

2007

Leigh Young aka Hardy v. Fire Insurance Exchange : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LEIGH YOUNG aka HARDY,)	
)	APPELLANT'S REPLY BRIEF
Plaintiff/Appellant)	
vs.)	
FIRE INSURANCE EXCHANGE)	
)	Appellate Case No. 20070279
Defendant/Appellee)	Trial Court No. 040915146

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

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SUMMARY OF ARGUMENT

The Notice of Appeal does designate “*all preceding or interim orders*,” giving notice that the court’s ruling on summary judgment is being appealed. Further, any interim order, involving the merits, can be challenged on appeal without being specifically designated in the notice of appeal. *Speros v. Fricke*, 98 P.3d 28 (Utah 2004).

There are numerous issues of fact in this case regarding the denial of Plaintiff’s insurance claim based on arson, and the Insurance Company’s failure to investigate the facts. When an insured’s claim is denied based on arson and issues of fact are present, the question as to whether the denial was “fairly debatable” at the time, or in “good faith,” is for the jury to determine. *Horrell v. Utah Farm Bureau Inc. Co.*, 909 P.2d 1279 (Ut.App. 1996).

Insurance policies are contracts for the payment of money when an unexpected loss occurs, therefore Utah courts have held that the issuance of an insurance policy for the loss, and the receipt of premiums on the policy, establishes the *prima facie* liability of the insurance company. *Fox v. Allstate Insurance Co.*, 453 P.2d 701, 706 (Utah 1969); *Peterson v. Western Casualty and Surety Co.*, 425 P.2d 769 (Utah 1976).

Insurance policies are contracts of adhesion and should be construed against the insurance company, allowing coverage in the broadest sense possible. When exceptions are contained in an insurance policy, the presumption is that that which is not clearly excluded, is included. *LDS Hospital, Division of Intermountain Healthcare, Inc.*

v. Capitol Life Ins. Co., 765 P.2d 857, 859 (Utah 1988).

The determination as to whether a fire is “accidental” under an insurance policy is not dependent on expert testimony regarding the cause of the fire, but rather whether from the *insured’s point of view*, the fire was foreseeable as a natural and probable result of the *insured’s own actions*. *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983); *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202, 1206 (Ut.App. 1997). Therefore, expert testimony was not necessary in this case, to put on evidence that the fire was “accidental” for coverage under the insurance policy.

Furthermore, when the cause and origin of a fire is at issue in a case, a party is not required to put on expert testimony, in order to present an issue of fact for the jury to determine whether or not the fire was accidental. *Bear River Mutual Ins. Co. v. Williams*, 2006 P.3d (2006 Ut. App. 500). Failure to use an expert to establish causation does not result in a directed verdict. *Neely v. Bennett*, 51 P.3d 724 (Ut.App. 2002).

Plaintiff’s expert was properly designated as a witness for Plaintiff’s case, and not merely as a rebuttal witness. Plaintiff’s intent to use the witness in rebuttal, does not preclude her from calling him on her case. The two are not mutually exclusive. The court was aware that Plaintiff intended to call her expert before resting her case; and told Plaintiff that her expert could testify on her case at noon the following day. The court abused its discretion in not allowing Plaintiff’s expert to testify the next day, and ruling on Defendant’s Motion for Directed Verdict before the close of Plaintiff’s case.

On a motion for directed verdict the moving party has the very difficult burden of showing that the party with the burden of proof has failed to raise any questions of material fact; and the court should deny the motion, when any evidence exists raising such a question, no matter how improbable the evidence may appear. *Alta Health Strategies, Inc., v. CCI Mechanical Serv.*, 930 P.2d 284 (Ut.App. 1996). The Plaintiff through her testimony, the testimony of her witnesses, as well as, the cross examination of Defendant's witnesses, and admitted exhibits, presented evidence raising questions of material fact, as to whether the fire was "accidental" under her insurance policy.

The court improperly dismissed Plaintiff's case in the middle of a jury trial relying on Rule 41(b) of the Utah Rules of Civil Procedure. The court did not just erroneously refer to Rule 41(b), but weighing the evidence, determined it was insufficient without expert testimony, to establish the fire was "accidental" under the insurance policy. The Defendant tried to change this reference in its preparation of the Judgment; however, it is the substance of a motion that is dispositive in determining its character. *Adoption of Baby K*, 967 P.2d 947, 948 n. 1 (Ut.App. 1998). It was improper for the trial judge to dismiss the jury trial based on the weight of the evidence under Rule 41(b).

I. THE NOTICE OF APPEAL IS SUFFICIENT TO APPEAL THE COURT'S PARTIAL SUMMARY JUDGMENT RULING.

The Notice of Appeal in this case references the Judgment on Directed Verdict, entered on December 7, 2006, as well as, "*all preceding or interim orders.*" (Rec. 1296). Therefore, the Notice of Appeal is sufficient in this case and gives the

Defendant notice that all preceding or interim orders, including the ruling on partial summary judgment, are being appealed.

