

1962

# P. Mart Jorgensen and Marie A. Jorgensen dba Dimple Dell Floral Company v. Hartford Fire Insurance Co. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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P. MART JORGENSEN and MARIE  
A. JORGENSEN, his wife, dba DIM-  
PLE DELL FLORAL COMPANY,

*Plaintiffs and Respondents,*

—vs.—

HARTFORD FIRE INSURANCE  
COMPANY, a corporation,

*Defendant and Appellant.*

Case No. 9602

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RESPONDENTS' BRIEF

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Appeal from the Judgment of the Third District Court  
in and for Salt Lake County, Hon. Stewart M. Hanson,  
Judge, Presiding

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# IN THE SUPREME COURT of the STATE OF UTAH

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*Defendant and Appellant.*

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## RESPONDENTS' BRIEF

---

### STATEMENT OF FACTS

The parties in this action will be referred to as they appeared in the trial court.

Plaintiffs adopt the statement of facts of defendant and appellant, except as the same appear inconsistent with the matters hereinafter set forth, and in addition call attention to other facts necessary in order to properly reflect the entire record.

The plaintiffs have been engaged in the floral business at what is commonly known as the Dimple Dell Floral for a period of approximately four years prior to the 12th day of December, 1960, on which date a fire occurred on plaintiffs' premises resulting in a loss to plaintiffs in excess of \$5000.00 (R. 9, 64).

Plaintiffs carried a policy of insurance with the defendant, which policy was a standard form fire insurance policy with attachments entitled "FARM, RANCH OR ORCHARD FORM" and "EXTENDED COVERAGE ENDORSEMENT." The policy provisions are extensive and the premium for a three year period amounted to \$1,850.67 (R. 9, Ex. 1).

The outside temperature on the day of the fire, as found by the trial court, and for two days following ranged from a low of 17 degrees to a high of 37 degrees with an average temperature of 27 degrees (Ex. 2).

As explained in defendant's brief, an alarm system was set up in plaintiffs' home to warn plaintiffs in the event the temperature in the greenhouse dropped below a stated minimum of 53 degrees.

At approximately 11:30 on the night in question the alarm sounded and Mr. Jorgensen went directly to the furnace. He was met by smoke and smell (R. 11). There was a definite and distinct burnt smell (R. 21).

The boiler unit supplying heat to plaintiffs' greenhouse is made up of component parts that are removable in sections. It is not necessary to remove the entire unit for repair, but only necessary to remove a section (R. 35).

Mr. Jorgensen tried to run the furnace, but his efforts were hopeless, and he immediately called Darrel Maynes, an electrician (R. 11). When Mr. Maynes arrived at the greenhouse he immediately went to the boiler unit

for the purpose of finding the trouble. He removed the housing and field coils which left the shaft with the rotor still attached to the furnace. Upon removing the housing and field coils he found the coils in the field to be molten and burned (R. 35-36).

Efforts were made by Mr. Maynes to install the second standby motor which necessitated a change of the rotor on the shaft because the field component windings in the second motor had a different interior diameter than that of the first motor and would not fit on the rotor (R. 37). In attempting to remove the rotor from the shaft Mr. Maynes used a crowbar and in doing so bent the shaft. The rotor on the shaft prior to the removal of the first motor turned freely and the removal of the first motor and the rotor were completed prior to the arrival of Mr. Eugene Hadley, a second electrician, called in about 4:00 A.M. on December 13th. When Mr. Hadley, an electrician employed by C. W. Silver Company, and who had worked with motors for a period of approximately 21 years, arrived at plaintiffs' greenhouse he looked into the motor removed by Mr. Maynes and found that the motor was burned completely out and that there were some *charred ashes* (R. 47). The copper was melted together which would require a degree of heat as specified in defendant's brief and would create a glow (R. 42). When asked concerning the presence of the glow, the evidence of ash and of flame, Mr. Maynes testified as follows:

"A. No. I just stuck that together there. And

it takes approximately 1981 degrees Fahrenheit to melt that wire like that and *the wire being that hot it was aglow, or some kind of fire or* electrical ignition in that rod. That is what we found in Westinghouse.

