

2007

Leigh Young aka Hardy v. Fire Insurance Exchange : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEIGH YOUNG aka HARDY,)

Plaintiff/Appellant)

vs.)

FIRE INSURANCE EXCHANGE)

Defendant/Appellee)

BRIEF OF THE APPELLANT

Appellate Case No. 20070279

Trial Court No. 040915146

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

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STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction to hear this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated. This appeal is subject to assignment and has been transferred to the Utah Court of Appeals, pursuant to Section 78-2-2(4), Utah Code Annotated. (Rec. 1298 & 1303).

STATEMENT OF ISSUES

1. **Issue:** Did the trial court err in dismissing Plaintiff's bad faith claim on summary judgment, when there were issues of fact present?

Standard of Review: Whether a party is entitled to summary judgment is a question of law, reviewed for correctness. All facts and inferences are to be viewed in a light most favorable to the nonmoving party, with no deference given to the trial court. *State Farm Mut. Auto Ins. Co. v. Green*, 89 P.3d 97 (Utah 2003).

Preservation for Review: This was raised in Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment (Rec. 509-593) and was ruled on by the trial court. (Minute Entry, Rec. 935-941; Order Rec. 944-945).

2. **Issue:** Did the trial court err in refusing to allow Plaintiff's expert to testify when he was properly designated and scheduled to testify at trial?

Standard of Review: A trial court's decision to disallow expert testimony based on evidentiary grounds is generally reviewed under an abuse of discretion standard. *Turner v. Nelson*, 872 P.2d 1021 (Utah 1994). However, in this case the testimony was excluded as a matter of law; and therefore should be reviewed under the correctness standard. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

Preservation for Review: The trial court knew Plaintiff's expert was scheduled to testify on Thursday at noon, as part of Plaintiff's case in chief (Rec. 1305, Trial Trans. pgs. 178-179, 252-254) but granted Defendants' Motion for a Directed Verdict Thursday morning, before Plaintiff's expert could testify. (Rec. 1195-1210).

3. **Issue:** Did the Plaintiff, as the insured, have the burden to prove that the fire in her home was "accidental" as part of her *prima facie* case, to seek recovery under her fire insurance Policy?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

Preservation for Review: This issue was preserved for review when the trial court granted the Motion for Directed Verdict based on Plaintiff's alleged failure to establish her *prima facie* case. (Rec. 1195-1201; Rec. 1209-1210).

4. **Issue:** Does the fact that Plaintiff had a fire insurance Policy in effect on her home, with the premiums paid, and that she was entitled to payment under the Policy for her fire loss, as stipulated to by the Insurance Company at trial, and ruled by the court as an admitted fact; sufficiently establish a *prima facie* case for the Plaintiff, to shift the burden of proving arson to the Insurance Company?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

Preservation for Review: Plaintiff began to put on evidence regarding these matters (Rec. 1304, pg 21-23) when the Insurance Company stipulated to these facts and the court ruled that the same was an admitted fact. (Rec. 1304, pg. 23) The court subsequently granted Defendant's Motion for Directed Verdict due to Plaintiff's alleged failure to establish her *prima facie* case. (Rec. 1195-1201; Rec. 1209-1210).

5. **Issue:** Is expert testimony necessary for an insured to present an issue of fact for the jury, as to whether a fire was intentionally set or accidental; or whether the insured had any involvement in starting or arranging the fire?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

Preservation for Review: The trial court granted Defendant's Motion for Directed Verdict based on Plaintiff's failure to put on expert testimony that the fire was "accidental." (Rec. 1195-1201; Rec. 1209-1210).

6. **Issue:** Even if Plaintiff's expert was only designated as a rebuttal witness, did the trial court err in refusing to allow him to testify, when the Insurance Company, before moving for directed verdict, elected to proceed with its own evidence and called its fire expert to put on evidence in support of its affirmative defense of arson?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

Preservation for Review: The trial court granted the Motion for Directed Verdict after Defendant's fire expert was allowed to testify regarding the cause of the fire and Plaintiff's possible involvement, but did not allow Plaintiff's expert to testify in rebuttal. (Rec. 1195-1201; Rec. 1209-1210).

7. **Issue:** Did the Insurance Company waive its right for a directed verdict based solely on Plaintiff's alleged case in chief, when before moving for directed verdict, it elected to proceed with its own witnesses at trial, and elected to put on evidence of its affirmative defense of arson?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

Preservation for Review: This issue was preserved for review when the trial court granted the Motion for Directed Verdict before the close of Plaintiff's evidence, but after the Defendant had proceeded to put on its own evidence regarding the cause of the fire, with its fire expert, and Plaintiff's possible motive for setting the fire, with a health inspector and insurance investigator. (Rec. 1195-1201; Rec. 1209-1210).

8. **Issue:** Was there any evidence introduced in this case, before the Motion for Directed Verdict was made, to raise an issue of fact for the jury to decide, precluding the entry of a directed verdict, including the cause of the fire and/or Plaintiff's involvement in the start of the fire?

Standard of Review: In reviewing a trial court's order granting a directed verdict, the appellate court examines whether any evidence was introduced at trial to raise an issue of fact for the jury. *Alta Health Strategies, Inc. v. CCI Mechanical Service*, 930 P.2d 280 (Ut.App.1996) *cert. denied*. All evidence and inferences are to be viewed in a light most favorable to the non-moving party. The standard of review on a directed verdict is the same as that imposed on the trial court. It is reviewed as a matter of law for

correctness. *Mahmood v. Ross*, 990 P.2d 933 (Utah 1999).

Preservation for Review: This issue was preserved for review when the trial court granted the Motion for Directed Verdict after evidence was presented to the jury regarding the cause of the fire, as well as, Plaintiff's possible motives for setting the fire, and involvement in the start of the fire. (Rec. 1195-1201; Rec. 1209-1210).

9. **Issue:** Did the trial court err in allowing the Insurance Company to move for a directed verdict, and granting a directed verdict, before the close of Plaintiff's evidence, knowing that Plaintiff's expert was to testify later that day?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000); *State v. Leyva*, 951 P.2d 738 (Utah 1997).

Preservation for Review: This issue was preserved for review when the trial court granted the Motion for Directed Verdict before the close of Plaintiff's evidence, knowing that Plaintiff's expert was scheduled to testify later that day. (Rec. 1195-1201; Rec. 1209-1210).

10. **Issue:** Did the trial court err in dismissing a jury trial pursuant to Rule 41(b) of the Utah Rules of Civil Procedure?

Standard of Review: A determination of the law is a question of law, reviewed for correctness. *Dipoma v. McPhie*, 1 P.3d 564 (Ut.App. 2000).

Preservation for Review: This issue was preserved for review when the trial court granted the Motion for Directed Verdict based on Rule 41(b). (Rec. 1201).

STATEMENT OF THE CASE

Nature of Proceedings:

The Plaintiff/Appellant, Leigh Young aka Hardy (“Leigh”) suffered from a fire in her home in Sandy, Utah, which started at approximately 6:45 a.m., the morning of July 26, 2001, when no one was home. Leigh had a fire insurance policy, which was in effect at the time, with the Defendant/Appellee, Farmers Insurance Exchange (“Insurance Company”). Leigh submitted claims to her Insurance Company for living expenses which the Insurance Company paid. Claims were also submitted regarding damage to her home and personal property, however, six months after the fire, in January 2002, the Insurance Company sent a letter denying these claims, claiming arson, under the Policy’s Intentional Act Exclusion. (See January 2002 letter, Trial Ex. 16).

Leigh filed this action on July 21, 2004, (Rec. 1-6) alleging bad faith on the part of the Insurance Company and breach of contract on the insurance Policy, for the Insurance Company’s refusal to fully investigate or pay the claims. Leigh obtain a fire expert, Mr. Fred King from Delta, Colorado, who was timely designated as an expert witness. (Rec. 58-59) Mr. King was of the opinion that the earlier investigation of the fire

failed to properly eliminate any and all accidental sources for the fire. Mr. King opined that the fire was a flashover fire, and could have been caused by a number of accidental sources, which were not eliminated as a possibility, including a “classic mattress fire.” (King Expert Report, Rec. 63-73). Mr. King was designated as an expert, his expert report was timely filed, and his deposition was taken.(Rec. 166-167). After Mr. King was designated as an expert and filed his report, the Defendant designated Mr. Jay Freeman, as a fire expert. (Rec. 154-165).

Depositions were taken and affidavits obtained by both parties; and on March 14, 2006, Defendant filed a Motion for Partial Summary Judgment, seeking to dismiss Plaintiff’s bad faith claim. (Rec. 173-175) On March 15, 2006, Plaintiff also filed a Motion for Summary Judgment on her breach of contract claim. (Rec. 419-421) This was accompanied with the Affidavit of Leigh Young, explaining her activities at the time of the fire (Rec. 442-447) and the fact that she did not set the fire, or arrange to have the fire set. (Rec. 447). Leigh argued that she was entitled to judgment as a matter of law, based on the undisputed fact that the Policy was in effect at the time of the fire, and there was no evidence that she had set the fire, but mere speculation. (Rec.422-508). The Insurance Company in their Motion for Summary Judgment claimed that there were issues of fact sufficient to refuse payment under the Policy, and that the court should

dismiss the bad faith claim as a matter of law. (Rec. 176-418). The Insurance Company never claimed that Leigh had not met her *prima facie* case, or that the fire did not fall under the terms of the Policy, rather the Insurance Company asserted its affirmative defense of arson and that it had a “fairly debatable” defense to not pay the claims. (Rec. 176-206).

On August 7, 2006, the court issued its ruling on the cross-motions for summary judgment, ruling that there were issues of fact to preclude Leigh’s Motion for Summary Judgment, but that the Insurance Company was entitled to have the bad faith claim dismissed as a matter of law, based on the presences of these factual issues. (Rec. 935-940). The court further ruled that for the Insurance Company to establish its *prima facie* case of arson to deny coverage under the insurance policy, it had to show (1) that the fire was incendiary in nature, (2) the insured had a financial motive for setting the fire, and (3) unexplained surrounding circumstantial evidence implicating the suspect, citing *Lawson v. State Farm Fire and Cas. Ins. Co.*, 585 P.2d 318 (Colo.App. 1978). (Rec. 939). The court then went on to find factual issues regarding these elements. (Rec. 936-939).