The notice of appeal in *Jensen v. Intermountain Power Agency*, 977 P.2d 474 (Utah 1999), is distinguishable from the Notice of Appeal in this case. In *Jensen* the notice of appeal was *only* from the jury verdict entered on July 14, 1995 and the denial of certain post-judgment motions. Jensen failed to indicate in his notice, that he was appealing any other orders entered by the court. Moreover the jury verdict entered in the *Jensen* case dealt with a totally separate issue than the earlier summary judgment motion, which involved other third-party defendants.¹ The Court in *Jensen* was concerned that the notice of appeal from the jury's verdict, which involved separate issues, failed to give adequate notice to Intermountain that there was also an appeal from the earlier summary judgment ruling; and as a result, Intermountain did not proceed with cross appeals against the third-party defendants involved, but dismissed years earlier by the court on summary judgment. *Id.* at 446.

The Notice of Appeal in this case however, clearly indicates that an appeal is being taken, not only from the Judgment on Directed Verdict entered on December 21, 2006, but from “*all preceding and interim orders.*” (Rec. 1296). This would include the court's ruling on the partial summary judgment, dismissing a portion of Plaintiff's claims.

¹ The summary judgment in *Jensen* dealt with Jensen's storage easements and water rights, and included cross-claims against third-party defendants; while the jury trial dealt solely with flooding issues against Intermountain Power Agency.

Furthermore, after *Jensen v. Intermountain*, in *Speros v. Fricke*, 98 P.3d 28 (Utah 2004), the Utah Supreme Court stated that Rule 3(d) of the Utah Rules of Appellate Procedure does not require an appellant to indicate that the appeal also concerns intermediate orders or events that have led to the final judgment. *Id.*, citing *Zion's First National Bank v. Rocky Mountain Irr. Inc.*, 931 P.2d 142, 144 (Utah 1977); *Scudder v. Kennecott Copper Inc.*, 886 P.2d 48, 50 (Utah 1994).

In addition, the Utah Supreme Court in *Speros v. Fricke*, limited the holding in *Jensen v. Intermountain*, to the fact that the appellee was unjustly prejudiced by the appellant's failure to designate earlier matters decided on summary judgment, because it deprived the appellee of the opportunity, "to proceed with cross-appeals against the third-party defendants involved, whom the court dismissed years earlier by granting summary judgment." *Speros v. Fricke*, *supra*, footnote 2.²

The Utah Supreme Court has made it clear that a party seeking to appeal a non-final summary judgment decision does not need to specifically identify that summary judgment ruling in its notice of appeal. *Id.* See *U.P.C. Inc. v. R.O.A. General Inc.*, 990 P.2d 945, 951 (Utah 1999)(because U.P.C. Inc., "generally designated the final judgment in its notice of appeal, [it is] not precluded from alleging errors in any intermediate order

²The Court in *Speros* found that even if the appellant failed to accurately designate the dates of the orders appealed, Nationwide did not, and cannot argue that it suffered any such prejudice. Likewise, in this case, the Defendant cannot argue any such prejudice; and has in fact responded to the appeal of the partial summary judgment ruling.

involving the merits or necessarily affecting the judgment.” *Id.* at 952, citing *Zions First National Bank*, 931 P.2d 142, at 144 (Utah 1997). To hold otherwise would be unduly harsh, does not further the underlying purpose of a notice of appeal and would be a direct contradiction of our jurisprudence governing the right of appeal. Statutes giving the right of appeal are to be liberally construed in the furtherance of justice. An interpretation that will work as a forfeiture of that right, is not favored. *Id.* at 952.

The Notice of Appeal in this case clearly designates “*all preceding and interim orders*,” and the summary judgment ruling is an intermediate order involving the merits of the case and affecting the final judgment reached. Therefore, the Defendant received adequate notice that the ruling on partial summary judgment was being appealed; and the Notice of Appeal is sufficient to convey jurisdiction to this Court.

II. THE BAD FAITH CLAIM SHOULD HAVE BEEN LEFT FOR THE JURY; NOT DISMISSED ON SUMMARY JUDGMENT.

The determination as to whether there is a “fairly debatable” defense under the facts and circumstances is usually a question of law. *Billings v. Union Bankers Inc. Co.*, 918 P.2d 461, 464 (Utah 1996). However, when there are factual questions as to the insurance company’s good faith investigation into the facts, the matter should be left for the jury to decide. *Billings v. Union Bankers Inc. Co.*, 918 P.2d 461, 466 (Utah 1996). In the case of *Horrell v. Utah Farm Bureau Inc. Co.*, 909 P.2d 1279 (Ut.App. 1996), where the insured’s claim was denied based on arson and misrepresentation, as in this case, the question as to whether the denial of the insurance claim was “fairly debatable” at the time

or not, was a question of fact, for the jury to decide. *Id.* at 1282.

