

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

ACADIA INSURANCE COMPANY,)
)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant.)
)

CIVIL ACTION NO.
CASE: 5:13-CV-00895-CLS

EXPERT OPINION DISCLOSURE OF DAVID J. ICOVE, Ph.D., P.E., SUBMITTED
ON BEHALF OF THE DEFENDANT, THE UNITED STATES OF AMERICA

March 19, 2014

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY.....3
II. DISCLOSURE..... 5
III. PROFESSIONAL BACKGROUND AND QUALIFICATIONS 8
IV. APPLICABLE FIRE INVESTIGATION METHODOLOGY 10
 A. *NFPA 921* -- The Standard for Fire and Explosion Investigation..... 11
 B. *NFPA 1033* – Professional Qualifications for Fire Investigator 13
V. THE FIRE INVESTIGATION 16
 A. Introduction..... 16
 B. Timeline of Events 19
 C. The City of Huntsville Fire Investigation 31
 D. The EFI Global, Inc. Fire Investigation 32
 E. The February 20, 2014 Inspection 35

VI. CASE ANALYSIS AND PROFESSIONAL OPINIONS	38
A. Sufficiency of Facts or Data.....	38
1. Failure to Properly Collect, Interpret, and Preserve Fire Debris Evidence.....	40
2. Failure to Notify Interested Parties	46
3. Allowing for Spoliation of Evidence	49
4. Liability for Spoliation of Evidence.....	54
5. Impact of the Untimely Destruction of the Fire Scene.....	56
B. Use of Reliable Principles and Methods by the Investigator	59
1. Lack of Emphasis on Witness Interviews	60
2. Incorrect Interpretations of Fire Patterns and Scene Evidence	62
3. Improper Application of Fire Dynamics	64
4. Failure to Use Arc Mapping.....	70
C. Reliably Applying the Principles and Methods to the Facts of the Case	72
VII. Conclusion.....	76
VIII. Certification	77
IX. Verification	77
APPENDIX A – LIST OF DOCUMENTS, INFORMATION, AND DATA REVIEWED	79
APPENDIX B – EXPERT QUALIFICATIONS AND PUBLICATIONS	84
APPENDIX C – EXPERT WITNESS TESTIMONY—PAST FOUR YEARS	93
APPENDIX D – EXHIBITS.....	95

I. EXECUTIVE SUMMARY

Country Inn and Suites was owned and operated by Yedla Management and Hospitality Enterprises of Huntsville, Inc. (“Yedla”) and is located at 4880 University Drive in Huntsville, Alabama 35816. The motel complex consists of three separate buildings containing approximately 170 individual guest rooms. Among other lodging services, Yedla provided housing for federal employees on temporary assignment at the nearby Redstone Arsenal in Huntsville, Alabama¹ (Plaintiff’s Original Complaint, pp. 3-4).

On September 22, 2010 at approximately 10:40 p.m., a fire occurred in Building 2 of the motel. The Huntsville Fire Department responded and extinguished the fire. Subsequent investigations by the Huntsville Fire Department and EFI Global, Inc. (“EFI”), a private forensic investigation firm, both concluded that the fire occurred on the second floor balcony of Room 2207, and asserted the cause of the fire was careless use of smoking materials by the occupant of that room.

The occupant of Room 2207 was a federal employee, who admitted to an investigator from the Huntsville Fire Department that he had smoked several cigarettes on the balcony one or two days prior to the fire, but not on the date of the fire. The employee maintained he always extinguished his cigarettes in a water-filled Styrofoam cup.

¹ Plaintiff’s Original Complaint, Acadia Insurance Co., As Subrogee of Yedla Management Co., Inc. & Hospitality Enterprises of Huntsville, Inc., d/b/a Country Inn & Suites, Plaintiff, v. United States of America and Michael Siegling, Defendants, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, Document 1, Filed May 10, 2013.

On August 1, 2012, almost two years after the fire, legal counsel for the Plaintiff, Acadia Insurance Company (“Acadia”) as subrogee of Yedla, filed a damages claim² for \$1,119,536.93 against the United States Government, alleging the federal employee who occupied Room 2207 that evening negligently caused the fire. Subsequently, on May 10, 2013 attorneys for Acadia followed up their claim by filing a lawsuit³ under the Federal Tort Claims Act against both the United States of America and the employee individually, seeking damages for the alleged negligence of the employee in causing the fire. Since the filing of the lawsuit, the federal employee has been dismissed as a Defendant and the matter is now pending only as to the claims against the United States of America (“United States”).

On October 25, 2013, the Defendant United States retained the services of Dr. David J. Icove, a court-recognized expert in the field of fire investigation and a Registered Professional Engineer licensed to practice in the State of Alabama. His professional services were retained to conduct a technical peer review of this case, provide a forensic engineering analysis of the fire sequence, and assess the validity and accuracy of the experts’ reports, opinions, and methodology under the professional standards of the applicable scientific field.

Dr. Icove’s analysis and review ultimately concluded that the investigations conducted by the Huntsville Fire Department and EFI Global both failed to meet the minimum accepted

² Standard Form 95, Claim for Damage, Injury, or Death, submitted to the Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW Washington, DC, by Acadia Insurance Company a/s/o Yedla Management Co. c/o McCathern Mooty Grinke, LLP, Paul A. Grinke, 3710 Rawlins Street, Suite 1600, Dallas, Texas 75219, Legal Counsel for Claimant, signed by Paul A. Grinke on August 1, 2012 (YEDLA000919-000929).

³ Acadia Insurance Company, as Subrogee of Yedla Management Company, Inc. & Hospitality Enterprises of Huntsville, Inc. d/b/a Country Inn & Suites, Plaintiff, v. United States of America and Michael Siegling, Defendants, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, filed May 13, 2013.

scientific standards in the field of fire investigation, resulting in improper, invalid, and unreliable opinions.

Furthermore, Dr. Icové uncovered significant issues regarding both investigations, including but not limited to the fact that they failed to pursue critical data through available witnesses; failed to properly document their observations and conclusions; failed to collect relevant evidence and thereby committed spoliation; failed to identify, consider and test alternative hypotheses for the cause of the fire, resulting in “expectation bias”; and otherwise failed to employ a scientifically valid and reliable forensic investigation methodology whose results and conclusions can be considered scientifically valid and reliable. These actions, among others, undermine the conclusions and opinions of the Plaintiff’s experts and place the Defendant United States at a significant disadvantage in terms of its ability to conduct an independent forensic investigation and establish a proper defense in this case. These actions were contrary to the generally accepted professional standards of forensic fire scene investigation and reconstruction required of fire investigators.

II. DISCLOSURE

This report discloses the expert opinions of David J. Icové, Ph.D., P.E., CFEI, as submitted to Assistant United States Attorney Jack B. Hood, United States Attorney’s Office, 1801 Fourth Avenue North in Birmingham, Alabama 35203-2101. Retained on October 25, 2013 by the Defendant US, his role as an expert witness in this case is to provide a forensic engineering analysis of the fire sequence, and to peer review the validity and accuracy of the other experts’ reports and opinions. Dr. Icové visited the site of the fire incident on February 20, 2014 before completing and submitting this formal expert report under the Federal Rules of Civil Procedure, Rule 26(a)(2)(B).

This report provides a forensic engineering and investigative analysis of the origin, cause, development, and responsibility for the fire on September 22, 2010 at the Country Inn and Suites located at 4880 University Drive in Huntsville, Alabama 35816 insured by Plaintiff/Subrogee Acadia Insurance Company. This will also assess the reports, materials, evidence and professional conclusions developed by the Huntsville Fire Department and EFI Global to establish whether the methodologies of their fire investigations and their professional opinions and conclusions resulting from those investigations (upon which the Plaintiff's claims in this action are based) are scientifically valid and reliable, and complied with the applicable professional standards of the forensic fire investigation field.

These standards include the National Fire Protection Association (NFPA) "*Guide for Fire and Explosion Investigations*" (NFPA 921⁴), the "*Standard for Professional Qualifications for Fire Investigator*" (NFPA 1033⁵), and other recognized and generally accepted standards and authoritative sources in the field.

Specifically, this report: (1) performed technical peer reviews of written reports of the Plaintiff's expert witnesses; (2) determined whether the expert opinions in those reports adequately identify, document, validate and verify their findings as to the origin, cause, and effects of this fire; and (3) assessed whether the investigations conducted by the Plaintiff's expert witnesses establish relevance and reliability in their methodology, the application of their methodology to the facts and data, and the conclusions derived from their investigations.

⁴ NFPA 921. (2014 Edition). *NFPA 921 – Guide for Fire and Explosion Investigations*. Quincy, MA: National Fire Protection Association.

⁵ NFPA 1033 (2014 Edition), *NFPA 1033 – Professional Qualifications for Fire Investigator*, National Fire Protection Association, Quincy, MA.

The analysis performed and the opinions expressed herein are established to a reasonable degree of scientific and engineering certainty, conform to the generally accepted principles of forensic fire scene reconstruction and investigation, and are based upon the relevant facts, evidence and data available as of the date of this report. The recognized principles and methods of forensic fire scene investigation and the standards of professional care in conducting forensic fire investigations cited within this report serve as the basis for the opinions rendered in this report.

This forensic engineering analysis is based upon the referenced empirical data and facts established in the investigation of this fire at this time. This analysis and report may be amended or revised should additional information become known in the form of first-hand observations, further analysis, facts presented to experts prior to trial through depositions or other disclosures, or facts established in court proceedings that have a bearing on this analysis. Such information may affect the opinions rendered in this analysis and in the event such new information becomes known, this report may be revised accordingly. In the absence of such new or additional information, the expert opinions and conclusions expressed herein stand as presented.

Appendix A lists the documents, information, and data reviewed in the preparation of this report. Appendix B lists my expert qualifications and publications for the preceding ten years. Appendix C lists my expert testimony in other cases for the preceding four (4) years.

Also included after the appendices of this report in the Exhibit Section are the pertinent discovery documents this expert reviewed and formed the underlying bases for opinions in this case. These documents are referenced by the sequential YEDLA and other numbered markings that appear at the bottom of the pages and are referenced in this report.

Compensation for consulting in this matter has been billed at the rate of \$200.00 per hour.

III. PROFESSIONAL BACKGROUND AND QUALIFICATIONS

I am a court-recognized expert witness in the fields of forensic fire engineering and fire scene analysis, fire origin and cause investigation, and forensic fire scene reconstruction. My formal education includes a B.S. degree in Fire Protection Engineering from the University of Maryland, along with B.S. and M.S. degrees in Electrical Engineering and a Ph.D. in Engineering Science and Mechanics from the University of Tennessee.

I have been recognized by my peers as a Fellow in the Society of Fire Protection Engineers. I am a Certified Fire and Explosion Investigator (CFEI) by the National Association of Fire Investigators (NAFI). My background includes over 40 years of experience in the investigation of fire and explosion incidents, including over 27 years of public service as a full-time law enforcement investigator at the federal, state, and local levels. I am the Principal of Icove & Associates, LLC, a consulting engineering practice in Knoxville, Tennessee. As a registered Professional Engineer (P.E.) in the field of Fire Protection Engineering, I am licensed to practice in numerous states, including the State of Alabama.

I am a faculty member at three universities. I presently serve as a Research Professor in the College of Engineering at the University of Tennessee at its Knoxville, Tennessee main campus. Additionally, I teach graduate courses as an Adjunct Faculty member for the Professional Master of Science program in the Department of Fire Protection Engineering at the University of Maryland in College Park, Maryland. I am also an Adjunct Faculty member at the University of New Haven in the Henry C. Lee College of Criminal Justice and Forensic Sciences in New Haven, Connecticut.

Since 1992, I have participated and served as a Principal Member of the National Fire Protection Association's *Technical Committee on Fire and Explosion Investigations*, which is responsible for the publication of *NFPA 921*, widely known and universally accepted in the forensic fire investigation and reconstruction field. The role of this committee includes providing peer-reviewed standards of professional conduct for undertaking scientific fire and explosion investigations and for rendering expert opinions as to the origin, cause, development, responsibility, and prevention of such incidents.

I am a frequent lecturer and instructor on the methodologies, protocols, and scientific standards for investigating the origin, cause, and development of fires and explosions. I am the author and co-author of several leading peer-reviewed textbooks, textbook chapters, journal articles, and three expert treatises published in the field of forensic fire investigation.^{6,7,8}

I serve on several national and international technical standards-making committees including the ASTM International Committee E05 on Fire Standards, Committee E30 on Forensic Sciences, and Committee E58 on Forensic Engineering. I also serve as a peer-reviewer for several leading academic journals in fire investigation, fire protection engineering, and field archaeology.

I am familiar with the legal requirements for the foundation of expert testimony and the standards of care and professional conduct by experts in this field. I have previously been qualified and have provided testimony as an expert witness in federal, state, and local court proceedings in

⁶ DeHaan, J. D., & Icove, D. J. 2012. *Kirk's Fire Investigation* (7th Edition). Upper Saddle River, NJ: Pearson-Prentice Hall.

⁷ Icove, D. J., DeHaan, J. D., & Haynes, G. A. 2013. *Forensic Fire Scene Reconstruction* (3rd Edition). Upper Saddle River, N.J.: Pearson/Prentice Hall.

⁸ Icove, D. J., Wherry, V. B., & Schroeder, J. D. 1998. *Combating Arson-for-Profit: Advanced Techniques for Investigators* (Second Edition). Columbus, OH: Battelle Press.

both civil and criminal matters. My expert testimony also includes three appearances before United States Congressional Committees developing legislative initiatives on the crimes of arson and bombing.

IV. APPLICABLE FIRE INVESTIGATION METHODOLOGY

Professions relying upon forensic-driven interpretations and expert conclusions require as their foundation accepted science-based and peer-reviewed methodologies. Over time, professional standards in the forensic sciences evolve to the point where the experts in their respective fields develop job performance requirements founded upon science and engineering-based methodologies. Examples in the forensic science and engineering community include the international standards-making committees of ASTM International's Committee E05 on Fire Standards, Committee E30 on Forensic Sciences, and Committee E58 on Forensic Engineering.

The leading organization involved in developing fire protection engineering standards nationally and internationally is the NFPA's Standards Council, which meets periodically throughout the year to review and approve standards developed by international committees of experts in a wide range of subjects. For example, in the field of fire⁹ and explosion¹⁰ investigations¹¹, two prevailing peer-reviewed standards exist: *NFPA 921* and *NFPA 1033*, which

⁹ NFPA 921, 2014 Edition, Ch. 3.3.62, defines a *fire* as "A rapid oxidation process, which is a chemical reaction resulting in the evolution of light and heat in varying intensities."

¹⁰ NFPA 921, 2014 Edition, Ch. 3.3.53, defines an *explosion* as "The sudden conversion of potential energy (chemical or mechanical) into kinetic energy with the production and release of gases under pressure, or the release of gas under pressure. These high-pressure gases then do mechanical work such as moving, changing, or shattering nearby materials."

¹¹ NFPA 921, 2014 Edition, Ch. 3.3.67, defines a *fire investigation* as "The process of determining the origin, cause, and development of a fire or explosion."

were developed, written, and peer-reviewed by a committee of international experts and approved by the NFPA Standards Council. *NFPA 921* and *NFPA 1033* address the methodology for conducting fire and explosion investigations. Both documents serve as the universally accepted and recognized professional standard in the field.

A. *NFPA 921* -- The Standard for Fire and Explosion Investigation

The generally recognized scientific methods, standards and procedures for investigating all aspects of all types of fires are found in the 2014 Edition of *NFPA 921*, which has been published by the NFPA since its first edition in 1992. Federal investigation guides including the National Institute of Justice's *Fire and Arson, A Guide to Public Safety Personnel*¹² cite *NFPA 921* as the definitive source for the appropriate scientific methodologies to be used in forensic fire investigations and note it serves as "*a benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause determination of fires.*"

The methodology and opinions expressed in this expert report rely primarily upon the 2014 edition of *NFPA 921*, approved and issued by the NFPA Standards Council on November 12, 2013 with an effective date of December 2, 2013.

The primary purpose of *NFPA 921* is to assist individuals who are charged with the responsibility of investigating and analyzing fire and explosion incidents, and rendering opinions on the origin, cause, responsibility or prevention of such incidents (*NFPA 921*, 2014 Edition, Ch. 1.1). Its purpose is to establish guidelines and recommendations for the safe and systematic investigation or analysis of fire and explosion incidents. It also maintains a comprehensive set of

¹² NIJ. 2000. *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel* (Office of Justice Programs, Trans.) Technical Working Group on Fire/Arson Scene Investigation (TWGFASI) (pp. 48). Washington, DC: National Institute of Justice.

definitions for the terms commonly used by fire and explosion investigators, fire protection engineers, researchers, and scientists.

Each chapter and indeed each sentence in *NFPA 921* was prepared and peer reviewed by a technical committee of NFPA experts prior to its adoption. After its approval by the NFPA's Standards Council, it is then forwarded for approval by the American National Standards Institute (ANSI). The goals of ANSI include promoting and safeguarding the integrity of voluntary consensus standards in the U.S.

NFPA 921 covers virtually all aspects of fire investigation. It includes chapters relevant to this case on Basic Methodologies (Ch. 4), Basic Fire Science (Ch.5) Fire Patterns (Ch. 6), Building Systems (Ch. 7), Fire Protection Systems (Ch.8), Electricity and Fire (Ch. 9), Building Fuel Gas Systems (Ch. 10), Fire-Related Human Behavior (Ch. 11), Legal Considerations (Ch. 12), Safety (Ch. 13), Sources of Information (Ch. 14), Planning the Investigation (Ch. 15), Documentation of the Investigation (Ch. 16), Physical Evidence (Ch. 17), Origin Information (Ch. 18), Cause Information (Ch. 16), Fire Cause Determination (Ch.19), Classification of the Fire Cause (Ch. 20), Analyzing the Incident for Cause and Responsibility (Ch. 21), Failure Analysis and Analytical Tools (Ch.22). Explosions (Ch. 23), Incendiary Fires (Ch. 24), Fire and Explosion Deaths and Injuries (Ch. 25), Appliances (Ch. 16), Motor Vehicle Fires (Ch. 27), Wildland Investigations (Ch. 28), Management of Complex Investigations (Ch. 29), and Marine Fire Investigations (Ch. 30). Although all of these chapters contain information pertinent to this case, the more important items relate to the use of the Scientific Method, basic fire science, fire patterns, origin and cause determination, and legal considerations

The underpinnings of forensic fire investigation/fire scene reconstruction are the use and application of relevant scientific principles and research in conducting a systematic examination of the relevant facts that gave rise to the incident. The *Scientific Method*,¹³ which is the cornerstone principle that embraces sound fire protection engineering principles combined with approved methods of peer-reviewed research and testing, is the universal approach for conducting fire scene investigations, fire cause analysis, and fire scene reconstruction.

B. NFPA 1033 – Professional Qualifications for Fire Investigator

The methodology and opinions expressed in this report rely upon both *NFPA 921* and its companion standard, the 2014 Edition of *NFPA 1033*. Approved by the Standards Council on May 28, 2013 with an effective date of June 17, 2013, and superseding all previous editions, *NFPA 1033* specifically sets forth the minimum job performance requirements¹⁴ to ensure compliance with all scientific standards in collecting and assessing evidence, determining responsibility, and rendering conclusions as to a fire's origin, cause, and development.

Tables 1 and 2 below lists the primary responsibilities and essential requirements specified in *NFPA 1033* for fire investigators in both the public and private sectors. These enumerated requirements are retroactively applicable to all investigators involved in the September 22, 2010 fire, as well as for future investigative activities conducted in this case.

¹³ Per *NFPA 921*, 2014 Edition, Ch. 3.3.149 states the **Scientific Method** is “The systematic pursuit of knowledge involving the recognition and definition of a problem; the collection of data through observation and experimentation; analysis of the data; the formulation, evaluation and testing of a hypothesis; and, when possible, the selection of a final hypothesis.

¹⁴ Per *NFPA 1033*, 2014 Edition, Ch. 1.2.2 states that “**Job performance requirements** for each duty are the tasks an individual must be able to perform in order to successfully carry out that duty; however, they are not intended to measure a level of knowledge. Together, the duties and job performance requirements define the parameters of the job of fire investigator.

Table 1. Professional Levels of Job Performance for Fire Investigators as Cited in the Standard *NFPA 1033 – Professional Qualifications for Fire Investigator*, both 2009 and 2014 Editions.

General Requirements for a Fire Investigator	<ul style="list-style-type: none"> 4.1.2 Employ all elements of the scientific method as the operating analytical process 4.1.3 Complete site safety assessments on all scenes 4.1.4 Maintain necessary liaison with other interested professionals and entities 4.1.5 Adhere to all applicable legal and regulatory requirements 4.1.6 Understand the organization and operation of the investigative team and incident management system
Scene Examination	<ul style="list-style-type: none"> 4.2.1 Secure the fire ground 4.2.3 Conduct an interior survey 4.2.4 Interpret fire patterns 4.2.5 Interpret and analyze fire patterns 4.2.6 Examine and remove fire debris 4.2.7 Reconstruct the area of origin 4.2.8 Inspect the performance of building systems 4.2.9 Discriminate the effects of explosions from other types of damage
Documenting the Scene	<ul style="list-style-type: none"> 4.3.1 Diagram the scene 4.3.2 Photographically document the scene 4.3.3 Construct investigative notes
Evidence Collection/ Preservation	<ul style="list-style-type: none"> 4.4.1 Utilize proper procedures for managing victims and fatalities 4.4.2 Locate, collect, and package evidence 4.4.3 Select evidence for analysis 4.4.4 Maintain a chain of custody 4.4.5 Dispose of evidence
Interview	<ul style="list-style-type: none"> 4.5.1 Develop an interview plan 4.5.2 Conduct interviews 4.5.3 Evaluate interview information
Post-Incident Investigation	<ul style="list-style-type: none"> 4.6.1 Gather reports and records 4.6.2 Evaluate the investigative file 4.6.3 Coordinate expert resources 4.6.4 Establish evidence as to motive and/or opportunity 4.6.5 Formulate an opinion concerning origin, cause, or responsibility for the fire
Presentations	<ul style="list-style-type: none"> 4.7.1 Prepare a written report 4.7.2 Express investigative findings verbally 4.7.3 Testify during legal proceedings 4.7.4 Conduct public informational presentations

Sources: *NFPA 1033*, 2009 ed.; S. Sklar presentation, 2008.

Table 2. Areas to be Addressed in a Peer Review of a Complex Fire Investigation using NFPA 1033, NFPA 921, and other Relevant Standards of Professional Conduct.

Instructions: Check the appropriate block (Yes or No) to indicate the presence or absence of the following information.

YES NO

- | | | |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | Scene secured (<i>NFPA 1033, 4.2.1</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Scene safety assessment conducted (<i>OSHA, 29 CFR Section 1910</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Exterior survey conducted (<i>NFPA 1033, 4.2.2; NFPA 906-2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Interior survey conducted (<i>NFPA 1033, 4.2.3; NFPA 906-2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Burn patterns interpreted (<i>NFPA 1033, 4.2.4; NFPA 906-2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Burn patterns correlated (<i>NFPA 1033, 4.2.5; NFPA 906-2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Fire debris examined and removed (<i>NFPA 1033, 4.2.6, ASTM 1188, ASTM E 1459</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Area(s) of origin reconstructed (<i>NFPA 1033, 4.2.7</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Building performance inspected (<i>NFPA 1033, 4.2.8</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Effects of explosions discriminated from other damage (<i>NFPA 1033, 4.2.9</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Scene diagrammed (<i>NFPA 1033, 4.3.1; NFPA 906-9</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Scene photographed (<i>NFPA 1033, 4.3.2; NFPA 906-8, ASTM E 1188</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative notes taken and preserved (<i>NFPA 1033, 4.3.3; NFPA 906</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Eyewitness evidence identified, preserved, collected, packaged
(<i>NIJ Eyewitness Evidence Guide</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Evidence (physical, electronic, digital) identified, preserved, collected,
packaged (<i>NFPA 1033, 4.4.1, 4.4.2; NFPA 906-7; ASTM E 620; ASTM E
860; ASTM E 1188, ASTM E 1459; NIJ Electronic Crime Scene
Investigation Guide; FBI Guidelines for Imaging Technologies</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Evidence properly selected for analysis (<i>NFPA 1033, 4.4.3; NFPA 906-7;
ASTM E 620, ASTM E 1492</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Chain of custody documented (<i>NFPA 1033, 4.4.4; NFPA 906-7</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Evidence properly disposed (<i>NFPA 1033, 4.4.5</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Interview plan developed (<i>NFPA 1033, 4.5.1</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Interviews/interrogations properly conducted (<i>NFPA 1033, 4.5.2; NFPA 906- 6</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information properly inventoried (<i>NFPA 906-0</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information properly analyzed/correlated (<i>NFPA 1033, 4.5.3;
ASTM E 620</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information properly obtained/documented (<i>NFPA 1033, 4.6.1;
NFPA 906-1, 906-10, 906-11</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information in file is interpreted/corroborated (<i>NFPA 1033,4.6.2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information on victims/casualties documented (<i>NFPA 906-5,
NIJ Death Investigation Guide</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information need for fire modeling documented (<i>NFPA 921,
ASTM E 1355, ASTM E 1472, ASTM E 1591, ASTM E 1895</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative information need for determining occurrence of room flashover
documented (<i>NFPA 555</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Expert resources matched to needs, causation (<i>NFPA 1033, 4.6.3</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Motive/opportunity evidence established (<i>NFPA 1033, 4.6.4</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Person(s)/product(s) identified for responsibility (<i>NFPA 1033, 4.6.5</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Concise written report prepared (<i>NFPA 1033, 4.7.1; ASTM E 620, ASTM E 678,
ASTM E 1020, ASTM E 1188, ASTM E 1492, ASTM E 1459, ASTM E1546</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Investigative findings verbally presented (<i>NFPA 1033, 4.7.2</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Testimony clearly presented at legal proceedings (<i>NFPA 1033, 4.7.3</i>) |
| <input type="checkbox"/> | <input type="checkbox"/> | Public informational presentations are accurate (<i>NFPA 1033, 4.7.4</i>) |

The universally recognized and generally accepted methodology cited by both NFPA 921 and NFPA 1033 for conducting investigations into the determination of the origin and cause of fires, and related issues, is a systematic approach employing the *Scientific Method*. The basic concepts of the Scientific Method are to *observe, hypothesize, test, and conclude* using relevant and reliable scientific principles and methodologies. The Scientific Method is considered the proper approach for conducting any competent fire scene origin and cause determination, analysis, and reconstruction.

The process of the Scientific Method is recursive in that it takes *data*¹⁵ and sources of information into consideration while it continuously refines and explores various “working” *hypotheses*¹⁶ until arriving at a final validated and verified hypothesis, which becomes the professional conclusion or *opinion*.¹⁷

V. THE FIRE INVESTIGATION

A. Introduction

This report presents a forensic engineering analysis of the investigations conducted by the Huntsville Fire Department and the private investigative firm, EFI Global, into the fire that occurred on September 22, 2010, at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama, 35816. The Country Inn and Suites was owned and operated by Yedla Management and

¹⁵ Per *ASTM E1138-89*, ASTM International, *data* are “Facts or information to be used as a basis for discussion or decision.”

¹⁶ Per *ASTM E1138-89*, ASTM International, a *hypothesis* is “A supposition or conjecture put forward to account for certain facts, and used as a basis for further investigation by which it may be proved or disproved.”

¹⁷ Per *ASTM E1138-89*, ASTM International, an *opinion* is “A belief or judgment based on facts and logic, but without absolute proof of its truth.”

Hospitality Enterprises of Huntsville, Inc. (“Yedla”) and insured by Acadia Insurance Company (“Acadia”). Figure 2 shows an aerial view of the motel complex taken from a publically available Internet map site.

