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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

P. MART JORGENSEN and
MARIE A. JORGENSEN, his
wife, dba DIMPLE DELL
FLORAL COMPANY,
Plaintiffs and Respondents,

vs.

HARTFORD FIRE INSURANCE
COMPANY, a corporation,
Defendant and Appellant.

FEB 23 1962

Clerk, Supreme Court, Utah

Case No. 9602

MAY 2 1962

LAW

APPELLANT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT FOR SALT LAKE
COUNTY. HON. STEWART M. HANSON,
JUDGE PRESIDING.

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FLORAL COMPANY,
Plaintiffs and Respondents,

vs.

HARTFORD FIRE INSURANCE
COMPANY, a corporation,
Defendant and Appellant.

} Case No. 9602

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action by plaintiff upon an insurance policy issued by defendant covering all direct loss by fire.

DISPOSITION IN THE LOWER COURT

The trial court, sitting without a jury, found that a fire occurred on the premises of the defendant, and as a direct loss of the fire, plaintiffs suffered damage in excess of \$5,000.00, and judgment was entered against defendant under the terms of its policy of insurance with plaintiffs for the sum of \$5,478.38.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of the trial court's judgment.

STATEMENT OF FACTS

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

The plaintiffs operate a floral business known as Dimple Dell Floral where they grow potted plants, chrysanthemums, poinsettias, azaleas, and other varieties of green plants (R. 9).

In connection with that operation they purchased a policy of insurance from the defendant, identified at trial as Exhibit 1. The policy insured against:

“ . . . ALL DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY . . . ”

Under paragraph 14 of the policy, the following appears:

“Electrical Apparatus: If electrical appliances or devices (including wiring) are covered under this policy, this company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices (including wiring) caused by electrical currents artificially generated unless fire ensues, and if fire does ensue, this company shall be liable only for its proportion of loss caused by such ensuing fire.”

The plants and bulbs in the greenhouse were insured for \$5,000.00 under the terms of the policy, as set forth above.

The plaintiffs' greenhouse is heated by steam heat and fired by an oil furnace. During the winter months, the grennhouse night temperature is maintained at approximately 65 degrees (R. 10). An electrical alarm is so constructed that when the temperature in the greenhouse drops to 53 degrees Farenheit, it sounds an alarm in the bedroom of the plaintiffs, which is approximately 100 feet away from the greenhouse (R. 10). During the evening of the 12th of December, 1960, and the morning of the 13th of December, 1960, the alarm sounded. Mr. Jorgensen immediately went to the greenhouse and found that the furnace was not operating (R. 11).

When Mr. Jorgensen first entered the greenhouse after the alarm sounded, he recognized the smell of an over-heated motor (R. 22). He observed no damage (R. 23), and saw no smoke (R. 21).

His attempts to reset the controls and start the furnace were futile and he immediately called his neighbor Darrell Maynes, who is an electrician (R. 11).

Since the temperature in the greenhouse was falling, the plaintiff burned alcohol and fuel in small stoves which produced sufficient heat (R. 12)

to maintain the temperature in the greenhouse above freezing for approximately 25 hours while repairs to the motor and furnace were being completed (R. 12-13). During this time, plaintiff's plants were damaged. The poinsettias turned blue and lost their leaves "and everything got covered with smoke," from the improvised heaters (R. 13). Exhibit No. 3 is a list of plants allegedly damaged. Some of the plants were salvaged and sold at a discount (R. 14).

Mr. Maynes discovered that the electric motor would not operate because it was "electrically burned out" (R. 35). He found some charred insulation in the area where the copper wire had melted. The plaintiffs maintained a new standby motor which the electrician installed and it immediately "burned out" (R. 24, 39). The electric motor which failed served to pump oil into the furnace and also operated a blower constructed as a part of the furnace (R. 26).

The plaintiffs' electrician explained that the excessive heat in a motor is caused "by electrical disturbances of some sort or another" (R. 40). He testified: "if the motor stops and the electrical current remains attached, that will cause it; another, there are two sets of windings in there. One is designed to carry a heavy current for a short period of time, but if it remains in or falls back into contact, that will do it" (R. 41).