In this case there were numerous factual questions presented on the motions for summary judgment (Rec. 422-508), regarding the actions of the Insurance Company, its investigation, and its denial based on arson.³

For example, the insurance investigator, Mr. Bebee testified he thought the fire was intentionally set because no one was home at the time; however, he did not talk to the boys who were in the home that night. (Rec. 1304, p. 101). The Plaintiff never told him she was at the home late at night or early in the morning on July 26th, the day of the fire. She told him that she was there late at night on the 24th of July; and had spent the day before the fire, July 25th in Salt Lake City. (Rec. 1304, p. 35-36). There were no eyewitnesses claiming Leigh was at the home the night of the fire. The written statement from Steve Johnson (admitted into evidence as Ex. 25), does not say that he saw Leigh or Doug there, only a Ford Ranger. (Rec. 1150-1151, Trial Ex. 25). If Mr. Bebee would have talked to the boys, he would have learned that Chad Smith, who also drove a Ford Ranger, was at the house that night and early the next morning, with Tim and his friends. (Rec. 1305, p. 152). Mr. Bebee did not fully investigate these facts.

³See Nature of Proceedings and Statement of Facts in Appellant's opening brief. Defendant in footnotes argues that Points I, VI, VII and VIII should be stricken for failure to cite to the record under Rule 24(a)(9) U.R.App.P. However, Plaintiff did cite to the record in her brief, in the Statement of the Case, Nature of Proceedings, Statement of Facts, and referred to them in her Argument when appropriate without restating all the facts. If strict compliance of the rules are enforced, Appellee's footnotes should be stricken, because they are not 13-point or larger, as required by Rule 27(b).

Sandy Fire Marshall Richard Lyman was also made aware that the boys were in the home the night of the fire, but he did not bother to talk to them in preparing his report. (Rec. 1305, p. 231). His report, upon which the Insurance Company relied, states that it could change upon further information. (Rec. 1305, p. 232). Mr. Lyman said that the boys being there that night could change his opinion in his report. (Rec. 1305, p. 232) When questioned about how this would change his opinion at trial, the court would not allow, Plaintiff's counsel to proceed with such questions. (Rec. 1305, p. 236). Mr. Lyman indicated that there was no source of ignition in the middle of the room and then states in the same report that the accelerant dog hit on an object in the middle of the room. (Rec. 1305, p. 228). If he would have talked to the boys he would have learned that they were there that night and had numerous appliances in the middle of the room, including a T.V., a VCR, video game, and even had a candle lit, all on a pine table located in the middle of the room. (Rec. 1305, p. 150-151). Mr. Lyman also testified that it was a flashover fire and could have started in a mattress located in the room. (Rec. 1305, p. 224). If Mr. Lyman would have talked to the boys, he would have learned that they were there drinking, lighting candles, and smoking on the mattresses. (Rec. 1305, p. 137).

John Blundell the insurance investigator (deceased before trial) did not talk to the boys that were there that night. (Rec. 1305, p.155). The statements he made in his report are hearsay, and were objected to and inadmissible, for purposes of summary judgment. (Rec. 523, ¶s j, k & l). Detective Berhow did not talk to the boys and did not testify at trial The statements made by Detective Berhow regarding what Richard Ricci or

John Remington may have said are hearsay, and were objected to and inadmissible for purposes of summary judgment. (Rec. 523, ¶s j, k & l).

There was no direct evidence that the fire was started or arranged by the Plaintiff, for the Insurance Company to deny coverage based on its arson exclusion. (Rec. 1305, p. 222). A jury could find that the denial based on arson constituted bad faith.⁴ This matter should not have been dismissed on summary judgment, but left for the jury to decide. *Horrell v. Utah Farm Bureau Inc. Co.*, 909 P.2d 1279 (Ut.App. 1996).

III. PLAINTIFF ESTABLISHED A *PRIMA FACIE* CASE OF LIABILITY AGAINST THE INSURANCE COMPANY.

The elements of a *prima facie* case for breach of contract are (1) a contract, (2) performance, (3) breach of contract by the other party and (4) damages. Breach of contract damages seek to place the party in the same economic position the party would have been in, if the contract had not been breached. *Bair v. Axiom Design L.L.C.*, 20 P.3d 388 (Utah 2001).

In this case, Plaintiff established that there was a contract (insurance policy); there was performance by the Plaintiff (paying premiums and submitting claims); there was a breach by the Insurance Company (denying her claims); and damages, (the payment she should have received under the policy). Therefore, Plaintiff did establish a *prima facie* case for breach of her insurance contract. *Id.*

⁴The Insurance Company did not deny the claim because it wasn't an "accident" under the policy, but relied on its exclusions for arson and fraud. (Rec. 1304; Ex. 16).

Since insurance policies are contracts for the payment of money for an unexpected loss, Utah courts have held that the issuance of an insurance policy for the loss, and the receipt of premiums on the policy, establishes the *prima facie* liability of the insurance company. *Fox v. Allstate Insurance Co.*, 453 P.2d 701, 706 (Utah 1969); *Peterson v. Western Casualty and Surety Co.*, 425 P.2d 769 (Utah 1976).