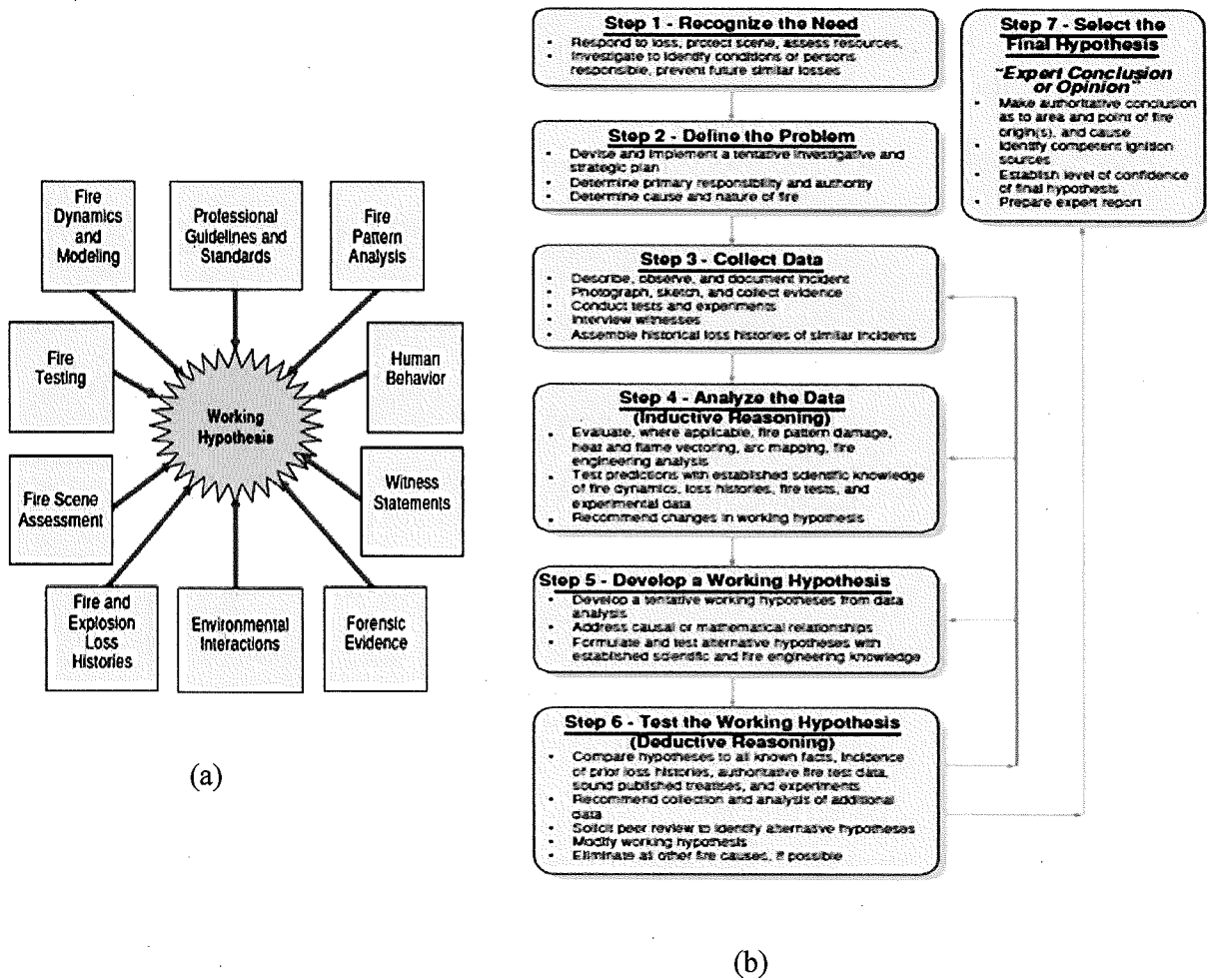


Figure 1. (a) Sources of information that may contribute to a working hypothesis; (b) Flowchart outlining the Scientific Method integral to NFPA 921 as it applies to fire scene investigation and reconstruction.

Source: Icove, D. J.; DeHaan, J. D.; & Haynes, G.A. (2013). *Forensic Fire Scene Reconstruction* (3rd Edition). Upper Saddle River, N.J.: Pearson/Prentice Hall.

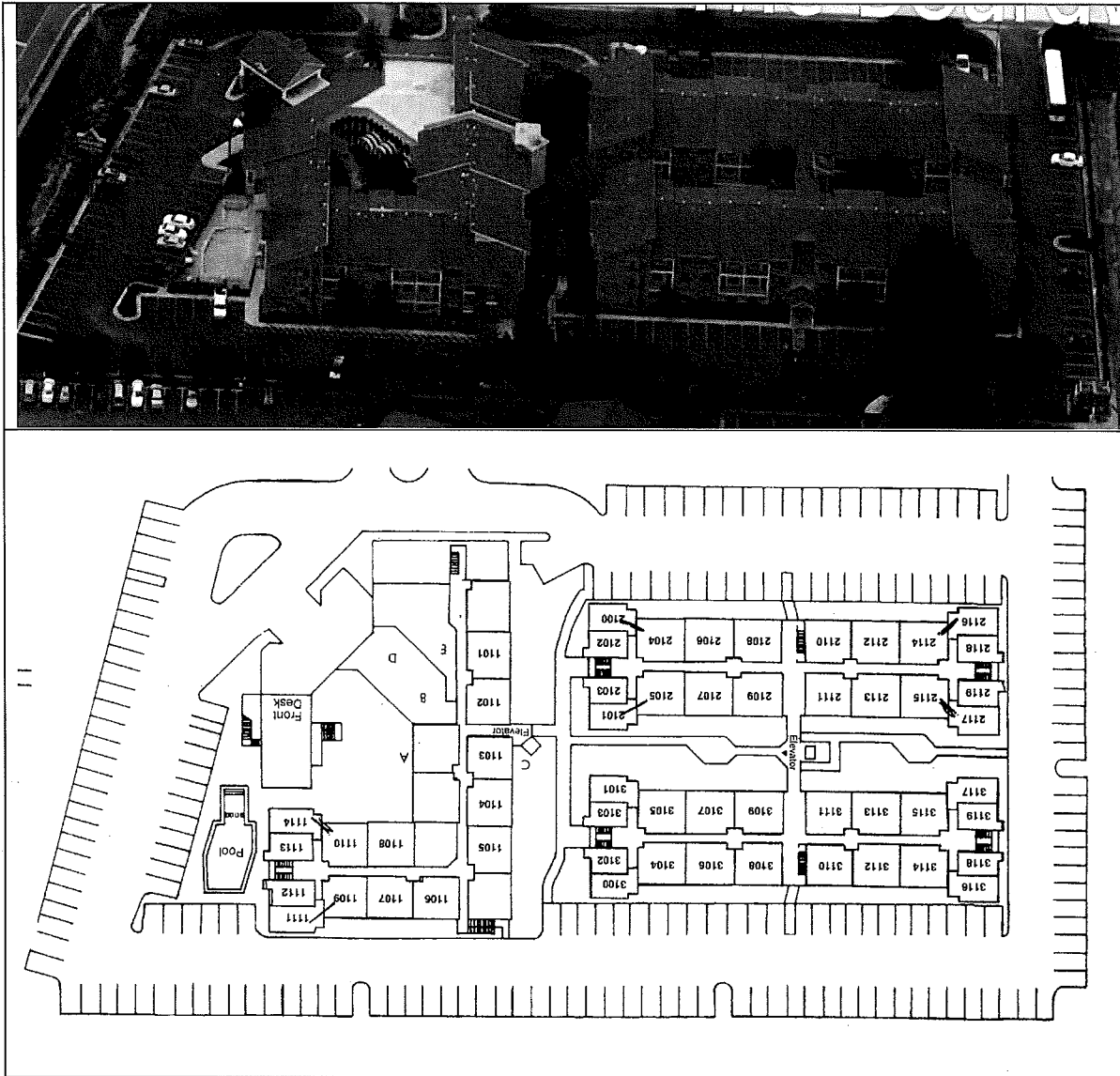


Figure 2. (Above) Country Inn and Suites owned and operated by Yedla Management and Hospitality Enterprises of Huntsville, Inc., 4880 University Drive, Huntsville, Alabama, 35816 (Bing Maps, <http://www.bing.com/maps>, retrieved February 22, 2014) and (Below) Room layout of the Country Inn and Suites as provided during the inspection on February 20, 2014.

Investigations by the Huntsville Fire Department and EFI Global, a private investigation firm, both concluded that the fire originated on the second floor balcony of Room 2207, and the

cause of the fire was careless use of smoking materials. Acadia's lawsuit in this action alleges that a negligent act of a federal employee residing in Room 2207 caused this fire.

Since the fire incident that is the basis of this lawsuit occurred on September 22, 2010, all of the investigations, both public and private, at the time of issuing their reports should have followed the operational procedures and protocols within the 2009 Edition of *NFPA 1033*. There are presently 2014 Editions of *NFPA 1033* and *NFPA 921* as approved by the NFPA Standards Council¹⁸ and those most recent editions supersede all previous editions.

According to accepted principles and practice in the field of fire investigations, these newly published 2014 editions should now be relied upon for purposes of expert disclosures and testimony in present and future proceedings, since they now supersede the previous editions of these standards.

B. Timeline of Events

NFPA 921 states that the careful study and analysis of a sequence of events during a fire can be useful in determining facts that can support or refute witness statements, identify gaps or inconsistencies in information, and provide support in the analysis, reconstruction, and progression of the fire (*NFPA 921*, 2014 Edition, Ch. 18.4.6). The events in timelines may include those occurring before, during, or after the fire incident (*NFPA 921*, 2014 Edition, Ch. 22.2.1.1). The relevant events in this incident are detailed below and summarized in Table 3:

¹⁸ *NFPA 921* approved by the NFPA Standards Council on November 12, 2013 with an effective date of December 2, 2013; *NFPA 1033* approved by the NFPA Standards Council on May 28, 2013 with an effective date of June 17, 2013. Both *NFPA 921* and *NFPA 1033* are American National Standards Institute (ANSI) approved documents.

Table 3. Summary of Events regarding the fire on September 22, 2010 at Country Inn and Suites, 4880 University Drive, Huntsville, Alabama, 35816.

Date	Time	Event	Reference
Sept. 22, 2010	10:40 p.m.	Huntsville Fire Department (HFD) received a fire alarm at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama.	YEDLA002966
	10:45 p.m.	First HFD unit, Engine 11, arrived to find smoke emerging from the courtyard.	
		District Chief Michael D. Dodson observed upon arrival that the balconies of the second and third floors of one of the buildings were completely engulfed in flames.	
		Fire extinguished using a 1¾ inch fire hose, salvage and overhaul conducted, and the building checked for any fire extensions.	
	10:50 p.m.	Chief Dodson requested Fire Investigator Daniel R. Wilkerson come to the scene.	
	11:11 p.m.	Inv. Wilkerson arrived at the fire scene.	
		Inv. Wilkerson requested Electrical Inspector Doug Smith, who in turn requested Building Inspector Skip Stinson. Inspectors Smith and Stinson declared building unsafe to occupy	FBI000081 FBI000080
		Inv. Wilkerson interviewed and took statement from Michael K. Siegling, the occupant of Room 2207.	YEDLA000917-000918
Sept. 23, 2010	2:44 a.m.	Inv. Wilkerson left the fire scene	
	3:00 p.m.	Inv. Wilkerson returned to inspect the fire scene. He interviewed Wanda Morgan, an employee who had received a suspicious telephone call that morning.	YEDLA000915-000916, FBI-000078
		Phil Yarbrough, representing Acadia Insurance Company, assigned the fire loss to Cook Claims Service. Specific File Requirement No. 8 in the assignment letter to Cook Claims Service was " <i>Thoroughly address subrogation and salvage.</i> "	YEDLA002912
		Jim Gowder, Adjuster, Cook Claims Service, requested an origin and cause investigation of fire, to be conducted by EFI Global, Inc.	EFI Report, p.2; YEDLA002943
Sept. 27, 2010		Jim Gowder, Adjuster, Cook Claims Service, issued his First Report on the Country Inn and Suites fire to Phil Yarbrough, Union Standard Insurance, Irving, Texas.	YEDLA000468

		Mr. Growder's First Report declares "SUBROGATION: There appears to be the possibility of subrogation."	YEDLA000470
		Rod Williams, EFI Global, Franklin, Tennessee, commenced his fire investigation into the fire's origin and cause.	YEDLA002942-002986
		Rod Williams, inspected an external lighting fixture and concluded damage to the lighting fixture and wiring was external due to the fire.	YEDLA002946
		Rod Williams concluded that discarded cigarettes ignited the fire.	YEDLA002947
Oct. 5, 2010	12:42 p.m.	Inv. Wilkerson filed his investigation report and concluded that the point of fire origin was on the second floor balcony of Room 2207 in Building 2.	YEDLA002966
Oct. 11, 2010		HFD's Fire Prevention Bureau inspected and cited the motel for numerous fire code violations.	FBI-000070
Oct. 11, 2010		HFD's Fire Prevention Bureau inspected and granted the motel an occupancy load of 50 persons for the Common Room.	FBI-000071
Oct. 11, 2010		HFD's Fire Prevention Bureau inspected and granted the motel an occupancy load of 100 persons for the Breakfast Room.	FBI-000073
Oct. 12, 2010		Rod Williams, EFI Global, submitted his report to Jim Gowder, Cook Claims Service, for Union Standard Insurance Company.	YEDLA002942-002986
		EFI Global report stated "There were no items collected during the investigation of this fire" and "There were no safety code violations noted"	EFI, p. 5; YEDLA002946; EFI, p. 3; YEDLA002944.
Oct. 21, 2010		Second report to Phil Yarbrough, Union Standard Insurance, by Jim Gowder of Cook Claims Service, Inc. mentioned wiring not compliant with the electrical code was found damaged on the third floor.	YEDLA002525
Jun. 3, 2011		HFD's Fire Prevention Bureau inspected and cited the motel for numerous fire code violations. Present are inspectors from other City of Huntsville organizations.	FBI-000063
Jun. 3, 2011		City of Huntsville inspected and declared 4880 University Drive, NW, Buildings 1 & 3, as unsafe due to numerous building, electrical, and fire code violations.	YEDLA000344-000345, FBI-000119, FBI-000127.

Jun. 10, 2011		City of Huntsville Dept. of Community Development and Code Enforcement issued official notices and declared 4880 University Drive, NW, Buildings 1 & 3, as unsafe. The Notice ordered corrections before Aug. 9, 2011.	FBI-000118, FBI-000126
Aug. 25, 2011		HFD's Fire Prevention Bureau inspected and found smoke detectors satisfactory in sleeping rooms.	FBI-000062
Aug. 31, 2011		HFD's Fire Prevention Bureau inspected and found a re-inspection is necessary after compliance with concessions made by the Plans Examiner for the City of Huntsville.	FBI-000060
Aug. 31, 2011		HFD's Fire Prevention Bureau inspected and cited numerous fire code violations.	FBI-000061
Oct. 12, 2011		HFD's Fire Prevention Bureau inspected and found Building 3 satisfactory.	FBI-000051
Aug. 1, 2012,		Plaintiff, Acadia Insurance Company, as subrogee of Yedla, filed a damage claim for \$1,119,536.93 against the United States Government alleging the federal employee who occupied Room 2207 that evening caused the fire.	YEDLA000919- 000929
Apr. 23, 2013		HFD's Fire Prevention Bureau inspected and granted the motel an occupancy load of 50 persons for the Common Room.	FBI-000049
May 10, 2013		Plaintiff, Acadia followed up their claim by filing a federal lawsuit against both the United States of America and the employee under the Federal Tort Claims Act seeking damages for the alleged negligence of the Government employee	
Oct, 2013		The motel's ownership doing business as the Country Inn & Suites is changed from K.R. Yedla, a sole proprietorship, to Utsav, LLC., a domestic limited liability company.	
Oct. 31, 2013		HFD's Fire Prevention Bureau inspected and cited the motel for numerous fire code violations.	FBI-000048
Feb. 20, 2014		Plaintiff, Acadia allows for an inspection by the Defendant's expert of the motel.	
Mar. 3, 2014		Plaintiff's FRCP 26(A)(2) expert disclosures	

On September 22, 2010 at 10:40 p.m., the Huntsville Fire Department received an alarm notification and report of a fire at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama, 35816.

On September 22, 2010 at 10:45 p.m., the first Huntsville Fire Department unit, Engine 11, arrived to find smoke emerging from the courtyard. District Chief Michael D. Dodson, in command of the firefighting suppression units, observed that the balconies of the second and third floors of one of the buildings were completely engulfed in flames. The fire was extinguished using a single 1¾ inch fire hose. Salvage and overhaul were then conducted, and the building was checked for any extension of the fire.

On September 22, 2010 at 10:50 p.m., Chief Dodson requested Fire Investigator Daniel R. Wilkerson come to the scene.

On September 22, 2010 at 11:11 p.m., Investigator Wilkerson arrived at the fire scene.

On September 22, 2010, Investigator Wilkerson requested Electrical Inspector Doug Smith to come to the fire scene. Upon arrival, Inspector Smith requests Building Inspector Skip Stinson to come to the fire scene. Due to the fire damage, Inspectors Smith and Stinson state to Investigator Wilkerson that the building was unsafe to occupy (Acadia Insurance Company v. United States of America, Document 1, filed May 10, 2013, p. 32; YEDLA002966).

On September 22, 2010 Investigator Wilkerson conducted his investigation, and interviewed Michael K. Siegling, the occupant of Room 2207. The transcript of Mr. Siegling's statement follows (Acadia Insurance Company v. United States of America, Document 1, filed May 10, 2013, pp. 40-41; YEDLA000917-000918):

Figure 3. Transcript of the short statement taken by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding the fire on September 22, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama. This is the only witness statement found in Investigator Wilkerson's file.

22 SEP 2010

I Michael K. Siegling was awakened by a fire alarm at the hotel at approximately 10:40 p.m. I went to the hallway and did not smell smoke nor see anyone vacating the building. Approximately five minutes later, another hotel guest knocked on my door and informed me there was a fire in our building. I then opened my balcony door, looked to the left and observed flame to the left of my balcony. End of statement.

Q When was the last time that you smoked cigarettes on the balcony?

A. I don't remember (yesterday or the day before yesterday)

Q How did you extinguish the cigarettes when you were done?

A. Styrofoam cup with water.

Q Before the fire, when was the last time you were on the balcony?

A. Around 5 or 6 today

Q What was on the balcony when you was [sic] last on the balcony?

A. Beer can

Michael Siegliy [sic]
180 Grand Avenue
Oakland, CA 94612
(510) 251-4022

Statement taken by Daniel Wilkerson /s/

On September 23, 2010 at 2:44 a.m., Investigator Wilkerson left the fire scene.

On September 23, 2010 at approximately 3:00 p.m., Investigator Wilkerson returned to the fire scene to examine and inspect the building. He interviewed Wanda Morgan, an employee of Country Inn and Suites, who had received a telephone call that morning from an individual named Mike LaGrange claiming to be from the Huntsville Fire Marshal's Office and leaving telephone number 678-615-7705. Investigator Wilkerson had Wanda Morgan call the individual back and he

spoke directly to Mr. LaGrange who then hung up the telephone (Acadia Insurance Company v. United States of America, Document 1, filed May 10, 2013, pp.38-39; YEDLA000915-000916; FBI-000078).

On September 23, 2010, Phil Yarbrough, Union Standard, a Berkley Company representing Acadia Insurance Company, assigned the Country Inn and Suites fire loss to Cook Claims Service. Specific File Requirement Number 8 listed in the assignment letter to Cook Claims Service was “*Thoroughly address subrogation and salvage*” (YEDLA002912).

On September 23, 2010, Jim Gowder, Adjuster for Cook Claims Service, requested an origin and cause investigation of the Country Inn and Suites fire. EFI Global, Nashville Service Center, 1880 General George Patton Drive, Building B, Suite 203, Franklin, Tennessee 37067 was contacted and assigned (EFI Global Investigation Report, p.2; YEDLA002943).

On September 27, 2010, Jim Gowder, Adjuster for Cook Claims Service, issued his First Report regarding the Country Inn and Suites fire to Phil Yarbrough, Union Standard Insurance, P.O. Box 152180, Irving, Texas 75015-2180. In his report, Mr. Gowder stated: “*According to the [Huntsville] Fire Marshall, the suspected perpetrator admitted smoking on the balcony [of Room 2207] but denied causing the fire. Per you instructions, we have engaged EFI Global to make a cause and origin determination and they will coordinate their investigation with the Fire Marshall.*” (YEDLA000468).

On September 27, 2010, under a heading in Mr. Gowder’s First Report, he also declares “*SUBROGATION: There appears to be the possibility of subrogation since the origin can reportedly be determined and the individual who was smoking has been identified. We will report further upon receipt of the C & O Report and that of the Fire Marshall. The Fire Marshall stated*

the FBI agent claims governmental immunity. We do not believe this will apply nor will it relieve the agent of personal responsibility." (YEDLA000470).

Of particular note is that this paragraph titled "*SUBROGATION*" only appears in Mr. Growder's First Report (September 27, 2010, YEDLA000470) while this paragraph caption appears with the text redacted from his Second Report (October 10, 2010, YEDLA002526).

On September 27, 2010, Roderick S. "Rod" Williams, Fire Investigator, EFI Global, Nashville Service Center, 1880 General George Patton Drive, Suite 203, Franklin, Tennessee 37067, commenced his investigation into the origin and cause of the fire at the Country Inn and Suites. He examined the fire scene and based upon the lowest burn damage along with fire patterns, concluded that the fire started in the northwest corner of the balcony to Room 2207.

During his examination of the fire scene, he came across an external lighting fixture on the porch which he examined, cut away the damaged wiring, removed an electrical outlet, discarded and then concluded that all the damage to the lighting fixture was external due to the fire. He stated in his report, "*The wiring was affected by the fire at a wall hung light fixture that was exposed to the fire spread on the balcony. As the fire spread away from the area of origin, the wiring was damaged consistent with random exposure damage*" (YEDLA002946).

He concluded that evidence from improperly discarded cigarettes ignited the fire. His report, filed October 12, 2010, states, "*There were no items collected during the investigation of this fire*" (EFI Report. P. 5; YEDLA002946). His file contains no sign-in sheet indicating that any potential interested parties were notified or attended this examination and subsequent discarding and abandonment of potential evidence.

On October 5, 2010 at 12:42 p.m., Investigator Wilkerson filed his half-page investigation report as the “Arson Narrative” in the Huntsville Fire Department Incident Report. After examining the scene, searching and finding a pack of cigarettes and a lighter on the television table just inside the door, and taking a short statement from the room’s occupant Michal [sic] Siegling, he concluded that the point of fire origin was on the second floor balcony of Building 2, Room 2207. There is no indication in the report whether Investigator Wilkerson took any photographs, make any scene sketches, or secured evidence (Huntsville Fire Department Report, Section: Arson Narrative, (Acadia Insurance Company v. United States of America, Document 1, filed May 10, 2013, p. 32; YEDLA002966; Huntsville Fire Department Report, Arson Narrative Section).

Figure 4. A transcription of the complete narrative report by Investigator Daniel R. Wilkerson, Huntsville Fire Department, regarding the fire on September 22, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama.

Arson Narrative:

I was requested on scene by District Chief Kay. When I arrived on scene, I was told that there had been a fire.

During my exterior examination, I noted a hotel building that had fire damage to the one balcony on the second floor 2207 and two balconies on the third floor 2307 and 2309. The building had been evacuated.

During my interior examination, I noted heavy fire/smoke/heat damage to a room on the third floor 2307 that extended to the attic. In the second floor apartment 2207, there was a pack of cigarettes and a lighter on the tv table just inside the door. I requested Electrical Inspector Doug Smith. See Doug Smith's report. Building Inspector Skip Stinson, also, responded to the scene per Doug Smith's request. Due to the fire damage Doug Smith and Skip Stinson stated that the building was unsafe to occupy.

I interviewed the occupant of room 2207, Michal [sic] Siegling.

In conclusion, the point of origin was on the second floor balcony. The cause of the fire was careless use of smoking materials.

10/05/2010 12:42:22 PM DRW

On October 11, 2010, Huntsville Fire Department's Bureau of Fire Prevention inspected the Country Inn & Suites, and cited them for exits signs and emergency lighting, prohibited storage of combustibles in mechanical and electrical rooms, and the need for annual certification of the alarm system (FBI-000070).

On October 11, 2010, Huntsville Fire Department's Bureau of Fire Prevention inspected the Country Inn & Suites, and granted them an occupancy load of 50 persons for the Common Room (FBI-000071).

On October 11, 2010, Huntsville Fire Department's Bureau of Fire Prevention inspected the Country Inn & Suites, and granted them an occupancy load of 100 persons for the Breakfast Room (FBI-000073).

On October 12, 2010, Rod Williams, EFI Global, submitted his report¹⁹ to Jim Gowder, Cook Claims Service, for Union Standard Insurance Company. The report listed as enclosures: 28 photographs, scene diagram, fire report, and an additional materials packet containing unmounted photographs. The report stated "*There were no items collected during the investigation of this fire*" (EFI Report, P. 5; YEDLA002946) and "*There were no safety code violations noted*" (EFI Report, p. 3; YEDLA002944). Furthermore, there is no mention in the report of any investigator's retention, storage, or submission of physical evidence for further forensic testing or evaluation.

¹⁹ Fire Investigation Report One and Final, by EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, September 22, 2010, Claim Number 10070791, EFI File Number 94216-08709, prepared for Union Standard Insurance Company in care of Jim Gowder, Cook Claims, signed by Rod Williams and reviewed by Metts Hardy, October 12, 2010.

On October 21, 2010, in a report to Phil Yarbrough, Union Standard Insurance, Jim Gowder of Cook Claims Service, Inc. mentioned the existence of wiring not compliant with the electrical code which was found damaged on the third floor (YEDLA002525).

On June 3, 2011, Huntsville Fire Department's Bureau of Fire Prevention inspected the Country Inn & Suites, and cited them for storage in electrical rooms, open wiring noted throughout all the buildings including rooms and corridors, rated fire doors propped open, compromised fire ratings of egress corridors with penetrations in many locations. Present for the inspection were representatives from the Huntsville Police Department, Building Inspection, Electrical Inspection, and Community Development, and deemed the building unsafe and condemned (FBI-000063).

On June 3, 2011, the City of Huntsville, Alabama, Department of Community Development and Code Enforcement Division, inspected and declared Hospitality Enterprises of Huntsville, Inc., 4880 University Drive, NW, Building 1, as unsafe due to numerous building, electrical, and fire code violations. The building was ordered to be vacated immediately, until the violations were corrected. Electrical violations included open electrical splices in walls and corridors, improperly installed lighting fixtures, telephone cords run under carpets, and improperly sized junction boxes. The notice gave the property owners until August 8, 2011 to correct the deficiencies (YEDLA000344-000345).

On June 3, 2011, the City of Huntsville Inspection Department issued an Investigation Report at 2:00 p.m., by Inspectors Bruce Owens, James Campbell, and Eric Weber for property located at Country Inn & Suites, 4880 University Drive, Huntsville. The summary for the Investigation Report states, "*Renovations under permit have been taking place in building number two due to a fire that occurred In September of 2010. While making an inspection on the building*

under permit, major code violations were identified to be throughout the entire complex. Records verification identified the work that was performed without permit or inspection and was a serious threat to the life, health, & safety of the building occupants.” Fifteen major codes violations are cited by the report (FBI-000119, FBI-000127).

On June 10, 2011, the City of Huntsville, Alabama, Department of Community Development and Code Enforcement Division, based upon their inspection on June 3, 2011, issues Official Notice Number 11-4264UB and 11-4252US to Hospitality Enterprises of Huntsville, Inc., with numerous electrical, structural, building, and fire code violations in Building Nos. 1 and 3. The Notice orders violations corrected prior to August 9, 2011 (FBI-000118, FBI-000126).

On August 25, 2011, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites, and tested and found satisfactory the smoke detectors in sleeping rooms (FBI-000062).

On August 31, 2011, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites, and notes that a re-inspection is necessary after the fire inspector reads the concessions made by Eric Weber, Plans Examiner, City of Huntsville (FBI-000060).

On August 31, 2011, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites, and it cited stops in rated doors, along with unsatisfactory conditions in laundries, maintenance shop, and trash collection areas (FBI-000061).

On October 12, 2011, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites, Building 3, and notes a final-satisfactory rating (FBI-000051).

On August 1, 2012, legal counsel for the Plaintiff, Acadia Insurance Company (“Acadia”), as subrogee of Yedla, submitted a damage claim for \$1,119,536.93 against the United States Government alleging the federal employee who occupied Room 2207 that evening had caused the fire.

On April 23, 2013, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites and grants an occupant load permit for 50 persons in the Commons Area (FBI-000049).

