

2007

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

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

LEIGH YOUNG, aka HARDY,

Plaintiff/Appellant

vs.

FIRE INSURANCE EXCHANGE,

Defendant/Appellee.

Appellate Court No. 20070279

District Court No. 040915146

BRIEF OF DEFENDANT/APPELLEE FIRE INSURANCE EXCHANGE

**APPEAL FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE J. DENNIS FREDERICK PRESIDING**

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PARTIES TO THE PROCEEDINGS

The parties named in the Second Amended Complaint are Leigh Young a/k/a Hardy (Plaintiff) and Fire Insurance Exchange (Defendant). As such, the caption of the case on appeal accurately reflects the names of all parties to this appeal.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over Leigh Hardy's (Plaintiff) appeal from the grant of the Directed Verdict in favor of Fire Insurance Exchange (Defendant) and the denial of Plaintiff's Motion for a New Trial pursuant to Section 78-2a-3(2)(j), Utah Code Annotated. Notice of Appeal from the grant of Defendant's Motion for Partial Summary Judgment dismissing the bad faith claim has not been provided, depriving this Court of subject matter jurisdiction over this issue.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. **Issue:** Does the failure of Plaintiff to designate on the Notice of Appeal an appeal from the grant of Defendant's Motion for Partial Summary Judgment dismissing the bad faith claim deprive the Court of jurisdiction over the issue?

- (a) If the Court finds that the Notice of Appeal was sufficient, then was the dismissal of Plaintiff's claim for bad faith on partial summary judgment supported by the record? (Plaintiff's Argument I.)

Standard of Review: The Court "view[s] the facts and all reasonable inferences drawn therefrom in the light most favorable to [the non-moving party]." *State Farm Mutual Auto Ins. Co. v. Green*, 89 P.3d 97 (Utah 2003.)

Preservation for Review: This issue was not designated in the Notice of Appeal. If the Court finds the Notice of Appeal is sufficient, then this issue was preserved by Defendant's Motion for Partial Summary Judgment, Plaintiff's Opposition to that Motion for Partial Summary Judgment, Defendant's Reply, and the Court's Order granting partial summary judgment. (R.173-418; R.509-593; R.891-924; R.934-941; R.1296-1297.)

2. Issue: Did the trial court rule correctly in granting Defendant's Motion for a Directed Verdict? (Plaintiff's Argument VII.)
- (a) Does Plaintiff have the burden of proving that her loss is a covered loss under the policy (was accidental) before the burden shifts to the Defendant to raise any exclusion as an affirmative defense? (Plaintiff's Argument III.)
 - (b) Does Plaintiff have the burden of putting on expert testimony to show that the fire was accidentally set? (Plaintiff's Argument IV.)
 - (c) Was it appropriate for Defendant to make its Motion for Directed Verdict at the close of its case? (Plaintiff's Argument VIII.)
 - (i) By proceeding with its case, did Defendant waive its right to move for a Directed Verdict?¹ (Plaintiff's Argument VI.)
 - (d) Did the trial court err in granting Defendant's Motion for Directed Verdict pursuant to Rule 41(b) of the Utah Rules of Civil Procedure? (Plaintiff's Argument IX.)

Standard of Review:

Issue 2: "A trial court is justified in granting a directed verdict only if, examining all evidence in a light most favorable to the non-moving party, there is no competent evidence that would support a verdict in the non-moving party's favor." *Carlson Distributing Co. v. Salt Lake Brewing Co., L.C.*, 95 P.3d 1171 (Utah App. 2004).

¹ This issue was not preserved for review.

Issues 2(a), 2(b), 2(c), 2(c)(i), 2(d): The trial court's ruling is reviewed under a correctness standard. *Handy v. Union Pacific R. Co.*, 841 P.2d 1210, 1214 (Utah App. 1992.)

Preservation for Review: The above issues, with the exception of 2(c)(i) (waiver), are preserved for review by the grant of Defendant's Motion for a Directed Verdict. Issue 2(c)(i) was never preserved for review. (R.1188-1190; R.1209-1210; R.1221-1225; R.1226-1233; R.1238-1250; R.1251-1274; R.1291-1294; R.1304:98:13-25; 99:1-3; R.1305:176:18-21; 183:14-21; R.1311:3-8.)

3. Issue: Did the trial court wrongfully exclude Plaintiff's rebuttal witness from testifying in her "case-in-chief?" (Plaintiff's Argument II.)

(a) Should Plaintiff's rebuttal witness have been allowed to testify at the close of Defendant's case? (Plaintiff's Argument V.)

Standard of Review: A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. *Patey v. Lainhart*, 977 P.2d 1193 (Utah 1999); *Steffensen v. Smith's Management Corp.*, 862 P.2d 1342, 1347 (Utah 1993).

Preservation for Review: These issues were preserved for review at the time of the trial and the court's ruling granting Defendant's Motion for a Directed Verdict. (R.1305:172:1-2; 253:10-12, 18-20, 22-23; 254:1-8, 13-15; R.1311:3-8.)

CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

Defendant cites to the following: (1) Utah Rules of Appellate Procedure, Rule 24(a)(9); (2) Utah Rules of Appellate Procedure, Rule 3(d); (3) Utah Rules of Civil Procedure, Rule 41(b);

(4) Utah Rules of Civil Procedure, Rule 50(a); and (5) Utah Rules of Evidence, Rule 103(a) (*see* Addendum).

STATEMENT OF THE CASE

A. Nature of the Case/ Course of Proceedings.

This claim arises out of a July 26, 2001 fire at Plaintiff's home. As a result of that fire, Plaintiff filed a claim for structural damages and for damage to her personal property. Because it was thought the fire was intentionally set by or at the direction of Plaintiff, the claim was denied. Plaintiff then filed a Second Amended Complaint for breach of contract and bad faith. (R.11-15; R. Ex. 16.)

At the close of discovery, Defendant filed a Motion for Partial Summary Judgment on the bad faith claim arguing that this claim was "fairly debatable" and that it was entitled to partial summary judgment. Plaintiff filed an Opposition to Defendant's Motion, and Defendant filed a Reply. The trial court granted Defendant's Motion for Partial Summary Judgment dismissing the bad faith claim, finding that Plaintiff's claim was in fact "fairly debatable." (R.173-418; R.509-593; R.891-924; R.934-941.)

Simultaneously with Defendant filing its Motion for Partial Summary Judgment, Plaintiff filed a Motion for Summary Judgment [sic] on the breach of contract claim, Defendant filed an Opposition to Plaintiff's Motion, and Plaintiff filed a Reply. The trial court denied Plaintiff's Motion, finding that there were issues of fact for the jury. (R.419-421; R.422-508; R.594-818; R.822-890; R.934-941.)

The breach of contract claim was set for jury trial beginning November 28, 2006. On November 30, 2006, at the conclusion of Plaintiff's case and, after putting on its case at the trial

court's request, Defendant made a Motion for Directed Verdict, which the trial court granted. In granting that Motion for Directed Verdict, the trial court determined that Plaintiff had not sustained her burden of showing she was wrongfully denied insurance coverage, or that the fire was accidentally set. As such, Defendant's Motion for Directed Verdict was granted.

On January 2, 2007, Plaintiff filed a Motion for a New Trial. That Motion for a New Trial was denied on February 28, 2007. This appeal followed, specifically appealing from the grant of the Directed Verdict and the denial of the Motion for a New Trial.² (R.1188-1190; R.1209-1210; R.1221-1225; R.1226-1233; R.1238-1250; R.1251-1274; R.1291-1294; R.1311:3-8.)

B. Statement of Facts

1. Facts Relating to Both the Bad Faith Motion for Partial Summary Judgment and the Directed Verdict

(a) Background Information

On July 26, 2001, a fire occurred in the southeast [sic, northeast] basement bedroom of the home (9950 South Marble Street) owned by Plaintiff. As a result of that fire, Plaintiff claimed structural damage in the amount of \$123,750 and for personal property in the amount of \$74,250.³ (R.180 ¶1; R.1304:17:19-20; 22:22-25; 23:1,20-23; 45:24-25; 46:9-14.) That same day, Plaintiff's husband, Douglas Young, filed a claim with Defendant Fire Insurance Exchange for this loss. (R.1304:37:1-2; R.180 ¶2.) The home was insured by Defendant under Policy No. 06092-23-87, which the parties agreed was in effect at the time of the loss. (R.1304:23:8-25;

² Plaintiff has not briefed the appeal from the denial of a new trial and has therefore waived the right to do so.

³ The total amount of damages to the contents was approximately \$145,000. However, Plaintiff only filed a claim for the policy limits of \$74,250.

24:1; R.180 ¶3; R. Ex. 4) That policy contains specific provisions excluding coverage for intentional acts, fraud and misrepresentation.

SECTION I - CONDITIONS

...

11. *Intentional Acts.* If any **insured** directly causes or arranges for a loss to covered property in order to obtain insurance benefits, this policy is void. We will not pay you or any other **insured** for this loss.

GENERAL CONDITIONS

Applying To The Entire Policy

...

3. **Concealment or Fraud.** This entire policy is void if any insured has knowingly and willfully concealed or misrepresented any material fact or circumstance relating to this insurance before or after the loss.

(4th Edition Your Protector Plus Policy, Utah, pp. 14, 18.) (R.180 ¶4; R. Ex.4.)

At the time of the fire, Plaintiff was married to Douglas Young, whom she had married twice – the first time on April 15, 2001, and again on August 18, 2001. Family and friends were only aware of the August 18, 2001 marriage. (R.1304:61:3-7, 11-16, 62:1-6; R.181 ¶5.) Shortly after this fire, Mr. Young was incarcerated and is still in the federal penitentiary. (R.1304:75:14-16; R.182 ¶9.) Prior to marrying Mr. Young, Plaintiff was married to Brad Hardy (they were divorced in March of 2001). (R.1304:18:13-16, 21-22; 19:4-5; R.181 ¶6; R. Ex.1.)

Plaintiff has three children: David Elliott, Tim Hardy and Breigh Hardy. David Elliott (Shawn) was incarcerated at the time of the fire. (R.1304:73:1-2; R.181 ¶7.) Tim Hardy lived with Plaintiff in August or September of 2000 and then moved to Idaho to live with his father. At the time of the fire, he was visiting his mother, but staying at a friend's house. (R.1304:14:9-16; 72:16-23; R.181 ¶7(b).) Breigh Hardy was the only child living in the home at the time of the

fire. However, the week of the fire, she was with her father in Idaho. (R.1304:72:24-25; R.182 ¶7(c).)