The case of *Fox v. Allstate Insurance Co.* is on point in this case, as the insured filed a claim for the loss of his boat. The insured claimed that the boat struck a submerged object in Utah Lake and sank. The insurance company did a search of the entire area, but found no signs of the sunken craft. The court found that the insured had met his *prima facie* case against the insurance company, by the issuance of the insurance policy and the payment of premiums. *Id* at 706. The insured was not required to produce expert testimony regarding the loss of his boat; and the question as to whether he even owned a boat or lost it at all, was left for the jury's determination. A motion for a directed verdict could not be properly granted. *Id* at 704.

The Plaintiff in this case, therefore, did establish a *prima facie* case of liability against the Insurance Company (without expert testimony), through her testimony and the Insurance Company's admission that the policy was purchased, the premiums paid, and the policy was in effect on the day of the fire.⁵ (Rec. 1304, p.23). *Id.* at 706.

⁵Defendant complains that this shouldn't automatically entitle the insured to payment under the policy. However, it doesn't. It only establishes the *prima facie* liability of the insurance company. The insurance company still has all of its exclusions

IV. THE PLAINTIFF DID PRESENT EVIDENCE THAT THE FIRE WAS “ACCIDENTAL” FOR COVERAGE UNDER HER INSURANCE POLICY.

The trial court granted Defendant’s Motion for Directed Verdict, stating that there was no evidence presented by Plaintiff’s expert that the fire was “accidental”. The trial court made this statement without attempting to define what constitutes “accidental” under an insurance contract. The Policy at issue in this case provides, “[w]e insure for accidental direct physical loss to property described in Coverage C, but only if caused by one or more of the following perils: 1. Fire or lightning. . . .” (Rec. 220). There is no definition of the term “accidental” in the Policy.

Although the courts construe insurance contracts using the same interpretive tools used to review contracts generally, they have frequently declared that because insurance contracts are contracts of adhesion, they are to be “construed liberally in favor of the insured and their beneficiaries, so as to promote and not defeat, the purposes of insurance.” *U.S. Fid. & Guar. Co. v. Sandt*, 854 P.2d 519 (Utah 1993). Liberal construction should be given in favor of the insured to accomplish the purpose for which the insurance was obtained and for which the premium was paid. *Id.* at 522. The insured is entitled to the broadest coverage or protection that he could reasonably believe was afforded under the policy.⁶ *Id.* at 522. If an insurance contract has inconsistent

and other defenses that can still be raised.

⁶It is not a reasonable belief, that an insured would be required to hire an expert to prove the cause and origin of a fire before establishing a *prima facie* case for liability on

provisions, one which can be construed against coverage and one which can be construed in favor of coverage, the contract should be construed in favor of coverage.⁷ *Id.* at 523.

Furthermore, where exceptions are introduced into an insurance contract, a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof.⁸ *LDS Hospital, Division of Intermountain Healthcare, Inc. v. Capitol Life Ins. Co.*, 765 P.2d 857, 859 (Utah 1988).

In *Richards v. Standard Accident Insurance Co.*, 200 P. 1017 (Utah 1921) the Utah Supreme Court first laid down the standard for defining the words “accident” or “accidental” as used in an insurance policy, stating “the word is descriptive of means which produce effects, which are not their natural and probable consequences.” *Id.* at 1023. The Court also defined the phrase “natural and probable consequence,” stating:

The natural and probable consequence of means used [is] the consequence which ordinarily follows from their use – the result which may be reasonably anticipated from their use, and which ought to be expected. *Id.*

his insurance policy.

⁷The trial court’s definition of “accidental” in this case, is even more restrictive than the exclusion for arson, as the arson exclusion only applies *if it is the insured who intentionally sets or arranges for the fire*. (Rec. 1304). In other words, if someone other than the insured intentionally sets fire to the home, the insured may still be able to recover despite the arson exclusion, *Error v. Western Home Ins. Co.*, 762 P.2d 1077, 1081 (Utah 1988); but that person would never be able to recover, because he would be unable to establish that the fire was “accidental” under the general terms of the policy.

⁸Given the trial court’s definition of “accidental” an insurance company will never again have the burden of proving arson as an affirmative defense, as the insured will be required to prove the fire was “accidental” under the general terms of the policy.

The Utah Supreme Court applied this definition in *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983), stating: “***thus, a person is a victim of an accident, when from the victim’s point of view, the occurrence causing the injury or death is not a natural and probable result of the victim’s own acts.***” (emphasis added) *Id.* at 416.⁹ This is consistent with the accepted definition of “accidental” as used in insurance contracts. *Black’s Law Dictionary*, 7th Edition (Qualification of a particular incident as an “accident” depends on two criteria: (1) The degree of foreseeability; and (2) the state of mind of the actor in intending or not intending the result).