Mr. Maynes originally installed the motor protection and control units, in connection with the operation of the furnace. They consisted of a magnetic switch with thermo-over-load protection units and manual switch operations (R. 42). After the second motor "burned out" the entire motor and a part of the furnace, were removed for repair (R. 45).

Mr. Eugene Hadley, an electrician employed by the C. W. Silver Company, was also called to Jorgensen's place of business during the early hours of December 13, 1960. When he arrived, he examined the motor and found it was "blowed" (R. 47). He explained this term by saying: "In the process the wires in the motor melted and the circuits broke." Since the melting point of copper is 1981 degrees Fahrenheit (R. 48), he gave as his opinion that when the copper wiring was in the process of melting it would produce a "glow" (R. 48). He explained that the melting of the wire circuits in the motor took place after the motor had stopped (R. 49). He described the "glow" as the "same glow as in a light globe produced from the flow of electricity through a wire." On cross examination this witness testified:

"Q. Did you find what caused this motor to burn?

A. It was a bad bearing deep in the rotor shaft.

Q. It was a mechanical defect that was in the motor that caused it to electrically burn out?

A. That is right. (R. 50)”

Upon examination of the motor he found that the bearings had been severely worn.

Q. What causes those to wear, do you know?

A. Every day use, metal, weak metal.

Q. Every day wear and tear? Do you know what happened to the second motor?

A. Well, it was just burned, electrically burned is all I know. (R. 51)

He also gave as his opinion, that the same worn bearings which caused the first motor to stop, also caused the stoppage of the second motor (R. 52). His further examination revealed a bent shaft in the furnace mechanism which, he indicated, would not permit the motor to run true and caused an electrical overload.

The defendant called Mr. David Lyon, an electrical engineer, who qualified as an expert in his profession. He indicated that when electrical energy is applied to a motor, and it cannot be dissipated in form of magnetic energy, that it manifests itself as heat. “The insulation becomes charred, and the windings eventually short circuit and melt together” (R. 58). He further testified that a defective bearing, or any other load connected to a motor which restricts the rotation of the motor, heats it and slows it down. As a result:

“The motor is going to become overloaded and the speed will fall below its normal, which in this case was 3,450 R.P.M. The speed falls below normal, and therefore the motor begins to consume or use or draw in as you may choose to look at it, magnetic current. And since current is energy, the energy has to be dissipated in some form, and as the motor is turning slower and slower and therefore accomplishing less work, the energy manifests itself in the form of heat.” (R. 58)

The heat which is not dissipated causes a rise in temperature and “cooks or fuses and blows the motor, and the motor becomes internally short-circuited and burned out . . . The associated heat in an electrical motor failure follows the mechanical malfunction,” (R. 59).

No testimony was offered by plaintiffs to show what portion of the claimed damage to the electric motors was a result of any alleged fire, and which portion was a result of “electrical injury or disturbance.”

The trial court, sitting without a jury, awarded plaintiffs judgment in the sum of \$5,478.38, which included \$190.20 damage to the furnace and the motors (R. 64-66). The policy limited recovery to \$5,0000 (Exhibit 1).

Motions for New Trial, and to Amend Findings of Fact, and Judgment were denied November 21, 1961.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT A FIRE OCCURRED ON PLAINTIFFS' PREMISES WITHIN THE CONTEMPLATION OF THE INSURANCE POLICY, WHEREBY DEFENDANT AGREED TO INDEMNIFY PLAINTIFFS AGAINST ALL DIRECT LOSS BY FIRE.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS' DAMAGE WAS A DIRECT AND PROXIMATE RESULT OF THE ALLEGED FIRE.

POINT III.

RECOVERY FOR DAMAGE RESULTING FROM AN ELECTRICAL INJURY OR DISTURBANCE IS SPECIFICALLY EXCLUDED UNDER THE TERMS OF THE POLICY.

POINT IV.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF AN AMOUNT IN EXCESS OF THE POLICY LIMITS.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN FINDING THAT A FIRE OCCURRED ON PLAINTIFFS' PREMISES WITHIN THE CONTEMPLATION OF THE INSURANCE POLICY, WHEREBY DEFENDANT AGREED TO INDEMNIFY PLAINTIFFS AGAINST ALL DIRECT LOSS BY FIRE.