Q. That was the first motor?

A. The first motor.

Q. Now when this copper would be melted, such as you found it to be, *would there be any glow produced in the melting?*

A. *There would have to be.*

Q. *As I understand it you did find some ash?*

A. *Yes, we found some ash.*

Q. And insulation?

A. Insulation burned, and things like that.

Q. *Would that cause a flame?*

A. *Yes, I would say it would, yes.* I might make a statement, when we stripped the motor, when we discovered there more melted copper in the slots of the motor, and on the ends, they were both blowed.'' (R. 48). (Emphasis added.)

In order to determine the cause of the fire resulting in the burned motor and the damage to the motor unit, and particularly the housing and field coils, Mr. Maynes took the entire unit to the C. W. Silver Company for complete repair, which included the stripping and rewinding of the motor and it took approximately 25 hours (R. 13).

In an effort to restore heat to the greenhouse plaintiffs made small stoves out of gallon cans filled with alcohol, burned several hundred pounds of newspapers, burned fuel oil and rented space heaters. By doing so they were able to maintain some heat in the greenhouse and keep the temperature above freezing. Had plaintiffs not done this all plants in the greenhouse would have frozen. Notwithstanding plaintiffs' efforts, many of plaintiffs' plants were damaged from fuel and smoke and as a result plaintiffs' total loss to the plants amounted to \$8,253.24 (R. 14, Ex. 3). Defendant stipulated that plaintiffs were faced with either having the plants freeze or trying to save them and that what they did under the circumstances was reasonable (R. 53).

## ARGUMENT

### POINT 1

WHERE THERE IS COMPETENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS, THE JUDGMENT BASED THEREON WILL NOT BE DISTURBED ON APPEAL.

This Court has consistently held where there is competent evidence to support the trial court's findings, the judgment based thereon will not be disturbed on appeal. In this connection, the Supreme Court must view the evidence and every fair inference and intendment arising therefrom in a light most favorable to plaintiffs, and if there is any reasonable basis in the evidence to support the findings made by the trial court the findings and judgment based thereon will not be disturbed. Among the cases supporting the above statement of the law are :

*Heiselt v. Heiselt* (Feb. 1960), 10 Utah 2d 126, 349 P. 2d 175.

*Rose v. Strike* (Jan. 1960), 10 Utah 2d 72, 348 P. 2d 563.

*Cassity v. Castagno* (Dec. 1959), 10 Utah 2d 16, 347 P. 2d 834.

*Lake v. Pinder* (1962), 368 P. 2d 593, ..... Utah .....

*Garrett Freight Lines v. Cornwall* (June 1951), 120 Utah 175, 232 P. 2d 786.

*John C. Cutler Assn. v. DeJay Stores* (Jan. 1955), 3 Utah 2d 107, 279 P. 2d 700.

*Nichol v. Wall* (Feb. 1953), 253 P. 2d 355, 122 Utah 589.

*Taylor v. Daynes* (May, 1950), 118 Utah 61, 218 P.2d 1069.

## POINT 2

THERE IS EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT A FIRE OCCURRED ON PLAINTIFFS' PREMISES WITHIN THE MEANING OF THE INSURANCE POLICY.

The trial court found in its Finding Number 5 as follows:

"5. That sometime between 11:30 P.M. on December 12, 1960 and the early morning hours of December 13, 1960, and while said fire insurance policy was in full force and effect, a fire occurred on plaintiffs' premises at 10216 Dimple Dell Road, Salt Lake County, Utah, resulting in the loss and

destruction of plaintiffs' plants and bulbs in their greenhouses, together with damage and loss to the oil burning unit, including the motor, which unit supplied heat to plaintiffs' greenhouses." (R. 64)

The existence of a definite and distinct burnt smell, intense heat, a glow, a flame and the presence of ash appeared without question in the record. The presence of the above factors constitute a fire under the terms of the insurance policy.

