UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: April 28, 2015

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Re: Case No. 14-5597*, Cincinnati Insurance Company v. Larry Banks, et al*
Originating Case No. : 4:12-cv-00032

Dear Counsel:

The Court issued the enclosed Opinion today in this case.

Sincerely yours,

s/Jeanine R. Hance on behalf of Robin Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Edward Jason Ferrell
Ms. Debra Poplin
Mr. Clinton Hondo Scott

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 15a0308n.06

No. 14-5597

**UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Apr 28, 2015
DEBORAH S. HUNT, Clerk

CINCINNATI INSURANCE CO.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
LARRY BANKS, et ux.,	)	COURT FOR THE EASTERN
	)	DISTRICT OF TENNESSEE
Defendants-Appellees.	)	
	)	
	)	

BEFORE: BATCHELDER, MOORE, and SUTTON, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. In this diversity case, Cincinnati Insurance Company ("CIC") appeals a verdict rendered against it in favor of Larry and Wanda Sue Banks (collectively "Banks"), whose home was damaged by fire in 2011, and the district court's denying CIC a new trial. Banks insured the home through CIC, and although CIC cited several reasons for not covering the damage, pursuant to Tennessee law CIC paid the mortgage balance to the bank that held the mortgage on the property. CIC then filed suit against Banks to recover that payment, and Banks filed a counterclaim seeking payment for the value of the property in excess of the outstanding mortgage, as well as personal property. After discovery and an eight-day trial, a jury rendered a verdict in favor of Banks. CIC raises fifteen issues on appeal covering manifold aspects of this litigation. We AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Cincinnati Insurance Company ("CIC") is an Ohio insurance company, and Defendants Larry Banks and Wanda Sue Banks ("Banks") are citizens of Tennessee. CIC insured Banks' residential property in Manchester, Tennessee. The policy covers the dwelling, other structures, personal property, and any loss of use. The parties dispute whether this is an "all-risk policy," covering all direct physical loss unless otherwise excluded. On November 28, 2011, the property was damaged by fire. On March 14, 2012, Banks filed a claim for $1,904,309.64. On March 17, 2012, CIC denied the claim. Banks filed a second claim, wherein they insist in a sworn statement:

> The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said Company as to the extent of said loss has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

CIC denied Banks' claim on May 18, 2012. CIC's letter reads in part:

> It is the opinion of [CIC] that the fire . . . was not accidental, as required by this insuring provision. It is further the opinion of [CIC] that you and/or others acting with your knowledge, consent and permission did intentionally set fire to the property for the purpose of destroying same and defrauding [CIC] . . . ."

The policy states, "'Physical loss' means accidental physical loss or accidental physical damage." However, the property was encumbered by a mortgage, and pursuant to Tennessee law, CIC paid $587,176.44 to Peoples Bank & Trust Company for the damaged property.

CIC filed suit against Banks in U.S. District Court for the Eastern District of Tennessee on May 18, 2012, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332, and seeking

both declaratory and monetary relief. Banks responded with an answer and counterclaim on June 4, 2012. CIC filed an amended complaint on June 12, 2012. CIC's complaint asked the court to declare that Banks' claim is void due to breach of contract and intentional misrepresentations, that Banks committed insurance fraud, and that an award of $670,139.36 in damages is due CIC, derived from the CIC's payment to People's Bank, plus incidental and subsequent costs, interest, and legal fees. Banks filed an amended counterclaim on August 10, 2012, followed by a second amended counterclaim on December 13, 2012, claiming (1) breach of contract, (2) statutory bad faith, and (3) common law bad faith. On November 15, 2013, after an eight day trial,[1] the jury issued a verdict finding that Banks did not "willfully and knowingly make a material misrepresentation to [CIC] with the intent to deceive" or "cause or consent to the intentional burning of the insured property." The jury awarded Banks $2,174,268.40, which when adjusted for the amount paid by CIC to People's Bank, became $1,625,053.19. On December 16, 2013, CIC filed a "motion for new trial, motion to amend findings and judgment, and/or motion for judgment notwithstanding the verdict" invoking Federal Rules of Civil Procedure 50 and 59. On April 22, 2014, the district court denied CIC's post-verdict motions. CIC filed a notice of appeal on May 16, 2014.

II. ANALYSIS

A.

The first two issues we address are CIC's strongest—but ultimately unsuccessful—arguments, both pertaining to jury instructions.

[1]The parties consented to have this case tried before Magistrate Judge William B. Carter, who presided over all the proceedings in the district court.

1.

CIC first challenges the instructions given to the jury regarding the burden of proof in this litigation. We review "legal accuracy of jury instructions de novo," *United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010). We reverse for an improper jury instruction "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 881 (6th Cir. 2007).

CIC argues that the jury should have been instructed that Banks must carry the burden of proof that the fire was not intentionally caused by any person. CIC cites for support the requirement under Tennessee law that an insured party show that a loss is covered by the terms of a policy. *Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 349 (6th Cir. 1999). CIC also faults the court for the verdict form's not requiring Banks to prove their loss was from an "accidental" fire. Citing *Farmers Bank & Trust Co. v. Transamerica Ins. Co.*, 674 F.2d 548, 551 (6th Cir. 1982), CIC argues that Banks must prove all facts essential to recovery under the policy. In *Farmers Bank*, we reversed a district court's requiring an insurer to prove that a note on which he sought to recover was not forged. CIC also cites a district court case where a plaintiff sought to collect under a policy covering injuries "caused by accident," where the court required the claimant to prove not only that the decedent had died, but also that the death was accidental. *Smith v. Life Ins. Co. of N. Am.*, 872 F. Supp. 482, 484–85 (W.D. Tenn. 1994).

The district court instructed the jury that "Banks bear the burden only to prove by a preponderance of the evidence the amount of damages they suffered as a result of the fire within the monetary coverage limits of the insurance policy." CIC faults this instruction for failing to instruct the jury that Banks also bore the burden of proving that the fire was accidental rather

than intentional, and the burden of proving that Banks were not themselves the cause of the fire, either directly or indirectly through an agent.

Under Tennessee law, an insurance company "ha[s] the burden of proving by a preponderance of the evidence that 'the loss was due to a fire of incendiary origin, that the insured had an opportunity to set the fire, and that he had a motive to do so." *Wharton v. State Farm Fire & Cas. Ins. Co.*, 57 F.3d 1072, 1995 U.S. App. LEXIS 14586, at *7 (6th Cir. 1995) (table decision) (quoting *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 211 (Tenn. Ct. App. 1991)). Thus the only factual issue on which the district court needed to instruct the jury on this count was the nature of the fire's origin; the court accordingly rejected CIC's argument that the court should instruct the jury that Banks bore the burden of proving that they had not started the fire.

CIC's argument turns *Farmers Bank* and *Blaine* on their heads. The district court held—and we agree—that this an all-risk policy. Under Tennessee law, "an all-risk policy automatically covers any loss unless the policy contains a provision expressly excluding the loss from coverage." *HCA, Inc. v. Am. Prot. Ins. Co.*, 174 S.W.3d 184, 187 (Tenn. Ct. App. 2005). Such a policy provides coverage "in the absence of fraud or other intentional misconduct of the insured unless the policy contains a specific provision expressly excluding the loss from coverage." *Id.* Tennessee law presumes that the "burning of a property is the result of an accidental cause." *Johnson v. Allstate Ins. Co.*, 2000 Tenn. App. LEXIS 548, at *20 (Tenn. Ct. App. 2000) (citing *Ricketts v. State*, 241 S.W.2d 604 (Tenn. 1951)). "[A] claimant under an insurance policy has the initial burden of proving that he comes within the terms of the policy. . . . Conversely, the insurer [must] carr[y] the burden if it claims that one of the policy exclusions applies to the claimant and prevents recovery." *Farmers Bank*, 674 F.2d at 550,

quoted in Blaine, 171 F.3d at 349. Moreover, "exceptions, exclusions and limitations in insurance policies must be construed against the insurance company and in favor of the insured." *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991), *quoted in Blaine*, 171 F.3d at 349.

There was no error in the jury instruction. CIC bears the burden of proof regarding its arson defense. The district court did not err by refusing to instruct the jury that Banks had to prove that they did not cause the fire.

2.

The second issue is whether the district court erred in its jury instruction regarding CIC's arson defense. We review for abuse of discretion the denial of proposed instructions. *King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000). We will find an abuse of discretion where "a ruling rests on clearly erroneous facts or an improper application of the law or erroneous legal standard." *United States v. Sandoval*, 460 F. App'x 552, 561 (6th Cir. 2012). The elements of arson are: (1) motive, (2) opportunity, and (3) incendiary origin. *McReynolds*, 815 S.W.2d at 211. The court's instruction was, "It is not necessary that the policyholder be the person who actually starts the fire," and that the jury could find Banks committed arson if Banks "intentionally or willfully set fire to the insured property or participated in or consented to the willful burning of the property." The court continued that the opportunity element of arson can be satisfied if the policyholder had "an opportunity to set the fire or to have it set by some other person." The jury was instructed that it must determine whether the "evidence establishes that the Banks burned or caused their house to be burned." CIC requested that the court include additional language that CIC did not need to "specifically identify" the person who started the fire.

Our task is "as a whole to determine whether [the instructions] fairly and adequately submitted the issues and applicable law to the jury," and are not deficient "unless the instructions, taken as a whole, are misleading or give an inadequate understanding of the law." *Arban v. W. Publ'g Corp.*, 345 F.3d 390, 404 (6th Cir. 2003). Reversible error would occur only if some element of what the law requires is not covered by any of the instructions. *Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 434 (6th Cir. 2009).

There is no indication that—for lack of the additional language—the jury was confused and might have thought Banks prevailed because CIC failed to name the arsonist. The district court's instructions sufficiently covered the elements of arson.

B.

The next three issues pertain to motions for judgment as a matter of law and the resulting impact on the jury award. In diversity-jurisdiction cases, we apply state law when reviewing such motions. *Mannix v. Cnty. of Monroe*, 348 F.3d 526, 531 (6th Cir. 2003). Under Tennessee law, when one party moves for what that State calls a motion for a directed verdict, "the trial court 'must consider the evidence most favorably for the [nonmoving party], allow all reasonable inferences in [the nonmoving party's] favor and disregard all counteracting evidence, and, so considered, if there is any material evidence to support a verdict for [the nonmoving party], [the court] must deny the motion.'" *Morris v. Wal-Mart Stores, Inc.*, 330 F.3d 854, 857–58 (6th Cir. 2003) (quoting *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977)) (final brackets in *Morris*). This standard is essentially the same as the standard for whether there is a genuine issue of fact for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

251–52 (1986). Whether a jury award should be reduced would automatically follow from the outcome of the motion for a directed verdict.

1.

The first of these issues is whether the district court erred by not granting CIC judgment as a matter of law under Federal Rule of Civil Procedure 50 on whether the retaining wall and driveway were covered by the "other structures" provision of the policy. The jury awarded Banks $21,500 for these two items. CIC argues that these items were part of the house itself, and therefore would not be covered because the coverage limit for the dwelling was exhausted when the house was designated a total loss (discussed *infra*). The policy required other items to be physically separated from the dwelling by a "clear space" in order to come within the "other structures" provision. CIC argues that the district court should have granted a directed verdict that the driveway and wall were part of the dwelling. Instead, the district court submitted the matter to the jury, which found that the items were "other structures" and awarded Banks relief.

The district court acted correctly by denying CIC's motion under Federal Rule of Civil Procedure 50(a). "A motion for a judgment as a matter of law converts what would otherwise be a question of fact, reserved to the jury and generally protected from review by the Seventh Amendment, into a legal question." Harry T. Edwards et al., *Federal Standards of Review: Review of District Court Decisions & Agency Actions* 50 (2d ed. 2013). A motion for judgment as a matter of law should be granted only "when the facts are sufficiently clear that the law requires a particular result." *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000). "[B]ecause improperly granted judgments intrude upon the province of the jury, the standard is demanding and must be applied with caution." Edwards, *supra*, at 51.

The jury was given photographs of the items in question. Reasonable jurors could differ on whether there was sufficient space between the dwelling and the driveway or retaining wall to qualify either item as part of "other structures." It would have been improper for the court to have decided that question rather than send it to the jury. We affirm the district court's denial of the motion for a directed verdict.

CIC moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) that the jury award should be reduced by $21,500. Because the jury found that those items were separate from the dwelling, the jury was correct in granting Banks $21,500 for damage to "other structures." We accordingly affirm the district court's denial of the Rule 50(b) motion.

2.

CIC also filed a motion under Federal Rule of Civil Procedure 50 for judgment as a matter of law on Banks' receiving additional living expenses ("ALE") under the policy, and whether CIC waived the right to enforce a policy provision to refuse payment for such expenses.

The relevant provision states that if the dwelling becomes "uninhabitable, [CIC] pay[s] for necessary increases in living expenses incurred so that [Banks's] household can maintain its normal standard of living." CIC argues that ALE applied only to expenses that are both necessary and incurred. Banks argues that CIC provided Banks with ALE payments of $3,100 per month without regard to whether they had been incurred, and thus waived a strict reading of the provision. CIC counters that Banks signed a non-waiver agreement.

Tennessee's rule on waiver is that an insurance provision can be waived by the acts, representations, or knowledge of the insurer. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). "The burden of proof to establish waiver rests with the

insured, and is a question of fact for the jury." *Id.* (citations omitted). CIC immediately began paying Banks $3,100 per month without requiring costs to be incurred first, and Kevin Young (CIC's adjustor) testified that he authorized those payments as fair and reasonable. In at least one previous case, an insurance company's authorizing payments for those same reasons constituted waiver. *See, e.g.*, *Norris v. Nationwide Mut. Fire Ins. Co.*, 728 S.W.2d 335, 337 (Tenn. Ct. App. 1986). CIC claims that only "technical rights" can be waived, and that by contrast this issue turns on non-waivable "substantive rights."

CIC is incorrect. According to Tennessee law, the relevant rule concerning waiver is that it "applies to a waiver of the right to enforce a provision in a contract." *GuestHouse Intern., LLC v. Shoney's N. Am. Corp.*, 330 S.W.3d 166, 201 (Tenn. Ct. App. 2010). That is precisely the question here, whether as a factual matter CIC had waived enforcement of the policy provision that expenses be both necessary and incurred before CIC must issue payments. Both parties proffered evidence in favor of their respective positions. Given this conflicting evidence, the court properly denied the motion for a directed verdict so as to submit this question to the jury.

C.

CIC next argues that the district court erred by granting Banks partial summary judgment by holding that the dwelling was a constructive total loss, justifying demolition of the property rather than repair. We review a district court's grant of summary judgment de novo. *Tompkins v. Crown Corr, Inc.*, 726 F.3d 830, 837 (6th Cir. 2013). "In examining the record to determine whether a genuine issue of material fact exists, the district court must review all evidence in the light most favorable to the nonmoving party, and 'all justifiable inferences are to be drawn in his

favor.'" *Miles v. Kohli & Kaliher Assocs.*, 917 F.2d 235, 240–41 (6th Cir. 1990) (quoting *Anderson*, 477 U.S. at 255).

A property can be designated a total loss. Tenn. Code Ann. § 56-7-801-803. CIC argues that the order from the City of Manchester's Codes Department did not require demolition of the property, and instead permitted repair as an alternative. The district court did not permit CIC to present proof on this issue stating that it had already ruled on the issue and held the property a total loss as a matter of law. CIC points out that the Tennessee courts have never adopted the constructive total loss doctrine, and instead have used a test of whether the damaged structure had lost its identity and specific character. *See, e.g.*, *Hollingsworth v. Safeco Ins. Cos.*, 782 S.W.2d 477, 479 (Tenn. Ct. App. 1988). Banks respond that the Codes Department condemned the dwelling and ordered its demolition, and that O.P. Guess, the Codes Director, executed an affidavit clarifying that the City was not giving Banks the option of repairing the dwelling. Banks further respond that the district court's adoption of the constructive loss doctrine was proper.

The district court could find no state court decision governing the rule to apply, and so followed an Eleventh Circuit diversity case involving insured Tennessee properties damaged by fire, in which the court adopted the majority rule "that a municipal demolition order creates a 'total loss at law' in the type of circumstances presented here." *Algernon Blair Grp., Inc. v. U.S. Fid. & Guar. Co.*, 821 F.2d 597, 600 (11th Cir. 1987). The district court noted that the Codes Department had authority to require demolition and that CIC presented no evidence to contradict Guess's affidavit, and granted summary judgment on this issue.

The district court—and in the previous case, the Eleventh Circuit—erred by invoking the constructive loss doctrine. The Tennessee Supreme Court long ago adopted the test of whether the building maintains its identify and specific character, as set forth in *Laurenzi v. Atlas Ins.*, 176 S.W. 1022, 1026 (Tenn. 1915). The intermediate Tennessee court in *Hollingsworth* held that *Laurenzi* was still controlling. *Hollingsworth*, 782 S.W.2d at 480. Federal courts exercising diversity jurisdiction are required to apply state law as construed by the highest court in that State. *Saab Auto. AB v. GM Co.*, 770 F.3d 436, 440 (6th Cir. 2014). The district court failed to do so here; there is no case law to suggest that *Laurenzi*'s test has been abandoned.

However, the error is harmless. The constructive loss doctrine and the identity-and-character test are not mutually exclusive, and can lead to the same result. The demolition order was valid, and therefore the dwelling would not maintain its identity and character after being razed. Thus the property is an *actual* total loss, not a *constructive* total loss. We can affirm on any basis supported by the record. *Pulte Homes, Inc. v. Laborers' Int'l Union of N. Am.*, 648 F.3d 295, 303 (6th Cir. 2011). We do so here, affirming the district court's grant of partial summary judgment, but on grounds other than those cited by the district court.

D.

CIC's remaining issues on appeal are entirely without merit, and do not warrant thorough discussion. We review each for abuse of discretion. *See King v. Ford Motor Co.*, 209 F.3d 886, 897 (6th Cir. 2000) (denying motion for a new trial reviewed for abuse of discretion); *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553, 556 (6th Cir. 1996) (district court's decision on whether to bifurcate claims reviewed for abuse of discretion); *United States v. Phibbs*, 999 F.2d

1053, 1078 (6th Cir. 1993) ("Motions in limine to exclude evidence are reviewed for an abuse of discretion.").

1.

We turn first to whether the district court erred in denying CIC's motion in limine to exclude evidence of four other fires in the Manchester area during November 2011. The court regarded those fires—all of which were suspicious in nature and happened within seven miles of Banks' home—as substantially similar to the fire that destroyed Banks' home. CIC objects that the court did exclude evidence of a previous total-loss fire at Banks' residence, showing an inconsistency in the court's method.

A party proffering evidence of other incidents bears the burden of showing the other incidents are substantially similar because they occurred "under similar circumstances or share the same cause." *Rye v. Black & Decker Mfg. Co.*, 889 F.2d 100, 102 (6th Cir. 1989). CIC argues that some of those fires were not incendiary in nature, and should thus not have been admitted as evidence.

This evidence is relevant under Federal Rule of Evidence 401. CIC argues that, if this evidence is relevant at all, then since one or more of those fires may not have been incendiary, they should have been excluded under Federal Rule of Evidence 403 because the evidence may have confused the jury. Whether the court could have ruled differently regarding this is not the test, and we find no abuse of discretion here.

2.

The second issue is whether the district court erred when it denied CIC's *Daubert* challenge to the admission of testimony of Jeffrey Morrill, an expert testifying on behalf of Banks. CIC argues that Morrill's methodology was not scientifically valid or reliable and therefore should have been excluded under Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993). CIC also argues that the testimony should have been excluded because it did not follow NFPA 921 (from National Fire Protection Association code), since it relied upon others' reports, testimony, and photos instead of those Morrill personally developed; Morrill did not consider all the relevant data; and that Morrill is not licensed in Tennessee as an investigator, which CIC says is required by Tenn. Code Ann. § 62-26-204. Morrill's license expired.

The lack of a license does not disqualify an expert. *Doochin v. U.S. Fid. & Guar. Co.*, 854 S.W.2d 109 (Tenn. Ct. App. 1993). And the district court ruled that "another section of the NFPA [] appears to support Morrill's methodology" and that CIC's arguments "go to the weight of his testimony and not whether it is admissible." This appears to be a reference to NFPA 921, § 4.4.3.3, which includes that "[t]he use of previously collected data from a properly documented scene can be used successfully in an analysis of the incident to reach valid conclusions." CIC does not cite to any important data that was overlooked, or to any precedent showing that such data would render an expert's testimony inadmissible. Morrill has testified as an expert in more than thirty trials, and according to the record his credentials have not previously been doubted. We find no abuse of discretion here.

3.

Third, CIC complained that the district court abused its discretion when it overruled CIC's *Daubert* challenge to John Lentini as an expert witness supporting Banks. Lentini testified regarding the fire debris, and was called to rebut the testimony of CIC's expert on that point, Christine Foran. CIC argues that Lentini's opinion testimony does not satisfy Federal Rule of Evidence 702 because his analysis was based on research conducted by others, such as the readings and results from investigators.

The district court found Lentini was qualified. Moreover, Lentini accepted much of Foran's data, and disagreed only with Foran's interpretation of, and conclusions reached from, the data. Lentini's disagreement with Foran consisted of criticizing what he opined were errors in Foran's methodology. These go "to the weight of the testimony and opinions," not their admissibility. *Travelers Cas. Ins. Co. of Am. v. Volunteers of Am. Ky., Inc.*, 2012 U.S. Dist. LEXIS 117789, at *6 (E.D. Tenn. Aug. 21, 2012) (citing *McClean v. Ontario, LTD*, 224 F.3d 797, 801 (6th Cir. 2000)). The district court did not abuse its discretion by denying CIC's motion to exclude Lentini's testimony.

4.

The next two issues concern the district court's denial of CIC's motion for a new trial. First, CIC objects to the district court's excluding all evidence regarding an "accelerant detection K-9." And second, CIC objects to the court's limiting the testimony of Marks Sells, CIC's expert on the fire's cause and origin, to preclude Sells from discussing items derived from the K-9 "alerts." CIC did not disclose prior to trial that it would proffer the expert testimony regarding

the use of the accelerant detection K-9, and Banks argued that the evidence was unreliable because seven of nine samples tested negative for accelerants.

The district court found that testimony regarding the dog's training and performance was necessary to lay a foundation for the evidence. The district court ruled that without expert testimony pertaining to "the dog's training, reliability and skill," the K-9 alerts were meaningless. Because Banks did not have "the appropriate opportunity to explore this particular dog's reliability," the court disallowed the evidence, and further ruled that the relevance of this evidence would be outweighed by unfair prejudice. CIC admits that the district court noted cases where canine testimony was excluded for lack of such a foundation, but argues (citing no case law support) that since those cases were criminal—in which the burden of proof is higher—courts should not be as stringent when ruling on the same issue in civil cases such as this one. Since the canine evidence was excluded, Sells's testimony was limited to the use of accelerant-detection canines without any discussion of his investigation methods (which used the canine) or direct observations (involving the canine's actions and responses) upon which he was basing his expert opinion.

Banks respond first that canine alerts are not reliable without laboratory confirmation. The two samples for which the canine alerted positive were sent to a lab, and came back negative.[2] Banks argue that the two alerts were therefore unreliable, pointing out that Sells admitted that "K-9 hits" have no value beyond helping determine where to take samples, at which point the proper evidence becomes the lab results of those samples. Since relevant evidence is excluded when the probative value is "substantially outweighed by the danger of

[2]Banks make clear that Foran said the results were positive, but Lentini said they were positive only for accelerants expected to be detected in the home, but negative for foreign accelerants.

unfair prejudice," Fed. R. Evid. 403, the court could exclude the canine alerts if the jury's hearing that the dog alerted could lead them to assign more value to the alert than to the inconsistent lab report on the sample.

The district court agreed with Banks, excluding all evidence from the canine, and limiting Sells's testimony accordingly. The court did not abuse its discretion when it denied CIC's motion for a new trial on both of these issues.

5.

Next, CIC challenges the district court's denial of CIC's motion for a new trial based on the court's excluding expert testimony from State Fire Marshall Bomb and Arson Investigator Russell Robinson. The deadline for disclosure of expert witnesses was November 13, 2012. CIC did not make the disclosure until August 9, 2013—eight months later. CIC claims it was unable to obtain the State's investigation file until after the court's deadline for expert disclosures had passed. The court permitted Robinson to testify regarding what he did and saw during the investigation, but did not allow him to offer expert opinion. The court held that the failure to meet the deadline was prejudicial to Banks and not substantially justified.