Under the terms of the insurance policy the defendant insured certain of the plaintiffs' property against “. . . all *direct loss by fire* . . . ” The inter-

pretation of this phase presents the principal issues of this appeal. Black's Law Dictionary, Third Edition, p. 783, defines fire as:

“The effect of combustion. The juridical meaning of the word does not differ from the vernacular.” *Lavitt v. Hartford County Mutual Fire Insurance Co.*, 105 Conn. 729, 136 A. 527.

The cases have consistently held that the term “fire” as used in insurance policies is to be given its ordinary and common meaning and not its scientific and technical meaning. *Pacific Fire Insurance Company vs. C. C. Anderson Company*, 45 Fed. Supp. 90 (Idaho), *Sculley vs. Brenner County Farmers Mutual Insurance Ass'n.*, 245 N.W. 280 (Iowa), *Vorse vs. The Jersey Plate Glass Insurance Company*, 93 N.W. 569 (N.J.)

The definition of “fire” as contained in the case of *Lavitt v. Hartford County Mutual Fire Insurance Co.*, 105 Conn. 729, 136 A. 527, has been widely accepted by both authors of textual materials and legal opinions alike. The Court there stated:

“The word ‘fire’, in insurance, does not have the technical meaning which is developed from a scientific analysis of its nature and properties, but more clearly that which conforms to the popular understanding of the word. It is rather an effect, than an elementary principle; *it is the effect of combustion, and is equivalent to ignition or burning; yet heat is not ‘fire’.*” (Emphasis added).

The annotator in 45 C.J.C., Insurance, Section 809, page 861 states:

“As a general rule, to constitute a ‘direct loss or damage by fire’, within the usual terms of a policy, there must be an actual fire in the proper sense of that term, from which the loss or damage results . . .”

In the case of *Western Woolen Mill Company vs. Northern Assurance Company of London*, 139 Fed. 637 (8th Cir., 1905), a quantity of wool owned by plaintiff was insured against direct loss by fire. During a flood the wool became submerged in water. Following the flooding there was evidence that the strings which held the fleeces together had been burned and the rooms where the wool was located were filled with smoke and an odor of burnt wool. A witness testified the wool was so hot it could not be handled by hand and there was also some evidence of the existence of ashes. Another testified that the wool was charred. The trial court sustained a demurrer to the evidence and judgment was entered for the defendant. The trial court’s finding that there was no fire within the meaning of the policy was affirmed. The following language, pertinent to our present inquiry, is borrowed from that opinion:

“In their interpretation we must give to the words employed therein their ordinary and proper significance, unless it appears the parties intended to use them in a different sense.

No such intention appears in this case as to the use of the word 'fire'. That the wool, submerged for the time mentioned, became smoking hot, may be conceded; that spontaneous combustion, caused by the wool being submerged in water, existed may also be conceded; and still the plaintiff has not shown any direct loss by fire as that word is used and known to the public generally. Fire is always caused by combustion, but combustion does not always cause fire. The word 'spontaneous' refers to the origin of that combustion. It means the internal development of heat without the action of the external agent. '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."

See also *Security Insurance Company vs. Choctaw Cotton Oil Company*, 299 P. 882, (Okla. 1931).

The court properly refused to accept mere evidence of charring and ashes, which were plain indications of combustion and heat as the equivalent of fire.

This common sense meaning of "fire" within the contemplation of fire policies, has been adopted by those courts which have considered claims of

coverage under a fire policy where the only evidence of "fire" was an overheated electric motor.

In the case of *Saul J. Baron Corp. vs. Piedmont Fire Ins. Co.*, 1 N.Y.S. 2d 713, 166 Misc. 69 (1937), the plaintiff brought an action in the New York Court under a standard fire policy for damage resulting from an alleged fire. The defendant denied the existence of a fire. In a Per Curiam decision the court held:

"Plaintiff had the burden of showing its alleged fire damage. The only evidence of the cause of the alleged fire, charring, or burning of electric wiring, was that of an overload of electric current. The burning or charring of a wire carrying electric current occurring during or accompanying an overload of current, must be regarded as an electrical injury, especially when, as here, there is an absence of evidence showing such burning or charring to be a fire, as distinguished, if it can be that, from electrical injury."