The matter was set for an eight day jury trial to commence Tuesday November 28th 2006 and conclude December 7th 2006. (Rec. 950-953). The parties made pretrial disclosures of witnesses and exhibits. Leigh designated Fred King as her fire

expert in her pre-trial disclosures. (Rec. 995). Counsel for the parties discussed the timing of witnesses that they planned to call and prepared a stipulation for the entry of certain exhibits, in order to facilitate time at trial. These exhibits, which were later admitted into evidence, included: the Insurance Policy, the Proof of Loss Claims with attached inventories, the January 2002 denial letter from the Insurance Company, the Written Statement from Steve Johnson, and Pictures of the fire scene. (Rec.1150-1151).

Counsel for the parties also submitted stipulated jury instructions regarding the remaining breach of contract claim and the Insurance Company's defenses, including a jury instruction that the Insurance Company has the burden to prove arson by a preponderance of the evidence. This instruction was stipulated to by the parties. There was no dispute to the fact that the fire was a covered catastrophe under the Insurance Policy. There were no instructions prepared addressing the issue of coverage or that it is the Plaintiff's burden to show the fire was accidental to obtain coverage. The issue for trial was whether or not there was arson by the Insured to prohibit recovery under the Intentional Act Exclusion of the Policy

Trial commenced on Tuesday November 28th and opening statements were made. Again there was no argument of the fact that the fire was a catastrophe covered under the Policy, that the fire occurred in Leigh's home, and that the Policy was in effect

at the time of the fire. The issue, according to the Insurance Company, was whether or not the fire was intentionally set by Leigh. (Rec. 1304, Trans. pg. 9).

After opening statements, Leigh testified similar to the statements made in her affidavit for summary judgment, (when the court previously found issues of fact for the jury) that she had owned the home at 9950 Marble Street since November, 1983, (Rec. 1304, pg.17), that in her divorce the home was quit-claimed to her (Rec. 1304, pg. 20, Trial Ex.2), that the mortgage payments on the home were current at the time of the fire, that there were no balloon or large payments due at the end of the mortgage (Rec. 1304, pg. 22, Trial Ex. 3), that the Plaintiff had obtained fire insurance on her home from the Defendant, Insurance Company, (Rec. 1304, pg. 22-23), and that the premiums for the Policy were paid and were current at the time of the fire, (Rec. 1304, pg. 23). In fact, it was admitted by Defendant at trial, that the Policy was in effect at the time of the fire, and that all the terms and conditions of the Policy, as far as Plaintiff's entitlement to payment under the Policy, were met. This was an admitted fact by stipulation and by the court's ruling. (Rec. 1304, pg. 23).

Leigh further testified that the last time she was in the home before the fire occurred (on the morning of July 26, 2001) was late at night on July 24, 2001, and she did not notice anything unusual in the home. (Rec. 1304, pg. 25). She testified that she then

left and stayed that night at the Travel Lodge in Salt Lake City, with her husband Doug Young. They had done this before in the past. Doug's brother worked at the hotel, and would give them a discount. (Rec. 1304, pg. 26-27). Leigh also testified as to the appliances and furniture, which were in the room where the fire started. (Rec. 1304, pgs. 29-32) She testified about the repairs that were currently being made to the home. (Rec. 1304, pgs. 34-35). Leigh further testified that she did not start the fire and that she did not know of the fire until she was called at the Travel Lodge by her son's girlfriend, Kelly, at approximately 8:30 or 9:00 that morning. (Rec. 1304, pgs. 35-36). Leigh testified that she was surprised by the fire. Her Insurance Company was contacted, and a representative arrived that night. (Rec. 1304, pgs. 34-35). Leigh testified that she did not know how the fire started and asked the insurance representative "how the fire started?" but received no response. (Rec. 1304, pg. 38).

Leigh further testified to the damage from the fire, both to her personal property and her home; and that after the fire she was overwhelmed so she hired Adjustors International, a professional adjusting company, to inventory her personal property, prepare an estimate for the damage to her home, and to deal with the Insurance Company in submitting the necessary forms for her loss, which Adjustors International did. (Rec. 1304, pgs. 41-43). Leigh also testified that she rented a home and that the

Insurance Company began paying living expenses under the Policy (Rec. 1304, pgs. 49-51), and never claimed that she was not entitled to payment under the Policy or that the fire was not a covered catastrophe under the Policy. However, six months later, in January of 2002, the Insurance Company sent a letter denying any further payment based on the Intentional Act Exclusion of the Policy, claiming that she intentionally set the fire or arranged for the fire. (Rec. 1304, pgs. 51-52; January 2002 letter, Trial Ex. 16).

At trial the court constantly cut off Leigh's testimony and would not let her fully answer the questions she was asked. The court did not allow her to testify about how she felt about the fire, although her state of mind was a relevant issue in the case as to any possible motive she may have had to set the fire. (Rec. 1304, pg. 37). Leigh also testified as to her financial condition; that she continued to make the house payments after the fire until July of 2003, when she finally sold the home in its burned condition. (Rec. 1304, pgs. 52-53) Leigh also presented a video of the room where the fire started and testified about an outlet in the room where the wires had melted together. (Rec. 1304, pg. 56). The court would not let her testify as to many items, including her emotional state and her feelings about the fire, and the loss of her personal belongings, although the court had previously ruled such issues were factors for the jury to decide. (Rec. 939).

Vaughn Bradley of Century Builders testified regarding the estimate he prepared to repair the dwelling after the fire. He testified that the bid he prepared was accurate and reasonable.(Rec. 1304, Pgs. 85-90) His repair was admitted into evidence. (Rec. 1304, pgs. 85-90, Trial Ex. 10). The court also rushed Mr. Bradley through his testimony.

After Mr. Bradley the Plaintiff did not have any more witnesses ready to call, so the Defendant, without objection or making any motion to dismiss or for directed verdict, began calling its own witnesses in support its affirmative defense of arson, i.e., that the fire was intentionally set. Defendant first called Mr. Bebee an investigator for the Insurance Company who testified that the fire seemed to be intentional (Rec. 1304, pg. 101), because the Plaintiff was not in her home at the time of the fire and the fire was discovered by several neighbors who were leaving for work the morning of July 26, 2001, at 6:45 a.m. (Rec. 1304, pg. 101). Mr. Bebee also testified about the background check he did on Leigh, including court records, and her financial situation; putting on evidence of a possible financial motive for the fire. (Rec. 1304, pg. 102) Mr. Bebee also testified about two conversations he allegedly had with Leigh regarding the last time she was at the house, claiming that she told him that she was there the night of the fire, July 25th rather than July 24th (Rec. 1304, pg. 104); thus creating issues of fact regarding Leigh's

involvement in the start of the fire.

On the next morning of trial, Nathaniel Cook of Adjusters International testified as to the procedures he used to inventory and value the personal property and in preparing the Proof of Loss Claims for the personal property and for the dwelling. The Proof of Loss Claims and attached inventories, were admitted into evidence. (Trial Exhs. 10-12). The judge also cut Mr. Cook short on his testimony and would not allow questions about the individual items of inventory. (Rec. 1305, pgs. 108-135).

Tim's friend, Brandon Yates, testified next. He testified that he was at the house the night of the fire with a group of friends. They had "nowhere else to go to smoke and drink," and they knew that Leigh was not home, so they went to the house. (Rec. 1305, pg. 137). They were drinking alcohol, smoking and playing video games. There were two mattresses in the room one on the floor and one on the bed. (Rec. 1305, pg. 137). They moved the TV on to a wood table that was in the middle of the room. (Rec. 1305, pg. 137). Not only were the boys smoking on the mattresses, but they also lit candles at various places through out the room (Rec. 1305, pg. 137). No one from the fire department or the Insurance Company contacted or talked to Brandon Yates, about being in the room that night. (Rec. 1305, pg. 141). Brandon testified that they were drunk that night and that he was the first person to leave, but he didn't check to see if all the

candles were out. (Rec. 1305, pg. 145). Brandon also testified that his friend Chad Smith, who was there that night, drove over in a gold colored pickup truck, that was newer but looked a lot like Doug Young's truck. (Rec. 1305, pg. 146).

Leigh's son, Tim Hardy, also testified that without Leigh's knowledge or consent, he was at the home the night of the fire. (Rec. 1305, pg. 150). Tim testified that he was there with several friend, watching TV, playing video games and hanging out in the room where the fire started. They were drinking alcohol, smoking cigarets and marijuana, and lighting candles in the room. (Rec. 1305, pg. 150-151) He also testified that Chad Smith was there and had driven over in his Ford Ranger pickup truck, that looked a lot like Doug Young's truck.¹ (Rec. 1305, pg. 152). Tim was never contacted by anyone from the fire department or from the Insurance Company, about being in the room that night, a few hours before the fire started. (Rec. 1305, pg. 155).

Grant Sumsion, an attorney helping Leigh with her insurance claim at the time testified that he had talked to Tim and his friends, that were at the house that night and that he had relayed this information to the Insurance Company. (Rec. 1305, pgs. 161-162). Leigh's friend Janet Sherwood testified that she knew Leigh was trying to fix up

¹The written statement of Steve Johnson, which was admitted into evidence by stipulation (Rec. 1150-1151) indicated that he saw a Ford Ranger parked in front of the house on July 26, 2001 between the hours of 12:00 - 2:00 a.m. (Trial Ex. 25)

the house, and was doing major repairs to the house at the time, and that furniture and boxes of items were stacked in certain areas, so they could replace the carpet. (Rec. 1305, pgs. 168-169). After Janet Sherwood, Plaintiff still had an electrician scheduled to testify, Mr. Chris Johnson, and her fire expert, Mr. Fred King, who was coming from Colorado. The court asked if Plaintiff was prepared to rest and Plaintiff said no. Plaintiff still intended to call the electrician, Mr. Chris Johnson, and her fire expert, Mr. King, who was scheduled to testify on Friday. The court indicated, “well, but he’s not going to be here until Friday and here we are at Wednesday and you can’t rest. (Rec. 1305, pg. 176).