Therefore, the question as to whether the fire was “accidental” under the insurance policy in this case, is not dependent on an expert testifying as to the cause or origin of the fire; but rather, whether ***from the Plaintiff’s point of view***, the fire was foreseeable as the natural and probable result of the ***Plaintiff’s own actions***. *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983); *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202, 1206 (Ut.App. 1997).¹⁰

⁹Hoffman had been suicidal and was armed when shot by police. The trial court ruled that his death was not accidental as a matter of law. The Utah Supreme Court however reversed and remanded the case back to the trial court to determine whether his death was intended or an accident, based on ***Hoffman’s state of mind***. *Id.* at 420-421.

¹⁰In *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202, (Ut.App. 1997) the Utah Court of Appeals indicated that an “accident” under an insurance policy may still occur even if the injury is the result of an insured’s deliberate or intentional act, if the actual result is beyond the scope of anticipated injury. For instance, the scope of anticipated injury is significantly greater when firing a shotgun or throwing a cherry bomb, than throwing a water balloon. *Id.* at 1206.

In this case, the Plaintiff testified that she was not home at the time the fire started, and that she had not been home the day before the fire started. (Rec. 1304, p. 34-36). She stated that the last time she was at home before the fire, everything appeared to be normal. (Rec. 1304, p. 25). She learned of the fire while at the Travelodge in Salt Lake City, and it came as a total surprise. (Rec. 1304, p. 35-37). She did not know how the fire started and asked how the fire started. (Rec. 1304, p. 38). Furthermore, she contacted her insurance company and filed proof of claims for her damages. (Rec. 1304, p. 41-43). According to her testimony, in her view the fire was accidental and she treated the fire as accidental. She did not do anything from which the fire could have started as a natural and probable result.¹¹ Therefore, the Plaintiff (without expert testimony) did present evidence that the fire was “accidental” under her insurance policy.

The case of *Metric Const. Co. v. St. Paul Fire & Marine Insurance Co.*, 2005 WL 21000939, (D. Utah 2005) is an unpublished decision, FOR EDUCATIONAL USE ONLY, and thus has no precedential value and should not be used, except for the purpose of applying the doctrine of law of the case, *res judicata*, or collateral estoppel.¹² Regardless, the decision in *Metric Const. Co.*, supports Plaintiff’s position that the

¹¹Defendant argues that the Plaintiff never testified specifically that she didn’t start the fire, however, this is a reasonable inference from her actions and testimony; and on Defendant’s Motion for Directed Verdict all inferences are to be viewed in Plaintiff’s favor. The question is whether *any evidence* was presented to the jury, no matter how improbable. *Alta Health Strategies, Inc. v. CCI Mechanical Service, supra*.

¹²*State v. Gambrell*, 814 P.2d 1136 (Ut.App. 1991); *DeBry v. Valley Mortgage Co.*, 835 P.2d 1000 (Ut.App. 1992)

determination of an “accident” under an insurance policy, depends on the *insured’s point of view* and the natural and foreseeable consequences from *the insured’s own actions*. The U.S. District Court in *Metric Const. Co.*, found that the insured proceeded with the installation of a defective roof, knowing that it would not be weather tight and doing nothing to rectify the problem. Therefore, the Court found that the water leaking from the roof, was a natural and foreseeable consequence of the insured’s own actions, and not an accident under the terms of his insurance policy.

The case of *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 371 n. 7, is not relevant to the facts in this case. The issue being addressed in footnote 7, was whether the loss was discovered within the effective period of Aetna’s bond. In this case, there is no question but that the insurance policy was in effect at the time of the fire.

Finally, the case of *Horrell v. Utah Farm Bureau Ins. Co.*, 909 P.2d 1279 (Ut.App. 1996), cited by the Defendant, actually supports Plaintiff’s position. In *Horrell* the insured’s claim was denied based on arson and misrepresentation, similar to the Plaintiff’s claims in this case. The Utah Court of Appeals in *Horrell* did not require the insured to prove the fire was “accidental” through the testimony of a cause and origin expert; but rather stated, that the burden of proving arson was on the insurance company, and not the insured. *Id.* at 1281.

**V. EXPERT TESTIMONY IS NOT REQUIRED TO RAISE AN
ISSUE OF FACT REGARDING THE CAUSE OF A FIRE.**

The trial court granted the Defendant's Motion for Directed Verdict stating that the Plaintiff by reserving her cause and origin expert for rebuttal, failed to put on any evidence to show the fire was accidental. (Rec. 1210) As set forth above, the determination as to whether a fire is "accidental" as defined under an insurance policy, is based on the insured's point of view and whether the fire was foreseeable as a natural and probable result of the insured's own actions. *Hoffman v. Life Ins. Co. of North America*, 669 P.2d 410 (Utah 1983).

Regardless, when the cause and origin of a fire is at issue, the Utah Court of Appeals has already held that expert testimony is not required to put on evidence to raise a question of fact for a jury to decide whether the cause of a fire was accidental. The Plaintiff cites two cases directly on point in her opening brief, which the Defendant fails to address. *Bear River Mutual Ins. Co. v. Williams*, 2006 P.3d (2006 Ut. App. 500); and *Neely v. Bennett*, 51 P.3d 724 (Ut.App. 2002).