At the time of their divorce in March of 2001, Brad Hardy was earning \$2,600 per month. (R.1304:60:7-20.) As part of the March, 2001 divorce settlement, Brad Hardy quit-claimed the home to Plaintiff, and also agreed to pay the mortgage on the home in the amount of \$696 per month in lieu of alimony and child support. At the time of the fire, Plaintiff was the sole owner of the home. (R.1304:19:2-5; 20:14, 17-20; 64:10-16; 82:25; 83:1-4; R.182 ¶8.)

Since 1999, and at the time of the fire, other than payment of the mortgage on the home as per the divorce decree, Plaintiff's only source of income was her Social Security/ Disability benefits in the amount of \$300 per month. (R.1304:60:11-20; R.182 ¶10; R. Ex.1.) Further, at the time of the fire, both she and her ex-husband, Brad Hardy, had outstanding tax liens and medical bills, and several judgments against them. (R.1304:65:10-19; R.183 ¶11.) After the fire, when she sold the home for approximately \$67,000, she used part of that money to pay off the tax liens, including those of Brad Hardy. (R. 1304:53:20-25; R.183 ¶11.)

(b) Pre-Fire Events

On July 13, 2001, approximately ten days prior to the fire, officers from the Sandy City Police Department were called to the home at 2:30 a.m. to investigate possible domestic abuse. (R.1304:66:16-19; 67:11-25; 68:1-4, 23-25; 69:1-6, R.183 ¶13; R. Ex.39.) When they arrived at the home, Breigh Hardy (13 years old) was very reluctant to let the officers into the home, stating "Our house is really messy," and "I don't want you to take me away because of my house." (R.183 ¶14; R. Ex.39.)

The officers described the house as having a pungent odor of cat urine and feces that was almost unbearable. The home had almost no furniture. There was a mattress on the living room floor with dirty blankets spread out. Dirty clothes were all throughout the house, with cats sleeping on some of them. The walls were badly damaged and the entire house was disorderly. The two back bedrooms on the main floor had about three feet of dirty clothes and other miscellaneous items covering the entire floor. There was no walking space in the bedrooms, and there was a strong fecal odor. The mess from the bedrooms spilled out covering half the main hallway in the home. The kitchen had rotten food on the counters and the floor. The bathroom toilet had brown water in the bowl and may not have been working. There was very little room to move about the house because of the dirty clothing. The driveway contained two vehicles packed full of miscellaneous items that appeared to have been parked in the same place for a long period of time. The yard was unkempt with tall, brown weeds. (R.183: ¶15; R. Ex.39.)

Because of the condition of the home and the concern about the minor child, the officers faxed their July 13, 2001 report to Craig Weinheimer of the Salt Lake County Board of Health. (R.1305:185:12-21; 186:17-25; 187:1; R.184 ¶16; R. Ex.39.) After reviewing this report, Mr. Weinheimer became concerned with the officers' description of the home and also of potential code violations. (R.1305:187:24-25; 188:1-8, R.184 ¶16; R. Ex.39.) Mr. Weinheimer attempted, on numerous occasions, to meet with Ms. Hardy. The first time he went to the Hardy home was on Friday, July 20, 2001. When he arrived, the front door was open and he could see inside the Hardy home. He noted the stairs were just bare wood with no floor coverings. There were many items stacked about. The house was cluttered with items and was generally in disrepair and unkempt. He also noted that the house had the very distinct odor of animal waste and rotting

garbage. (R.1305:188:14-25; 189:1-10; R.184 ¶16; R. Ex.39.) At that time, Ms. Hardy was leaving and she requested he return on Monday, advising him the house “will be just as bad on Monday.” (R.1305:190:3-15; R.184 ¶16; R. Ex.39.)

On Monday, July 23, 2001, Mr. Weinheimer telephoned Ms. Hardy, prior to going to the home, to confirm the inspection and expressed his concerns regarding the seriousness of the problem. A meeting was set for Wednesday, July 25, 2001 to inspect the premises. (R.1305: 189:18-25; R.184 ¶17.) As scheduled, Mr. Weinheimer went to the home on July 25, 2001, but nobody was home. Later that afternoon, he telephoned Ms. Hardy and advised her that this was a very serious matter and that “we need to conclude our business on Thursday or I may be required to close the home to occupancy without actually inspecting the property.” (R.1305: 191:11-22; R.184 ¶18.) A meeting was set for July 26, 2001 at 11:00 a.m. The fire was reported at 6:55 a.m. that very day, just prior to that meeting. (R.1305:193:2-5; R.184 ¶18.) Regardless, he was of the opinion, after observing the home through the front door, that “. . . the burden of proof had been met, and that it wasn’t fit to be occupied.” (R.1305:192:2-5; R.185 ¶19.)

Ms. Hardy claims that from July 21, 2001 through the morning of July 26, 2001, she was staying at the Travel Lodge with Doug Young. Breigh was with her father in Idaho, and Tim was at his friend’s home. (R.1304:25:16-17; 26:1-12; R.185 ¶20; R. Ex.37.)

Two days prior to the fire, on July 24, 2001, Ms. Hardy claims that she, Doug Young, Tim Hardy and Tim’s friend, Matt, went to Lagoon, where they remained until about midnight. The last time she claims that she and Doug were in the home was when they went back to the house on July 25, 2001 at approximately 1:30 a.m. to make sure the lights were on in the front room and the swamp cooler was on, as well as the oscillating fan in the room of origin. (R.1304:25:4-22; 74:5-

19; R.185 ¶21, 22, 23.) Plaintiff denied being at the home anytime on July 26, 2001, just prior to this fire, even though she told Mr. Beebe, the Defendant's claims representative, she was in the home on July 26, 2001 between 1:30 and 2:00 a.m. (R.1304:104:5-12, 20-21; 105:6-10; R.1305:205:10-11; R.186 ¶24; R.193 ¶39(b); R. Ex.37.) This was confirmed by a neighbor, Steve Johnson, who noted that Doug Young's vehicle was parked at the home between midnight and 2:00 a.m. on July 26, 2001. (R.190 ¶30(c); R. Ex.37.)

The fire occurred on July 26, 2001, and was reported at approximately 6:55 a.m. when it was first noticed. Plaintiff and Mr. Young were at the Travel Lodge and were not notified of the fire until 8:30 a.m. by her son Shawn's friend, Kelly. By the time she arrived, the fire had been contained. (R.1304:35:21-25; 36:1-2; R.186 ¶25.)

(c) Post-Fire Events

The Sandy City Fire Marshall, Richard Lyman, was one of the parties called to the scene of the fire and was there at approximately 7:00 a.m. on the morning of the fire to do a cause and origin investigation (he was a city employee, not Defendant's cause and origin expert.) (R.1305:203:17-18; 204:15-17; R.186 ¶26; R. Ex.37.) He began investigating the fire by inspecting and photographing the scene and interviewing various witnesses to determine the cause and origin of the fire. After speaking to the various witnesses, Mr. Lyman learned: (1) none of the occupants were home at the time of the fire (R.1305:205:11; R.187 ¶26(a)); (2) Steve Johnson, a neighbor, had seen Plaintiff and Doug Young's bronze Ford Ranger at the home late on the night of July 25, 2001/ early morning of July 26, 2001 (between midnight and 2:00 a.m.) (R.187 ¶26(b); R. Ex.37 p.13); (3) Leigh Hardy and Doug Young indicated the last time they were at the home was late July 24, 2001/ early morning July 25, 2001 to make sure it was locked (R.1304:25:4-22; R.187

¶26(c); R. Ex.37); (4) a neighbor, Lt. Kent Demille, found the front door unlocked and saw flames coming from the front basement window east of the entry, but there was no fire in the rest of the home (R.187 ¶26(e); R. Ex.37); and (5) the dogs were in a run on the west side of the house. (R.187 ¶26(f); R. Ex.37.)

Mr. Lyman did not see anything in the center of the room that could have provided a source of ignition. There was no TV or Nintendo in the center of the room. (R.1305:209:14-16; 219:5-13, 14-20; 220:25; 221:1-2; R.189 ¶28(b).) He was aware the accelerant dog hit on an object in the center of the room and concluded that an accelerant was used. (R.1305:222:24-25; 223:1-3; 225:1-8; R.188 ¶28(a).)

Based on his investigation, Mr. Lyman was of the opinion that the point of origin of the fire was in the center of the room of origin. (R.1305:208:23-25; 209:1-5; 219:5-13; R.188 ¶28(a).) This was later confirmed by the accelerant dog, who hit on an object in the center of the room, thought to be an accelerant. (R.1305:243:4-12, 22-25; R.189 ¶28(a).) He also noted that no accidental source of ignition was found at the point of origin, indicating the fire was deliberately or intentionally set. (R.1305:209:6-13; 219:14-20; R.189 ¶28(b).) Mr. Lyman testified that the fire was intentionally set by ruling out all potential accidental sources. (R.1305:235:20-23; R.189 ¶28(c).)

Because of the suspicious nature of the fire, Sandy City employee, Rex Nelson, and his accelerant dog were called to the scene. Both Mr. Nelson and his dog proceeded to the room of origin. They first went around the perimeter of the room, but there were no hits. He and the dog then worked back and forth through the center of the room. While doing so, the dog made an alert in the center of the room, confirming Mr. Lyman's finding that the point of origin was in the

center of the room. (R.1305:243:4-12, 22-25; R.188 ¶28(a).) The suspect sample was taken out of the room and placed on a plywood board. The dog again hit on the suspect sample, confirming the presence of an accelerant. (R.1305:245:8-16, 18-23; R.192 ¶34(e).)

Initially, Luke Kneisler was assigned the claim. However, because of the suspicious nature of the claim, it was assigned to Scott Beebe, Defendant's Special Investigations Unit (SIU) investigator. Mr. Beebe noted that there were certain indicators that led to the assignment of the claim to SIU. These included financial status, the credibility of the plaintiff, the condition of the home, the lack of an accidental cause of the fire, and the potential use of an accelerant.

(R.1304:100:13-22; 101:12-25; 102:1; R.192 ¶35; R.193 ¶37.)

After the fire occurred, feeling overwhelmed with the amount of personal property destroyed and/or damaged, Ms. Hardy retained Nathaniel Cook, a public adjuster, to prepare the inventories. She claims she did not assist in preparing those inventories or assessing the values, but she did review the content of the inventories and affixed her signature on the proof of loss.

(R.1304:43:5-6, 9-15; 44:7-9; 48:8-18, 75:20-25; 76:1-3, 4-8; R.194 ¶40.)