The court then asked the Defendant if it had any more witnesses it would be willing to call at the time. Defendant’s expert, Mr. Freeman, was in Sacramento, and he also couldn’t be in Utah until Friday. (Rec. 1305, pg. 176). The Defendant then indicated that it may waive his testimony, based on the testimony of the fire marshall, Richard Lyman. (Rec. 1305, pg. 177). The court then asked Plaintiff’s counsel if he could call Mr. King during the noon recess, to get him to court any sooner. (Rec. 1305, pg. 177). Mr. King was contacted during the noon recess and arrangements were made to have him in court the next day, Thursday, at noon. At the start of the afternoon session the court asked the Plaintiff if it had any other witnesses other than Mr. Johnson, and Mr. Fred King, and Plaintiff indicated that he had subpoenaed Steve Johnson, but these were

Plaintiff's last witnesses. (Rec. 1305, pg. 178). It was discussed that Steve Johnson may appear the next morning at trial to be questioned and that Mr. Fred King would be on the stand by noon on Thursday. The court indicated, "[a]ll right on that basis then we'll proceed." (Rec. 1305, pg. 179).

Chris Johnson, the electrician was called and testified that he had observed the outlet in the room where the fire had started and had seen the melted and burned wires in the electrical outlet. (Rec. 1305, pg. 182). At the end of Mr. Johnson's testimony, the court asked Plaintiff's counsel, subject to the last witness you have, you rest? To which counsel responded yes. Plaintiff's last witness, being Mr. King, Plaintiff's fire expert. (Rec. 1305, pg. 183). The court then asked the Defendant if it was willing to proceed with additional witnesses at this time. (Rec. 1305, pg. 183).

Defendant's counsel indicated that it was, and Defendant called several of its own witnesses, including: Craig Weinheimer - a health inspector; Mr. Richard Lyman - the Sandy City Fire Marshall; and Rex Nelson - a dog handler. No objection was made by the Insurance Company to calling these witnesses out of turn. No motion was made for directed verdict on the evidence then presented; and no objection was made to allowing the Plaintiff to wait until noon the next day to call her fire expert. Defendant's witnesses were called and cross examined.

Mr. Craig Weinheimer, the housing officer, was called to testify regarding a referral from Sandy Police regarding the condition of the house (Rec.1305, pg.186); the condition of the home he observed on a visit to the house (Rec. 1305, pgs. 188-189); an appointment he had with Leigh on July 26, 2001, the day of the fire (Rec. 1305, pg. 191); and the fact that he had faxed a copy of his report and the Sandy Police referral to DCFS. (Rec. 1305, pg. 193). Mr. Weinheimer was cross-examined, and admitted that he only saw the house for five minutes through the screen door; that he did not have authority to condemn, but could only close the home to occupancy; and that he never threatened to close the house, but eluded the possibility. (Rec. 1305, pg. 197). There was also no action taken by DCFS and he was never contacted by DCFS on his referral. (Rec. 1305, pg. 197). He testified that no one was staying in the home at the time, and that even if closed to occupancy the owner can still go into the home to remodel and make repairs, and that this is in fact encouraged to remedy any health concerns. (Rec.1305, pg. 196-197).

Richard Lyman, the Sandy City Fire Marshall, was called and allowed to testify as a cause and origin expert.(Rec. 1305, pg. 202-204). His report and investigation regarding the start of the fire, was admitted into evidence (Rec. 1305, pg. 205). There were no occupants in the home at the time of the fire. (Rec. 1305, pg. 206). His report included his opinion, as to the room where the fire started (Rec. 1305, pg. 209) and the

likely point of origin. (Rec. 1305, pg. 209). The photos relied upon were stipulated to and received into evidence. (Rec. 1305, pg. 209). There was no concrete evidence regarding the burn patterns, but it was believed to be a flashover fire, i.e., where the heat builds up so everything in the room ignites at the same time. (Rec. 1305, pg. 215 & 229). Mr. Lyman testified that with the dresser and walls intact and the uniform burning, it was believed that the fire was more in the center of the room. (Rec. 1305, pg. 216). He also testified that the sagging in the mattress springs indicated there was more heat in that area of the room. (Rec. 1305, pg. 218). He testified the most likely area where the fire started was the center of the room. (Rec. 1305, pg. 219). He didn't note any legitimate source of ignition in that area, and could not determine any cause of the fire. (Rec. 1305, pg. 219). He had no evidence that Leigh was involved in the start of the fire. (Rec. 1305, pg. 222).

On the cross-examination of Mr. Lyman, numerous issues were raised regarding his investigation, including the fact that under the National Fire Protection Agency guidelines, a fire is not to be determined as intentionally set until all possible accidental sources have been eliminated. (Rec. 1305, pg. 223). Mr. Lyman failed to check all the outlets or electrical appliances in the room. (Rec. 1305, pg. 224, 229). He didn't notice an outlet with burned or melted wires, or an extension cord that was plugged into one of the outlets. (Rec. 1305, pg. 229). He indicated that there was a lot of heat

produced in the mattress springs and that could have been involved in the cause of the fire. (Rec. 1305, pg. 224). He admitted that the debris the dog hit on could have been pulled down from the ceiling. (Rec. 1305, pg. 225). He was also not sure what the part was that the accelerant dog hit on. He thought it was a automobile part, then a computer monitor or possibly a television part. (Rec. 1305, pg. 228). He did not have the part at trial or any lab results identifying the part or any accelerant on the part.

Mr. Lyman later learned that Tim Hardy, Brandon Yates, and their friends, were in the home the night of the fire, but he did not talk to them in preparing his report. (Rec.1305, pg.231). He testified that this information would be important and that his report could change with this new information. (Rec. 1305, pg. 232). Plaintiff attempted to find out how his report would change with this additional information, but the court would not allow such questioning. (Rec. 231).

Furthermore, since Mr. Lyman's report was admitted into evidence, the court would not allow Plaintiff's attorney to ask him questions regarding the findings in his report. The court indicated, "the report speaks for itself. I'm not going to have you stand here for the next 30 minutes and question him about what it says. So the objection—so the question is out of order." (Rec. 1305, pg. 236).²

²When the court later ruled on directed verdict that there was no evidence presented regarding the cause of the fire, the court had not read, nor did it indicate that it

The Defendant next called Rex Nelson, the dog handler to testify about the accerlarant dog. He testified that before the dog went in he had the mattress springs removed (Rec. 1305, pg. 241) and that the dog actually hit in an area that was in the northeast area of the room, not the center; and that they had to dig down through the debris to find the suspect part. (Rec. 1305, pg.247). The part looked like a screen or something you would take out of a car. (Rec.1305, pg. 248). He was questioned regarding possible contamination of the fire scene. He was not the one to remove the debris and he did not preserve the part or any other debris for trial. (Rec. 1305, pg 249).

After Mr. Lyman, the Defendant did not have any more witnesses to call that afternoon. The Defendant's only other witnesses were Mr. Pace, a Sandy Police officer, who saw the condition of the home before the fire; and Mr. Lew Kanizer, an estimator for the Insurance Company. Both were out of Town. One was in Las Vegas, the other in Arizona. (Rec. 1305, pg. 250-251).

The court released the jury saying, "I can tell you this case is going to wrap up tomorrow, one way or another." Please be back tomorrow at 9:00 and we will finish the evidence at that point. (Rec. 1305, pg. 251). After the jury was released, the Defendant indicated that Mr. Freeman was tied up in California and couldn't be in court

had considered any of the reports, statements, photographs, or other documents which were received into evidence, regarding the investigation of the fire.

tomorrow, and wouldn't be available until Friday. (Rec. 1305, pg. 252). The court indicated that regardless, "the case is going to finish tomorrow." (Rec. 1305, pg. 252). The court indicated that it would hear from Plaintiff's fire expert, Mr. King, at noon on Thursday, "we'll defer our lunch and we'll hear him at 12:00, and then we'll argue, and instruct, and send it out to the jury. (Rec. 1305, pg. 252-253). Defendant's counsel asked if the Plaintiff had rested and the court indicated, "of course, he hasn't. Because he hasn't got all of his witnesses here." (Rec. 1305, pg. 253). The Defendant complained that Plaintiff's expert was a rebuttal witness and therefore, since she couldn't call her other fire expert, Mr. Freeman, who couldn't be there until Friday, that Plaintiff should not be able to call Mr. King, regarding the cause of the fire. (Rec. 1305, pg. 253-254).

The court stated that Mr. King was identified as a rebuttal witness, but does not say that his rebuttal was limited only to Mr. Freeman's testimony and not Mr. Lyman's report; nor does the court identify any official document, filed by the Plaintiff, listing Mr. King, as merely a rebuttal witness to Mr. Freeman's testimony. (Rec. 1305, pg. 253). It was known by both the parties and the court, that the Plaintiff intended to call Mr. King as part of her case, regardless of the testimony of Mr. Lyman or Mr. Freeman.³ He

³Plaintiff was asked several times if "Plaintiff rests," and Plaintiff clearly indicated that she still intended to call her expert, Mr. King, to testify. (Rec. 1305 pgs. 176 & 183)

was scheduled to testify at noon the next day, before Mr. Freeman was scheduled to testify on Friday. (Rec. 1305, pg. 252).

On the morning of November 30th the third day of trial, Defendant's counsel again complained that Mr. Freeman, was not going to be able to testify until Friday, so Plaintiff's fire expert, Mr. King, should not be able to testify. (Rec. 1197). To the extent Mr. King's testimony was to be in rebuttal to Mr. Lyman's testimony, it was argued (contrary to Defendant's prior waiver and agreement to proceed with its own witnesses while waiting for Mr. King) that Mr. King should have been put on earlier, and (contrary to what the court ruled, and was obvious to everyone at the end of the day on Wednesday) that the Plaintiff had rested. (Rec. 1305, pg. 1187). It was argued that there was no evidence that the fire was accidental, entitling the Defendant to a directed verdict. (Rec. 1198). An argument was also made as to the value placed on the personal inventory items, which the court apparently did not consider in its ruling.