The judgment warding recovery was reversed.

The same result was reached by the Pennsylvania Court in the case of *Bass, et al vs. Security Insurance Company of New Haven, et al.*, 78 D. & C. 26, (Pa. 1951). The defendants had issued fire insurance policies to the plaintiff wherein property of the plaintiff was insured against "direct loss by fire". The issuance of the policies and the damage were admitted, but the defendants denied the loss was a result of fire. The evidence indicated that when

firemen arrived at the premises they found the ground floor and the cellar of the building filled with smoke. In the cellar they found an overheated and smoldering electric motor. There was no visible light or flame. Vegetables, fruits and meats in the premises were condemned by the health authorities, and the plaintiff brought suit to recover his loss occasioned thereby. The case turned on the meaning of "fire" as contained in the policy. The following is quoted from the opinion of the court:

"'Fire' is a common term. It is a rule of reason, primarily in the interpretation and construction of written contracts, that the sense in which the terms are used is determined by the intent of the parties. The term 'fire', is not defined in these contracts, and hence it is that the commonly understood meaning is the criterion." (Citing cases)

After discussing several decisions from other jurisdictions, the Court concluded:

"There was no fire as such term is used in the policies and therefore no liability of the insurers arose thereunder."

The mere presence of heat is to be distinguished from "fire" under a fire insurance policy. This distinction has been long recognized by the courts. The Illinois Court, relying on substantial precedent in the early case of *Gibbons vs. German Insurance and Savings Institution*, 30 Ill. App. 263, 266 (1889), held that damage caused by steam escaping from

a break in the pipes of the heating apparatus by which the rooms were heated, which produced such a degree of heat that the furniture and books became charred, was not damage by "fire", within the terms of an ordinary fire insurance policy. The Court stated:

"The common understanding of the word fire would never include heat, short of the degree of ignition, however produced."

The reasoning contained in these early cases has found acceptance in the decisions of contemporary courts. In *Spare vs. Glen Falls Insurance Company*, 75 A. 64, 137 Conn. 105 (1950), an action was filed on a fire policy claiming damage sustained by fire when an oil burning furnace became overheated because of failure of a safety shut-off device. The only fire involved was that which burned within the combustion chamber of the furnace itself. However, the heat became so intense as to cause the outside finish to "disintegrate". The Court declared the fire, although excessive, to be a friendly one and the damage not compensable.

"When, however, a friendly fire escapes from the agency employed to restrain it, and damages property by igniting it or, while still confined therein, causes a secondary fire to start outside the agency, it becomes a hostile fire, and for loss so caused the insurer must indemnify the owner. Accordingly, the distinction is clearly drawn between a case where, as here, damage results in consequence

of excessive heat from fire confined as designed, with no external burning, and one where such excessive heat kindles a secondary fire.”

A similar result was reached in the case of *First Christian Church vs. Hartford Mutual Ins. Co.*, 276 S.W. 2d 502 (Tenn. 1954), where damage caused by heat from an overheated boiler due to a faulty stoker mechanism was held not compensable within the terms of a fire policy. See also *Consoli vs. Commonwealth Ins. Co.*, 84 A. 2d 926 (N. H., 1951), to the same effect.

The testimony of the plaintiff's witness to the effect that heat within the electric motor was generated to a degree sufficient to melt the copper wire within the motor and char the insulation is not evidence of a “fire”. In the cases cited above there was heat produced in the “agency” by a “friendly fire” beyond that which was intended or expected, but recovery was denied because no damage was done beyond the agency itself. There is no evidence, and such is not claimed, that the damage to plaintiffs' plants resulted from “external burning”, or a “secondary fire” started outside the agency. Thus, even were it conceded that the conversion of electric energy to heat energy under the circumstances of this case, was a fire, there would be no basis for recovery because it was confined to the motor where its use

was contemplated, and burning did not occur beyond that "agency".

In the instant case the motor became overheated because a short circuit, or a resistance which developed to the electrical current. This same principle finds useful application in an electric heating coil where heat is produced by creating an intentional resistance to an electric current. Under all the definitions of "fire", including the *Lavitt case*, the element of "combustion" is essential. A "fire", "friendly" or "hostile", was not produced within the electric motor because there was an absence of combustion. The heat produced from the electrical energy is not the "effect of combustion", nor is it the equivalent of "ignition or burning." The electrical disturbance produced heat, but "heat is not fire".