After doing his investigation, Mr. Cook submitted a proof of loss on the dwelling for \$123,750. (R.1304:45:24-25.) He also submitted a proof of loss for the personal property damage, claiming \$74,250³ in contents. (R.1304:46:2-6, 13-14.)

Many items on the proof of loss were duplicate items. For example, there were 6 vacuum cleaners and repeated and extensive items of clothing such as mens, womens, boys and girls socks, sweaters, shirts, pants, shoes, etc. listed over and over again, without providing a description, not even a color or a brand name that would differentiate these articles of clothing.

(R.1305:123:6-25; 124:4-17; 133:24-25; 134:1-2; 197 ¶48.)

2. Facts Relating Only to the Bad Faith Partial Summary Judgment

(a) Additional Background Information

Mr. Young has been charged in the past with aggravated bank robbery, possession of drugs with intent to distribute, and aggravated burglary. (R.182 ¶9.) Also, Shawn Elliott and Tim Hardy have criminal records. (R.181 ¶7(b).)

(b) Additional Pre-Fire Events

There are no additional facts.

(c) Additional Post-Fire Events

Because of the suspicious nature of the fire, Detective Tim Berhow of the Sandy City Police Department was assigned to investigate the fire. (R.189 ¶29.) In doing so, he spoke with and was provided with Richard Lyman's report and the July 13, 2001 report from the Sandy City Police Department. In addition, he spoke with Scott Beebe, Defendant's SIU investigator, various neighbors, Plaintiff and her husband, Doug Young, and Tim Hardy. He also contacted the Utah Housing Authority, the county treasurer's office, and visited the home. (R.189 ¶29.)

In addition to the information provided him, Detective Berhow noted the following: (1) Leigh Hardy and Doug Young had retained counsel before learning anything about the origin of the fire. After being told there were suspicions of arson, Plaintiff became verbally combative. (R.189 ¶30(a)); (2) Scott Beebe advised that Plaintiff and Doug Young had told him they had been to the home in the early morning hours of July 26, 2001, and that she had locked the front door when she left. (R.190 ¶30(c)); (3) the next-door neighbors, the Shavers, indicated the dogs were in the outside kennel on the day of the fire. Normally, they are kept inside. (R.190 ¶30(d)); (4) the home was in poor condition, the inside was filthy (trash, dog feces and garbage) and the

backyard was unkempt with weeds 2-3 feet high. (R.190 ¶30(e)); (5) Plaintiff was uncooperative with all of the investigators in the case. When asked questions at any time regarding the house, she became verbally combative. In fact, she avoided talking to Detective Berhow by wrongfully claiming she was represented by counsel. (R.190 ¶30(f)); (6) the antique dresser valued at \$799 which Plaintiff claims was destroyed matched the one in the garage which did not appear to have been damaged. (R.190 ¶30(h)); (7) based on the photographs, many of the items Plaintiff listed as destroyed or damaged did not appear to be in the home, and did not depict over \$100,000 of property Plaintiff claimed was in the home. (R.191 ¶30(i)); (8) information was obtained from informants, Richard Ricci (now deceased) and John Remington, that Plaintiff and Doug Young stated they had set the fire and that law enforcement would never be able to prove it. (R.191 ¶30(j)); and (9) when advised she was being implicated with Doug Young for arson and insurance fraud, Plaintiff claimed it was John Remington's fault. (R.191 ¶30(k).)

Initially, the claim was assigned to Luke Kneisler, a large loss property investigator, who primarily dealt with the inventory, proof of loss, and additional living expenses (ALE's). Mr. Kneisler retained John Blundell of Global Investigations to determine the cause and origin of the fire and, because of the suspicious circumstances, referred the file to Scott Beebe in Farmers' Special Investigation Unit. In addition, Mr. Kneisler authorized the taking of Leigh Hardy's sworn statement. (R.191 ¶31, 32.)

After being retained by Defendant, Mr. Blundell visited the scene on July 27, 2001, the day after the fire. He spoke with several people including fire marshall Richard Lyman, took photographs, and prepared a scene diagram. He had available to him the lab report from Barker & Herbert analyzing the debris, the fire marshall's report, and scene diagrams of the various rooms

in the house. (R.192 ¶33.) Mr. Blundell's investigation revealed that the house was in poor condition and that the fire originated in the southeast [sic, northeast] corner basement bedroom. After going through this bedroom with Plaintiff and looking at the burn patterns, he concluded that there were no appliances at the point of origin of the fire and, therefore, no accidental source of ignition. He concluded that the fire was intentionally set and may have been set with the use of a flammable accelerant. The Barker & Herbert lab report later revealed that the debris hit on by the accelerant dog contained a turpentine residue. (R.192 ¶33.)

In the course of his investigation, Mr. Beebe looked into Plaintiff's financial history which included, but was not limited to, outstanding judgments and liens, a bankruptcy, the filing of other insurance claims, credit reports, employment history, and financial resources. In addition, he spoke to various neighbors, met with and obtained John Blundell's report, met with Leigh Hardy and Doug Young, met with Detective Berhow, spoke with and obtained the fire marshall's report, and spoke with and obtained the Sandy City Police Department report on the domestic abuse incident. (R.193 ¶38.)

He noted that the Hardy residence had a history of questionable living conditions and, had the fire not occurred, in all likelihood the home would have been closed to occupancy. The possibility also existed that Plaintiff's daughter, Breigh, would have been taken into protective custody. The Board of Health had made many attempts to contact Plaintiff to set up a meeting to inspect the home. Coincidentally, a meeting was finally set for the morning of the fire, but never took place because of the fire. (R.194 ¶39(c)(d).) The only source of income Plaintiff had was her disability check of approximately \$300 per month. She had various outstanding judgments and tax liens. (R.194 ¶39(e).) The mortgage balance on the home was \$45,456.96, and the tax

assessed value of the home was approximately \$143,300. Her monthly payment was \$696 which, pursuant to the divorce decree, her ex-husband, Brad Hardy, was paying. (R.194 ¶39(f).) Mr. Beebe also noted that, based on the reports of Richard Lyman and John Blundell, an ignition source could not be located. Also, according to Rex Nelson and his accelerant dog, the fire at the Hardy home was most likely started using an accelerant. (R.194 ¶39(g).)

3. Facts Relating Only to the Directed Verdict

(a) Additional Background Information

Doug Young, her husband at the time of the fire, had no finances or sources of income at all. Also, at some point, both her sons were on social security/ disability. Both she and Brad Hardy, her ex-husband, filed a bankruptcy in 1991. (R.1304:60:21-23; 66:2-4; 82:4-6.)

(b) Additional Pre-Fire Events

Janet Sherwood, Plaintiff's friend, testified Plaintiff was remodeling the house and, for this reason, it was cluttered. Noteworthy, the last time she was in the home was in the spring of 2001, which was 2-3 months prior to the fire. (R. 1305:167:19-22; 168:13-16; 171:2-5.)

Also, it was noted that because of the condition of the home, Mr. Weinheimer made a referral to DCFS by faxing a copy of the Sandy City police report and his report to them. (R.1305:193:6-8; R. Ex.39; R. Ex.42.)

Plaintiff stayed at the Travel Lodge for "quiet time" even though nobody else was living at the home at the time. (R.1304:73:13-17.) In addition, Plaintiff indirectly acknowledged that her vehicle was at the scene when she testified, in response to questioning regarding this, that the vehicle belonged to a friend of Mr. Johnson's or that he could have mistaken the vehicle as being there on July 25th, not July 26th. (R.1304: 74:20-25; 75:1-8.)

(c) Additional Post-Fire Events

Mr. Lyman also noted there was nothing in the room of origin indicating candles had been lit. He did not observe any evidence of burning or any wax residue. (R.1305:220:21-24.) He did not see any evidence that the house was being remodeled. (R.1305:221:3-5.) He was not sure what the object was that the dog hit on, initially thinking it was a transmission pan, which later turned out to be a computer part. (R.1305:225:25; 226:1-17; 227:8-12; 228:4-15.) Noteworthy, he never found a surge protector, candles or a TV in the room of origin. (R.1305: 230:8-16.)

Mr. Lyman's opinion was later confirmed by Rex Nelson, the handler of the accelerant dog. Mr. Lyman had contacted Rex Nelson, also a cause and origin expert, and requested that he go to the scene with the accelerant dog on July 26, 2001. (R.1305:231:1-5; 249:5-8; 250:2-4.) After arriving at the scene, he calibrated the dog and took the dog into the room of origin. He worked the dog around the perimeter of the room. The dog did not make any alerts. (R.1305:242:15-25; 243:1-2.) After going around the perimeter of the room, he and the dog worked back and forth through the center of the room. At that time, the dog made an alert in the center of the room, confirming Mr. Lyman's position that the point of origin was in the center of the room. (R.1305:243:4-12, 22-25; R.188 ¶28(a).) The debris hit on by the dog was then removed from the room of origin and the dog was re-calibrated. (R.1305:244:1-7, 16-25; 245: 1-6.) The suspect sample was taken out of the room and placed on a plywood board. The dog again hit on the suspect sample, confirming the presence of an accelerant. (R.1305:245:8-16, 19, 23.)

Because this residue could be independent, or exist in coniferous wood, Rex Nelson explained that the accelerant dog could distinguish between turpentine residues that were the

result of the burning of pine furniture or pine ceilings versus the existence of a chemical accelerant. (R.1305:240:19-25.)

To show the fire was allegedly accidentally set, Plaintiff called a friend of hers, Chris Johnson, an electrician. She specifically asked him to give her an opinion regarding an outlet in the room of origin that was melted and burned. However, because he had no forensic expertise, he was unable to determine whether the fire was electrically caused. (R.1305:181:11-13, 17-22; 182:1-8; 183:5-11.)

Sometime later, Tim Hardy and his friend, Brandon Yates, told Plaintiff they had been in the house the night of the fire. (R.1305:142:3-9; 153:1-4.) Mr. Yates became involved with this litigation when he ran into Plaintiff at the 7-11 store. They were talking about Tim, and this gave rise to questions concerning the fire. (R.1305: 142:10-15.) Interestingly, Plaintiff gave him a ride to his deposition and also met him at Mr. Call's office for preparation for that deposition. (R.1305:142:19-21, 25; 143:1-3.) Also of interest, at the time Mr. Yates met with Mr. Call and Plaintiff, he could not remember the room, but somehow at the time of his deposition he was able to draw the room placing the furniture and electrical appliances. (R.1305:143:20-25; 144:10-18.)