Plaintiff responded that Mr. King was not simply designated as a rebuttal witness to Mr. Freeman, but as part of Plaintiff's case in chief. (Rec. 1198) Mr. King didn't prepare his report in rebuttal to Mr. Freeman's report, but in response to Mr. Lyman's findings and report.(Rec. 1198). Mr. King submitted his report long before Mr. Freeman was designated as a fire expert for the Defendant and before Mr. Freeman's

report was submitted. (Rec. 63-73). Plaintiff also argued, as far as “accidental” cause, that the burden of proving arson in order to deny payment under the Policy, is on the Insurance Company. (Rec. 1198). Plaintiff further argued that a directed verdict was inappropriate because numerous issues of fact were presented to the jury, regarding the cause of the fire, and the jury could still determine, based on the facts presented, that the Plaintiff did not start the fire. (Rec. 1199). Plaintiff reminded the Judge of his ruling on summary judgment where he had earlier found such issues of fact for the jury to decide. (Rec. 1199) Plaintiff also argued that the denial under the Policy required more than just a determination as to whether the fire was “accidental,” but whether it was set by the insured. For instance, even if the jury found that the fire wasn’t “accidental,” the jury could still find that the Plaintiff was entitled to payment under the Policy, if it believed that *she* did not directly cause, or arrange, the fire. (Rec. 1199).

The court granted Defendant’s Motion for Directed Verdict, indicating that it was a breach of contract case under the Policy and the Insurance Company refused to pay because it had determined that the fire was intentionally set, and in all likelihood, by her or at her direction.⁴ (Rec. 1200). The court continued, stating that the burden is on the Plaintiff, as the insured, to establish that the fire was “accidental” and not intentionally

⁴The court at this point is apparently weighing and determining the factual issues.

set; and that the Plaintiff must at least present evidence that the fire was not intentionally set, which the Plaintiff has not done, by resting without presenting expert testimony with regard to cause and origin. (Rec. 1200). Thereafter, the court dismissed the matter based upon Rule 41(b) of the Utah Rules of Civil Procedure. (Rec. 1201).

A Judgment for Directed Verdict was entered on December 21, 2006. Plaintiff objected to the form of the Order because at trial, the Judge dismissed the case, not based on Rule 50(a), but based on Rule 41(b) of the Utah Rules of Civil Procedure. (Rec. 1188). A Motion for New Trial was filed on January 2, 2007, pursuant to Rule 59(a) of the Utah Rules of Civil Procedure, which was considered by newly appointed Judge, Kate A. Toomey. (Rec. 1226-1232). The Motion for New Trial was denied by way of Minute Entry entered by Judge Toomey on February 28, 2007. (Rec. 1291-1293). A Notice of Appeal was filed on March 29, 2007. (Rec. 1296).

Statement of Facts:

1. Appellant, Leigh Young aka Hardy (“Leigh”) owned a home located at 9950 Marble Street, Sandy Utah, which suffered fire damage on the morning of July 26, 2001. The fire started at 6:45 a.m., when no one was home. (Rec.1304, pg. 17)
2. Leigh had fire insurance on her home, Policy No. 76-06092-23-87 from Appellee, Farmers Insurance Exchange (“Insurance Company”), which was in effect

on the day of the fire. (Rec. 1304, pg. 22-23).

3. When the fire occurred the mortgage payments were current on the home and the insurance premiums paid. It was admitted by the Insurance Company at trial, that all terms and conditions of the Policy were met as far as Plaintiff's entitlement to coverage under the Policy. This was an admitted fact at trial, as stipulated to by the Defendant; and ruled by the court. (Rec. 1304, pg. 23).

4. At the time of the fire, the mortgage balance was \$45,4656.96, and Leigh's ex-husband had recently quit-claimed his interest in the home to Leigh. The monthly payments were \$696.00 and the home had an assessed tax value of \$134,300.00. Leigh had substantial equity in the home and owned the title free and clear if she wanted to sell the home. (Rec. 22-23, Trial Ex. 4).

5. In July of 2001, Leigh resided in the home with her daughter Breigh Hardy, who was 14 at the time. Leigh's son Tim Hardy, who was 16 at the time, was living with his father, Brad Hardy (Leigh's ex-husband) in Idaho. (Rec. 1304, pg. 72).

6. On the morning of July 26, 2001, when the fire started, no one was at the house. Leigh had spent the night of July 25, 2001, at the Travel Lodge in downtown Salt Lake City, with her new husband Doug Young. Breigh had recently left with her father, Brad Hardy, to visit him in Idaho. In exchange Leigh's son, Tim Hardy, was left

here in Utah to stay with friends. (Rec. 1304, pg. 26, 72).

7. The last time Leigh was in the home, before the fire, was the night of July 24th or the early morning of July 25th 2001. She did not notice anything strange or unusual at the house at this time. (Rec. 1304, pg. 25) Leigh was in the process of remodeling her house, repairing the walls, getting new floors (Rec. 1304, pg. 34) and had furniture and other items stacked in the rooms. (Rec. 1305, pgs.168-169).

8. The fire started at 6:45 a.m. July 26, 2001. Leigh first learned of the fire while at the Travel Lodge in Salt Lake City. Leigh returned home to find firefighters in her house. The home was severely damaged and Leigh's personal belongings were scattered all over the lawn. (Rec. 1304, pg. 35 & 36).

9. Unbeknownst to Leigh at the time, her son Tim was in the home the night of the fire with several friends. Tim and his friends were in the room where the fire started, using a number of electrical appliances, which were located in the middle of the room on a large pine table; including a TV, a VCR, and a video game station. (Rec. 1305, pg. 137-141). Tim and his friends were lying on two mattresses in the room watching TV, playing video games, and just hanging out. They were drinking alcohol, and smoking both cigarettes and marijuana, while laying on two separate mattresses, one on the floor and one on the bed. (Rec. 1305, pg 139). They also lit 4 or 5 candles in the room,

including one on the TV located on the pine table in the middle of the room. (Rec. 1305, pgs. 137-155).

10. Tim and his friends were at the home until approximately 2:00 a.m. the morning of July 26, 2001. Chad Smith, one of Tim's friends who was there, drove over in a Ford Ranger pickup truck that looked a lot like the truck Doug Young drove. (Rec. 1305, pg. 146 & 152).

11. Upon returning home, after learning of the fire, Leigh was overwhelmed by the damage to her home and to her personal property. She eventually hired Adjusters International (a professional adjusting company) to assess her loss, prepare inventory lists, and to submit the necessary forms to her Insurance Company. (Rec. 1304, pg. 41-43).

12. Adjusters International on behalf of Leigh, prepared and submitted claims to the Insurance Company, first for living expenses, and then Proof of Loss forms for the dwelling and personal property, as required under the Policy. These were forms were submitted in October of 2001. (Rec. 1304, pg. 41-43; Trial Exs. 10-12).

13. The Insurance Company began paying the living expenses, then approximately 6 months later, in a letter dated January 31, 2002, the Insurance Company claimed an exclusion under the *Intentional Acts* provision of the Policy which provides:

“If any insured directly causes or arranges for a loss to covered property in order to obtain insurance benefits, this policy is void.” No claim was made by the Insurance Company that the Policy was not in effect on the day of the fire, or that the fire was not a covered catastrophe under the Policy. Rather, the Insurance Company asserted arson under the Policy’s exclusions. (Rec. 1304, pgs. 51-52: Trial Ex. 16, denial letter).

14. Leigh did not set fire to her home, nor did she arrange for anyone else to set fire to her home. She did not know of the fire until she was called at the Travel Lodge by her son’s girlfriend, Kelly, at approximately 8:30 or 9:00 a.m., that morning. (Rec. 1304, pgs. 35-36).. Leigh testified that she was surprised by the fire and did not know how the fire started and asked investigators “how the fire started?” but received no response. (Rec. 1304, pg. 38). Leigh has maintained her innocence throughout.⁵

15. Leigh cooperated with the Insurance Company and its investigators, but the Insurance Company still refused to pay, although there was no evidence linking Leigh to the fire. Leigh filed this action alleging breach of contract, under the insurance Policy, as well as, bad faith on the part of the Insurance Company. (Rec. 1-6).

16. Sandy City Fire Marshall, Richard Lyman, reported that he believed the point of origin was in some debris in the middle of the downstairs bedroom. (Rec.

⁵The criminal action filed against Leigh, was dismissed at the Preliminary Hearing stage by Judge Ann Boyden.

1305, pg. 209) There was no concrete evidence based on the burn patterns, but he believed it was a flashover fire, where the heat slowly builds up so everything ignites at the same time. (Rec. 1305, pg. 215 & 229). The sagging in the mattress springs indicated that there was more heat in that area of the room, but he did not find any ignition source for the fire. (Rec. 1305, pg. 218 & 219) He believed the debris hit on by the accelerant dog, was a transmission part, then later believed it to be a computer or television part. (Rec. 1305, pg. 228) Mr. Lyman had no evidence that Leigh was involved in the cause of the fire. (Rec. 1305, pg. 222).

17. Under the National Fire Protection Agency ("NFPA") Guidelines, a fire is not to be determined as intentionally set, until all possible accidental sources have been eliminated. (Rec. 1305, pg. 223). Mr. Lyman failed to check all the outlets and electrical appliances in the room. (Rec. 1305, pg. 224-229). There was a lot of heat produced in the mattresses that could have caused the fire. (Rec. 1305, pg. 224). The debris the dog hit on, could have been pulled down from the ceiling; and it could be a transmission part, an automobile part, a computer or television part. He did not have the part at trial, and did not know what it was. (Rec. 1305, pg. 228). Mr. Lyman later learned that Tim Hardy, Brandon Yates, and their friends were in the home the night of the fire, but he did not talk to them, or consider their information, in preparing his report. (Rec.

1305, pg. 231). He testified that this information would be important to a fire investigator; and that his report could change with new information. (Rec. 1305, pg. 232).

18. Leigh obtained her own fire expert, Mr. Fred King, who was of the opinion that the earlier investigation failed to properly eliminate any and all accidental sources for the fire to be considered intentional under NFPA Guidelines. (Rec. 68) Mr King opined that the fire, was a flashover fire, and that the heat build up of this nature, and the sag in the mattress springs, was a “classic indication of a mattress fire” or a fire originating in overstuffed furniture. (Rec. 68). He also found that there was a likely cross contamination of the debris hit on by the accelerant dog. (Rec.68).