Robinson is a non-retained expert. CIC argues that Fed. R. Civ. P. 26(a)(2) controls, and therefore that the required disclosure includes only the subject matter and summary of facts. CIC argues that it satisfied these requirements on August 10, 2012, by informing Banks that Robinson would testify on the "cause and origin and investigation of the Banks' fire and the claim submitted by the insureds," and further, by its supplement to interrogatory answers. CIC also argues that the 2010 amendment to Rule 26(a)(2)(C) has generated confusion as to what the new rule requires, and thus essentially asked to be excused on equitable grounds for any possible

violation. Separately, CIC argues that it is unreasonable to conclude that Banks were surprised by CIC's attempt to introduce expert opinion from Robinson.

The district court was unpersuaded by these arguments. The district court acted well within its discretion by excluding Robinson's expert testimony, and thus did not abuse its discretion by denying a new trial on this issue.

6.

The next issue is whether the district court erred in denying a new trial because it had limited the expert testimony of Mike Caldwell. The district court did not permit Caldwell to testify as to the value of Banks' personal property items. CIC objects that Banks' personal property expert, Tanya Butler, was allowed to testify,[3] but Caldwell was not. Butler has acted upon 500 personal property inventories, compared to 300 for Caldwell.

The district court found Caldwell did not have the necessary "knowledge, expertise, or training in evaluating personal property and that he relied on the expertise of others to do so in his report." The court also gave CIC the opportunity to designate someone else from the same company as Caldwell to testify. CIC declined to do so.

The court acted within its discretion by finding that Caldwell was not qualified to testify, and went beyond what was required to offer CIC the opportunity to substitute a different expert. The district court did not abuse its discretion by denying a new trial.

[3]Although Butler's testimony was allowed, it appears that she never actually testified.

7.

Next, we consider whether the district court erred by bifurcating Banks' bad-faith claims from the remaining claims. Banks' counterclaim alleged bad faith against CIC under Tennessee Code Annotated § 56-7-105. That counterclaim was filed on August 10, 2012. On October 7, 2013—fourteenth months later—Banks moved to bifurcate the statutory bad-faith claims from the contractual claims. The district court informed the parties on October 24, 2013, that it planned to grant the motion.

Banks argues that this issue is moot because Banks voluntarily dismissed their bad-faith claim at the conclusion of Phase 1 of the trial. CIC argues that there was certain evidence it would have introduced that would have impacted the principal trial had it known how the issue of a second trial would eventually play out. Banks counters that the evidence CIC wished to introduce was ruled inadmissible for any purpose other than bad faith.

This goes to tactical decisions that counsel routinely make in determining how best to prosecute their case. CIC is not affirmatively entitled to a "do-over" when part of a case unfolds differently from what they expected. And the district court could take into account whether the evidence in question was in fact inadmissible for any purpose other than bad faith, such that once bad faith was no longer at issue in the litigation, there was no acceptable purpose for the evidence. There was no abuse of discretion here.

8.

The final issue is whether the district court erred by not granting a new trial on the grounds that the jury's verdict was against the weight of the evidence. A new trial is "warranted when a jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being

against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *Holmes v. City of Massillon*, 78 F.3d 1041, 1045–46 (6th Cir. 1996). CIC argues that "[b]ased upon the jury's verdict, it is clear the jury did not even listen to the Banks' own evidence and arguments."

CIC's argument on this count is meritless. The district court did not abuse its discretion by refusing to disturb the jury's verdict.

III. CONCLUSION

We AFFIRM the judgments of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

CINCINNATI INSURANCE COMPANY, Plaintiff/Counter-Defendant, v. LARRY BANKS AND WANDA SUE BANKS, Defendants/Counter- Plaintiffs.	)))))))))))	 No. 4:12-cv-32 MAGISTRATE JUDGE CARTER

MEMORANDUM and ORDER

I. Introduction

This action is brought by Cincinnati Insurance Company (CIC) seeking a declaratory judgment that it does not have to pay on its insurance policy to the Banks following a fire at the Banks' home on November 28, 2011, because the Banks allegedly caused the fire to be set and the Banks allegedly materially misrepresented the value of property destroyed in the fire. CIC also seeks return of the monies it paid to the Banks' mortgage holder to pay off the mortgage of the house which burned in the fire. The Banks have counterclaimed for breach of contract and seek monetary damages for the loss of the house and personal property. They also have asserted against CIC a claim of statutory bad faith failure to pay.

This action currently comes before the Court upon a number of *Daubert* motions filed by the parties challenging the expert testimony of each other's witnesses[1]. The motions and their dispositions are as follows: CIC's Motion to Exclude Expert Testimony of Jeffery Morrill [Doc.

[1] The parties waived their right to a hearing and agreed to have their motions decided on the papers filed.

87] is DENIED; CIC's Motion to Exclude the Expert Testimony of Tanya Butler [Doc. 90] is DENIED; CIC's Motion to Exclude the Expert Testimony of John Lentini [Doc. 92] is DENIED; CIC's Motion to Exclude the Expert Testimony of John Lentini [Doc. 92] and the Banks' Motion to Exclude the Expert Testimony of Christine Foran [Doc. 96] are DENIED; and the Banks' Motion to Exclude Expert Testimony of Michael E. Caldwell [Doc. 97] is GRANTED. The Court shall address each in turn.

II. Standard of Review Under Fed. R. Civ. P. 702 and *Daubert*

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Daubert v. Merrell Dow Phamaceuticals, Inc.,* 509 U.S. 579, 597 (1993), the Supreme Court held that Rule 702 requires district courts to ensure that an expert's scientific testimony "both rests on a reliable foundation and is relevant to the task at hand." Rule 702 imposes a gatekeeping duty on the Court to exclude from trial expert testimony that is unreliable and irrelevant. *Kumho Tire Co. Ltd.v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert*, 509 U.S. at 589, 597-98; *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 176 (6th Cir. 2009); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 792 (6th Cir. 2002). In *Kumho Tire*, 526 U.S. at 152, the Supreme Court extended *Daubert* to include any expert testimony based on technical and other specialized knowledge. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 907 (6th Cir. 2004); *United States v. Tarwater*, 308 F.3d 494, 512-13 (6th Cir. 2002).

The party proffering the expert testimony bears the burden of showing its admissibility under Rule 702 by a preponderance of the proof. *Daubert*, 509 U.S. at 592 n. 10; *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001); *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000); *Goldman v. Healthcare Management Systems, Inc.*, 559 F. Supp.2d 853, 860 (W.D. Mich. 2008).

When determining the admissibility of expert testimony under Fed. R. Evid. 702 and *Daubert*, the Court considers three factors. First, the witness must be qualified to express an expert opinion. To qualify as an expert under Rule 702, a witness must establish his expertise by reference to his knowledge, skill, experience, training, or education. *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 529 (6th Cir. 2008); *Pride*, 218 F.3d at 577; *Goldman*, 559 F. Supp.2d at 859. Although this requirement receives liberal treatment, a witness is not an expert simply because he claims to be one. *Pride*, 218 F.3d at 577.

Second, the testimony must be relevant. Expert testimony is relevant under Rule 702 when it will aid or assist the trier of fact to understand the evidence or to determine a material fact in issue. *Daubert*, 509 U.S. at 592-93; *Scrap Metal*, 527 F.3d at 529; *Conwood*, 290 F.3d at 792; *Nelson*, 243 F.3d at 250; *Jahn v. Equine Services, PSC*, 233 F.3d 382, 388 (6th Cir. 2000); *Pride*, 218 at 578.

Third, the testimony must be reliable. Rule 702 guides us by providing general standards to assess reliability. The Court must consider: (1) whether the testimony is based upon sufficient facts and data; (2) whether the testimony is the product of reliable principles and methods, i.e. whether the reasoning and methodology underlying the experts's opinion is scientifically valid; and (3) whether the witness has applied the principles and methods reliably to the facts at issue

in the case. *Scrap Metal*, 527 F.3d at 529; *United States v. Smihers*, 212 F.3d 306, 315 (6th Cir. 2000).

Daubert provides a nonexclusive checklist for trial courts to use in evaluating the reliability of expert testimony. These factors include: (1) whether a theory or technique can be or has been tested; (2) whether the theory has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known potential rate of error and there standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community. *Daubert*, 509 U.S. at 592-94; *Scrap Metal*, 527 F.3d at 529; *Nilavar v. Mercy Health System-Western Ohio*, 244 Fed. Appx. 690, 696-97 (6th Cir. 2007); *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007); *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001); *Goldman*, 559 F. Supp.2d at 859. The test of reliability is flexible. These *Daubert* factors do not constitute a definitive test but may be applied and tailored to fit the particular facts of each case. *Kumho*, 526 U.S. at 150; *Daubert*, 509 U.S. at 593; *Scrap Metal*, 527 F.3d at 529; *Johnson, Inc.*, 484 F.3d at 429-30; *Goldman*, 559 F. Supp.2d at 859-60. If the expert testimony is relevant and reliable, the Court must also determine if the probative value of the expert testimony is outweighed by its prejudicial effect. *Daubert*, 509 U.S. at 595; *United States v. Beverly*, 369 F.3d 516, 528 (6th Cir. 2004).

III. Analysis

1. CIC's Motion to Exclude Expert Testimony of Jeffery Morrill [Doc. 87]

CIC contends Morrill is not qualified as an expert in the area of cause and fire origin. Mr. Morrill's CV, which the Court incorporates by reference herein, more than adequately established that Mr. Morrill is qualified to offer expert testimony as to the cause and origin of a

house fire. CIC also states Morrill failed to follow accepted procedures of investigating a house fire by not collecting raw data himself. However, NFPA 921. § 4.4.3.3 permits the use of previously collected data from a properly documented scene to analyze the fire at issue.

CIC also disagrees with the conclusions reached by Morrill and asserts they should be excluded for failure to follow procedures set forth in the NFPA. However, for every such criticism, the Banks can counter by citing another section of the NFPA which appears to support Morrill's methodology in reaching his conclusion. The Court concludes that any criticisms CIC has of Morrill's methodology and his opinions goes to the weight of his testimony and not whether it is admissible.

CIC also argues Morrill's testimony should be excluded because he does not have a valid Tennessee private investigator's license which is required by law to investigate house fires. While a PI license may be required in Tennessee to investigate house fires, it does not conclusively establish or dispel his ability to testify pursuant to Fed. R. Evid. 702, and the Court has already concluded Morrill has more than sufficient experience and qualifications.

Accordingly, CIC's motion to exclude Morrill's expert testimony [Doc. 87] is DENIED.

2. CIC's Motion to Exclude the Expert Testimony of Tanya Butler [Doc. 90].

CIC moves to exclude the expert testimony of Tonya Butler regarding the loss and value of personal property inside the burned house on the grounds that Ms. Butler is not qualified to give such testimony and that the methodology she employed to inventory and value the personal property at issue was not reliable.

Ms. Butler has been a licensed public adjuster in Tennessee for eight years and she has been involved in more than 500 personal property claims and has testified as an expert witness in this area. She is qualified.

CIC alleges Ms. Butler did not sufficiently investigate and verify the presence in the burned home of the contents listed by the Banks as having been lost in the fire. CIC also seems to demand a degree of certainty about the lost property list which seems unrealistic to the Court. Few people actually inventory the items in their home, with brand, model number and value, prior to such a destructive event as a fire. The Banks' response brief adequately addresses for the Court those concerns regarding methodology and reliability raised by CIC. CIC is certainly free to point out to the jury any weaknesses it feels exist in Ms. Butler's expert testimony. The Court will not disqualify her as an expert. Accordingly, this motion is DENIED.

3. CIC's Motion to Exclude the Expert Testimony of John Lentini [Doc. 92] and the Banks' Motion to Exclude the Expert Testimony of Christine Foran [Doc. 96]

John Lentini and Christine Foran are dueling cause and origin experts. CIC has pointed out what it believes are the flaws in Lentini's opinions and the Banks have highlighted what they believe are Foran's flaws. Each asserts the other should not be allowed to testify because the expert failed to follow some specific step in the approved analysis. Each is able to come forward, in the responses to the motions to exclude, with reasons why its own expert's analysis is appropriate, and the Court finds those reasons, incorporated herein, to be availing. The alleged flaws in the experts' testimony and opinions go to the weight of the testimony and opinions. The jury will be free to consider all the evidence and determine which opinion is the accurate one. Further, the experts' CV's indicate they are both fully qualified to give the opinions they have offered in their expert reports. These motions to exclude testimony are DENIED.

4. Banks' Motion to Exclude the Expert Testimony of Mark Sells [Doc. 98]

The Banks seek to exclude the testimony of Mark Sells regarding the origin of the fire because he was unable to rule out electrical or negligence causes of fire. CIC asserts Sells

followed the procedure set forth by NFPA 921 and concluded, based on several factors, that human involvement in setting the fire was the probable cause as opposed to the other proposed causes. The Court will therefore allow Mr. Sells to testify and offer an opinion as to the cause of the fire at issue, and the Banks will be free to cross-examine him to highlight any perceived weaknesses in the testimony and opinion.

The Banks also seek to exclude any testimony from Sells regarding what should or should not have survived the fire in the house on the grounds that he did not know how hot the fire was and he does not have training or education to make such a determination. However, Sells has investigated hundreds of fires and is familiar with items which normally survive a fire. Sells may testify as to what should survive a fire based on his experience, and the Banks are free to cross examine him.

Mark Sells' report also stated, "[w]hile I made no specific determination as to the quantity and quality of items claimed to have been in the left side of the home destroyed by fire during my initial investigation, I had hand sifted the area and was completely familiar with the evidence that remained in the fire debris." Mr. Sells can certainly testify as to what he saw when he hand-sifted the area. The Court will reserve ruling on other testimony from Mr. Sells regarding this specific area.

Accordingly, the Banks' Motion to Exclude Mr. Sells' expert testimony is DENIED in part and RESERVED in part.

5. Banks' Motion to Exclude Expert Testimony of Michael E. Caldwell [Doc. 97]

Michael E. Caldwell was specially retained by CIC to examine the remaining portions of the burned house, inventory its contents, and provide a value. Caldwell admitted in his deposition, however, that he has no knowledge, expertise, or training in evaluating personal

property and that he relied on the expertise of others to do so in his report. Consequently, the Court finds that Mr. Caldwell does not have the necessary expertise to testify concerning the value of personal property claimed by the Banks. This motion is GRANTED. However, Mr. Caldwell may testify as to what he did and saw when he inspected the burned premises.

SO ORDERED.

ENTER.

S /*William B. Mitchell Carter*
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CINCINNATI INSURANCE COMPANY,	)	
Appellant,	)	
v.	)	**No. 14-5597**
	)	**ORAL ARGUMENT REQUESTED**
LARRY BANKS AND WANDA SUE BANKS,	)	**U. S. District Court, Eastern District of Tennessee, Winchester Division**
Appellees	)	**No. 4:12-CV-00032**

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APPELLANT'S BRIEF ON APPEAL

CORPORATE DISCLOSURE FORM

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-5597 Case Name: Cincinnati Insurance Company v. Banks

Name of counsel: Parks T. Chastain and E. Jason Ferrell

Pursuant to 6th Cir. R. 26.1, Cincinnati Insurance Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Cincinnati Financial Corporation owns 100% of the stock of The Cincinnati Insurance Company. Cincinnati Financial Corporation is a publicly traded company on the NASDAQ Global Select Market under the ticker "CINF." Cincinnati Casualty Corporation is surety for an appeal bond filed in the District Court of the Eastern District of Tennessee, Winchester Division.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Yes. Cincinnati Financial Corporation owns 100% of the stock of The Cincinnati Insurance Company. Cincinnati Financial Corporation is a publicly traded company on the NASDAQ Global Select Market under the ticker "CINF." Cincinnati Casualty Corporation is surety for an appeal bond filed in the District Court of the Eastern District of Tennessee, Winchester Division.

CERTIFICATE OF SERVICE

I certify that on 9/04/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ E. Jason Ferrell

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant, Cincinnati Insurance Company ("Cincinnati"), through its attorneys, hereby requests oral argument pursuant to Fed. R. App. P. 34, because courts in this Circuit do not yet have authoritative guidance from this Court as to the proper burden to impose in first party insurance litigation, and resolution of this issue affects each litigant in first party coverage disputes and litigation.

Under the plain terms of most first party property insurance policies, the insured has initial obligation or burden to demonstrate that the claimed loss falls within the policy's insuring agreement, usually by proving an accidental direct physical loss. Only after this burden is met does the burden shift to the insurance company to prove that a policy exclusion or limitation then applies. In this case, the District Court simply removed the burden of proof upon the insured when obligated to prove an accidental direct physical loss without a motion for directed verdict or a judgment as a matter of law. Appellees, Larry and Wanda Sue Banks (the "Banks") did not move for judgment as a matter of law or for directed verdict on the issue of whether there was an accidental direct physical loss, and thus, this burden should have first been born by the Banks. Further, the other issues on appeal are such that oral argument may assist this Court's analysis of the issues.

JURISDICTIONAL STATEMENT

The District Court had diversity of citizen jurisdiction over this case pursuant to 28 U.S.C. §1332(a).

The District Court's Order denying appellant's Motion for New Trial, to Amend Findings and Judgment, and/or for Judgment Notwithstanding the Verdict, thus closing the case, was entered on April 22, 2014. (Order Denying Motion for New Trial, RE 282, at Page ID #6925-6926).

The Notice of Appeal was filed less than thirty (30) days later on May 16, 2014, pursuant to Fed. R. App. p. 4(a)(1)(A). (Notice of Appeal, RE 283, at Page ID # 6927).

The instant appeal is, therefore, timely.

STATEMENT OF ISSUES

1. Did the Trial Court commit reversible error when it failed to impose any burden of proof upon the Banks to demonstrate an accidental direct physical loss as required by the terms of the policy, requiring the Banks to first establish damage to their home was the result of an accidental cause, when there had been no directed verdict or judgment as a matter of law raised on this issue?

2. Did the Trial Court commit reversible error when failed to direct verdict to Cincinnati as to the claimed retaining wall and driveway when such claims were never presented to Cincinnati prior to trial; when there was no evidence that either the retaining wall or the driveway was damaged by a covered cause of loss; and when there was no evidence either was covered separately under the policy as an "other structure" pursuant to the policy provisions?

3. Did the Trial Court commit reversible error when it instructed the jury monies could be awarded for the retaining wall and driveway as "other structures" when the Trial Court first erred in failing to direct verdict to Cincinnati that there was no proof at trial that the remaining wall or driveway were covered separately under the policy?

4. Did the Trial Court commit reversible error when it failed to direct verdict to Cincinnati on the issue of whether the Banks could collect Additional

Living Expenses ("ALE") under the policy and later instructed the jury Cincinnati could be found to have waived its ALE policy provisions?

5. Did the Trial Court commit reversible error when it denied Cincinnati's requested jury instruction based upon an accurate principle of Tennessee law that it was not necessary for Cincinnati to specifically identify the person responsible for setting the fire?

6. Did the Trial Court commit reversible error when it failed to utilize Tennessee's "identity and character test" and instead granted partial summary judgment to the Banks on the issue of whether their home constituted a constructive total loss under Tennessee's valued policy law when no Tennessee case has adopted such doctrine?

7. Did the Trial Court commit reversible error when it denied Cincinnati's motion to exclude evidence of four other fires occurring in the Manchester, Tennessee area during November 2011, when only one which was found to be incendiary and all were factually distinguishable?

8. Did the Trial Court commit reversible error when it denied Cincinnati's motion to exclude the Banks' expert witness, Jeffrey Morrill, because of his failure to follow the guidelines set forth in NFPA 921 and his blatant disregard for Tennessee law requiring a license for Origin and Cause investigation?

9. Did the Trial Court commit reversible error when it denied Cincinnati's motion to exclude the Banks' expert witness, John Lentini, and allowed his testimony at trial?

10. Did the Trial Court commit reversible error when it excluded all evidence at trial concerning the accelerant detection canine which made multiple alerts at the scene, when such evidence was disclosed through Cincinnati's expert, Mark Sells, who was deposed about both the origin and cause of the Banks' fire, collection of fire debris samples from locations where such canines "alerted," as well as his experience with accelerant detection canines?

11. Did the Trial Court commit reversible error when it limited the trial testimony of Cincinnati's cause and origin expert, Mark Sells, concerning the involvement and use of accelerant detection canines and prevented him from testifying about his investigation methods and direct observations?

12. Did the Trial Court commit reversible error when it limited the trial testimony of State Fire Marshall Bomb and Arson Investigator, Russell Robinson, as to the cause and origin of the fire, when he was disclosed as a witness to testify as to the origin and cause of the Banks' fire and disclosed pursuant to Fed. R. Civ. P. 26(a)(2)(C)?

13. Did the Trial Court commit reversible error when it excluded expert opinions and reference to value of Cincinnati's expert witness, Mike Caldwell?

14. Did the Trial Court commit reversible error when it bifurcated the bad faith claims from the issues of coverage under the policy?

15. Did the Trial Court commit reversible error when it failed to grant a new trial pursuant to Fed. R. Civ. P. 59 when the jury's verdict was against the weight of evidence presented at trial, and even against the verdict suggested by the Banks?

STATEMENT OF CASE

Cincinnati issued a policy number H01 0429125 to the Banks for property located at 1810 Sycamore Circle, Manchester, TN 37355. (CIC Amd. Complaint, RE 8, at Page ID # 270-285). On November 28, 2011, an arson fire damaged the property, with multiple points of origin and the presence of an ignitable liquid being detected. Id. at ¶ 8-11. The Banks submitted two Sworn Statements in Proof of Loss to Cincinnati. The first made claim for damage in an amount "to be determined." Id. at ¶ 9. The second made claim for $1,904,309.64, and included a personal property inventory with a Replacement Cost claim of $872,123.34. Id. at ¶ 10.

Peoples Bank & Trust Company held a mortgage on the property in the amount of $588,744.03 with a balloon balance of $555,937.00 due on March 17, 2012. Id. at ¶ 14. Cincinnati denied the Banks' claim insurance proceeds and was required to pay the Banks' mortgagee. Id. at ¶14-15.

The policy only covered "accidental physical loss." Id. at ¶ 19-20. The fire was not accidental, and Cincinnati's investigation revealed the Banks and/or others acting with their knowledge, consent and permission did intentionally set fire to the property for the purpose of destroying same and defrauding Cincinnati out of insurance proceeds. Such intentional acts simply cannot be an "accident" as required for the policy's coverage to apply and are further excluded under the policy and

under Tennessee law. Id. at ¶ 21-22. The Banks had motive, both financial and otherwise, to set the fire and/or have it set; were the last persons known to be in the house; and otherwise had opportunity to set the fire and/or arrange for it to be set with their knowledge, consent and permission. Id. at ¶ 24-25.

In their claims submissions, the Banks made material misrepresentations, intentionally concealed or misrepresented material facts, engaged in fraudulent conduct and made false statements relating to their involvement on the fire, knowledge of the cause of the fire, and the extent of the loss. The Banks intentionally and materially misrepresented the presence of certain personal property as being in the house at the time of the fire. Id. at ¶ 26-27. Cincinnati filed suit seeking a declaration it owed the Banks nothing under the policy and to recover the amount it paid on the Banks' mortgage.

SUMMARY OF ARGUMENT

The District Court made several reversible errors requiring a new trial. The most significant concerns the failure to impose a burden of proof upon the Banks to demonstrate an accidental direct physical loss before requiring Cincinnati to prove any exclusion applies. The jury verdict form likewise should have first required the jury to answer the question of whether the Banks met their initial burden.

The Banks claimed damage to a retaining wall and driveway that were never claimed prior to trial. If these were deemed part of the coverage applying to the Banks' dwelling structure, no additional coverage was available. The Banks sought coverage as an "other structure" with a separate limit that only applies in certain circumstances. The Banks offered no proof these items fell within the "other structure" coverage, and Cincinnati should have been granted directed verdict. Likewise, the "other structures" coverage should not have been instructed to the jury or appear on the verdict form.

The Banks' did not incur Additional Living Expenses ("ALE") as provided by the policy. The Banks' allege waiver applied based upon payments previously made on behalf of the Banks allowing them to recover. There was no such waiver, and there can be no waiver of such policy coverage under the facts presented at trial. The District Court should have granted directed verdict to Cincinnati and

should not have instructed the jury that ALE could be recovered as included on the verdict form.

Cincinnati requested a jury instruction that it was not necessary for Cincinnati to specifically identify the person who started the fire in order to prevail on the Arson Defense. This was an accurate principle of Tennessee law, and the District Court erred in failing to instruct the jury accordingly.

The District Court granted the Banks' motion for partial summary judgment seeking a determination that their home was a total loss as a matter of law under Tennessee's valued policy laws. This was error as the District Court's decision was not based upon Tennessee's "identity and character" test, but instead upon an alleged municipal order requiring demolition.