There is a further reason why the plaintiff has failed to bring his case within the coverage of the policy. Electrical current, with accompanying heat and light has long been held not to constitute "fire" within the meaning of a fire policy.

In the case of *Sleet vs. Farmers Mutual Fire Ins. Co.*, 113 S.W. 515 (Ky. 1908), plaintiff's barn was struck by lightning and destroyed, but was not burned. The Kentucky court in denying the recovery under a fire policy, stated:

"She was not entitled to recover for loss

by lightning which did not burn, but merely knocked down, the barn, anymore than she would have been entitled to recover under the policy if it had been blown down by a windstorm.”

Similarly, in the instant case the mere existence of an electrical current with its associated heat and light, was not the equivalent of “burning”, and was not a “fire”, within the meaning of the policy. In the very early case of *Kenniston vs. The Mer. County Mutual Ins. Co.*, 14 N. H. Reports 341 (1843), the Court held that damage from lightning without combustion was not within the terms of a fire insurance policy, although it recognized that had the fire occurred from lightning, that the destruction or the damage done would have been compensable.

In the instant case the electrical malfunction could have resulted in a fire and damage, for which recovery could have been made. Such did not happen and the mere occurrence of an electrical phenomenon generating heat is not sufficient to bring it within the coverage of the policy.

Under law and reason it is submitted that an electrical short circuit in a motor producing internal heat, as was testified to in this case, is not a “fire” within the meaning of the insurance policy.

ARGUMENT

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS' DAMAGE WAS A DIRECT AND PROXIMATE RESULT OF THE ALLEGED FIRE.

Even were the trial court justified in finding that a fire occurred in the electric motor, the damage which occurred to plaintiff's plants was not the direct result thereof.

"The rule in fire insurance cases where liability arises for 'direct' loss is that the loss must be connected by the relationship of cause and effect with the fire (citing cases). In other states, when the subject has received broader discussion, 'direct' has been considered the equivalent of 'immediate,' or 'approximate,' as distinguished from 'remote' or incidental." *Sidehill Corporation vs. Glen Falls Insurance Co.*, 183 N. Y. 2d 897 (1959).

The "fire" must be the efficient cause which sets in motion the chain of events which immediately results in the damage. The evidence is undisputed in the present case that the motor ceased operating because of bad bearings. This fact was established by plaintiff's witnesses:

"It was the mechanical defect that was in the motor that caused it to electrically burn out."
(R. 50)

Further testimony indicated that the worn bearings were a result of "every day wear and tear". These bearings caused the motor to become over-

loaded and reduce its normal speed. As the motor turned more slowly, the electrical energy manifested itself in the form of heat (R. 58). The heat associated with a motor failure followed the mechanical malfunction (R. 59). The uncontradicted testimony of the witnesses is that the mechanical failure was the proximate and direct cause of the motor failure. The facts affirm this fact more convincingly than words. Following the "electrical burn-out" of the first motor, the electrician installed a second standby motor. It also "burned out" because of the "drag" occasioned by the worn bearings. It is submitted that if a dozen more electrical motors had been successively installed, each would have been "blown out" just as the two did because the cause, namely, the worn bearings, had not been eliminated.

The heat generated within the motor, which the trial court has termed "fire", did not cause the furnace to cease operation and the heat loss in the greenhouse. The "fire", if any, was only a consequence of the mechanical malfunction, and the resulting "electrical blow-out" of the motors, was not a cause, either direct or remote, of the heat failure. The "fire" even as alleged by plaintiff occurred after the motor stopped, and was in no way a proximate cause of the threatened freezing to the plants in the greenhouse (R. 60-61).

"The proximate cause of the fire within an insurance policy is the efficient cause, the one

that necessarily sets the other causes in motion.” *Port Washington National Bank & Trust Company vs. The Hartford Fire Insurance Company*, 300 N. Y. Supp. 874, 253 App. Div. 760.

