Eng'g & Mfg. Co.*, 553 F.3d 638, 645 (8th Cir. 2009). *See also Depositors Ins. Co. v. Hall's Rest., Inc.*, 2014 U.S. Dist. LEXIS 39717 (E.D. Mo. 2014) (rejecting defendant's attempt to exclude a fire expert on the basis that "the negative corpus methodology is specifically prohibited by NFPA 921 because the methodologies utilized by the expert were sufficiently reliable). Nor is it a case where the "negative corpus methodology" complained of by Appellant was even employed.

Further, any criticisms of Eley's opinion do not give rise to plain error as a result of its admission because these criticisms were utilized during a vigorous cross-examination of Eley. "The Supreme Court has emphasized the usual tools to expose flaws in evidence remain available" and stated that "'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Russell v. Whirlpool Corp.*, 702 F.3d 450, 458 (8th Cir. 2012).

In this regard, during cross-examination, Eley was questioned regarding NFPA 921. App. 94-97. He acknowledged that, pursuant to NFPA 921, if a cause cannot be determined due to insufficient data to support a hypothesis, the cause must be classified as undetermined. App. 97. He acknowledged that he cannot determine the cause of between 5 and 10 percent of fires he investigates in a given year. App. 101. Further, Mr. Manuel questioned Eley regarding the NFPA's position on negative corpus. App. 105-107. Eley testified that he did not believe his examination could properly be classified as utilizing a negative corpus approach because of the physical examination he

performed and the information he obtained which supported his hypothesis. App. 108.

However, Eley maintained that all the physical evidence he examined supported his conclusion that the fire was incendiary in origin and that this was sufficient to render it reliable. App. 98. This included the area of heavier damage, the location of the arc mapping, his examination of the wiring and appliances, and the information obtained from Mr. Manuel. App. 98. He testified that, when he goes by a process of elimination, he eliminates everything except an incendiary fire cause. App. 98. Eley maintained that it was his position that his opinion was tested scientifically and that his examination was in conformance with NFPA 921, noting Section 18.4.4.3 of that section which provides that "There are many times when there's no physical evidence of the ignition source found at the origin, but where an ignitable or ignition sequence can be logically inferred by using other data." App. 104.

Also during cross, NFPA section 18.6.5, relied upon by Appellant, was read to the jury. App. 113-114. However, it was Eley's position that he did not base his opinion on the absence of any supportive

evidence but, rather, contended that he used a scientific process of elimination to eliminate all other potential ignition sources utilizing the physical evidence that was present. App. 114-115. He further testified that his investigative method was consistent with that used by fire investigators throughout the United States. App. 114.

In addition to Manuel's cross-examination of Eley, he was also allowed to explore the origin and cause issue with Purvis Watson, Captain of the Helena-West Helena Fire Department. Sep. App 80. Watson, who acknowledged that he was not an expert, testified that, when he saw what was left of the house, he decided he would leave it up to the insurance company's investigator to try to determine the cause of the fire. Sep. App. 84. Nonetheless, Watson testified that, in his report, he stated that the cause of ignition was undetermined. Sep. App. 85-86. Watson was also permitted to testify that, in his report, he stated there were no human factors contributing to ignition. Sep. App. 86.

Under these circumstances, there was no plain error sufficient to warrant reversal of the Jury Verdict in favor of MDOW arising from the admission of Rick Eley's testimony.

CONCLUSION

MDOW requests that the Verdict against Manuel and the Judgment entered on its behalf be affirmed. Specifically, it requests that this Court find that the District Court did not abuse its discretion when it found that Manuel did not meet the high evidentiary burden to grant a new trial or even to merit the Court conducting a hearing on his request for a new trial. MDOW also requests that this Court affirm the Jury Verdict in its favor because the District Court did not commit plain error when it admitted the testimony of MDOW's expert witness.

CERTIFICATE OF COMPLIANCE

I certify that the brief and addendum have been scanned for viruses and are virus free in compliance with Eighth Circuit Rule 28A(c).

Further, pursuant to rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the applicable type-volume limitation. Specifically, the Brief contains 9,236 words using proportional spacing and 14 point type (Century Schoolbook font, Microsoft Word), and the brief has been prepared using Microsoft Word.

/s/Ashleigh Phillips

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2015, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Ashleigh Phillips