Cincinnati sought pre-trial to exclude evidence of four other fires in the area of the Banks' home during November 2011. Only one of these was an incendiary fire, and all of them were different than the Banks' fire. The District Court excluded reference the Banks' own prior fire, but it was error to allow evidence concerning these other unrelated fires at trial.

Cincinnati moved to exclude testimony of the Banks' witness, Jeffrey Morrill, for his failure to follow established guidelines imposed by NFPA 921 and performing an origin and cause investigation without proper Tennessee licensure. The District Court erred when it allowed Morrill's testimony.

Cincinnati moved to exclude testimony of the Banks' witness, John Lentini. Lentini's opinions and testimony were unreliable, and he performed no independent testing or analysis. The District Court erred when it allowed Lentini's testimony.

The Banks moved to exclude all evidence of accelerant detection canines used during the origin and cause investigation of their fire. Even though Cincinnati disclosed its expert, Mark Sells, along with his experience in utilizing accelerant detection canines, and his statements and opinions as to how such accelerant detection canines assisted in determining the locations of where debris samples (determined to be positive for ignitable liquid residue) were taken, the District Court erroneously excluded the evidence finding expert testimony must be disclosed, even though such testimony was actually disclosed. Based upon this decision, the District Court also erred in excluding Marks Sells testimony concerning his investigation methods and observations related to the use of accelerant detection canines in his investigation during his testimony at trial.

The District Court improperly limited the trial testimony of State Fire Marshall Bomb and Arson Investigator, Russell Robinson, as to the cause and origin of the fire, finding he was required to be disclosed as an expert and not disclosed pursuant to Fed. R. Civ. P. 26(a)(2)(C). Cincinnati disclosed Robinson on its initial disclosures as a person with knowledge as to the origin and cause of the fire.

It was not able to obtain the State's investigation file until months after the expert disclosure deadline. Once it was obtained, the materials obtained were provided to the Banks' counsel, and Cincinnati made supplemental disclosures. Because Robinson was not retained by Cincinnati, and his file materials were provided to the Banks once available, it was error to exclude his opinion testimony.

Cincinnati presented Michael Caldwell as an expert related to his evaluation of contents in the Banks' home and those claimed by the Banks. The Banks moved to exclude him as an expert and the District Court allowed him to testify but excluded his testimony as to a personal property item's "value." The District Court erred in this pre-trial decision as it denied Cincinnati's motion to exclude the Banks' expert, Tanya Butler, to testify at trial when she had similar experience and also relied upon others in determining value of personal property. This pre-trial error required Cincinnati to change its strategy at trial.

The District Court improperly bifurcated the bad faith claims from the issues of coverage under the policy. The Banks requested this approximately one month before trial even though their complaint seeking bad faith was filed more than one year before trial. Such bifurcation put Cincinnati in the role of preparing to try the case twice, in both cases using many of its witnesses from phase one in the second phase. This was clearly prejudicial to Cincinnati and constitutes reversible error in

that Cincinnati had already disclosed witnesses and made disclosures based upon how it intended to present the case at trial.

The District Court failed to grant a new trial pursuant to Fed. R. Civ. P. 59 when the jury's verdict was against the weight of evidence presented at trial. There was clear evidence of incendiary origin, financial motive and opportunity. Most importantly, however, was the jury's failure to listen to the court and the evidence. The most outstanding example of this is when the jury awarded an amount of personal property that did not coincide with the proof. The jury clearly failed to render a verdict consistent with the weight of evidence presented at trial, and the District Court did nothing to correct the problem. Thus, a new trial is necessary.

ARGUMENT

A. STANDARD OF REVIEW

1. The standard of review on appeal.

This Court reviews a District Court's legal conclusions *de novo* and its factual findings for clear error. United States v. Branch, 537 F.3d 582, 587 (6th Cir. 2008). Mixed questions of law and fact are also subject to *de novo* review. Thoroughbred Software Int'l, Inc. v. Dice Corp., 488 F.3d 352, 358 (6th Cir. 2007).

2. The standard of review for Motion for New Trial, to Amend Findings and Judgment, and/or for Judgment Notwithstanding the Verdict.

The decision to deny a motion for new trial or a motion to amend findings and judgment is reviewed under an abuse of discretion standard. Perceptron, Inc. v. Sensor Adaptive Machines, Inc., 221 F.3d 913, 920 (6th Cir. 2000); Korn v. Paul Revere Life Ins. Co., 382 F. App'x 443, 448-49 (6th Cir. 2010). A denial of motion for judgment notwithstanding the verdict is reviewed by applying "the same standard applied by the District Court in denying the motion." Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir.1986), cert. denied, 480 U.S. 919 (1987). Such a motion for judgment notwithstanding the verdict is appropriate when "the court finds that the evidence points so strongly in favor of the movant that reasonable minds could not come to a different conclusion." Id.

B. The Trial Court committed reversible error when it failed to impose any burden of proof upon the Banks to demonstrate an accidental direct physical loss as required by the terms of the policy, requiring the Banks to first establish damage to their home was the result of an accidental cause, when there had been no directed verdict or judgment as a matter of law raised on this issue.

The Court failed to impose any burden of proof upon the Banks except to simply establish the amount of damages they may have incurred. The Sixth Circuit consistently reverses the judgment in cases where the wrong burden of proof has been applied. Mitchell v. United States, 396 F.2d 650 (6th Cir. 1968); Safeco Ins. Co. of Am. v. City of White House, Tenn., 191 F.3d 675 (6th Cir. 1999); Jones v. Consol. Rail Corp., 800 F.2d 590 (6th Cir. 1986); McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663 (6th Cir. 2003); Wooldridge v. Marlene Indus. Corp., 875 F.2d 540 (6th Cir. 1989); In re Calhoun, 715 F.2d 1103 (6th Cir. 1983); Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672 (6th Cir. 2000).

The District Court failed to require the jury to first determine the Banks met their burden of proof to demonstrate an accidental loss. Tennessee law applied to the case, and the District Court was obligated to follow Tennessee law on substantive issues such as the allocation of the burden of proof. Tennessee law absolutely requires that the insured bears the burden of proof of establishing a loss comes within the terms of a policy. Blaine Constr. Corp. v. Ins. Co. of N. Am., 171 F.3d 343, 349 (6th Cir.1999). The insured has the obligation and burden to show that any claimed loss falls within the insuring provisions of the policy.

Cincinnati issued a policy of insurance to the Banks which provided in relevant part:

> "We" insure direct "physical loss" unless the "physical loss" is:
>
> > **1.** Excluded in Section **I** – Property Coverages, **C.** Exclusions; or
> >
> > **2.** Limited in Section **I**, **A.3. c.** Limitations

The term "physical loss" is defined by the policy as follows:

> "Physical loss" means accidental physical loss or accidental physical damage.

(Policy, RE 8-1, at Page ID # 295 and 308). This has been the primary basis of Cincinnati's denial all along. (CIC Denial Letter, RE 8-4, at Page ID # 506-508). Instead of instructing the jury the Banks must prove an "accidental direct physical loss" as required by this insuring agreement, the District Court instead instructed the jury the "Banks bear the burden only to prove by a preponderance of the evidence the amount of damages they suffered as a result of the fire within the monetary limits of the insurance policy." (Transcript, RE 287, at Page ID # 6951). The District Court then went on to instruct the jury that Cincinnati had two defenses to the Banks' claims – the arson defense and misrepresentations. Id. The District Court's instructions had the effect of putting the proverbial "cart before the horse," and were further referenced in the jury verdict form that only asked whether the Banks made material misrepresentations or consented to the

intentional burning of their home. (Verdict Form, RE 245, at Page ID # 5316). Like the jury instructions themselves, the jury verdict form did not require the Banks to prove their claims were "accidental" and fell within the insuring agreement of the policy. Id.

Proving only the amount of damages caused by the fire does not even arguably demonstrate their alleged loss fell within the terms of the policy's insuring agreement. The Banks' burden was much greater and required them to prove all facts essential to recovery under the policy. Farmers Bank & Trust Co. of Winchester v. Transamerica Ins. Co., 674 F.2d 548, 551 (6th Cir. 1982). This includes proof of both an "accident" and a "direct physical loss." The District Court should have instructed the jury that in order to collect under the policy, the Banks must first prove the fire was more likely than not an accidental fire. The District Court erred in failing to instruct the jury that the Banks first bear the burden of proving an accidental fire, and Cincinnati should be granted a new trial.

The Farmers Bank case confirms under Tennessee law, "the burden is on the insured to prove the essential elements of his cause of action to recover on an insurance policy." Id. at 551. The Farmers Bank insured sought to recover on a forged note. While the trial court placed the burden on the insurer to prove that that the note was not forged, the Sixth Circuit reversed and found that placing the initial burden upon the insurer was improper. Id.

In the case of Smith v. Life Ins. Co. of N. Am., 872 F. Supp. 482 (W.D. Tenn. 1994), the plaintiffs sought to collect under a life insurance policy providing coverage for injuries "caused by an accident." Id. at 484. The court considered the requirements of Tennessee law as set forth in Farmers Bank and found the plaintiffs must prove the decedent's death was caused not only by injuries, but also by an "accident." Smith at 484-5. See also Gilmore v. Continental Casualty Co., 188 Tenn. 588, 221 S.W.2d 814 (Tenn. 1949).

The most instructive case on this issue in Tennessee is William G. Hall v. Allstate Insurance Company, 01-A-01-9607-CV-00305, (Tenn. Ct. App., 1996)(copy attached as Exhibit A). In Hall, the insured sued Allstate for damage to his truck caused by fire – a fire Allstate believed was the result of arson by the insured. The trial court found Hall failed to carry his initial burden of proof and awarded judgment in favor of Allstate. Id. at 3. Hall appealed, and one of the issues on appeal was whether the "trial court erred as a matter of law, in holding that the [insured] had the burden of proof as to the nonexistence of an exception or defense to the insurance policy." Id.

That is precisely what the Banks argued at the District Court – that because this is an arson case, Cincinnati bore the burden of demonstrating the Banks' fire was a result of the Banks' intentional acts. The District Court agreed and instructed the jury accordingly. (Transcript, RE 287, at Page ID # 6951). However, as referenced

by both the trial court and Tennessee Court of Appeals in Hall, placing the burden upon the insurer without first requiring the insured to prove an accidental fire was improper.

As referenced by the Tennessee Court of Appeals in its decision in Hall, the Allstate policy covered "'loss' mean[ing] direct and accidental loss of or damage to" the automobile, requiring both a direct and accidental loss. Id. at 4. The Court of Appeals expressly found "Hall had the burden of proving these details of his claim." Id.

In its decision, the Tennessee Court of Appeals referenced the Smith case, supra, and held under Tennessee law it was first the insured's:

> burden at trial to show that the loss fell within the terms of the policy. We are of the opinion that the trial court's finding that **the [insured] failed to prove the accidental nature of the fire** and the entry of judgment in favor of Allstate was proper. There is ample evidence from which the trial court found that the loss to the pickup truck was not accidental and that [the insured] failed to meet his burden of showing that a covered loss occurred.

Hall. at *5-6 (emphasis added). The Hall case presents the precise issue that exists in the instant matter. There was complete agreement between the trial court judge and the judges of the Tennessee Court of Appeals that it is the insured's burden to first prove an accidental cause as required by the policy before the insurer has any burden to prove an exception, exclusion or defense applied. Id.

This is simply the rule in Tennessee. For example, in Tuturea v. Tennessee Farmers Mut. Ins. Co., 2010 WL 2593627 (Tenn. Ct. App.), the court dealt with an "innocent spouse" issue but specifically stated "[i]n order to establish coverage, Mrs. Tuturea would have to demonstrate that the burning of the residence was an accident because the applicable policies only provide coverage for accidental direct physical loss." Id. at *10. Tennessee courts have actually been imposing this burden for decades, if not longer. An example of this can be found in the case of De Rossett Hat Co. v. London Lancashire Fire Ins. Co., 183 S.W. 720 (Tenn. 1916), almost one hundred years ago. In De Rossett, the trial court provided jury instructions on a fire case where the very first issue for the jury to address was whether "the fire which occasioned the loss sued for accidental?" Id. at 721. While this case makes it clear the jury should first be required to consider whether the fire was "accidental," the verdict form used in the instant case simply asked whether the Banks "cause[d] or consent[ed] to the intentional burning of the insured property?" (Verdict Form, RE 245, at Page ID # 5316). The jury was not able to first address the common sense issue whether there was an "accidental" fire. We simply do not know what the jury would have decided had the proper burden been imposed.

Courts in other cases have reached this conclusion. In Williford v. Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co., 135 S.E.2d 37 (1964),

found it appropriate for the jury to determine whether fire damage to an automobile was "accidental" within the insurance policy. Lamadrid v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 2014 WL 2135970 (11th Cir.) found the insureds "met their burden of demonstrating an accidental and fortuitous loss under the Policy…" The Metivier v. Liberty Mut. Ins. Co., 1999 Mass. App. Div. 88 (Dist. Ct.) court held the "plaintiff-insured thus has the burden of proving that the loss falls within the insuring clause of the "Comprehensive" coverage ("direct and accidental"),. . . including the burden of proving that the loss was "accidental." Id. (internal citations omitted).

The case of Cancer & Blood Disease Ctr., P.C., Inc. v. State Farm Fire & Cas. Co., 2000 WL 33281096 (S.D. Ind.) also supports this position. This court found while the insured "established that it suffered a direct physical loss, it has produced no evidence that the loss was 'accidental.'" The Cancer and Blood Disease court found that:

> An accident within accident insurance policies is an event happening without any human agency, or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens. A more comprehensive term than 'negligence,' and in its common signification the word means an unexpected happening without intention or design.

Id. at *4 (citing Black's Law Dictionary 15 (6th ed.1990). In granting State Farm's motion for summary judgment, the court went on to state that:

> Instead of offering evidence of an "accidental" loss, the Center simply claims that the cause of its damage is unknown. The Court refuses to speculate, however, that because the cause of its loss is unknown, it must have been accidental and therefore covered under State Farm's policy. With no evidence of an accidental loss, the Center has failed to meet its burden of establishing coverage under State Farm's policy.

Id. Under Tennessee law, an "accident" generally means an unexpected or unforeseen event. Gassaway v. Travelers Ins. Co., 439 S.W.2d 605, 608 (Tenn. 1969). Thus, the District Court should have at the very least instructed the jury the Banks bore the burden to establish the fire was unexpected or unforeseen.

The Utah case of Young v. Fire Ins. Exch., 182 P.3d 911, 918-19 (Utah. App. 2008) found that under policy language similar to the Cincinnati policy, the insured "was in fact required to present evidence that the fire was the result of an accident, or at least not a result of [the insured's] intentional acts, i.e., the intentional act of someone not connected to [the insured], before shifting the burden to [the insurer] to prove arson." Id. This is precisely the type of burden the Banks should have been required to meet at trial.

Cincinnati's policy requires an "accidental" loss in order for coverage to apply just as the Allstate policy did in Hall. The District Court should have also required the jury to first consider whether the Banks met their burden of demonstrating an accidental cause of loss. Tennessee courts require it. Thus, the judgment entered by the District Court should be vacated, and its decision denying Cincinnati's request for a new trial should be reversed.

The jury should have been instructed that the Banks must prove damages caused by an accidental fire and this should have been included on the verdict form. The Banks may have been able to do this, perhaps through a direct verdict motion or through a motion for judgment as a matter of law, but to improperly instruct the jury that it was instead Cincinnati's burden to show the fire was the result of arson was error and requires a new trial. This decision essentially took the issue out of the jury's hands. Instead, the jury should have been required to specifically find whether the Banks' claims fell within the coverage grant of the policy requiring an "accidental" loss. Only then should have Cincinnati have had to prove anything at all.

In announcing its decision on the burden of proof, the District Court relied upon Mark VII Transp. Co., Inc. v. Responsive Trucking, Inc., 339 S.W.3d 643 (Tenn. Ct. App. 2009), that when "a contract contains both general and specific provisions relating to the same thing, the specific provisions control. Where uncertainty exists between general and specific provisions, the specific provisions will usually qualify the general." It ruled specifically as follows:

> The interpretation of a contract is a question of law, not a question of fact. Mark VII Transportation, Incorporated v. Responsive Trucking, Incorporated, 339 SW3d, 643——it's a Tennessee Court of Appeals case, 2009— —held that, "Further, when a contract contains both general and specific provisions related to the same thing, the specific provision controls." To answer the pure question of law, i.e., who bears the burden of proof in this breach-of-contract case, the Court will look to the language of the contract, the insurance policy, with the

> applicable specific provisions controlling. It's agreed by the parties that the policy at issue was in full force and effect at the time that the Banks' house burned on November 28, 2011. It's agreed that the policy covers physical loss caused by accidental events, including accidental fire. It's agreed -- it is agreed that the loss was caused by the fire. It is not agreed how the fire originated. Cincinnati Insurance asserts the fire was not accidental because the Banks intentionally caused the fire to be set. While the insurance policy, the contract, covers generally accidental physical loss, it specifically excludes, among other things, intentional damages, meaning any damages arising out of an act an insured commits or conspires to commit with the intent to cause damage. That's found on Page 23 of the policy.
>
> In Tennessee it's the insurance company's burden to prove that exclusions in coverage apply. The citation for that is Blaine Construction v. Insurance Company of North America, 171 F3d at 343, a 1999 Sixth Circuit Court of Appeals decision. Whether or not the Banks intentionally caused their home to burn down is the only factual issue raised by the evidence at trial regarding the accidental nature of the fire. Since this issue falls squarely within one of the specifically enumerated exclusions of the policy, it is the burden of Cincinnati Insurance to prove that the Banks intentionally caused the fire to be set. This is the only issue for the jury to decide as to the accidental nature of the fire, and, thus, it is the only issue the Court will submit to the jury to decide as to the accidental nature of the fire. And, again, since it is a specific exclusion in the policy, Cincinnati bears the burden to prove the exclusion applies.

(Transcript, RE 277, at Page ID # 6857-6860).

When comparing the grant of coverage requiring an "accidental" loss to the intentional acts exclusion, and finding the exclusion to be more specific and thus controlling, the District Court simply misapplied the general precepts of policy analysis. The grant of coverage in Cincinnati's policy requiring an "accidental" direct physical loss is for all practical purposes the same as an insuring agreement

in a liability policy. A policy's "insuring agreement sets the outer limits of an insurer's contractual liability. If coverage cannot be found in the insuring agreement, it simply will not be found elsewhere in the policy. Exclusions help define and shape the scope of coverage, but they must be read in terms of the insuring agreement to which they apply." Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc., 972 S.W.2d 1, 7-8 (Tenn. Ct. App. 1998). Such "exclusions should also be read seriatim. Each exclusion reduces coverage and operates independently with reference to the insuring agreement." Id. at 8. Thus, proper policy analysis does not allow for a specific exclusion to control the general insuring agreement. Instead, separate and independent policy analyses of the insuring agreement and policy exclusions must be made.

Busch Thoma, the Banks' insurance agent, testified at trial. After questioning by counsel, in an apparent attempt to confirm its decision concerning the "accidental" burden, the District Court questioned Thoma on this very issue. It inquired as to whether the policy was an "all-risk" policy. Thoma responded the description of "all-risk" was a "dangerous statement." (Transcript, RE 262, at Page ID # 5748). Thoma confirmed the policy covered "all direct physical loss unless specifically . . . excluded or restricted." Id. at Page ID # 5749-5750. The District Court was then concerned it "opened Pandora's box" and allowed counsel to ask questions based upon the court's questions. Id. Thoma confirmed in order

for coverage to apply any direct physical loss must also be "accidental." Id. at Page ID # 5752.

While the issue of policy interpretation is a matter of law to be decided by the court, there was testimony that the policy required an "accidental" loss. The the jury heard the testimony, and it should have been instructed concerning the requirement of an "accidental" loss. The failure to so instruct the jury likely left it wondering about the meaning of that testimony.

Cincinnati had no obligation whatsoever under the policy unless and until the Banks first demonstrated an "accidental" direct physical loss. The District Court erred by wrongly finding Cincinnati bore the burden since policy exclusions are more specific and failing to require the jury to first determine whether the Banks met their burden. This Court should reverse the District Court's failure to impose the correct burden of proof upon the Banks and vacate the judgment against Cincinnati.

C. The Trial Court committed reversible error when it failed to direct verdict to Cincinnati as to the claimed retaining wall and driveway when such claims were never presented to Cincinnati prior to trial; when there was no evidence that either the retaining wall or the driveway was damaged by a covered cause of loss; and when there was no evidence either was covered separately under the policy as an "other structure" pursuant to the policy provisions.

Cincinnati moved for directed verdict on the issue of coverage for a retaining wall and a driveway at the end of the Banks' proof. (Transcript, RE 277,

Page ID # 6871- 6875). The issues were whether these were "other structures" based upon the proof at trial, and whether damaged by the fire. The policy provides the following with respect to the Other Structures coverage:

> **2. COVERAGE B – OTHER STRUCTURES**
>
> "We" will pay for direct "physical loss" to Covered Property and other covered costs caused by or resulting from a Covered Cause of loss that occurs during the "coverage term".
>
> **a. Covered Property**
>
> Covered Property under Coverage B – Other Structures means other structures on the "residence premises" set apart from the dwelling insured under Coverage A by clear space. This includes structures connected to the dwelling insured under Coverage A by only a fence, utility line, or similar connection.

(Policy, RE 8-1, Page ID # 297). For coverage to apply, there must be proof of damage to a structure, set apart from the dwelling, unless connected by only a fence, utility line, or similar connection. Only Mr. Banks testified about the rock wall and driveway. (Transcript, RE 276, Page ID # 6834-6836, 6842). His testimony did not reference whether either structure was separated by a clear space or connected only by a "fence, utility line, or similar connection." The proof was simply insufficient to demonstrate either item fell within the policy's "Other Structures" coverage. On cross-examination, Mr. Banks admitted the claims for the retaining wall and driveway were prepared in the week before trial and never presented to Cincinnati. (Transcript, RE 276, Page ID #6844).

The Banks' recovery for damage to property for their dwelling house is limited to the Coverage A. limit. If the driveway and retaining wall were part of the dwelling iteself, recovery for those items fall under the dwelling limit which was exhausted by the District Court's finding that the home was a total loss. An additional limit applies to "other structures," and if the Banks could demonstrate the driveway and retaining wall fell within the specific provisions of that coverage and were damaged by the fire, the "other structures" limit of coverage would then be available. It was the insured's responsibility to prove their loss comes within the policy's coverages, and it was their burden to demonstrate facts for this coverage to apply. Evidence at trial was insufficient to have been submitted to the jury.

The case of Porco v. Lexington Ins. Co., 679 F. Supp. 2d 432 (S.D.N.Y. 2009) concerned whether a swimming pool was part of the dwelling or an other structure, and required the court's consideration of the phrase "clear space." Id. The court focused on the importance of "clear space" in making the determination of which coverage would apply. The court found that based upon the proof there was a clear space between the dwelling and the swimming pool for it to fall within the "other structures" coverage. Id. However, the case also demonstrates the need for evidence or proof to resolve the issue.

There was no such proof at trial of a clear space necessary for the Banks to have met their burden, and the jury should not have been allowed to consider an award of damages to the retaining wall and driveway. The failure to grant Cincinnati directed verdict on this issue was error. The judgment entered concerning Other Structures requires reversal, and instead, the judgment should be amended in Cincinnati's favor reducing the jury's verdict by $21,500.00. (Verdict Form, RE 245, Page ID #5317).

D. The Trial Court committed reversible error when, based upon its failure to grant a directed verdict on the issues of damages claimed to be to "other structures", it instructed the jury monies could be awarded for "other structures" for such items.

The Court failed to grant a directed verdict on the issues of damages claimed to be to "other structures", and instead instructed the jury monies could be awarded for "other structures" for such items. Because a directed verdict should have been granted, this constitutes error and requires reversal of the $21,500.00 judgment for Other Structures and entry of judgment in Cincinnati's favor notwithstanding the Jury's verdict. (See Verdict, RE 245, Page ID #5317).

E. The Trial Court committed reversible error when it failed to direct verdict to Cincinnati on the issue of whether the Banks could collect Additional Living Expenses ("ALE") under the policy and later instructed the jury Cincinnati could be found to have waived its ALE policy provisions.

Cincinnati moved for directed verdict on whether the Banks could collect Additional Living Expenses under the policy. The policy coverage provided, in part, as follows:

a. Additional Living Expense

> If a covered "physical loss" under Section I makes the "residence premises" uninhabitable, "we" pay for necessary increases in living expenses incurred so that "your" household can maintain its normal standard of living. Payment shall be made for the shortest time period required to repair or replace the premises or, if "you" choose, permanently relocated "your" household.

(Policy, RE 8-1, at Page ID # 301). Under its specific terms, ALE coverage applied only to necessary expenses incurred for the insureds' household to maintain its standard of living. Unless the expense is both necessary and incurred, ALE coverage does not apply.