19. According to the fire marshall, the condition of the home had nothing to do with the cause of the fire and was not a factor in the fire. (Rec. 1305, pg. 224). Mr. Weinheimer only saw inside the house for five minutes through a screen door. (Rec. 1305, pg. 195) He did not have authority to condemn the house and never told Leigh that he would close the home to occupancy, but eluded that possibility. (Rec. 1305, pg. 196-197). If a home is closed to occupancy, the owner can still go into the home to remodel and make repairs. This is encouraged to fix any problems. (Rec. 1305, pg. 196).

20. The dog handler, Rex Nelson, in his report indicated that he had the mattress springs removed before he went in with his dog (Rec. 1305, 241) and that the dog hit was in the northeast area of the room, not the middle of the room (Rec. 1305, pg.

46). He indicated that his report may be off because he wasn't sure which way the home faced. (Rec. 1305, pg. 247). He did not personally bring the debris or other samples out to test them; and when they were brought out they were placed on a plywood board. He did not preserve the part hit on, to determine what it was. (Rec. 1305, pg. 247-249).

SUMMARY OF ARGUMENT

The trial court pushed and effectively cut an eight day jury trial down to two days. This prejudiced both parties, and prevented the Plaintiff the opportunity to present all of the evidence in her case.⁶ The court, well aware that Plaintiff had a fire expert scheduled to testify as to the cause and origin of the fire (whose appearance had been moved up several days at the court's request) erred in dismissing the case by directed verdict, before the close of Plaintiff's evidence.

Furthermore, on a motion for directed verdict involving a jury trial, the moving party must show that no issues of fact were presented in the case for the jury to decide. In this case, numerous issues of fact were presented for the jury to decide regarding the cause and origin of the fire. Including the testimony of the insured, Leigh, that she didn't start the fire, as well as Tim Hardy and Brandon Yates, who were both in the room where the fire started, a few hours earlier, with friends drinking, smoking and

⁶The court indicated that the case would end on the third day of trial, no matter what. This prejudiced both parties, by not allowing Plaintiff's fire expert to testify on Thursday, or Defendant's expert, Mr. Freeman, to testify on Friday.

lighting candles on several mattresses. The Sandy Fire Marshall indicated that it was a flashover fire, and could have been a mattress fire. He could not determine the source of ignition, but never talked to the boys that were in the home that night, although he indicated that this information would be important and could change his report. He did not have the part hit on, didn't know what it was, and didn't have any lab results regarding the part. Rex Nelson contradicted the location where the fire started, saying it started in the northeast area of the room. He did not personally handle the debris or part hit on, and failed to preserve any evidence for trial. The investigator Scott Bebee claimed that Leigh told him she was at the home the night of the 25th instead of the 24th. He also testified as to Leigh's financial condition, and the results of his background check on Leigh, to raise a possible financial motive for starting the fire. Mr. Weinheimer testified regarding the condition of the home and the possibility of it being closed to occupancy. This evidence presents numerous issues of fact for the jury to decide regarding not only the cause of the fire, but the involvement and possible motive of the insured to start the fire, precluding a directed verdict.

The court indicated that no evidence regarding the cause of the fire was presented because Plaintiff had not called her expert witness. However, expert testimony is not necessary for a party to put on evidence and present issues of fact for a jury to

decide regarding the cause of a fire. Furthermore, expert testimony was not needed in this case for the Plaintiff to present issues of fact for the jury to decide regarding the cause of the fire in her home, and particularly *her involvement*, or lack thereof, in the fire.

Moreover, the question as to whether Plaintiff was entitled to payment for her fire damage under the Policy, *i.e.*, her *prima facie* case, was an admitted fact at trial. This was agreed and stipulated to by the Defendant at trial and ruled as an admitted fact by the court. This was not the issue being tried to the jury. The issue being tried was whether or not the Plaintiff intentionally set or arranged the fire, thereby falling under the Policy's Intentional Act Exclusion, relied on by the Insurance Company in refusing payment. (Trial Ex. 16). Once the Insurance Company admitted that the Plaintiff was otherwise entitled to coverage under the Policy, the burden shifted to the Insurance Company to prove arson as its affirmative defense. The burden is not on the insured to prove disprove arson, *i.e.* that the fire was "accidental." Furthermore, under the Policy at issue in this case (for Plaintiff's breach of contract claim) the determinative issue is not whether or not the fire was "accidental;" but rather, whether Leigh, as the insured, directly caused, or arranged the fire.⁷

⁷Even if the jury found the fire was not "accidental," the jury could still find that the Plaintiff is entitled to payment under the Policy, if it believed that the Plaintiff, *herself*, did not directly cause or arrange for the fire.

In addition, when all of Plaintiff's witnesses were not available to testify, including her expert, the Insurance Company (without objection or making a motion to dismiss on the evidence then presented) elected to proceed with its own evidence and witnesses, including Mr. Lyman who testified as a fire expert regarding the cause and origin of the fire.⁸ Therefore, even if Mr. King was only a rebuttal witness, Plaintiff was still entitled to put him on as a rebuttal witness to Mr. Lyman's testimony. Mr. King's report was submitted in response to Mr. Lyman's investigation and before, Mr. Freeman was even designated as a witness or filed his report.

Plus, as stated above, even without the testimony of Mr. King as a fire expert, the testimony of the other witnesses, on direct and cross-examination, easily raises issues of fact regarding the cause and origin of the fire, the possible motivation of the insured to set or arrange the fire, and the insured's actual involvement in the start of the fire, for the jury to decide. All these facts and inferences on Defendant's Motion for Directed Verdict, must be viewed in favor of the Plaintiff. Numerous issues of fact were presented to the jury regarding the cause of the fire and Leigh's involvement in the fire; therefore, the Motion for Directed Verdict should have been denied.

⁸The Insurance Company cannot complain, as it argued later, that Mr. King should have testified earlier, when it had no objection to proceeding with its own witnesses and fire expert, out of turn, while waiting for Mr. King to arrive from out of town, to testify.

Finally, the court indicated that it was dismissing the matter pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. Rule 41(b) does not apply to jury trials. The court's dismissal pursuant to Rule 41(b) usurped the jury of its exclusive fact finding prerogative; and such dismissal based on Rule 41(b) should not be allowed to stand.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE BAD FAITH CLAIM ON SUMMARY JUDGMENT WHEN MATERIAL ISSUES OF FACT WERE PRESENT.

The determination as to whether there is a "fairly debatable" defense under the facts and circumstances is usually a question of law. *Billings v. Union Bankers Inc. Co.*, 918 P.2d 461, 464 (Utah 1996). However, when there are factual questions as to coverage, this is a question for the jury to decide. *Billings v. Union Bankers Inc. Co.*, 918 P.2d 461, 466 (Utah 1996).

In this case there were numerous factual questions presented on the motions for summary judgment that should have been left for a jury to decide, regarding the actions of the Insurance Company, its investigation, and its denial based on arson. For example, the insurance investigator, Mr. Bebee testified he thought the fire was intentionally set because no one was home at the time and that neighbors going to work in the morning reported the fire. He also did not talk to the boys who were in the home that

night. This is not a sufficient investigation to deny coverage, and a jury could find that this constituted bad faith on the part of the Insurance Company. At a minimum, this matter should not have been dismissed as a matter of law, but should have been left for the jury to decide. *Id.*

II. THE TRIAL COURT ERRED IN NOT ALLOWING PLAINTIFF'S EXPERT TO TESTIFY WHEN HE WAS PROPERLY DESIGNATED AND SCHEDULED TO APPEAR

A party has a right to call witnesses, including expert witnesses to testify on its behalf at trial. The trial court's refusal to allow Plaintiff's expert, Mr. Fred King, to testify as scheduled, and then dismissing Plaintiff's case, due to Plaintiff's failure to provide expert testimony regarding the cause of the fire, was an abuse of discretion, and was substantially prejudicial to the Plaintiff. *Turner v. Nelson*, 872 P.2d 1021 (Utah 1994). The court asked the Plaintiff several times, if Plaintiff rests, and the Plaintiff explained each time that her expert was coming from Colorado to testify. In fact, at the court's request, Mr. King was contacted during a noon recess, and his appearance was moved up to Thursday at noon. (This was only the third day of a scheduled eight day jury trial.) The court indicated to Plaintiff and stated on the record that Thursday at noon would be acceptable to the court; that Mr. King would be heard Thursday at noon, the case argued and then sent to the jury. (Rec. 1305, pg. 252-253).

Under Rule 50(a) of the Utah Rules of Civil Procedure governing motions for directed verdicts, it requires that the motion for directed verdict not be made until “at the close of evidence offered by an opponent.” The court in this case erred in granting the Defendant’s Motion for Directed Verdict before the close of Plaintiff’s evidence. The court knew that Plaintiff’s expert was to testify at noon that same day, and had previously indicated to the Plaintiff that this would be acceptable. The Defendant also knew that Plaintiff’s expert was scheduled to testify and that Plaintiff had not reached the close of her evidence. In fact, the Defendant asked the court if the Plaintiff had rested, and the court indicated “of course he hasn’t. Because he hasn’t got all of his witnesses here.” (Rec. 1305, pg. 253).

The trial court erred when it refused to allow all of Plaintiff’s witnesses, including her expert to testify, when the court knew that he was properly designated and he was scheduled to appear to testify on her behalf that same day; as the court had previously approved on the record. Furthermore, the court knew that Plaintiff had not rested, because all of Plaintiff’s witnesses had not testified.

III. THE BURDEN IS ON THE INSURANCE COMPANY TO PROVE ARSON AS ITS AFFIRMATIVE DEFENSE.

The issuance of an insurance policy for the loss, and the receipt of premiums on the policy, establishes the *prima facie* liability of the insurance company. *Fox v. Allstate Insurance Co.*, 453 P.2d 701, 706 (Utah 1969); *Peterson v. Western Casualty and Surety Co.*, 425 P.2d 769 (Utah 1967). In this case, Plaintiff testified that she had a fire insurance Policy on her home, that she had made all the premium payments, and that the fire was a covered catastrophe under the Policy, thus entitling her to payment for her fire damage under the Policy. This was admitted by the Insurance Company, and recognized by the court as an admitted fact. (Rec. 1304, pg. 23). Plaintiff made a *prima facie* case for wrongful denial; and this was not even an issue being tried in the case. The issue being tried was whether or not Plaintiff intentionally set or arranged the fire in order to justify the Insurance Company's refusal to pay, relying on the Policy's exclusions, as set forth in the Insurance Company's denial letter, dated January 31, 2002, and admitted into evidence. (Trial Exhibit 16).