In the case of *Western Woolen Mill Co. v. Northern Assurance Co. of London*, (8th Cir. 1905) 139 F. 637, cited by defendant, the court in defining a fire states:

" 'Fire' is defined in the Century Dictionary as 'the visible heat or light evolved by the action of a high temperature on certain bodies, which are in consequence styled 'inflammable or combustible.' In Webster's Dictionary 'fire' is defined as 'the evolution of light and heat in the combustion of bodies.' No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word."

The actual observance of a glow is not necessary as pointed out in the case of *The H. Schumacher Oil Works v. Hartford Fire Insurance Company* (5th Cir. 1956), 239 F. 2d 836 wherein the court states:

"On the other hand, the law does not require that a glow actually be observed, but merely that if there had been an observer in the middle of the pile, who secured his vantage without introducing any extraneous oxygen, he could have observed an actual glow."

In the case of *Security Ins. Co. v. Choctaw Cotton Oil Company* (Okla. 1931), 299 P. 882 cited by defendant, the evidence did not show the existence of a flame or glow. The plaintiff in the instant matter proved the existence of intense heat, the glow, the flame and the presence of ash which point up a factual situation different from that in the *Security Ins. Co. v. Choctaw* case supra. The above case supports the trial court's finding of a fire.

In the case of *Saul J. Baron Corp. v. Piedmont Fire Ins. Co.*, 1 N.Y.S. 2d 713, 166 Mich. 69 cited by defendant, the Court in its decision found that plaintiff had failed to show a fire. The only evidence produced to prove the existence of a fire was a charring or burning of electrical wire and the Appellate Court sustained the finding of the Lower Court. In the instant case plaintiffs' evidence went beyond this and proved the existence of a fire as found by the Trial Court.

In the case of *Bass et al v. Security Ins. Co. of New Haven et al* (Pa. 1951), 78 D. & C. 26, cited by defendant, the plaintiff failed to prove the existence of a light or flame. This case, like the other cases cited by defendant, is not in point, but does support the existence of a fire in the instant matter and the finding of the Trial Court.

In the matter now before the Court the evidence supports the finding of the Trial Court and the same will not be disturbed on appeal.

### POINT 3

**THERE IS EVIDENCE TO SUPPORT THE COURT'S FINDING THAT PLAINTIFFS' DAMAGE WAS A DIRECT AND PROXIMATE RESULT OF THE FIRE.**

Finding Number 6 states as follows :

“6. That as a direct and proximate result of the fire plaintiffs’ plants and bulbs were damaged in excess of \$5,000.00. The oil burning unit including the motor and located in said service building were damaged in the amount of \$190.20 and plaintiffs were required to expend the sum of \$32.72 for the purchase of fuel and rental of space heat equipment in order to maintain heat in the greenhouses in an effort to preserve and protect plaintiffs’ property, which expenditures were justified under the terms of said fire insurance policy.”

The evidence and every fair inference and intendment arising therefrom support the finding of the trial court that as a direct and proximate result of the fire plaintiffs’ plants and bulbs were damaged in excess of \$5,000.00.

The fire in the housing and field coils of the motor operating the heating unit supplying heat to plaintiffs’ greenhouse occurred at a time when the outside temperature was such, that but for plaintiffs’ efforts to restore heat in order to preserve and protect their property the same would have frozen and become worthless. Applying the facts in the instant case to the rules laid down in the case of *Mork v. Eureka-Security Fire & Marine Insurance Company* (Mar. 1950), 230 Minn. 382, 42 N.W. 2d 33, 28 A.L.R. 2d 987 wherein plaintiff recovered for damage due to the freezing of water within the plumbing and heating pipes of his dwelling under an explosion policy, and in light of the record and the evidence presented to the trial court, it becomes apparent that the fire in the hous-

ing and field coils of the motor operating plaintiffs' heating unit was the direct and natural cause in the ordinary course of events of plaintiffs' damage. The authorities as pointed out in the *Mork* case, *supra*, hold that:

“\* \* \* To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire.”