The Banks admitted the testimony at trial would not support a verdict if an instruction were given on ALE as it is written. (Transcript, RE 277, Page ID # 6893). Cincinnati paid off the Banks' mortgage as required by the policy and Tennessee law, and the Banks no longer had a $3,512.00 monthly payment, thus reducing the Banks' overall monthly expenses. (Transcript, RE 274, at Page ID # 6549 and 6597). Since the Banks could not recover under the terms of the policy as written, they instead claimed Cincinnati waived its right to rely upon the provisions of the ALE coverage. Id.

Cincinnati argued there was no waiver and exhibited to the District Court a copy of the non-waiver agreement signed by the Banks. (Transcript, RE 277, Page ID # 6894-6896; Appendix, Trial Exhibit 257). It provided any action taken by [Cincinnati] in investigating the cause of the loss or the amount of damages would not "waive or invalidate any of the terms or conditions of the policy" or any of the rights of the parties. Id. However, the District Court ruled Cincinnati's non-waiver agreement did not constitute a non-waiver agreement, and instructed the jury Cincinnati could be found to have waived its ALE policy provisions. (Transcript, RE 277, Page ID # 6891-6896). The jury returned a verdict for the Banks in the amount of $52,700.00 for ALE, but the jury should have never been instructed on ALE. (Verdict Form, RE 245, at Page ID # 5317).

Cincinnati paid approximately $3,100.00 per month on behalf of the Banks for furniture rental – expenses well over and beyond the Banks' normal expenses – based upon invoices from Home Source Corporation. (Transcript, RE 262, at Page ID # 5823; Appendix, Trial Exhibit 291). Mr. Banks admitted neither he nor Mrs. Banks made the $3512.00 monthly mortgage payments after the fire and that the mortgage was paid off by Cincinnati. (Transcript, RE 274, at Page ID # 6506 and 6549). Once the Banks no longer had a mortgage payment, they no longer had "additional" expenses and no proof of such expenses was presented.

Cincinnati's payment of furniture rental expenses simply cannot amount to a waiver of the ALE provisions of the policy. The Banks had no furniture and needed furniture to maintain their normal standard of living. Thus, the payments made by Cincinnati to Homesource on behalf of the Banks under the ALE coverage were both necessary and incurred. There was no waiver.

Waiver does not apply to substantive contract provisions. The term "waiver" is "defined as a voluntary and intentional relinquishment of a known right...." GuestHouse Intern., LLC v. Shoney's North America Corp., 330 S.W.3d 166, 201 (Tenn.Ct.App.2010), appeal denied (Sept. 23,2010). Waiver "applies primarily to conditions which may be thought of as procedural or technical, or to instances in which the non-occurrence of a condition is comparatively minor." Id. (emphasis added). The doctrine is only "applied to a procedural or technical condition, not to a substantive right." Id. at 203. ALE provisions of policy are substantive rights – not conditions - because they go to the very nature of the coverage provided by the policy and simply cannot be ignored due to allegations of waiver. They are not conditions precedent or duties of an insured after a loss such as a request for a Proof of Loss that could be waived.

Even if such policy provisions were waivable, Cincinnati did not voluntarily or intentionally relinquish a known right. In addition to obtaining the non-waiver agreement, the payments made by Cincinnati were actually incurred and necessary

so that the Banks would have furniture in their home to help them to maintain their normal standard of living. The expense was an amount over and beyond the Banks' normal household expenses. Cincinnati had an obligation to pay those expenses up and until the time it determined the Banks' claim was not covered by the policy. The ALE coverage does not require actual expenditure by the Banks – just that it was a necessary and incurred expense.

During the discussion on the issue with the District Court, the Banks' counsel argued the holding of Bill Brown Const. Co., Inc. v. Glens Falls Ins. Co., 818 S.W.2d 1 (Tenn. 1991) applied to this case that any provision of a policy can be waived by an insurer's agent. (Transcript, RE 277, at Page ID #: 6892-6893). However, reliance upon Bill Brown in the instant matter is misplaced. The Bill Brown case was one in which the insurance agent promised full insurance coverage when a policy was first issued. Id. The decision was based upon an agency statute, Tenn. Code Ann. § 56-6-115(b), providing insurance producers are agents for the insurance carrier and not the insured. Id. This case is not about the insurance agent's misrepresentations of coverage when selling the policy. Thus, Bill Brown does not apply.

The Bill Brown court went on to conclude that "estoppel is available to protect a right, but never to create one," and "that an insurer should not be held liable, by estoppel, for a risk for which it received no consideration." Id. at 12.

The Banks paid consideration for the ALE coverage, but only in accordance with how the coverage is expressly provided. Other courts note that "[s]ubsequent Tennessee decisions make clear that the rule of Bill Brown applies only where the insured has no knowledge that the agent lacks authority to make representations that would alter the policy terms, and that where the policy states that its terms can be amended or waived only by the company, the insured is charged with that knowledge and a claim for waiver by estoppel will not lie." Builders Mut. Ins. Co. v. Pickens, 2013 WL 3788225 (E.D. Tenn.).

The Banks referenced Norris v. Nationwide Mut. Fire Ins. Co., 728 S.W.2d 335 (Tenn. Ct. App. 1986), but the Norris case is also inapplicable. In Norris, the insurer believed $4,000 per month was a reasonable amount for ALE expenses and paid it to the insured over a period of ten months without requiring any documentation that the expense was incurred or was necessary. Id. at 337. In the instant matter, Cincinnati did nothing of the sort – it merely paid for additional expenses that were necessary to maintain the insureds' standard of living, and that were incurred in that furniture was actually rented for and by the Banks.

ALE provisions of the policy are not conditions that can be waived. Even if it were possible to waive those provisions, there was no waiver as Cincinnati paid pursuant to the clear terms of the provision. The Banks admit without waiver, there is no evidence to demonstrate recovery under the provision. Accordingly, it

was error for the District Court to submit this question to the jury, and it should have granted Cincinnati's motion seeking judgment in Cincinnati's favor notwithstanding the verdict. This portion of the verdict should be reversed and judgment entered for Cincinnati.

F. The Trial Court committed reversible error when it denied Cincinnati's requested jury instruction based upon an accurate principle of Tennessee law that it was not necessary for Cincinnati to specifically identify the person responsible for setting the fire.

Cincinnati sought a jury instruction that it was not necessary for Cincinnati to specifically identify the individual who set the fire. Cincinnati's request was an accurate principle of law and should have been given. The Court actually instructed the jury that "[i]t is not necessary that the policyholder be the person who actually starts the fire." (Transcript, RE 287, at Page ID # 6952). This is a true statement of the law, however, Cincinnati also requested language to be included in the jury instructions that it did not need to "specifically identify" the person who set the fire. Guess v. Grange Mut. Cas. Co., 2007 WL 2897892 (E.D. Tenn.) (Order Denying Summary Judgment, RE, 153, at Page ID # 3930). This is a different inquiry than whether the Banks themselves set the fire. Cincinnati wanted to make it abundantly clear to the jury that even though it is not necessary to show the Banks actually started the fire, Cincinnati was also not required to specifically identify the person who did start it.

It is reversible error not to allow a proposed jury instruction when "(1) the omitted instruction is a correct statement of the law, (2) the instruction is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case." Morgan v. New York Life Ins. Co., 559 F.3d 425, 434 (6th Cir. 2009). The instruction requested was a correct statement of Tennessee law and was not substantially covered by the instructions actually given by the court as discussed above.

The failure to instruct the jury as requested by Cincinnati undoubtedly impaired its theory of the case on the issue of opportunity to set the fire. Cincinnati never argued the Banks themselves started the fire – they had an alibi. Instead, Cincinnati argued only that they were responsible for whoever did set the fire. Cincinnati wished to make it clear to the jury that any failure to specifically identify the individual who set the fire would not destroy any burden Cincinnati may have had on the arson defense.

The District Court's failure to properly instruct the jury with the requested correct statement of law is reversible error requiring a new trial. It should have granted Cincinnati's motion for a new trial. Accordingly, the District Court's denial of Cincinnati's Motion for New trial should be reversed.

G. The Trial Court committed reversible error when it failed to utilize Tennessee's "identity and character test" and instead granted partial summary judgment to the Banks on the issue of whether their home

constituted a constructive total loss under Tennessee's valued policy law when no Tennessee case has adopted such doctrine.

Prior to trial, the District Court granted partial summary judgment on the issue of whether the Banks' home constituted a total loss under Tennessee's valued policy law. Tenn. Code Ann. § 56-7-801-803. (Memorandum and Order, RE 175, at Page ID # 3994-4004). According to the District Court, there was no genuine issue of material fact as to whether the Banks' home was the subject of a compulsory demolition order. Id. However, the plain and ordinary terms of the City of Manchester's Order of Condemnation never required the property be demolished, but only required the conditions be corrected. (Motion for Partial Summary Judgment, RE 76-2, at Page ID #1102-1104). According to the Codes Order, such correction could have been accomplished by either demolition or repair. Id. While the Banks used an affidavit from a codes official stating that the property must be demolished and not repaired, that is simply not what was required in the Codes Order. However, Cincinnati was unable to challenge this ruling at trial, even by way of an offer of proof, through its witness, Kevin Young.

Cincinnati requested to be allowed to make an offer of proof outside the presence of the jury as to the reparability of the insured property. It sought to do this so that in the case it lost the case, but later prevailed on the issue of whether the home was a total loss, it would not be necessary to have a completely new trial on the issue of damages. The District Court, however, refused the offer of proof

finding that it had ruled on the issue prior to trial and found the property was a total loss as a matter of law. (Transcript, RE 262, at Page ID # 5845-5849).

The condemnation order unequivocally allowed for repair of the building. Other than the statements in an affidavit, which were contrary to the language in the cited City Code itself, there has been no order produced requiring demolition. Thus, the District Court erred when it found that there was no genuine issue of material fact that the "City of Manchester has issued a mandatory order that the Banks' house be demolished." (Memorandum and Order, RE 175, at Page ID # 3999).

Further, the District Court reasoned Tennessee courts would adopt the so-called constructive total loss doctrine to find the condemnation order resulted in a total loss of the Banks home under Tennessee's valued policy law (Tenn. Code Ann. § 56-7-802). No Tennessee court has ever imposed or adopted the constructive total loss doctrine. Rather, the Tennessee courts have only adopted the identity and specific character test to determine whether a loss is partial or total. Hollingsworth v. Safeco Ins. Companies, 782 S.W.2d 477, 479 (Tenn. Ct. App. 1988). The Tennessee Court of Appeals, in refusing a "prudent man test" instead of an identity and specific character test, held:

> We are not prepared to make such an adoption. There is a marked difference between the Supreme Court, the highest court in the state, and the Court of Appeals, an intermediate appellate court. It is the duty of the Court of Appeals to apply the law as promulgated by the

> legislature or as announced by the Supreme Court. This Court is bound by the Supreme Court's decisions under the doctrine of *stare decisis* and in no way is it the function of this court to intentionally reverse the holding of the Supreme Court. Although the Supreme Court may wish to adopt the prudent man test for making a determination as involved in this case, we feel constrained to follow the test established in *Laurenzi.*

Ultimately, the court determined this was not the proper inquiry – rather, the issue was whether the building has lost its character and identity.

Even if demolition is now required, it is not required because of the fire, but instead because of the Banks' failure to correct the conditions of the property. As such, the District Court erred in granting the Banks' motion for partial summary judgment because the identity and character test applied and was a decision to be decided by the jury. Because the District Court refused to allow an offer of proof on reparability, a new trial on the issue of damage to the home will be necessary.

H. The Trial Court committed reversible error when it denied Cincinnati's motion to exclude evidence of four other fires occurring in the Manchester, Tennessee area during November 2011, when only one which was found to be incendiary and all were factually distinguishable from the Banks' fire.

The District Court improperly denied Cincinnati's motion to exclude evidence of four other fires occurring in the Manchester, Tennessee area during November 2011. The Court reasoned these fires were "substantially similar" because they occurred with seven (7) miles of the Banks' home and were "suspicious" in nature and denied the motion, thus allowing the evidence. (Order

CIC MIL, RE 219, at Page ID #: 5128). However, the District Court excluded evidence of the Banks' prior fire which it actually was similar to the facts of this case in that the fire occurred when the Banks were not home. (Order Banks MIL, RE 218, at Page ID # 5114).

These rulings were inconsistent in that if an insured's own similar fire is excluded, it stands to reason that other fires, especially those not found to be incendiary, should not be admissible. Cincinnati sought to exclude evidence of those other fires as not relevant, and obviously, the Banks wanted evidence of the other fires to show someone else was responsible for their fire. However, they did not want evidence of their own prior total loss fire admitted at trial.

Federal courts hold where the proffered evidence is of other incidents, such as other fires, the party offering the evidence must prove those other incidents were "substantially similar" to the incident at issue and therefore relevant. Rye v. Black & Decker Mfg. Co., 889 F.2d 100, 102 (6th Cir. 1989); Burke v. Deere & Co., 6 F.3d 497, 506 (8th Cir. 1993). The Sixth Circuit holds such incidents are "substantially similar" when they occur "under similar circumstances or share the same cause." Rye, at 102. The Banks bore the "burden of proving the substantial similarity between prior [fires] and [their] own." Id. The evidence should not be admitted where the other fires "contained sufficient facts for the District Court to

find that the circumstances were substantially similar to those in the [Banks'] case." Id.

Even though only one of the other fires was classified as incendiary, the District Court concluded that all the other fires were "suspicious" in nature. (Order CIC MIL, RE 219, at Page ID #: 5128). The record demonstrates three of the other fires occurred at a different time than the Banks' fire; one was at a business instead of a residence; one was to a home under construction; another to a mobile home; and all had different areas of origin. (CIC MIL Memo., RE 116, at Page ID #: 2359).

The other fires were actually significantly dissimilar to the Banks' fire. The only thing in common with all fires is the fact they were all fires and in the general area. At the very least, the District Court should have excluded evidence of those fires which were not classified as incendiary. Allowance of evidence about these fires constitutes error, and such evidence unfairly affected the jury's determination of who started the Banks' fire. Accordingly, the District Court's denial of Cincinnati's Motion for New Trial should be reversed.

I. The Trial Court committed reversible error it denied Cincinnati's motion to exclude the Banks' expert witness, Jeffrey Morrill, because of his failure to follow the guidelines set forth in NFPA 921 and his blatant disregard for Tennessee law requiring a license for Origin and Cause investigation.

Cincinnati moved prior to trial to exclude the Banks' expert witness, Jeffrey Morrill, because of his failure to follow guidelines set forth in NFPA 921. This was denied, and the District Court explained that "the Banks can counter by citing another section of the NFPA which appears to support Morrill's methodology in reaching his conclusion" and that Cincinnati's criticisms of Morrill's methodology and opinions "go to the weight of his testimony and not whether it is admissible." (Order CIC Daubert Motions, RE 233, at Page ID #: 5260). The methodology underlying Morrill's opinion was not scientifically valid, was unreliable, and should have been excluded pursuant to Federal Rule of Evidence 702. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Moreover, Morrill's criticism of Sells' methodology and conclusions should be excluded because of his own admitted failure to follow NFPA 921 guidelines, as all Morrill did was rely on Sells' report and deposition testimony, affidavit of John Lentini, pre and post loss photographs, and 4 pages of diagrams of the Banks' house. (Daubert Challenge Morrill, RE 89, at Page ID #: 1218). While some reliance on data collected by others may be permissible, Morrill's complete and utter failure to directly observe, experiment, or gather any other information supporting his conclusion constitutes insufficient data collection under NFPA 921. Id. at Page ID # 1219. Morrill also failed to consider all the data the Banks' fire scene collected by Sells.

Morrill did not conduct his own investigation, but merely attempted to poke holes in Sells' opinions without considering all of Sells evidence. Morrill's fatal flaw is his failure to follow the Scientific Method required by NFPA as each substantive step is dependent upon another. Morrill could not properly and adequately "analyze the data" under NFPA 921 as it requires analysis of "all data," "develop a hypothesis" that is "based on data analysis," and "test the hypothesis" against "all known facts."

Morrill admitted he previously held a private investigator's license, and such licenses are required by Tennessee law before conducting an origin and cause investigation. T.C.A. § 62-26-204 (Transcript, RE 276, at Page ID # 6804-6805). He admitted his license expired prior to retention by the Banks. Id.

According to Doochin v. U.S. Fid. & Guar. Co., 854 S.W.2d 109 (Tenn. Ct. App. 1993), the failure to be licensed alone does not disqualify an expert. However, Mr. Morrill's actions were more blatant than in Doochin, because when he accepted to work on the case, he was well aware of the license requirement and previously even entered into a consent order with the State of Tennessee over his past violations of the law. Id. at 6805-6806. Yet, Morrill intentionally ignored Tennessee's laws when he accepted the work and knew he would be providing opinions in a courthouse in Tennessee. Because Morrill blatantly violated the law, he should have been disqualified.

Because Morrill failed to apply the scientific method in reaching his conclusion the cause of the fire is "undetermined" and because he was not licensed to investigate fires in Tennessee, his testimony is unreliable and should have been excluded according to Federal Rule of Evidence 702. Thus, the District Court's denial of Cincinnati's Daubert motion and its denial of Cincinnati's Motion for New Trial should be reversed.

J. The Trial Court committed reversible error when it denied Cincinnati's motion to exclude the Banks' expert witness, John Lentini.

Cincinnati moved to exclude the Banks' expert witness, John Lentini – a witness disclosed to criticize the methodology and interpretation of test results performed by Cincinnati's expert, Christine Foran, concerning her conclusions that two samples from the Banks' fire scene were positive for a medium to heavy petroleum distillate. The Court denied the motion finding Mr. Lentini qualified. (Order Daubert Motions, RE 233, at Page ID # 5261).

Lentini did not conduct his own investigation and performed no testing though he could have done so. (CIC Daubert Memo, RE 93, at Page ID # 1367-1369; Transcript, RE 276, at Page ID # 6751-6759). In fact, he never went to the fire scene. Id. He merely made assumptions about the components of the Banks' home without any proof or data. He simply looked at gas chromatograms and told the jury why he thought the medium to heavy petroleum distillate was asphalt smoke condensate instead of an ignitable liquid. Id. He did not consider the

results of the testing of negative comparison samples in his opinions even though he admitted being involved in a case offering an opinion such negative samples could be used as an appropriate comparison sample. Id.

Lentini's complete disregard of known, vital facts and inconsistent methodology demonstrates the unreliability of his opinion under Federal Rule 702. Accordingly, his opinions should have been excluded at trial, and the District Court's denial of Cincinnati's Daubert motion and its denial of Cincinnati's Motion for New Trial should be reversed.

K. The Trial Court committed reversible error when it excluded all evidence at trial concerning the accelerant detection canine which made multiple alerts at the scene, when such evidence was disclosed through Cincinnati's expert, Mark Sells, who was deposed about both the origin and cause of the Banks' fire, collection of fire debris samples from locations where such canines "alerted," as well as his experience with accelerant detection canines.

An accelerant detection canine made multiple alerts at the fire scene. The Banks sought to exclude this evidence on two bases: (1) that Cincinnati failed to disclose an expert on this issue, and (2) the evidence is unreliable as seven of nine samples tested negative for accelerants. (Order Banks MIL, RE 218, at Page ID # 5119). The Court erroneously excluded this evidence and reasoned the party offering such evidence must disclose expert testimony regarding use of the accelerant detection canine and Cincinnati failed to do so.

In its expert disclosures, Cincinnati provided Mark Sells' curriculum vitae and supplemental expert report, making it he was qualified to and would in fact testify regarding his use of the accelerant detection canine. Sells referenced the canine alerts in his Rule 26 report as required by the Federal Rule of Civil Procedure 26(a)(2)(B). (Sells Report, RE 132-4, at Page ID # 3333). Sells was an accelerant canine handler for the ATF National Response Team for more than four (4) years. (CIC Resp. Banks MIL Sells, RE 132-1, Page ID # 3219). This was known to the Banks who questioned Sells regarding his use and the accuracy of accelerant detection canines during his deposition. (Banks MIL Sells, RE 122-2, at Page ID #: 2653). Disallowing this evidence basically prevented Sells from testifying in complete detail concerning his cause and origin investigation.

Though it was not an argument made by the Banks, the District Court further explained evidence of the accelerant detection canine would only be admissible where expert testimony was provided regarding the specific dog's training and track record though case law makes clear a reliable foundation may be established through other means. Other courts have admitted evidence of the canine's detection where it was confirmed by burn patterns. See State v. Buller, 517 N.W.2d 711, 713–714 (Iowa 1994) and Commonwealth v. Gwynn, 555 Pa. 86, 105–106, 723 A.2d 143 (1998). A reliable foundation was established in this case

by the facts that two samples taken from areas where the dog alerted tested positive for ignitable liquids and the dog alerted at suspicious burn patterns.

All the cases cited by the District Court are based in criminal matters – not civil cases. Criminal cases require a much higher burden of proof than mere preponderance. It is understandable in a criminal matter that evidence should be required to meet a higher threshold. However, this is a civil case, and here, Cincinnati was not basing the incendiary fire solely on an accelerant canine alert – that was one factor used as part of the cause and origin analysis. Cincinnati's cause and origin expert should have been allowed to testify concerning all of the factors used in forming his opinion, including reference to accelerant canine detection. If the use of accelerant canines is believed less reliable, this is a matter that would go to the weight of the evidence. Accelerant canine evidence must be reliable to some degree because in at least two areas where an accelerant canine alerted, positive samples were obtained. (Order Banks MIL, RE 218, at Page ID # 5119). The District Court's conclusion that expert testimony regarding the specific dog's training and track record was a necessary prerequisite for the admission of canine evidence constitutes reversible error requiring a new trial. The District Court's denial of Cincinnati's Motion for New Trial should be reversed.

L. The Trial Court committed reversible error when it limited the trial testimony of Cincinnati's cause and origin expert, Mark Sells, concerning the involvement and use of accelerant detection canines and

prevented him from testifying about his investigation methods and direct observations.

Based upon the Court's exclusion of canine evidence, the trial testimony of Cincinnati's expert, Mark Sells, was limited as to the involvement and use of accelerant detection canines. The exclusion prevented Sells from testifying about all of his investigation methods and direct observations used in forming his opinions. See United States v. Hebshie, 754 F. Supp. 2d 89 (D. Mass. 2010) (holding canine evidence would be admissible to show how the dog assisted the investigators assist in the selection of samples for testing); Commonwealth of Mass. v. Crouse, 855 N.E.2d 391 (Mass. 2006) (holding testimony regarding canine alerts was admissible as investigating trooper's direct observation and circumstantial evidence that gas had been in the back of a SUV). The District Court's exclusion of evidence of the accelerant detection canine interfered with Sells discussion of evidence or data collected as part of the Scientific Method referenced in NFPA 921. This exclusion of accelerant detection canine evidence at trial in the testimony of Mark Sells constitutes error requiring a new trial. Thus, the District Court's denial of Cincinnati's Motion for New Trial should be reversed.

M. The Trial Court committed reversible error when it limited the trial testimony of State Fire Marshall Bomb and Arson Investigator, Russell Robinson, as to the cause and origin of the fire, when he was disclosed as a witness to testify as to the origin and cause of the Banks' fire and disclosed pursuant to Fed. R. Civ. P. 26(a)(2)(C).

The Court limited the trial testimony of State Fire Marshall Bomb and Arson Investigator, Russell Robinson, as to the cause and origin of the fire. (Order Banks MIL, RE 218, at Page ID #: 5109-5111). Cincinnati was not able to obtain the State's investigation file until after the expert disclosure deadline, but supplemented its expert disclosures thereafter. Id. The Court ruled because the disclosures were beyond the expert deadline, even though Robinson was not a retained witness and there were initial disclosures of his use in the case, Cincinnati's disclosure of Robinson was not timely and prejudicial to the Banks, and the disclosure did not meet the requirements of Fed.R.Civ.P. 26(a)(2)(C). Id. However, Robinson was allowed to testify about what he did and saw during his investigation though he could not offer opinion testimony. Id. The Court's limitation of his testimony concerning opinions as to the cause and origin of the fire was error.

Since Robinson was a non-retained expert, the provisions of Fed.R.Civ.P. 26(a)(2)(C) control. The rule provides as follows:

> (C) **Witnesses Who Do Not Provide a Written Report.** Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:
>
> (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
>
> (ii) a summary of the facts and opinions to which the witness is expected to testify.

Fed. R. Civ. P. 26(a)(2). The Advisory Committee Comments further clarify that the "disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B)." Advisory Committee Comments to Fed. R. Civ. P. 26.