Therefore, Plaintiff did meet her *prima facie* case to show her entitlement to recover under the Policy; and the burden was on the Insurance Company to prove arson as its affirmative defense. In *Horrell vs Utah Farm Bureau Inc. Co.*, 909 P.2d 1279 (Utah App. 1996) this Court held that the burden of proving arson is on the insurance company

and not the insured. In this case, the trial court by requiring the Plaintiff to disprove arson, *i.e.*, that the fire was “accidental”, improperly placed the burden of proving arson on the insured. *Id.*

Furthermore, there is only an exclusion if the fire is intentionally set or arranged by the insured. Therefore, whether the fire was “accidental” is not determinative as to Plaintiff’s recovery under the Policy; and thus, it is not necessary to prove the fire was “accidental” to establish a *prima facie* case for recovery under the Policy. In other words, the jury could have found that the fire was not “accidental” based on the testimony at trial, but still could have awarded Plaintiff her recovery under the insurance Policy, if the jury believed that *she* did not intentionally set or arrange for the fire in her home. The trial court’s ruling that the Plaintiff had the burden to show the fire was “accidental” to recover under the Policy, was clearly an error in the law.

IV. EXPERT TESTIMONY IS NOT NECESSARY FOR AN INSURED TO RAISE ISSUES OF FACT AS TO THE CAUSE OF A FIRE FOR THE JURY.

Even if the trial court properly excluded Plaintiff’s expert from testifying, expert testimony is not necessary to put on evidence to create an issue of fact for a jury to determine whether or not a fire was accidental. *Bear River Mutual Ins. Co. v. Williams*, 2006 P.3d (2006 Ut. App. 500). Even if one party does elect to put on expert testimony

that a fire was intentionally set; the opposing party is still not required to put on expert testimony that the fire was accidental, in order to raise issues of fact for the jury. *Id.* See also *Neely v. Bennett*, 51 P.3d 724 (Ut.App. 2002) (failure to have expert testimony regarding causation does not establish causation as a matter of law, so as to allow a directed verdict against a party). Furthermore, in determining the cause of a fire, a jury may elect to give no weight at all to an expert's testimony. See *Dixon v. Stewart*, 658 P.2d 591, 597 (Utah 1982).

Therefore, the Plaintiff was not required to put on expert testimony that the fire was "accidental" in order to present an issue of fact to the jury regarding the cause and origin of the fire. The jury could have totally disregarded the testimony of Mr. Lyman regarding the origin of the fire, or could have given very little weight to his belief that the fire was intentionally set, since he based his finding on no other legitimate ignition source being known, when he did not talk to the boys in preparing his report, although he believed their information would be important, and could change the findings in his report. Certainly the Plaintiff would not be required to put on expert testimony regarding her lack of any financial motivation to set her home on fire; and her lack of any involvement in the fire. The court erred in ruling that the lack of expert testimony prevented the jury from considering the above factual issues.

V. WHEN THE DEFENDANT ELECTS TO PUT ON EVIDENCE IN SUPPORT OF ITS AFFIRMATIVE DEFENSE; THE PLAINTIFF IS ENTITLED TO PUT ON EVIDENCE IN REBUTTAL.

Where a Defendant is allowed to introduce evidence of an affirmative defense, the Plaintiff, as a matter of right; is entitled to introduce evidence in rebuttal to such affirmative evidence. *Astill v. Clark*, 956 P.2d 1081 (Ut.App.1998). In this case, after Plaintiff had no more witnesses available to testify, the Defendant, without objection, elected to proceed with its own evidence regarding its affirmative defense of arson. This was done voluntarily, knowing that the Plaintiff had not finished with her witnesses, and specifically that Plaintiff still intended to call her fire expert, Mr. King.

Therefore, since the Defendant elected to put on a fire expert, Mr. Lyman, to testify that the fire was intentionally set, and Mr. Nelson, the dog handler regarding his investigation of the fire, before moving for directed verdict; the Plaintiff had the right to put on Mr. King in rebuttal to this testimony (even if Mr. King was only listed as a rebuttal witness); and the trial court erred in not allowing Mr. King to testify in rebuttal to the testimony of Mr. Lyman and Mr. Nelson. *Id.* at 1087

VI. WHEN A DEFENDANT ELECTS TO PROCEED WITH ITS AFFIRMATIVE DEFENSE BEFORE SEEKING A DIRECTED VERDICT IT WAIVES ITS RIGHT TO RELY SOLELY ON EVIDENCE IN PLAINTIFF'S ALLEGED CASE IN CHIEF AND ALL EVIDENCE OFFERED IS AVAILABLE FOR THE JURY'S CONSIDERATION.

When a Defendant proceeds to put on evidence in support of its defense or justification after the Plaintiff's evidence rather than seeking a directed verdict; the defendant waives his right for a directed verdict based solely on the evidence in plaintiff's alleged case in chief, and all evidence offered is available for the jury's consideration.

State v. Stockton, 310 P.2d 398 (Utah 1957).

Since the Defendant in this case elected to proceed with its case and put on evidence of its affirmative defense of arson, without objection; and before seeking a directed verdict, all evidence offered is available for the jury's consideration. *Id.* Therefore, with all the above evidence being presented in the case, sufficient issues of fact were presented to the jury regarding the cause of the fire, Plaintiff's financial situation and possible motivation to set the fire, and her direct involvement in the fire.

For instance, Plaintiff testified that she was not at all involved in the start of the fire. The Sandy Fire Marshall, Mr. Lyman, testified that he thought the fire was intentionally set. Tim Hardy and Brandon Yates, testified that they were in the home that night drinking, lighting candles, and smoking cigarettes and marijuana on two mattresses.

Mr. Lyman, indicated that the fire was a flashover fire and could have started in one of the mattresses. He admitted that the information from the boys would have been important to his report, but that he did not talk to them. He also indicated that new information could change his report and his conclusion that the fire was intentionally set. Leigh testified that she was not there the night of the fire. The insurance investigator Scott Bebee testified that Leigh told him that she was there the night of the fire between 1:30 and 2:00 a.m., rather than the night before the fire; and he also testified as to the background check he did into Leigh's court records and financial situation as a possible motive for setting the fire. Mr. Weinheimer also testified as to the condition of the house, which was countered by the testimony of Mr. Lyman that the condition of the house had nothing to do with the fire; and the possibility of closing the home to occupancy, which was countered on his cross-examination, and by Leigh's testimony.

Basically all of the witnesses testified in this trial, except for Plaintiff's fire expert and Defendant's second fire expert, Mr. Freeman. All of the evidence offered by these witnesses, including the exhibits admitted into evidence at trial, are available for the jury's consideration in this case. All of this evidence is more than sufficient to raise an issue of fact regarding the cause of the fire and Plaintiff's involvement, or lack thereof, in the fire, to preclude a directed verdict for the Defendant.

**VII. SUFFICIENT EVIDENCE WAS INTRODUCED TO
RAISE MATERIAL ISSUES OF FACT FOR THE JURY
TO DECIDE, PRECLUDING A DIRECTED VERDICT.**

On a motion for directed verdict the moving party has the very difficult burden of showing that the party with the burden of proof has failed to raise any questions of material fact, and the court should deny the motion when any evidence exists raising such a question, “no matter how improbable the evidence may appear.” *Alta Health Strategies, Inc., v. CCI Mechanical Serv.*, 930 P.2d 284 (Ut.App. 1996)(emphasis added).

On a motion for directed verdict the court is not to weigh the evidence or determine its probability, but it is only to determine if some evidence exists to create a material issue of fact.⁹ *Id.*

Given all the evidence presented in this case regarding the cause of the fire, Plaintiff’s involvement in the fire, or lack thereof, a possible motive to set the fire, as well as, the alleged unexplained circumstances regarding the fire, as set forth above; numerous issues of material fact were presented for the jury to decide, precluding a directed verdict for the Defendant.

⁹The court in its ruling on directed verdict does not address the evidence that was presented by the witnesses, the documents admitted into evidence, or if the court even considered such evidence. (Rec. 1200-1201).

**VIII. THE TRIAL COURT ERRED IN RULING ON THE
MOTION FOR DIRECTED VERDICT BEFORE THE
CLOSE OF PLAINTIFF'S EVIDENCE.**

Rule 50(a) of the Utah Rules of Civil Procedure provides that a motion for directed verdict may be made *at the close of the opposing party's evidence*. It was known to the Defendant and the court, that Plaintiff still intended to call its expert Mr. King, to testify regarding the cause and origin of the fire. Mr. King was scheduled to testify Thursday at noon, which was acceptable to the court, as stated on the record. The trial court erred and greatly prejudiced the Plaintiff in ruling that Plaintiff's expert would be able to testify at noon on Thursday, and then granting Defendant's Motion for Directed Verdict on Thursday morning, before the close of Plaintiff's evidence.

The Defendant also waived any right to claim that Mr. King should not be allowed to testify. The Defendant waived this right, because when Mr. King was not originally available to testify with Plaintiff's other witnesses, the Defendant agreed to call its own witnesses and proceed with its defense, out of turn, and before Mr. King would be available to testify. If the Defendant had an objection to proceeding in such a manner, it should have raised such objection at the time. Rather, the Defendant indicated that it had no objection to proceeding with its witnesses and allowing Mr. King to testify later.

The court specifically asked if the Plaintiff rests, to which Plaintiff replied that she still had her fire expert, Mr. King, coming from out of state to testify on Friday. The court requested that he be contacted to move this time up, which he was, and he was scheduled to appear Thursday at noon. The court indicated to the Plaintiff that this would be satisfactory, and that the case would proceed, with Mr. King testifying at noon on Thursday. The court never indicated that Mr. King had to be there earlier to testify, or that the case would be dismissed without his testimony. (This was only the second day of a eight day trial). The court should have allowed Mr. King to testify and the Plaintiff to complete her evidence, before ruling on Defendant's Motion for a Directed Verdict.

IX. THE TRIAL COURT ERRED IN DISMISSING THE CASE PURSUANT TO RULE 41(b) WHICH DOES NOT APPLY TO JURY TRIALS, BUT TO BENCH TRIALS.