Mr. Yates claims that he, Tim and some other friends were in the house the evening of July 25, 2001, at approximately 10:00 p.m., smoking marijuana, drinking and playing games in the downstairs basement bedroom. (R.1305:137:22-25; 138:1-18; 22-25; 139:1-2.) He described two mattresses in the room, one on the floor and one on the bed. (R.1305:139:9-10.) He was sitting in multiple spots playing video games and moving around the room. (R.1305: 139:3-13.) He remembers a fan in the room and a TV being on a stool in the center of the room. (R.1305:139:17-23.) The only other appliances in the room were a radio and a Nintendo.

(R.1305:139:24-25; 140:1.) He claims they lit 3-5 candles. There was a candle on the TV, another was on the dresser or entertainment center, and two were on a ledge. (R.1305: 140:4-12.) He claims they all left the house at approximately 1:00 a.m. (R.1305:140:23-25; 141:1-2.)

Mr. Yates described the vehicle driven by Chad Smith, who was also at the home that night, as being similar to the vehicle driven by Doug Young, except that he described it as being a faded blue-silverish in color, not gold. (R.1305:145:12-13; 146:10-16.) Also, Mr. Yates recalls that, as they walked out of the room to leave the house, he told everybody to blow out the candles. He thought that they all walked home and left Chad Smith's vehicle there because they were too intoxicated to drive. (R.1305:145:16-17; 146:10-16.) Yet, there was no vehicle at the scene when the call was reported at 6:55 a.m.

Tim Hardy, Plaintiff's son, also claims to have been at the home that evening. He testified that, the night before the fire, he was at his friend Matt's house where they were partying and playing video games, before deciding to go his mother's home. He then went with his friends to his mother's home where they drank alcohol, smoked marijuana and played Nintendo. He thought they went over there at 8:00 or 9:00 p.m. even though, according to his mother, he was with her at Lagoon at that time. (R.1305:149:12-18, 20-25; 150:1-4.) He acknowledged lighting 4-5 candles and that they were smoking cigarettes and marijuana. (R.1305:150:16-24.) He also testified that the TV was on and they were playing video games. He could not recall if the stereo was on, but they listened to a lot of music. (R.1305:150:25; 151:1-5.)

He initially described one or two mattresses on the floor. He then testified that there was a mattress on the floor and one was on the bed frame, and then wasn't sure if there was more than one mattress. The TV was on a homemade stool that had been moved around the room that night,

so he was not sure where the TV was. (R.1305:151:7-25; 152:1; 157:6-16.) He testified they were sitting on the mattress playing video games and smoking marijuana. (R.1305:152:2-6.) When questioned about the date he was at the house, he could not remember testifying that he was at the house on July 24th and 25th and not in the early morning hours of July 26th. He then changed his testimony to say he was at the house in the early morning hours of July 25th. (R.1305:155:14-17; 156:15-17.) Finally, he changed his testimony to say they were there the night of the fire, but he doesn't know the date. (R.1305:160:6-8.)

When they left the home, he recalls telling Chad Smith to blow out the candles before he left the room, and was pretty sure that he did. (R.1305:157:20-25.) He testified a fan in the room was on part of the time, but doesn't know if it was on all of the time. He does not think the computer was plugged in. He thought there was a surge protector in the room but was not certain. (R.1305:158:13-16; 159:3-5, 13-18.)

Also of interest is that he testified they went to the house in Chad Smith's Ford Ranger, which looked similar to Doug Young's. They left the house between 1:00 and 2:00 a.m. to go back to Matt's house. The next morning, he learned of the fire. (R.1305:152:10-23.) Even after he learned about the fire, he never told Plaintiff that he had been at the house. In fact, on questioning by the fire marshall, he denied this. (R.1305:153:1-4.)

(d) Facts Pertaining to the Grant of the Motion for Directed Verdict

At the time of the trial, Plaintiff designated her fire expert, Fred King, as a rebuttal witness, specifically stating: "I have my fire witness I am going to call in rebuttal to their experts." (R.1305:172:1-2; 253:10-12, 18-19, 22-23; 254:1-8, 13-15; R. 1154.) Because Plaintiff designated her expert as a rebuttal witness, Defendant argued that Plaintiff could not use this

expert witness in her “case-in-chief,” but only as a rebuttal witness at the close of Defendant’s case. (R.1311:3-8; 1305:253:2-25; 254:1-15.) Prior to making this argument, the trial court was going to allow Mr. King to testify. (R.1311:3-8; 1305:178:2-25; 179:1-7; 252:8-25; 253:1.) Because Mr. King was not immediately available to testify, the trial court ordered Defendant to put on its witnesses. (R.1305:176:18-20.) In fact, early in Plaintiff’s case, when Plaintiff was without a witness, the trial court requested that if Defendant had any witness they be called out of turn, which occurred. (R.1304:98:15-25; 99:1-4.)

Subsequently, the trial court agreed with Defendant that because Plaintiff’s expert had been designated as a rebuttal witness he could not testify in Plaintiff’s “case-in-chief.” (R.1311:3-8.) As such, Defendant made a Motion for a Directed Verdict, which was granted on November 30, 2006 and reduced to a judgment dated December 21, 2006, with the trial court finding that Plaintiff failed to meet her burden of showing that the fire was accidentally set, and that Plaintiff needed expert testimony to do so. (R.1209-1210; R.1221-1225.)

Finally, in ruling in favor of Defendant on the Motion for Directed Verdict, the trial court, in its oral ruling, erroneously referred to U.R.C.P., Rule 41(b), even though this was a jury trial. This was corrected in the Judgment on Directed Verdict, which shows the Directed Verdict was granted based on U.R.C.P., Rule 50(a). (R.1209-1210; R.1221-1225.)

Following the grant of the Directed Verdict, Plaintiff filed a Motion for a New Trial² on January 2, 2007, alleging that Defendant had the burden of proving the fire was intentionally set. (R.1226-1228; R.1229-1233; R.1238-1250; R.1251-1260; R.1291-1294.) Further, Plaintiff argued that, even assuming she had the burden of showing the fire was accidentally set, she met this burden of proof by her own testimony, that an expert was not necessary, and also argued that

because the parties stipulated there was an insurance policy in effect at the time of the fire and the premiums were paid on that policy, that establishes her entitlement to coverage. (R.1251-1260.) Plaintiff's Motion for a New Trial was denied.² (R.1291-1293.) This appeal from the grant of the Motion for Directed Verdict and the denial of the Motion for a New Trial followed.

SUMMARY OF ARGUMENT

Defendant maintains that the Motion for Partial Summary Judgment dismissing the bad faith claim and the Directed Verdict were properly granted. Plaintiff's brief advanced nine arguments addressing these two issues. Because of the duplicity of Plaintiff's arguments, Defendant consolidated these arguments into three issues, bad faith, the directed verdict, and expert testimony.

Bad Faith: First, with respect to the grant of the Motion for Partial Summary Judgment, Plaintiff failed to identify this as an issue that was being appealed from in the Notice of Appeal. Because the purpose of the Notice of Appeal is to provide Defendant notice of specifically which judgment is being appealed from, the failure to do so renders the Notice of Appeal defective as to this issue. As such, the Court lacks jurisdiction to hear this issue.

Assuming that the Court finds the Notice of Appeal sufficient, then it is Defendant's position that the grant of the Motion for Partial Summary Judgment dismissing the bad faith claim was still appropriate. Defendant's claims adjuster and SIU personnel conducted extensive investigations. Those investigations support Defendant's position that this claim is "fairly debatable." Specifically, Defendant's investigation revealed that: (1) the home was in terrible condition and would have, in all likelihood, been closed to occupancy; (2) because of the condition of the home, Breigh Hardy could be taken into protective custody; (3) Plaintiff had no

financial means to remedy the condition of the home; (4) Plaintiff and her ex-husband had various outstanding liens, medical bills and judgments against them; (5) Mr. Weinheimer of the board of health made various attempts to meet with Plaintiff to discuss the condition of the home, with the meeting coincidentally taking place on July 26, 2001, the day of the fire; (6) nobody was home at the time of the fire; (7) the dogs which were usually kept in the garage were outside at the time of the fire; (8) Plaintiff told Scott Beebe she was at the home in the early morning hours of July 26, 2001, the day of the fire; (9) a witness, Steve Johnson, placed Plaintiff's vehicle at the home in the early morning hours of July 26, 2001, the day of the fire; (10) Sandy City Fire Marshall Richard Lyman, Detective Berhow and Defendant's cause and origin expert, John Blundell, all concluded that the fire was intentionally set and that an accelerant had been used; (11) Detective Berhow had information from two informants that Plaintiff and Doug Young stated they had set the fire and that law enforcement would never be able to prove this; (12) Doug Young, who is a career criminal, and Plaintiff's sons, Tim Hardy and David Elliott, who also have criminal records, all had access and the means to commit arson; and (13) Plaintiff is claiming damages to the home of approximately \$78,000 over the amount owed on the home.

Finally, in addition to the Sandy City Fire Marshall, both of the experts retained by Defendant, Jay Freeman and John Blundell, determined there was no accidental cause for the fire and it was intentionally set. Clearly then, the above gives rise to legitimate factual issues regarding the validity of this claim. As such, Plaintiff's claim is "fairly debatable" as a matter of law, and partial summary judgment dismissing the claim for bad faith was appropriately granted and should be affirmed.

Directed Verdict: The court correctly ruled when it determined that Plaintiff had the burden of proving that she was wrongfully denied coverage by showing the fire was accidentally set. It is not until Plaintiff meets this burden that it shifts to Defendant to show, by a preponderance of the evidence, that Plaintiff intentionally set the fire or it was set at her direction. *Metric Const. Co. v. St. Paul Fire & Marine Ins. Co.*, 2005 WL 2100939 (D.Utah 2005); *Home Sav. and Loan v. Aetna Cas. and Sur. Co.*, 817 P.2d 341, 371 fn 7 (Utah App. 1991); *Horrell v. Utah Farm Bureau Ins. Co.*, 909 P.2d 1279 (Utah App. 1996); *LDS Hosp. a Div. of Intermountain Health Care, Inc. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988).

Further, the court also ordered that for Plaintiff to meet this burden of showing the fire was accidentally set, it necessitated calling an expert witness, which Plaintiff failed to do. As such, she failed to sustain her burden of proof. Thus, the burden did not shift to Defendant to prove that the fire was intentionally set, and the Directed Verdict was appropriately granted.

Clearly, “expert testimony is needed when the causative factors created by a breach of legal duty are outside the realm of common knowledge and experience of laypersons.” *King v. Searle Pharmaceuticals, Inc.*, 832 P.2d 858, 862 (Utah 1992). In this instance, it is undisputed that to perform a cause and origin investigation, which would include looking at burn patterns, the presence of accelerants, and determining the point of origin, is not within the province of laypersons. Having failed to offer expert testimony, the trial court appropriately found that Plaintiff failed to meet her burden of proof.