The same principle was declared by the Missouri court in different language. Where the peril specifically insured against sets other causes in motion, which in an unbroken sequence and connection between the act and final injury, produces the final results for which the insured seeks recovery under the policy, then the peril insured against will be regarded as the proximate cause. *Dixie Pine Products Company vs. Maryland Casualty*, 100 S. W. 2d 23.

Mr. Hadley, plaintiffs’ witness, affirmed that a mechanical malfunction was the cause of the damage:

“Q. Did you find what caused this motor to burn?

A. It was a bad bearing deep in the rotor shaft.

Q. It was a mechanical defect that was in the motor that caused it to mechanically burn out?

A. That is right.” (R. 50).

It is submitted that the direct or proximate cause of plaintiffs’ loss was a mechanical failure in the motor and furnace mechanism which set in motion an unbroken sequence of events resulting in his damage.

ARGUMENT

POINT III.

RECOVERY FOR DAMAGE RESULTING FROM AN ELECTRICAL INJURY OR DISTURBANCE IS SPECIFICALLY EXCLUDED UNDER THE TERMS OF THE POLICY.

The insurance policy, under the Farm, Ranch and Orchard Endorsement, Paragraph 14, contains the following provisions:

“14. Electrical Apparatus Clause: If electrical appliances or devices (including wiring) are covered under this policy, this company shall not be liable for an electrical injury or disturbance to the said electrical appliances or devices (including wiring) caused by electrical currents artificially generated unless fire ensues, and if fire does ensue, this company shall be liable only for its proportion of loss caused by such ensuing fire.”

This paragraph specifically excludes coverage for any loss or damages resulting from an “electrical injury or disturbance to electrical . . . devices caused by electrical currents” unless fire ensues. In the event fire does ensue the company has limited its liability to the proportion of loss caused by the fire. Argument and authority presented under Point I, *infra.*, affirms that a “fire” did not ensue. Even were it determined that the electrical blow-out of the motor was a fire, the company’s liability is restricted to that portion of the damage directly resulting from the fire. No proof was presented or

attempted by plaintiff concerning this. Further, since “electrical injury or disturbance” is excluded from coverage, any damage proximately resulting therefrom is also excluded.

There is a complete absence of evidence in the record to show the cost of repair of the damage done by “fire” in the motor. Similarly, there is no evidence whereby the court could find that any fire damage resulted. The repair invoice indicates that the damages to the motors were mechanical in nature. The repair included rewinding of the motor armatures, replacement of bad bearings and straightening a bent shaft, all as more fully appears in plaintiff’s Exhibit 4. Electrical exemption clauses on fire policies similar to the one contained in the policy under consideration have been consistently enforced by the courts. See *U. S. Fire Insurance Company vs. Universal Broadcasting Corporation*, 168 S.W. 2d, 191 (Ark. 1943).

ARGUMENT

POINT IV.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF AN AMOUNT IN EXCESS OF THE POLICY LIMITS.

The insurance policy, Plaintiffs’ Exhibit 1, indicates that the “. . . policy covers the following described property . . . “\$5,000.00 on plants and bulbs

in greenhouse.” Coverage is specifically limited to those items in the amount indicated.

The judgment entered by the court granted recovery for damage to plants and bulbs in the amount of \$5,000.00, damage to the oil burning unit including the motor in the sum of \$190.20 and \$32.72 for purchase of fuel and rental of space heat equipment, or a total of \$5,222.92, to which interest in the amount of \$255.46 was added for a total of \$5478.38.

As observed, defendant’s liability under the policy was limited to \$5,000.00. The court permitted a recovery of \$5222.92, or \$222.92 in excess of the limits of its liability. Applicable interest on the excess was also wrongfully included in the judgment.

CONCLUSION

Based upon the law and evidence it is submitted that:

1. A “fire” did not occur on plaintiff’s premises as alleged.
2. Even were it determined that a “fire” did ensue, the plaintiffs’ damage was not the direct result thereof.
3. Plaintiffs’ damage was the direct and proximate result of a mechanical failure which was not insured against.

4. Any damage resulting from electrical injury, as disturbance was specifically excluded from coverage under the policy, and

5. In any event, defendant's liability is limited to \$5,000.00 as stated in the policy.

The judgment of the trial court should be reversed.

Respectfully submitted,

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