The trial court dismissed Plaintiff's case in the middle of a jury trial, relying on Rule 41(b) of the Utah Rules of Civil Procedure. Rule 41(b) URCP applies only to bench trials, not jury trials. Rule 41(b) should not be used in jury trials and should not be confused with a motion for directed verdict. *Grossen v. DeWitt*, 982 P.2d 581 (Ut.App. 1999). Under Rule 41(b) the trial court may not usurp the jury's fact-finding role. *Id.*

The court erred by dismissing Plaintiff's jury trial, based on Rule 41(b) of the Utah Rules of Civil Procedure, and therefore, the Directed Verdict must be set aside.

CONCLUSION

An issue of fact remained regarding the Insurance Company's investigation of the fire and whether it was conducted in good faith. The bad faith claim should have remained for the jury to decide at trial.

Sufficient evidence was introduced at trial to raise issues of fact for the jury to decide regarding the cause of the fire, as well as, Plaintiff's involvement, or lack thereof, in the fire. Considering that such evidence exists, which is all that is necessary to overcome a motion for directed verdict; the trial court erred in granting the Defendant's Motion for Directed Verdict.

Furthermore, expert testimony was not required to present issues of fact for the jury to consider, in determining the cause and origin of the fire, and certainly not as to the Plaintiff's alleged motivation and involvement, or lack thereof, in the start of the fire.

Plaintiff did put on evidence and did establish a *prima facie* case for breach of the Insurance Policy, i.e. that the Policy was in effect and premiums paid, which the Insurance Company stipulated to at trial, and the court ruled as an admitted fact. This was sufficient to place the burden of proving arson on the Insurance Company. It is not the insured's burden to disprove arson, i.e, that the fire was "accidental," to recover for breach of the Insurance Policy; and the trial court erred in placing this burden on the Plaintiff when considering the Defendant's Motion for Directed Verdict.

Moreover, the trial court erred when it did not allow Plaintiff's expert to testify in rebuttal to Defendant's expert witnesses, which Defendant elected to put on, without objection or moving for a directed verdict on the evidence then presented. The trial court erred by not allowing Plaintiff's expert to testify when the court previously ruled that Plaintiff's expert would be able to testify at noon on Thursday, before Plaintiff rested her case. The court erred when it granted Defendant's Motion for Directed Verdict, Thursday morning, when both the court and Defendant knew that Plaintiff's expert was coming to testify later that day and Plaintiff had not rested her case.

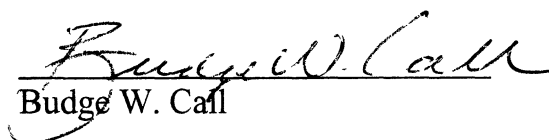
In addition, the court failed to consider all of the evidence presented, including Plaintiff and her witnesses, Defendant's witnesses, and all the reports, and other documents admitted into evidence, in determining if issues of fact were present.

Finally, the trial court erred when it dismissed the case in the middle of a jury trial, based on Rule 41(b) of the Utah Rules of Civil Procedure. Rule 41(b) does not apply to jury trials, and its application took away the jury's fact finding prerogative.

Based upon the foregoing, the Directed Verdict should be set aside; and the case remanded back for a jury trial on the issues.

DATED this 28 day of June, 2007.

BOND & CALL L.C.


Budge W. Call

MAILING CERTIFICATE

I hereby certify that on the 28 day of June 2007 I did mail, postage prepaid, _____ true and correct copies of the foregoing **BRIEF OF THE APPELLANT**, to the following:

Barbara Maw
515 East 100 South, Suite 525
Salt Lake City, UT 84102

A handwritten signature in cursive script, reading "Jodi Hamuy", is written over a horizontal line.

ADDENDUM

- A. Minute Entry on Cross Motions for Summary Judgment, dated August 7, 2006. (Rec. 935-941)
- B. Judgment on Directed Verdict, entered December 21, 2006. (Rec. 1209-1210).
- C. Motion for New Trial pursuant to Rule 59(a). (Rec. 1226-1228).
- D. Minute Entry denying Motion for New Trial, February 28, 2007. (Rec. 1291-1294).
- E. Notice of Appeal, filed March 29, 2007. (Rec. 1296-1297).

ADDENDUM A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEIGH YOUNG, Plaintiff, vs. FIRE INSURANCE EXCHANGE, Defendant.	MINUTE ENTRY Case No. 040915146 Hon. J. DENNIS FREDERICK August 7, 2006
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The above-entitled matter comes before the Court pursuant to Defendant's Motion for Partial Summary Judgment and Plaintiff's Cross Motion for Summary Judgment. The Court heard oral argument with respect to the motions on July 7, 2007. Following the hearing, the matters were taken under advisement.

The Court having considered the motions, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the following ruling.

On July 26, 2001, at approximately 6:45 a.m., a fire occurred at Plaintiff's residence on 950 South Marble Street in Sandy, Utah. Plaintiff was not home at the time of the fire. On the date of the fire, Plaintiff had fire insurance coverage with Defendant.

Defendant initially made payments under the policy. However, approximately six months after the fire, Defendant refused to make any further payments, claiming no further obligation under Section I - CONDITIONS paragraph 11, Intentional Acts. Defendant claimed the fire was intentionally caused or arranged by the Plaintiff in

order to obtain insurance benefits. Defendant also refused to proceed under the policy based on the GENERAL CONDITIONS, claiming that the insured willfully concealed or misrepresented information relating to the circumstances surrounding the fire.

In support of its motion, Defendant argues that under the circumstances of this case, Plaintiff's entitlement to any benefits under the insurance policy is "fairly debatable." Consequently, contends Defendant, it cannot be liable for breach of the implied covenant of good faith and fair dealing as a matter of law. Further, argues Defendant, it is undisputed Plaintiff's bad faith claim is a first-party or contract claim, and that Plaintiff has not asserted an independent tort. As such, asserts Defendant, Plaintiff is not entitled to punitive damages as a matter of law.

Specifically, argues Defendant, the information it possessed, as a matter of law, created factual issues as to the claim's validity. This information, asserts Defendant, includes: (1) the opinions of two cause and origin experts that the fire was intentionally set; (2) an admission by Plaintiff to Defendant that she was at the scene the morning of the fire, corroborated by a neighbor who placed her and her husband's vehicle at the scene that morning; (3) conveniently, nobody was staying at the home at the time of the fire; (4) the dogs that were normally kept in the

garage were outside in the kennel; (5) the uninhabitable condition of the home such that, in all probability, it would have been condemned and her daughter would be taken into protective custody; (6) the lack of finances to remedy the condition of the home; (7) the failure to meet with the representative of the Board of Health after many attempts until the morning of the fire; (8) the presence of an accelerant; and (9) financial difficulties, including many judgments and tax liens.

Plaintiff opposes the motion and brings her own motion for summary judgment arguing the allegations of Defendant do not present a factual issue as to the validity of Plaintiff's claim and there is no arguable reason from these alleged facts that the insured would set fire to her home. According to Plaintiff, she had substantial equity in her home that had recently been quit-claimed to her by her ex-husband. Moreover, asserts Plaintiff, her ex-husband was to continue the mortgage payments in lieu of his court-ordered support obligations. It is Plaintiff's position there was no financial reason for her to set fire to the home.

Additionally, contends Plaintiff, there is no evidence that she had any opportunity that morning to set the fire and all the evidence indicates that she was not home when the fire started.

Indeed, asserts Plaintiff, there is also no evidence that she had any information or knowledge on how to commit arson.

Further, argues Plaintiff, there is no evidence that her daughter was to be taken into protective custody and, in fact, her daughter was in Idaho with her father at the time.

According to Plaintiff, setting fire to the home would not remedy any decision to take her daughter into protective custody, nor would it remedy any chance that the home might be closed to occupancy. Indeed, asserts Plaintiff, such would guaranty the home's closure.

With regard to punitive damages, Plaintiff claims she has alleged a claim independent from the Breach of Contract claim for Bad Faith in the Defendant's conduct and actions in this case and a claim independent of the contract for breach of duties beyond the contract is recognized in Utah.

In sum, it is Plaintiff's position that sufficient facts have not been raised which create an issue of fact that Plaintiff intentionally set or arranged the fire. Indeed, argues Plaintiff, the cause of the fire remains unknown and based upon the facts of this case, a jury would be left to decide the matter based upon speculation and conjecture. Further, asserts Plaintiff, no facts have been discovered that Plaintiff intentionally misrepresented

the facts, known to her, sufficient to void the insurance policy under Utah law.

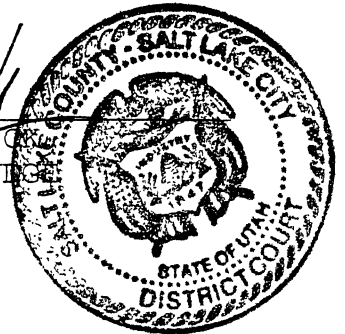
Turning, initially, to Defendant's Motion for Partial Summary Judgment, under Utah law, where a claim is "fairly debatable," the insurer acts reasonably in denying that claim and cannot be found to have acted in bad faith. A claim is "fairly debatable" "[if] the evidence presented creates a factual issue as to the claim's validity." *Prince v. Bear River Mutual Ins. Co.*, 56 P.3d 524, 535 (Utah 2002). After reviewing the record in this matter, the Court finds the evidence presented creates a factual issue as to the claim's validity and, consequently, there exists a debatable reason for denial, thus eliminating the bad faith claim. See *Callioux v. Progressive Ins. Co.*, 745 P.2d 838, 842 (Utah Ct. App. 1987).

As to Plaintiff's cross motion, to establish a prima facie case of arson for purposes of denying coverage under an insurance policy, the insurer must show: (1) that the fire was incendiary in nature, (2) the insured had a financial motive for setting the fire, and (3) unexplained surrounding circumstantial evidence implicated the suspect. See *Lawson v. State Farm Fire and Cas. Ins. Co.*, 585 P.2d 318 (Colo. App. 1978). In the instant case, disputed issues of fact surrounding these elements preclude summary judgment as requested by Plaintiff.