Plaintiff also took issue with the appropriate time to make a motion for a directed verdict, arguing that it was not appropriate for Defendant to make this motion at the close of its case and that, by doing so, Defendant somehow waived the right to a directed verdict. First, it was at the

trial court's request that Defendant was told to put on its witnesses while waiting for Plaintiff's expert witness, Fred King. At the time Defendant made its Motion for Directed Verdict, it argued that Mr. King was designated as a rebuttal witness and, as such, he should not be allowed to testify in Plaintiff's "case-in-chief." The trial court ruled in Defendant's favor, finding Mr. King was in fact a rebuttal witness and, as such, could not testify in Plaintiff's "case in chief." Once that finding was made, Plaintiff had no further witnesses. As such, Plaintiff's case was rested and Defendant appropriately made its Motion for Directed Verdict and, further, did not waive the right to do so.

Finally, when the trial court granted the Motion for Directed Verdict, it mistakenly referred to Rule 41(b). However, that was corrected on the actual Judgment on Directed Verdict, which reflects that the Directed Verdict was granted pursuant to Rule 50(a).

Rebuttal Witness: The trial court did not abuse its discretion in not allowing Mr. King to testify in Plaintiff's "case-in-chief." It is undisputed that Mr. King was designated as a rebuttal witness. This was not only admitted by Mr. Call the first day of trial, but he actually wrote it on a sheet of paper which he submitted to the trial court at its request. To allow Mr. King to testify in Plaintiff's "case-in-chief" is highly prejudicial. This is because Defendant was prepared to cross-examine Plaintiff's expert as a rebuttal witness, not as to cause and origin. As such, the trial court properly excluded Plaintiff from allowing her rebuttal witness to testify in her "case-in-chief."

Noteworthy, Plaintiff failed to proffer Mr. King's testimony as required by Utah Rules of Evidence, Rule 103. Therefore, the Court is unable to determine whether an error has affected the substantial rights or was prejudicial to Plaintiff. As such, there is no basis to reverse the judgment. *Downey State Bank v. Major-Blakney Corp.*, 578 P.2d 1286, 1287 (Utah 1978).

Finally, the trial court ruled correctly in excluding Plaintiff's rebuttal witness' testimony at the close of Defendant's case. This is because once the court ruled on the Directed Verdict, finding Plaintiff had not sustained her burden of proving that the fire was accidentally set, there was no need for rebuttal testimony. Therefore, the Directed Verdict was appropriately granted and rebuttal testimony was unnecessary.

ARGUMENT

POINT I

BECAUSE PLAINTIFF FAILED TO DESIGNATE APPEAL FROM THE GRANT OF PARTIAL SUMMARY JUDGMENT DISMISSING THE BAD FAITH CLAIM, THIS COURT LACKS JURISDICTION TO REVIEW THIS ARGUMENT

The Notice of Appeal filed by Plaintiff shows her intention to appeal from the trial court's grant of the Motion for Directed Verdict in favor of Defendant and the denial of Plaintiff's Motion for a New Trial, but not the grant of Partial Summary Judgment in favor of Defendant dismissing the bad faith claim. As such, the Notice of Appeal, as to the bad faith claim, is defective.

The Utah Supreme Court addressed this issue in *Jensen v. Intermountain Power Agency*, 977 P.2d 474 (Utah 1999), a procedurally similar case. In *Jensen*, the trial court granted a partial summary judgment motion in defendant's favor, dismissing plaintiff's easement and water rights claims. The trial court conducted a jury trial on the remaining issue regarding flooding. The jury returned a verdict in favor of defendant, finding no negligence. Plaintiff moved for a judgment notwithstanding the verdict and for a new trial. Both motions were denied and a final judgment was entered on August 10, 1995. Plaintiff then appealed.

The notice of appeal did not state that plaintiff was appealing from the grant of defendant's motion for partial summary judgment on the easement and water rights claims. As

such, defendant moved for summary disposition or, alternatively, to limit the scope of the appeal, arguing that the court did not have jurisdiction to review the partial summary judgment because plaintiff did not appeal from the judgment finalizing it.

Referring to the Utah Rules of Appellate Procedure, Rule 3(d), the Utah Supreme Court noted that: “[t]he notice of appeal shall . . . designate the judgment or order, or part thereof, appealed from.” The Supreme Court further held that Rule 3(d)’s requirement is jurisdictional. *Id.* 476. In reaching this conclusion, the court emphasized that “the object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a specific case. [Defendant] is entitled to know specifically which judgment is being appealed.” *Id.* 476.

The court found in favor of defendant, noting that plaintiff’s Motion for a New Trial addressed only those claims that went to the jury, it did not include the easement and water rights claims that were addressed on partial summary judgment. The court also noted that defendant was prejudiced by plaintiff’s failure to identify the appeal from the partial summary judgment motion. The court found the notice of appeal defective and that it lacked jurisdiction to hear the issue.

In the present case, there is no relationship between the dismissal of the bad faith claim on partial summary judgment and the Directed Verdict granted on the breach of contract claim, such that Defendant was on notice that the bad faith claim was also being appealed. The Notice of Appeal identifies appeal from the Directed Verdict and denial of the Motion for a New Trial, neither of which address the bad faith claim. Thus, the Notice of Appeal is defective as to the bad faith claim and this Court lacks jurisdiction to review this claim. This is the case even if the

failure to identify appeal from the bad faith partial summary judgment did not prejudice Defendant.

A. **If the Notice of Appeal Was Sufficient, Dismissal of Plaintiff's Claim for Bad Faith on Partial Summary Judgment Is Still Appropriate**⁴ (Plaintiff's Argument I)

The parties to any contract have parallel obligations to perform their contractual obligations in good faith. *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985). More specifically, the Utah Supreme Court explained the obligations of an insurer in a first-party context as follows:

[T]he implied obligation of good faith performance contemplates, at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim. *Id.* at 801.

See also Callioux v. Progressive Ins. Co., 745 P.2d 838, 842 (Utah App. 1987); *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 535 (Utah 2002); and *Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 465 (Utah 1996). It follows then, "if an insurer acts reasonably in denying a claim, then the insurer did not contravene the covenant." *Prince, Id.* 533.

As a matter of law, it is well established in Utah, "[i]f a claim brought by an insured against an insurer is fairly debatable, ***failure to comply with the insured's demands cannot form the***

⁴ Plaintiff's brief, Argument Point I, fails to comply with Utah Rules of Appellate Procedure, Rule 24(a)(9), which requires that the argument in the brief ". . . shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes and parts of the record relied on." Plaintiff has failed to cite to the record to support her position that partial summary judgment on the bad faith claim was wrongfully granted. As such, Plaintiff leaves it for this court to do so. Because Plaintiff has inadequately briefed this argument, it should be stricken. *MacKay v. Hardy*, 973 P.2d 941, 947 (Utah 1998); *Beehive Telephone Company v. Public Service Commission of Utah*, 89 P.3d 131 (Utah 2004); *Burns v. Summerhays*, 927 P.2d 197 (Utah App. 1996).

basis of bad faith.” *Saleh v. Farmers Ins. Exchange*, 133 P.3d 428 (Utah 2006) (emphasis added). See also *Prince, supra* and *Callioux, supra*. Where a claim is fairly debatable, “the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so.” *Prince, Id.* 533-534.

Further, “if the evidence presented creates a factual issue as to the claim’s validity, there exists a debatable reason for denial, . . . eliminating the bad faith claim A ‘debatable reason,’ for purposes of determining whether a first party insurer may be subjected to bad faith liability, means an arguable reason, a reason that is open to dispute or question.” *Prince, Id.* 535. (Internal citations and quotation marks omitted.)

In *Callioux, supra*, a factually similar case, Progressive’s insured filed a claim for the loss of his vehicle as the result of a fire. Progressive hired an arson expert to investigate the claim, who concluded that the loss was of incendiary origin, occurring by or at the direction of the insured. Based on this, Progressive denied the claim. Progressive then reported its findings to the state fire marshall, who also determined it to be of incendiary origin. The fire marshall reported his findings to the Sevier County Attorney. Based on the state fire marshall’s report and an independent investigation by the Sevier County Attorney’s office, the insured was charged with arson and attempted insurance fraud. Ultimately, the insured was acquitted of these charges and the insurer paid the claim. Following the insured’s acquittal, the insured filed a bad faith action against Progressive. Progressive filed a motion for summary judgment, arguing that the insured’s claim was “fairly debatable” and, as such, there is no bad faith. Plaintiff’s motion was granted. On appeal, the Utah Court of Appeals determined that:

If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim, and eliminating the bad faith claim. "When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Id.* 842.

In *Prince, supra*, the claimant was involved in an automobile accident for which he sought PIP benefits. After several weeks of treatment, the claimant submitted to an independent medical evaluation, and it was determined by this physician that further medical treatment was not necessary. As such, further claims for PIP benefits were denied. Because of this denial, the claimant filed a claim for breach of contract, bad faith, and assorted other causes of action. The insurer then filed for summary judgment maintaining that, based on the report of the independent medical physician, further PIP benefits were neither reasonable nor necessary, the standard used to determine whether to continue paying PIP benefits. Summary judgment was granted and the Utah Supreme Court affirmed that the insurer's reliance on the opinion of an expert medical doctor that further medical care was unnecessary creating "a legitimate factual question regarding the validity of the insured's claim for benefits, making the insured's claim fairly debatable." *Id.* 535. As such, the denial of benefits did not constitute a "breach [of] the covenant of good faith and fair dealing as a matter of law." *Id.*

Finally, the Utah Supreme Court in *Billings, Id.* 465, addressed whether a first party insurer could be held liable for breaching the implied covenant on the grounds that it wrongfully denied coverage if the insured's claim was later found to be proper. In addressing this issue, the court noted that if the insurer acted reasonably in dealing with the insureds, "it is entirely consistent . . . to hold that when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Id.* 465.