In *Bear River Mutual Ins. Co.*, the insured was not required to present any evidence by expert testimony to raise issues of fact for the jury to decide the cause of a fire, thus precluding summary judgment. Furthermore, the Court of Appeals in *Bear River Mutual Inc. Co.*, held that even if the insurance company puts on expert testimony that a fire was intentional; the insured is still not required put on expert testimony that the fire was accidental, to raise any issue of fact for the jury. *Id.*

In *Neely v. Bennett*, the Court of Appeals specifically ruled that the failure to use expert testimony regarding the cause of a fire, does not establish causation as a matter of law, so as to allow a directed verdict against a party. Furthermore, the Court of Appeals stated that in determining the cause of a fire, a jury may elect to give no weight at all to an expert's opinion. *Id. citing Dixon v. Stewart*, 658 P.2d 591, 597 (Utah 1982).

Therefore, the Plaintiff in this case, contrary to the trial court's ruling, was not required to put on expert testimony that the fire was "accidental" either to present a *prima facie* case of liability under the insurance policy; or to raise an issue of fact as to the cause of the fire on the claim of arson. *Id.*

The Defendant has failed to cite any cases where expert testimony was required for an insured to establish a *prima facie* case that a fire was "accidental" under an insurance policy. The case of *Walker v. Parrish Chemical Co.*, 914 P.2d 1157 (Ut.App.1996) does not support this position. In fact, *Walker v. Parrish Chemical* did not involve the question of whether the fire was accidental under an insurance policy, but the plaintiff's attempt to establish negligence under the doctrine of *res ipsa loquitur*. The Plaintiff in this case is not attempting to invoke the doctrine of *res ipsa loquitur* or establish the negligence of any party under tort law. Plaintiff's claim is contractual. Plaintiff had a policy of insurance with the Defendant, who promised to pay for damages caused by accidental means. If the Plaintiff was required to establish the negligence of the party committing the fire before she could recover under her insurance policy this

could have been written into the policy.¹³

Furthermore, the case of *Walker v. Parrish Chemical* supports Plaintiff's position that expert testimony as to the cause of a fire is not required. The Court in *Walker* states that it is a matter of common knowledge that fires of unknown origin often occur. Professors Prosser and Keaton explain:

[T]here are many accidents which ***as a matter of common knowledge***, occur frequently A tumble downstairs, a fall in alighting from a standing bus or street car, an ordinary slip and fall, a tire of an ordinary automobile which blows out, a skidding car, a staph infection from an operation, ***or a fire of unknown origin***. *Id.*

Therefore, according to the Utah Court of Appeals in *Walker v. Parrish Chemical*, as well as Professors Prosser and Keaton, a fire of unknown origin is a matter of common knowledge.

The case of *King v. Searle Pharmaceuticals Inc.*, 832 P.2d 858 (Utah 1992) is even more distinguishable. It is also a *res ipsa loquitur* attempt to establish negligence, but in the medical field. The plaintiff in *King v. Searle* was attempting to establish negligence and the medical causation of her injuries from the implementation of an intrauterine device (IUD). The court found that her claimed medical injuries and the medical standard of care, were beyond the common knowledge of the jury, so she could

¹³It should be remembered that insurance policies are contracts of adhesion and should be given their broadest interpretation to extend coverage to the insured and fulfill its intended purpose. The requirement that in order to recover under an insurance policy, the insured must first prove the negligence of the person responsible, is contrary to the reason most people purchase insurance; and there would be no purpose for insurance, since recovery would first have to be sought against the negligent party responsible.

not rely on the doctrine of *res ipsa loquitur*. The pharmaceutical company's liability could not be deduced from common experience and knowledge. However, this case does not involve a medical claim, medical causation, or the medical standard of care, requiring expert testimony. Furthermore, even in medical malpractice claims expert testimony is not always required.¹⁴

The case of *Preston v. Chambers, P.C. v. Koller*, 943 P.2d 260 (Ut.App. 1997) is also distinguishable from this case, as it does not involve the question as to whether a fire is accidental under an insurance policy, but is a legal malpractice case. Therefore, expert testimony was necessary in *Preston v. Chambers* to establish the professional standard of care in the legal profession. There is no professional standard of care at issue in this case, requiring expert testimony.

VI. PLAINTIFF'S EXPERT WAS PROPERLY DESIGNATED AND SCHEDULED AS AN EXPERT WITNESS ON PLAINTIFF'S CASE.

The Insurance Company claims that since Mr. King was to be used in rebuttal of the testimony of the fire marshal and Defendant's fire expert that the Plaintiff should be precluded from calling him as part of her case-in-chief, because it would be prejudicial to the Defendant.

However, Mr. King was properly designated as an expert witness for Plaintiff's case in chief. (See Plaintiff's Designation of Expert Witnesses, Rec. 58-59).