Based upon the forgoing, Defendant's Motion for Partial Summary Judgment is granted. Plaintiff's Cross Motion for Summary Judgment is, respectfully, denied.

DATED this 8th day of August, 2006.


J. DENNIS FREDERICKS
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 040915146 by the method and on the date specified.

METHOD NAME

Mail	BUDGE W CALL ATTORNEY PLA 8 EAST BROADWAY SUITE 720 SALT LAKE CITY, UT 84111
Mail	BARBARA L MAW ATTORNEY DEF 515 EAST 100 SOUTH SUITE 525 SALT LAKE CITY UT 84102

Dated this 8th day of Aug., 2006.


C. Bowerley
Deputy Court Clerk

ADDENDUM B

FILED DISTRICT COURT
Third Judicial District

DEC 21 2006

SALT LAKE COUNTY

By  Deputy Clerk

BARBARA L. MAW #4081
Law Offices of Barbara L. Maw, P.C.
515 East 100 South, Suite 525
Salt Lake City, Utah 84102
Telephone: (801) 533-9700
Fax: (801) 533-8111
Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEIGH YOUNG, aka HARDY,

Plaintiff,

vs.

FIRE INSURANCE EXCHANGE,

Defendant.

**JUDGMENT ON DIRECTED
VERDICT**

Case No. 040915146

Judge J. Dennis Frederick

The trial of the above-entitled matter was held on November 28, 29 and 30, 2006, the Honorable J. Dennis Frederick presiding before an 8-person jury.

Plaintiff Leigh Hardy Young was present and represented by counsel, Budge Call of the law firm of Bond & Call. Defendant Fire Insurance Exchange was present and represented by counsel, Barbara L. Maw of the law firm of Barbara L. Maw, P.C.

The parties presented opening statements. Plaintiff put on evidence by way of witnesses, documents and exhibits. Defendant also put on evidence by way of witnesses, documents and exhibits. At the conclusion of Plaintiff's case, Defendant Fire Insurance Exchange made a Motion for Directed Verdict pursuant to Utah Rules of Civil Procedure, Rule 50(a). The Court

granted Defendant's Motion for Directed Verdict, finding that Plaintiff had the burden of proving entitlement to insurance coverage or that Fire Insurance Exchange breached the contract of insurance. Having failed to put on any evidence to support her position that Fire Insurance Exchange breached the contract by showing the fire was accidentally set (reserving her cause and origin expert for rebuttal), Plaintiff failed to establish that her claim for benefits was wrongfully denied or that Fire Insurance Exchange breached the insurance contract.

Pursuant to all of the foregoing, and good cause appearing, now, therefore,

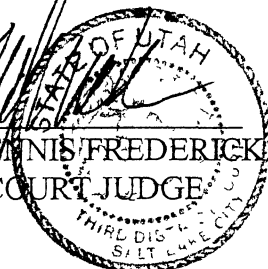
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be and the same is hereby entered as follows:

1. Judgment of no cause of action is hereby entered in favor of Fire Insurance Exchange and against Plaintiff Leigh Hardy Young, and the Complaint of Plaintiff against Fire Insurance Exchange and all claims of Plaintiff contained therein or in any way arising therefrom are hereby dismissed with prejudice, on the merits, no cause of action.
2. Defendant is entitled to its costs. Defendant requests that the Clerk of the Court enter its costs in the amount of \$ 4,922.41.

DATED this 21st day of Dec-, 2006

BY THE COURT:

HONORABLE J. DENNIS FREDERICK
THIRD DISTRICT COURT JUDGE



ADDENDUM C

Budge W. Call (5047)
8 East Broadway, Suite 720
Salt Lake City, Utah 84111
Telephone (801) 521-8900
Facsimile (801) 521-9700

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEIGH YOUNG, aka HARDY,

)

Plaintiff,

)

**MOTION FOR NEW TRIAL
PURSUANT TO RULE 59(a)**

vs.

)

FIRE INSURANCE EXCHANGE,

)

Case No. 040915146
Judge J. Dennis Frederick

Defendant.

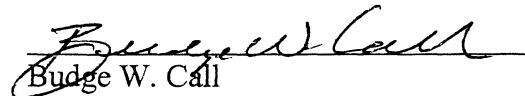
)

COMES NOW the Plaintiff, Leigh Young, aka Hardy, by and through counsel and hereby move the court for a new trial in the above captioned matter pursuant to Rule 59(a) of the Utah Rules of Civil Procedure.

The Trial Court has discretion to grant a new trial under one of the circumstances specified in Rule 59(a) of the Utah Rules of Civil Procedure. *Moon Lake Electric Associates Inc. vs Ultrasystems Western Constructors Inc.* 767 P.2d 125 (Ut.App. 1988). The trial court's ruling on a motion for new trial is renewed under an abuse of discretion standard, *Crookston vs Fire Insurance Exchange*, 817 P.2d 789, 804 (Utah 1991).

Plaintiffs Motion for New Trial is based on Rule 59(a)(7) an “error in the law;”
and is supported by Plaintiff’s Memorandum in Support of Motion for New Trial, filed herewith.

DATED this 2 day of January, 2007


Budge W. Call
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 2nd day of January, 2007, I did mail, U.S. First Class,
postage prepaid, a true and correct copy of the foregoing, **MOTION FOR NEW TRIAL**, to the
following:

Barbara Maw
515 East 100 South, Suite 525
Salt Lake City, Utah 84102



Jodi Haney
Legal Assistant

ADDENDUM D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEIGH YOUNG, aka HARDY,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 040915146
vs.	:	
FIRE INSURANCE EXCHANGE,	:	
Defendant.	:	

The Court has before it a request for decision filed by the defendant seeking a ruling on the plaintiff's Motion for a New Trial. The Court notes that the defendant has requested oral argument on this Motion. Since the parties' written submissions adequately set forth their respective legal positions, a hearing on the plaintiff's Motion is not necessary. Therefore, having reviewed the moving and responding memoranda, the Court rules as stated herein.

In her Motion, the plaintiff seeks a new trial under Rule 59(a)(7) of the Utah Rules of Civil Procedure, which addresses rulings that are errors of law. The plaintiff asserts that during a jury trial in this matter, Judge Frederick, who was previously assigned to this matter, erred as a matter of law when he entered a Judgment on Directed Verdict against her. According to the plaintiff, Judge Frederick based this ruling on her failure to establish that the fire, for which she was seeking insurance coverage, was accidentally set. The plaintiff contends

that this ruling was erroneous for the following reasons: (1) The insurance company had the burden of proof to establish that the fire was intentionally set or arranged and therefore excluded under the policy; (2) the issue of whether the fire was "accidentally" set was not determinative and (3) that expert testimony was unnecessary to establish that the fire was accidental.

The defendant opposes the plaintiff's Motion, arguing that the plaintiff had the initial burden of establishing an entitlement to insurance coverage. The defendant maintains that since the plaintiff rested her case without presenting any expert testimony with regard to the cause and origin of the fire, Judge Frederick properly determined that she had not met her burden of proving that she was wrongfully denied coverage.

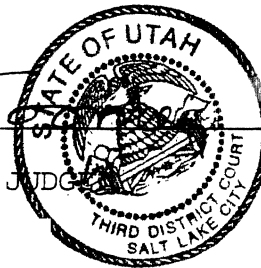
After considering the arguments, the Court determines that the plaintiff is not entitled to a new trial under Rule 59(a)(7) because Judge Frederick's directed verdict against her was not an error in law. The Court is satisfied that Judge Frederick appropriately allocated the initial burden of proof upon the plaintiff. As supported by the case law cited in the defendant's moving papers, the plaintiff/insured must first prove entitlement to insurance benefits before the defendant/insurance company has the burden of proving an exclusion (i.e. arson) as a defense. See e.g. Metric Construction Company v. St. Paul Fire and Marine Ins. Co., 2005 WL 2100929 (D. Utah) ("[T]he plaintiff has the burden of

proving that [its] loss comes within the coverage stated in the policy.") (citations omitted). The Court is not persuaded by the plaintiff's arguments that she met this burden by simply establishing that her insurance policy was in effect at the time of the fire. Rather, the plaintiff was required to put on evidence concerning the cause and origin of the fire. In the complete absence of such evidence, Judge Frederick correctly ruled that the jury could not be left to speculate on the cause of the fire and properly entered a direct verdict against the plaintiff. Accordingly, the plaintiff's Motion for New Trial is denied.

This Minute Entry decision will stand as the Order of the Court.

Dated this 28th day of February, 2007.

Kate A. Toomey
KATE A. TOOMEY
DISTRICT COURT JUDGE



YOUNG V. FIRE
INSURANCE EXCHANGE

PAGE 4

MINUTE ENTRY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 28 day of February, 2007:

Budge W. Call
Attorney for Plaintiff
8 E. Broadway, Suite 720
Salt Lake City, Utah 84111

Barbara L. Maw
Attorney for Defendant
515 East 100 South, Suite 525
Salt Lake City, Utah 84102

F. L. Westwood

ADDENDUM E

Budge W. Call (5047)
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Telephone (801) 521-8900
Facsimile (801) 521-9700

Attorney for Plaintiff

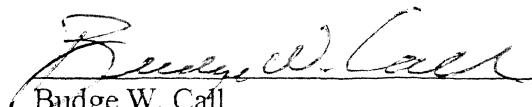
IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPT.

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LEIGH YOUNG, aka HARDY,)	
)	NOTICE OF APPEAL
Plaintiff/Appellant,)	
vs.)	
)	Case No. 040915146
FIRE INSURANCE EXCHANGE,)	Judge Kate A. Toomey
)	
Defendant/Appellee.)	

NOTICE is hereby given that the Plaintiff, Leigh Young, aka Hardy, hereby appeals to the Utah Supreme Court the Judgement on Directed Verdict entered on December 21, 2006, by this Court, including all preceding or interim orders, and the denial of Plaintiff's Motion for New Trial entered by the Court on February 28, 2007.

DATED this 29 day of March, 2006.


Budge W. Call
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that on the 30 day of March, 2007, I did mail, U.S. First Class, postage prepaid, a true and correct copy of the foregoing, **NOTICE OF APPEAL**, to the following:

Barbara Maw
515 East 100 South, Suite 525
Salt Lake City, Utah 84102



Jodi Haney
Legal Assistant