Defendant clearly met its good faith obligations under the *Beck* standards by diligently and fairly investigating the claim. Defendant's claims adjuster and SIU personnel conducted extensive investigations, which included: retaining a fire investigation firm; meeting with and gathering documents from the Sandy City Fire Marshall, the Sandy City Police Department, and the Sandy City Board of Health; gathering and confirming financial information; and meeting with various witnesses including the insured and her husband. That investigation supports Defendant's position that this claim is "fairly debatable." Specifically, Defendant's investigation revealed that: (1) prior to the fire, the home was in terrible condition and would, in all likelihood, have been closed to occupancy (R.183-184 ¶13-19); (2) because of the state of the home, Breigh Hardy, the only child living in the home at the time, could be taken into protective custody (R. 194 ¶39(c)); (3) Plaintiff had no financial means to remedy the condition of the home, her only source of income being \$300 per month in SSI benefits (R.182 ¶10); (4) Plaintiff and her ex-husband had various outstanding liens, medical bills and judgments against them (R.183 ¶11); (5) various attempts were made by Mr. Weinheimer of the board of health to meet with Plaintiff to discuss the condition of the home, with the resulting meeting coincidentally taking place on July 26, 2001, the day of the fire (R.183-184 ¶13-19); (6) nobody was home at the time of the fire – Plaintiff and her husband were staying at the Travel Lodge and had been since July 21, 2001, Tim Hardy was at a friend's house, and Breigh Hardy was with her father (R.185 ¶20); (7) the dogs which were usually kept in the garage were outside at the time of the fire (R.190 ¶30(d)); (8) Plaintiff told Scott Beebe she was at the home in the early morning hours of July 26, 2001, the day of the fire, to turn on the lights, open the windows for the swamp cooler, and turn on the oscillating fan in the bedroom, even though nobody was staying at the home (R.186 ¶24; R.193

¶39(b)); (9) a witness, Steve Johnson, placed Doug Young's truck at the home in the early morning hours of July 26, 2001, the day of the fire (R.187 ¶26(b)); (10) Sandy City Fire Marshall Richard Lyman, Detective Berhow and Defendant's cause and origin expert, John Blundell, all concluded that the fire was intentionally set and that an accelerant had been used (R.186 ¶26; R.189 ¶28(b)); (11) Detective Berhow had information from two informants that Plaintiff and Doug Young stated they had set the fire and that law enforcement would never be able to prove this (R.191 ¶30(j)); (12) Doug Young, a career criminal charged with aggravated bank robbery, possession of drugs with intent to distribute, and aggravated burglary, and Plaintiff's sons, Tim Hardy and David Elliott, who have criminal records, all had access and the means to commit arson (R.181 ¶7; R.182 ¶9); (13) Plaintiff claimed damages to the home in the amount of \$123,750, approximately \$78,000 over the amount owed on the home (R.180 ¶1); (14) Plaintiff's limited financial means calls into question her proof of loss showing an extensive lost contents (R.197 ¶48); and (15) the duplicity of the items on the proof of loss and the lack of description, calling into question the values assigned to the items (R.197 ¶48.)

Finally, in addition to the Sandy City Fire Marshall, both of the experts retained by Defendant, Jay Freeman and John Blundell, determined that there was no accidental cause for the fire and that it was intentionally set. Like *Callioux* and *Prince*, the reliance on the fire experts alone supports Defendant's position that this was a "fairly debatable" claim. Both experts concluded the fire originated in the same location, that there was no ignition source in this location, an accelerant (turpentine) was likely used, and all possible electrical sources of ignition could be ruled out, resulting in their ultimate conclusion the fire was caused by arson.

Furthermore, Plaintiff had motive to commit arson given her financial means, the condition of the home just prior to the loss, the fact her daughter could be taken into protective custody, and no means to remedy the condition. Clearly then, the above gives rise to “legitimate factual question[s] regarding the validity of the insured’s claim for benefits, making the insured’s claim at least fairly debatable.” *Prince, Id.* 535. Therefore, because Plaintiff’s claim was arguably “fairly debatable” under Utah law, partial summary judgment dismissing Plaintiff’s claim for bad faith was appropriately granted and should be affirmed.

POINT II

THE DISTRICT COURT RULED CORRECTLY IN GRANTING DEFENDANT’S MOTION FOR DIRECTED VERDICT⁵ (Plaintiff’s Argument VII)

The court ruled correctly when it determined that Plaintiff had the burden of proving that she was wrongfully denied coverage by showing the fire was accidentally set. It is not until Plaintiff meets this burden that the burden shifts to Defendant to show, by a preponderance of the evidence, that Plaintiff intentionally set the fire or it was set at her direction. *Metric Const. Co. v. St. Paul Fire & Marine Ins. Co., supra*; *Home Sav. and Loan v. Aetna Cas. and Sur. Co., supra*; *Horrell v. Utah Farm Bureau Ins. Co., supra*; *LDS Hosp. a Div. of Intermountain Health Care, Inc. v. Capitol Life Ins. Co., supra*.

The court further ruled that in order for Plaintiff to meet the burden of showing the fire was accidentally set, this necessitated calling an expert witness, which Plaintiff failed to do.

⁵ Plaintiff’s brief fails to comply with Utah Rules of Appellate Procedure, Rule 24(a)(9) because she does not cite to the record and does not cite any case law supporting her position. Further, she has not shown there were factual issues for the jury. For the above reasons, this argument should be stricken.

Therefore, Plaintiff failed to sustain her burden of proof. Thus, the burden did not shift to Defendant to prove that the fire was intentionally set, and the Directed Verdict was appropriately granted. Regardless, the evidence presented by Plaintiff at trial is clearly insufficient to set aside the Directed Verdict.

For example, the testimony of Plaintiff, Brandon Yates, Tim Hardy and Chris Johnson does not establish the fire was accidental. Leigh Hardy testified as to various ways the fire may have occurred, such as a lightning storm which occurred approximately one month prior to the fire. (R.1304:24:6-8, 24-25; 25:1.) She identified appliances in the room which included a TV, Nintendo 64, VCR, touch lamp, surge protector, computer, fan, and stereo, claiming they were all plugged in, to somehow suggest that they could have been a source of the fire. (R.1304:29:8-12, 18-25; 30:2-6.) She identified the furniture in the room, with the purpose of showing that it was pine and that it could be the source of the turpentine accelerant that was found. (R.1304:30:9-12, 25; 31:1-6, 24-25; 32:1-11.) Finally, she identified an outlet where she noticed that all the wires had melted together, all to point to other potential accidental sources of the fire. (R.1304: 56:13-15). Noteworthy, Plaintiff never testified that she did not set the fire.

Similarly, Brandon Yates offered testimony of possible causes of the fire. He identifies the furniture in the room, claiming there were two mattresses in the room, one on the floor and one on the bed, to suggest the possibility of a mattress fire. (R.1305:139:9-10.) He identifies the appliances in the room which included a TV, radio, Nintendo and fan. (R:1305:139:15-19, 24-25; 140:1.) He describes lighting candles in the room and the placement of those candles throughout the room. He also identified two ashtrays that were moved around throughout the room. (R.1305:140:8-22.) All of the above was to establish possible sources of the fire.

Tim Hardy testified that 4-5 candles were lit, that he told another individual to blow out those candles, and he was pretty sure that they were in fact blown out. (R.1305:150:16-24; 151:14-15; 157:20-25.) He also testified that they were playing video games and that the TV was on, but he could not remember if the stereo was on. He described two mattresses in the room. (R.1305:151:2-3, 6-13, 18-25; 152:1-6; 157:6-16.) He also testified the fan was on part of the time, he did not think the computer was plugged in, and he was not sure if there was a surge protector. (R.1305:158:13-16; 159:3-5, 13-18.) Again, all of the above testimony was for the purpose of establishing an accidental source of the fire.

Finally, Plaintiff called Chris Johnson, an electrician, who testified he is not a cause and origin expert and was not testifying as such. He indicated Plaintiff asked him to give an opinion regarding an outlet in the basement, specifically whether it was melted or burned. (R.1305:172:25; 173:1; 182:1-8, 21-23.) Mr. Johnson described the wires as being melted and burned, but testified he could not determine whether the fire had an electrical cause. (R.1305:182:1-8, 18-20; 183:5-11.)

The above testimony offers possible sources of the fire, but does not establish the fire was accidentally set. As such, the evidence provided would only allow a jury to speculate as to whether the fire was accidentally caused. For Plaintiff to establish the fire was accidentally caused, a cause and origin expert was necessary. Absent this expert testimony, Plaintiff fails to meet her burden of showing she was wrongfully denied coverage. Thus, the Directed Verdict was appropriately granted.

A. Plaintiff Has the Burden of Proving Her Loss Was a Covered Loss Under the Policy (Was Accidental) Before the Burden Shifts to Defendant to Raise any Exclusions as a Defense (Plaintiff's Argument III)

After Plaintiff put on her evidence (with the exception of her expert witness, Fred King) and Defendant put on its evidence, Defendant made a Motion for a Directed Verdict. The Court granted Defendant's Motion for Directed Verdict, finding that:

... It is the allegation of the Plaintiff that she was wrongfully denied the opportunity to receive the money under the policy because the company had determined that the fire was intentionally set and, in all likelihood, by her or at her direction.

Now, as an essential aspect of that claim, the burden then falls upon the Plaintiff to establish wrongful denial. And by virtue of that, it is upon the Plaintiff to establish that the fire was accidental and, indeed, it was not intentionally set. Otherwise, of course, all that is being presented here is allowing for speculation as to what occurred. And as part of the Plaintiff's case in chief, the Plaintiff must establish that the fire – at least present evidence that the fire was not intentionally set and, therefore, the denial of the claim was improper. And that Plaintiff has not done. The Plaintiff has rested without presenting expert testimony with regard to cause and origin. (R.1311:7:5-25.) *See also* Judgment (R.1209-1210).

Utah case law supports the position that Plaintiff has the burden of proving entitlement to insurance coverage by showing the fire was accidentally set. In *Metric Const. Co. v. St. Paul Fire & Marine Ins. Co.*, *supra*, the Federal District Court determined: “[T]he plaintiff has the burden of proving that [its] loss comes within the coverage stated in the policy. (Cites omitted.) . . . [If] plaintiff succeeds in establishing coverage, the burden then shifts to the insurer to raise any exclusions as a defense.” *Id.* 2. *See also* *Home Sav. and Loan v. Aetna Cas. and Sur. Co.*, *supra*.

Similarly, the Utah Supreme Court in *LDS Hosp., a Div. of Intermountain Health Care, Inc. v. Capital Life Ins. Co.*, *supra*, determined that:

When an insured claims a right to recover under the accident provisions of the policy, all he need do is bring himself within the field therein defined and show his

injury or disability was proximately and predominantly caused through violent, external and accidental means. He then has brought himself within the policy, and the terms thereof have been met. . . . When he brings himself within the insuring clause he has made his case . . . and any exceptions or conditions which would then deny him relief, take him out of the indemnity provisions, render them inoperative as to him, are matters of defense, and the burden therefore rests upon the insurer. . . . *Id.* 859.