Robinson was not hired or retained as an expert by Cincinnati, and pursuant to Rule 26(a)(2), was only required to provide the Banks with the subject matter and summary of facts and opinions to which Robinson is expected to testify. On August 10, 2012, Cincinnati met this requirement when it informed the Banks that Robinson would testify concerning the "…cause and origin and investigation of the Banks' fire and the claim submitted by the insureds" and again later when it supplemented its interrogatory answers to disclose Robinson as a non-retained expert. (Order Banks MIL, RE 218, at Page ID #: 5109-5111). Cincinnati provided notice Robinson was someone likely to have discoverable information it would likely use at trial. Cincinnati provided the Banks with a copy of Robinson's file once it was received but Cincinnati was unable to obtain the material because of an open investigation until it obtained the materials via subpoena. Cincinnati anticipated Robinson would testify as to information and opinions as set forth in the State's file. However, it simply did not know what Robinson's opinions were until receipt of the file which was after the expert disclosure deadline.

Subsection (C) of Federal Rule of Civil Procedure 26(a)(2) was added in 2010 and mandates "summary disclosures of the opinions to be offered by expert

witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions." Chesney v. Tennessee Valley Auth., 2011 WL 2550721 (E.D. Tenn.) (citing Fed.R.Civ.P. 26, adv. committee's note 2010). Cases in the first few years after change demonstrate some confusion as to the particular requirements of Subsection (C). See Chesney v. Tennessee Valley Auth., 2011 WL 2550721 (E.D.Tenn.); Little Hocking Water Ass'n, Inc. v. E.I. Du Pont de Nemours & Co., 2013 WL 6843058 (S.D. Ohio); and Saline River Properties, LLC v. Johnson Controls, Inc., 2011 WL 6031943 (E.D. Mich.). Even though Cincinnati's position is that its disclosure was appropriate, prior to the rule change, disclosures such as the one made with respect to Robinson were routinely made.

It simply cannot be reasonably argued that the Banks were surprised Cincinnati would expect Robinson to testify as to the cause and origin and investigation of the Banks' fire. Cincinnati met its requirement with respect to disclosing Robinson as a non-retained expert, and Robinson should have been allowed to offer opinion testimony at trial. The District Court erred in excluding Robinson's opinion testimony, requiring a new trial. Thus, the District Court's limitation of Robinson's testimony and denial of Cincinnati's Motion for New Trial should be reversed.

N. The Trial Court committed reversible error when it excluded expert opinions and reference to value of Cincinnati's expert witness, Mike Caldwell.

The Court allowed Cincinnati's expert witness, Mike Caldwell, to testify at trial, but limited his expert opinions excluding him from testifying as to value. (Order Daubert Motions, RE 233, at Page ID #: 5262-5263). Caldwell testified valuation of items is something that experts in his field rely upon and that in this case employees from his office performed the valuation. He evaluated all other necessary components such as brand, age, description, and quality of items necessary for the valuation process to take place. (CIC Resp, MIL Caldwell, RE 134, at Page ID #: 3534).

The District Court found Caldwell admittedly did not have the necessary "knowledge, expertise, or training in evaluating personal property" but that he did rely upon "the experts of others to do so in his report." (Order Daubert Motions, RE 233, at Page ID #: 5262-5263). While the District Court in its pre-trial rulings determined Caldwell could not testify as to value, it placed no such exclusion on the Banks' expert, Tanya Butler. Id.

Butler handled over 500 personal property inventories. (Order Daubert Motions, RE 233, at Page ID #: 5260). Caldwell has handled more than 300. (CIC Resp, MIL Caldwell, RE 134, at Page ID #: 3531). While Caldwell relied upon others to value the personal property he evaluated, Butler did as well. (Id. at Page

ID # 3534). Butler had others provide valuation of personal property items, and she did not even prepare her own inventory. Id. Butler may have completed more inventories than Caldwell, and she might have had some limited participation in valuing the items, but otherwise, she was doing substantially the same job as Caldwell, except she did not prepare an independent inventory. The District Court's pre-trial rulings allowing Butler to testify as an expert on the issue of value and disallowing Caldwell's expert testimony on value was inconsistent and unfair. Based upon the District Court's pre-trial rulings, Butler, who did not prepare an independent inventory as Caldwell did, would be allowed to provide more much more testimony than Caldwell. Thus, it was error for the District Court to exclude Caldwell's value testimony at trial. Thus, the District Court's limitation of Caldwell's testimony and denial of Cincinnati's Motion for New Trial should be reversed.

O. The Trial Court committed reversible error when it bifurcated the bad faith claims from the issues of coverage under the policy.

The Banks' counter-claim, filed August 10, 2012, made claim against Cincinnati for bad faith pursuant to Tenn. Code Ann. § 56-7-105. (First Amd. Counter-Complaint, RE 14, Page ID # 538-540). However, approximately one month before the beginning of a two-week jury trial on October 7, 2013, they moved to bifurcate the statutory bad-faith claims from the contract claims. (Motion to Bifurcate, RE 178, Page ID # 4042-4046). The District Court notified

the parties of its intention to grant the motion to bifurcate on October 24, 2013 (Motion New Trial, RE 249-2, Page ID # 5376).

Federal Rule of Civil Procedure 42(b) allows for bifurcation of trials only in limited circumstances, and bifurcation is not the "norm" and should not be "routinely ordered." The Marianist Province of the United States, Inc. v. ACE USA, 2010 WL 2681760 (D. Colo.). The party moving to bifurcate bears the burden of demonstrating that bifurcation is appropriate in a particular case. Farmers Bank of Lynchburg, Tenn. v. BancInsure, Inc., 2011 WL 2023301, *1 (W.D. Tenn.).

Federal courts in insurance cases routinely deny motions to bifurcate where the proof relevant to the breach of contract and bad faith claims substantially overlaps and is inextricably intertwined. See e.g. McLaughlin v. State Farm Mut. Auto. Ins. Co., 30 F.3d 861, 870 (7th Cir. 1994). Bifurcation should be denied in order to avoid unnecessary duplication of witnesses and evidence resulting in additional expense and delay. Jarvis v. Allstate Ins. Co., 2013 WL 587325 (D. Mont.). Federal courts hold bifurcation is especially inappropriate on the eve of trial. Kakeh v. United Planning Org., Inc., 587 F. Supp. 2d 125, 131 (D.D.C. 2008) (denying motion to bifurcate made two weeks before trial as untimely).

Farmers Bank is the only case of which Cincinnati is aware where a court located in Tennessee bifurcated the statutory bad-faith claims from the contract

action. However, the facts of that case can be easily distinguished. In Farmers Bank, the party moving to bifurcate the case was the insurance company - not the party who filed the bad-faith claim. In fact, in the vast majority of cases, it is the insurance company instead of the insured seeking bifurcation. In Farmers Bank, the insurance company moved to bifurcate the trial within two (2) months of an amended complaint being filed and more than five (5) months before the trial was set. Because the Court ruled on the motion four (4) months before trial was to begin, both parties were able to adequately prepare evidence and witnesses for trial. Id.

The Banks, however, instead waited more than a year after alleging bad-faith to seek bifurcation. (First Amd. Counter-Complaint, RE 14, Page ID # 538-540; Motion New Trial, RE 249-2, Page ID # 5376). This was approximately one month before trial was to begin. Based upon the District Court's bifurcation, several of Cincinnati's witnesses, including two or three paid experts, had to limit their initial testimony. This was prejudicial to Cincinnati in that it had to completely change its trial strategy less than one month before trial. Further, the proof in the contract claim was inextricably linked to the proof relevant to the bad-faith claim.

For instance, the Banks moved to bifurcate the trial October 7, 2014. (Motion Bifurcate, RE 178, at Page ID # 4042-4046). However, Cincinnati

already made its evidence and witness disclosures as required by the Federal Rules of Procedure and the District Court's case management order on August 30, 2013 as required – well before the Banks moved to bifurcate. (Witness List, RE 94, at Page ID # 1420-1422).

Cincinnati's Associate Manager, Karen Roop, attended trial as its corporate representative. She made the decision to deny the claim and issued the denial letter. (CIC Denial Letter, RE 8-4, at Page ID # 506-508). Before the case was bifurcated, she planned to testify as to Cincinnati's "state of mind" at the time it denied the claim. This included testimony such as what Cincinnati considered as to the origin and cause of the fire from Sells and Russell Robinson; the alerts of the accelerant canines; evidence of misrepresentation of value based upon reports from Mike Caldwell; the Banks' other recent claims; Mr. Banks' prior felony conviction; etc. The late bifurcation made this impossible and made it necessary for Cincinnati to have other witness testify to this evidence at trial. However, it could not do so because of the short time before trial and the disclosure deadlines that had passed.

Cincinnati was also aware of additional information deemed inadmissible during the first phase of the trial but clearly relevant to the bad faith claim.

- Mark Sells and/or Russell Robinson were expected to testify concerning the accelerant detection.

- Russell Robinson and Jeremy Woods of the City of Manchester Fire Department were expected to testify concerning the cause and origin of the fire and their investigation.

- Karen Roop planned to testify concerning Mr. Banks' prior criminal conviction and the Banks' prior total loss fire. (Ord. Banks' MIL, RE 218, at Page ID # 5111-5114).

- Michael Caldwell was expected to testify as to the value of the personal property actually in the Banks' home.

This type of testimony was excluded during the first phase of trial but would have been absolutely relevant to Cincinnati's "state of mind" and admissible had the case not been bifurcated. Evidence ordinarily inadmissible is admissible in a bad-faith claim if relevant to the insurer's state of mind in denying the claim. Riad v. Erie Ins. Exch., 2013 WL 5874733 (Tenn. Ct. App.). The District Court indicated it would allow this type of evidence as relevant to the Banks' bad faith claims against Cincinnati. (See Ord. Banks' MIL, RE 218, at Page ID # 5113).

The decision to bifurcate the trial after Cincinnati made its witness and evidence disclosures was prejudicial and amounts to error. The District Court erred in denying Cincinnati's Motion for New Trial, and the case should be reversed and remanded for a new trial.

P. The Trial Court committed reversible error when it failed to grant a new trial pursuant to Fed. R. Civ. P. 59 when the jury's verdict was against the weight of evidence presented at trial, and even against the verdict suggested by the Banks.

The jury's verdict in this case is against the weight of evidence presented at trial requiring a new trial. According to Fed. R. Civ. P. 59, a new trial is "warranted when a jury has reached a "seriously erroneous result" as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, the proceedings being influenced by prejudice or bias." Holmes v. City of Massillon, Ohio, 78 F.3d 1041, 1045-46 (6th Cir. 1996). If the verdict is against the "great weight of evidence," a new trial should be granted. Butler v. French, 83 F.3d 942, 944 (8th Cir.1996). The "key question is whether a new trial should have been granted to avoid a miscarriage of justice." McKnight By & Through Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1400 (8th Cir.1994).

Cincinnati put on proof of incendiary origin, motive and opportunity concerning the Banks fire to demonstrate they or someone at their direction burned the home. The other fires allowed into evidence were completely different than the Banks' fire. Based upon the proof at trial no one other than the Banks had the motive to have burned the home.

Based upon the jury's verdict, it is clear the jury did not even listen to the Banks' own evidence and arguments. One indisputable example of this concerns the Banks' personal property award. They claimed personal property with a Replacement Cost Value of $872,123.34. (Inventory, Appendix, Trial Exhibit 170,

at p. 38) The jury's award of $871,623.24 was inconsistent with the Banks' proof. The Banks' inventory was $500.10 more than the jury awarded. At trial, the Banks actually asked the jury not to consider their class rings which they admitted were not present in the home at the time of the fire. (Transcript, RE 276, at Page ID # 6695). However, those rings, valued at $915 and $595 respectively (Inventory, Appendix, Trial Exhibit 170 at p. 29), obviously did not account for the discrepancy between what was claimed and awarded. Clearly, the jury's personal property award was inconsistent with the weight of evidence at trial, and the District Court erred in denying Cincinnati's motion for a new trial. This Court should reverse the decision of the District Court.

CONCLUSION

For the reasons stated above, the District Court erred when it denied appellant's Motion for New Trial, to Amend Findings and Judgment, and/or for Judgment Notwithstanding the Verdict. Thus, this Court should reverse the District Court's judgment and remand the case for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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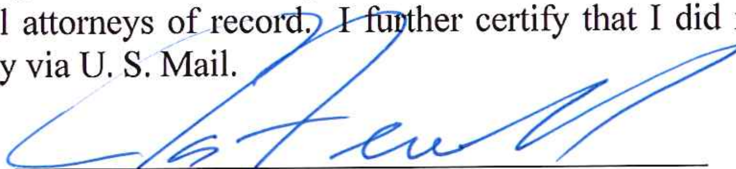
E. JASON FERRELL
Date: September 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2014, I electronically filed Appellant's brief on appeal using the Court's ECF system, which will automatically send notice of such filing to all attorneys of record. I further certify that I did not serve this document on any party via U. S. Mail.



E. JASON FERRELL
Date: September 4, 2014

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry	Record Entry Number	Page ID # Range
Banks' MIL Sells Ex.	122-2	Page ID # 263
CIC Amd. Complaint	8	Page ID # 270-285
CIC Daubert Memo.	93	Page ID # 1367-1369
CIC Denial Letter	8-4	Page ID # 506-508
CIC's MIL Memo.	116	Page ID # 2359
CIC Resp. Banks MIL Sells Ex.	132-1	Page ID # 3219
CIC Resp, MIL Caldwell	134	PageID #: 3531 - 3534
Daubert Challenge Morrill	89	PageID #: 1218-1219
First Amd. Counter-Complaint	14	Page ID # 538-540
Memorandum and Order	175	Page ID # 3994-4004
Motion to Bifurcate	178	Page ID # 4042-4046
Motion New Trial Ex.	249-2	Page ID # 5376
Motion for Partial Summary Judgment Ex.	76-2	Page ID #1102-1104
Notice of Appeal	283	Page ID # 6927
Order Banks MIL	218	Page ID # 5109-5119
Order CIC Daubert Motions	233	Page ID #: 5260-5261
Order CIC MIL	219	Page ID #: 5128
Order Daubert Motions	233	Page ID #: 5260-5263
Order Denying Motion New Trial	282	Page ID #6925-6926
Order Denying Summary Judgment	153	Page ID # 3930
Policy	8-1	Page ID #295-308
Sells Report	132-4	Page ID # 3333
Trial Transcript	262	Page ID # 5748-50; 5823; 5845-5849; 5884-5888.
Trial Transcript	274	Page ID # 6506; 6549; 6597.

Trial Transcript	276	Page ID # 6695; 6751-6759; 6804-6806; 6834-6836; 6842-6844.
Trial Transcript	276	Page ID # 6751-6759; 6804-6806.
Trial Transcript	277	Page ID # 6857-6860; 6871-6875; 6891-6896.
Trial Transcript	287	Page ID # 6951-6952.
Verdict	245	Page ID # 5316-5317.
Witness List	94	Page ID # 1420-1422.

EXHIBIT A

WILLIAM G. HALL,	)	
Plaintiff/Appellant,	)	Appeal No. 01-A-01-9607-CV-00305
v.	)	Rutherford Circuit No. 32430
ALLSTATE INSURANCE COMPANY,	)	
Defendant/Appellee.	)	

DEC 18 1996

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR RUTHERFORD COUNTY

AT MURFREESBORO, TENNESSEE

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AFFIRMED AND REMANDED

SAMUEL L. LEWIS, JUDGE

Received Time Aug. 19. 2014 3:43PM No. 0266

OPINION

This is an appeal by plaintiff/appellant, William G. Hall, from the trial court's judgment entered in favor of defendant/appellee, Allstate Insurance Co. The dispute involved Allstate's failure to pay an insurance claim filed by Hall.

Hall owned a 1988 Ford Ranger Truck. On 6 February 1993, a fire totally destroyed the truck. Hall, his brother, and his brother-in-law were present at the time of the fire. There is no dispute that there was a valid insurance policy, which insured Hall's truck against loss due to fire, in effect at the time of the accident. The policy defined a loss as a "direct and accidental loss."

Allstate investigated Hall's claim by hiring an expert to examine the truck. It was the opinion of the expert that the fire was not accidental, but that an incendiary liquid caused the fire. Allstate determined that the policy did not cover the fire because it was not an accidental loss and denied Hall's claim.

Hall filed a complaint against Allstate on 5 October 1993 in the Circuit Court for Rutherford County. In its answer, Allstate admitted that it insured Hall's truck and that the truck was totally destroyed. In its defense, however, Allstate alleged that Hall made material misrepresentations as to the cause and origin of the fire and that these misrepresentations constituted fraud and voided the policy ab initio. Allstate also filed a counter-claim alleging that Hall did not bring his claim in good faith.

At an evidentiary hearing on 7 March 1996, the following persons testified: 1) Hall; 2) Hall's brother; 3) Hall's brother-

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in-law; 4) David Meador, Chief of the Rutherford County Fire Department; and 5) Jerry Russell Carter, the arson investigator retained by Allstate. Thereafter, the court wrote a letter setting forth its findings and conclusions. In the letter, which the court incorporated into the final judgment, the court made separate findings regarding the claim and counter-claim. The court first addressed Hall's claim and found that the testimony of Hall and the arson investigator were inconsistent and that the Fire Chief's testimony did not favor either party. As a result, the court found that Hall failed to carry his burden of proof and awarded judgment in favor of Allstate. The court then addressed Allstate's bad-faith claim. The court found that Allstate failed to establish motive and concluded that Allstate failed to satisfy its burden of showing bad faith on Hall's part.

Thereafter, Hall filed a timely notice of appeal. He presented two issues which we discuss together. They are as follows:

> I. That the trial court erred as a matter of law in failing to enter a judgment for the Plaintiff insured after specifically finding as the trier of fact that there was no proof of motive for a willful burning by the Plaintiff.
> II. That the trial court erred as a matter of law, in holding that the Plaintiff insured had the burden of proof as to the nonexistence of an exception or defense to the insurance policy.

We review this matter de novo upon the record of the trial court. A presumption of correctness accompanies the trial court's findings of fact. Thus, this court will not disturb those findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d) (West 1996).

It is well established in this state that a "claimant under an insurance policy must prove the existence and validity of the policy and the details of the claim." ***First Am. Nat'l Bank v.***

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Fidelity & Deposit Co., 5 F.3d 982, 984 (6th Cir. 1993). Allstate admits that the insurance policy was valid and in existence at the time of the loss, but contends that Hall failed to prove the details of his claim. We agree.

The courts of this state have held that ordinary rules of contract construction apply to insurance policies. ***McKimm v. Bell***, 790 S.W.2d 526, 527 (Tenn. 1990). Our courts have also determined that courts have a duty to enforce insurance policies as they are written. ***Spears v. Commercial Ins. Co.***, 866 S.W.2d 544, 548 (Tenn. App. 1993). If there is no ambiguity in the insurance policy, it is the court's duty to take the ordinary meaning of the words used and favor neither party. ***Omaha Property & Cas. Ins. Co. v. Johnson***, 866 S.W.2d 539, 541 (Tenn. App. 1993). Section III of the policy issued to Hall by Allstate provided: "'loss' means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured properties . . . ." Therefore, the policy would not cover Hall's loss unless it was direct and accidental. Hall had the burden of proving these details of his claim.

David Meador, Chief of the Rutherford County Fire Department, testified that he responded to the fire call. He found no extensive fire damage and/or burning to the bed of the truck. Chief Meador stated that he had never seen anything like the fire or heard of anything burning in that manner before. The trial court found a portion of Chief Meador's testimony supported the contention that "the flame spread far too rapidly and that the vehicle was too completely involved for ignition to have occurred from an accidental, non-incendiary means." There was also evidence from Jerry Russell Carter, the arson expert. Mr. Carter's investigation revealed that the cause of the fire was incendiary and that it was intentionally set. He based his findings on the

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fire flow patterns found within the vehicle. Mr. Carter examined the vehicle and saw no evidence of the fire starting as a result of a systems failure. It was his opinion that the type of burning indicated the presence of a flammable or combustible liquid. He also found an actual pour pattern where a liquid had been poured on the vehicle and set on fire. The trial court credited Mr. Carter's testimony, finding that "the fire could not have started under the dashboard of the truck or in such manner that smoke would have first appeared through the defroster vents as Hall asserts, but rather that the origin of the blaze was from a pore (sic) of an incendiary liquid within the passenger compartment of the vehicle."

The district court addressed a similar issue in 1994. ***Smith v. Life Ins. Co.***, 872 F. Supp. 482 (W.D. Tenn. 1994). The plaintiffs in ***Smith*** were beneficiaries under an accidental death insurance policy. At trial, they were unable to prove that the death of the insured was accidental within the terms of the policy. As a result, the court held that the benefits were not payable. The court found "that plaintiffs had not met their burden of proving that decedent's death was 'caused by accident . . . which, [results] directly and from no other causes' as required by the terms of the policy." ***Id.*** at 485; ***see also Gilmore v. Continental Cas. Co.***, 188 Tenn. 588, 591, 221 S.W.2d 814, 815 (Tenn. 1949) (finding the burden is on the plaintiff to show that death resulted from an accidental injury.)

It was Hall's burden at trial to show that the loss fell within the terms of the insurance policy. We are of the opinion that the trial court's finding that Hall failed to prove the accidental nature of the fire and the entry of judgment in favor of Allstate was proper. There is ample evidence from which the trial court found that the loss to the pickup truck was not accidental and that Hall failed to meet his burden of showing that a covered

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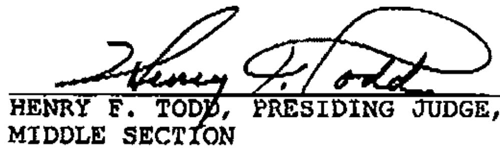
loss occurred. The preponderance of the evidence supports the judgment of the trial court.

The judgment of the trial court is affirmed with costs assessed to the plaintiff/appellant, William G. Hall. The cause is remanded to the trial court for further necessary proceedings.

SAMUEL L. LEWIS, JUDGE

CONCUR:



HENRY F. TODD, PRESIDING JUDGE,
MIDDLE SECTION

WILLIAM C. KOCH, JR., JUDGE

Received Time Aug. 19. 2014 3:43PM No. 0266

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CINCINNATI INSURANCE COMPANY,

Appellant,

v.

LARRY BANKS and
WANDA SUE BANKS,

Appellees.

No. 14-5597
Oral Argument Requested

U.S.D.C. Eastern District of TN,
Winchester Division
No. 4:12-cv-00032

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellees, Larry Banks and Wanda Sue Banks, request oral argument pursuant to Fed. R. App. 34 because the complex issues on appeal are such that oral argument will assist this Court's analysis.

STATEMENT OF CASE

A. PROCEDURAL BACKGROUND

Cincinnati Insurance Company ("CIC") filed this case against its insureds, Larry and Wanda Banks (the "Banks"), seeking monetary damages and a declaratory judgment that it was not obligated to pay the Banks' insurance claim submitted after a fire destroyed their home. (Amended Complaint, RE 8, PageID #279-80, 284-85). CIC claimed that the Banks, or others at their direction, intentionally caused the fire and that the Banks made fraudulent statements concerning their insurance claim. (*Id.*). The Banks answered CIC's Amended Complaint, and filed a Counterclaim alleging breach of contract and bad faith. (Second Amended Counterclaim, RE 36, PageID #629).

After an eight day trial, the jury returned its verdict, finding that the Banks did not "willfully and knowingly make a material misrepresentation to [CIC] with the intent to deceive," and that the Banks did not "cause or consent to the intentional burning of the insured property." (Verdict Form, RE 245, PageID #5316-17). The jury awarded the Banks damages in the amount of $2,174,268.40. (*Id.*). After applying a credit to the verdict for the amount paid by CIC to the Banks' mortgagee, judgment was entered in favor of the Banks in the amount of $1,625,053.19. (Judgment, RE 247, PageID #5323).

On December 16, 2013, CIC filed a Motion for New Trial, Motion to Amend Findings and Judgment, and/or Motion for Judgment Notwithstanding the Verdict, all of which were denied by the Trial Court. (Motion for New Trial, RE 248, PageID #5325; Order Denying Motion for New Trial, RE 282, PageID #6925-26). CIC appealed. (Notice of Appeal, RE 283, PageID #6927).

B. FACTS

1. General Background.

On November 28, 2011, a fire (the "Fire") destroyed the Banks' home located at 1810 Sycamore Circle, Manchester, Tennessee (the "Dwelling"). (Stipulated Facts, RE 287, PageID #6940). The Banks and CIC were parties to an insurance contract that was in full force at the time of the Fire. (*Id.*). The Policy insured the Dwelling with limits of $1,167,000 and afforded coverage for Other Structures ($233,400), Personal Property ($875,250), and Loss of Use (actual loss). (*Id.*). The Policy also provided insurance for (1) damage to trees, shrubs, lawns, and other plants; and (2) debris removal. (*Id.*). After the fire, the Banks submitted a claim for their loss as follows:

Dwelling	$1,167,000
Personal Property	$872,123.34
Debris Removal	$42,000 (CIC stipulated to this amount)

(*Id.* at PageID #6941). The Banks also made a claim for additional living expenses and damage to Other Structures, trees, shrubs, lawns, and other plants. (*Id.*; Transcript, RE 276, PageID #6835, 6842).