¹⁴In *Searle Pharmaceuticals, supra*, the Court stated that medical claims could proceed without expert testimony when the treatment received is within the common knowledge of the laymen, such as when an instrument is left inside a patient.

Furthermore, Mr. King's expert report was filed with the court and properly served on Defendant's counsel (Rec. 63-73), indicating that all accidental causes of the fire were not properly eliminated and the collapsed springs were a "classic indicator of a mattress fire." (Rec. 68). It was after receiving Mr. King's report that Defendant designated its expert witnesses. (Rec. 140). After receiving Mr. King's report and obtaining its own experts, Defendant took Mr. King's deposition and had the opportunity to question him regarding his report. (Rec. 166-167). Mr. King was designated as a witness on Plaintiff's case-in-chief. There was no prejudice to the Defendant in allowing Mr. King to testify on Plaintiff's case-in-chief.¹⁵

The Defendant argues that Plaintiff indicated that Mr. King was going to be called as a rebuttal witness. This may be true, but Mr. King was also going to be called on Plaintiff's case-in-chief. The fact Mr. King was also going to be used in rebuttal to the Insurance Company's claim of arson; does not preclude him from also testifying on Plaintiff's case-in-chief. *Randle v. Allen*, 862 P.2d 1329, 1338 (Utah 1993). He should have been permitted to testify before the ruling on directed verdict, especially when he was properly designated as an expert witness on Plaintiff's case-in-chief.¹⁶

¹⁵Defendant's real concern was that its expert, Mr. Freeman, would not be available to testify until Friday; and the court made it clear on Wednesday, that regardless, the case was going to finish on Thursday. (Rec. 1305, p. 252).

¹⁶Even if he were only designated as a rebuttal witness (which he wasn't); the Defendant elected to proceed and presented expert testimony to the jury through Richard Lyman that the fire was intentional; therefore, Mr. King still had the right to testify in rebuttal to Mr. Lyman's testimony. *Astill v. Clark*, 956 P.2d 1081 (Ut.App. 1998).

Moreover, both the Defendant and the trial court knew that Plaintiff intended to call Mr. King before the close of Plaintiff's evidence. At the end of Mr. Johnson's testimony, the court asked Plaintiff, subject to your last witness (being Mr. King) do you rest? (Rec. 1305, p. 183). It was known that Mr. King was going to testify before Plaintiff rested her case. Furthermore, asked if she rested, Plaintiff's counsel informed the court that she still intended to call Mr. King before resting her case. (Rec. 1305, p. 252-253). In addition, the court told the Plaintiff and her counsel, that she would be able to call Mr. King on her case-in-chief at noon on Thursday, November 30th. (Rec. 1305, p. 252-253). Plaintiff relied on this and had Mr. King ready to testify Thursday morning before noon. The trial court abused its discretion and greatly prejudiced the Plaintiff by not allowing her to call her expert to testify and close the evidence on her case, before ruling on the Motion for Directed Verdict.¹⁷

VII. THERE WAS EVIDENCE PRESENTED TO THE JURY TO WITHSTAND A DIRECTED VERDICT.

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

¹⁷The expert report of Mr. King was filed with the court and is part of the record. He would have testified that not all accidental sources of the fire were properly eliminated and it appeared to be a classic mattress fire. (Rec. 63-73).

On a motion for directed verdict the court is not to weigh the evidence or determine its probability, but it is only to determine if some evidence exists to create a material issue of fact. The trial court in its ruling on directed verdict did not address all the evidence that was presented to the jury by the Plaintiff, her witnesses, the cross-examination of the Defendant's witnesses, or the documents that were admitted into evidence by stipulation.¹⁸ (Rec. 1150-1151).

For instance, the Plaintiff testified that she was not involved in the cause or the fire. She did not set it, arrange for it, or know that it was going to happen. It came as a complete surprise. (Rec. 1304, p. 35-36). Tim and his friend Brandon, where in the home that night and early morning, without Plaintiff's knowledge or permission, drinking alcohol, lighting candles, smoking on the mattresses, and playing video games, and watching TV, on appliances that were placed in the middle of the room on a pine table. (Rec. 1305, p.137; 150-151); and they were there with Chad Smith, who drove over in a goldish looking Ford Ranger, similar to Doug Young's. (Rec. 1305, p. 155). Electrician Chris Johnson testified that after the fire he observed burned wires in an electrical outlet, contrary to the pictures and reports prepared by Lyman and Blundell (Rec.1305, p.182). Mr. Lyman, the Sandy Fire Marshall, testified that his report was not complete, and that he never talked to the boys, that were there at the house that night, although new information would change his opinion on the cause of the fire. (Rec. 1305, p. 232). He

¹⁸All evidence presented to the jury is to be considered on a motion for directed verdict. *State v. Stockton*, 310 P.2d 398 (Utah 1957).

also testified that the sagging mattress springs indicated a lot of heat and that this could have been a cause of the fire. (Rec. 1305, p. 224). Mr. Lyman indicated that there was no legitimate source of ignition in the middle of the room, where he believed the fire started, but yet identified some debris in the middle of the room the dog hit on, that he first thought was an auto part, then a computer part, or possibly a television part. (Rec. 1305, p. 225-228). Mr. Nelson, the dog handler, testified that the dog hit on some debris in the northeast part of the room and they had to dig down to reach the debris. (Rec. 1305, p. 247). The lab report from Barker & Herbert indicates that the turpentine residue is naturally found in coniferous wood (such as pine) and can contaminate nearby objects when coniferous wood is burned. (Rec. 355).