On May 10, 2013, attorneys for Acadia followed up their claim by filing a lawsuit in this court against both the United States of America and the federal employee, under the Federal Tort Claims Act seeking damages for the alleged negligence act of the federal employee. Since the filing of the lawsuit, the federal employee has been dismissed as a party Defendant.

Sometime in late 2013, the motel’s ownership doing business as the Country Inn & Suites is changed from K.R. Yedla, a sole proprietorship, to Utsav, LLC., a domestic limited liability company.

On October 31, 2013, Huntsville Fire Department’s Bureau of Fire Prevention inspected the Country Inn & Suites reports unsatisfactory conditions for fire exit doors, obstructed, egress paths, and emergency lights (FBI-000048).

C. The City of Huntsville Fire Investigation

The official public sector investigation in this case was conducted by Daniel R. Wilkerson with the Huntsville Fire Department in Huntsville, Alabama. Investigator Wilkerson responded to the scene of the fire while the suppression operations were still continuing. He assessed the situation, concluded that the fire started on the balcony of Room 2207, and interviewed its

occupant. The only other statement ever taken by Investigator Wilkerson was of a motel employee who received a telephone call the next morning after the fire which was deemed “suspicious.”

Investigator Wilkerson filed a half-page report as an addendum to the department’s fire incident report. There is no indication in this case that Investigator Wilkerson took any photographs, prepared any diagram of the scene, interviewed any additional witnesses, or secured any physical evidence in the course of his investigation.

The discovery does not show that the curriculum vitae for Investigator Wilkerson has been produced as required for expert witnesses in federal litigation. However, the Plaintiff’s expert designation²⁰ states that Investigator Wilkerson is “*an expert in the field of cause and origin fire analysis, fire pattern investigation analysis, fire prevention, evaluation of fire loss, and the National Fire Protection Association (NFPA) codes and standards.*” The professional background information, educational history, training and experience of this witness is needed to more fully assess the understanding and application of his expert testimony.

D. The EFI Global, Inc. Fire Investigation

The private sector investigation in this case was conducted by Rod Williams, a Fire Investigator employed by EFI Global and based in Franklin, Tennessee. Investigator Williams spent only one day at the fire scene on September 27, 2010 conducting his investigation. He did not conduct any witness interviews, with the exception of contacting Huntsville Fire Investigator Wilkerson. He confirms in his report that he did not collect any evidence in this case (EFI Report,

²⁰ Plaintiff’s Expert Designations Pursuant to Fed. R. Civ. P. 26(A)(2), Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, March 3, 2014, pp. 3-4.

p. 5; YEDLA002946) or recommend to his client that any other potential interested parties be placed on notice and informed of available dates to participate in a joint fire scene inspection.

Investigator Williams' report had numerous shortcomings in documentation and evidence collection as required by *NFPA 921* and *NFPA 1033*. Investigator Williams drew only two scene diagrams consisting of a map/diagram of the Country Inn and Suites property and a second diagram showing the position of photographs taken of Room 2077.

Investigator Williams took 172 photographs (YEDLA002990-003161) yet failed to produce the standard narrative log describing each photo (See *NFPA 921*, 2014 Edition, Fig. A.16.3.2(f) Sample Form for Photograph Log). The photos of electrical circuit panels were blurred, were not contained in his report, and did not document the locations of and areas covered by the individual circuit breakers in each of the panels as required (See *NFPA 921*, 2014 Edition, Fig. A.16.3.2(g) Sample Form for Electrical Panel Data).

Investigator Williams located but failed to collect physical evidence to support his hypothesis of the fire (See EFI Report, P. 5; YEDLA002946, "*There were no items collected during the investigation of this fire*"). His report indicated (EFI Report, p. 8; YEDLA002949) the location of a beer can and discarded cigarette butts below the balcony on ground level, yet Investigator Williams failed to secure, collect, and preserve these items. He also failed to note and document the location of the electrical lighting fixture and wiring on the balcony that he subsequently examined and discarded.

The Plaintiff in this case listed Investigator Williams as a retained expert witness in its discovery filing²¹ on December 20, 2013. In answer to Interrogatory Number 1, Part 2, Plaintiff represented that Investigator Williams followed *NFPA 921* and *NFPA 1033* in conducting his investigation. In Plaintiff's expert designations filed on March 3, 2014, Investigator Williams has produced what he considered to be a report dated February 18, 2014 containing all of the information required under Federal Rules of Civil Procedure, Rule 26(a)(2). In this report²², Mr. Williams confirms that he followed *NFPA 921* and *NFPA 1033* in conducting his investigation, and states his systematic examination of the fire scene and adhered to "*the scientific method where the compilation of factual data, as well as an analysis of those facts, should be accomplished objectively, truthfully, and without expectation bias, preconception, or prejudice.*"

Investigator Williams' curriculum vitae was previously included as a three-page document summarizing his professional experience, licensures, court qualifications, education, affiliations, and specialized education (YEDLA002987-002989). Of particular note in the curriculum vitae is that Mr. Williams has received no specialized education of any kind in fire investigation issues since a class on expert witness testimony nearly eight (8) years ago in 2006.

²¹ Plaintiff's Objections and Answers to Interrogatories, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, , filed December 20, 2013.

²² Federal Rule 26 Statement of Rod Williams, EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, Date of Loss: September 22, 2010, Claim Number Not Given, EFI File Number 94216-08709, signed by Rod Williams, February 18, 2014, YEDLA003164-003169.

E. The February 20, 2014 Inspection

Your expert visited the site of the fire incident on February 20, 2014 before completing and submitting this formal expert report. Attending this inspection²³ representing the Plaintiff was their attorney, Carl L. Evans, Esq., McCathern, P.L.L.C., Regency Plaza, 3710 Rawlins Street, Suite 1600, Dallas, Texas 75219.

Representing the motel was Ms. Seyma Njubigbo, Assistant General Manager, Country Inn & Suites by Carlson, 4880 University Drive, Huntsville, Alabama 35816, telephone number (256) 837-4070. Ms. Njubigbo indicated that since late 2013 (possibly Oct. 2013) the motel is now under new ownership. Website searches through the Alabama Secretary of State's Office²⁴ and the City of Huntsville Business License Tax Office²⁵ search confirms that in 2013 the motel's ownership doing business as the Country Inn & Suites changed from K.R. Yedla, a sole proprietorship, to Utsav, LLC., a domestic limited liability company.

The inspection consisted of exterior and interior photographs of the repaired motel, specifically of Room 2207 and a view from Room 3209 directly across the courtyard. Both rooms were unoccupied at the time of the inspection. Also inspected were the stairwells, electrical panels, and the third floor attic access.

²³ Defendant's Third Request for Production or Inspection to Plaintiff, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, January 24, 2014.

²⁴ Business Entity Details for Utsav, LLC, doing business as Country Inn and Suites, Huntsville, Entity Identification Number 036-936, Website <http://arc-sos.state.al.us>, retrieved February 22, 2014.

²⁵ City of Huntsville, Business License Tax Search for Utsav, LLC, doing business as Country Inn and Suites, Huntsville, Website <http://lictaxsearch.huntsvilleal.gov>, retrieved February 22, 2014.

Since the fire damage to Room 2207, Room 2307, and the third floor attic space had already been repaired, the February 20, 2014 inspection did not produce any evidence of lead value in this case that could provide insight into the origin and cause of the fire on September 22, 2010. Also, any necessary destructive or evasive internal examinations behind the walls of the electrical, plumbing, and structural conditions could also not be accomplished to confirm that the repairs had remedied deficiencies which could have served as competent and accidental ignition sources or support alternative hypotheses for the fire on September 22, 2010.

However, several potential fire, building, and electrical code irregularities were noted during this inspection that are worth mentioning. These irregularities included, but were not limited to those documented in the following photographs (Figure 5).

The irregularities noted during were all in the presence of Ms. Seyma Njubigbo, the motel's Assistant General Manager. Figure 5 (Top left) shows a fire extinguisher missing which is missing from alarmed cabinet on the third floor down the hall from Room 2307. Figure 5 (Top right) documents a fire door leading to second floor which does not close properly due to it being too large for the Underwriters Laboratory listed frame.

Figure 5 (Bottom) shows the third floor attic space near Room 2307 where exposed unknown wiring emerges from a broken plastic pipe in the foreground as well as the existence of an unknown penetration opening through a firewall or partition in the rear background which is partially covered with a piece of plywood. Note also the piece of blue carpeting laying across the exposed electrical wiring. The cables in the front foreground appear to be those from the cable/video television installation. The green handle of a valve, assumed to be controlling water is in the foreground.



Figure 5. Irregularities noted during the February 20, 2014 inspection of the Country Inn & Suites by Carlson, 4880 University Drive, Huntsville, Alabama 35816. (Top left) Fire extinguisher missing from alarmed cabinet, (Top right) Fire door leading to second floor which does not close properly, and (Bottom) Third floor attic space showing exposed unknown wiring and penetration opening through a firewall or partition in background.

VI. CASE ANALYSIS AND PROFESSIONAL OPINIONS

Based upon my analysis of this case, along with my training, education, and professional experience, I reached several conclusions regarding the facts of this incident and the opinions expressed by the Plaintiff's experts. In establishing whether the opinions of those experts are the product of reliable principles and methods, I examined the following factors:

A. Did the expert base the analysis upon sufficient facts or data?

B. Did the expert use reliable principles and methods?

C. Did the expert reliably apply the principles and methods to the facts of this case?

Note that the primary purpose for the review of this case does not concern these investigators' knowledge, experience, training, and education, as that was not material to the analysis. Rather, the primary issue is the *reliability of their methodologies, the application of those methodologies to the facts, and the reliability of their opinions derived from their investigations.*

A. Sufficiency of Facts or Data

In applying *NFPA 921*, *NFPA 1033*, and other recognized professional standards that relate to fire and explosion investigations, there is an overarching duty to collect and preserve all information, data, and objects of evidentiary value.²⁶ In fact, the scientific method requires a

²⁶ Clinkinbeard, K. J., & King, G. A. (2008). *Spoliation: Can the Investigator be Sued for Destruction of Evidence?* Paper presented at the International Symposium on Fire Investigation Science and Technology, ISFI 2008, Cincinnati, OH., May 18 -21, 2008.

comprehensive collection of facts and data (see Figure 1, *supra*). Furthermore, a fire investigation report produced per *NFPA 1033* (2009 and 2014 Editions, Ch. 4.7.1) should be prepared so that it:

... accurately reflects the investigative findings, is concise, expresses the investigator's opinion, contains facts and data that the investigator relies on in rendering an opinion, contains the reasoning of the investigator by which each opinion was reached, and meets the needs or requirements of the intended audience(s).

In collecting this data, investigators are directed to describe, observe, and document the incident; photograph, sketch, and collect evidence; conduct tests and experiments; interview witnesses; and assemble historical loss histories of similar incidents (Figure 1(b)). This collected data and evidence should not consist of only the data and evidence which support the investigator's initial or assumed hypothesis, but should include *all* data and evidence so as to verify and validate that all other reasonable alternative hypotheses were considered and ruled out. To ignore the consideration of alternative hypotheses can only serve to undermine objectivity and improperly introduce "expectation bias" into the investigation.

An example of a viable alternative hypothesis in this case is a fire caused by an electrical failure in the vicinity of the area Mr. Williams considered the area of fire origin. Mr. Williams examined and claimed to eliminate as a potential cause the failure of an externally hung electrical lighting fixture and associated electrical wiring near the area of fire origin.

Other hypotheses included the possibility that the fire originated on a higher balcony or attic overhang and dropping debris made it appear that the fire started on the second floor balcony. No eyewitness testimony exists to support or deny that fact other than Chief Dodson's observation upon arrival that the balconies of the second and third floors were completely engulfed in flames at that time. No observations or evidence exists as to the conditions prior to the arrival of Chief Dodson.

This fire investigation, directed by both the City of Huntsville Fire Department and EFI Global, is deficient for failing to follow *NFPA 921*'s requirement calling for the comprehensive review and collection of all data. In this case, both experts failed to review and preserve all of the data and evidence directly relevant to the fire investigation, based many of their conclusions on suppositions rather than facts, and neglected to have their respective opinions constructively peer reviewed. This conclusion of an *insufficiency of facts and data* is based upon the following observations, which undermine the foundational reliability of the reports in this case:

1. Failure to Properly Collect, Interpret, and Preserve Fire Debris Evidence

The basic tenet of evidence collection is the preservation and interpretation of fire debris evidence, a concept that was overlooked in this case. Failing to collect and preserve this fire debris evidence limits the facts and data available. *NFPA 1033* (2014 Edition, Ch. 4.4.2) outlines the requisite job task requirement for evidence collection and preservation where it states:

4.4.2 Locate, document, collect, label, package, and store evidence, given standard or special tools and equipment and evidence collection materials, so that it is properly identified, preserved, collected, packaged, and stored for use in testing, legal, or other proceedings and examinations, ensuring cross-contamination and investigator-inflicted damage to evidentiary items is avoided and the chain of custody is established.*

The fundamental principles behind how and why fire scene evidence is so important to collect is based upon three major standards of practice:

- *ASTM E860-07(2013) – Standard Practice for Examining and Preparing Items that Are or May Become Involved in Criminal or Civil Litigation;*
- *ASTM E 1188-11 – Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator; and*
- *NFPA 921 – Guide for Fire and Explosion Investigations.*

NFPA 921 cites *ASTM E860* eight times (2014 Edition, Chs. 2.3.5, 12.3.5.7, 17.7.3, 17.10.1.6.2, 29.3.1, A.17.1, A.17.2.2, and A.17.5.1.2) and provides detailed guidelines to fire investigators when examining items of evidence that they anticipate could possibly be the subject of litigation, whether it be civil or criminal. Under *ASTM E860*, it is strongly advised that a person or entity collecting and examining evidence, or testing that evidence, should strictly adhere to the following standard of care²⁷:

- 1) *Document the condition of the evidence by photographs or other suitable methods prior to any examination or disassembly;*
- 2) *If the intended procedure is likely to alter the evidence in a manner that limits additional examination and testing, then it is incumbent upon the examining or testing entity to*
 - a) *Notify its client that the proposed action is likely to alter the nature, state, or condition of the evidence;*
 - b) *Recommend that the client notify other interested parties of the proposed action;*
 - c) *Recommend that other interested parties be given an opportunity to participate in the procedure;*
 - d) *If a compelling reason exists why the foregoing cannot be performed, then the examining party must draft and preserve all applicable information supporting what the compelling reason is.*

NFPA 921 also cites *ASTM E1188* seven times (2014 Edition, Chs. 2.3.5, 12.3.5.7, 17.7, 17.7.3, A.17.1, A.17.2.2, and A.17.5.1.2) and addresses the issue of documenting destructive disassembly and testing of evidence, which occurred in this case. *ASTM E1188* states that:

if items involved in the incident are disassembled or subject to destructive testing, each step of the disassembly or testing shall be documented by contemporaneous photographs or videotaping.

²⁷ Goldberg, N. A. and Freedenberg, J.P. (2003). *Spoliation—Avoiding Specious Claims by Plaintiffs*. Goldberg Segalla, L.L.P., New York. November 2003.

This documentation of scenes often establishes an investigator's hypothesis of when they believed the fire's origin and cause had been proved, but also serves to refute other reasonable alternative hypotheses. *NFPA 921* (2014 Edition, Ch. 12.3.5.2) provides the following documentation requirements:

12.3.5.2 Documentation. *Efforts to photograph, document, or preserve evidence should apply not only to evidence relevant to an investigator's opinions, but also to evidence of reasonable alternate hypotheses that were considered and ruled out.*

With the early mention of subrogation in this fire loss, both the EFI Global investigator and the Cook Claims Service insurance adjuster should have been well aware that litigation was a probable, if not likely result. With this realization, *NFPA 921*, *ASTM E860*, and *ASTM E1188* certainly applied to the Country Inn and Suites fire investigation.

The actions of Investigator Williams and insurance adjuster Jim Gowder, working individually and in concert, show they failed to recognize, collect, and preserve evidence in this case, particularly evidence that later forensic examination might prove exculpatory in nature. The scene should have been better protected, interested parties should have been notified of the destructive inspections, steps should have been taken by which the fire scene examination was delayed, and the disassembly and destructive testing of critical evidence should have been halted pending the arrival of those other interested parties.

Of particular note is Mr. Gowder's reported background as an expert witness. The Plaintiff's witness designation dated March 3, 2014, pp. 4-5, describes Mr. Gowder as "*an expert in the field of forensic damages analysis and evaluation.*" With this stated background and expertise, Mr. Gowder and should have quickly recognized and taken the responsibility to halt any destructive evidence examinations, take measures to preserve the fire scene, and notify

interested parties in this matter. This decision should have been compounded with the very early notification the next day after the fire when he received his assignment to “thoroughly address subrogation and salvage” from Phil Yarbrough, representing Acadia Insurance Company. Mr. Growder even documented this realization of the potential for subrogation actions against the U.S. Government and others as stated in his First Report on September 27, 2010 (YEDLA000470).

Examples of critical evidence that should have been preserved include all electrical fixtures and wiring within the area the Plaintiff’s investigators believed to be the room of fire origin. Their investigations both appeared to overlook or ignore the significant pre-existing fire code violations and electrical code violations in the wiring of electrical fixtures, junction boxes, and branch wiring in the walls and ceilings that were cited after the fire by City of Huntsville code enforcement officials. A comprehensive fire scene investigation and examination of the structure would have revealed these serious violations and would have posed additional hypotheses for the cause of this fire.

Both investigators noticed the presence of cigarettes in Room 2207, as well as on the ground beneath the balcony to that room, yet they failed to photograph the de-layering process which revealed that evidence and collect any of the debris containing those critical items. No fire debris at all was retained for follow-up forensic testing. Furthermore, no one inquired during the interview with the occupant of Room 2207 if he left the water-filled Styrofoam cup on the balcony.

It is likely that this cup and its contents of a few cigarette butts would have been blown off the decking by fire suppression efforts and onto the ground directly below the balcony. Photographs taken by Investigator Williams shows that there were cigarette butts on the ground,

which would confirm these facts. Collecting those cigarette butts and conducting even a cursory search for the Styrofoam cup in the debris would have been a very simple exercise.

Several examples document the *insufficiency of facts and data* collected and preserved, and subsequently interpreted in this case. For example, Investigator Williams claimed that he examined the electrical circuit breaker panels and electrical wiring circuits, and found them to be in operating order with no life safety violations. Specifically, Investigator Williams' report (EFI Report, p. 5; YEDLA002946) regarding potential electric causes for the fire stated:

The electrical panel was not involved. The wiring was affected by the fire at a wall hung light fixture that was exposed to the fire spread on the balcony. As the fire spread away from the area of origin, the wiring was damaged consistent with random exposure damage.

Investigator Williams missed essential information in doing so and his report shows that the evidence was not properly preserved. The electrical circuit panels examined by Investigator Williams were so poorly photographed by him (YEDLA003133-003141) that the positions of the circuit breakers, as well as the written documentation on the panel for the routing of each branch circuit, were not even discernible. The investigative value of such information cannot be overlooked and needs to be preserved, and *NFPA 921* even provides forms for capturing this information rather than relying only on photographs (*NFPA 921*, 2014 Edition, Electrical Panel Documentation, Figure A.16.3.2(g)).

A striking example of the major electrical code and fire code violations that both Investigators Wilkerson and Williams missed and failed to document was revealed in the June 3, 2011 inspection of the Country Inn and Suites property by the City of Huntsville's Code Enforcement Division. City codes enforcement officials found such a significant number of

electrical code violations in that inspection that they ordered the immediate vacating and prohibited the use and occupancy of those buildings. These deficiencies included numerous significant electrical code violations, such as improperly sized junction boxes at service panels, improperly installed lighting fixtures, and open electrical splices in walls. In several bathrooms, inspectors found live electrical boxes wallpapered over. These and other electrical, fire, and building code violations caused the City of Huntsville to force the owners to immediately vacate these buildings and prohibit their use as a motel.

Of particular interest was the potential contribution of overlooked exterior lighting fixtures on balconies of each unit. The exterior electrical light fixtures were mounted outside on the wall in proximity to the area of fire origin. Investigator Williams took it upon himself to examine this piece of evidence, described it in his report, yet failed to preserve it (Figure 6). Furthermore, it appears he examined an electrical junction box where the wires appear to have been cut (Figure 7).



Figure 6. Remains of the exterior electrical lighting fixture on balcony of Room 2207 (left, YEDLA003053) and exemplar placement of these fixtures (right, YEDLA003154).

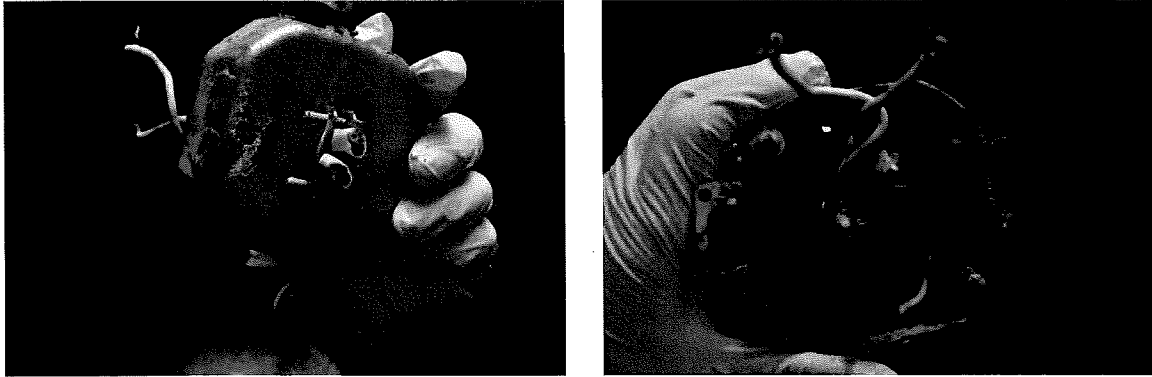


Figure 7. Self-documented destructive examination of electrical evidence of unknown origin from the fire scene (left, YEDLA003053 and right, YEDLA003055).

2. Failure to Notify Interested Parties

A second essential element in maintaining the *sufficiency of facts and data* in a fire investigation is to allow for the participation of all individuals and parties during the comprehensive processing, collection, documentation, and evaluation of information and evidence collected while processing the fire scene. This ensures that fire investigators and experts retained by their respective clients are given equal access and input into the processing of the fire scene and allows all investigators to arrive at accurate determinations related to the origin, cause, fire spread, and responsibility for the incident (NFPA 921, 2011 Edition, Ch. 4.4.3.4).

NFPA 921 strongly cautions investigators that improper scene documentation can impair the opportunity of other *interested parties* to develop the same evidentiary value from the data (NFPA 921, 2011 Edition, Ch. 4.4.3.4). These interested parties may be in a position to participate in the investigation and provide technical and engineering resources not always readily available to the primary investigators.

NFPA 921 (2011 Edition, Ch 3.3.105) defines an *interested party* as

3.3.105 Interested Party. *Any person, entity, or organization, including their representatives, with statutory obligations or whose legal rights or interests may be affected by the investigation of a specific incident.*

Fire investigators are trained to recognize interested parties, notify their clients of their existence, and suspend the processing of the fire scene until these parties have the opportunity to have an expert and/or representative at the fire scene. The reasoning for this need for recognition is that interested parties may later become the targets of **subrogation** where a lawsuit is filed against that party or other parties with the purpose to collect damages for the entity allegedly responsible for causing or contributing to the fire loss.

In this case, the first mention of the issue of subrogation appears on September 23, 2010 in the letter from Phil Yarbrough, representing Acadia Insurance Company, that assigned the fire loss to Cook Claims Service. Mr. Yarbrough listed Specific File Requirement No. 8 in the assignment letter to Cook Claims to “*Thoroughly address subrogation and salvage*” (Emphasis added, YEDLA000346, YEDLA000351, YEDLA002912).

A second early reference to subrogation is discussed in length in YEDLA Exhibit B, which is a September 27, 2010 four-page report from Jim Gowder, Adjuster with Cook Claims Service, to Phil Yarbrough representing Acadia/Union Standard Insurance (YEDLA000467-000470) including eight pages of photographs (YEDLA000471-000478). In this letter, Mr. Gowder states on page 3 (YEDLA000469):

SUBROGATION: *There appears to be the possibility of subrogation since the origin can reportedly be determined and the individual who was smoking has been identified. We will report further upon receipt of the C & O Report and that of the Fire Marshall. The fire Marshall stated the FBI agent claims governmental immunity. We do not believe this will apply nor will it relieve the agent of personal responsibility.*

Starting on September 23, 2010, Plaintiff Acadia would have been fully aware that a subrogation action would likely be initiated sometime in the near future, as turned out to be the case. Therefore, it became the responsibility of those decision-makers, including but not limited to Mr. Yarbrough, Mr. Jim Gowder, and eventually Investigator Williams and his supervisors at EFI Global, Inc., to ensure that (1) the evidence in this case was properly preserved *in situ*, (2) safeguarded from loss, destruction, or spoliation, and (3) that the appropriate interested parties were notified and invited to all evidence inspections and sharing of data regarding the fire loss.

In this case, interested parties would have included, but were not limited to persons, entities, and organizations who participated in the design, construction, renovation, and general operation of the Country Inn and Suites; the fire, electrical, and other individuals who participated in the design, installation and servicing of those items identified as fire, electrical, and structural violations cited on June 3, 2011 by City of Huntsville code enforcement officials (FBI000118-000119, FBI000126-FBI000127), and the United States named as the Defendant in this action. All such parties should have been provided notice as an interested party and afforded an opportunity to participate in the EFI Global, Inc. evidence inspection and destructive testing at the fire scene.

The ability to provide timely notice in this case to those interested parties is evident, since EFI Global received their assignment from Jim Gower, Cook Claims Company, on September 23, 2010 and did not commence their investigation until September 27, 2010. The issue of subrogation was specifically mentioned in writing on those same dates, before the fire scene investigation even commenced. Moreover, once on the fire scene EFI Global should have surveyed the situation, notified their client of the responsibility to identify and notify other interested parties, and then halted their investigation until these other parties could have a representative on the scene.

NFPA 921 clearly sets forth the process for notification of interested parties that should have been recognized and initiated by EFI Global, Inc. and Cook Claims Company before proceeding. *NFPA 921* specifically states (2014 Edition, Ch. 12.3.4.4):

12.3.5.4 Notification to Interested Parties. *Claims of spoliation of evidence can be minimized when notice is given to all known interested parties that an investigation at the site of the incident is going to occur so as to allow all known interested parties the opportunity to retain experts and attend the investigation. Such notice may be made by telephone, letter, or e-mail. Oral notification should be confirmed in writing. Notification should include the date of the incident; the nature of the incident; the incident location; the nature and extent of loss, damage, death, or injury to the extent known; the interested party's potential connection to the incident; next action date; circumstances affecting the scene (such as pending demolition orders or environmental conditions); a request to reply by a certain date; contact information as to whom the notified person is to reply; and the identity of the individual or entity controlling the scene. The notification should also include a roster of all parties to whom notice has been provided. Public sector investigators may have different notification responsibilities than the private sector investigators. Responsibility for notification varies based on jurisdictions, scope, procedures, and the circumstances of the fire. Interested parties should make public officials aware of their interest. A private sector consent to search does not constitute notice unless it conforms with this section.*

In summary, both EFI Global, Inc. and Cook Claims Company, the firm who gave the assignment to conduct the origin and cause investigation of the Country Inn and Suites fire, had ample opportunity and time to recognize their known responsibilities. These included, but were not limited to ensuring that (1) the evidence in this case would be properly preserved *in situ*, (2) safeguarded from loss, destruction, or spoliation, and (2) that the appropriate interested parties would be invited to all evidence inspections and sharing of data regarding the fire loss.

3. Allowing for Spoliation of Evidence

A third essential element in maintaining the *sufficiency of facts and data* in a fire investigation concerns the protection from loss, destruction, or alteration of material data and

evidence. The investigation conducted by EFI Global and directed by the Cook Claims Company, based upon both their actions and their failure to act, caused and/or contributed to the spoliation of evidence in this case.