CIC denied the Banks' claim, alleging arson, intentional acts, and post-loss misrepresentations. (Transcript, RE 287, PageID #6941; Denial Letter, Appendix, Trial Exhibit 237). As required by the Policy, CIC paid Peoples Bank and Trust $587,176.44, reflecting the payoff of the Banks' mortgage. (CIC's Theory of the Case, RE 287, PageID #6942).

2. <u>CIC Could not Carry its Burden on its Arson Defense.</u>

At trial, there was no direct testimony that the Banks caused or had anything to do with the Fire. Instead, CIC presented only circumstantial evidence that failed to carry its burden of proving its arson defense. On the other hand, there was substantial direct proof that the Banks had nothing to do with the Fire. For example, Mr. Banks, Mrs. Banks, both of their sons (Chad and Stephen), City of Manchester Fire Investigator Jeremy Woods, Antonio Rosendo, and Keith Adams all testified that the Banks did not start or in any way cause the fire. (Transcript, RE 267, PageID #5789-5790; RE 274, PageID #6391, 6422, 6438, 6447, 6555, 6570-71; RE 276, PageID #6692-6699). Even CIC's own fire investigator did not accuse the Banks of starting or contributing to the fire. (Transcript, RE 273, PageID #6301-6302).

The weight of the evidence presented at trial shows that CIC did not carry its burden of proving (1) opportunity; (2) motive; and (3) that the fire was incendiary in origin.

a. OPPORTUNITY

On the issue of opportunity, the fire was first reported at 4:59 p.m., with firemen arriving at the scene at 5:03 p.m. (Fire Department Incident Report, Appendix, Trial Exhibit 102; Transcript, RE 262, PageID #5764). It was stipulated that Mrs. Banks had a colonoscopy performed in Nashville on the morning of the fire. (Transcript, RE 287, PageID #6940). After Mrs. Banks' medical procedure, the Banks stopped at a cabinet store in Nashville, ate lunch, and shopped at TJ Maxx in Murfreesboro. (Transcript, RE 276, PageID #6653; RE 274, PageID #6530-31).

The Banks learned of the fire from Mrs. Banks' sister on their way home from Murfreesboro and ultimately arrived home around 6:00 p.m., about an hour after the Fire was reported. (Transcript, RE 274, PageID #6532; RE 262, PageID #5787; Fire Department Incident Report, Appendix, Trial Exhibit 102). Knowing and admitting that the Banks did not start the Fire, CIC attempted to implicate the Banks' twenty-seven year old son, Stephen. Stephen, however, was hunting with a friend and his friend's daughter at the time of the Fire. (Transcript, RE 274,

PageID #6390-91). In fact, Stephen did not learn of the Fire until he finished hunting and retrieved his phone from his friend's house after 5:00 p.m. (*Id.*).

b. MOTIVE

The only motive alleged at trial was financial in nature, but the proof did not support this theory either. Although the Banks had gotten behind on their mortgage over the years, the evidence showed that the Banks had a net worth of approximately $1,000,000.00 and that the Banks had made consistent mortgage payments in the months leading up to the fire, including a payment three days before the fire. (Transcript, RE 261, PageID #5635-36, 5643-45; RE 262, PageID #154). Further, the Banks had four other pieces of real estate and substantial personal property, none of which they had tried to sell. (Transcript, RE 261, PageID #5643-44).

Additionally, the President of Peoples Bank & Trust testified that the Banks had always made good on their debts, that the Banks had never been declined a loan, and that they never had any discussion with the Banks as to whether or not their loan would be renewed when it matured at the scheduled date the following spring. (Transcript, RE 262, PageID #5727-28). The Banks' loan officer, Howard Vaden, testified that Mr. Banks had always paid his debts, that the loan on the Dwelling was well-secured by multiple properties, and that he had told Mr. Banks to just not allow the loan to get more than 90 days behind and the bank would work

with him. (Transcript, RE 263, PageID #5949-50). Mr. Vaden saw no reason the bank would not have renewed the loan when it matured in 2012, as the Banks were "valued long-term customers" that "had always made good on their obligations." (*Id.* at PageID #5951).

c. INCENDIARY FIRE

At trial, two of the Banks' experts, Jeff Morrill and John Lentini, offered persuasive testimony that the Fire was not incendiary. Morrill is an experienced fire investigator who has investigated the origin and cause of approximately 3,500 fires. (*Id.* at PageID #6762). A member of multiple industry associations, including the committee that drafts NFPA 921- *The Guide for Fire and Explosion Investigations* and the author of multiple publications, Morrill is a well-renowned expert in the field. (*Id.* at RE 276, PageID #6762-66). Upon a review of all of the relevant facts, circumstances, and data surrounding the Banks' Fire, Morrill opined that the Fire was not incendiary in origin, but rather should have been classified as undetermined. (*Id.* at PageID #6797-99).

Like Morrill, Lentini is a renowned expert in the field of fire investigation. (*Id.* at PageID #6723-35; Lentini CV, RE 121-1, PageID #2468-74). He is certified by multiple associations for his skills as a fire investigator and he is also a certified Diplomat of the American Board of Criminalistics, with a specialty in Fire Debris Analysis. (Transcript, RE 276, PageID #6725; Lentini CV, RE 121-1,

PageID #2469). He is a frequent lecturer and author concerning fire investigations, and has written multiple peer reviewed publications, including two in the Journal of Forensic Sciences that are directly on on point with his testimony in this case. (Transcript, RE 276, PageID #6729-31; Lentini CV, RE 121-1, PageID #2471).

Much of CIC's proof concerning the cause of the Fire centered around two debris samples that CIC contended were "positive" for the presence of kerosene. Lentini disproved this contention by explaining that the samples were not positive for kerosene, but rather were positive for floor finishing and asphalt smoke residue. (Transcript, RE 276, PageID #6744, 6748).

As to the sample that showed the presence of asphalt smoke residue from asphalt shingles that fell into the Dwelling during the Fire, Lentini testified: "This is asphalt. This screams asphalt. And any chemist who knows what they're doing in fire debris analysis would call this asphalt residue. I can't make it any plainer than that." (*Id.* at RE 276, PageID #6745). As to the other sample in question, Lentini testified that floor finishing, by definition, is a medium-to-heavy petroleum distillate and that such would be found in any sample of hardwood flooring. (*Id.* at PageID #6746-47). As a result of this native, innocent medium-to-heavy petroleum distillate that is found in hardwood floors, it is mandatory that the analyzing chemist utilize a comparison sample from an area of the same premises, a step that CIC's chemist failed to perform. (*Id.* at PageID #6748-49). In sum,

according to Lentini, there was no evidence that there was ignitable liquid residue that was foreign to the scene, and the samples in question did not indicate the presence of an accelerant. (*Id.* at PageID #6750-51).

The only proof offered by CIC that the Fire was incendiary came from Mark Sells, CIC's cause and origin expert, who testified that he was unable to rule out electrical as a cause of the Fire, even noting in his report that the meter base was not properly grounded. (Transcript, RE 273, Page ID# 6233, 6286). Importantly, Sells was not even aware of a third electrical box that had been covered with fall-down debris and was in the exact area of origin that he identified, a fact which Sells admitted would have been important to know because "electrical panels can cause fires" and "that's where a lot of fires start." (*Id.* at Page ID #6230-34; RE 274, PageID #6557-58). The reason he was unaware of the electrical box is that CIC did not allow him to interview the Banks so that he could obtain information that only the homeowner would know, a fact which Sells acknowledges inhibited him from being objective and unbiased. (Transcript, RE 273, PageID #6211-14, 6234-35, 6262-63).

Sells also admitted he found no evidence of any "fire trails" and further that there were no samples that tested positive for accelerants in the area of origin that he identified (the master bedroom area). (*Id.* at PageID #6238-40). Despite no evidence of a fire trail and the lack of any positive samples in the master bedroom

area that he identified as the area of origin, Sells' theory was that an arsonist poured gasoline from the master bedroom to the office. (*Id.*). In support of this theory, Sells testified that there was a saddle burn in the office with no corresponding fuel load and that he was positive that the office desk and office chair were not present at the time of the fire. (*Id.* at PageID #6241-60). The Banks, however, presented evidence of identifiable burned remnants of the desk and chair at trial. (Post-Loss Photos-Jeremy Woods (Photos 516, 523), Appendix, Trial Exhibits 381-82; Post-Loss Photos-Mark Sells (Photo 22), Appendix, Trial Exhibit 386; Post-Loss Photo-Fire Marshall (Photo 81), Appendix, Trial Exhibit 390; Sells Deposition-Exhibit 39, Appendix, Trial Exhibit 417; Transcript, RE 276, PageID #6680-87). In fact, Sells even admitted that he might have tossed metal roller slides (the kind found in an office desk) through a burned hole in the floor into the crawl space. (Transcript, RE 273, PageID #6261; Post-Loss Photo-Jeremy Woods (Photo 523), Appendix, Trial Exhibit 382).

3. <u>CIC'S Misrepresentation Defense.</u>

In its denial of the Banks' claim, CIC accused the Banks of making post-loss material misrepresentations with regard to their contents inventory. At trial, the testimony of CIC's *own* witness, Michael Caldwell, proved this accusation to be false.

Caldwell testified that he was hired by CIC to perform an inventory of the items in the portions of the Banks' home that were less severely damaged. (Transcript, RE 262, PageID #5869). CIC also tasked him to inventory items that were removed by Sells from the Dwelling and stored at Sells' office. (*Id.* at PageID #5873-74). After completing his inventory, Caldwell found a total of 286 items, with 241 items from his inventory of the Banks' home and 45 from his inventory of the items stored by Sells. (*Id.* at PageID #5873-74, 78; RE 263, PageID #5895).

Concerning the inventory of the items stored by Sells, Caldwell admitted that Tanya Butler (on behalf of the Banks) inventoried the same boxes and found 376 items, as opposed to the 45 items he claimed to have found. (Transcript, RE 262, PageID #5878). Caldwell further admitted that he did not dispute the accuracy of the inventory performed by Butler. (*Id.*).

The Banks submitted a personal property inventory that consisted of 1,496 line items, as compared to the 286 line items found by Caldwell, leaving 1210 allegedly unverified by Caldwell. (Transcript, RE 263, PageID #5897; RE 262, PageID #5873-74). After his deposition, Caldwell supplemented his inventory, reversing course and claiming only 39 items to be unverified. (Transcript, RE 263, PageID #5918). Of the 39 remaining items that Caldwell claimed were not at the

Dwelling, Caldwell was shown photographs of a majority of these items at trial - - destroying what little was left of his credibility. (*Id.* at PageID #5919-31).

At the conclusion of his testimony, Caldwell admitted that if he had been permitted to handle the claim in the manner he desired that he would have talked to the Banks and that his misunderstanding and confusion concerning the Banks' claim could have been avoided. (*Id.* at PageID #5931). Unfortunately, he was not able to talk to the Banks because CIC had instructed him not to do so. (*Id.*).

After being accused of lying on their personal property inventory, the Banks set out to prove their innocence. Mrs. Banks went to the Dwelling and dug through the debris, finding numerous items that CIC claimed were not there, such as pieces of the office desk, remnants of the office chair, and pieces of the secretary that had been in the office at the time of the fire. (Transcript, RE 276, PageID #6680-87). She also located linens and numerous other items that CIC had claimed to not exist. (*Id.)* Their search also unearthed an electrical panel near the area of origin in a portion of the Dwelling where CIC had not bothered to investigate. (Transcript, RE 274, PageID #6557-58). The Banks also located shoes and cookbooks that CIC claimed not to exist. (Transcript, RE 276, PageID #6679; RE 274, PageID #6564-65). As can be seen from this short synopsis, CIC's defenses slowly but surely unraveled at the seams and then were obliterated by the proof at trial.

SUMMARY OF ARGUMENT

The primary issue on appeal is whether the Trial Court erred in its instructions to the jury concerning the burden of proof. It did not. The insurance policy is an all-risk policy, which by its very nature is designed to protect insureds from the requirement of proving the cause of a loss. Courts in Tennessee, the Sixth Circuit, and around the country uniformly hold that an insured under an all-risk policy is not required to show how a loss occurred, but rather only has to prove that a loss did in fact occur and that the policy was in place. These requisite facts were stipulated by CIC.

Tennessee precedent establishes that the insurer bears the burden of proving its affirmative defense of arson. To place the burden on the Banks to prove they did not burn their home would improperly shift the burden to the insured. CIC's argument is unconvincing because it would result in both the insurer and the insured bearing the burden of proof on the exact same issue - - whether the Banks caused the fire. Finally, there is a presumption that all fires are accidental, and the Banks presented both expert and lay testimony to make a prima facie claim that they had nothing to do with the fire and further that the fire was not even incendiary. Accordingly, even if CIC was correct, any error would be harmless.

The Trial Court did not commit reversible error when it denied CIC's motion for directed verdict on the issues of coverage for "other structures" and "additional living expenses." The insurance policy at issue provided coverage for other structures where they were separated by a "clear space" from the Dwelling. Photographic evidence was presented at trial, establishing that the rock wall and driveway were other structures under the policy. As for additional living expenses, the proof at trial supported a claim that CIC waived any requirement within the Policy that the Banks were required to actually incur additional expenses before they could be reimbursed. Thus, the issue of waiver was properly submitted to the jury for consideration.

The Trial Court correctly declined to give a jury instruction that CIC was not required to specifically identify the person(s) responsible for the Fire. The instructions provided were accurate statements of law, came from the Tennessee Pattern Jury Instructions, and in no way led the jury to believe that CIC had the burden of proving exactly who "lit the match."

Partial Summary Judgment was appropriately granted to the Banks on the issue of whether their home was a total loss for purposes of Tennessee's valued policy law. Because the City of Manchester condemned and required demolition of the Dwelling after the fire, the constructive total loss doctrine was applicable, entitling the Banks to the full face value of the policy.

Evidence of four other fires in the Manchester, Tennessee area within a week of the Banks' fire was admissible as such was relevant and was not unduly prejudicial.

John Lentini and Jeff Morrill were qualified to offer expert opinion testimony at trial and their opinions were reliable and helpful to the jury.

Because CIC neither disclosed an expert witness to testify regarding the alleged K-9 alerts, nor an expert witness to testify regarding the training and reliability of the K-9 at issue, all such evidence was properly excluded from trial. Further, the failure of CIC to disclose Russell Robinson as an expert witness necessitated the preclusion of any expert opinion testimony by him at trial.

Michael Caldwell was not qualified to render opinions regarding valuation and played no role in the valuation of the Banks' personal property claim. As such, he was properly excluded from offering expert testimony at trial.

The breach of contract and declaratory judgment act claims were bifurcated into Phase 1 of the Trial, leaving the bad faith claim to be tried separately, if necessary, in Phase 2. The Trial Court did not abuse its discretion in granting this motion. Furthermore, the Banks non-suited their claim for bad faith at the conclusion of Phase 1, making any such allegation of error harmless.

Finally, the weight of the evidence presented at trial clearly supported the jury's verdict. The proof established that the Banks did not burn or cause the burning of their home. Furthermore, the jury verdict comported with the trial testimony regarding the amount of their personal property claim.

ARGUMENT

A. ASSIGNMENT OF ERROR 1 - - THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY CONCERNING THE BURDEN OF PROOF.

The first assignment of error is that "[t]he Court failed to impose any burden of proof upon the Banks to demonstrate an accidental direct physical loss." After much consideration, the court ruled:

> The issue before the Court is, who bears the burden of proof for this breach-of-contract case. The interpretation of a contract is a question of law, not a question of fact. *Mark VII Transportation, Incorporated v. Responsive Trucking, Incorporated*, 339 SW3d, 643——it's a Tennessee Court of Appeals case, 2009——held that, "Further, when a contract contains both general and specific provisions related to the same thing, the specific provision controls."
>
> To answer the pure question of law, i.e., who bears the burden of proof in this breach-of-contract case, the Court will look to the language of the contract, the insurance policy, with the applicable specific provisions controlling. It's agreed by the parties that the policy at issue was in full force and effect at the time that the Banks' house burned on November 28, 2011. It's agreed that the policy covers physical loss caused by accidental events, including accidental fire. It's agreed -- it is agreed that the loss was caused by the fire. It is not agreed how the fire originated. Cincinnati Insurance asserts the fire was not accidental because the Banks intentionally caused the fire to be set. While the insurance policy, the contract, covers generally accidental physical loss, it specifically excludes, among other things, intentional damages, meaning any damages arising out of an act an insured commits or conspires to commit with the intent to cause damage. That's found on Page 23 of the policy.

> In Tennessee it's the insurance company's burden to prove that exclusions in coverage apply. . . . Whether or not the Banks intentionally caused their home to burn down is the only factual issue raised by the evidence at trial regarding the accidental nature of the fire. Since this issue falls squarely within one of the specifically enumerated exclusions of the policy, it is the burden of Cincinnati Insurance to prove that the Banks intentionally caused the fire to be set. This is the only issue for the jury to decide as to the accidental nature of the fire, and, thus, it is the only issue the Court will submit to the jury to decide as to the accidental nature of the fire. And, again, since it is a specific exclusion in the policy, Cincinnati bears the burden to prove the exclusion applies.

(Transcript, RE 277, PageID #6858-59). Based on this ruling, the Trial Court provided the jury with instructions concerning the parties' burdens of proof, as follows:

> The Banks' Burden of Proof. In this action the Banks have the burden of proving by a preponderance of the evidence their claim against Cincinnati. However, in this case the parties agree that the Banks had an insurance policy covering the residence and property inside it, which was in full force and effect at the time of the fire, and that Cincinnati has refused to pay the Banks' claim. Therefore, in order to recover under the insurance policy, the Banks bear the burden only to prove by a preponderance of the evidence the amount of damages they suffered as a result of the fire within the monetary coverage limits of the insurance policy.

(Transcript, RE 287, at PageID #6950-51). The Trial Court then instructed the jury that CIC had the burden of proving "that the Banks committed arson; that is, that one or both of the Banks or someone acting with knowledge and at the direction of

one or . . . both of the Banks intentionally set the fire to the Banks' residence." (*Id.* at PageID #6951).

The Trial Court did not err in its analysis or in its instructions to the jury, and any holding otherwise would be contrary to decades of binding authority that repeatedly and consistently holds that the insurer has the burden of proving arson.[1]

1. Standard of Review.

The Court reviews the "legal accuracy of jury instructions de novo," and the denial of a proposed jury instruction for an abuse of discretion. *Arch Ins. Co. v. Broan-Nutone, LLC*, 509 Fed. Appx. 453, 459 (6th Cir. 2012). The district court has broad discretion in framing jury instructions, and this Court should review the instructions as a whole to decide whether they adequately informed the jury of the relevant considerations and provided a basis in law to assist the jury in reaching its decision. *Id.*

Reversal is appropriate "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* at 460. Even if an instruction is incorrect as a matter of law, the judgment shall be affirmed unless it affects the substantial rights of the parties, i.e., harmless error. 28 U.S.C. § 2111; *United*

[1] *See*, *e.g., Wharton v. State Farm Fire & Cas. Ins. Co.*, 1995 U.S. App. LEXIS 14586, *7 (6th Cir. 1995); *Mathis v. Allstate*, 1992 U.S. App. LEXIS 7130, *5 (6th Cir. 1992); *Alexander v. Tenn. Farmers Mut. Ins. Co.*, 905 S.W.2d 177, 179 (Tenn. Ct. App. 1995); *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 211 (Tenn. Ct. App. 1991).

States v. Pointer, 85 F.3d 615 (6th Cir. 1936).

2. The "All-Risk" Nature of the Policy and Its Effect on the Burden of Proof.

a. Nature of an "All-Risk Policy"

The insurance policy at issue is an "all-risk" policy (as opposed to a named perils policy). The Policy insured against all direct accidental physical loss unless otherwise excluded or limited. (Policy, Appendix, Trial Exhibit 224, p. 19). Unlike typical property loss policies which are structured to cover specified losses, "an all-risk policy automatically covers any loss unless the policy contains a provision excluding the loss from coverage." *HCA, Inc. v. Am. Prot. Ins. Co.*, 174 S.W.3d 184, 187 (Tenn. Ct App. 2005). "The effect of an all-risk policy is to broaden coverage." *Id.* An all-risk policy extends to risks not usually contemplated, and "recovery under the policy will be generally allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured unless the policy contains a specific provision expressly excluding the loss from coverage." *Id.*

b. Under an "All-Risk Policy" an Insured Need Only Show the Existence of the Policy and a Loss.

The very purpose of all-risk policies is to protect the insured in those cases where difficulties of logical explanation or some mystery surrounds the loss or damage to the property. *Simplexdiam, Inc. v. Brockbank*, 283 A.D.2d 34, 28 (N.Y.

Sup. Ct. App. Div. 2001). "Under an all-risk policy the [insured] need only prove that a fortuitous[2] event caused the loss."[3] *HCA, Inc.*, 174 S.W.3d at 215 (citing *Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 257 (6th Cir. 1994)). "A fortuitous event is 'an event which so far as the parties to the contract are aware, is dependent upon chance'." *Id.* at 188. "It is not necessary for the [insured] to show how the property came to be lost or the methods by which the property came to be lost. It is sufficient if the [insured] shows the property is lost and covered by the physical loss provision of the contract of insurance." *Id.* at 215. The question of fortuity is a legal question for the court. *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1281 (6th Cir. 1995).

Tennessee courts have had only one occasion to address the interplay of the law surrounding all-risk policies and a requirement in the policy that the loss be "accidental."[4] In *Union Planters Nat'l. Bank v. Am. Home Assur. Co.*, 2002 Tenn.

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2 Courts have held that the concept of "accidental" loss is synonymous with "fortuitous" loss. *Lamadrid v. Nat'l. Union Fire Ins. Co.*, 2014 U.S. App. LEXIS 9548, *15 (11th Cir. 2014).

3 This burden has been characterized as "not particularly onerous" and "light," and courts around the country have rejected the notion that the insured must show the precise cause to demonstrate fortuity - - all that is required is that a loss occurred. *Lamadrid*, 567 Fed. Appx. at *15-16; *Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430-31 (5th Cir. 1980); *Int'l Multifoods Corp. v. Comm. Union Ins. Co.*, 309 F.3d 76, 83 (2nd Cir. 2002).

4 "Accidental" contemplates an event that is unforeseen and unexpected by the insured. *Tuturea v. Tenn. Farmers Mut. Ins. Co.*, 2010 Tenn. App. LEXIS 414, *32-33 (Tenn. Ct. App. 2010); *Travelers Indem. Co. v. Moore & Assoc.*, 216 S.W.3d 302, 308 (Tenn. 2007).

App. LEXIS 205, *24 (Tenn. Ct. App. Mar. 18, 2002), the insurance company argued that the loss of an airplane's seat and logbooks was not covered because the damage was not "accidental." Relying on a policy provision that defined "physical damage" as "direct and accidental physical loss or damage," the insurer argued that the disappearance of the seats and logbooks were obviously an intentional act and not "accidental." *Id.* at *22-23. The court rejected the insurer's "accident" argument, noting that a loss arising from an unexplained event is covered by an all-risk policy unless specifically excluded or unless the loss is due to the wrongdoing of an insured. *Id.* at *24.

The question of who bears the burden of proving the cause of the loss under an all-risk policy was answered by this Court in *Persian Galleries v. Transcontinental Ins. Co.*, 38 F.3d 253 (6th Cir. 1994). There, an insured sued its insurer when it refused to pay for the loss of oriental rugs covered under an "all-risk" insurance policy. The judge instructed the jury that it was not necessary for the insured to show how the property came to be lost, but rather only that it was lost. *Id.* at 256. The insurer alleged the instruction was improper because it did not require the insured to prove that the loss was fortuitous, meaning that the theft was by persons unknown to the parties to the insurance contract. *Id.* at 256. This Court framed the issue as follows:

> The central question . . . is whether [the insured] was required . . . to prove that its rugs had been stolen as the

> result of a theft perpetrated by persons unknown to the parties to the contract of insurance and that plaintiff had not fraudulently caused the event to occur as urged by the [insurer] or whether it simply had to prove that a burglary of its premises occurred and that its rugs were stolen.