The trial court makes no indication that it even considered such evidence as to whether an issue of fact was presented, but simply states that Plaintiff failed to put on evidence that the fire was accidental, by reserving her cause and origin expert for rebuttal.

Given all the evidence presented in this case regarding the cause of the fire, as set forth above, and in Plaintiff's Statement of the Facts in her brief; numerous factual questions were presented to the jury, precluding a directed verdict.

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

The trial court dismissed Plaintiff's case in the middle of a jury trial, relying on Rule 41(b) of the Utah Rules of Civil Procedure. (Rec 1201). Rule 41(b) applies only to bench trials, not jury trials. Rule 41(b) should not be used in jury trials and should not

be confused with a motion for directed verdict. *Grossen v. DeWitt*, 982 P.2d 581 (Ut.App. 1999). Under Rule 41(b) the trial court may not usurp the jury's fact-finding role. *Id.*

The court did not just erroneously refer to Rule 41(b) of the Utah Rules of Civil Procedure by stating that expert testimony was needed to prove the fire was accidental, without considering the other evidence presented to the jury. It is evident from this statement that the court was weighing the evidence and applying Rule 41(b) which gives the court greater discretion in considering the evidence¹⁹. As the trial court did in this case, under Rule 41(b), the court may dismiss a trial without a jury, if “(1) the claimant has failed to introduce *evidence sufficient to establish a prima facie case* or (2) the trial court is not persuaded by that evidence.” *Walker v. Union Pac. R.R.*, 844 P.2d 335, 338 n. 1 (Ut.App. 1993) (emphasis added). The trial court improperly dismissed the jury trial in this case, using a Rule 41(b) standard. *Alta Health Strategies, Inc. v. CCI Mechanical Service*, 930 P.2d 280, 284 (Ut.App. 1997).

CONCLUSION

The question as to whether the fire was “accidental” under the insurance policy in this case, is not dependent on an expert testifying as to the cause or origin of the fire; but rather, whether *from the Plaintiff's point of view*, the fire was foreseeable as the natural and probable result of the *Plaintiff's own actions*. *Hoffman v. Life Ins. Co. of*

¹⁹It is the substance of a motion that is dispositive in determining the character of the motion. *Adoption of Baby K*, 967 P.2d 947, 948 n. 1 (Ut.App. 1998).

North America, 669 P.2d 410 (Utah 1983); *Fire Insurance Exchange v. Rosenberg*, 930 P.2d 1202, 1206 (Ut.App. 1997). Therefore, expert testimony was not needed for the Plaintiff to present evidence that the fire was “accidental” under the insurance policy.

Furthermore, even when the cause and origin of a fire is at issue in a case, expert testimony is still not required to raise an issue of fact for the jury to determine whether the cause of a fire was accidental. *Bear River Mutual Ins. Co. v. Williams*, 2006 P.3d (2006 Ut. App. 500); and *Neely v. Bennett*, 51 P.3d 724 (Ut.App. 2002). The Plaintiff did establish a *prima facie* case against the Insurance Company in this case without the need of expert testimony; and did present evidence to raise an issue of fact for the jury, precluding a directed verdict.

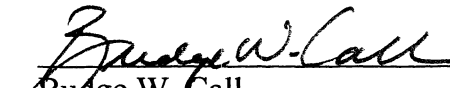
Moreover, the trial court abused its discretion when it ruled on Defendant’s Motion for Directed Verdict without allowing Plaintiff’s expert to testify, when he was properly designated as an expert for Plaintiff’s case-in-chief, when Plaintiff had indicated that she intended to call him before resting her case, and when the court earlier agreed to allow Mr. King to testify the next day, before the close of Plaintiff’s evidence.

Finally, the trial court improperly dismissed the jury trial by applying Rule 41(b), in weighing the evidence and determining that it was insufficient without expert testimony, to present any evidence to the jury that the fire was accidental.

The trial court’s ruling on partial summary judgment and the Directed Verdict should both be set aside; and the case remanded back for a trial on these issues.

DATED this 12 day of October, 2007.


BOND & CALL L.C.


Budge W. Call

MAILING CERTIFICATE

I hereby certify that on the 2 day of October 2007 I did mail, postage prepaid, 2 true and correct copies of the foregoing **APPELLANT'S REPLY BRIEF**, to the following:

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

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