Particularly, EFI Global, in proceeding with their destructive inspection, testing, and subsequent destruction/discarding of material evidence, along with their failure and that of Cook Claims Company to notify interested parties constituted significant spoliation in this case prejudicial to those interested parties. The specific investigator-caused spoliation took place in five forms:

- (1) **Recognition.** *Their failure to recognize, with early indications of potential legal actions through subrogation, that physical evidence at the scene needed to be protected and interested parties needed to be identified;*
- (2) **Notification.** *Their failure to recognize and instruct their clients on the importance of the notification of interested parties;*
- (3) **Protection and Safeguard.** *Their failure to safeguard the fire scene from further damage or alteration until other interested parties could make arrangements to attend the examination of evidence;*
- (3) **Destructive Examination.** *Their proceeding, without notification and waiting for the participation of interested parties, with the decision to conduct a destructive scene examination and disassembly of physical evidence; and*
- (4) **Failure to Collect and Preserve.** *Their abandonment of crucial evidence during the destructive scene examination which supported their hypothesis as to the cause and responsibility for the fire with disregard for exculpatory evidence that could have supported other viable hypotheses.*

In this case where the Plaintiff claims damages in excess of \$1 million, all the evidence, no matter how seemingly inconsequential, should have been properly identified and protected until all potential interested parties received their notification and arranged for participation in the scene

examination. The boarding-up of the section of the building where the fire occurred could have been easily accomplished without impeding the operations of the facility.

Both the public and private fire investigators are trained in the recognition of the concept of spoliation. *NFPA 921* (2011 Edition, Ch. 3.3.162) defines *spoliation* as

“Loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation.” (emphasis added).

Fire investigators, since they handle, evaluate, and document evidence at scenes, also bear the ultimate responsibility to recognize and prevent spoliation. *NFPA 921* cautions that this responsibility applies equally to investigators that are public officials and those who are in the private sector, and defines this *responsibility* of investigators and individuals associated with or supervising the investigation, to recognize and protect against spoliation (2014 Edition, Ch. 12.3.5.1)

12.3.5.1 Responsibility. The responsibility of the investigator (or anyone who handles or examines evidence) is evidence preservation, and the scope of that responsibility varies according to such factors as the investigator’s jurisdiction, whether he or she is a public official or private sector investigator, whether criminal conduct is indicated, and applicable laws and regulations. However, regardless of the scope and responsibility of the investigation, care should be taken to avoid destruction of evidence. (emphasis added)

NFPA 921 sets forth clear guidance for fire investigators on the recognition and prevention of spoliation of evidence (2014 Edition, Ch. 11.3.5).

11.3.5 Spoliation of Evidence. Spoliation of evidence refers to the loss, destruction, or material alteration of an object or document that is evidence or potential evidence in a legal proceeding by one who has the responsibility for its preservation. Spoliation of evidence may occur when the movement, change, or destruction of evidence, or the alteration of the scene, significantly impairs the

opportunity of other interested parties to obtain the same evidentiary value from the evidence, as did any prior investigator. (emphasis added)

In order to maintain the sufficiency of facts and data in a fire investigation, there remains a conscious and continuing duty to collect and preserve all information, data, and objects of evidentiary value. As demonstrated previously, in the case of the fire at the Country Inn and Suites, the loss of the evidence, particularly the exterior mounted lighting fixtures on the balconies and the related electrical wiring, deprived all parties, named and unnamed, from an equal access to the evidence at the fire scene.

With the numerous major electrical code violations found by city inspectors, a fire of electrical origin can never be ruled out, especially since critical evidence was never properly documented and preserved. Due to spoliation of evidence in this case, the lack of documentation along with numerous opportunities to collect and preserve essential evidence, the true origin and cause of this fire will never be known.

In evaluating the sufficiency of evidence, fire investigators are trained to recognize that collected data and evidence should not consist of only the data and evidence that support the investigator's initial or assumed hypothesis, but should include all data and evidence to verify and validate (or refute) *alternative hypotheses* (see *NFPA 921*, 2014 Ed., Ch. 12.3.5.2). *NFPA 921* emphasizes that equal efforts should be pursued not only to preserve evidence to support the investigator's hypothesis for the fire's origin and cause, but also to carefully and thoroughly document evidence of all other reasonable alternative hypotheses that can be considered and validated or ruled out.

To ignore the consideration of alternative hypotheses can only serve to undermine objectivity and improperly introduce *expectation bias* into the investigation. *NFPA 921* (2014 Edition, Ch. 4.3.8) discusses the impact of expectation bias as:

Expectation bias is a well-established phenomenon that occurs in scientific analysis when investigator(s) reach a premature conclusion without having examined or considered all of the relevant data. Instead of collecting and examining all of the data in a logical and unbiased manner to reach a scientifically reliable conclusion, the investigator(s) uses the ***premature determination to dictate investigative processes, analyses, and, ultimately, conclusions, in a way that is not scientifically valid.*** The introduction of expectation bias into the investigation results in the use of only that data that supports this previously formed conclusion and often results in the misinterpretation and/or the discarding of data that does not support the original opinion. Investigators are strongly cautioned to avoid expectation bias through proper use of the scientific method. (*emphasis added*)

Considering the case of the Country Inn and Suites, both the public and private investigators concluded prematurely that since the occupant of Room 2207 admitted to smoking on the balcony, the cause of the fire had to be a discarded cigarette. Discussed in a later section are the fire dynamics of cigarette ignition and the fact that fire-safe cigarettes were already in place and widely used before the September 22, 2010 fire.

To engage in an unsupported “jump to a conclusion” in blaming a cigarette for the cause of this fire without a defined ignition sequence supported by documented physical evidence demonstrates that both investigators used a narrowly selected approach by which they employed data and facts that supported their pre-determined conclusions. Absent from any meaningful consideration was the possibility of many other even *more* likely scenarios for viable ignition scenarios, not only on the balcony of Room 2207 but also on higher levels, within the walls, and caused by dangerous electrical wiring so defectively installed and in use that the code enforcement

officials later shut down the entire motel complex for major violations rising to the level of life safety hazards.

This approach fails to maintain a *sufficiency of facts and data* in conducting a fire scene investigation and is not scientifically valid and reliable.

4. Liability for Spoliation of Evidence

A fourth essential element in maintaining the *sufficiency of facts and data* in a fire investigation concerns the need for collecting enough data and evidence that deflects any allegations of spoliation. In applying *NFPA 921*, *NFPA 1033*, and other recognized professional standards in fire and explosion investigations, there is a duty to collect and preserve all information, data, and objects of evidentiary value. There exists a potential that investigators can be held legally liable for spoliation and destruction of evidence²⁸ at a fire scene; and this topic on losing or destroying evidence on fire scenes is frequently discussed at fire investigation training conferences, seminars, and in fire investigation journals²⁹.

The recognized liability of a private investigative firm for spoliation of evidence is best exemplified in an affidavit³⁰ given by Mr. E. Metts Hardy, Regional Vice President of EFI Global, Inc., which is a self-described nationwide engineering and investigation firm that handles fire

²⁸ Clinkinbeard, K. J., & King, G. A. (2008). *Spoliation: Can the Investigator be Sued for Destruction of Evidence?* Paper presented at the International Symposium on Fire Investigation Science and Technology, ISFI 2008, Cincinnati, OH., May 18 -21, 2008.

²⁹ Lynch, P. A. (1997). *Watch Out for Tort Liability for Spoliation of Evidence*. *Fire & Arson Investigator, International Association of Arson Investigators*, Volume 47, Number 4. June 1997, pp. 17-19.

³⁰ The Cincinnati Insurance Company, and Applied Technical Services, Inc. Plaintiffs, United States Liability Insurance Company d/b/a United States Liability Group, Defendant, United States District Court for the Middle District of Tennessee at Nashville, Case# 3:11-Cv-01169, Document 26, Filed June 6, 2012.

investigation matters on a nationwide basis (and is the same firm that conducted the Country Inn and Suites origin and cause investigation by its employee, Mr. Williams, which is the subject of my peer review and professional opinions in this action). Note that Mr. Hardy signed Investigator Williams' report as his company's designated technical peer reviewer.

In the matter for which he provided a sworn affidavit, Mr. Hardy reviewed two cases of alleged spoliation and rendered an expert opinion in federal court. He stated that there was no doubt that the evidence in question was in the custody and control of a fire investigation firm or its representatives, and the evidence was subsequently lost or discarded during the litigation.

In two specific paragraphs extracted from his affidavit signed May 29, 2012, Mr. Hardy provides his expert opinion regarding the liability of any private investigation firm in a suit or claim against their company for losing evidence:

Figure 8. Paragraphs 6 and 7 from an expert opinion affidavit by E. Metts Hardy, Regional Vice President of EFI Global, Inc., regarding the liability of private investigation firms for a spoliation claim or lawsuit against their company for losing evidence.

6. After reviewing these documents and researching spoliation issues, it is my opinion to a reasonable degree of professional certainty that it would be reasonably foreseeable that the loss of evidence by XXX, a professional fire investigation company, would give rise to a claim or suit for spoliation under a professional liability policy. This is especially true where the evidence spoliated by XXX was a crucial part of the investigation and the litigation.

7. Based upon my review of the records, there was no doubt that the evidence in question was in the custody and control of XXX or its representatives and was lost or discarded during the course of ongoing litigation. It is clear that XXX knew or should have known, as a professional fire investigation company, that its loss of the evidence would likely give rise to a suit or claim against its professional liability policy. This is clear because the relevant fire investigation texts speak to the issue of spoliation.

Mr. Hardy confirms that all professional fire investigation companies should know that a loss of evidence would likely give rise to a suit or claim against their professional liability policy and that relevant fire investigation texts such as *NFPA 921* speak to the issue of spoliation.

5. Impact of the Untimely Destruction of the Fire Scene

Through documentation provided in discovery, it is indisputable that the fire scene was prematurely destroyed before interested parties were properly notified. The fire scene was altered; fire debris was disturbed; critical evidence was discarded and abandoned; evidence of significant fire and electrical violations was removed, stripped out and repaired; and potential witnesses at the motel left without being interviewed. These actions occurred in September 2010, several *years* before the Defendant in this case was first notified of a claim on August 1, 2012, followed by a civil Complaint filed on May 10, 2013.

The individuals who were directly involved, or who eventually became aware of the destruction of the fire scene, include without limitation Acadia Insurance Company's representatives, adjusters, investigators, and attorneys. Based upon correspondence found in discovery, the names of those individuals include the corporate representative, Phil Yarbrough, of Union Standard Insurance; Jim Gowder, claims adjuster for Cook Claims Service; Roderick Williams and E. Metts Hardy, of EFI Global, Inc.; and Jamie P. Cooper, attorney at Martin, Disiere, Jefferson & Wisdom LLC (YEDLA002032-002040).

Altering and/or destroying a fire scene before all interested parties are properly notified and can participate directly in the investigation adversely impacts their ability to defend themselves, and is by definition a matter which is incurably prejudicial in nearly every instance. The scene destruction, especially the removal and alteration of potentially exculpatory evidence

such as improper and dangerous electrical wiring in this case, only further undermines the opportunity for a potential Defendant to understand and meaningfully participate in the investigation and to develop alternative hypotheses for the fire's origin and cause to defend itself in a subsequent legal action.

The fire occurred on September 22, 2010 and the Plaintiff claims damages in this action exceeding \$1 million, which is not a minor claim by any measure. The mere mention of the potential for subrogation by Phil Yarbrough in correspondence to Cook Claims Service on September 23, 2010 (YEDLA002912), the first day after the fire, should have set in motion the notification process among all involved. Mr. Yarbrough should have immediately informed the insurance company, their adjusters, their investigators, and ultimately their attorneys of the responsibility to protect the scene from spoliation and provide immediate notification to interested parties so as to allow them the opportunity to fully participate in the investigation.

Acadia Insurance Company and its representatives had a clear-cut duty to preserve the fire scene since the company was already aware (1) that pending or probable litigation would involve the Defendant and (2) it was readily foreseeable that prematurely processing the scene and discarding the evidence would be substantially prejudicial to the Defendant.

Acadia Insurance Company, its adjusters, investigators, and attorneys should have already been well-versed on the issue of spoliation, as that subject is discussed at many insurance conferences annually and is the subject of publications in insurance trade journals and legal publications on a regular basis. Upon learning of the allegations involving the Defendant as a potentially responsible party, it was in complete control of the fire scene and should have taken

immediate steps to suspend any further investigative activities, preserve the scene, and notify all potential subrogation target defendants both orally and in writing.

If a thorough scene examination involving all interested parties had been allowed, all of the parties (including Plaintiff's own representatives) would have become aware of the numerous fire, building, and electrical code violations that existed and would have considered those factors as potential hypotheses for the fire to be further investigated and tested. The entire fire scene should have been preserved to allow these interested parties to examine all of the evidence and debris in order to confirm for themselves that a proper investigation was conducted. Witnesses could have been identified for interviews; adequate photographic documentation of all evidence and fire debris could have been performed; and all physical evidence could have been properly collected and preserved for further forensic analysis, as appropriate.

Photography alone does not support the notion that a scene could be processed and evaluated later by another expert who could derive the same evidentiary value from those photographs as if they had been physically present at the scene. A thorough scene examination would have required clearly-taken photographs of the investigative process being undertaken; the condition of electrical equipment, wiring and other utilities; and the layered processing (de-layering) of the fire debris down to discrete burn patterns. The Defendant's expert in this case was provided with only a limited number of photographs and those were not clear, nor were they sufficiently comprehensive to even approach the investigative value of having been physically present.

Not all items arguably relevant at a fire scene are worthy of retention, sampling, or documentation. However, when items made unavailable by the offending party through loss or

spoliation are inextricably connected to the evidence which the offending party believes to have caused the fire, it becomes extremely important to the defense. If the item's importance is already known or likely to become known later, such evidence should be retained for inspection until the opposing party has adequate notice and a reasonable opportunity to conduct an examination by its own experts.

The Defendant's expert in this case is plainly hindered in countering the Plaintiff's allegation that the fire was caused by an improperly discarded cigarette by not having available any tangible evidence, exhibits, or definitive photographs. The Defendant's expert has also been prejudiced by the failure of Plaintiff's experts to reasonably document the available evidence of fire origin commensurate with the circumstances and their expected level of expertise and experience as required by *NFPA 1033* and *NFPA 921*.

In summary, the evidence supports my professional conclusion that the Defendant has been deprived of an opportunity to conduct a first-hand investigation of a myriad of possible alternative ignition sources at the scene of the fire and is being forced instead to rely on an unclear and incomplete investigation conducted by Plaintiff Acadia Insurance Company's investigator in order to rebut the Plaintiff's claims in this action. The Defendant has been deprived of any opportunity to examine the original fire scene evidence *in situ*, intact and unspoiled.

B. Use of Reliable Principles and Methods by the Investigator

The use of *reliable principles and methods* is the central theme in scientific fire origin and cause determination. *NFPA 921* states that reliable fire cause determinations first require the determination of the fire's origin. It specifically states:

Fire cause determination is the process of identifying the first fuel ignited, the ignition source, the oxidizing agent, and the circumstances that resulted in the fire. Fire cause determination generally follows origin determination (see Origin Determination chapter). Generally, a fire cause determination can be considered reliable only if the origin has been correctly determined. (NFPA 921, 2014 Edition, Ch. 19.1). (emphasis added)

NFPA 921 (2014 Edition, Ch. 18.1.2) is very clear in identifying the four factors needed to make the determination of fire origin during an investigation. The determination of the origin of the fire involves the coordination of information derived from one or more of the following:

- (1) **Witness Information.** *The analysis of observations reported by persons who witnessed the fire or were aware of conditions present at the time of the fire.*
- (2) **Fire Patterns.** *The analysis of effects and patterns left by the fire.*
- (3) **Fire Dynamics.** *The analysis of the fire dynamics, that is, the physics and chemistry of fire initiation and growth, and the interaction between the fire and the building's systems.*
- (4) **Arc Mapping.** *The analysis of the locations where electrical arcing has caused damage and the documentation of the involved electrical circuits.*

The following is an analysis of some of the factors leading to the failure of the insurance investigation in this case to properly arrive at a scientifically valid and reliable determination of the origin and cause of the fire at the Country Inn and Suites. These issues as to origin and cause determination are central to my analysis in this case.

1. Lack of Emphasis on Witness Interviews

The first tool useful in determining a fire's origin is witness information. There was a lack of information obtained through witness interviews in this case, in fact they are practically non-existent. The only significant interview was a very short statement from the occupant of Room 2207 taken by Investigator Wilkerson. Of concern is that fact that there are no eyewitness

interviews of residents of the Country Inn and Suites, despite the fact many of them were long-term residents attending a local training school who could have easily been identified and interviewed. For example, even the identity of the person pulling the fire alarm was never determined.

Eyewitnesses to the fire itself and persons who were aware of the conditions present at the time of the fire are among the most important of all witnesses. However, there are serious short-fallings when they attempt to assess the rate of fire growth. *NFPA 921* (2014 Edition, Ch. 5.10.1.4) cautions:

“The rate of fire growth as determined by witness statements is highly subjective. Many times witnesses are reporting the fire growth from time of discovery, which cannot be directly correlated to ignition time. The rate of fire growth is dependent on many factors besides fuel load, including fuel configuration, compartment size, compartment properties, ventilation, ignition source, and first fuel ignited. Eyewitnesses reporting a rapid rate of fire growth should not be construed as data supporting an incendiary fire cause.”

Investigator Wilkerson’s short report indicates that he called to the scene the evening of the fire Huntsville Electrical Inspector Doug Smith, who in turn requested Building Inspector Skip Stinson. His report indicated, but does not document the decision that both Inspectors Smith and Stinson arrived at to declare the building unsafe to occupy. Note that it was not until June 3, 2011 that the City of Huntsville declared 4880 University Drive, NW, Building 1, as unsafe due to numerous major building, electrical, and fire code violations.

Failing memories over succeeding months and years, when their information is developed from depositions in subsequent litigation much later on, will inevitably limit the accuracy and reliability of such witness information.

2. Incorrect Interpretations of Fire Patterns and Scene Evidence

The second tool relied upon in determining a fire's origin is the analysis of *fire patterns*. Fire patterns are the thermal effects left by the fire on furnishings, walls, ceilings, floors, and other objects (NFPA 921, 2014 Edition, Ch. 18.4.2). Correctly documenting and interpreting fire patterns is an essential methodology integral to the proper investigation of a fire incident by investigators, and caution must be taken to correctly document and interpret those patterns.

Furthermore, the series of photographs taken by the EFI Global investigator shows that the fire scene debris was moved and some physical evidence examined, such as the external lighting fixture and wiring. However, there appears to be no collection, interpretation, and preservation of the fire scene evidence and fire debris, especially as it relates to fire patterns.

An essential part of analyzing fire patterns is through the use of *heat and flame vector analysis* (NFPA 921, 2014 Edition, Ch. 3.3.96, Ch. 18.4.2) where arrows placed on fire scene drawings/diagrams indicate the direction of heat, smoke, or flame flow. When combined with identifiable and documented fire patterns such as depth of char measurements, the investigator can make interpretations to establish the direction of heat or flame spread integral to determining the area of origin and the path of the fire as it progressed and developed. *NFPA 921* states that the drawings/diagrams should include walls, doorways and doors, windows, and any pertinent furnishings or contents. An example from *NFPA 921* (2014 Edition, Figure 16.4.2(d)) is shown below in Figure 9.

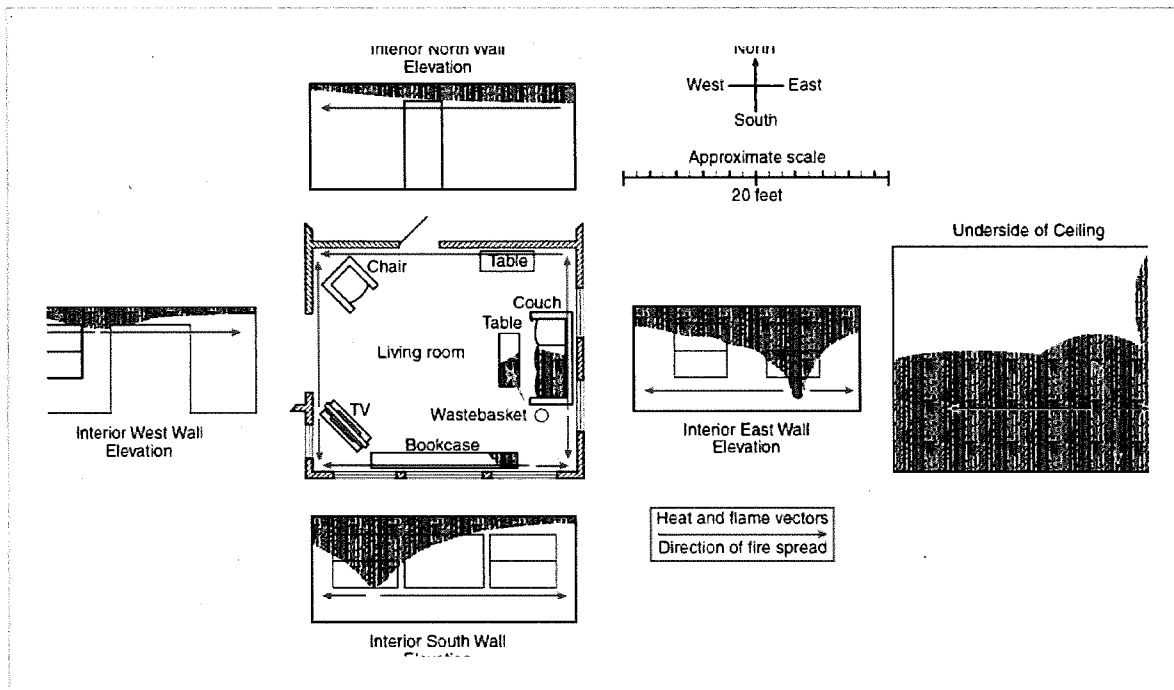


Figure 9. NFPA 921's example of using heat and flame vectors to document the direction of fire spread on an exploded room diagram showing damage patterns, sample locations, and photo locations. (2014 Edition, Figure 16.4.2(d)).

The investigation by Investigators Wilkerson and Williams failed to properly use this approach and to identify even the basic fire patterns in this case, let alone a heat and flame vector analysis. Both had the opportunity, yet failed to use this recognized investigative technique to document and correlate their fire patterns with photographs and scene sketches.

Furthermore, Investigators Wilkerson and Williams concentrated their examination of fire patterns to the balcony of Room 2207, while ignoring other viable fire origin and development ignition scenarios, failing to seek information from eyewitnesses, and ignoring potential fire-producing electrical and building code violations. These alternative ignition scenarios could have included a fire originating on the balcony above Room 2207, originating in the walls, or originating in electrical wiring and fixtures—ignition scenarios which easily could have produced the fire

damage seen in this case and which have factual support in the post-fire inspections and code violation citations.

3. Improper Application of Fire Dynamics

The third tool useful in determining a fire's origin and cause is *fire dynamics*, defined as “*The detailed study of how chemistry, fire science, and the engineering disciplines of fluid mechanics and heat transfer interact to influence fire behavior*” (NFPA 921, 2014 Edition, Ch. 3.3.65). This well-founded science is recognized and discussed at length in *NFPA 921*'s section on the dynamics of fire (NFPA 921, 2014 Edition, Ch. 6.2).

One of the most widely used considerations in origin and cause analysis is the reliance on sound scientific principles of fire dynamics, which is the analysis of the physics and chemistry of fire initiation and growth, and the interaction between the fire and the building's systems. Fire dynamics includes the evaluation of temporal aspects of heat transfer, flame spread, ignition temperatures, and fire growth.

Investigators Wilkerson and Williams apparently attempted to use fire dynamics to place the fire's area of origin on the balcony of Room 2207, but such attempts were made unreliably and were unsubstantiated. Both Investigators Wilkerson and Williams failed to demonstrate a working knowledge in this area, used simple and misleading observations of fire pattern damage to explain the impact of fire dynamics, and failed to adequately document their findings.

Only individuals adequately trained in that field should undertake the use and interpretation of the principles of fire dynamics. For example, the fire pattern artifacts that Investigators Wilkerson and Williams saw led them to assume that the fire started on the balcony of Room 2207, based upon their assumptions that the greatest concentration of damage occurred on that room's

balcony. This observation is a fundamental oversimplification of the principles of fire dynamics. While this is a valid basis for identifying the area of origin in certain fires, the science shows that maximum fire damage is not always a reliable technique for determining a fire's origin and should not be assumed as such.

In fact, *NFPA 921* cautions about the reliability of basing conclusions wholly on fire pattern generation and maximum damage.

The investigator should not assume that the fire at the origin burned the longest and therefore fire patterns showing the greatest damage must be at the area of origin. Greater damage in one place than in another may be the result of differences in thermal exposure due to differences in fuel loading, the location of the fuel package in the compartment, increased ventilation, or fire-fighting tactics (NFPA 921, 2014 Edition, Ch. 18.4.1.3) (emphasis added)

Fire investigators have long known of this phenomenon and are cautioned that when conducting their fire scene examination from the least-burned to the most-burned area that the greatest damage is not always indicative of the area of fire origin. Shown in Figure 10 is such a case³¹ where this expert was involved in the design of a fire test confirming this common phenomenon. . In this controlled fire test, the origin was actually at the floor level of the structure in what was the least damaged area and traveled through the building to the most damaged area in the right foreground.

By way of example, the extreme damage to the corner of the balcony at Room 2207 could have been produced by and influenced by more complex effects than these investigators explored. Fire dynamics can explain other potential reasons for this damage, which should have been

³¹ Icove, D. J., DeHaan, J. D., & Haynes, G. A. 2013. *Forensic Fire Scene Reconstruction* (3rd Edition). Upper Saddle River, N.J.: Pearson/Prentice Hall.

considered by the investigators and could easily have established that the fire was not started by a carelessly discarded cigarette, but by other equally likely (or more likely) potential causes.

In this case involving the proper interpretation of fire dynamics, both Investigators Wilkerson and Williams should have considered and evaluated all potential ignition scenarios and not speculated without having any supporting evidence. This evidence must be of such quality as to be “on point” and directly relevant to the investigation. Furthermore, the opinions offered by both investigators must have a direct connection to the facts of the case and be tied to their expert conclusions.



Figure 10. Example showing that the most damaged area is not always the area of fire origin. In this fire test, the origin was at the floor level of the structure in the least damaged area and traveled through the building to the most damaged area in the right foreground.

Expert fire investigators cannot and should not rely on speculation and must account for alternative causes that are supported by the evidence. *NFPA 921* specifically addresses in the section on spoliation the need for the thorough documentation of evidence that not only supports the investigator's own hypothesis as to the origin and cause of the fire, but also other hypotheses (NFPA 921, Ch. 12.3.5.2).

12.3.5.2 Documentation. Efforts to photograph, document, or preserve evidence should apply not only to evidence relevant to an investigator's opinions, but also to evidence of reasonable alternate hypotheses that were considered and ruled out. (emphasis added)

Expert opinions in fire cases have been excluded when the fire investigator did not equally consider both favorable and unfavorable data, and simply ignored unfavorable data so as to support the theory or hypothesis being advanced. Likewise, investigators at fire scenes are cautioned not to "cherry-pick" and document only the most favorable evidence, while ignoring and not collecting other evidence that may support alternative hypotheses for the cause of the fire. Furthermore, not spending adequate time examining the fire scene, quickly eliminating causes and discarding physical evidence, and not pursuing consideration of other potential causes is improper and does not meet the job performance requirements set forth by *NFPA 1033* and the peer-reviewed guidance of *NFPA 921*.

In this case, the investigators' methodologies and conclusions are dangerously flawed. The underlying failings include the use of an oversimplified approach to isolate the fire to the balcony of Room 2207, while not considering the fire dynamics evidence of a potential ignition source from a fire above that level, or from nearby electrical fixtures, or from improper wiring within the walls and ceilings, or from other scenarios not considered. In an over \$1 million fire loss, it would

be expected that a private fire investigator retained by a major insurance company would spend more time examining the scene than just one day, and that fact alone doubtless contributed to the inadequacy of his investigation.

The hypothetical “discarded cigarette ignition scenario” on the balcony of Room 2207 proposed by both Investigators Wilkerson and Williams (and which is the basis of this action against the United States) is flawed from several forensic viewpoints. Both investigators failed to (1) document the de-layering of the debris found on the balcony, (2) search to secure any evidence of the remains of a cigarette, (3) isolate a burn pattern on the balcony’s surface consistent with damage from a lit cigarette, (4) provide an explanation of even the most basic outline of a discarded cigarette as an ignition scenario in this case, and (5) provide the citation to even one peer-reviewed reference authority supporting such a hypothesis.