Id. at 257. In considering the issue, this Court did not disagree with the insurer's insistence that an insured bears the initial burden of proving that a loss occurred and the loss was due to some fortuitous event or circumstance. The Court noted, however, that the insured did not bear the burden of proving that the rugs had been stolen by persons unknown to the parties to the insurance policy before it could recover. *Id.* Specifically, the Court found that under an all-risk policy, the insured need only show that a fortuitous event caused the loss, which in that case was a theft by burglary, a conclusion which was obvious. *Id.* The insured "is not required to prove that the theft was perpetrated by persons unknown to the parties to the contract as implied by the [insurer's] proffered jury instruction." In fact, the instruction proposed by the insurer "would have compelled the [insured] to prove the facts and circumstances of the theft and by implication that it, the [insured] was not a party to the theft nor fraudulently caused it to occur." *Id.* Such a result would improperly shift the burden to the insured. *Id.* Accordingly, the Sixth Circuit Court of Appeals affirmed the trial court's findings.

Applying this law to the facts at hand, the Banks needed only to show (a) the existence of the all-risk policy; and (b) that fire damaged the Banks' residence.

These facts were stipulated. (Transcript, RE 287, at PageID #6939-40; *see also* Policy, Appendix, Trial Exhibit 224, pp. 8, 19; Final Pre-Trial Order, RE 231, PageID #5203). Cincinnati then had the burden of proving the application of any applicable exclusion.

3. <u>Principles of Contract Interpretation Require that the Judgment be Affirmed.</u>

The Trial Court aptly noted that when a contract contains both general and specific provisions related to the same thing, the specific provision controls. (Charge Conference, RE 277, at PageID #6858-59 (citing *Mark VII Transp. Co. v. Responsive Trucking, Inc.*, 339 S.W.3d 643 (Tenn. Ct. App. 2009)). This general principle of contract law has been applied in the context of insurance policies. *See*, *e.g.*, *Body v. Lamarr*, 2001 Tenn. App. LEXIS 325, *12 (Tenn. Ct. App. 2001); *Spivey v. Metro. Life Ins. Co.*, 1986 Tenn. App. LEXIS 2995, *6-7 (Tenn. Ct. App. 1986). Here, the Policy's insuring clause covers direct accidental physical loss, but it specifically excludes "intentional damage, meaning any damages arising out of an act an insured commits or conspires to commit with the intent to cause damage." (Policy, Appendix, Trial Exhibit 224, pp. 6, 8, 19, 23). In Tennessee, the insurance company bears the burden of proving that one of the policy exclusions applies and prevents recovery. *See*, *e.g.*, *Blaine Constr. Corp. v. Ins. Co. of N. Am*, 171 F.3d 343 (6th Cir. 1999).

In this case, the following facts were undisputed: (1) the Policy covers fire damage; (2) the Fire damaged the Dwelling; and (3) the Policy specifically excludes intentional damages caused by an insured. (Transcript, RE 287, at PageID #6939-40; *see also* Policy, Appendix, Trial Exhibit 224, pp. 6, 8, 19, 23; Final Pre-Trial Order, RE 231, PageID #5203). Because the only issue raised by the evidence at trial regarding the accidental nature of the fire was whether the Banks intentionally caused the fire, the issue falls squarely within one of the specifically enumerated exclusions, upon which CIC bears the burden of proof.

A plain reading of the Policy also supports this conclusion. CIC's argument defies logic because it flies in the face of established rules of policy interpretation. Specifically, there would be no reason for the "intentional acts" exclusion if Cincinnati's interpretation of the insuring clause was correct. The "intentional acts" exclusion would be nothing but unnecessary surplus, which the law does not recognize. In fact, the opposite is true.

Insurance policies must be construed as a whole in a logical and reasonable manner, with all provisions of the policy being construed together and rejecting no part of the policy which may, by a reasonable interpretation, be saved. *English v. Virginia Surety Co.*, 268 S.W.2d 338, 340 (Tenn. 1954). And, if repugnant clauses cannot be harmonized so as to give effect to both, and one is subordinate to principal purpose and intent of the contract, a court will disregard it rather than

permit it to destroy and nullify the contract. *Shamrock Homebuilders v. Cherokee Ins. Co.*, 466 S.W.2d 204, 206 (Tenn. 1971). Further, if an insurance contract is subject to more than one meaning, it is the court's duty to construe the contract strictly against the insurer and in favor of the insured, with an eye toward a construction that provides coverage not an attempt to defeat it. *Alcazar v. Hayes*, 982 S.W.2d 845, 852 (Tenn. 1998). All doubt must be resolved in favor of the insured. *Palmer v. State Farm Mut. Auto. Ins. Co.*, 614 S.W.2d 788, 789 (Tenn. 1981).

4. Cincinnati's Interpretation of the Policy Would Result in Both the Insured and the Insurer Bearing the Burden of Proof on the Exact Same Issue.

If CIC's contention concerning the burden of proof was correct, trial courts would be left with a situation in which both the insured and the insurer have the burden of proof on the exact same issue, a result that is ludicrous both in the realm of scholarly theory and practical application in the courtroom. As it relates to the issue of the cause of the fire, there was only one triable issue - - whether the fire was caused by the Banks or at their direction. It is impossible for both parties to bear the burden of proving that the Banks did or did not cause the fire.

5. Persuasive Authority from Our Sister Circuits.

The Eighth Circuit Court of Appeals addressed the precise issue present here in *Kostolec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220 (8th Cir. 1995). In

Kostolec, State Farm insured Mr. Kostolec's property for all "accidental direct physical loss," subject to certain exclusions. *Id.* at 1223. One of the exclusions was for any loss caused by the insured for the purpose of obtaining insurance benefits, including arson. *Id.* After a fire to Mr. Kostolec's home, State Farm denied his insurance claim, alleging the fire was intentional. The trial judge instructed the jury that State Farm had the burden of proving arson. *Id.* at 1224-25.

Just like CIC in this case, State Farm argued that because the policy only covered "accidental losses," Mr. Kostolec was required to prove that the fire was not intentionally set. *Id.* at 1225. The Eighth Circuit rejected this argument, noting that it is well-settled that the burden falls upon an insurer to prove arson as a defense to coverage. *Id.* The court further noted, "[A]n insured need only prove that his property was destroyed or damaged by a fire to state a *prima facie* case for coverage." *Id.* And, when an insured establishes a loss by fire, he has made a prima facie case of coverage and he is not required to disprove any claim of arson to establish that he suffered a compensable loss." *Id.*

The *Kostolec* case is a perfect example of the proper allocation of the burden of proof in an insurance claim on an all-risk policy where arson is pled as a defense. *Kostolec* is consistent with *HCA, Union Planters* and *Persian Galleries*, all of which noted that an insured is not required to prove the exact cause of the loss, but rather just prove the existence of the policy and that a loss occurred. In

the case at bar, the parties stipulated to these facts, and there is no requirement in the law that would force the Banks to disprove CIC's defense of arson. In fact, such a proposition conflicts with binding Tennessee cases law that the insurer bears the burden of proving its arson defense.

6. <u>There is a Presumption that Fires Are Accidental.</u>

In Tennessee, there is a legal presumption that the "burning of a property is the result of an accidental cause." *Johnson v. Allstate Ins. Co.*, 2000 Tenn. App. LEXIS 548, *20 (Tenn. Ct. App. 2000) (citing *Ricketts v. State*, 241 S.W.2d 604 (Tenn. 1951)). The existence of the presumption is important because a presumption establishes a prima facie case and, in the absence of contrary proof, thereby sustains the burden of proof on the point which it covers. *Siler v. Siler*, 277 S.W. 886, 887-88 (Tenn. 1925). "A presumption is prima facie proof of the fact presumed, and unless the fact thus established, prima facie, by the legal presumption of its truth is disproved, it must stand as proved." *Braswell v. Tindall*, 294 S.W.2d 685, 689 (Tenn. 1956).

An example of the operation of legal presumptions in the insurance setting can be found in *Life & Cas. Ins. Co. v. Robertson*, 6 Tenn. App. 43 (Tenn. Ct. App. 1927). In that case, the insurer defended a claim by asserting the insured's death was caused by suicide. The trial court instructed the jury that there was a presumption against suicide and that the burden was on the defendant to prove the

suicide. After a verdict in favor of the insured's estate, the Court of Appeals affirmed. *Id.* at 53-54.

Seventy years later, in *Johnson v. Allstate*, 2000 Tenn. App. LEXIS 548 (Tenn. Ct. App. 2000), the insured sued Allstate for failure to pay damage caused by fire to his vehicle after Allstate denied his claim on the basis of fraud. The insured prevailed at a jury trial. On appeal, one of the issues was whether "the trial court erred in not requiring that plaintiff prove the fire loss was accidental" as required by the policy. *Id.* at *19-20. In considering the issue, the *Johnson* court stated the general rule that "[a] claimant under an insurance policy must prove the existence and validity of the policy and the details of the claim." *Id.* at *21. However, the court noted that "there is a presumption that the burning of property is the result of an accidental cause," and further that the insured testified that he did not set fire to the property in question and that he did not know who did. *Id.* Importantly, the court then ruled, as have multiple courts before and since, that "an insurer seeking to prove an arson defense has the burden of proving all of the requisite elements of the defense." *Id.* at *21. The jury's verdict in favor of the insured was affirmed. *Id.* The same should be done in this case.

7. <u>The Cases Cited by Cincinnati Are Not Controlling and Do Not Support Its Position.</u>

CIC cites *Farmers Bank & Trust Co. of Winchester v. Transamerica Ins. Co.*, 674 F.2d 548, 551 (6th Cir. 1982) for the proposition that the Banks were

required to prove all facts essential to recovery under the policy. (Appellant's Brief, p. 25). This case is not controlling here for several reasons. First and most importantly, the Banks' policy was an all-risk policy unlike the bond at issue in *Farmers Bank*. The Banks did not have to prove their loss fell within a coverage for a named peril (such as the forgery at issue in *Farmers Bank*), but rather only had to show the existence of the Policy and the fact that the Dwelling was damaged. P*ersian Galleries*, 38 F.3d at 257. Second, under an all-risk policy, the insured need only show that a fortuitous event caused the loss, which in this case was a loss by fire, a conclusion which was obvious and even stipulated. *Id.* Further, when there is an all-risk policy, the insured is not required to prove the facts and circumstances of the fire nor is it required to prove that it did cause or procure its occurrence. *Id.* Finally, unlike the forgery that was at issue in *Farmers Bank*, the burden of arson is undeniably on the insurer. *Alexander v. Tenn. Farmers Mut. Ins. Co.*, 905 S.W.2d 177, 179 (Tenn. Ct. App. 1995).

CIC also relies on *Gilmore v. Continental Cas. Co.*, 221 S.W.2d 814 (Tenn. 1949). *Gilmore* is not-controlling for many of the same reasons as *Farmers Bank*. Moreover, *Gilmore* can be further distinguished because it was a life insurance case that *only* covered death resulting from accidental injury. *Id.* at 815. In other words, nothing was covered except for the only named peril - - accidental death. On the other hand, the exact opposite is true in the Banks' policy - - everything

was covered unless specifically excluded. And one of those exclusions included the intentional acts of the insureds, which CIC carries the burden of proving.

Hall v. Allstate, 1996 WL 34905699 (Tenn. Ct. App. 1996) is equally unavailing because it is non-binding and can be distinguished at multiple levels. First, Hall is an unreported case and is not binding law. Second, there is no indication in *Hall* that the policy was actually an all-risk policy. Third, there is nothing in *Hall* to give any insight as to whether there was an exclusion in the policy for intentional acts. Lastly, there is no indication in *Hall* that the mandatory presumption of accidental fires was ever even considered, mentioned, or briefed. Further, the case is contradictory to well-established and more recent case law issued since the time of its entry - - *HCA*, *Union Planters*, and *Johnson.*

8. <u>Even if the Trial Court Erred Concerning its Instructions on the Burden of Proof (which is denied), Such Error Was Harmless.</u>

As a final matter, even if this Court finds the Trial Court erred in its instructions, such error was harmless and did not affect the substantial rights of the parties. CIC argues that the Trial Court should have followed the burden shifting process demonstrated in the Utah case of *Young v. Fire Ins. Exch.*, 182 P.3d 911 (Utah. App. 2008). In *Young*, the Utah Court of Appeals held that the insured is first required to make a *prima facie* case of an accidental fire by simply presenting proof that the fire was the result of something other than his own intentional acts before the burden would be shifted to the insurer to prove arson. *Id.* at 919.

Cincinnati states, "This is precisely the type of burden the Banks should have been required to meet at trial." (Appellant's Brief, p. 30).

However, even assuming that such an instruction was required, the failure to impose such a burden was harmless because the record clearly demonstrates that the Banks did in fact make out a prima facie case that the Fire was caused by accidental means, i.e., by a means other than at the hands of or at the direction of the Banks. Specifically, the Banks, their sons, Antonio Rosendo, and Keith Adams all testified that they had nothing to do with the Fire and did not know how it started. (Transcript, RE 274, PageID #6391, 6422, 6438, 6447, 6555, 6571; RE 276, PageID #6692). In fact, CIC admits the Banks did not start the Fire. (Appellant's Brief, p. 44). Further, the Banks presented expert proof that the Fire was not incendiary, and the Fire Department investigator testified that he had no reason to believe that the Fire was caused by the Banks or at their direction. (Transcript, RE 276, PageID #6797-99; RE 262, PageID #5790). The Banks had the benefit of both the presumption of an accidental fire and sworn testimony (lay and expert) that allowed them to make out a prima facie case of coverage under the all-risk policy. Even if CIC's proposed was provided, it would not have impacted the outcome of the case.

The verdict form in this case asked, "Did one or more of the Banks cause or consent to the intentional burning of the insured property?" The jury answered,

"No." This was the critical issue in the case. There is no doubt that the Banks presented sufficient evidence to make out a prima facie case that the Fire was accidental, and the jury further found that CIC did not carry its burden of proving that the Banks caused or consented to the fire. Any error concerning the instructions was harmless.

B. ASSIGNMENTS OF ERROR 2 AND 3 - -THE TRIAL COURT DID NOT ERR IN PROVIDING JURY INSTRUCTIONS AND IN DENYING CIC A DIRECTED VERDICT ON THE ISSUE OF DAMAGES TO "OTHER STRUCTURES"

The Trial Court properly instructed the jury and denied CIC's Motion for Directed Verdict on the issue of damages to the driveway and rock wall that lined the driveway. CIC argues that the driveway and rock wall were not separated from the Dwelling by "a clear space" as required by the Policy. If separated by "a clear space," the damage is not subject to the limits of the Dwelling coverage of the Policy, but rather falls within the "Other Structures" coverage that provides additional limits. (Policy, Appendix, Trial Exhibit 224, pp. 8-9).

The Fifth Circuit has held that a driveway is an "other structure" as a matter of law. *Shelter Mut. Ins. Co. v. Simmons*, 2008 U.S. App. LEXIS 19465 (5th Cir. Sep. 11, 2008). Further, the photographs introduced at trial demonstrate that the driveway and rock wall were separated from the Dwelling by "a clear space." (State Fire Marshall Photo 33, Appendix, Trial Exhibit 373; Other Realtor Photos (CIC Bates Nos. 2614-15, 2626), Appendix Trial Exhibit 247; Policy, RE 801,

PageID #297). Thus, the trial court's instructions were proper and the jury verdict was proper and supported by the proof at trial.

C. ASSIGNMENT OF ERROR 4 – THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS CONCENRING ADDITIONAL LIVING EXPENSES

The Trial Court did not err in its jury instructions concerning additional living expenses ("ALE"). The Banks made a claim for ALE under the Policy in the amount of $3,100.00/month. CIC avers that the Banks must carry the burden of establishing the necessary increase in their living expenses that they actually incurred to maintain their standard of living. However, the proof establishes that CIC waived its right to rely on the Policy's strict, technical requirements. In Tennessee, *any* contractual provision of a policy of insurance, including one that is part of an insuring clause, may be waived by the acts, representations, or knowledge of the insurer's agent, and the question of waiver is one for the jury. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003); *Bill Brown Const. Co. v. Glen Falls Ins. Co.*, 818 S.W.2d 1, 13 (Tenn. 1991).

After the Banks' claim was submitted, CIC waived the strict requirements of the Policy and voluntarily paid the Banks $3,100/month for rental furniture without any requirement that the costs first be incurred. (Transcript, RE 262, PageID #5820). CIC's adjuster, Kevin Young, testified that $3,100/month was fair and reasonable and that he authorized the monthly payments to the Banks. (*Id.* at

PageID #5820-21, 5844-45). Under these circumstances, CIC waived the requirement that the Banks actually incur additional costs in order to recover ALE. *Norris v. Nationwide Mut. Fire Ins. Co.*, 728 S.W.2d 335, 337 (Tenn. Ct. App. *1986)* (holding that the insurer waived the policy provision requiring that ALE be incurred and documented when the insurer agreed $4,000/month was fair and voluntarily paid same without requiring the costs be incurred and documented).

Finally, the Trial Court did not err in ruling that the non-waiver agreement relied upon by CIC was inapplicable. (Charge Conference, RE 277, PageID #6896). Non-waiver agreements do not prevent a waiver by subsequent acts. *Davis v. Aetna Ins. Co.*, 65 S.W.2d 235, 238 (Tenn. Ct. App. 1932).

D. ASSIGNMENT OF ERROR 5 - - THE TRIAL COURT DID NOT ERR IN ITS JURY INSTRUCTIONS CONCERNING CIC'S ARSON DEFENSE.

The Trial Court did not err by declining to include a jury instruction that CIC did not need to "specifically identify" the person who set the Fire. Jury instructions must be reviewed "as a whole to determine whether they fairly and adequately submitted the issues and applicable law to the jury," and a new trial is not required based on flaws in the jury instructions "unless the instructions, taken as a whole, are misleading or give an inadequate understanding of the law." *Arban v. West Publ'g Corp.*, 345 F.3d 390, 404 (6th Cir. 2003). There is no reversible error when the omitted requested instruction is substantially covered by

other delivered charges. *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 434 (6th Cir. 2009). Failure to give an instruction is reviewed for abuse of discretion. *Fisher v. Ford Motor Co.*, 224 F.3d 570, 575-76 (6th Cir. 2000).

To prove a defense of arson, an insurance company must prove three elements: (1) motive; (2) opportunity; and (3) incendiary origin. *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 211 (Tenn. Ct. App. 1991). CIC's proposed instruction that it is not required to specifically identify the person who set the Fire was unnecessary because it was substantially covered by other delivered charges. The Trial Court expressly instructed the jury that "[i]t is not necessary that the policyholder be the person who actually starts the fire," and that the Banks could be found to have committed arson if the jury found that the Banks "intentionally or willfully set fire to the insured property or participated in or consented to the willful burning of the property." (Jury Charge, RE 287, PageID #6952). The jury was also instructed that one of the elements of an arson defense is that the policyholder have "an opportunity to set the fire or to have it set by some other person." (*Id.*).

These instructions conformed with the law, came straight from the Tennessee Pattern Jury Instructions, and in no way led the jury to believe that CIC had the burden of proving exactly who "lit the match." There was no instruction that CIC had to prove with particularity who started the fire, but rather the

instructions provided that it was up to the jury to decide whether the "evidence establishes that the Banks burned or caused their house to be burned." (*Id.*). Accordingly, the instruction sought by CIC was adequately covered by other delivered charges, the instructions given adequately informed the jury of the applicable law, and the omission of the requested instruction did not substantially impair CIC's theory of the case.

E. ASSIGNMENT OF ERROR 6 – THE TRIAL COURT DID NOT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE FIRE WAS A CONSTRUCTIVE TOTAL LOSS.

The Trial Court properly granted the Banks' Motion for Partial Summary Judgment as to whether the Dwelling was a constructive total loss under Tennessee's valued policy statute.

1. Compulsory Demolition

The facts concerning the compulsory demolition were undisputed. A month after the Fire, the City of Manchester Codes Department condemned the Dwelling, and issued an order requiring it be demolished. (Guess Affidavit, RE 76-2, Page ID #1100-1105). According to the Codes Director, the Dwelling cannot repaired, but rather must be demolished. (*Id.* at Page ID #1101). Further, the Codes Director made clear that if the Banks did not demolish the Dwelling, the City would demolish it and tax the costs to the Banks. (*Id.*).

CIC argues that the Banks had the option of either demolishing or repairing

the Dwelling, but the undisputed proof from the Codes Director shows that demolition was required. (*Id.*). The Trial Court thoughtfully considered CIC's argument, but ultimately concluded that CIC had failed to "address the affidavit of O.P. Guess, the Codes/Safety Director for the City of Manchester, Tennessee, in which Mr. Guess specifically stated that following the fire at the Banks' house, the City condemned the house and *required* that it be demolished." (Order Granting Partial Summary Judgment, RE 175, PageID #3999). While CIC argued against this point based on the language of the ordinance at issue, the Trial Court pointed out that City Ordinance No. 13-303 gave "the codes administrator . . . the authority to require demolition," which further supported the affidavit of Mr. Guess, and further noted that CIC could have deposed Mr. Guess on this issue if it had desired, but did not do so and had "come forward with no evidence to contradict Mr. Guess' affidavit." (*Id.*). The undisputed evidence reveals that there was a compulsory demolition.

2. <u>Constructive Total Loss</u>

The Trial Court then concluded that under Tennessee law the constructive total loss doctrine was applicable and "that the Banks ha[d] suffered a total loss of their home under the insurance policy issued by CIC." (*Id.* at PageID #4003). Recognizing that no Tennessee court decisions dealing with this issue exist, the Trial Court looked to the decision in *Algernon Blair Corp. Inc. v. United States*

Fidelity and Guar. Co., 821 F. 2d 597 (11th Cir. 1987), where the district court applied Tennessee law on the identical issue. The *Algernon* court noted that "the law of most jurisdictions seemed to be that a municipal demolition order creates a 'total loss at law' in the type of circumstances presented here." *Id*. at 600 (citing 6 Appleman, *Insurance Law and Practice*, § 3822, p. 215 (1972)).[5]

Following *Algernon*, the Trial Court properly found "the general rule to be reasonable and 'anticipat[ed]' that if this same issue were before the Tennessee Supreme Court, it would adopt the general rule and apply the constructive loss doctrine where a municipality lawfully requires an insured structure to be demolished due to fire damage." (Order Granting Partial Summary Judgment, RE 175, PageID #4003).

3. **Application of Tennessee's Valued Policy Law.**

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5 The general rule is that if repair or reconstruction of a building damaged by fire is prohibited by the municipal authorities acting under proper authority of law, recovery may be had as for a total loss. *See, e.g. Algernon Blair Group, Inc. v. Turner Ins. & Bonding Co., Inc.*, 821 F.2d 597 (11th Cir. 1987); *Danzeisen v. Selective Ins. Co. of Am.*, 689 A.2d 798, 799-800 (N.J. App. 1997); *Stevick v. Northwest G. F. Mut. Ins. Co.*, 281 N.W.2d 60, 62 (N.D. 1979); *Stahlberg v. Travelers Indem. Co*., 568 S.W.2d 79 (Mo.Ct.App. 1978); *Maryland Cas. Co. v. Frank*, 452 P.2d 919, 920 (Nev. 1969); *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co*., 220 A.2d 778, 779 (Del. 1966); *Fidelity & Guaranty Insurance Corp. v. Mondzelewski,* 115 A.2d 697, 699 (Del. 1955); *City of New York Fire Ins. Co. v. Chapman*, 76 F.2d 76, 77 (7th Cir. 1935); *Scanlan v. Home Ins. Co*., 79 S.W.2d 186 (Tex.Civ.App. 1935); *Rutherford v. Royal Ins. Co.*, 12 F.2d 880, 881 (4th Cir. 1926); *Dinneen v. American Ins. Co*., 152 N.W. 307, 308-309 (Neb. 1915).

It is a long-standing rule in Tennessee that valued insurance policies must be paid at the full value listed on the policy if the loss is total in nature. *See, e.g., Price v. Allstate Ins. Co.*, 614 S.W.2d 377, 379 (Tenn. Ct. App. 1981); Tenn. Code Ann. § 56-7-801. "The valued policy statute was enacted primarily to protect the insureds from being subjected to the insurer's argument that the building had been over insured and gives the insurer an incentive to inspect risks and assist insureds in establishing proper insurance evaluations." *Price*, 614 S.W.2d at 381. These statutes are considered "remedial statutes," and they should be "liberally construed in furtherance of their purpose." *Id.*

When a total loss to insured property occurs more than ninety days after the issuance of the insurance policy, the value shown on the face of the policy is "conclusively presumed to be reasonable, and settlement *shall* be made on that basis." Tenn. Code Ann. § 56-7-803 (emphasis added). Viewing this statutorily imposed non-rebuttable presumption, together with the compulsory demolition of the Dwelling, the Trial Court correctly ruled that the Fire resulted in a constructive total loss as a matter of law. Thus the Banks were entitled to recover the full amount of the face value of the coverage on the Dwelling. (Order Granting Partial Summary Judgment, RE 175, PageID #4004).