Clearly then, Plaintiff has the burden of showing that she was wrongfully denied coverage by showing the fire was accidentally set, before the burden shifts to the Defendant to show by a preponderance of the evidence that Plaintiff committed the intentional act of arson to preclude coverage. *Metric Const. Co. v. St. Paul Fire & Marine Ins. Co.*, *supra*; *Home Sav. and Loan v. Aetna Cas. and Sur. Co.*, *supra*; *LDS Hosp. a Div. of Intermountain Health Care, Inc. v. Capitol Life Ins. Co.*, *supra*; and *Horrell v. Utah Farm Bureau Ins. Co.*, *supra*.

Plaintiff argues, wrongfully, that she has met this burden of proof just because she had an insurance policy in effect at the time of the fire and she had made all her premium payments. The parties stipulated that the policy was in effect at the time of this loss. However, they never stipulated that, because there was a policy in effect at the time of the loss, Plaintiff was entitled to payment, the subject of this very lawsuit. (R.1304:23:5-23.)

Plaintiff supports her position by citing to *Fox v. Allstate Ins. Co.*, 453 P.2d 701, 706 (Utah 1969) and *Peterson v. Western Cas. & Sur. Co.*, 425 P.2d 769 (Utah 1967), for the proposition that receipt of the premiums on the policy establishes the prima facie liability of the insurance company to make payments. If this were the case, then an insured would only have to show there was a policy in effect and the premiums were current, and there would be entitlement to payment under that policy.

Fox v. Allstate, supra, does not address this issue, that is that having a policy in effect and payment of the premiums establishes prima facie liability. Rather, this case involved whether the sinking of a boat actually occurred when the insured failed to produce evidence of proof of ownership or any evidence that the boat had in fact sunk. The issue addressed by the court was whether summary judgment in favor of the plaintiff was appropriate based on his affidavit. In reversing summary judgment, the court determined that plaintiff had not shown proof of ownership or loss to warrant summary judgment. Thus, the court found there was an issue of fact to be tried by the jury. This case does not stand for the proposition that, because there was a policy of insurance in place at the time, this automatically entitled the plaintiff to payment of the policy benefits.

Peterson v. Western Cas. & Sur. Co., supra, is also distinguishable. First, *Petersen* involved a third-party claim, not a first-party claim. Also, *Petersen* involved a summary judgment entered against defendant insurer. Defendant insurer then sought to overturn the judgment by arguing that the insured failed to cooperate and, as such, summary judgment was not appropriate. The court determined it was not persuaded that defendant had used the degree of diligence necessary to locate the insured. As such, the judgment stood and the insured was required to pay that judgment. This case does not stand for the proposition that merely having a policy in effect at the time and premiums current entitles the individual to payment under the policy.

It follows then that, in order to sustain her burden of proof, Plaintiff needed to prove that the fire was accidentally set, and having failed to do so, did not meet this burden. Therefore, the Directed Verdict was appropriately granted.

B. Plaintiff Has the Burden of Putting on Expert Testimony to Show That the Fire Was Accidentally Set (Plaintiff's Argument IV)

The Court ruled correctly in determining that Plaintiff had the burden of putting on expert testimony to show that the fire was accidentally set. In Utah, the law is clear, when the information sought is not within the common knowledge of laypersons, then the party must introduce expert testimony to establish this. The failure to do so allows the jury to wrongfully speculate as to the causation. *Walker v. Parish Chemical Co.*, 914 P.2d 1157, 1162 (Utah App. 1996); *King v. Searle Pharmaceuticals, Inc.*, *supra*; *Nixdorf v. Hicken*, 612 P.2d 348, 352 (Utah 1980); *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 263 (Utah App. 1997).

In the present case, Plaintiff failed to put on any testimony from a cause and origin expert to establish that the fire was accidentally set. Clearly, expert testimony is needed to evaluate burn patterns, establish the point of origin, determine the type of accelerant, and generally perform an investigation of the cause and origin of a fire. It is not within the province of laypersons to do so. As such, it was necessary for Plaintiff's counsel to have the testimony of a fire expert.

Walker v. Parish Chemical Co., *supra*, was a case involving the cause and origin of a fire and the doctrine of *res ipsa loquitur*. Even though the current case does not involve this doctrine, the principles and holding in this case are applicable. In *Walker*, a fire broke out on the premises. Rather than extinguish the fire, the firefighters let it burn. As a result, the plaintiff, a bystander, was injured. Plaintiff filed a lawsuit against Parish Chemical, alleging her injuries were the result of the company's negligence. She proceeded under a theory of *res ipsa loquitur* because she could not point to a specific negligent act that the chemical company committed, and hoped to establish the accident was the kind that would not occur absent negligence.

Plaintiff called three witnesses who agreed on the location of where the fire started, but only speculated about the cause and origin of that fire. Parish Chemical moved for a directed verdict, but the court allowed the case to go to the jury and gave the *res ipsa loquitur* instruction. The jury returned a verdict for plaintiff, finding Parish Chemical negligent. After the verdict, Parish Chemical moved the trial court for a JNOV, arguing that plaintiff had failed to establish the necessary foundation for the *res ipsa* instruction, contending that she had not shown the fire was more probable than not the result of Parish Chemical's negligence. The trial court ruled that Parish Chemical was entitled to judgment as a matter of law because plaintiff had not introduced sufficient evidence to establish the necessary foundation for the *res ipsa loquitur* instruction, specifically that there "... be a basis either in common knowledge or expert testimony that when such an accident occurs it is more probable than not the result of negligence."

In essence, like the present case, the plaintiff in *Walker* did not present any expert testimony, but instead called three witnesses who speculated about the possible causes of the fire, but none offered an expert opinion about the cause. The court determined plaintiff must present sufficient evidence to show that a particular accident at issue was more likely the result of negligence. In concluding this, the court stated:

[a]s long as the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained. *Id.* 1163.

Because Walker relied on speculation and conjecture, the trial court concluded appropriately she was not entitled to a jury instruction on *res ipsa loquitur* and correctly ruled Parish Chemical was entitled to judgment as a matter of law.

The Utah Supreme Court in *King v. Searle Pharmaceuticals, Inc., supra*, a products liability case, addressed the circumstances when expert testimony is necessary, rather than relying on the experience of laypersons. *King, supra* was an appeal from a summary judgment in favor of the pharmaceutical company and against plaintiff on her claims based on strict liability and negligence. The trial court ruled that plaintiff failed to show a material issue of fact to preclude summary judgment on whether the pharmaceutical company caused the alleged injury. Plaintiff argued that the trial court erred in granting summary judgment because the doctrine of *res ipsa loquitur* established a prima facie case of liability against Searle and, therefore, raised a material issue of fact as to causation with respect to both claims against Searle.

The product at issue was the CU-7 intrauterine device (IUD), in which there were allegations that the product was defective and unreasonably dangerous. On this issue, the pharmaceutical company filed a motion for summary judgment supported by the affidavit from a gynecologist who had examined the plaintiff and reviewed her medical records, and concluded that the IUD was neither defective nor unreasonably dangerous and that plaintiff's injuries were not caused by any negligence or fault on the part of the pharmaceutical company.

Plaintiff opposed this motion by filing the affidavit of Robert Baier, Ph.D. Dr. Baier's affidavit was based on laboratory studies he performed on animal tissue and his conclusion that the CU-7 was "an inherently dangerous device inappropriate for implantation in the female uterus." The court granted the pharmaceutical company's motion for summary judgment, noting that Dr. Baier had not examined plaintiff or any of her medical records and did not know any of the particular facts concerning the complication at issue. As such, his affidavit failed to raise a genuine issue of fact as to whether the CU-7 was the cause of plaintiff's injury. *Id.* 861.

The issue on appeal was whether plaintiff had established a factual dispute as to the cause of her injury. In order to bridge the factual gap as to causation, she raised the doctrine of *res ipsa loquitur*. On appeal, plaintiff conceded that Dr. Baier's affidavit did not create a factual issue as to whether the CU-7 was the cause of her injuries. As such, she maintained that it was unfair to require her to put on direct evidence of causation because it was impossible to do so and, hence, relied on the doctrine of *res ipsa loquitur*.

In analyzing ordinary *res ipsa loquitur* cases, the court noted that the foundation from which a logical conclusion "can be drawn that an injury was probably caused by negligence is the common knowledge and experience of the community with respect to how such events generally occur." *Id.* 862. The court also noted, however, that:

In some kinds of cases, however, the circumstances giving rise to the injury and the probabilities that the causative factors were created by a breach of legal duty are outside the realm of the common knowledge and experience of lay persons. Even so, occasionally the state of the art or technology causing an injury may pass from the realm of expert evidence into the realm of common knowledge and experience. *Id.* 862.

Thus, the court concluded that: "[W]hen the circumstances and the probabilities as to the cause of the factors of an accident lie within the ken of experts, expert evidence is necessary to establish a foundation that gives rise to an inference of negligence." *Id.* 862. The court concluded then that, given the defendant's expert's affidavit, an inference of the pharmaceutical company's liability could not be deduced from common experience and knowledge. *Id.* 864.

In *Nixdorf, supra*, a medical malpractice case, the Utah Supreme Court determined:

The plaintiff must introduce expert testimony to establish [the] standard of care. Expert testimony is required because the nature of the profession removes the particularities of its practice from the knowledge and understanding of the average citizen. *Id.* 352.

In stating the majority rule, the court also recognized that there were certain exceptions to this general rule requiring expert testimony. In this regard, the court noted:

. . . Specifically, expert testimony is unnecessary to establish the standard of care owed the plaintiff where the propriety of the treatment received is within the common knowledge and experience of the layman. The loss of a surgical instrument or other paraphernalia, in the operating room, exemplifies this type of treatment. *Id.* 352.

In explaining this, the court made a distinction between the loss of instruments or paraphernalia, which is within the general common knowledge of a layperson that negligence occurred, versus whether a surgical operation was skillfully or unskillfully performed as not being within the province of the jury.

The same standard regarding expert witness testimony applied in a legal malpractice case. In *Preston & Chambers, P.C., supra*, the court determined that an expert was required, noting that:

Utah courts have held that expert testimony may be helpful, and in some cases necessary, in establishing the standard of care required in cases dealing with the duties owed by a particular profession. . . . Expert testimony is required “[w]here the average person has little understanding of the duties owed by particular trades or professions” as in cases involving medical doctors, architects and engineers. (Cites omitted.) Expert testimony may also be required to establish the duties owed by practicing attorneys to their clients, especially in cases involving complex and involved allegations of malpractice. *Id.* 263.