The underlying science for the ignition scenarios of discarded lit cigarettes is well known and well documented in the research literature. Discarded lit cigarettes, while a “potential” ignition source for easily ignited items such as padded furniture, normally do not have the thermal energy and sustenance to ignite wooden deck flooring by themselves. Furthermore, discarded lit cigarettes often readily self-extinguish. It is well known in the peer-reviewed fire investigation literature³² that discarded lit cigarettes have a burning duration of about 5 minutes; a small heat release rate of about 5 watts, and a maximum heat flux of 35 to 42 kW/m² (see Table 6.1, Kirk’s Fire Investigation, 7th Edition, p. 170). These combined characteristics make it highly unlikely that a

³² DeHaan, J. D., & Icove, D. J. 2012. *Kirk's Fire Investigation* (7th Edition). Upper Saddle River, NJ: Pearson-Prentice Hall.

discarded lit cigarette could ignite a thermally dense material such as the timbers of a wooden deck.

Investigators Wilkerson and Williams should have known through their training and articles in professional literature that cigarettes produced after January 1, 2010 by a majority of manufacturers now comply with laws requiring cigarettes to meet certain fire-safety standards for self-extinguishing when not being smoked. The laws require cigarettes to exhibit a greater likelihood of self-extinguishing using a prescribed laboratory test method ASTM E2187 developed by ASTM International. These cigarettes are commonly known as Fire Standards Compliant (FSC) or Reduced Ignition Propensity (RIP) cigarettes and are designed to automatically self-extinguish within 5 minutes of being left unsmoked. This means there is insufficient contact time to ignite almost any available fuel.

It is important to note that the cigarette allegedly in question here from Room 2207 was a Marlboro brand by Philip Morris USA. The Philip Morris Company manufactures only FSC Marlboro cigarettes. Since both Investigators Wilkerson and Williams failed to document and collect the unsmoked cigarettes in Room 2207, as well as the several smoked butts found on the ground under the balcony, it will never be possible to confirm whether these were Marlboro brand FSC cigarettes found under the balcony and whether they can be matched with those found in the room so they can be attributed to the occupant of Room 2207.

Furthermore, the ignition of the balcony by an alleged discarded lit cigarette would have required an intermediate source of fuel that the cigarette came into contact with. The occupant of Room 2207 said in his statement to Investigator Wilkerson that he always extinguished his cigarettes in a water-filled Styrofoam cup. These investigators did not explore a potential ignition

sequence of discarded cigarettes, as well as the potential ignition sequence of Styrofoam acting independently or in conjunction with the discarded cigarettes. With no actual documentation of the fire scene and no sifting and retention of evidence recovered from the balcony, the true origin and cause of this fire may never be determined now.

4. Failure to Use Arc Mapping

The fourth tool useful in determining and applying reliable principles and methods in establishing a fire's origin and cause is through the use of *arc mapping*. *NFPA 921* (2014 Edition, Ch. 3.3.8) defines this technique as:

The systematic evaluation of the electrical circuit configuration, spatial relationship of the circuit components, and identification of electrical arc sites to assist in the identification of the area of origin and analysis of the fire's spread.

Using this technique, a fire investigator identifies and “maps” the locations of arcing in energized electrical wiring to help determine the area of origin for the fire. Arc mapping is also helpful in charting the development and direction of the fire. This sequence can be used in combination with other data to more clearly define the area of origin and evaluate potential ignition sources. During this process, the evidence of arcing is carefully documented and the arced wiring is removed, along with other electrical fixtures, junction boxes, etc. See *NFPA 921* (2014 Edition, Ch. 18.4.5) for a detailed discussion on arc survey mapping and evidence collection.

There is no indication that either Investigator Wilkerson or Williams used arc mapping to assist in their examination of the fire scene and locating what they considered to be the area of fire origin. A potential hypothesis is that the fire started in the concealed ceiling on the third floor, and falling debris ignited the second floor balcony of Room 2207. This hypothesis is supported by

Huntsville District Chief Michael D. Dodson who stated that upon arrival at the fire scene, he observed the balconies of the second and third floors of one of the buildings were completely engulfed in flames (YEDLA002966).

Insurance inspections just after the fire provide further evidence supporting this alternative hypothesis. Those inspections documented the existence of exposed and fire-damaged wiring on the third floor that was not compliant with the electrical code. If exposed damaged wiring existed on the third floor, it could have supported an alternative hypothesis for the origin and cause of this fire being on the third floor and relating to that wiring. These damaged wires could have been useful in performing arc mapping for charting the development and direction of the fire. In a report³³ dated October 21, 2010 to Phil Yarbrough, Union Standard Insurance, Jim Gowder of Cook Claims Service, Inc. mentioned the existence of wiring not compliant with the electrical code and found damaged on the third floor.

We would also like to call to your attention that there is extensive damage to the wiring in the third floor of the building and our inspection revealed that none of the wiring is in conduit and there may be code upgrades involved in the repair of the wiring as well as the construction of the balcony, which was destroyed in the fire.

Another failure of both investigators was in failing to adequately document the positions of circuit breaker activations in the electrical panels serving the building of fire origin. This documentation was necessary to identify and track the tripping of the circuit breakers during the fire, to further isolate the area of fire origin.

³³ Second Report to Phil Yarbrough, Union Standard Insurance, Irving, Texas, from Jim Gowder, Adjuster-Florence Office, Cook Claims Service, Athens, Alabama, dated October 21, 2010 (YEDLA002524-002527).

To his credit, Investigator Williams did photograph the circuit breaker panels and associated documentation in these panels. Investigator Williams does not indicate in his report the locations of each of these circuit breaker panel cabinets, however. Unfortunately, the photographs he took, which were provided during discovery (YEDLA 0003133-0003141), were blurred and have no evidentiary value except to observe a large label identifying the manufacturer as “Square D”.

No additional details are available regarding the make and model of the Square D cabinets, as well as the type of breakers installed. Obtaining this information is vitally important, especially where there is documented evidence of “counterfeit” Square D circuit breakers which have been found and later proven to have started fires.

This has been documented in a number of television and news media stories. For example, on August 10, 2010, Miami Breaker Inc. (MBI), of Miami, Fla. announced a recall of 43,600 counterfeit Square D circuit breakers it had sold. The recalled circuit breakers³⁴ labeled “Square D” or “SQD” were determined to be counterfeit and capable of failing to trip when they are overloaded, posing a significant fire hazard to consumers.

C. Reliably Applying the Principles and Methods to the Facts of the Case

This analysis focuses on the issue of Plaintiff’s unfounded claims and flawed investigative methodologies. Supporting documentation is cited throughout this analysis, referring to specific sections from disclosed written reports of findings, witness statements, and forensic laboratory tests (or the lack thereof). Also cited are recognized professional standards of proper forensic

³⁴ For additional information, see: <http://www.schmidtandclark.com/circuit-breaker-recall>

principles and methodologies, expert treatises, and peer-reviewed literature available to all fire investigators. These professional standards and the established principles and methodologies apply whether the fire investigator is in the public or private sector.

Note that the evaluation of this case does not concern these investigators' knowledge, skill, experience, training, and education. **At issue in this case is the reliability of the methodologies employed and the opinions rendered by Investigator Daniel Wilkerson (City of Huntsville Fire Department) and Investigator Roderick Williams (EFI Global, Inc.). This reliability analysis is directed at whether or not these experts followed the scientific principles and methodologies required for a proper origin and cause determination; whether or not sufficient facts or data were developed in their investigation; and whether or not the scientific principles and methodologies were properly applied to the facts and data developed in their investigation to verify and validate the reliability of their ultimate opinions.**

Although the fire incident which is the center of this lawsuit occurred on September 22, 2010 and the Plaintiff represents³⁵ that the investigations followed the generally accepted professional practices set forth in *NFPA 921* and *NFPA 1033*, the Plaintiff's experts did not specify which Editions they used and adhered to in conducting their investigations. The generally accepted practice in the fire investigation field is to apply the latest edition in effect at the date of the expert's trial testimony, deposition testimony, or expert disclosure report.

Therefore, the editions used in this analysis are the 2014 Editions of *NFPA 921* and *NFPA 1033*. It will be expected that both the Plaintiff's and Defendant's experts will reference the 2014

³⁵ Plaintiff's Responses to Request for Admissions, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, December 20, 2013.

editions in any courtroom testimony, depositions, and expert reports produced. Those sources establish the principles and methodologies for a reliable and scientifically valid fire scene investigation. Any deviation from those procedures should be documented and justified by the fire investigators in their reports.

Both Investigators Wilkerson and Williams failed to apply the accepted scientific principles and methods of fire scene investigation to their analysis of the September 22, 2010 fire at the Country Inn and Suites in Huntsville, Alabama. They both failed to reliably apply the proper principles and methods of fire scene investigation to the facts of this case. Some of the most striking examples are illustrated by the following:

- 1. The failure to employ and embrace the tenets of the scientific method, particularly when collecting and interpreting data, and considering other potential hypotheses;**
- 2. The failure to conduct and thoroughly document any oral or written interviews conducted in this matter regarding observations of the development and growth of the fire, with the exception of Investigator Wilkerson's very short statement taken of the occupant of Room 2207 and which had little or no information to contribute to the analysis;**
- 3. The failure to inquire about any exterior video security system at the motel, in adjoining public or private areas, and through responding public safety personnel which could have pinpointed and documented the origin, cause, spread and development of the fire;**
- 4. The failure to properly employ the four essential methodologies necessary for determining a fire's origin, cause, and development: (1) witness information, (2) fire patterns, (3) fire dynamics, and (4) arc mapping;**
- 5. The failure to protect evidence from spoliation through proper scene security, notification to the client of potential interested parties, and**

deferring/suspending the processing of the fire scene until all interested parties could arrange to participate;

- 6. The failure to recognize and account for other potential hypotheses for the origin and cause of the fire, including numerous fire, building, and electrical code violations which easily could have caused this fire; and**
- 7. The failure to collect and preserve evidence found at the fire scene to forward that evidence to a competent forensic engineering laboratory for their evaluation.**

These experts for Plaintiff have not complied with many of the generally accepted scientific principles and methods for conducting a proper fire investigation. The errors and omissions are so numerous and so fundamentally flawed in terms of scope and degree that the reliability of their conclusions as to the origin, cause, development, and responsibility for this fire cannot be established.

Although Mr. Wilkerson and Mr. Williams may be generally capable and experienced investigators, their failure in this case to employ reliable principles and methods for conducting a proper forensic fire scene investigation and their failure to reliably apply the proper principles and methods to the facts in this case undermines the reliability and validity of their conclusions, specifically that the resident of Room 2207 caused or was in some way responsible for the fire by allegedly discarding a lit cigarette. In fact, their basic underlying premise that the fire was caused by *anyone* cannot be scientifically verified and validated.

It is the professional opinion of this author that the investigations conducted by Investigator Daniel Wilkerson (City of Huntsville Fire Department) and Investigator Roderick Williams (EFI Global, Inc.) whose findings, conclusions and opinions are reviewed in this report, are not the product of reliable scientific principles and methods; are based

upon insufficient facts or data; fail to reliably apply the proper principles and methods of forensic fire investigation to the facts of this case; and fail to meet the generally accepted standard of care for conducting a proper and reliable scientific fire investigation as set forth in *NFPA 921 – Guide for Fire and Explosion Investigations* (2014 Edition), *NFPA 1033 – Standard for Professional Qualifications for Fire Investigator* (2014 Edition), and all other recognized professional standards for conducting a proper fire investigation. These failings defeat the validity and reliability of their opinions rendered in this case.

VII. Conclusion

The analysis performed and the opinions expressed herein are established to a reasonable degree of scientific and engineering certainty, conform to the generally accepted principles of forensic fire scene reconstruction and investigation, and are based upon the facts and information made available as of the date of this report. The recognized principles and methods of forensic fire scene investigation and the standards of professional care in conducting fire and explosion investigations cited within this report serve as the basis for the opinions rendered.

This report is based upon the empirical data and facts established in the investigation of this fire incident and may be amended at a later date if any additional information becomes available through first-hand observations, further analysis, facts presented to experts prior to trial through depositions or other disclosures, or facts established in court proceedings which have a bearing on this analysis. Such information may affect the opinions rendered in this analysis and in the event such new information becomes known, this report may be revised accordingly and the opinions rendered in this analysis may be changed. In the absence of any such newly disclosed information, the opinions stated herein stand as presented.

The foregoing is based upon my training, experience, and review of the relevant literature. My opinions and methodologies are based on principles, facts, and data that other experts in my field of forensic fire investigation and reconstruction reasonably rely upon in making expert and professional decisions. All of the foregoing opinions are to a reasonable degree of certainty and in all probability.

A listing of the data and information reviewed and relied upon is attached hereto as Appendix A, along with Exhibits A, B, C, and D. There are no assumptions that the attorney hiring me has provided or that I have relied upon in forming the foregoing opinions. Also attached hereto as Appendix B is a current copy of my resume showing my expert qualifications, along with a list of all publications within the past ten (10) years. Finally, attached hereto as Appendix C is a listing of cases in which I have given trial or deposition testimony within the past four (4) years.

My fees are set by agreement at the rate of \$200.00 per hour.

VIII. Certification

I hereby certify that this report was prepared by me, and that I am a duly licensed Registered Professional Engineer under the laws of the State of Alabama, License Number 31381, Expiration Date: December 31, 2014.

IX. Verification

I hereby affirm, pursuant to 28 U.S.C. § 1746, under penalties of perjury, that the foregoing report is true and correct.

Dated this 19th day of March, 2014.

A handwritten signature in black ink, appearing to read 'D. Icove', with a long horizontal flourish extending to the right.

David J. Icove, Ph.D., P.E., CFEI



APPENDIX A – LIST OF DOCUMENTS, INFORMATION, AND DATA REVIEWED

The following documents, materials, and references reviewed, including those relied upon in the preparation of this report:

Bulk Discovery Documents

- Plaintiff's Discovery Records, YEDLA 000001-003169
- City of Huntsville, Alabama, Fire Rescue Records, FBI 000020-000078
- City of Huntsville, Alabama, Inspection Records, FBI 000079-000142
- City of Huntsville, Alabama, Photos, FBI 000143-000186

Insurance Documents

- Assignment of Fire Loss by Phil Yarbrough, Staff Adjuster, Union Standard, Irving, Texas, to Cook Claims, for 4880 University Drive, Huntsville, Alabama, assigned September 23, 2010 (YEDLA002912)

Reports of Investigation

- Narrative report by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding the fire on September 22, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama (YEDLA002966).
- First Report to Phil Yarbrough, Union Standard, Irving, Texas, from Jim Gowder, Adjuster-Florence Office, Cook Claims Service, Athens, Alabama, dated September 27, 2010 (YEDLA000467-000478).
- Fire Investigation Report One and Final, by EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, September 22, 2010, Claim Number 10070791, EFI File Number 94216-08709, prepared for Union Standard Insurance Company, in care of Jim Gowder, Cook Claims, signed by Rod Williams and reviewed by Metts Hardy, October 12, 2010 (YEDLA002942-002989).
- Second Report to Phil Yarbrough, Union Standard Insurance, Irving, Texas, from Jim Gowder, Adjuster-Florence Office, Cook Claims Service, Athens, Alabama, dated October 21, 2010 (YEDLA002524-002527).
- Federal Rule 26 Statement of Rod Williams, EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, Date of Loss: September 22, 2010, Claim Number Not Given, EFI File Number 94216-08709, signed by Rod Williams, February 18, 2014 (YEDLA003164-003169).
- City of Huntsville Fire, Electrical, and Building Inspection Reports (FBI000048-000051, FBI000060-000063, FBI000070-000074, FBI000078, FBI000118-000119, FBI000126-000127)

Statements

- Written statement of Wanda Morgan taken by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding events on September 23, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama (YEDLA0000915-0000916).
- Written statement of Michael K. Siegling taken by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding the fire on September 22, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama (YEDLA0000917-0000918).

Claims

- Standard Form 95, Claim for Damage, Injury, or Death, submitted to the Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW Washington, DC, by Acadia Insurance Company a/s/o Yedla Management Co. c/o McCathern Mooty Grinke, LLP, Paul A. Grinke, 3710 Rawlins Street, Suite 1600, Dallas, Texas 75219, Legal Counsel for Claimant, signed by Paul A. Grinke on August 1, 2012 (YEDLA0000919-0000920).
- Redacted electronic mail "*RE: Yedla Management 10070791 FBI file*" dated January 31, 2011 and redacted correspondence from Jamie P. Cooper, attorney at Martin, Disiere, Jefferson & Wisdom LLC to Union Insurance Company (YEDLA002032-002040).

Court Documents

- Plaintiff's Original Complaint, Acadia Insurance Co., As Subrogee of Yedla Management Co., Inc. & Hospitality Enterprises of Huntsville, Inc., d/b/a Country Inn & Suites, Plaintiff, v. United States of America and Michael Siegling, Defendants, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, Document 1, filed May 10, 2013.
- Acadia Insurance Company, as Subrogee of Yedla Management Company, Inc. & Hospitality Enterprises of Huntsville, Inc. d/b/a Country Inn & Suites, Plaintiff, v. United States of America and Michael Siegling, Defendants, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, filed May 13, 2013.
- Defendant's Combined Discovery to Plaintiff, Acadia Insurance Company, Plaintiff, v. United States of America, Defendants, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, November 20 2013.
- Plaintiff's Responses to Request for Admissions, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, December 20, 2013.
- Plaintiff's Objections and Answers to Interrogatories, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, December 20, 2013.

- Defendant's Second Request For Production of Documents to Plaintiff, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, January 8, 2014.
- Defendant's Third Request for Production or Inspection to Plaintiff, Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, January 24, 2014.
- The Cincinnati Insurance Company, and Applied Technical Services, Inc. Plaintiffs, United States Liability Insurance Company d/b/a United States Liability Group, Defendant, United States District Court for the Middle District of Tennessee at Nashville, Case# 3:11-Cv-01169, Document 26, Filed June 6, 2012.
- Plaintiff's Expert Designations Pursuant to Fed. R. Civ. P. 26(A)(2), Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, March 3, 2014.

Websites

- <http://www.schmidtandclark.com/circuit-breaker-recall>
- Query of 4880 University Drive, Huntsville, Alabama, 35816. Source: Bing Maps, <http://www.bing.com/maps>, last retrieved February 22, 2014.
- Query of Business Entity Details for Utsav, LLC, doing business as Country Inn and Suites, Huntsville, Entity Identification Number 036-936, Website <http://arc-sos.state.al.us>, retrieved February 22, 2014.
- Query of City of Huntsville, Business License Tax Search for Utsav, LLC, doing business as Country Inn and Suites, Huntsville, Website <http://lictaxsearch.huntsvilleal.gov>, retrieved February 22, 2014.

Technical References

- Clinkinbeard, K. J., & King, G. A. (2008). Spoliation: *Can the Investigator be Sued for Destruction of Evidence?* Paper presented at the International Symposium on Fire Investigation Science and Technology, ISFI 2008, Cincinnati, Ohio, May 18 -21, 2008.
- Goldberg, N. A. and Freedenberg, J.P. (2003). "*Spoliation—Avoiding Specious Claims by Plaintiffs.*" Goldberg Segalla, L.L.P., New York. November 2003.
- Icove, D.J. and Haynes, G.A. 2007. "*Guidelines for Conducting Peer Reviews of Complex Fire Investigations.*" (Fire and Materials Conference, San Francisco, California, January 29-31, 2007.)
- Lynch, P. A. (1997). *Watch Out for Tort Liability for Spoliation of Evidence.* Fire & Arson Investigator, International Association of Arson Investigators, Volume 47, Number 4. June 1997, pp. 17-19.

Textbooks

- DeHaan, J. D., & Icové, D. J. (2012). *Kirk's Fire Investigation* (7th Edition). Upper Saddle River, NJ: Pearson-Prentice Hall.
- Icové, D. J., Wherry, V. B., & Schroeder, J. D. (1998). *Combating Arson-for-Profit: Advanced Techniques for Investigators* (2nd Edition). Columbus, OH: Battelle Press.
- Icové, D. J., DeHaan, J. D., & Haynes, G. A. (2013). *Forensic Fire Scene Reconstruction* (3rd Edition). Upper Saddle River, N.J.: Pearson/Prentice Hall.

Guidelines and Standards

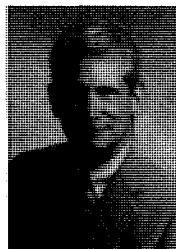
- ASTM E620. (2011). ASTM E620-11 - Standard Practice for Reporting Opinions of Scientific or Technical Experts *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E678. (2013). ASTM E678-13 Standard Practice for Evaluation of Scientific or Technical Data *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E860. (2013). ASTM E860-13 Standard Practice for Examining and Preparing Items That Are or May Become Involved In Criminal or Civil Litigation *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International:
- ASTM E1020. (2013). ASTM E1020-13 Standard Practice for Reporting Incidents that May Involve Criminal or Civil Litigation *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E1138. (1989). ASTM E1138-89: Terminology of Technical Aspects of Products Liability Litigation *Committee E30.40 on Technical Aspects of Products Liability Litigation (withdrawn 1995)*. West Conshohocken, PA: ASTM International.
- ASTM E1188. (2011). ASTM E1188-11 Standard Practice for Collection and Preservation of Information and Physical Items by a Technical Investigator *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E1459. (2013). ASTM E1459-13 Standard Guide for Physical Evidence Labeling and Related Documentation *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E1492. (2011). ASTM E1492-11 Standard Practice for Receiving, Documenting, Storing, and Retrieving Evidence in a Forensic Science Laboratory *ASTM International Subcommittee E30.11 on Forensic Sciences*. West Conshohocken, PA: ASTM International.
- ASTM E2187. (2009). ASTM E2187-09. Standard Test Method for Measuring the Ignition Strength of Cigarettes. *ASTM International Subcommittee E05.15 on Furnishings and Contents*. West Conshohocken, PA: ASTM International.
- NFPA 72 (2013). National Fire Alarm and Signaling Code, 2013 Edition. National Fire Protection Association, Quincy, MA.
- NFPA 921. (2014). *NFPA 921--Guide for Fire and Explosion Investigations*. Quincy, MA: National Fire Protection Association.

- NFPA 1033. (2014). NFPA 1033--Standard for Professional Qualifications for Fire Investigator. Quincy, MA: National Fire Protection Association.
- NIJ. 2000. Fire and Arson Scene Evidence: A Guide for Public Safety Personnel (Office of Justice Programs, Trans.) Technical Working Group on Fire/Arson Scene Investigation (TWGFASI) (pp. 48). Washington, DC: National Institute of Justice.

APPENDIX B – EXPERT QUALIFICATIONS AND PUBLICATIONS

DAVID J. ICOVE, Ph.D., P.E., CFEI

P.O. Box 1348
Knoxville, Tennessee 37901-1348
Phone: (865) 693-4361
Fax: (865) 693-4369



EDUCATION

- B.S., Electrical Engineering, University of Tennessee, Knoxville (1971)
- M.S., Electrical Engineering, University of Tennessee, Knoxville (1974)
Thesis: FEDAP: The Fire Engineering Data Analysis Program
- B.S., Fire Protection Engineering, University of Maryland, College Park, Maryland (1975)
Thesis: Application of Pattern Recognition to Arson Investigation
- Ph.D., Engineering Science and Mechanics, University of Tennessee, Knoxville (1979)
Dissertation: Principles of Incendiary Crime Analysis

PROFESSIONAL REGISTRATION

- Professional Engineer, State of Alabama, 2010, License No. 31381
- Professional Engineer, State of Arkansas, July 20, 2010, License No. 14304
- Professional Engineer, State of Florida, May 31, 2013, License No. 76243
- Professional Engineer, State of Louisiana, May 20, 2010, License No. 0035454
- Professional Engineer, State of Maryland, July 1, 2010, License No. 39316
- Professional Engineer, State of Nebraska, February 28, 2011
- Professional Engineer, State of New Hampshire, May 31, 2013, License No. 14094
- Professional Engineer, State of North Carolina, February 14, 2011, License No. 037613
- Professional Engineer, State of Pennsylvania, January 7, 2010, License No. PE077385
- Professional Engineer, State of South Carolina, July 11, 2011, License No. 29180
- Professional Engineer, State of Tennessee, Feb. 25, 1984, License No. 16650
- Professional Engineer, State of Texas, November 24, 2009, License No. 104460
- Professional Engineer, State of Virginia, Oct. 1, 1984, License No. 15062
- Professional Engineer, State of Wisconsin, March 11, 2013, License No. 42851-6
- Certified Fire and Explosion Investigator, National Association of Fire Investigators, June 28, 2006, Rec. No. 7271-5469

EXPERIENCE

Oct. 2009 – Present
Oct. 1995 – Sep. 2009
Jan. 1980 – Jan. 1984

Research Professor

Adjunct Assistant Professor

Instructor

Department of Electrical Engineering and Computer Science, The University of Tennessee, Knoxville

Courses taught:

ECE 301/302 - Circuits, Electronics, Instruments

EF 230 - Computer Solution Engineering Problems

EF 402 - Electrical Engineering for the FE Exam
ME 495 - Enclosure Fire Dynamics
ECE 491/599 - Introduction to Pattern Recognition
ECE 599 - Fire Modeling and Visualization
ECE 599 - Pattern Recognition/Forensic
Engineering
ECE 692 - Pattern Recognition/Cluster Analysis

Dec. 2004 – Present

Adjunct Faculty

Professional Master of Fire Protection Engineering
The University of Maryland, College Park, MD

Courses taught:

ENFP 629D (Forensic Fire Analysis)
ENFP 629M (Performance Based Fire Codes
Analysis)

Sep. 2012 – Present

Adjunct Faculty

University of New Haven
The Henry C. Lee College of Criminal Justice and
Forensic Sciences

Courses taught:

NSP 607 (Architecture of Protected Information)

Mar. 2006 – Present

Reserve Deputy Sheriff

Fire Investigations Bureau
Knox County Sheriff's Department
Knoxville, Tennessee

1998 – Present

President/Manager

Icove and Associates, LLC
Knoxville, Tennessee

Dec. 1993 – Dec. 2005

Federal Law Enforcement Agent

Criminal Investigations Division
U.S. Tennessee Valley Authority Police
Knoxville, Tennessee

Mar. 1984 – Dec. 1993

Program Manager, GM-1801-15

Arson and Bombing Investigative Services Sub-unit
Federal Bureau of Investigation
Behavioral Science Unit, Quantico, Virginia

Oct. 1979 – Dec. 1983

Supervisor, Arson Task Force

Knoxville Police Department, Knoxville, Tennessee

Mar. 1978 – Sep. 1979

Investigator, Ohio State Fire Marshal's Office

Reynoldsburg, Ohio

- Federal Emergency Management Agency, 1995-2001, \$450,000. “*Trip Kit*.” Development of the Transportable Rapid Information Package for fire scene assessment and documentation.
- U.S. Department of Defense, National Computer Security Center, Project CASIAT, \$450,000. “*Computer Assisted Security and Investigative Analysis Toolkit*.”
- National Institute of Standards and Technology, 1974, \$500, support for “*Fire Engineering Data Analysis Program (FEDAP)*.”