4. The "Constructive Total Loss Doctrine" and the "Identity and Specific Character Test" are not mutually exclusive.

CIC also confuses the applicability of the "Constructive Total Loss Doctrine" and the "Identity and Specific Character Test," arguing that they are mutually exclusive. This is not the case. The former is a total loss in law, while the latter is a total loss in fact. If the Identity and Specific Character Test fails, this does not preclude application of the Constructive Total Loss Doctrine. In fact, this is precisely why the doctrine is called "Constructive." A structure is considered a total loss, under the identity test, if it has lost its identity and specific character as a building, and becomes so far disintegrated, it cannot possibly be designated as a building, although some part of it may remain standing. *Laurenzi v. Atlas Ins. Co.*, 176 S.W.1022, 1026 (1915). A structure, however, is considered a constructive total loss when the building, although still standing, is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished. *See, e.g. Citizens Property Ins. Corp. v. Hamilton*, 43 So.3d 746, 753 (Fla. Dist. Ct. App. 2010); *Greer v. Owners Ins. Co.*, 434 F.Supp.2d 1267 (N.D. Fla. 2006); *Glens Falls Ins. v. Peters*, 386 S.W.2d 529 (Tex. 1965); *Occhipinti et al. v. Boston Ins. Co.*, 72 So.2d 326 (La. Ct. App. 1954). Thus, application of the "Constructive Total Loss Doctrine" is not precluded by the "Identity and Character Test" because the two tests are not mutually exclusive, which is evidenced by the fact that jurisdictions recognizing the "Constructive Total Loss Doctrine" also recognize either the "Specific Identity or Character Test"

or the "Prudent Man Test." *See, e.g. Greer,* 434 F.Supp.2d at 1267; *Oscar L. Aronsen, Inc. v. Compton*, 370 F.Supp. 421 (S.D. N.Y. 1973); *Fidelity & Guar. Ins. Corp.v. Mondzelewski*, 49 Del 306 (Del. 1955); *Citizens Property Ins. Corp. v. Ashe*, 50 So.3d 645 (Fla. Dist. Ct. App. 2010); *Citizens Property Ins. Corp. v. Hamilton*, 43 So.3d 746 (Fla. Dist. Ct. App. 2010); *Northwestern Mut. Life Ins. v. Rochester German Ins. Co.*, 85 Minn. 48 (Minn. 1901); *Firemen's Ins. Co. v. Houle*, 96 N.H. 30 (N.H. 1949); *Glens Falls Ins. Co.*, 386 S.W.2d at 529; *Eck v. Netherlands Ins. Co.*, 203 Wis. 515 (Wis. 1931).

F. ASSIGNMENT OF ERROR 7 - - THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF OTHER FIRES

The Trial Court did not abuse its discretion by ruling that other fires were "sufficiently substantially similar to be relevant to the question of whether the Banks caused their house to be set on fire." (Order on CIC's Motions in Limine, RE 219, PageID #5128). In its ruling, the Trial Court noted that "CIC [would] be free to point out all the differences it can between the Banks' fire and these other fires." (*Id.*).

Here, the other fires were obviously relevant under Fed. R. Evid. 401, because the main issue in the case was whether the Banks caused the Fire that destroyed their home. "Evidence is relevant if: (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Because CIC

attempted to convince the jury that the Fire to the Dwelling was intentionally set, the other fires were relevant to the issue of who, if anyone, caused the fire.

Additionally, the other fires were substantially similar. There were a cluster of fires in the Manchester area in the days before and after the Banks' fire, consisting of four fires in five days. (Transcript, RE 262, PageID #5782-86). These other fires were highly probative to the issue of who, if anyone, caused the fire to the Banks' home. The local fire investigator even testified at trial that he only typically investigates 3-5 fires a year in Manchester, Tennessee. (*Id.* at PageID #5762, 5785-86). The fact that the other fires may have been at different times of the day or to different types of property has no bearing on the relevancy issue. The occurrence of four other fires in the days before and after the Fire was highly relevant circumstantial evidence that directly bore on the issues in the case.

G. ASSIGNMENT OF ERROR NO. 8 – THE TRIAL COURT DID NOT ERR IN ADMITTING THE OPINION TESTIMONY OF JEFF MORRILL

The Trial Court properly denied CIC's Daubert Challenge as to Expert Witness Jeffrey Morrill ("Morrill"), ruling that Morrill "ha[d] more than sufficient experience and qualifications" to testify "as to the cause and origin of a house fire and "that any criticisms CIC has of Morrill's methodology and his opinions goes to the weight of his testimony and not whether it is admissible." (Order on *Daubert* Motions, RE 233, PageID #5259-60). CIC challenges this ruling, arguing two

bases for exclusion of Morrill: (a) that Morrill failed to gather all facts and data; and (b) that Morrill does not have a Tennessee private investigator's license. Neither allegation provides a sufficient basis to exclude Morrill's opinion testimony – Morrill's expertise and qualifications are beyond dispute and his opinions were based on scientifically valid principles and were reliable.

In rendering his opinions regarding origin and cause, Morrill reviewed numerous documents and analyzed data gathered by others, but CIC criticizes him for not gathering his own data about the fire. (Transcript, RE 276, PageID #6767-69; Morrill Report, RE 123-2, PageID #2781). This argument is unconvincing in light of NFPA 921, § 4.4.3.3, which provides:

> The use of previously collected data from a properly documented scene can be used successfully in an analysis of the incident to reach valid conclusions through the appropriate use of the scientific method. Thus, the reliance on previously collected data and scene documentation should not be inherently considered a limitation in the ability to successfully investigate the accident.

(NFPA 921, § 4.4.3.3, Appendix, Trial Exhibit 104 at p. 19). Further, case law is clear that such complaints about "allegedly unaccounted for factors go to the weight of the testimony, not its admissibility." *Travelers Cas. Ins. Co. of Am. v. Volunteers of Am. Ky., Inc.* 2012 U.S. Dist. LEXIS 117789, *5 (E.D. Tenn. Aug. 21, 2012).

CIC also argues that Morrill should have been excluded because he does not have a Tennessee private investigator license. This argument fails as a matter of law. A person who performs the duties of a fire investigation company, but does not have a license, is not necessarily disqualified as an expert witness on fire progression. *Doochin v. U.S. Fid. & Guar. Co.*, 854 S.W.2d 109, 115 (Tenn. Ct. App. 1993). A license is only one factor affecting his expertise. *Id.* The proof is uncontroverted that Morrill was absolutely qualified to offer expert opinions in this case. (Transcript, RE 276, PageID #6761-66; Morrill CV, RE 123-1, PageID #2775-77). He has testified in more than thirty trials as an expert, and his qualifications, experience, knowledge, and expertise cannot be reasonably called into question. (*Id.*).

H. ASSIGNMENT OF ERROR NO. 9 - - THE TRIAL COURT DID NOT ERR IN ADMITTING THE OPINION TESTIMONY OF JOHN LENTINI

The Trial Court did not abuse its discretion when it denied CIC's Daubert Challenge as to Expert Witness John Lentini ("Lentini"). (Order on *Daubert* Motions, RE 233, PageID #5261). Lentini was permitted to testify as an expert witness at trial regarding fire debris analysis and was qualified to render the opinions to which he testified. (Transcript, RE 276, PageID #6723-35; Lentini CV, RE 121-1, PageID #2468-74). His opinions were based on scientifically valid principles and were reliable. (Transcript, RE 276, PageID #6723-51, Lentini

Affidavit, RE 121-2, PageID #2476-95). Each of CIC's alleged flaws in Lentini's testimony go "to the weight of the testimony and opinions," rather than admissibility. *Travelers Cas. Ins. Co. of Am. v. Volunteers of Am. Ky., Inc.*, 2012 U.S. Dist. LEXIS 117789, *6 (E.D. Tenn. Aug. 21, 2012) (citing *McClean v. Ontario, LTD*, 224 F.3d 797, 801 (6th Cir. 2000)).

Lentini is a renowned expert in the field of fire investigation. (Transcript, RE 276, PageID #6723-35; Lentini CV, RE 121-1, PageID #2468-74). His credentials speak for themselves. (Transcript, RE 276, PageID #6725; Lentini CV, RE 121-1, PageID #2469). He has written multiple peer reviewed publications, including two that are on point with his testimony in this case: "Persistence in Floor Coating Solvents" and "Differentiation of Asphalt and Smoke Condensates from Liquid Petroleum Distillates Using GC/MS." (Transcript, RE 276, PageID #6730-31; Lentini CV, RE 121-1, PageID #2471). Lentini was qualified to provide expert testimony at trial with regard to fire debris analysis. (Transcript, RE 276, PageID #6732).

CIC argues that Lentini should have been excluded from testifying at trial because he "did not conduct his own investigation and performed no testing though he could have done so." These assertions are both untrue and irrelevant. Lentini did not do any independent testing because it was not necessary. (*Id.* at PageID

#6752). He admitted that Foran's data was good, but opined that Foran's interpretation of the data was the issue. (*Id.*).

Furthermore, Lentini did not make assumptions regarding the components of the Dwelling without proof or data. Lentini testified and the record reflects that the Banks' home had asphalt shingles and hardwood floors that had been refinished in the last four years. (Transcript, RE 274, PageID #6556-57; RE 276, PageID #6741) Lentini also testified that he reviewed photographs of the fire debris and samples collected by CIC's investigator, satisfying himself "that Sample 3 was in fact hardwood flooring." (Transcript, RE 276, PageID #6751, 6753). Additionally, Lentini used his experience, training, and qualifications to analyze the chromatograms and provide expert testimony. (*Id.* at Page ID #6723-51; Lentini Affidavit, RE 121-2, PageID #2746-95).

The final issue raised by CIC relates to comparison samples. Lentini criticized Foran for not requesting and obtaining a true comparison sample (i.e. an undamaged portion of the hardwood floor from the Banks' home), even though the record reflects that such a sample could have been obtained. (Transcript, RE 276, PageID #6748; Transcript, RE 274, PageID #6563). CIC argues that Lentini should not have been permitted to testify because he did not consider the samples tested by Foran to be valid comparison samples. A review of his testimony, however, reveals that he did analyze the alleged comparison sample (Sample #2)

and explained to the jury why it actually supported the fact that Sample 3 showed floor finishing native to the Dwelling. (Transcript, RE 276, PageID #6749-50).

Any perceived flaws in Lentini's opinions went to the issues of weight and credibility, not admissibility.

I. ASSIGNMENT OF ERROR NO. 10 AND 11 - - THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF K-9 ALERTS.[6]

The Trial Court did not abuse its discretion when it excluded evidence of the accelerant detection K-9 at trial because the party offering such evidence must disclose expert testimony regarding the use of the accelerant detection K-9 and CIC failed to do so. (Order on Banks' Motions in Limine, RE 218, PageID #5120). Without expert testimony regarding "the dog's training, reliability and skill," the K-9 alerts were meaningless and the Banks were precluded from having "the appropriate opportunity to explore this particular dog's reliability." (*Id.* at PageID #5120-21). Additionally, any relevance of the alleged alerts was substantially outweighed by unfair prejudice. (*Id.*).

1. <u>General Background</u>

During the investigation of the Fire, Daniel Foster, a Special Agent/K-9 Handler with the Tennessee State Fire Marshal's Office, went to the scene of the

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[6] A district court's exclusion of an expert witness and evidentiary rulings are reviewed under the abuse of discretion standard. See *Palatka v. Savage Arms, Inc.*, 535 Fed. Appx. 448, 453 (6th Cir. 2013); *United States v. Hough*, 385 Fed. Appx. 535 (6th Cir. 2010).

Fire with a K-9 unit. (Origin and Cause Statement, RE 122-1, PageID #2643-44). The K-9 was not owned or handled by Sells, and he admitted that K-9s have no particular value other than helping locate a place to take samples. (Sells Deposition, RE 122-2, PageID #1653-54).

2. <u>CIC did not Disclose an Expert Witness to Testify on this Issue</u>

CIC did not disclose Daniel Foster or any other expert witness to provide opinion testimony regarding alleged K-9 "alerts" or the K-9's training and reliability. The Sixth Circuit has routinely acknowledged that dismissal or exclusion of testimony are appropriate remedial measures for failure to appropriately disclose Rule 26 expert material, opinions, and reports. *Sexton v. Uniroyal Chemical Co*., 62 Fed. Appx. 615, 616 (6th Cir. 2003).

Despite CIC's arguments to the contrary, Sells' report was devoid of any mention that Sells handled the K-9 at the scene or could testify regarding the K-9's alleged "alerts," reliability, or training. (Sells Report, RE 98-1, PageID #1806-44). Other than referencing the alleged "alerts," Sells report makes no further reference to the K-9. (*Id.* At PageID #1807).

CIC also argues that because Sells' CV references K-9 handling in his past employment that it had met the disclosure requirements. This argument is unconvincing. There is a sharp distinction between including credentials in a CV and disclosing expert opinions. Furthermore, Sells' CV gives no indication that he

had any experience or training with the K-9 used at the Dwelling. (Sells CV, RE 98-1, PageID #1845-47).

3. Unconfirmed Alerts by Accelerant-Detection K-9s are Unreliable

With regard to accelerant-detection K-9s, the scientific and law enforcement communities agree that "[K-9] alerts are *not* reliable in the absence of laboratory confirmation." *State v. Sharp*, 928 A.2d 165, 170 (N.J. Super. 2006) (emphasis in original); *see also Basic Guidelines for Establishing an Accelerant Detector Canine Program*, RE 122-7, PageID #2757-59; *IAAI Forensic Science Committee Position on the Use of Accelerant Detection Canines*, RE 122-8, PageID #2761.

Here, the State of Tennessee performed laboratory tests on the samples that were taken from locations where the K-9 allegedly "alerted," all of which came back negative. (Lab Report, RE 123-3, PageID #2655-56) Accordingly, the K-9's alleged "alerts" are unconfirmed and are scientifically unreliable and invalid.[7]

4. Evidence of the K-9's Alerts was Properly Excluded under the Federal Rules of Evidence

Evidence is relevant only when it will assist the trier of fact in understanding the evidence or determining a material fact in evidence. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592-93 (1993); *see also Harleysville Mut. Ins. Co. v. Kingsport Packaging Co.*, 2005 U.S. Dist. LEXIS 47876 (E.D. Tenn. Sept. 1,

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7 While Foran Testified that the samples were positive, Lentini explained that they were not positive for an accelerant foreign to the home. (Transcript, RE 276, PageID #6750-51).

2005) (holding that the actual evidence is the lab samples themselves). Thus, the lab test results were relevant, but the K-9'S alleged "alerts" were not. This logic is confirmed by CIC's own witness, Mark Sells, who testified that K-9 hits have no particular value other than helping determine where to take samples. (Sells Deposition, RE 122-2, PageID# 1653-54).

Finally, even evidence that is relevant should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Here, the evidence of the canine alerts was properly excluded under Rule 403 because the probative value of such evidence was substantially outweighed by undue prejudice. *See Sharp*, 928 A.2d at 172; *People v. Acri,* 662 N.E. 2d 115, 117 (Ill. App. Ct. 1996) (courts are "very cautious" about admitting evidence "derived from the use of dogs," both because of "the fallibility of dogs" and because of "the 'superstitious awe' with which people view dog-sniff evidence").

Additionally, the K-9's alleged "alerts" do not add any probative force to the laboratory findings, and are in fact often prejudicial. In other words, evidence of the lab testing renders the fact of the K-9's alert redundant, if not irrelevant. *See United States v. Hebshie*, 754 F. Supp. 2d 89 (D. Mass. 2010). Thus, even if CIC was correct, any error was harmless, as CIC was able to present testimony at trial regarding its alleged positive samples.

J. ASSIGNMENT OF ERROR 12 - - THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF RUSSELL ROBINSON

The Trial Court did not abuse its discretion in excluding Russell Robinson ("Robinson") from offering expert opinion testimony at trial, ruling that CIC failed to provide the disclosures required by Fed. R. Civ. P. 26(a)(2)(C) and that such failure was prejudicial to the Banks and not substantially justified. (Order on Banks' Motions in Limine, RE 218, PageID #5111). On appeal, this Court reviews the lower court's decision to invoke discovery sanctions for an abuse of discretion. *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994).

This Court has upheld the exclusion of an expert witness's opinions when the expert was not disclosed until after the due date for expert witness disclosures. *Rowe v. Case Equip. Corp.*, 1997 U.S. App. LEXIS 227, at *6-7 (6th Cir. 1997); *see also Vaughn v. City of Lebanon*, 2001 U.S. App. LEXIS 18935 (6th Cir. 2001).

The Sixth Circuit has also acknowledged that dismissal or exclusion of testimony are appropriate remedial measures for failure to timely and appropriately disclose Rule 26 expert material, opinions, and reports. *Sexton v. Uniroyal Chemical Co.*, 62 Fed. Appx. 615, 616 (6th Cir. 2003). Furthermore, Rule 37(c)(1) mandates that a trial court sanction a party for discovery violations in connection with Rule 26(a) unless the violations were harmless or were substantially justified." *Id.* at *3 n.1; Fed. R. Civ. P. 37(c)(1).

1. CIC Failed to Comply with Expert Disclosure Deadlines and Rule 26.

On August 9, 2013, over eight months after the November 13, 2012 deadline for disclosure of expert witnesses, CIC named Robinson as an additional individual it expected to call as an expert witness at trial. (Order on Banks' Motion in Limine, RE 218, PageID #5109-10). Thus, CIC failed to disclose Robinson as an expert prior to the expiration of the expert disclosure deadline and to comply with the expert disclosure requirements set forth in Fed. R. Civ. P. Rule 26. (*Id.*).

2. CIC's Failure to Timely Disclose Robinson Was Not Substantially Justified and Would Have Prejudiced the Banks.

CIC attempted to excuse its failure to disclose Robinson as an expert witness arguing that it did not receive his Origin and Cause statement until January 31, 2013. CIC, however, failed to explain why it did not subpoena Robinson's file earlier in the lawsuit, which was filed in May 2012, and offered no explanation as to why it did not move to extend the expert disclosure deadline at that time, rather than waiting until the last day of discovery and eight months after the deadline to disclose him. Such delay was not substantially justified.

If CIC had been allowed to designate Robinson as an expert at such a late hour, the Banks would have been prejudiced. With a trial date just two months away, *Daubert* motions due twenty-days after his disclosure, and the discovery deadline passed, the Banks were stripped of the ability to realistically challenge Robinson's testimony if he had been allowed to offer expert opinions.

K. ASSIGNMENT OF ERROR 13 – THE TRIAL COURT DID NOT ERR IN LIMITING MICHAEL CALDWELL'S TESTIMONY.

The Trial Court granted the Motion in Limine to Exclude Testimony and Opinions of Michael Caldwell ("Caldwell"), ruling that "Caldwell [did] not have the necessary expertise to testify concerning the value of personal property claimed by the Banks." (Order on *Daubert* Motions, RE 233, PageID #5263). The Court found that "Caldwell admitted in his deposition . . . that he has no knowledge, expertise, or training in evaluating personal property and that he relied on the expertise of others to do so in his report." (*Id.* at PageID #5262-63).

After precluding Caldwell from testifying as to value, the Trial Court gave CIC the opportunity to designate someone with Enservio (the company for which Caldwell worked) to testify about valuation and the Banks the opportunity to depose said individual. CIC opted not to designate anyone, but now seeks to use this decision as an alleged basis of error, which should not be permitted.

L. ASSIGNMENT OF ERROR NO. 14 – THE TRIAL COURT DID NOT ERR IN BIFURCATING THE TRIAL.

The Trial Court did not abuse its discretion in granting the Banks' Motion to Bifurcate the breach of contract claims and bad faith claim. Furthermore, the Banks voluntarily dismissed their bad faith claim at the conclusion of Phase 1 of the trial of this matter, making the claims now asserted by CIC moot, and the evidence that CIC argues it would have been able to present in support of its

defense of the bad faith claim was ruled inadmissible by this Court with regard to all issues except bad faith. (Order on Banks' Motions in Limine, RE 218, PageID #5109-14, 5119-22). Bifurcation of claims falls soundly in the discretion of the trial judge. *Saxion v. Titan-C-Manufacturing*, 86 F.3d 553, 556 (6th Cir. 1996). Additionally, it is of no consequence that the trial was bifurcated approximately thirty days prior to trial. *Id.* at 556 (holding that the bifurcation of a trial even after the trial has begun is usually not an abuse of discretion).

M. ASSIGNMENT OF ERROR 15 – THE VERDICT WAS SUPPORTED BY WEIGHT OF THE EVIDENCE.[8]

The Trial Court denied CIC's Motion for New Trial, ruling that the jury verdict was supported by the weight of the evidence. (Order Denying Motion for New Trial, RE 282, PageID #6925-26). CIC asserts that based on "the proof at trial no one other than the Banks had the motive to have burned the home" and that "the jury did not even listen to the Banks' own evidence and arguments." Thes arguments are unconvincing.

1. <u>Arson</u>

CIC has never taken the position that the Banks personally burned their home. Instead, CIC argued that the Banks had someone do it, even though they were unsure who this may have been. The law required CIC to prove three

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[8] "A district court's disposition of a motion for new trial is reviewed for abuse of discretion." *Arban v. West Publ'g Corp.*, 345 F.3d 390, 394 (6th Cir. 2003).

elements to establish the defense of arson by circumstantial evidence: (1) that this fire was incendiary in origin; (2) that the Banks had a motive for setting the fire; and (3) that the Banks had an opportunity to set the fire. *McReynolds v Cherokee Ins. Co.,* 815 S.W. 2d 208, 211 (Tenn. Ct. App. 1991). However, even if the jury found all three elements to be present, the jury was still not obligated to find that the Banks caused the fire. Once these elements are proven, the jury *may*, but is not required, to find in the insurance company's favor. *Smith v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 134343 (S.D. Ohio 2010); *Martell v. IDS Prop. Cas. Co.*, 2012 U.S. Dist. LEXIS 2736 (E.D. Mich. 2012). It goes without saying that a fire could be intentional and an insured could have motive and opportunity without the insured having anything to do with the fire. *Id.*

The evidence in this case supports the jury verdict that the Banks did not burn the Dwelling. There was evidence of four other fires in the Manchester, Tennessee area within a week of the Banks' fire. (Transcript, RE 262, PageID #5782-86). There was also proof regarding the threats made by a man named Zimmerman a week before the house burned. (Transcript, RE 274, PageID #6445-47). Additionally, the City of Manchester Fire Investigator testified that he had no reason to believe that the Banks, Stephen Banks, or Antonio Rosendo set fire to the Dwelling. (Transcript, RE 262, PageID #5790). Most importantly, Larry Banks, Sue Banks, Stephen Banks, Chad Banks, Keith Adams, and Antonio Rosendo all

testified under oath at trial that they did not start the fire. (Transcript, RE 274, PageID #6391, 6422, 6438, 6447, 6555, 6571; Transcript, RE 276, PageID #6692). This proof supports the jury verdict.

2. Personal Property Award

The weight of the evidence also supports the jury's verdict as to the personal property award rendered in favor of the Banks. While CIC argues that the jury's personal property award of $871,623.34 is inconsistent with the proof at trial, this is simply not the case. Yes, the Banks did ask the jury to remove the value of their class rings from their personal property award, as they had inadvertently been included on their personal property inventory. (Transcript, RE 276, PageID #6697). The Banks original claim was for $872,123.34 and the rings were listed on the inventory at $915 and $595. (Inventory, Appendix, Trial Exhibit 170, p. 30). This, however, is explained by the fact that the Banks testified to numerous items during trial that they had left off of their inventory. (Transcript, RE 274, PageID #6574; Transcript, RE 276, PageID #6695). For example, the Banks testified about carpet and mat board that were stored in the basement of the Dwelling with a value in excess of $2,000 and $500-600 respectively, neither of which was included on the personal property inventory. (Transcript, RE 274, PageID #6546-47, 6574; Transcript, RE 276, PageID #6695-96). This testimony explains and supports the jury verdict.

CONCLUSION

Based on the foregoing, the Banks as this Court to affirm the Trial Court on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,908 words.

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6)(a) because this brief has been prepared in a proportionally spaced type face using Microsoft Word 2010 and size 14 Times New Roman font.

s/ Clinton H. Scott
Date: October 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of October, 2014, I electronically filed Appellees' brief on appeal using the Court's ECF system, which will automatically send notice of such filing to all attorneys of record. I further certify that I did not serve this document on any party via U.S. Mail.

s/ Clinton H. Scott
Date: October 7, 2014

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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