Practically all fires originate from an exterior force, which in some cases may not be included among the perils insured against. This in and of itself will not defeat recovery. Where an efficient cause nearest the loss is a peril expressly insured against, the insurer is not relieved from responsibility by showing that the property was brought within such peril by a cause not mentioned in the insurance policy. *Fogarty v. Fidelity & Casualty Co.*, 180 A. 458, 120 Conn. 296. *Glens Falls Ins. Co. of Glens Falls of New York v. Linwood Elevator*, 130 So. 2d 262 (Miss. 1961).

When trouble occurs in an electrical motor by reason of a defective bearing or otherwise an overabundance of energy is generated. When this energy dissipates itself in the form of heat, and as in the instant matter, a fire ultimately occurs. If the motor operates a unit furnishing heat to a greenhouse and if the motor is burned to the extent as burned in the instant case, and if all of these things occur in freezing weather, there is but one natural result unless human efforts intervene and restore heat. When the insurance contract was entered into it could

reasonably have been foreseen that if in freezing weather the furnace were put out of commission by a fire and the heat supply thus cut off, plaintiffs' plants would freeze. The insurance company is charged with notice of such eventualities and the insurance policy must be construed with reference thereto. *Appleman Insurance Law and Practice*, Vol. 5, Sec. 3081, page 209.

It is conceded that plaintiffs performed with due diligence every act required of them to protect their property after the fire. The Court found that the fire was immediately responsible for the damage to plaintiffs' heating unit and that but for the damage to said unit the freezing of plaintiffs' plants would not have occurred. The Court's findings are supported by the evidence and cannot be disturbed on appeal. In analogy see *Norwich Union Fire Ins. Soc. v. Board of Commissioners of Port of New Orleans* (5th Cir. 1944) 141 F. 2d 600.

#### POINT 4

**PLAINTIFFS' DAMAGE IS NOT EXCLUDED UNDER THE TERMS OF THE INSURANCE POLICY AND DEFENDANT HAS WHOLLY FAILED TO PLEAD OR PROVE ANY EXCLUSION.**

In support of plaintiffs' position under this point, we refer the Court to the entire record and the matters raised under Points 1, 2 and 3 of this brief. Defendant's statement that there is no evidence to show the cost of repair by reason of the damage caused by the fire is not supported by the evidence, and in this connection, we refer the Court to Exhibit 4 and the testimony of Darrel Maynes and Eugene Hadley.

The case of *U.S. Fire Ins. Co. v. Universal Broadcasting Corp.*, (1943 Ark.), 168 S.W. 2d 191 cited by defendant holds, among other things, that the burden is on the insurer (defendant) to show that the loss or damage was caused by a peril excluded under the terms of the policy. It is the burden of the defendant (insurer) to plead and prove that the loss came within some specific policy exception. *Appleman Ins. Law & Practice*, Vol. 21, Sec. 12096, page 12. Defendant has wholly failed to plead and prove its claim that plaintiffs' damage was specifically excluded from coverage under the policy.

#### POINT 5

THE TRIAL COURT DID NOT ERR IN AWARDING PLAINTIFFS AN AMOUNT IN EXCESS OF THE POLICY LIMITS.

Plaintiffs were awarded the sum of \$5,000.00 for damage to their plants and bulbs, the amount specified in the policy of insurance. In addition, plaintiffs were awarded the sum of \$190.20 representing damage to the oil burning unit including the motor located in the service building, all of which is covered under Item 1 of Form 78b attached to Exhibit 1. In addition plaintiffs were awarded the sum of \$32.72 for the purchase of fuel and rental of heating equipment in order to maintain heat in the greenhouse in an effort to preserve and protect plaintiffs' property, said expenditure being justified under subparagraph (i) lines 21 through 24 of page 2 of the insurance policy marked Exhibit 1. To the above amounts was added the sum of \$255.46 representing interest at the

rate of six per cent per annum from the 13th day of December, 1960 to date of judgment.

## CONCLUSION

The evidence and the inferences and intendments to be drawn therefrom support the findings of the trial court, which finding should not be disturbed on appeal.

It is respectfully submitted that the judgment of the lower court should be affirmed.

Respectfully submitted,

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