PATENTS

- U.S. Patent US 8,594,979 B2, D.J. Icové and C.T. Lyster, “Handheld And Imbedded Devices to Detect Sticky Devices Using Magnets” Nov. 26, 2013
- U.S. Patent 8,493,212, D.J. Icové, C.T. Lyster, and D.M. Banwarth, “Passive Microwave System and Method for Protecting a Structure from Fire Threats,” July 23, 2013.
- U.S. Patent 8,429,153, J.D. Birdwell, T.W. Wang, D.J. Icové, R. Horn, D.V. Stansberry, C.G. Sapp, and M.S. Rader, “Method and Apparatus for Classifying Known Specimens and Media Using Spectral Properties and Identifying Unknown Specimens and Media,” April 23, 2013.
- U.S. Patent 8,396,870, J.D. Birdwell, T.W. Wang, R.D. Horn, D.J. Icové, S.P. Horn, R. Horn, D.V. Stansberry, and M.S. Rader, “Method And Apparatus for Predicting Object Properties and Events Using Similarity-Based Information Retrieval and Modeling,” March 13, 2013.
- U.S. Patent 8,392,418, J.D. Birdwell, T.W. Wang, R.D. Horn, D.J. Icové, and S.P. Horn, “Method And Apparatus for Predicting Object Properties and Events Using Similarity-Based Information Retrieval and Modeling,” February 12, 2013.
- U.S. Patent 8,375,032, J.D. Birdwell, T.W. Wang, R.D. Horn, D.J. Icové, S.P. Horn, and M.S. Rader, “Method and Apparatus for Predicting Object Properties and Events Using Similarity-Based Information Retrieval and Modeling,” February 12, 2013.
- U.S. Patent 8,212,671. D.J. Icové and C.T. Lyster, “Passive Microwave Speed and Intrusion Detection System,” July 3, 2012.
- U.S. Patent 8,099,733. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, “Parallel Data Processing Architecture,” January 17, 2012.
- U.S. Patent 8,060,522. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, “Parallel Data Processing Architecture,” November 15, 2011.
- U.S. Patent 8,049,620. D.J. Icové and C.T. Lyster, “Passive Microwave Fire and Intrusion Detection System Including Black Body and Spectral Emission at the Hydrogen, Hydroxyl and Hydrogen Chloride Lines,” November 1, 2011.
- U.S. Patent 8,044,798. D.J. Icové and C.T. Lyster, “Passive Microwave Speed and Intrusion Detection System,” October 25, 2011.
- U.S. Patent 8,013,745. D.J. Icové, M.B. Zemel, C.T. Lyster and N. Feld, “Passive Microwave Assessment of Human Body Core to Surface Temperature Gradients and Basal Metabolic Rate, September 6, 2011.
- U.S. Patent 7,884,717. D.J. Icové and C.T. Lyster, “Passive Microwave Fire and Intrusion Detection System, February 8, 2011.
- U.S. Patent 7,882,106. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, Method of Indexed Storage and Retrieval of Multidimensional Information, February 1, 2011.

- U.S. Patent 7,724,134. D.J. Icové and C.T. Lyster, "Passive Microwave Fire and Intrusion Detection System," May 25, 2010.
- U.S. Patent 7,454,411. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, "Parallel Data Processing Architecture," November 18, 2008.
- U.S. Patent 7,272,612. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, "Method of Partitioning Data Records," September 18, 2007.
- U.S. Patent 6,741,983. J.D. Birdwell, T.W. Wang, R.D. Horn, P. Yadav, and D.J. Icové, "Method of Indexed Storage and Retrieval of Multidimensional Information," May 25, 2004.

TECHNICAL COMMITTEE MEMBERSHIPS

- *NFPA 921* "Technical Committee on Fire and Explosion Investigations," Member 1992, reappointed to present, and liaison member to *NFPA 901*, Fire Incident Reporting
- *NFPA 901* "Fire Incident Reporting," Chairperson, March 2013.
- National Institute of Justice (NIJ), Technical Working Group Publications
 - *Fire and Arson Scene Evidence: A Guide for Public Safety Personnel (June 2000)*
 - *Electronic Crime Scene Investigation: A Guide for First Responders" (July 2001)*
- American Society for Testing and Materials (ASTM),
 - Committee E05 on *Fire Testing*, Member 2000 to present
 - Committee E30.11 on *Interdisciplinary Forensic Science Standards*, 2009 to present
 - Committee E58 on *Forensic Engineering*, 2009 to present.
- Underwriters Laboratory, Inc. "Fire Advisory Council," Member 2005 to present.
- International Code Council, "Log Cabin Committee," Member 2010 to present.
- Science Advisory Committee, National Association of State Fire Marshals, Member 2011 to present
- Editorial Review Committee, Fire and Arson Investigator Journal, International Association of Arson Investigator, Member 2010 to present
- City of Knoxville, Building Board of Adjustments and Appeals, representative of the Fire Service. Member.

PROFESSIONAL ASSOCIATION MEMBERSHIPS

- Institute of Electrical and Electronic Engineers (IEEE), Member since 1971, Senior Member since 2000.
- Society of Fire Protection Engineers (SFPE), Member since 1971, Fellow since 2011.
- International Association of Arson Investigators (IAAI), Member since 1973.
- National Fire Protection Association (NFPA), Member since 1979.
- American Society for Industrial Security (ASIS), Member since 1984.
- International Association of Bomb Technicians and Investigators (IABTI), Member since 1988.
- International Homicide Investigators Association (IHIA), Charter Member since 1989.
- National Society of Professional Engineers (NSPE), Member since 1997.
- National Arson Forum, Charter member since 1986.
- Society of Police Futurists International (PFI), Charter Member since 1991.
- Presidents Club, University of Tennessee, Member since 1998.

- American Society for Testing and Materials (ASTM), Member since 2000.
- National Association of Fire Investigators (NAFI), Member since 2001.
- International Code Council (ICC), Member since 2009.

TEXTBOOKS

- J.D. DeHaan and D.J. Icové. 2012. *Kirk's Fire Investigation*, 7th Edition (Prentice Hall, Upper Saddle River, New Jersey)
- D.J. Icové, J.D. DeHaan, and G.A. Haynes. 2013. *Forensic Fire Scene Reconstruction*, 3rd Edition (Prentice Hall, ISBN 0-13-222857-2, Upper Saddle River, New Jersey, 2009.)
- D.J. Icové. 2006. *Forensics in Fire* (Harcourt Education, 2006 ISBN 1869703871, 9781869703875.)
- D.J. Icové, C.M. Blocher, and J.D. DeHaan. 2002. *Instructor's Manual to Kirk's Fire Investigation*, 5th Edition. (Prentice Hall, ISBN 0-13-060458-5, Upper Saddle River, NJ, 2002.)
- D.J. Icové, V.B. Wherry and J.D. Schroeder. 1998. *Combating Arson-for-Profit: Advanced Techniques for Investigators*, 2nd Edition. (Battelle Press, ISBN 0-934550-2, Columbus, OH, 1998.)
- L. Koch and D.J. Icové, editors. 1992. *Book of Selected Articles for Arson Investigators*, 1992 edition. (International Association of Arson Investigators, St. Louis, MO, 1992.)
- D.J. Icové, editor 1984, 1992 *Incendiary Fire Analysis and Investigation*. Open Learning Fire Service Program, Federal Emergency Management Agency, U.S. Fire Administration, Washington, D.C. (Ginn Custom Publishing Program, 1984; republished January 1992.)

TEXTBOOK CHAPTERS

- A.D. Sapp, T.G. Huff, G.P. Gary, and D.J. Icové. 1998. "Arson and Fire-Related Crime Factors" in V.B. Van Hasselt and M. Hersen, editors, *Handbook of Psychological Approaches with Violent Offenders*. (Plenum Publishing Corp., New York, NY, ISBN 0-306-45845-4, 1998.)
- A.D. Sapp, T.G. Huff, G.P. Gary, and D.J. Icové. 1998. "Arson and Fire-Related Crime Factors" in V.B. Van Hasselt and M. Hersen, editors, *Handbook of Psychological Approaches with Violent Offenders*. (Plenum Publishing Corp., New York, NY, ISBN 0-306-45845-4, 1998.)
- D.J. Icové and M.H. Estépp. 1997. "Motive-Based Offender Profiles of Arson and Fire-Related Crimes" in Part VIII-Property Crime, *Criminal Detection and the Psychology of Crime*. (Ashgate-Dartmouth, Brookfield, VT, ISBN 1-85521-963-8, 1997.)
- D.J. Icové, G.P. Gary, T.G. Huff, A.D. Sapp. 1995. "A Motive-Based Offender Analysis of Serial Arsonists," *The Investigation & Prosecution of Arson*, 2nd ed. (California District Attorneys Association, CA, 1995.)
- D.J. Icové, J.E. Douglas, G. Gary, T.G. Huff, and P.A. Smerick. 1993. "Arson" in J.E. Douglas et al., *Crime Classification Manual*. (Lexington Books, New York, 1993.)
- J.L. Bryan and D.J. Icové. 1983. "Recent Advances in Computer Assisted Arson Investigation," Chapter 23 in *The Social and Economic Consequences of Residential*

Fires." Chester Rapkin, editor. (Lexington Books, Lexington, Massachusetts, ISBN 0-669-04362-1, 1983.)

- D.J. Icové and M.M. Gohar. 1979. Chapter in "*Fire Investigation Photography*," in *Fire Investigation Handbook*. (National Bureau of Standards, Washington, D.C., 1979.)

PAPERS

- A.T. Tinsley, E.G. Burdette, & D.J. Icové. 2013. *Structural Deformations as an Indicator of Fire Origin*. Journal of Performance of Constructed Facilities.
- J.D. DeHaan, D.J. Icové, R. Crim, J.L. Blankenship. 2010. "Burning for Profit: Putting it all Together." (ISFI 2010, International Symposium on Fire Investigation Science and Technology, College Park, Maryland, September 27-29, 2010)
- D.J. Icové, G.E. Gorbett, J.D. Birdwell, and R.E. Merck. 2010. "*Fire Modeling: Best Practices for Constructing Academic High Performance Computing Clusters.*" (ISFI 2010, International Symposium on Fire Investigation Science and Technology, College Park, Maryland, September 27-29, 2010)
- D.J. Icové and B.P. Henry. 2010. "*Expert Report Writing: Best Practices for Producing Quality Reports.*" (ISFI 2010, International Symposium on Fire Investigation Science and Technology, College Park, Maryland, September 27-29, 2010)
- A.T. Tinsley, M. Whaley, and D.J. Icové. 2010. "*Analysis of Hay Clinkers as an Indicator of Fire Cause.*" (ISFI 2010, International Symposium on Fire Investigation Science and Technology, College Park, Maryland, September 27-29, 2010)
- A.T. Tinsley and D.J. Icové. 2008. "*An Assessment of the Use of Structural Deformation as a Method for Determining Area of Fire Origin.*" (ISFI 2008, International Symposium on Fire Investigation Science and Technology, Cincinnati, Ohio, May 19-21, 2008)
- D.J. Icové and M.W. Dalton. 2008. "*A Comprehensive Prosecution Report Format for Arson Cases.*" (ISFI 2008, International Symposium on Fire Investigation Science and Technology, Cincinnati, Ohio, May 19-21, 2008)
- D.J. Icové and C.T. Lyster. 2007. "*Passive Microwave Fire Detection: A Survey and Assessment,*" (11th International Conference on Fire Scene and Engineering, University of London, Royal Holloway College, United Kingdom, September 3-5, 2007.)
- D.J. Icové and G.A. Haynes. 2007. "*Guidelines for Conducting Peer Reviews of Complex Fire Investigations.*" (Fire and Materials Conference, San Francisco, California, January 29-31, 2007.)
- D.J. Icové and J.D. DeHaan. 2006. "*Hourglass Burn Patterns: A Scientific Explanation for their Formation,*" (International Symposium on Fire Investigation Science and Technology, Cincinnati, Ohio, June 26-28, 2006.)
- D.J. Icové, H.E. Welborn, A.J. Vonarx, E.C. Adams, J.R. Lally, T.G. Huff. 2006. "*Scientific Investigation and Modeling of Prehistoric Structural Fires at Chevelon Pueblo.*" (International Symposium on Fire Investigation Science and Technology, Cincinnati, Ohio, June 26-28, 2006.)
- D.J. Icové and J.D. DeHaan. 2004. "*NFPA 921's Impact on Fire Scene Reconstructions,*" *Fire Protection Engineering Magazine*, (Society of Fire Protection Engineers, Bethesda, Maryland, Vol. 21, pp. 10-16. Winter 2004)

- A.M. Christensen and D.J. Icové. 2004. "The Application of NIST's Fire Dynamics Simulator to the Investigation of Carbon Monoxide Exposure in the Deaths of Three Pittsburgh Fire Fighters," (*Journal of Forensic Science*, Vol. 49, No.1, January 2004.)
- T.G. Huff, G.P. Gary, D.J. Icové. 2001. "The Myth of Pyromania," *Fire and Arson Investigator*, (International Association of Arson Investigators, Bridgeton, MO, Vol. 51, No. 1, October 2001, pp. 28-37.)
- H. Stambaugh, D.S. Beaupre, D.J. Icové, R. Baker, W. Cassaday, and W.P. Williams. 2001. "Electronic Crime Needs Assessment for State and Local Law Enforcement," *National Institute of Justice*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, NCJ 186276. March 2001.)
- T.G. Huff, G.P. Gary, D.J. Icové. 2001. "The Myth of Pyromania," *Fire and Arson Investigator*, (International Association of Arson Investigators, Bridgeton, MO, Vol. 51, No. 1, October 2001, pp.28-37.)
- H. Stambaugh, D.S. Beaupre, D.J. Icové, R. Baker, W. Cassaday, and W.P. Williams 2001. "Electronic Crime Needs Assessment for State and Local Law Enforcement," *National Institute of Justice*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, NCJ 186276. March 2001
- D.J. Icové & J.D. DeHaan, 1998. "Forensic Fire Scene Reconstruction," (National Fire Protection Association, Fall Meeting, Atlanta, GA, Nov. 17, 1998.)
- D.J. Icové. 1997. "Collaring Cybercrooks: An Investigator's View," *IEEE Spectrum*. (New York, NY, Institute of Electrical and Electronic Engineers, June 1997.)
- J.D. Birdwell, D. Wiggins, L. Leedy, G. Larsen, and D. Icové. 1997. "Wide Area Information Servers in Secure Environments." (Office of National Drug Control Policy (ONDCP) Symposium, 1997) see: www.lit.net/ondcp/wais.html.
- D.J. Icové. 1995. "Fire Scene Reconstruction", First International Symposium on the Forensic Aspects of Arson Investigations, Federal Bureau of Investigation, Fairfax, Virginia, July 31, 1995.
- D.J. Icové, & S.A. Kelly. 1993. "Total Quality in Arson Unit Management: A Blueprint for Public Safety Managers," *IAFC On Scene*. (Washington, D.C., International Association of Fire Chiefs, April 15, 1993.)
- D.J. Icové. 1990. "Safeguarding Computer Centers," *Security Management*. (American Society for Industrial Security, Arlington, VA, 1990.)
- D.J. Icové and P.R. Horbert. 1990. "Serial Arsonists: An Introduction," *The Police Chief*. (International Association of Chiefs of Police, Washington, D.C., Vol. 57, No. 12, December 1990.)
- D.J. Icové and R. Gilman. 1989. "Arson Reporting Immunity Laws," *FBI Law Enforcement Bulletin*. (U.S. Department of Justice, Washington, D.C., Vol. 58, No. 6, September 1989.) Republished in *National Fire and Arson Report*. (Charlotte, NC, Vol. 7, No. 5, 1989.)
- K.A. Seger and D.J. Icové. 1988. "Power Theft: The Silent Crime," *FBI Law Enforcement Bulletin*. (U.S. Department of Justice, Washington, D.C., March 1988.)
- D.J. Icové and M.H. Estep. 1987. "Motive-Based Offender Profiles of Arson and Fire-Related Crimes," *FBI Law Enforcement Bulletin*. (U.S. Department of Justice, Washington, D.C., April 1987.)

- D.J. Icové. 1986. "*Automated Crime Profiling*," FBI Law Enforcement Bulletin. (U.S. Department of Justice, Washington, D.C., December 1986.) Republished in National Fire and Arson Report. (Charlotte, NC, Vol. 5, No. 3, 1987.)
- D.J. Icové and M.O. Soliman. 1983. "*Computer-Assisted Arson Information Management*." (Washington, D.C., The International Fire Chief, Vol. 49, No. 12, December, 1983.)
- J.L. Bryan and D.J. Icové. 1977. "*Recent Advances in Computer-Assisted Arson Investigation*," Fire Journal. (National Fire Protection Association, Quincy, MA, Vol. 71, No. 1, January 1977.) Republished in Fire & Arson Investigator. (International Association of Arson Investigators, St. Louis, MO, Vol. 32, No. 2, 1977.)
- D.J. Icové and H.J. Crisman. 1975. "*Application of Pattern Recognition to Arson Investigation*," Fire Technology. (National Fire Protection Association, Quincy, MA, Vol. 37, No. 4, February 1975.)
- D.J. Icové, T.W. Reddock and D. Monro. 1974. "*Mathematical Characterization of the MIRS Fire Reporting System*," 6th Annual Systems Symposium. (Institute of Electrical and Electronic Engineers, Baton Rouge, LA, February 1974.)
- D.J. Icové. 1973. "*The Application of ECAP to the Solution of One and Two Dimensional Heat Transfer Equations*," Society of Naval Engineers. (Naval Ship Systems Command, Washington, D.C., March 1973.)

1/20/2014

APPENDIX C – EXPERT WITNESS TESTIMONY—PAST FOUR YEARS

- December 3, 2012 – Courtroom Testimony, Indictment Nos.: 2011-GS-39-103-104, State of South Carolina, Court of General Sessions, Thirteenth Judicial Circuit, County of Pickens; STATE OF SOUTH CAROLINA, vs. DONALD GREGORY KINSELA, Defendant (criminal case).
- November 27, 2012 – Expert Witness Qualification Testimony, Indictment Nos.: 2011-GS-39-103-104, State of South Carolina, Court of General Sessions, Thirteenth Judicial Circuit, County of Pickens; STATE OF SOUTH CAROLINA, vs. DONALD GREGORY KINSELA, Defendant (criminal case).
- June 27, 2012 – Deposition, Case Action No. PJM 09-1894, United States District Court, District of Maryland, Southern Division, THE CHARTER OAK FIRE INS. CO., Plaintiff vs. MARLOW LIQUORS, LLC, and POTOMAC ELECTRIC POWER CO., et al., Defendants (civil fire case).
- October 25, 2011 - Courtroom Testimony, No. 3669, COURT OF COMMON PLEAS, PHILADELPHIA COUNTY, Pennsylvania: EDWIN BRECHBIEL, as Administrator of the Estate of KEVIN BRECHBIEL and co-Administrator of the Estates of DEXIE BRECHBIEL, KAYLA BRECHBIEL ABBY BRECHBIEL, JUSTIN BRECHBIEL and JASON BRECHBIEL and CONSTANCE C. MA YO-COLLIER, as Administratrix of the Estate of ANITA PATRICE MA YO and Co-Administratrix of the Estates of DEXIE BRECHBIEL, KAYLA BRECHBIEL, ABBY BRECHBIEL, JUSTIN BRECHBIEL and JASON BRECHBIEL and SUSAN BRECHBIEL and RUTH BRECHBIEL, v. REDMAN HOMES, INC., et al. (hearing).
- September 22, 2010 – Deposition, Case No. 09-04669, District Court, Dallas County, Texas, 101st Judicial District. BLANCA FLORES, INDIVIDUALLY; LEANDRO FLORES, INDIVIDUALLY; BLANCO AND LEANDRO FLORES ON BEHALF OF AND AS NEXT FRIENDS OF KATIE VICTORIA FLORES, A MINOR CHILD, IN HER INDIVIDUAL CAPACITY AND AS THE SOLE HEIR ON BEHALF OF THE ESTATES OF JOANA CARRASCO AND ESTEBAN FLORES; AND JUAN CARRASCO, INDIVIDUALLY, Plaintiffs, versus MDH REALTY INVESTMENT, LLC; LK REALTY INVESTMENT, LLC; GBK REALTY INVESTMENT, LLC; MICHAEL D. HIBBERT, INDIVIDUALLY; AND SUNRIDGE MANAGEMENT GROUP, INC., Defendants (civil fire case).
- May 18, 2010 – Courtroom Testimony, Case No. 6:08-cv-02115HMH, United States District Court for the District of South Carolina, Greenville Division. GENESIS PRESS, INC. AND GENESIS PUBLICATIONS, LLC, Plaintiffs, versus MAC FUNDING CORPORATION AND CAROLINA FIRST BANK, Intervenor Plaintiffs, versus HARTFORD CASUALTY INSURANCE COMPANY, Defendant (civil fire case).

- December 17, 2009 – Deposition, Case No. 6:08-cv-02115HMH, United States District Court for the District of South Carolina, Greenville Division. GENESIS PRESS, INC. AND GENESIS PUBLICATIONS, LLC, Plaintiffs, versus MAC FUNDING CORPORATION AND CAROLINA FIRST BANK, Intervenor Plaintiffs, versus HARTFORD CASUALTY INSURANCE COMPANY, Defendant (civil fire case).
- March 10, 2009 – Deposition, Case No. 3:07-cv-78-H, United States District Court for the Western District of Kentucky. BARTON BRANDS LIMITED, Plaintiff, versus O'BRIEN & GERE, INC. OF NORTH AMERICA, et al., Defendants (civil fire case).
- November 13, 2008 – Courtroom testimony, Case No. 88531, Criminal Court of Knox County, Tennessee. STATE OF TENNESSEE, Plaintiff, versus REGINALD FOWLER, ALIAS, Defendant (criminal case).
- August 7, 2008 – Deposition, Case No. 0516-CV27029, Circuit Court of Jackson County, Missouri. ST. PAUL TRAVELERS, Plaintiff, versus THE WILLIAMS-CARVER COMPANY, et al, Defendants (civil fire case).

APPENDIX D – EXHIBITS

REFERENCE	EXHIBIT
(1) YEDLA000467-000478	First Report to Phil Yarbrough, Union Standard, Irving, Texas, from Jim Gowder, Adjuster-Florence Office, Cook Claims Service, Athens, Alabama, dated September 27, 2010.
(2) YEDLA0000915-0000916	Written statement of Wanda Morgan taken by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding events on September 23, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama.
(3) YEDLA0000917-0000918	Written statement of Michael K. Siegling taken by Investigator Daniel Wilkerson, Huntsville Fire Department, regarding the fire on September 22, 2010 at the Country Inn and Suites, 4880 University Drive, Huntsville, Alabama.
(4) YEDLA000919-000920	Standard Form 95, Claim for Damage, Injury, or Death, submitted to the Federal Bureau of Investigation, 935 Pennsylvania Avenue, NW Washington, DC, by Acadia Insurance Company a/s/o Yedla Management Co. c/o McCathern Mooty Grinke, LLP, Paul A. Grinke, 3710 Rawlins Street, Suite 1600, Dallas, Texas 75219, Legal Counsel for Claimant, signed by Paul A. Grinke on August 1, 2012
(5) YEDLA002032-002040	Redacted electronic mail “RE: Yedla Management 10070791 FBI file” dated January 31, 2011 and redacted correspondence from Jamie P. Cooper, attorney at Martin, Disiere, Jefferson & Wisdom LLC to Union Insurance Company.
(6) YEDLA002524-002527	Second Report to Phil Yarbrough, Union Standard Insurance, Irving, Texas, from Jim Gowder, Adjuster-Florence Office, Cook Claims Service, Athens, Alabama, dated October 21, 2010.
(7) YEDLA002912	Assignment of Fire Loss by Phil Yarbrough, Staff Adjuster, Union Standard, Irving, Texas, to Cook Claims, for 4880 University Drive, Huntsville, Alabama, assigned September 23, 2010
(8) YEDLA002942-002989 (photos not included are YEDLA 002990-003136)	Fire Investigation Report One and Final, by EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, September 22, 2010, Claim Number 10070791, EFI File Number 94216-08709, prepared for Union Standard Insurance Company, in care of Jim Gowder, Cook Claims, signed by Rod Williams and reviewed by Metts Hardy, October 12, 2010.

(9) YEDLA003164-003169	Federal Rule 26 Statement of Rod Williams, EFI Global, Inc., Insured: Country Inn & Suites, 4880 University Drive, Huntsville, Alabama 35816, Date of Loss: September 22, 2010, Claim Number Not Given, EFI File Number 94216-08709, signed by Rod Williams, February 18, 2014.
(10) FBI000048-000051, FBI000060-000063, FBI000070-000074, FBI000078, FBI000080- 000081, FBI000118-000119, FBI000126-000127	City of Huntsville Fire, Electrical, and Building Inspection Reports
(11) Case No. 3:11-cv-01169	The Cincinnati Insurance Company, and Applied Technical Services, Inc. Plaintiffs, United States Liability Insurance Company d/b/a United States Liability Group, Defendant, United States District Court for the Middle District of Tennessee at Nashville, Case Number 3:11-cv-01169, Document 26, Filed June 6, 2012.
(12) Case No. 5:13-cv- 00895-CLS	Plaintiff's Expert Designations Pursuant to Fed. R. Civ. P. 26(A)(2), Acadia Insurance Company, Plaintiff, v. United States of America, Defendant, United States District Court of the Northern District of Alabama, Huntsville Division, Case Number 5:13-cv-00895-CLS, March 3, 2014.

**IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF ALABAMA
HUNTSVILLE DIVISION**

ACADIA INSURANCE CO.,
Plaintiff,

v.

**UNITED STATES OF
AMERICA**
Defendant.

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Cause No.: 5:13-cv-00895-CLS

**PLAINTIFF’S RESPONSE BRIEF TO DEFENDANT’S MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 37, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56**

Respectfully submitted,

MCCATHERN, P.L.L.C

By: /s/ Paul A. Grinke

Carl L. Evans
Alabama State Bar No. 6823-A35C
Texas State Bar No. 24056989
cevens@mccathernlaw.com
Paul A. Grinke
Texas State Bar No. 24032255
pgrinke@mccathernlaw.com
Regency Plaza
3710 Rawlins Street, Suite 1600
Dallas, TX 75219
(214) 741-2662 Telephone
(214) 741-4717 Facsimile

ATTORNEYS FOR PLAINTIFF

TABLE OF CONTENTS

INTRODUCTION.....	1
I. PLAINTIFF’S RESPONSE TO MOVANT’S STATEMENT OF UNDISPUTED FACTS.....	2
II. PLAINTIFF’S ADDITIONAL UNDISPUTED FACTS.....	8
III. PLAINTIFF’S DISPUTED FACTS	14
IV. ARGUMENT & AUTHORITIES.....	15
A. Eleventh Circuit Precedent Mandates that Spoliation Sanctions Are Not Appropriate in the Present Matter.	15
1. There Was no Evidence to Collect From the Area of Origin of the Fire....	16
2. Defendant Does Not Have the Burden of Proof in this Matter.....	17
3. There Is No Evidence That Plaintiff Has Acted In Bad Faith	18
B. Alabama Case Law Regarding Spoliation Favors Plaintiff & the Denial of Defendant’s Motion to Dismiss.....	22
V. CONCLUSION.....	28
CERTIFICATE OF SERVICE.....	30

**IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF ALABAMA
HUNTSVILLE DIVISION**

ACADIA INSURANCE CO.,
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v.

**UNITED STATES OF
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Defendant.

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Cause No.: 5:13-cv-00895-CLS

**PLAINTIFF’S RESPONSE BRIEF TO DEFENDANT’S MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 37, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT
PURSUANT TO FED. R. CIV. P. 56**

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, Acadia Insurance Co., as Subrogee of Yedla Management Co., Inc. & Hospitality Enterprises of Huntsville, Inc. d/b/a Country Inn & Suites (hereinafter referred to as “Plaintiff” or “Acadia”), files this Response Brief to Defendant’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 37, or, in the alternative, for Summary Judgment Pursuant to Fed. R. Civ. P. 56, and in support thereof would respectfully show the Court the following:

INTRODUCTION

The U.S. Government wholly failed to respond to Acadia’s formal notice of claim. The U.S. Government did not request an opportunity to inspect the fire scene for one and a half years after being placed on formal notice of claim. There is no evidence the U.S. Government made any attempt to inspect the fire scene in

the months following the fire on September 22, 2010, although a fire originated on the balcony of a room occupied by one of its federal agents, and although that agent was interviewed by the local authorities and admitted to smoking on the balcony. The U.S. Government showed no concern for inspection of the fire scene until January 24, 2014—eight months after this lawsuit was filed; seventeen months after it received formal notice of claim under 28 U.S.C. § 2675; and over three years after the fire. Now, the U.S. Government complains the fire scene was not preserved for its inspection, and seeks death penalty sanctions against Acadia. There is no authority requiring a fire scene be held intact indefinitely until an interested party asks for the opportunity to inspect. The fire scene was well photo-documented by not one but two certified fire investigators. One of those investigators is a completely uninterested party with the City of Huntsville Fire Department. Should the Court find spoliation occurred, there is no evidence that any alleged spoliation occurred in bad faith. Pursuant to clear Eleventh Circuit and Alabama Supreme Court precedent, any spoliation sanction would be inappropriate. Defendant's Motion to Dismiss should be denied.

I. PLAINTIFF'S RESPONSE TO MOVANT'S STATEMENT OF UNDISPUTED FACTS

Plaintiff would demonstrate that the following are actual undisputed facts within the meaning of FED. R. CIV. P. 56, contrary to Defendant's assertions in § 1 of Defendant's Brief in Support of Motion to Dismiss. *See* Doc. 23.

1. On September 22, 2010, a fire ignited on the second floor balcony of Room 2207 at the subject Country Inn & Suites located at 4880 University Drive. *See* Exhibit A, Standard Form 92 & correspondence without exhibits.
2. An investigation as to the cause and origin of the fire at the subject Country Inn & Suites was initiated first by the City of Huntsville Fire Marshal's Department. *See* Exhibit B, October 5, 2010 City of Huntsville Fire Marshal's Report at FBI000037.
3. During the cause and origin investigation of the fire, the City of Huntsville Fire Marshal's Department conducted a thorough investigation of the fire scene, including requesting an inspection of electrical wiring and fixtures present at the scene by Electrical Inspector Doug Smith. *See Id.*; *see also* Exhibit C, Report of Electrical Inspector Doug Smith, FBI 000081.
4. Due to the findings of the City of Huntsville Fire Marshal's Department and an independent cause and origin analysis from EFI Global, the relevant parties were put on notice that there may be a claim for subrogation. *See* Exhibit A.
5. On October 12, 2010, Rod Williams issued a report that stated the following with regard to the cause and origin of the September 22, 2010 fire at the subject Country Inn & Suites:

Fire pattern analysis indicates that the fire originated in the northwest corner of the balcony of room 2207. The evidence indicates ignition resulted from improperly discarded smoking materials. Evidence indicates first fuel ignited consisted of ordinary combustibles on or associated with the balcony.

Events bringing ignition and fuel together include human involvement, which would include improperly discarded smoking materials. *See* Doc. #21 at Exhibit 8; *see* Exhibit D, Declaration of Rod Williams at ¶ 19.

6. On October 5, 2010, Investigator Dan Wilkerson, a Fire Marshal with the Huntsville Fire Department, issued a report and concluded the following in regards to the cause and origin of the September 22, 2010 fire at the subject Country Inn & Suites:

During my interior examination, I noted heavy fire/smoke/heat damage to a room on the third floor 2307 that extended to the attic. In the second floor apartment 2207, there was a pack of cigarettes and a lighter on the tv table just inside the door. I requested Electrical Inspector Doug Smith. See Doug Smith's report. Building Inspector Skip Stinson, also, responded to the scene per Doug Smith's request. Due to the fire damage Doug Smith and Skip Stinson stated that the building was unsafe to occupy. I interviewed the occupant of room 2207, Michal (sic) Siegling. In conclusion, the point of origin was on the second floor balcony. The cause of the fire was careless use of smoking materials. *See* Exhibit B, October 5, 2010 Report of Fire Marshal Dan Wilkerson at FBI000037.

7. On September 27, 2010, "systematic debris removal began with the fire department during their investigation. Some of the fire debris had been removed from the area of origin, in search for the ignition source." *See* Doc. #21 at Exhibit 8; *see* Exhibit D, Declaration of Rod Williams at ¶ 18. Due to the investigation of the Huntsville Fire Marshal's Department and resulting conclusion that the fire was caused by the careless discarding of smoking materials, no items were collected by the Huntsville Fire Marshal's Department during the investigation of the fire. *See* Doc. #21 at Exhibit 8; *see* Exhibit D,

Declaration of Rod Williams at ¶¶ 18 – 21; *See* Exhibit B, October 5, 2010 Report of Huntsville Fire Marshal's Report at FBI000037. During the cause and origin investigation by the City of Huntsville Fire Marshal's Department, the subject Country Inn & Suites did not receive any citations for safety code violations. *See* Doc. #21 at Exhibit 8; *see* Exhibit D, Declaration of Rod Williams at ¶ 8; *See* Exhibit B, October 5, 2010 Report of Huntsville Fire Marshal's Report at FBI000037.

8. On October 21, 2010, Plaintiff's claim service expressly stated the following in report:

We would also like to call to your attention that there is extensive damage to the wiring in the third floor of the building [due to the fire made the basis of the present matter] and our inspection revealed that none of the wiring is in conduit and **there may be code upgrades involved in the repair of the wiring as well as the construction of the balcony, which was destroyed in the fire.** *See* Doc. #21 at YEDLA 2525.

Yedla never received a safety violation citation in relation to the wiring on the third floor of Building 2. *See Id.*; *see* Exhibit B, October 5, 2010 City of Huntsville Fire Marshal's Report; *see* Exhibit D, Exhibit D, Declaration of Rod Williams at ¶ 8.

9. On June 3, 2011, the Department of Community Development Code Enforcement Division issued a citation to Plaintiff for building code violations present within **Building 1** at the subject Country Inn & Suites. *See* Doc. #21 at YEDLA 344 – 345. The fire made the basis of the present lawsuit originated in

Room 2207 of **Building 2** of the subject Country Inn & Suites. *See* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department; *see* Doc. #21 at Exhibit 8.

10. On August 1, 2012, Plaintiff timely presented this claim in writing to the Federal Bureau of Investigation (FBI) by sending a Standard Form 95 Claim for Damage, Injury, or Death Pursuant to 28 U.S.C. § 2675 and 28 C.F.R. §§ 14.2 – 14.3, and correspondence with additional documentation, in satisfaction of the jurisdictional prerequisites of 28 U.S.C. § 2401(a) & (b) (stating that plaintiff must present claim to appropriate federal agency within two (2) years of the incident made the basis of the complaint). *See* Exhibit A, Standard 95 Claim Form & August 1, 2011 correspondence with exhibits omitted.
11. Both Lieutenant Dan Wilkerson of the Huntsville Fire Marshal's Department, an independent, non-retained expert, and Plaintiff's retained expert, Rod Williams, opined that the fire originated in the northwest corner of the balcony of Room 2207 due to improperly discarded cigarettes by the room's occupant, Michael Siegling, an agent of the FBI. *See* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department; *see* Doc. #21 at Exhibit 8.
12. Defendant's retained expert witness surmises that there is a "reasonably significant possibility that the fire was caused by faulty or defective electrical

wiring, fixtures, and furnishings at the fire scene[.]” *See* Doc. # 23 at p. 6, ¶12; *see* Doc. # 21 at pp. 40 – 45; 49 – 54; 56 – 59.

13. Defendant’s expert witness cannot substantiate his “hunch” regarding the origin and cause of the fire made the basis of the present lawsuit, and cannot disprove the conclusions and findings of the City of Huntsville Fire Marshal’s report and the report(s) of Rod Williams, Plaintiff’s retained expert. *See* Doc. 23 at p. 6, ¶12. Plaintiff vigorously disputes Defendants’ assertion that Defendants’ expert cannot opine about the cause and origin of the fire without inspecting the “fire debris, electrical wiring, fixtures, and furnishings from the fire scene” as Defendants’ expert had access to all reports, including hundreds of photographs, taken of the fire scene and physically inspected the scene on February 20, 2014. *See* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal’s Department; *see* Doc. # 21, pp. 35 – 38, Exhibit 8.
14. Plaintiff is not in possession, custody, ownership and/or control of any fire debris evidence, electrical wiring, fixtures, and furnishings from the fire scene and is therefore not obligated to produce said items pursuant to FED. R. CIV. P. 34.
15. Plaintiff has timely responded to all of Defendant’s discovery requests and has produced over three thousand (3,000) documents in response to same. Plaintiff has redacted privileged, confidential and/or proprietary information in

accordance with the FEDERAL RULES OF CIVIL PROCEDURE. *See* Plaintiff's entire production of documents to date.

16. The City of Huntsville Fire Marshal's Department and Plaintiff's retained expert, Rod Williams, met the standards of professional care in the United States required by the National Fire Protection Association (NFPA) "*Guide for Fire and Explosion Investigations*" (NFPA 921) and the "*Standard for Professional Qualifications for Fire Investigator*" (NFPA 1033). *See* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department; *see* Exhibit D, Declaration of Rod Williams at ¶¶ 1 – 5.

17. With regards to the cause and origin investigation of the subject fire, all of Plaintiff's experts met the standards of professional care as stated in NFPA 921 and NFPA 1033. *See Id.* Additionally, Plaintiff timely provided notice of its claim pursuant to the express requirement of 28 U.S.C. § 2675 and 28 C.F.R. §§ 14.2 – 14.3, and correspondence with additional documentation, in satisfaction of the jurisdictional prerequisites of 28 U.S.C. § 2401(a) & (b). *See* Exhibit A, Standard 95 Claim Form & August 1, 2011 correspondence with exhibits omitted.

II. PLAINTIFF'S ADDITIONAL UNDISPUTED FACTS

Plaintiff would further demonstrate that the following are additional undisputed facts within the meaning of FED. R. CIV. P. 56 that necessitate the Court's attention,

and support Plaintiff's assertion that this Court should summarily deny Defendant's Motion to Dismiss:

1. On August 1, 2012, Plaintiff timely presented this claim in writing to the Federal Bureau of Investigation (FBI) by sending a Standard Form 95 Claim for Damage, Injury, or Death Pursuant to 28 U.S.C. § 2675 and 28 C.F.R. §§ 14.2 – 14.3, and correspondence with additional documentation, in satisfaction of the jurisdictional prerequisites of 28 U.S.C. § 2401(a) & (b) *See* Exhibit A, Standard 95 Claim Form & August 1, 2011 correspondence with exhibits omitted. Pursuant to the express guidelines of 28 C.F.R. § 14.2(a), the Standard Form 95 claim must “state[] a sum certain of the damages suffered.” 28 C.F.R. § 14.2(a). Due to the continuing nature of the injury suffered, the sum certain of the damages claimed until late 2012. *See* Exhibit A, Standard 95 Claim Form & August 1, 2011 correspondence with exhibits omitted.
2. Very importantly, Defendant never responded to Plaintiff's formal submission of claim pursuant to 28 U.S.C. § 2675 and 28 C.F.R. §§ 14.2 – 14.3. As such, the demand was deemed to have been denied by Defendant pursuant to 28 U.S.C. § 2675(a) on February 1, 2013 (holding that “[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.”). Plaintiff filed its Original Complaint on

May 10, 2013, in federal court pursuant to 28 U.S.C. § 2401(a) & (b) (within six months of the appropriate federal agency failing to make a final disposition of claim). *See* Doc. # 1. After submission of the claim to Defendant on August 1, 2012, Defendant never requested an inspection of the fire scene and/or inquired as to the fire investigation during the statutory six-month determination period. *See* Doc. #1.

3. Defendant did not request to enter and inspect the subject Country Inn & Suites until January 24, 2014, one and a half years after Defendant was placed on notice of Plaintiff's claim for damages. *See* Exhibit F, Defendant's Third Request for Production and Inspection *c.f.* Exhibit A, Standard 95 Claim Form & August 1, 2012 correspondence with exhibits omitted. The inspection of the subject Country Inn & Suites occurred on February 20, 2014. *See* Exhibit F, Defendant's Third Request for Production and Inspection.
4. Michael Siegling's employment position from September 1, 2009 to the present date is a Special Agent with the Federal Bureau of Investigation (FBI). *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.
5. Michael Siegling was an employee of the Federal Bureau of Investigation for the relevant time period of August 14, 2010 through September 23, 2010. *See*

Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.

6. Michael Siegling arrived at the subject Country Inn & Suites on August 14, 2010 to complete a six (6) week training program required in order to be a certified bomb technician. *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.
7. Michael Siegling applied to the training program and his application was approved by the FBI. Mr. Siegling also submitted a travel request, including lodging, for this training which was approved by the FBI's San Francisco Field Office. *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.
8. Defendant admits that the training program that Michael Siegling was attending while in Huntsville, Alabama was relevant to his position with the FBI and that attendance at the training was required in order to be a certified bomb technician. The training was not a condition on employment. *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.
9. Michael Siegling required lodging in Huntsville, Alabama in order to attend the six-week training program because it was not commutable from his office of permanent assignment. *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.

10. Michael Siegling's lodging in at the subject Country Inn & Suites was booked on a government-issued credit card and then reimbursed by the San Francisco Field Office of the FBI. *See* Exhibit E, Defendant's Responses to Plaintiff's Discovery Requests at pp. 4 – 12.
11. On September 22, 2010, Michael Siegling was the occupant of Room 2207 at the subject Country Inn & Suites. *See* Exhibit B, October 5, 2010 Report of Huntsville Fire Marshal's Report at FBI000037; *see* Exhibit D, Declaration of Rod Williams at ¶ 28 – 31; *see* Doc. #21 at Exhibit 8.
12. An investigation including exterior fire pattern analysis indicated the fire originated exterior to the balcony of room 2207. *See* Exhibit B, City of Huntsville Fire Marshal's Report at FBI000037; *see* Exhibit D, Declaration of Rod Williams at ¶ 10.
13. Systematic debris removal began with the fire department, a non-party to the present matter, during their investigation. Plaintiff has no control over the City of Huntsville Fire Department. Some of the fire debris had been removed from the area of origin, in search for the ignition source. *See* Exhibit D, Declaration of Rod Williams at ¶ 18 – 21; *see* Doc. #21 at Exhibit 8.
14. However, the conditions and/or alteration to the fire scene did not preclude determining the origin or cause of the fire by either the Huntsville Fire Marshal's Department or Plaintiff's retained expert. *See* Exhibit B, City of

Huntsville Fire Marshal's Report at FBI000037; *see* Exhibit D, Declaration of Rod Williams at ¶ 6, 20.

15. Marlboro brand cigarette butts were found in the area directly below the balcony of room 2207. *See* Exhibit D, Declaration of Rod Williams at ¶¶ 21 – 32; *see* Doc. #21 at Exhibit 8. Upon Lieutenant Wilkerson's interview of Michael Siegling, Mr. Siegling confirmed that he used Marlboro brand cigarettes. *See Id.*
16. The Huntsville Fire Department responded to the alarm at 10:40 p.m. on September 22, 2010 and arrived on the scene at 10:45 p.m. *See* Exhibit B, October 5, 2010 City of Huntsville Fire Marshal's Report; *see* Exhibit D, Declaration of Rod Williams at ¶ 26; *see* Doc. #21 at Exhibit 8
17. Per request of the Huntsville Fire Department, on the date of the incident, at approximately 11:45 p.m. City of Huntsville Electrical Inspector Doug Smith was called out to the fire scene at the subject Country Inn & Suites. *See* Exhibit C, FBI 000081. Electrical Inspector Smith determined that the fire made the basis of the subject lawsuit was not by any electrical malfunction and/or electrical component. *See Id.* This includes the inspection of the electrical panel, electrical wiring connected to a wall hung light fixture, and the heat plant and determination that none of these electrical components caused the fire made the basis of the present lawsuit. *See Id.*; *see* Exhibit D, Declaration of Rod

Williams at ¶ 20. Indeed, these items were not located within the area of origin.
See Id.

18. Lieutenant Wilkerson interview Michael Siegling on the date of the incident, September 22, 2010. *See Exhibit D, Declaration of Rod Williams at ¶¶ 21 – 32.* Mr. Siegling confirmed that he extinguished his used cigarettes in a styrofoam cup with water. *Id.* Mr. Siegling stated that he was last on the balcony outside of Room 2207 around 5 or 6:00 p.m. prior to the fire. *Id.*
19. No investigator for the City of Huntsville or for the Plaintiff has identified any code violations existing in Building 2 of the hotel where the fire occurred as the **cause** of the subject fire. *See Doc. # 21 at Exhibits 8 & 12; see Exhibit B.*

III. PLAINTIFF'S DISPUTED FACTS

1. The evidence indicates ignition resulted from improperly discarded smoking materials, with the evidence indicating first fuel ignited consisted of ordinary combustibles on or associated with the balcony outside of Room 2207. *See Exhibit B, October 5, 2010 City of Huntsville Fire Marshal's Report; see Exhibit D, Declaration of Rod Williams at ¶¶ 21 – 32.* The events bringing ignition and fuel together include human involvement, which would include improperly discarded smoking materials by the occupant of Room 2207, Michael Siegling. *See Id.*

IV. ARGUMENT & AUTHORITIES

Defendant argues that its Motion to Dismiss, based on alleged spoliation of evidence, is based on principles of “fundamental fairness.” *See* Doc. #23 at p. 2. However, Defendant seeks to impose death penalty spoliation sanctions on Plaintiff without providing evidence of: (1) any bad faith on behalf of Plaintiff; (2) any actions on behalf of Plaintiff that demonstrate an intent to actively inhibit Defendant’s investigation; or (3) that Defendant requires the evidence to assert a claim or affirmative defense. *See* Doc. #23. However, the U.S. Government showed no concern for inspection of the fire scene until January 24, 2014—eight months after this lawsuit was filed; seventeen months after it received formal notice of claim under 28 U.S.C. § 2675; and over three years after the fire. Defendant cannot provide any evidence, nor cite to any federal or state authority, that would support the imposition of spoliation sanctions on Plaintiff under the facts of this matter. As such, Defendant’s Motion to Dismiss should be denied.

A. Eleventh Circuit Precedent Mandates that Spoliation Sanctions Are Not Appropriate in the Present Matter.

The Eleventh Circuit has held that federal law governs the imposition of spoliation sanctions. *See Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943-44 (11th Cir. 2005). Importantly, federal precedent in the Eleventh Circuit establishes “the party seeking [spoliation] sanctions must prove ... first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to

preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense.” *Walter*, 2010 WL 2927962, at *2 (citing *Floeter v. City of Orlando*, 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 9, 2007)).

1. There Was no Evidence to Collect From the Area of Origin of the Fire.

Defendant contends that Plaintiff’s expert should have saved “evidence” from the fire scene. *See* Doc. #23. However, there were no electrical components, wiring, or equipment found in the area of origin of the fire scene. *See* Exhibit D, Declaration of Rod Williams at ¶ 20.

While activities such as product retention and arc-mapping are certainly appropriate and necessary in some fire scenes, they are not required in every investigation. Regardless of the dollar amount of the property damaged caused by this fire, this is not a complex fire scene that would require all manner of physical evidence be removed and processed. *See Id.* at ¶¶ 15 – 30. This is not a case where multiple potential sources of ignition were located within the area of origin, such that collection and further testing of each of those items would be required to determine which of those items was the cause. *Id.* This is not a case where a product is alleged to have caught fire, such that collection and testing would be required to determine whether a defect in the product existed and caused the fire. *Id.* The items Defendant complains were not removed from the fire scene are items

that were simply not located within the area of origin of this fire. *Id.* In this case we have an area of origin where the only potential source of ignition present was the existence of carelessly discarded cigarettes. *Id.* There were no products, no lights, no furnaces, no electrical devices or features within the area of origin to collect. *Id.* Mr. Williams, the expert opining on behalf of the party with the burden of proof in this matter, inspected the area of origin of the fire, and along with the City of Huntsville Fire Marshal's Department, reached the conclusion the fire ignited due to carelessly discarded cigarette and not due to some other source. *Id.*; *see* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department. In addition, no one from the City of Huntsville, not the Fire Marshal, not the Building Inspector, concluded any code violation existed in the building and caused this fire. *Id.*

2. Defendant Does Not Have the Burden of Proof in this Matter.

The alleged "evidence" that Defendant contests should have been kept and/or preserved is not crucial for movant to be able to prove a prima facie defense because Defendant does not have the burden of proof in this case. This topic is discussed at length in the Alabama Supreme Court's decision in *Vesta Fire Ins. Co.*, *discussed supra*. 901 So. 2d 84 (Ala. 2004).

3. There Is No Evidence That Plaintiff Has Acted In Bad Faith

Even if all three elements are met, “[a] party’s failure to preserve evidence rises to the level of sanctionable spoliation “only where the absences of that evidence is predicated on bad faith,” such as where a party purposely loses or destroys relevant evidence.” *Id.* at *2 (citing *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)(emphasis added)); see *Walter v. Carnival Corp.*, No. 09–20962–CIV, 2010 WL 2927962 at *2 (S.D. Fla. July 23, 2010) (citation and internal quotation marks omitted) (stating that “[m]ere negligence in losing or destroying records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case.”); *Floeter v. City of Orlando*, No. 6:05–CV–400–Orl–22KRS, 2007 WL 486633, at *7 (M.D. Fla. Feb. 9, 2007) (stating that “in th[e] [Eleventh C]ircuit the negligent destruction of evidence is insufficient to support an adverse inference instruction.”).

The Eleventh Circuit’s recent holding in *S.E.C. v. Goble* is particularly instructive in this matter. 682 F.3d 934, 947-48 (11th Cir. 2012). In *Goble*, the SEC requested a Receiver and a Securities Investor Protection Corporation (“SIPC”) Trustee to have control of North American’s books and records during the wind down of North American’s operations. *Id.* *Goble* alleged that after their appointment, and the district court’s restraining order to preserve North American’s records, he found twenty-five bags of shredded documents at North

American's offices. *Id.* Goble contended that these destroyed documents contained evidence that it was a customary business practice for him to sign off on wire transfers, and because the documents were destroyed, Goble argued that the spoliation of evidence occurred and that the district court failed to properly consider this claim. *Id.*

Here, the Eleventh Circuit refused to impose a spoliation sanction, regardless of Goble's assertions that the destruction of evidence prejudiced him from making a defense, as Goble had presented no evidence that the SEC destroyed the documents contained in the bags or made intentional efforts to withhold evidence at trial. *Id.* Because Goble did not demonstrate that the missing evidence resulted from the SEC's bad faith, the Eleventh Circuit held that the district court was correct in rejecting Goble's spoliation claim. *Id.*

Defendant has presented no evidence that any alleged spoliation of evidence is predicated on bad faith as required pursuant to Eleventh Circuit precedent. *Id.*; *Bashir*, 119 F.3d at 931. Instead, the evidence demonstrates that systematic debris removal of the fire scene began with the City of Huntsville Fire Department, a non-party to the present matter with no obligation to preserve evidence, during their investigation. *See* Exhibit D, October 12, 2010 Report of Rod Williams at p. 4; *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000) (noting that there is no general duty placed on an independent third party to preserve evidence; further in addition to

proving duty, breach, proximate cause, and damage, plaintiff in a third-party spoliation of evidence case must also show: (1) that defendant spoliator had actual knowledge of pending or potential litigation; (2) that duty was imposed on defendant through a voluntary undertaking, agreement, or specific request; and (3) that missing evidence was vital to plaintiff's pending or potential action). Some of the fire debris had been removed from the area of origin, in search for the ignition source. *See Exhibit D, October 12, 2010 Report of Rod Williams at p. 4.*

Defendant presents no evidence of alleged bad faith on behalf of Plaintiff with regards to preserving evidence. Doc. #23. Indeed, Defendant does not even assert that Plaintiff has taken any action with regard to the failure to preserve evidence that would rise above alleged negligence. Doc. 23 at § 2, pp. 10 – 19. As such, Defendant has not provided any evidence of conduct on behalf of Plaintiff that would allow for the institution of *any* sanction, much less dismissal. *See Bashir*, 119 F.3d at 931; *Flury*, 427 F.3d at 943-44. While this circuit does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient to draw an adverse inference. *See Id. Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009) (holding that, where proponent presented five instances of alleged spoliation and asked for corresponding sanctions, but presented no evidence that any party acted in bad

faith regarding any of the instances, that the district court did not err in declining to draw an adverse inference against the responding party).

Further, a party moving for sanctions must establish, among other things, that the destroyed evidence was relevant to a claim or defense such that the destruction of that evidence resulted in prejudice. *See Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 943 (11th Cir. 2005) (explaining that spoliation analysis hinges upon the significance of the evidence and the prejudice suffered as a result of its destruction). Importantly, as the defending party, Defendant does not have the burden to *disprove* Plaintiff's theory of the cause and origin of the fire or to propose an alternate cause and origin scenario. *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.*, 901 So. 2d 84 (Ala. 2004). Indeed, federal courts in this Circuit have continuously refused to impose spoliation sanctions on parties that have destroyed and/or failed to preserve evidence. *Eli Lilly & Co. v. Air Exp. Intern. USA, Inc.*, 615 F.3d 1305 (11th Cir. 2010) (holding that the ability of carrier to make claim or defense had not been affected by manufacturer's post-transit destruction of temperature-sensitive insulin products that had been frozen in transit as required for claim for spoliation of evidence, and therefore that spoliation sanctions were not warranted).

As discussed in the sections above, Defendant's retained expert witness surmises that there is a "reasonably significant possibility that the fire was caused

by faulty or defective electrical wiring, fixtures, and furnishings at the fire scene[.]” See Doc. # 23 at p. 6, ¶12; see Doc. # 21 at pp. 40 – 45; 49 – 54; 56 – 59. However, a “reasonably significant possibility” (i.e., a “hunch”) is not evidence of the significance of the alleged evidence and the prejudice suffered as a result of its destruction as required by Eleventh Circuit precedent. *Eli Lilly & Co.*, 615 F.3d at 1305; *Flury*, 427 F.3d at 943. The evidence that Defendant’s cite as “proof” of faulty electrical wiring and/or issues all relate to issues within **Building 1** at the subject Country Inn & Suites. See Doc. #21 at YEDLA 344 – 345. The fire made the basis of the present lawsuit originated in Room 2207 of **Building 2** of the subject Country Inn & Suites. See Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal’s Department; see Doc. #21 at Exhibit 8. In fact, there was no electrical wiring at all located within the area of origin. See *Id.*; see also Exhibit C, FBI 000081.

B. Alabama Case Law Regarding Spoliation Favors Plaintiff & the Denial of Defendant’s Motion to Dismiss

The Eleventh Circuit also considers the law of the state in which a subject Court sits when determining guidelines relating to spoliation. *Flury*, 427 F.3d at 943-44 (citing *Silvestri v. General Motors Corporation*, 271 F.3d 583, 590 (4th Cir. 2001)(concluding that although federal law of spoliation applies, the court will recognize principles from some of the state cases cited to them)). The case law

concerning spoliation in Alabama overwhelmingly supports denying Defendant's Motion to Dismiss and refusing to place spoliation sanctions on Plaintiff.

The factual scenario in the Alabama Supreme Court's decision in *Vesta Fire Ins. Corp. v. Milam & Co. Const., Inc.* parallels the facts of the present case and provides excellent analysis of the spoliation doctrine present in Alabama. 901 So. 2d 84 (Ala. 2004). The *Vesta Fire Ins. Corp.* cases were the result of a fire that destroyed a video rental store in Bessemer on July 24, 1998. *Id.* at 87-88. The *Vesta Fire Insurance Corporation* ("Vesta") insured the premises for the owner of the building, and *Wausau Insurance Company* ("Wausau") insured the store's inventory for *Hollywood Entertainment Corporation* ("Hollywood"), which owned the inventory. *Id.* *Vesta* and *Wausau* sued, as subrogors of their respective insureds, *Landmark Electric Company, Inc.* ("Landmark"); *Milam & Company Construction, Inc.* ("Milam"); *Sentry Heating & Air Conditioning* ("Sentry"); *Sure Air, Ltd.*; *Lenz-Ramseur, Inc.*; and *DesignWorx, Inc.*, alleging that the defendants, as contractors and subcontractors responsible for the construction or maintenance of the building that housed the video rental store, had negligently designed, constructed, and maintained the building and thereby had caused the fire that destroyed the building and its contents. *Id.* Specifically, the plaintiffs alleged that the defendants had improperly installed and maintained the electrical components

in the air-conditioning system and that that improper installation and maintenance had caused the fire. *Id.*

On the day of the fire Vesta employed Robert Young, a certified fire investigator of considerable experience, to investigate the fire. *Id.* at 90. The City of Bessemer did not conduct any independent investigation of the fire; instead it relied upon Young, who directed fire department employees at the scene. *Id.* Young investigated the scene of the fire on the day of the fire. *Id.* Young's report, dated September 14, 1998, concluded that the fire originated in the attic of the building near a steel I-beam described as being in the rear third of the building to the right of center; the I-beam was badly twisted as a result of the fire. *Id.* Young determined that the fire was caused by an electrical malfunction, most likely an HVAC unit. *Id.* Several weeks after the fire, the building was demolished, which resulted in the loss of a section of undamaged HVAC conduit "from about in front of the office back to the back wall" as well as all the other electrical components in the building that had not showed signs of arcing or short circuits, including the electrical receptacles, fluorescent fixtures, and neon-sign transformers. *Id.*

The trial court dismissed the case on summary judgment based on the trial court's determination that the plaintiffs' conduct had resulted in spoliation of the evidence, namely, the HVAC and all other electrical components. *Id.* at 88. However, the Alabama Supreme Court reversed the trial court's decision, noting

that without evidence to the contrary, “we must accept the explanations given by the plaintiffs for how and why various items become unavailable, including in this case the professed opinion and judgment of their experts that materials at the fire scene that were allowed to be demolished were not “germane” to a determination of the cause of the fire.” *Id.* at 98-99. Importantly, the Alabama Supreme Court noted that “*[t]he plaintiffs have the burden of proving their theory of causation from that evidence whereas the defendants have no affirmative burden to establish a cause for the fire.*” *Id.* (emphasis added). Although the defense expert testified that no one can draw any reliable conclusions concerning the cause of the fire based on the remaining evidence, the plaintiffs’ experts were of the opposite view, and the plaintiffs will have the burden of proving from that evidence their theory of the case. *Id.* at 97. The Alabama Supreme Court also noted that there were witness interviews, photographs, and an investigation that supported the plaintiffs’ experts’ theory of the case and could be reviewed and/or relied upon by defendant’s experts. *Id.*

As in *Vesta Fire Ins. Corp.*, the present lawsuit concerns the subrogation interests of Plaintiff, the insurer of the subject Country Inn & Suites, as a result of the September 22, 2010 fire that caused extensive property damages. *See* Doc. #1. Per request of the Huntsville Fire Department, on the date of the incident, at approximately 11:45 p.m. City of Huntsville Electrical Inspector Doug Smith was

called out to the fire scene at the subject Country Inn & Suites. *See* Exhibit C, FBI 000081. Electrical Inspector Smith determined that the fire made the basis of the subject lawsuit was not by any electrical malfunction and/or electrical component. *See Id.* This includes the inspection of the electrical panel, electrical wiring connected to a wall hung light fixture, and the heat plant and determination that none of these electrical components caused the fire made the basis of the present lawsuit. *See* Exhibit D, Declaration of Rod Williams at ¶¶ 21 – 32. Lieutenant Daniel Wilkerson of the Huntsville Fire Marshal's Department interviewed Michael Siegling on the date of the incident, September 22, 2010. *See Id.* Marlboro brand cigarettes were found in the area below the balcony of room 2207. *Id.* Upon Lieutenant Wilkerson's interview of Michael Siegling, Mr. Siegling confirmed that he used Marlboro brand cigarettes. *Id.*

In addition to the independent investigation of the Huntsville Fire Marshal's Department, Rod Williams, Plaintiff's retained expert, investigated the scene and prepared a report regarding the cause and origin of the subject fire. *See* Exhibit D, Declaration of Rod Williams; *see* Doc. #21 at Exhibit 8 & Exhibit 12. Both Lieutenant Dan Wilkerson of the Huntsville Fire Marshal's Department, an independent, non-retained expert, and Plaintiff's retained expert, Rod Williams, opined that the fire originated in the northwest corner of the balcony of Room 2207 due to improperly discarded cigarettes by the room's occupant, Michael Siegling,

an agent of the FBI. *See Id.*; *see also* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department at FBI000037.

The evidence indicates ignition resulted from improperly discarded smoking materials, with the evidence indicating first fuel ignited consisted of ordinary combustibles on or associated with the balcony outside of Room 2207. *See Id.* Plaintiff's experts opine that the events bringing ignition and fuel together include human involvement, which would include improperly discarded smoking materials by the occupant of Room 2207, Michael Siegling. *Id.* Having determined that any electrical component was *not* the cause and/or origin of the subject fire, and therefore not germane to the fire investigation, electrical wiring and other electrical components as well as fire debris were removed from the fire scene. *See* Exhibit C, FBI 000081; *see* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department at p. 19; *see* Exhibit D, Declaration of Rod Williams at ¶¶ 21 – 32. There is no evidence, nor does Defendant assert, that the removal of the electrical wiring and components by the Huntsville Fire Department was done in bad faith or to inhibit the investigation of Defendant. *See* Doc. #23.

As in *Vesta Fire Ins. Corp.*, although Defendant's retained expert has acknowledged a "possibility" that the electrical wiring and components *could have* caused the subject fire, Plaintiff's retained experts are of the opposite view, and the Plaintiff will have the burden of proving from that evidence their theory of the

case. 901 So. 2d at 97. Plaintiff's experts have also demonstrated that the electrical components and wiring were not saved as after a thorough investigation and analysis, electrical failure was ruled out as a cause of the subject fire. *See* Exhibit C, FBI 000081; *see* Exhibit B, October 5, 2010 Report of City of Huntsville Fire Marshal's Department at FBI000037; *see* Exhibit D, Declaration of Rod Williams at ¶ 20; *see also Vesta Fire Ins. Co.*, 901 So. 2d at 98 – 99. Further, although Defendant's experts contest that he or she did not have the ability to view the fire scene and/or witnesses, Defendant's experts has had access to all government reports issued relating to the subject fire, has had the opportunity to review hundreds of photographs taken of the fire scene, and knows the identity of and has the ability to depose the witnesses to the subject fire. *See* Doc. #21 and all attached exhibits. As in *Vesta Fire Ins. Co.*, the laws governing spoliation in Alabama decisively demonstrate that spoliation sanctions are not appropriate in the present matter, and therefore Defendant's Motion to Dismiss should be summarily denied. *Vesta Fire Ins. Co.*, 901 So. 2d at 98 – 99.

V. CONCLUSION

As clearly demonstrated above, federal precedent in this Circuit and Alabama case law relating to spoliation clearly favor the refusal to impose spoliation sanctions on Plaintiff in this matter. Defendant has presented no evidence that any alleged spoliation of evidence is predicated on bad faith as

required pursuant to Eleventh Circuit precedent. *Bashir*, 119 F.3d at 931; Doc. # 23. Instead, the evidence demonstrates that systematic debris removal of the fire scene began with the City of Huntsville Fire Department, a non-party to the present matter with no obligation to preserve evidence, during their investigation. See Exhibit D, Declaration of Rod Williams at ¶¶ 18 – 21; *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000). Defendant does not present any evidence of any alleged bad faith on behalf of Plaintiff with regards to preserving evidence. Doc. # 23. Indeed, Defendant does not even assert in the argument portion of its Motion to Dismiss that Plaintiff has taken any action with regard to preserving evidence that would rise above alleged negligence. Doc. 23 at § 2, pp. 10 – 19. As such, Defendant, who bears the burden to receive a spoliation sanction, has not provided any evidence of conduct on behalf of Plaintiff that would allow for the institution of any sanction, much less dismissal. See *Bashir*, 119 F.3d at 931; *Flury*, 427 F.3d at 943-44; *Mann v. Taser Intern., Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009). Based on the overwhelming federal and state authority in favor of Plaintiff, Plaintiff respectfully requests that this Court deny Defendant's Motion to Dismiss and refuse to impose spoliation sanctions on Plaintiff.

Respectfully submitted,
MCCATHERN, P.L.L.C

By: /s/ Paul A. Grinke

Carl L. Evans
Alabama State Bar No. 6823-A35C
Texas State Bar No. 24056989
cevens@mccatherlaw.com
Paul A. Grinke
Texas State Bar No. 24032255
pgrinke@mccatherlaw.com
Regency Plaza
3710 Rawlins Street, Suite 1600
Dallas, TX 75219
(214) 741-2662 Telephone
(214) 741-4717 Facsimile

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, 2014, a true and correct copy of the foregoing was served upon the following counsel via e-service:

Jack Hood
Assistant United States Attorney
Attorney for Defendant United States
US Attorney's Office
State Bar No. D41J
1801 Fourth Avenue North
Birmingham, AL 35203
205-244-2103
205-244-2181 – Fax
Email: Jack.hood@usdoj.gov

Jayme Kantor, Esq.
Assistant General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Suite 10140
Washington, DC 20535
Phone: 202/324-7194
Email: Jayme.Kantor@ic.fbi.gov

ATTORNEYS FOR DEFENDANT UNITED STATES OF AMERICA

/s/ Paul A. Grinke

Paul A. Grinke

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

ACADIA INSURANCE CO.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL ACTION NO.
5:13-CV-00895-CLS

**DEFENDANT’S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 37, OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56**

The Defendant United States of America, in the above-styled cause, by and through Joyce White Vance, United States Attorney for the Northern District of Alabama, and Jack Hood, Assistant U.S. Attorney, and pursuant to Rules 37 and 56 of the Federal Rules of Civil Procedure respectfully submits the following reply brief in support of Defendant’s Motion to Dismiss or in the alternative for Summary Judgment against Plaintiff, and shows as follows:

TABLE OF CONTENTS

I. DEFENDANT’S RESPONSES TO PLAINTIFF’S ADDITIONAL
UNDISPUTED FACTS.....2

II. DEFENDANT’S RESPOSNSES TO PLAINTIFF’S DISPUTED
FACTS.....9

III. ARGUMENT AND CITATION OF AUTHORITIES.....9

1. The Defendant Asserts There Was Important Evidence to Collect From the Area of Origin of the Fire and That Plaintiff’s Defined Area of Origin Was Too Restrictive.....9

2. The Defendant Does Have the Burden of Proof in this Matter and Evidence Should Have Been Documented, Photographed, and Preserved.....15

3. There Is Evidence That the Plaintiff’s Destruction of Evidence was at Least Negligent or “Culpable”.....16

4. Defendant Does Not Need to Show That Plaintiff Acted in Bad Faith but Only That Plaintiff is “Culpable.”.....17

III. CONCLUSION.....19

CERTIFICATE OF SERVICE.....20

I. Defendant’s Response to Plaintiff’s Additional Undisputed Facts

The Defendant contends that paragraphs 1 through 16 are mostly background facts that are incomplete and thus irrelevant to the issues raised in Defendant’s motion.

As to paragraphs 17 through 19, Defendant would clarify and dispute Plaintiff’s assertions by showing the following narrative and relevant citations to evidence:

This case concerns a \$1 million fire claim regarding Building 2 of the Country Inn and Suites, 4880 University Drive in Huntsville, Alabama, previously owned and operated by Yedla Management and Hospitality Enterprises of Huntsville, Inc. (“Yedla”). The September 22, 2010 10:40 p.m., fire was extinguished by the Huntsville Fire Department (“HFD”). (Government Exhibit A, Defendant’s Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 16-17, 20; YEDLA002966).

Subsequent investigations by the HFD and EFI Global, Inc. (“EFI”), a private forensic investigation firm who often specializes in subrogation claims, both concluded that the fire occurred on the second floor balcony of Room 2207, and asserted the cause of the fire was careless use of smoking materials by the occupant of that room, FBI agent Michel Siegling. (Government Exhibit A, Defendant’s Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 21; YEDLA002966 and EFI. p. 5; YEDLA002946)

FBI agent Michael Siegling stated to the HFD investigator Daniel R. Wilkerson that he had smoked several cigarettes on the balcony one or two days prior to the fire, but not on the date of the fire. FBI agent Michael Siegling maintained he always extinguished his cigarettes in a water-filled Styrofoam cup. (Government Exhibit A, Defendant’s Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, Plaintiff’s Rule 26(a)(2) Disclosure,

Exhibit 3, Written statement of Michael K. Siegling, YEDLA000917-YEDLA000918).

EFI's fire investigator Roderick S. "Rod" Williams conducted a scene examination. The examination included destructive disassembly of electrical wiring and debris, and it occurred in the alleged area of fire origin, on the second floor balcony of Room 2207. The wiring and debris were discarded at the scene without regards to further competent laboratory and forensic examinations. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, pp. 40-45; 49-54; 56-59)

The field examination of electrical wiring and fixtures is a task best deferred to electrical engineers in a competent forensic laboratory. The conscious abandonment of evidence by EFI seriously deprived third parties' ability to pursue alternative causation as to potential sources of ignition through electrical failures or malfunctions. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, pp. 40-45; 49-54; 56-59)

Although Acadia's insurance adjuster recognized early in his investigation that the fire could create a subrogation claim, Acadia failed to notify the United States of America that it would be a target. Furthermore, investigators for the United States, as an interested party in the fire scene examination, were unable to investigate the scene. Acadia's adjuster, who was also responsible for the salvage,

allowed the building to be repaired, thus destroying all of the physical evidence abandoned by EFI. The evidence is clear that Acadia's adjuster did not take any affirmative steps to protect the evidence. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 46-49; 72-76).

The EFI fire investigator also had a responsibility to recognize his role to preserve evidence he examined, avoid destructive disassembly, and minimize potential for spoliation of evidence. He also had a responsibility to recognize and notify his client of potential interested parties, temporarily cease his scene investigation, protect the scene, and await further instructions for later joint inspections of the scene. Interested parties in this case would have included, but not be limited to, the United States, the manufacturers of lighting and electrical equipment, and persons responsible for past renovations. The evidence is clear that EFI's investigator did not take any affirmative steps to protect the evidence. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 40-54; 56-59)

On June 3, 2011, the evidentiary value of the electrical wiring in walls and lighting fixtures became clearly significant. The wiring and lighting were found to be potential sources of ignition and thus were improper and dangerous installations throughout the entire Yedla motel complex. During a June 3, 2011, routine permit

inspection by the City of Huntsville Codes Enforcement, the inspectors found serious fire, electrical, and building code violations throughout the entire Yedla motel complex (Buildings 1, 2, and 3). These electrical violations included, for example, incorrectly installed lighting fixtures, open electrical splices in the walls of all of the occupied rooms, and open slices in electrical boxes wallpapered over. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, Exhibit 10, City of Huntsville Fire, Electrical, and Building Inspection Reports)

The investigative findings of the City of Huntsville Codes Enforcement officials showed that significant codes violations existed in all of the Yedla buildings, but were not detected the evening of the fire or immediately thereafter by the fire or other inspectors. There is no mention of findings of code violations by the City of Huntsville Electrical Inspector Doug Smith. Mr. Smith was called out to rule out any electrical malfunctions and/or electrical components as the cause of the fire. Mr. Smith inspected electrical panels, electrical wiring connected to a wall hung light fixture, and concluding that none of these caused the fire. However, he did not note the very obvious violations which were later found by City of Huntsville Codes Enforcement officials. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, pp. 40-45; 49-54; 56-59).

Both the HFD and EFI's fire investigators and the Electrical Inspector failed to note in their reports the discovery of fire code violations. However, based upon the June 3, 2011 findings, it is reasonable to deduce that the HFD and EFI investigators along with Electrical Inspector Smith either did not take the time to thoroughly inspect the property or they simply lacked the prerequisite knowledge of how to conduct proper codes assessments. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 40-45; 49-54; 56-59).

On September 23, 2010, Plaintiff directed its claim service to investigate the fire and “[t]horoughly address subrogation and salvage.” (Emphasis added) Plaintiff was looking for potential litigants for recovery of fire losses on the very day its experts began their investigations. Defendant was not given notice of a claim against it until August of 2012, almost two years after the fire. The first notice came when Plaintiff submitted its Administrative Claim for damages totaling \$1,119,536.93 under the Federal Tort Claims Act, (“FTCA”) 28 U.S.C. §§ 1346(b)(1) and 2671- 2680. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 31; 46-48; Exhibit 4, YEDLA 000919-000920; Government Exhibit B, Declaration of Lori Lee Holland, FBI Supervisory Paralegal Specialist).

On May 13, 2013, attorneys for Acadia followed up their claim by filing the instant lawsuit against the United States and Michael Siegling. Since the filing of the lawsuit, Michael Siegling has been dismissed as a Defendant, and the matter is now pending only as to the claims against the United States of America.

(Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icové with attachments, pp. 31; 46-48)

The Defendant's fire causation expert, David J. Icové, Ph.D., P.E., is an experienced, credentialed, and published expert in the field of forensic fire scene reconstruction and analysis, professional standards of care, and spoliation of evidence. His expert testimony record include appearances before U.S. Congressional committees seeking guidance and recommended legislation in arson, bombing, and other violent crimes. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icové with attachments, pp. 5-11) Dr. Icové's professional opinion in this case is that the investigations conducted by Investigator Daniel Wilkerson (City of Huntsville Fire Department) and Investigator Roderick Williams (EFI Global, Inc.) are not the product of reliable scientific principles and methods; are based upon insufficient facts or data; fail to reliably apply the proper principles and methods of forensic fire investigation to the facts of this case; and fail to meet the generally accepted standard of care for conducting a proper and reliable scientific fire investigation as

set forth in *NFPA 921* (2014 Edition), *NFPA 1033* (2014 Edition), and all other recognized professional standards for conducting a proper fire investigation. These failings defeat the validity and reliability of both Investigators Wilkerson's and Williams' opinions rendered in this case. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 75-76).

II. Defendant's Response to Plaintiff's Disputed Facts

As to paragraph 1, Defendant responds to Plaintiff's assertions by showing the same foregoing narrative and relevant citations to evidence contained in section I, *supra*.

III. ARGUMENT AND CITATION OF AUTHORITIES

1. The Defendant Asserts There Was Important Evidence to Collect From the Area of Origin of the Fire and That Plaintiff's Defined Area of Origin Was Too Restrictive.

The Defendant contends that Plaintiff's expert should have saved "evidence" from the fire scene. The Plaintiff incorrectly states that there were no electrical components, wiring, or equipment found in the area of origin of the fire scene. In fact, there were numerous several items of evidence on the balcony where HFD and EFI stated the fire originated. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 31;

46-48, 70-72) Potential relevant artifact evidence generated by the fire included arc mapping of energized connectors and fixtures. *Id.*

The Defendant also asserts that EFI's "hide-the-ball" approach effectively discarded evidence. Assuming that HFD and EFI fire investigators correctly located the fire starting on the second floor balcony of Room 2207, the entire balcony of Room 2207 must be considered to be the area of fire origin. Thus, all debris on the second balcony would be considered evidence. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 31; 46-48; 64-70) (*NFPA 921*, 2014 Edition, pt. 3.3.11, defines the "area of origin" as: "*A structure, part of a structure, or general geographic location within a fire scene, in which the 'point of origin' of a fire or explosion is reasonably believed to be located.*")

In particular, EFI excludes in its evaluation the existence and potential source of ignition of the lighting fixture and electrical wiring, although these items were examined, destructively disassembled, and discarded. This "hide-the-ball" approach to fire investigation is professionally frowned upon since it prevents other interested parties in obtaining the same evidentiary value from that evidence. There are many times that laboratories perform careful forensic examination of this evidence. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 31; 40-48; 49-59)

The Defendant further asserts that incorrectly installed electrical wiring and lighting fixtures were in existence at the time of the fire. During a June 3, 2011 routine permit inspection by the City of Huntsville Codes Enforcement, inspectors found serious fire, electrical, and building codes violations common throughout the entire Yedla motel complex (Buildings 1, 2, and 3). These electrical violations included, for example, incorrectly installed lighting fixtures, open electrical splices in the walls of all of the occupied rooms, and open slices in electrical boxes wallpapered over. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icovc with attachments, pp. 40-45; 49-54; 56-59)

It should be specifically noted that a photograph from Room 2207 (FBI Agent Seigling's room) taken by EFI shows a telephone wire running underneath the carpet, an obvious electrical code violation.



Figure 1. Photo from Room 2207 (Michael K. Siegling's room) of a telephone junction box with cable running from under the carpet, behind the

baseboard, up the face of the wall, and into the junction box. (YEDLA003042). This same electrical code violation of “open wiring” and “Telephone cable run under carpet from wall to wall In rooms” was cited by the City of Huntsville Codes Enforcement, inspectors on June 3, 2011, in Buildings 1, 2, and 3. (Government Exhibit A, Defendant’s Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachment, Exhibit 10; Building 1 (FBI000126), Building 2 (FBI000119), and Building 3 (FBI000118).)

The photographs taken by EFI clearly (Figure 2, below) show evidence remaining in the form of fire debris, an electrical lighting fixture, and a self-documented destructive examination of the evidence within the area of fire origin. This evidence should have been documented, photographed, and secured. No evidence should have been subject to destructive examinations. (Government Exhibit A, Defendant’s Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 40-45; 49-54; 56-59).



Figure 2. Remains of the exterior electrical lighting fixture on balcony of Room 2207 (left, YEDLA003053). Self-documented destructive examination of electrical evidence of unknown origin from the fire scene. (right, YEDLA003053)

Generally, in fire investigations, arc mapping itself is significant evidence. The Plaintiff incorrectly assumes that while activities such as product retention and arc mapping are certainly appropriate and necessary in some fire scenes, they are not required in every investigation. The Plaintiff also assumes that the Yedla fire was not a complex scene and would not require physical evidence be removed and processed. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 40-45; 49-54; 56-59; 70-72) (*NFPA 921*, 2014 Edition, pt. 3.3.8, recommends the use of *arc mapping* since it is: "*The systematic evaluation of the electrical circuit configuration, spatial relationship of the circuit components, and identification of electrical arc sites to assist in the **identification of the area of origin** and analysis of the fire's spread.*" (emphasis added).

It should be noted that this fire may actually have been a products liability case. The Plaintiff incorrectly assumes that the Yedla motel fire was not caused by a defective product, and therefore collection and testing would be required to determine whether a defect in the product existed and caused the fire.

Unfortunately, since EFI discarded the evidence and Acadia's adjuster allowed the

salvage to be disposed of, no one will never know the true nature of this fire. The June 3, 2011, permit inspection by the City of Huntsville Codes Enforcement revealed that numerous electrical violations existed in each one of the Yedla motel buildings, incorrectly installed lighting fixtures, open electrical splices in the walls of all of the occupied rooms, and open slices in electrical boxes wallpapered over. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, pp. 40-45; 49-54; 56-59) This is ample evidence of other potential causes of the fire.

It must be emphasized that Plaintiff's investigators, claims adjusters, and legal counsel should have been aware of the spoliation potential. Both parties agree that the prevailing professional standards include National Fire Protection Association (NFPA) "Guide for Fire and Explosion Investigations" (*NFPA 921*) and the "Standard for Professional Qualifications for Fire Investigator" (*NFPA 1033*). Fire investigators, insurance claims personnel, and insurance legal counsels are routinely advised through *NFPA 921* and *NFPA 1033* of their responsibility to recognize and minimize the potential for spoliation by halting fire scene examinations pending the proper notification and participation of interested parties. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icové with attachments, pp. 38-59)

Although both parties agree in this case that NFPA 921 establishes the recognized standards for fire investigation, the Defendant disputes whether *NFPA 921* was properly applied in this matter by the Plaintiff's experts, particularly with the issue of spoliation of evidence. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc. 21), Declaration of David Icove with attachments, pp. 49-54; 72-76)

2. The Defendant Does Have the Burden of Proof in this Matter and Evidence Should Have Been Documented, Photographed, and Preserved.

The Defendant disagrees with Plaintiff's assertion that evidence need not have been kept and/or preserved since the Plaintiff has the burden of proof in this case. This is a flawed approach as the diversity of independent parallel investigations often reveals the true origin, cause, development, and responsibility for the fire. Parallel investigations rely upon unspoiled evidence to seek out the answer. (Government Exhibit A, Defendant's Rule 26(a)(2) Disclosure (Doc.21), Declaration of David Icove with attachments, pp. 31; 46-48; 64-70)

In *Story v. Raj Properties, Inc.*, 909 So. 2d 797, 802-803 (Ala. 2005), the Alabama Supreme Court set out the movant's burden to show spoliation and applied five factors in analyzing spoliation of evidence: (1) the importance of the evidence destroyed, (2) the culpability of the offending party, (3) fundamental fairness, (4) alternative sources of the information, and (5) the possible

effectiveness of other sanctions less severe than dismissal. The Court concluded that “[t]here was evidence to support a conclusion by the trial court that Story was culpable in preventing the EIFS defendants from inspecting the house.” *Id.* at 804

3. There Is Evidence That the Plaintiff’s Destruction of Evidence was at Least Negligent or “Culpable”.

The Plaintiff’s supervision of the EFI investigation, allowing for the disposal of scene evidence, and failure to notify even one interested party was at least negligent or a basis for finding spoliation “culpability.” *See Story v. Raj Properties, Inc., supra*, at 804.

It should be noted that: (1) Acadia and EFI had the means to track down and notify the United States that it was an interested party before the scene was destroyed; (2) Acadia and EFI failed to document, collect, and preserve physical evidence that may have posed alternative and plausible hypotheses for the origin and cause of the fire; (3) Acadia and EFI showed no appreciation that a subrogation target would want the opportunity to inspect the scene before it was disturbed; and (4) there is no proof independent third-party investigated the fire, its origin, and its cause, thus, the only record that existed was created by the agents retained by Acadia. This loss of evidence is so prejudicial that it substantially denies the Defendant the ability to defend the claim.

Acadia's conduct was also "culpable" because in its supervision of the investigation and later salvage operations, it did not take any steps to preserve the fire scene or to seasonably notify even one potential subrogation target. This action could only be characterized as negligent or "culpable". The evidence is clear that Acadia and EFI's investigator did not take any affirmative steps to protect any evidence.

Moreover, the evidence of spoliation has irreparably prejudiced the Defendant's case. Specifically, if the Defendant had been put on reasonable notice of the fire, it would have been able to conduct a parallel and coordinated investigation to search the debris of the fire for the critical evidence that Acadia failed to find or claimed did not exist. In addition, the destruction of the fire scene deprived the Defendant of the opportunity to establish defenses such as the origin and cause of the fire may have been in an area above the balcony, or that the fire may have been caused one or more of the serious electrical problems that existed throughout the Yedla motel complex.

4. Defendant Does Not Need to Show That Plaintiff Acted in Bad Faith but Only That Plaintiff is "Culpable."

The Plaintiff asserts that Defendant must show that Plaintiff acted in bad faith in order to prevail in Defendant's motion raising spoliation. However, "[the Eleventh Circuit] does not require a showing of *malice* in order to find bad faith,

[but] mere negligence in losing or destroying records is not sufficient to draw an adverse inference.” *Silver v. Countrywide Home Loans, Inc.*, 483 F. App’x 568, 572 (11th Cir. 2012). (Emphasis added)

Under Alabama law, as demonstrated by *Story v. Raj Properties, Inc.*, *supra*, the spoliator’s conduct must be found to be “culpable”. *Id.* at 804.

The Eleventh Circuit has affirmed the imposition of sanctions short of dismissal where the plaintiff was the more “culpable” party and caused the defendant substantial prejudice. *Graff v. Baja Marine Corp.*, No. 08–10413, 2009 WL 226308 at *2 (11th Cir. Feb. 2, 2009). *See also Continental Casualty Company, a/s/o Downey Trees v. Peterson Pacific Corp.*, Case No. 2:08-cv-0240-WCO, filed May 21, 2010 (U.S. District Court for the Northern District of Georgia, Gainesville Division)(defendant was unable to conduct further testing to rebut plaintiff expert’s theories regarding cause and origin of fire, and therefore court excluded any and all testimony by plaintiff’s expert). *See also Erie Insurance Exchange v. Davenport Insulation, Inc.*, 659 F. Supp. 2d 701 (2009)(plaintiff’s failure to notify defendant of fire scene before it was destroyed was negligent and justified a finding of spoliation and case dismissal, in part because defendant was deprived of the opportunity to show that he fire may have been caused by an electrical problem).

The Plaintiff's conduct, as demonstrated hereinabove, rises to the level of "culpable," and the Plaintiff has caused the Defendant substantial prejudice.

III. CONCLUSION

WHEREFORE, the Defendant respectfully moves the Court for an order dismissing this case pursuant to Rule 37 or granting summary judgment pursuant to Rule 56. In the alternative, Defendant is entitled to a negative inference against Plaintiff. The inference would be that the electrical wiring, fixtures, and furnishings at the fire scene were not preserved for inspection by Plaintiff's experts and would have provided favorable evidence to Defendant. Furthermore, the Plaintiff should not be permitted to produce any expert testimony on the cause and origin of the fire.

Respectfully submitted,

JOYCE WHITE VANCE
UNITED STATES ATTORNEY

s/ Jack Hood

Jack Hood
Assistant United States Attorney
U.S. Attorney's Office
State Bar No. D41J
1801 Fourth Avenue North
Birmingham, Alabama 35203
(205) 244-2103
(205) 244-2181 (fax)
jack.hood@usdoj.gov

Of Counsel:

Jayne Kantor, Esq.
Assistant General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Suite 10140
Washington, DC 20535
Phone: 202/324-7194
Email: Jayme.Kantor@ic.fbi.gov

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

Carl L. Evans, Esq.
Paul A. Grinke, Esq.
Attorneys for Plaintiff
McCathern, P.L.L.C.
Regency Plaza
3710 Rawlins Street
Suite 1600
Dallas, TX 75219
Phone: 214/741-2662
Facsimile: 214/741-4717
Email: cevans@mccathernlaw.com
pgrinke@mccathernlaw.com

s/ Jack Hood
Jack Hood
Assistant United States Attorney