In this case, clearly, the cause and origin of a fire is not within the general background and common knowledge of laypersons. Therefore, the Court correctly ruled that it was necessary for Plaintiff to put on expert testimony to show the fire was accidentally set. Therefore, the Directed Verdict should be affirmed.

C. It Was Appropriate for Defendant to Make its Motion for Directed Verdict at the Close of its Case⁶ (Plaintiff's Argument VIII)

In order to move the matter forward, the trial court requested that Defendant put on its case and, at the conclusion of evidence, allowed Defendant to move for a Directed Verdict. (R.1305:176:9-20; 183:12-19; 253:2-13.) At the time Defendant made its Motion for Directed Verdict, it argued that Mr. King was designated as a rebuttal witness and, as such, he should not be allowed to testify in Plaintiff's "case-in-chief." (R.1305:253:22-25; 254:1-15; R. 1154.) The trial court ruled in Defendant's favor, finding that Mr. King was a rebuttal witness and, as such, could not testify in Plaintiff's "case-in-chief." Therefore, once the trial court made that finding, Plaintiff had no more witnesses and essentially rested her case. Therefore, Defendant appropriately made its Motion for Directed Verdict. U.R.C.P., Rule 50(a), provides:

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right to do so to the same extent as if the motion had not been made. . . .

In this case, Defendant did move for a directed verdict at the close of Plaintiff's evidence. Once it was decided that Mr. King could not testify, Plaintiff had no further witnesses, so the Motion for Directed Verdict was appropriately made. Regardless, there are Utah cases where the court has requested to hear both plaintiff's and defendant's evidence before allowing a motion for directed verdict. *Brewer v. Denver & Rio Grande Western Railroad.*, 31 P.3d 557 (Utah 2001); *Carlson Distributing Co. v. Salt Lake Brewing Co., L.C.*, *supra*.

⁶ Plaintiff's brief fails to comply with Utah Rules of Appellate Procedure, Rule 24(a)(9), in that Plaintiff does not cite to any case law to support her position, nor does she cite to the record. As such, this argument should be stricken as well.

Clearly then, Defendant made its Motion for Directed Verdict at the appropriate time, at the close of Plaintiff's case.

**(i) *Defendant Did Not Waive its Right to a Directed Verdict by Putting on its Case*⁷
(Plaintiff's Argument VI)**

Plaintiff also argues, for the first time that, because Defendant put on its case, somehow it now waives its right to a directed verdict. Regardless, for all the reasons discussed above under Point C, there is no waiver.

In support of her position, Plaintiff relies on *State v. Stockton*, 310 P.2d 398 (Utah 1957). However, Plaintiff's reliance on *Stockton* is misplaced because it does not stand for the proposition that if defendant fails to seek a directed verdict at the close of plaintiff's case, then it somehow waives the right to do so. In fact, not only is this not the law as indicated in *Stockton*, but the case is factually distinguishable.

Stockton was a criminal matter where, at the close of the prosecution's case, defendant made a motion for directed verdict, which was subsequently denied. Rather than rest, after the motion for directed verdict was denied, defendant elected to move forward and put on additional evidence. At the close of defendant's case, the jury found defendant guilty. The appellate court found that the denial of defendant's motion for directed verdict was appropriate. The court also found that, because defendant elected to put on his defense, he then made all the testimony available to the jury for its final consideration. However, what is distinguishable in that case is that the evidence put on by the defendant did not affect the court's initial decision to sustain the

⁷ This issue has not been preserved on appeal and, therefore, this Court should not address it. Plaintiff's brief, Argument, Point VI, fails to comply with Utah Rules of Appellate Procedure, Rule 24(a)(9) which requires that the plaintiff specifically cite to the record, which Plaintiff has not done. As such, this argument should be stricken. (See cites under Argument I, Footnote 4.)

conviction. *Stockton* clearly does not stand for the proposition that if defendant moves forward with its case, then it cannot make a motion for directed verdict. Because the trial court requested that Defendant put on its case while waiting for Plaintiff's expert, this does not give rise to a waiver of Defendant's right to a directed verdict. Plaintiff has cited to no case law to support that position.

It follows then that Defendant appropriately made its Motion for Directed Verdict at the close of Plaintiff's case and did not waive its right to do so by putting on its evidence. As such, the Directed Verdict should be affirmed.

D. Did the Court Err in Granting Defendant's Motion for Directed Verdict Pursuant to Rule 41(b) of the Utah Rules of Civil Procedure? (Plaintiff's Argument IX)

Initially, the court mistakenly ordered the directed verdict pursuant to U.R.C.P., Rule 41(b). However, that error was corrected in the actual Judgment on Directed Verdict, which reflects that the Directed Verdict was granted pursuant to Rule 50(a).

POINT III

**THE TRIAL COURT CORRECTLY EXCLUDED
PLAINTIFF'S REBUTTAL WITNESS FROM TESTIFYING IN HER "CASE-IN-CHIEF"
(Plaintiff's Argument II)**

The trial court did not abuse its discretion in not allowing Mr. King, Plaintiff's expert, to testify in her "case-in-chief." Mr. King was designated as a rebuttal witness. Mr. Call clearly admitted this the first day of trial where he submitted this designation on a sheet of paper, at the Court's request. (R.1311:8:1-4; R. 1154.) Again, during the trial, Mr. Call specifically stated he was calling Mr. King as a rebuttal witness. (R.1305:172:1-2.) Defendant relied on Plaintiff's representations in preparing the cross-examination that Mr. King was a rebuttal witness and was

prepared to cross-examine him as only a rebuttal witness. To have allowed Plaintiff's expert to testify in her "case-in-chief" would have been highly prejudicial to Defendant.

The purpose of rebuttal evidence is "tending to refute, modify, explain or otherwise minimize or nullify the effect of an opponent's evidence." *Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993). *See also Astill v. Clark*, 956 P.2d 1081, 1086 (Utah App. 1998), wherein it states the "purpose of rebuttal evidence is not to merely contradict or corroborate evidence already presented, but to respond to new points or evidence first introduced by opposing party." *Id.* 1086. The purpose then is to allow Plaintiff's expert to respond to issues raised by Defendant's witnesses, not for Plaintiff's expert to give his opinion as to the cause and origin of the fire. To find otherwise is an unfair surprise to Defendant and is highly prejudicial.

Plaintiff's reliance on *Turner v. Nelson*, 872 P.2d 1021 (Utah 1994) for the proposition that the trial court abused its discretion in not allowing her expert to testify in her "case-in-chief" is misplaced. The facts in *Turner* are clearly distinguishable because the plaintiff in that case sought the testimony of an undisclosed rebuttal witness who was going to be called during trial to testify as to a reasonably anticipated defense. The testimony was excluded because it would unfairly disadvantage the defendant, who had no notice of or opportunity to depose the surprise witness. *Turner, Id.* 1023. The principle in *Turner* is, however, applicable to this case; that is that it would unfairly prejudice Defendant if Mr. King were allowed to testify the fire was accidentally set without giving the Defendant the opportunity to prepare for this testimony. Clearly then, the trial court did not abuse its discretion in not allowing Plaintiff's expert to testify.

More importantly, because Plaintiff did not comply with the Utah Rules of Evidence, Rule 103(a), this Court has no basis to determine whether the testimony of Mr. King was erroneously

excluded. Utah Rules of Evidence, Rule 103(a), provides: “. . . [e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” For Plaintiff to comply with this rule, she needed to proffer Mr. King’s testimony. This is the only way the Court can determine whether Plaintiff’s “substantial rights” have been impacted. That is, had Mr. King been allowed to testify, the outcome would have been different. *City of Hildale v. Cooke*, 28 P.3d 697, 705 (Utah 2001); *Downey State Bank v. Major-Blakney Corp.*, *supra*. Absent this proffered testimony, there is no way for this Court to determine whether the trial court’s ruling was “prejudicial.” Therefore, “a judgment will not be reversed for alleged error in the exclusion of evidence unless it appears in the record that the error was prejudicial.” *Downey*, *Id.* 1287. Because Plaintiff failed to proffer what her evidence would show, she is precluded from asserting on appeal that the exclusion of this evidence was an error.⁸

A. The Court Correctly Ruled in Excluding Plaintiff’s Rebuttal Witness’s Testimony at the Close of Defendant’s Case (Plaintiff’s Argument V)

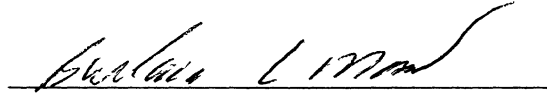
Plaintiff argues that she is entitled to rebut Defendant’s testimony, which may be true; however, under the facts of this case there is no need for rebuttal testimony. Because Plaintiff did not meet her burden of proof showing that she was wrongfully denied coverage, by showing the fire was accidentally set, the Directed Verdict was appropriately granted and rebuttal testimony was unnecessary.

⁸ Note that Plaintiff cites to testimony from Mr. King’s report on page 32, ¶18 of her brief, when neither his report nor any of the testimony she cites at this section is part of the record.

CONCLUSIONS AND RELIEF SOUGHT

Defendant respectfully requests that this Court affirm both the grant of the Motion for Partial Summary Judgment dismissing the bad faith claim, as well as the Directed Verdict. Defendant also requests that this Court find that the Notice of Appeal was defective and that Plaintiff has now waived the right to appeal from the grant of the Motion for Partial Summary Judgment. Finally, Defendant requests that the Court find that Plaintiff has waived the right to appeal from the Motion for New Trial (which was not briefed) and that Plaintiff's Arguments, Point I, VI, VII, and VIII, all be stricken for failure to comply with the Utah Rules of Appellate Procedure, Rule 24(a)(9).

DATED this 21st day of August, 2007.

A handwritten signature in black ink, appearing to read "Barbara L. Maw", is written over a horizontal line.

Barbara L. Maw

Counsel for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2007, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was mailed, first-class postage prepaid, to the following:

Budge W. Call
8 East Broadway, Suite 720
Salt Lake City, UT 84111

Jobie Mitchell

ADDENDUM

Utah Rules of Appellate Procedure, Rule 24(a)(9):

Rule 24. Briefs.

...

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

Utah Rules of Appellate Procedure, Rule 3(d):

Rule 3. Appeal as of right: how taken.

...

(d) *Content of notice of appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

Utah Rules of Civil Procedure, Rule 41(b):

Rule 41. Dismissal of actions.

...

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Utah Rules of Civil Procedure, Rule 50(a):

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) *Motion for directed verdict; when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Utah Rules of Evidence, Rule 103(a):

Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . .