

1995

# Gregory S. Horrell and Barbara Horrell v. Utah Farm Bureau Insurance Company, a Utah Corporation, and Farm Bureau Mutual Insurance Company : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

GREGORY S. HORRELL and  
BARBARA HORRELL,

Plaintiffs/Appellants,

vs.

UTAH FARM BUREAU  
INSURANCE COMPANY,  
a Utah Corporation,  
and FARM BUREAU MUTUAL  
INSURANCE COMPANY

Defendants/Appellees.

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Case No. 950059-CA

Priority No. 10

UTAH COURT OF APPEALS  
FILED

NO. 95-9CA

BRIEF OF APPELLEE

Interlocutory Appeal To The Third Judi-  
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Rigtrup

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AUG 16 1995

COURT OF APPEALS

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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to UTAH CODE ANN. § 78-2a-3(2)(k) (Supp. 1995).

## **STATEMENT OF ISSUES**

Utah Farm Bureau does not contest the issues as stated by the Plaintiffs. However, Utah Farm Bureau does challenge the Horrells' assertion that this Court can determine that any error was harmless by applying a *de novo* standard. The trial court, by ordering a new trial, has already determined that the error was prejudicial. This Court has recently held that it does "not reverse a trial court's decision to grant or deny a motion for a new trial absent an abuse of discretion." *Rasmussen v. Sharapata*, 895 P.2d 391, 396 (Utah Ct. App. 1995). This standard should apply to the trial court's determination that its error regarding the burden of proof was harmful.

## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES**

There are no controlling constitutional provisions, statutes, ordinances, or rules.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

Utah Farm Bureau is not dissatisfied with the Horrells' statement regarding the nature of the case.

## **B. COURSE OF PROCEEDINGS**

Utah Farm Bureau is not dissatisfied with the Horrells' statement regarding the course of proceedings.

## **C. STATEMENT OF FACTS**

Before setting forth a more complete Statement of Facts, Utah Farm Bureau wishes to correct an error in the Horrells' Statement of Facts. The Horrells state in paragraph 3 of their Statement of Facts that Utah Farm Bureau's adjuster "hoped that the Horrells would 'go away' during this period time." Brief of Appellant, p. 5.

Utah Farm Bureau has examined the citations to this particular contention. (R. 2323, 2024.) The record at page 2323 sets forth the testimony of Arlene Beckstrom, the mortgagee on the property, who was totally unrelated to Utah Farm Bureau or the adjustment of the claim. The testimony at R. 2024 does not contain any reference to "hope" or anything resembling the Horrells' assertion.

Perhaps the Horrells are referring to R. 2026, a portion of which states:

Q. You hoped he'd go away, didn't you?

A. Well, to be honest, there's a lot of people that do--when we ask for a proof of loss that don't follow through with their claim and do go away.

R. 2026. Mr. Bachmann's testimony related to the fact that the Horrells failed to submit a completed Proof of Loss after being advised to do so by Utah Farm

Bureau. As set forth more fully below, Mr. Bachmann intended to convey the fact that many people do not continue with claims when required to state under oath that they did not start the fire. It is extremely unfair for the Horrells to assert that Mr. Meade's question was Mr. Bachmann's answer. At no time did Mr. Bachmann state that he hoped the Horrells would go away.

In order to provide this Court with a more comprehensive statement of facts, Utah Farm Bureau sets forth the following. To prove an incendiarism defense, most states have required evidence of 1) incendiary nature; 2) opportunity; and 3) motive. *Emasco Ins. Co. v. Waymire*, 788 P.2d 1357, 1360 (Mont. 1990). Utah Farm Bureau has conformed its Statement of Facts to these elements.

### **INCENDIARY NATURE OF THE FIRE**

1. On October 3, 1990, at 11:29 p.m., the South Salt Lake Fire Department was called to a fire at the Horrells' residence. R. 2863.

2. Captain Michael Larsen was one of the fire-fighters called to battle the fire. He testified that the fire was consistent with an accelerated fire while he was attempting to extinguish it:

Q. Well, when you went in to fight that fire, based on your observations, how was the fire responding to your water and what did that mean to you?

A. Well, I had some very bad reactions with the water. Every time we moved it to the right, we'd get a flareup of the fire and it would roll over our heads.

Q. What did that mean to you?

A. That meant that I had a flammable liquid, an accelerant in that fire.

R. 2870. Captain Larsen also observed "V-patterns," which is indicative that a chemical or accelerant is burning. R. 2888.

3. Captain Larsen further testified that his observations convinced him that the fire had started in two separate locations, not one, when the fire department arrived. R. 2876.<sup>1</sup>

4. After the fire was extinguished, the South Salt Lake Fire Department returned possession of the home to Mr. Horrell at approximately 2:48 a.m. R. 2138.

5. At approximately 4:35 a.m., the South Salt Lake City Fire Department was called back to the Horrell property for a second fire. R. 2138.

6. Shawn Irvine, one of the firefighters attempting to extinguish the second fire, testified that it would be difficult to reignite a building after 30,000 gallons of water were used to extinguish the first fire. R. 2146.

7. Mr. Irvine also testified that when he arrived for the second fire the roof was burning, which surprised him:

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<sup>1</sup> Under such circumstances, the probability that the fire was accidental is extremely remote because it would require an accident in each location at the same precise moment.

A. I noticed heavy flames issuing from the rooftop. And I was looking over the hobby shop to see that the roof on the house was burning.

Q. Did that surprise you in light of the 30,000 gallons of water?

A. Very surprised.

R. 2158.

8. Captain Larsen characterized the second fire as "accelerated":

Q. And how did the second fire you fought compare with the first fire?

A. The second fire, to me, was more surface fire, more of a rapid burn, rapid build up, accelerated.

R. 2893.

9. Randy Jacobson is a firefighter and fire investigator for South Salt Lake City. R. 2647. Mr. Jacobson was assigned to perform a cause and origin investigation into the fire at the Horrell premises. 2653.

10. Mr. Jacobson testified that there are only two causes for a fire: accidental and incendiary. R. 2655.

11. Mr. Jacobson examined the electrical system and found no evidence of a short or other accidental cause of the fire. R. 2656.

12. Based upon his investigation into the fire, Mr. Jacobson rendered an opinion that the fire was incendiary and that Greg Horrell started the fire. R. 2725-2729. The basis for this opinion included not only Mr. Jacobson's conclusion that there was no accidental cause of the fire, but also that an examination of Mr.



Horrell's story and his many financial problems pointed to him as starting the fire.

*Id.*

13. Shortly after the fire, Robert "Jake" Jacobsen (not related to Randy Jacobson) was retained to investigate the fire on behalf of Utah Farm Bureau. Mr. Jacobsen was also able to eliminate any "electrical or accidental causes" and concluded that Mr. Horrell set the fire:

Q. Now, when you say "the insured cannot be eliminated," did you eliminate electrical and other accidental causes?

A. Yes.

Q. Did you ever eliminate the insured as the one who set the fire?

A. No.

\* \* \*

Q. I take it you have an opinion on whether or not the insured set the fire?

A. I do.

Q. And can you tell--could you tell us what that opinion is?

A. My opinion is that Mr. Horrell set this fire.

R. 3150-51.

14. Mr. Jacobsen also rendered the opinion that the first fire originated in two separate, unconnected, locations. R. 3110.

15. One basis for Mr. Jacobsen's opinion that Mr. Horrell set the fire was that an accelerant was used:

Taking into consideration that the fire department took about a four-minute response, this fire was going. It was involved and fully involved upon their arrival. For those conditions to occur, this fire was accelerated. It had to have had something other than an accidental cause for it to ignite to get to those conditions.

R. 3152. Mr. Jacobsen further testified:

Q. And to have an advanced fire like that, do you have an opinion as to whether or not an accelerant has to be involved in order to create that?

A. An accelerant of some type has to be involved. There's no doubt about it. I can walk over and light that chair up, and we can all sit here for five or ten minutes and watch it burn. I mean, it is not just going to burn that violently. Eventually it is going to get going as with anything in this room. But to have it advance to the conditions that they found as testified by Mr. D'Emal and the first arriving officers and the fire crews it had to have some help.

R. 3158-59.

16. Another basis for Mr. Jacobsen's opinion was that the home was locked when the fire department arrived. R. 3162. Mr. Horrell's theory was that an unidentified "shooter" started the fire. (See "Opportunity" Section, *infra*). Mr. Jacobsen opined that the securing of the home served another purpose:

It's my opinion that when this fire was set, Mr. Horrell didn't want anyone to put it out. There's two things that come into play when considering that: One, that the house was locked up. That would keep anyone from going in and getting hurt or going in and putting out the fire. The other thing that comes into play is that shooting incident. The shooting incident was nothing more than a red herring, and--to try and make sure that his buddy, Mr. D'Emal wasn't going to be a hero and go in and try to put the fire out in Greg's house.

R. 3162.<sup>2</sup>

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<sup>2</sup> The firefighters found no evidence of forced entry. R. 3163. As a result, Mr. Horrell's theory presumes that the "shooter" started the fire and then took due care to lock the home with the key prior to departing. R. 3163. Another firefighter testified that one door was unlocked when he arrived. But

17. Mr. Jacobsen's opinion was also based upon the financial problems experienced by Mr. Horrell. R. 3178-79.

18. On February 4, 1991, Mr. Jacobsen set forth his opinions in a report to Utah Farm Bureau, stating his views that the fire was of suspicious origin and that Mr. Horrell's statements were so inconsistent as to raise a concern of deception. R. 3165-3167. (See Report, attached as Exhibit "A").

19. In early November, 1990, Jake Jacobsen provided evidence samples to Dr. Robert Lantz, an analytical chemist. R. 3062. Included were carpet samples from the utility room and another area of the home, as well as some glass, and a control sample of carpet from the home. R. 3062-63.

20. Based upon his chromatograph studies, Dr. Lantz determined that the chemicals found on the samples matched mineral spirits, kerosene, or paint thinner, all highly flammable compounds. R. 3080-3082. (See Report of Dr. Lantz, attached as Exhibit "B").

21. Mr. Robert Adamson, one of Mr. Horrell's "gamer" friends, testified that Mr. Horrell kept solvents and other flammable compounds in his store:

MR. MORGAN: And did he have any flammable in the store?

A. Yes, a spray primer had some flammable solvents; any of the enamel-based paints had flammable solvents. That's probably the extent of most of them.

---

this is of little use to Mr. Horrell, who told Mr. Jacobsen that the home was locked.

R. 2970.

## **OPPORTUNITY**

22. On the night of the fire, Mr. Horrell was playing a hobby game called "Fantasy Hero" at his hobby store which neighbored his home. R. 2336.

23. One of the game's participants, Jacques D'Emal, testified that Mr. Horrell appeared "a little agitated." R. 2351.

24. Another of the participants, Robert Adamson, testified that Mr. Horrell was more "fidgety" than normal. R. 2958. He further testified that Mr. Horrell was less focused:

A. Okay. Well, normally Greg was very involved, very fixed or focused on the game that he was playing. But that night he did get up on several occasions and moved things about in the store, go back to the house, do various things. And he also had an intercom set up that went back into the house. And he did that sometimes when he had his--when he had his kids at home. He was making sure they were asleep.

R. 2955.

25. During the course of the evening, Mr. Horrell left several times. (See Exhibit 222, which summarizes Mr. Horrell's actions on the night of the fire, attached as Exhibit "C").

26. Mr. Dave Wiggins, one of the participants at this game, left at approximately 11:00 p.m., and only Mr. Horrell and Mr. D'Emal remained. R. 2972.

25. Mr. D'Emal testified that at about 11:00 p.m. on the night of the fire, he was loading his game materials into his vehicle when he heard a noise:

Q. And after you heard this noise, when did you next see Greg?

A. I heard the noise, closed my car door, turned and Greg came running out of the store.

Q. And did he say anything to you?

A. He yelled at me to run because someone was shooting at him.

\* \* \*

Q. Where did you go?

A. Diagonally, across Main Street to a small lot, vacant lot, very small, that's behind a used car lot or used to be a used car lot. I'm not sure what it is now.

Q. And were you able to see the property from where you were standing?

A. The store front, yes.

Q. Could you see the house?

A. You can't see the house from the street.

Q. Did you observe flames at some point in time?

A. *After I'd been standing there for a few minutes, I noticed there was a glow and some embers flying up from over the top of the building next door to Greg (Indicating).*

R. 2342-43 (emphasis added).

### MOTIVE

27. The home involved in the fire was sold to the Horrells by Arlene Beckstrom in 1983. R. 2287.

28. On March 27, 1990, a foreclosure report was issued. R. 2050.

29. On April 20, 1990, a Notice of Default was issued. *Id.*

30. A Notice of Trustee Sale was issued on October 2, 1990, one day prior to the fire. R. 2051, 2303-04. (See Exhibit 96, attached as Exhibit "D").

31. Between 1983 and 1990, the Horrells gave Ms. Beckstrom many checks in payment on the note which wouldn't clear the bank. R. 2288.

32. The Utah Farm Bureau policy of insurance was applied for by Mr. Horrell on July 27, 1990. R. 2051.

33. Due to an unfavorable credit report, Utah Farm Bureau sent a Notice of Cancellation on August 31, 1990. *Id.* (See Notice of Cancellation, attached as Exhibit "E").

34. The policy of insurance was to be cancelled effective October 4, 1990, at 12:01 a.m., approximately 30 minutes after the fire started. *Id.*

35. In the two years prior to this fire, Utah Power & Light sent 16 "final notices" to the Horrells indicating that if payment was not made, the power would be terminated. R. 2943. Utah Power made 12 personal visits to the Horrells in an attempt to collect overdue payments. *Id.* In the four months prior to the fire (June 25, 1990, through October, 1990), the Horrells made no payments on their power bill. R. 2944.<sup>3</sup>

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<sup>3</sup> These facts give the Court some flavor of the financial incentives Mr. Horrell had to light the fire on October 4, 1990. There is a wealth of additional information which also shows the Horrells' dire financial straits, but to detail each item would exhaust the page limitation of this brief.

## **OTHER SUSPICIOUS CIRCUMSTANCES**

36. Shortly before the fire, the Horrells decided to take a three day trip to Vernal, Utah. R. 1616.

37. For this reason, they packed up all their clothes and their children's clothes and left town on October 2, 1990. R. 1614.

38. However, when the family reached Park City, they decided to return, ostensibly because Mrs. Horrell needed to meet a Mountain Fuel employee the next day at her mother's home to light the pilot light on her furnace. R. 1615.

39. The Horrells got a room in Park City, 45 minutes from home, and returned to Salt Lake City the following day (October 3). During the early evening, Mrs. Horrell decided to stay at her mother's home with her children, allegedly due to power problems at their home. R. 1948.

40. As a result, all of the family (except Greg Horrell)<sup>4</sup>, their clothes, and essential necessities were out of the home at the time of the fire.

## **DECISION TO DENY CLAIM**

41. A few days after the fire, Larry Bachmann, an adjuster for Utah Farm Bureau, instructed another employee to retain an independent adjuster, David Rawlings, and a cause and origin expert, Robert "Jake" Jacobsen. R. 2047.

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<sup>4</sup> As stated earlier, Greg Horrell played fantasy games at his hobby shop that evening.

42. Mr. Bachmann instructed Mr. Rawlings to do a "scope of loss" to determine if the home was a total loss and to obtain an appraisal to determine its value. R. 2048.

43. On October 25, 1990, Mr. Rawlings reported that Mr. Horrell had discussed the home with the building inspector and was advised that he would not be allowed to repair the home. R. 2049.

44. Prior to the denial, Mr. Bachmann had in his possession the Foreclosure Report, the Notice of Default, and the Notice of Trustee Sale. R. 2050-51.

45. Mr. Bachmann also had the information relating to the Utah Farm Bureau policy and the fact that it was due to expire 30 minutes after the fire was started. R. 2051.

46. Mr. Bachmann received the statements of Mr. D'Emal, Mr. Adamson, and Mr. Wiggins which indicated that the Notice of Trustee Sale was posted at the residence prior to the fire. R. 2052.

47. On November 2, 1990, Mr. Bachmann sent Mr. Horrell a letter indicating that a Sworn Statement and Proof of Loss were due within 60 days and that the claim was still under investigation, and that the investigation could not be completed until the Proof of Loss was submitted. R. 2053.

48. Prior to denying the claim, Mr. Bachmann was aware that Mr. Horrell had filed bankruptcy on November 15, 1990. R. 2055. Mr. Bachmann reviewed



the bankruptcy schedules and was concerned because there were inconsistencies between the statements given by Mr. Horrell and those schedules. R. 2055-2062.

49. The Proof of Loss that was submitted did not contain information on the amount of losses Mr. Horrell was claiming. R. 2063. Upon receipt of that Proof of Loss on January 21, 1991, Mr. Bachmann wrote to Mr. Horrell and indicated that the Proof of Loss was inadequate, that it needed to be completed before the claim could be considered, and to contact Mr. Bachmann if he had any questions concerning the Proof of Loss. R. 2065-66.

50. On February 4, 1991, Mr. Bachmann received Mr. Jake Jacobsen's cause and origin report indicating that he was unable to identify any accidental cause for the fire, and that the fire was intentionally set and the insured was probably responsible for it. R. 2068-69. (See Report of Robert Jacobsen, attached as Exhibit "A").

51. Mr. Jacobsen included in his report statements from the other participants in the fantasy game and his conversations with the fire department. R. 2069.

52. Despite Mr. Bachmann's letter regarding the inadequacy of the Proof of Loss, Mr. Horrell did not submit a Proof of Loss until October 18, 1991. R. 2074.

53. On December 28, 1991, an examination under oath was taken from Mr. Horrell. R. 2070. This is "always" done after the completed Proof of Loss is submitted so that the company knows what is claimed. R. 2070-71. (The delay between receipt of the Proof of Loss and the Examination under Oath was apparently due to scheduling conflicts between the counsel involved. R. 2076).

54. On March 18, 1992, Mr. Bachmann denied the claim. R. 2077. The primary basis for his denial was that the fire was of incendiary origin and that Mr. Horrell set the fire. R. 2077-2078. Mr. Jacobsen's report outlined that there were two distinct locations of fire during the initial fire. R. 2078. Mr. Jacobsen also included the report from Dr. Lantz stating that an accelerant such as mineral spirits, paint thinner, and kerosene, was used to start the fire. R. 2079-80. Mr. Bachmann was also aware that Mr. Jacobsen was not able to rule out any accidental cause of the fire and was not able to rule out the insured as the person who set the fire. R. 2079. (See Denial Letter, Exhibit 463, attached as Exhibit "F").

55. Mr. Bachmann also took into account the numerous inconsistencies between Mr. Horrell's statements to the fire department, Mr. Jacobsen, and the bankruptcy court regarding various matters. R. 2082.

## SUMMARY OF ARGUMENTS

I. The trial court correctly concluded that Utah Farm Bureau should not have been required to prove its contractual defenses by clear and convincing evidence. The overwhelming majority of courts have held that the proper standard of proof for an incendiarism or misrepresentation defense is a preponderance of the evidence. *Verrastro v. Middlesex Ins. Co.*, 540 A.2d 693, 695-96, n.2 (Conn. 1988).

These courts properly recognize that the incendiarism and misrepresentation defenses are contract defenses under the policy and should be treated similar to other contractual issues. *Italian Fisherman, Inc. v. Commercial Union Assur. Co.*, 521 A.2d 912, 913 (N.J. Ct. App. 1987); *Whitlock v. Old American Ins. Co.*, 21 Utah 2d 131, 442 P.2d 26, 27 (Utah 1968). Because Utah Farm Bureau was doing no more than proving another provision of the same contract upon which the Horrells base their claim, the same burden should be applied to each party.

Many courts adopting the preponderance standard do so because the elements of the incendiarism or misrepresentation defenses do not mirror fraud. *Rego v. Connecticut Ins. Placement Fac.*, 593 A.2d 491, 495 (Conn. 1991). In neither defense need the insurer prove that the insured intended to deceive it, nor must the insurer prove that it relied upon the insured's representations to its damage.

There is no authority for the Horrells' proposition that because incendiarism is also a crime, a higher standard should apply. On the contrary, the Utah Supreme Court has held that where a defendant alleges a crime as an affirmative defense in a civil action, the preponderance of the evidence standard applies. *Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984).

The significant public policy in deterring incendiarism and the difficulty in proving the defense also warrant application of the normal civil burden. If a higher burden were imposed, the ability of insurers to prove incendiarism would be eliminated. *Dairy Queen of Fairbanks v. Travelers Indem. Co. of Am.*, 748 P.2d 1169, 1172 (Alaska 1988). The Utah Supreme Court has held that arson can be proven by circumstantial evidence because it is often secretly planned and initiated. *State v. Dronzack*, 671 P.2d 199, 200 (Utah 1983). The fact that a stigma may attach to the crime of arson is insufficient to raise the standard of proof.

Utah Farm Bureau's claims are not those of "avoidance." The Utah Supreme Court has already held that when an insurer asserts an exclusion to coverage as an affirmative defense, the exclusion need only be proven by a preponderance of the evidence. *Whitlock v. Old American Ins. Co.*, 21 Utah 2d 131, 442 P.2d 26, 27 (Utah 1968).

**II.** The trial court did not err in concluding that its error was harmful. This determination should not be overturned absent an abuse of discretion. *Rasmussen v. Sharapata*, 895 P.2d 391, 396 (Utah Ct. App. 1995).

The Horrells argue that the jury already concluded that Mr. Horrell did not start the fire. However, this is based upon a comparison of separate bodies of evidence. When asked to determine whether Mr. Horrell set the fire, the jury was allowed to consider all evidence presented at trial. However, when determining whether the claim was fairly debatable, the jury could consider only that evidence known to Utah Farm Bureau at the time of the denial. Thus, the Horrells' argument that the jury's determination with respect to the fairly debatable issue is controlling with respect to the issue of whether Mr. Horrell set the fire is comparing "apples and oranges."

Between the time the claim was denied and the trial, Utah Farm Bureau obtained even more evidence indicating that Mr. Horrell set the fire, evidence which the jury could not consider when making its fairly debatable determination. While the Horrells may dispute this evidence: "The jury, not the appellate court, should weigh the evidence and assess witness credibility." *State v. Brown*, 853 P.2d 851, 860 (Utah 1992).

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ERR IN GRANTING A NEW TRIAL ON THE GROUNDS THAT THE BURDEN OF PROOF ORIGINALLY REQUIRED WAS INCORRECT.**

The trial court correctly concluded that it erred by requiring Utah Farm Bureau to prove its defenses of incendiarism and misrepresentation by "clear and convincing evidence" rather than a "preponderance of the evidence." The trial court's conclusion is supported by the overwhelming weight of authority from other jurisdictions and analogous decisions from the Utah Supreme Court. Therefore, the trial court's order granting Utah Farm Bureau's motion for new trial should be affirmed.

#### **A. THE OVERWHELMING MAJORITY OF COURTS APPLY THE PREPONDERANCE OF THE EVIDENCE STANDARD.**

The parties agree that vast majority of jurisdictions addressing this issue have held that an insurer must prove its defense of incendiarism and misrepresentation by a preponderance of the evidence. The Supreme Court of Connecticut surveyed the case law in 1988 and concluded that twenty-two states found the preponderance of the evidence standard to be applicable while only three applied a clear and convincing standard:

We have examined case law from twenty-five states that have considered the standard of proof in a civil arson case. Twenty-two states have applied the preponderance of the evidence rule: *Mueller v. Hartford Ins. Co. of Alabama*, 475 So.2d 554 (Ala.1985); *Godwin*

*v. Farmers Ins. Co. of America*, 129 Ariz. 416, 631 P.2d 571 (1981); *Haynes v. Farm Bureau Mutual Ins. Co. of Arkansas*, 11 Ark.App. 289, 669 S.W.2d 511 (1984); *Lawson v. State Farm Fire & Casualty Ins. Co.*, 41 Colo. App. 362, 585 P.2d 318 (1978); *Precision Printers, Inc., v. Central Mutual Ins. Co.*, 175 Ga. App. 890, 334 S.E.2d 914 (1985); *Dean v. Ins. Co. of North America*, 453 N.E.2d 1187 (Ind. App. 1983); *Neises v. Solomon State Bank*, 236 Kan. 767, 696 P.2d 372 (1985); *Clifton v. Louisiana Farm Bureau Casualty Ins. Co.*, 510 So.2d 759 (La. App. 1987); *Trempe v. Aetna Casualty & Surety Co.*, 20 Mass.App. 448, 480 N.E.2d 670 (1985); *United Gratiot Furniture Mart, Inc. v. Michigan Basic Property Ins. Ass.*, 159 Mich.App. 94, 406 N.W.2d 239 (1987); *DeMarais v. North Star Mutual Ins. Co.*, 405 N.W.2d 507 (Minn. App. 1987); *Britton v. Farmers Ins. Group (Truck Insurance Exchange)*, 721 P.2d 303 (Mont. 1986); *Italian Fisherman, Inc. v. Commercial Union Assurance & Co.*, 215 N.J.Super. 278, 521 A.2d 912, cert. denied, 107 N.J. 152, 526 A.2d 211 (1987); *Yassoo Enterprises, Inc. v. North Carolina Joint Underwriting Assn.*, 73 N.D. App. 52, 325 S.E.2d 677 (1985); *Zajac v. Great American Ins. Cos.*, 410 N.W.2d 155 (N.D.1987); *Caserta v. Allstate Ins. Co.*, 14 Ohio App.3d 167, 470 N.E.2d 430 (1983); *Seals, Inc. v. Tioga County Grange Mutual Ins. Co.*, 359 Pa.Super. 606, 519 A.2d 951 (1986); *Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 334 S.E.2d 131 (1985); *Raphtis v. St. Paul Fire & Marine Ins. Co.*, S.D. 491, 198 N.W.2d 505 (1972); *Texas General Indemnity Co. v. Speakman*, 736 S.W.2d 874 (Tex. Civ. App. 1987); *Huff v. State Farm Fire & Casualty Ins. Co.*, 716 S.W.2d 927 (Tenn. App. 1986); *Great American Ins. Co. v. K & W Log, Inc.*, 22 Wash. App. 468, 591 P.2d 457 (1979); *Hayseeds, Inc. v. State Farm Fire & Casualty*, 352 S.E.2d 73 (W.Va. App.1986). Three jurisdictions have applied the clear and convincing evidence standard: *Schultz v. Republic Ins. Co.*, 124 Ill.App.3d 342, 464 N.E.2d 767 (1984); *Hutt v. Lumbermens Mutual Casualty Co.*, 95 App.Div.2d 255, 466 N.Y.S.2d 28 (1983); *Northwestern National Ins. Co. v. Nemetz*, 135 Wis.2d 245, 400 N.W.2d 33 (1986).

*Verrastro v. Middlesex Ins. Co.*, 540 A.2d 693, 695-96, n.2 (Conn. 1988).<sup>5</sup> A survey of current cases reveals that twenty-nine jurisdictions find that incendiarism must be proven by a preponderance of the evidence, whereas only three find that the defense must be proven by clear and convincing evidence. The leading treatise has also concluded:

As a matter of law, a defense of incendiarism is not sustained unless the evidence creates a reasonable inference of [the] insured's guilt. Evidence does not need to be clear and convincing but rather the insurer must prove its defense by the preponderance of the evidence.

18 George J. Couch, *Cyclopedia of Insurance Law* § 74:667 (1983).

The Horrells can find only four cases to support their contention that the incendiarism defense should be proven by clear and convincing evidence. *Carpenter v. Union Ins. Soc.*, 284 F.2d 155 (4th Cir. 1960); *Mize v. Hartford Ins. Co.*, 567 F.Supp. 550 (W.D. Va. 1982); *McGory v. Allstate Ins. Co.*, 527 So. 2d

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<sup>5</sup>The *Verrastro* court found only three jurisdictions that applied a clear and convincing standard: New York, Wisconsin and Illinois. Since *Verrastro*, Illinois has adopted the preponderance standard. *Fittje v. Calhoun County Mut. County Fire Ins. Co.*, 552 N.E. 2d 353 (Ill. Ct. App. 1990). Mississippi adopted a clear and convincing standard. *McGory v. Allstate Ins. Co.*, 527 So. 2d 632 (Miss. 1988). Three other states (in addition to Connecticut in *Verrastro*) have since adopted the preponderance standard. *Dairy Queen of Fairbanks, Inc., v. Travelers Indemnity Co. of America*, 748 P.2d 1169 (Alaska 1988); *Pacheco v. Safeco Ins. Co. of America*, 780 P.2d 116 (Idaho 1989); *Bateman v. State Farm Fire & Casualty Co.*, 814 S.W.2d 684 (Mo. Ct. App. 1991). Iowa adopted the preponderance standard in 1944 and Oklahoma in 1969. *Koontz v. Farmers Mut. Ins. Ass'n of Van Buren County*, 16 N.W.2d 20 (Iowa 1944); *Pacific Ins. Co. v. Frank*, 452 P.2d 794 (Okla. 1969).



632 (Miss. 1988); *Hutt v. Lumberman's Mut. Cas. Co.*, 466 N.Y.S.2d 28 (N.Y. App. 1983).

However, the Fourth Circuit's ruling in *Carpenter* (applying South Carolina law), has been implicitly overruled by the South Carolina Court of Appeals. *Rutledge v. St. Paul Fire & Marine Ins. Co.*, 334 S.E.2d 131 (S.C. Ct.App. 1985). Thus, only three cases cited by the Horrells have continuing force.<sup>6</sup>

**B. PUBLIC POLICY SUPPORTS THE APPLICATION OF THE PREPONDERANCE OF THE EVIDENCE STANDARD.**

Those courts requiring that the incendiarism defense be proven by "clear and convincing" evidence rationalize that the incendiarism and misrepresentation exclusions in the policy are "like fraud." *McGory v. Allstate Ins. Co.*, 527 So.2d 632, 635 (Miss. 1988). Another Court has held that because incendiarism is also a crime, a higher standard should apply. *Mize v. Hartford Ins. Co.*, 567 F.Supp. 550, 552 (W.D.Va. 1982). These contentions have been rejected by the better reasoned cases from this and other jurisdictions.

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<sup>6</sup> There is an issue as to whether the *McGory* decision would require the insurer to prove its defense under the "concealment" clause, also at issue here, by clear and convincing evidence. *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210 (5th Cir. 1991)(the elements of "concealment" differ from those of fraud and need only be proven by a preponderance of the evidence.)

**1. THE INCENDIARISM AND MISREPRESENTATION DEFENSES ARE CONTRACTUAL AND SHOULD BE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE.**

The better-reasoned cases teach that the preponderance of the evidence standard should apply because incendiarism and misrepresentation are contractual defenses under the policy. The Utah Supreme Court has long held that an exclusion is an affirmative defense which need be proven only by a preponderance of the evidence. *Whitlock v. Old American Ins. Co.*, 21 Utah 2d 131, 442 P.2d 26, 27 (Utah 1968) (see Section C, *infra*).

The New Jersey Court of Appeals has concluded that because these defenses are contractual in nature, the preponderance standard should apply:

Defendant does not assert that upon procuring the policy plaintiff intended to commit arson. *Rather, defendant is claiming that plaintiff, through its principal managing agent Fish, deliberately and willfully set the fire. This case is not one of equitable fraud. It involves the affirmative defenses of arson and fraud and false swearing which, if proven, establish a violation of the standard provisions of the fire insurance policy ... and relieve defendant from any responsibility for plaintiff's fire loss.* Where, as here, the plaintiff--insured has intentionally set fire to the property covered by the policy of insurance, sound principles of public policy preclude recovery.

*Italian Fisherman, Inc. v. Commercial Union Assur. Co.*, 521 A.2d 912, 913 (N.J. Ct. App. 1987). The Kansas Supreme Court has likewise held that the incendiarism or misrepresentation defenses are contractual and do not state a claim for fraud:

The company is not claiming that the insurance contract is void because, at the time it was obtained, the insureds had the intent to commit arson and collect under the policy. Rather, it claims that the Neises committed an unlawful act, arson, or procured its commission, which is a simple breach of contract. Strong principles of public policy deny the insured the right to recover when he intentionally sets on fire property covered by the insurance contract.

*Neises v. Solomon State Bank*, 696 P.2d 372, 378 (Kan. 1985). The Idaho Supreme Court has also held that the incendiarism and misrepresentation defenses are contractual in nature:

The case was actually tried on a breach of contract theory, and breach of contract is proven by a preponderance of the evidence, not by clear and convincing evidence. The terms of the policy stated that the insurance company would not pay if someone burned his own property; the policy language clearly includes the defenses of dishonest and criminal acts in addition to the defense of fraud. Finally, public policy would not allow recovery under a contract of insurance where the insured started his own fire.

*Pacheco v. Safeco Ins. Co. of Am.*, 780 P.2d 116, 123-23 (Idaho 1989). Finally, the Connecticut Supreme Court has held as follows:

Finally, we note that in the case of an insurance contract, the consequence of the alleged concealment or misrepresentation is the forfeiture of a contractual benefit, and therefore the burden of proof normally applicable to contractual claims, the preponderance of the evidence standard, should control. . . . We therefore disagree with the plaintiff's contention that common law fraud and an insurer's defense of concealment or misrepresentation are sufficiently similar to warrant applying an elevated burden of proof to the latter.

*Rego v. Connecticut Ins. Placement Fac.*, 593 A.2d 491, 495 (Conn. 1991).

In this case, the Horrells sued Utah Farm Bureau for breach of contract alleging that it had an obligation to provide benefits for a covered occurrence. Utah Farm Bureau raised as affirmative defenses the fact that the Horrells' fire was not a covered loss because the policy provisions did not cover intentional acts (such as incendiarism) and losses where the insured made misrepresentations in relation to the claim. Utah Farm Bureau did not counterclaim against Mr. Horrell and allege all nine elements of common law fraud. The entire action was tried as a "breach of contract" action, and indeed the Horrells did not even allege non-contract claims.

To hold that incendiarism must be proven by clear and convincing evidence would impose an unfair burden upon one party to the contract. Such a rule would allow the Horrells to prove a breach of one provision of the agreement by a mere preponderance of the evidence, while requiring Utah Farm Bureau to prove the application of another provision of the same contract by a much higher burden. The Horrells' attempts to transform Utah Farm Bureau's contractual defenses into a "fraud" action should be rejected, and the trial court's order granting a new trial should be affirmed.

## **2. THE INCENDIARISM AND MISREPRESENTATION DEFENSES ARE NOT COMPARABLE TO FRAUD.**

Many courts adopting the preponderance standard do so because the elements of the incendiarism or misrepresentation defense do not mirror fraud. For example, in *Rego v. Connecticut Ins. Placement Fac.*, 593 A.2d 491, 495 (Conn. 1991), the Supreme Court of Connecticut rejected the plaintiff's argument that the misrepresentation exclusion was "like fraud":

Our conclusion is supported by the distinction between the elements of common law fraud and the elements of an insurer's defense of concealment or misrepresentation. An insurer who raises this special defense must prove only that the insured wilfully concealed or misrepresented a material fact with the intention of deceiving the insurer. *Chauser v. Niagara Fire Ins. Co.*, 123 Conn. 413, 423, 196 A. 137 (1937). Unlike a party asserting a cause of action for common law fraud, an insurer who raises the special defense of concealment or misrepresentation does not have to prove that the insurer actually relied on the concealment or misrepresentation or that the insurer suffered injury.

*Id.* Similarly, in *St. Paul Mercury Ins. Co. v. Salovich*, 705 P.2d 812, 815 (Wash. App. 1985), the Washington Court of Appeals held:

However, courts from other jurisdictions have distinguished between cases involving misrepresentations to induce the execution of the contract, in which fraud must be established, and cases involving misrepresentations in a claim for coverage under the contract, in which fraud need not be established. While direct proof of misrepresentation by the insured in an insurance claim is seldom available, and the insurer often has no choice but to rely on the words of the insured in ascertaining the facts involved in the loss, the insurer need not

establish reliance, an essential element of fraud, in order to deny coverage for such misrepresentation.

*Id.* at 814-15.

Here, the Utah Farm Bureau policy provided as follows:

**Concealment of Fraud.** The entire policy will be void if, whether before or after a loss, an **insured** has:

- a. intentionally concealed or misrepresented any material fact or circumstance;
- b. engaged in any fraudulent conduct; or
- c. made false statements.

R. 21. Utah Farm Bureau alleged that Mr. Horrell "has intentionally made misrepresentations of material fact relating to his loss" by denying that he intentionally set the fire. R. 21. Utah Farm Bureau did not raise as an affirmative defense that Mr. Horrell "engaged in any fraudulent conduct."

In order to state a claim for fraud in Utah, a party must prove nine elements:

(1) that a misrepresentation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury or damage.

*Educators Mut. Ins. Assoc. v. Allied Prop. & Cas. Ins. Co.*, 890 P.2d 1029, 1032 (Utah 1995).

As in the cases from other jurisdictions cited above, Utah Farm Bureau was not required to prove elements (5)-(9) in order to prove its affirmative defense under the policy. Utah Farm Bureau need only prove that a misrepresentation of a material fact was made. Thus, the Horrells' claim that this action is "like fraud" fails and the trial court's order granting a new trial should be affirmed.

The incendiarism exclusion under the policy is even less analogous to a fraud action. Utah Farm Bureau need not prove that any material misrepresentation was made, nor must it prove that Mr. Horrell intended to deceive Utah Farm Bureau or that it relied upon the misrepresentations. In fact, Utah Farm Bureau need not prove a single element of the "fraud" claim to state an incendiarism defense.

The Horrells' contention that the incendiarism and misrepresentation defenses are "like fraud" has been rejected by the overwhelming majority of courts because there is no relation between the common law fraud action and the breach of contract due to incendiarism or misrepresentation defense. The trial court's order granting Utah Farm Bureau's motion for new trial should be affirmed.

### **3. THE CRIMINAL NATURE OF ARSON SHOULD NOT ALTER THE CIVIL BURDEN OF PROOF.**

As set forth above, one court has ruled that the incendiarism and misrepresentation defenses must be proven by "clear and convincing evidence" because

arson is also a crime. *McGory v. Allstate Ins. Co.*, 527 So.2d 632, 635 (Miss. 1988). However, the Horrells have presented no authority from the Utah Supreme Court requiring that criminal acts be proven by clear and convincing evidence in civil cases.

On the contrary, the Utah Supreme Court has held that where a defendant alleges a crime as an affirmative defense in a civil action, the preponderance of the evidence standard applies. *Auto West, Inc. v. Baggs*, 678 P.2d 286 (Utah 1984). In *Baggs*, the defendant counterclaimed against the plaintiffs alleging slander. Specifically, the defendant alleged that the plaintiffs had told third parties that he had "embezzled" or "stolen" from the company. The plaintiffs defended the counterclaim based upon the truth of the statements. The Utah Supreme Court held that the plaintiffs need only prove the truth of their embezzlement claim by a preponderance of the evidence:

We adopt the general rule that where a crime is imputed to a plaintiff and a defendant pleads truth as a defense, he need not prove the truth of the assertion "beyond a reasonable doubt, and a preponderance of evidence is sufficient to bar recovery."

*Id.* at 291.

Certainly, the Horrells would agree that an accusation of embezzlement carries a stigma equal to that of fraud.<sup>7</sup> Nevertheless, the Utah Supreme Court

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<sup>7</sup> Indeed, the Mississippi Supreme Court equated the two charges. *McGory*, 527 So.2d at 635.



allowed the defense to prove the stigmatizing crime of "embezzlement" in a civil action by a mere preponderance of the evidence. There is no reason why Utah Farm Bureau, notwithstanding the alleged stigma, should be held to a higher burden when proving that Mr. Horrell breached the "intentional act" exclusion of the policy.

The Horrells present no Utah authority to support their contention that criminal acts must be proven by a higher quantum of evidence in civil cases. Indeed, much of tort law is merely an extension of the criminal code. For example, the tort concept of "wrongful death" is similar to "negligent homicide." UTAH CODE ANN. § 76-5-206 (1995). The civil action for "assault and battery" mirrors the crime of "assault." UTAH CODE ANN. § 76-5-102 (1995). Indeed, even driving infractions such as "speeding," "following too closely," and "failing to signal," have criminal consequences. UTAH CODE ANN. § 41-6-1 et seq. (1994). Yet neither this Court nor the Utah Supreme Court has ever required that these tort actions be proven by clear and convincing evidence simply because the elements are analogous to a crime.

Indeed, each of these civil actions requires only a preponderance of the evidence for that very reason -- each is a civil action and no criminal sanctions are sought. Similarly, the Utah Supreme Court has never required more than a preponderance standard in breach of contract actions. *Whitlock v. Old American*

*Ins. Co.*, 21 Utah 2d 131, 442 P.2d 26, 27 (Utah 1968). Utah Farm Bureau can perceive no basis for allowing the Horrells to pursue their breach of contract claim using traditional contract standards, while requiring Utah Farm Bureau to pursue its breach of contract claims under criminal or fraud standards. There is no Utah authority for such an imbalance in the burdens of proof, and the Horrells argument should be rejected.

**4. THE NATURE OF THE INCENDIARISM DEFENSE WARRANTS A PREPONDERANCE OF THE EVIDENCE STANDARD.**

Many courts have accurately noted that incendiarism is difficult to prove because there are rarely eye-witnesses to the "striking of the match." *Great American Ins. Co. v. K & W Log, Inc.*, 591 P.2d 457 (Wash. Ct. App. 1979); *Christensen v. State Farm Mut. Auto. Ins. Co.*, 552 So. 2d 1377 (La. Ct. App. 1989). For example, in *Great American Ins. Co.*, the Washington Court of Appeals stated:

Arson is an offense which is most often proved by circumstantial evidence. It is one of those crimes which is peculiarly of secret preparation and commission; and it is seldom that the prosecution can furnish testimony of an eye witness who observed the setting of the fire.

*Great American Ins. Co.*, 591 P.2d at 460. The Louisiana Court of Appeals has also stated:

At this point, we recognize a distinct observation from our jurisprudential experience, that the very act of arson necessitates an environment where there are no witnesses and little direct evidence pointing towards the responsible party.

*Christensen*, 552 So. 2d at 1379.

The Utah Supreme Court has also recognized the difficulty in proving criminal arson:

In viewing the case in light of the totality of the evidence, the offense may be established by circumstantial evidence. Such evidence may be the only way of establishing a case of arson, which usually is based on secret preparation and activity.

*State v. Dronzack*, 671 P.2d 199, 200 (Utah 1983).

For this reason, the majority of courts have held that an insurer meets its burden of proof by setting forth sufficient circumstantial evidence to establish each of the following elements:

- (1) the incendiary nature of the fire;
- (2) that the insureds had a motive for setting the fire, and
- (3) surrounding circumstantial evidence implicating the appellants in setting the fire or causing it to be set.

*Emasco Ins. Co. v. Waymire*, 788 P.2d 1357, 1360 (Mont. 1990). *See, also, State Farm Lloyds, Inc. v. Polasek*, 847 S.W.2d 279, 282 (Tex. Ct. App. 1992); *McReynolds v. Cherokee Ins. Co.*, 815 P.2d 208, 211 (Tenn App. 1991); *Moore v. Farmer's Ins. Exch.*, 444 N.E.2d 220 (Ill. Ct. App. 1982).

To impose a higher evidentiary burden upon insurers already required to prove a claim with largely circumstantial evidence would essentially eliminate the incendiarism defense altogether because the insurer would be required to present direct evidence that the insured lit the fire, evidence which the careful arsonist would not provide.

The Horrells contend that to allow the incendiarism defense to be proven applying the same standard as in all other civil cases would essentially require them to prove that they did not set the fire. However, they do not present any basis for this conclusion. The insurer already has the heavy burden of presenting sufficient circumstantial evidence that the insured set the fire intentionally. This alone provides sufficient protection for the Horrells.

Moreover, the burden of contradicting the evidence presented by Utah Farm Bureau is no greater in this case than in any other civil case. The Horrells retained the services of their own cause and origin investigator, John Blundell, to help them disprove that Mr. Horrell set the fire. They called in their case in chief certain firefighters and neighbors to negate Utah Farm Bureau's theory that Mr. Horrell set the fire.

Under the preponderance standard, the Horrells would be treated no differently from any civil plaintiff facing a contention that he or she was contributorily negligent. In fact, no more would be required of the Horrells to

defend against Utah Farm Bureau's claim that Mr. Horrell breached the policy than was expected of Utah Farm Bureau in defending against the Horrells' claims that it breached the contract.

Utah Farm Bureau was already disadvantaged in this suit because it was required to prove its claim by circumstantial evidence, whereas the Horrells could prove their contentions by largely direct evidence from the insurer's claim file. To magnify this disadvantage when both claims arise out of the same contract would be manifestly unfair to Utah Farm Bureau.

**5. PUBLIC POLICY CONCERNS MANDATE IMPOSITION OF THE NORMAL CIVIL STANDARD OF PROOF.**

The Horrells freely admit that those committing arson should not benefit from their acts by recovering insurance. Application of the civil burden of the preponderance of the evidence is the only manner in which to effectuate this public policy.

The Supreme Court of Alaska has held that application of the preponderance of the evidence standard is the only manner in which to advance the public policy underlying the incendiarism defense:

Perhaps more importantly, these courts recognize that "[s]trong principles of public policy deny the insured the right to recover when he intentionally sets on fire property covered by his insurance contract. *Neises*, 696 P.2d at 378. It would hinder this public policy to require proof by a higher standard than usual for civil cases.

*Dairy Queen of Fairbanks v. Travelers Indem. Co. of Am.*, 748 P.2d 1169, 1172 (Alaska 1988).

The Utah Legislature has not hesitated to maintain the normal preponderance standard when public policy requires. For example, while punitive damages generally must be proven by clear and convincing evidence, this standard does not apply to claims that a tort-feasor was driving under the influence of alcohol. UTAH CODE ANN. § 78-18-1 (1)(b) (1992).

As set forth above, if the clear and convincing evidence standard were applied, the insurer would rarely be able to meet its burden. An insured exercising even the slightest care would be able to recover benefits because there would never be an eye-witness to the crime and therefore, the insurer would rarely be able to prove its case such that there was no "substantial doubt" as to who started the fire, which is necessary under the clear and convincing instruction given in this case. R. 1082. The only manner in which to effectuate the public policy of denying arsonists financial gain is to allow the insurer to prove its claims by a preponderance of the evidence.

**6. THE HORRELLS' ARGUMENT THAT ARSON CARRIES A "STIGMA" SHOULD BE REJECTED.**

Stripped to its essence, the Horrells' claim is ultimately that a higher burden should apply because an allegation of misrepresentation and incendiarism carries

a "stigma." This is an inadequate basis to impose a higher burden of proof upon Utah Farm Bureau.

The Horrells' argument largely follows one case. *Transamerica Ins. Co. v. Bloomfield*, 637 P.2d 176, 180 (Or. Ct. App. 1981). Like much of the authority relied upon by the Horrells, *Bloomfield* has been overruled. *Mutual of Enumclaw Ins. Co. v. McBride*, 667 P.2d 494 (Or. 1983). In *McBride*, the Supreme Court of Oregon held that the defenses of incendiarism and misrepresentation need only be proven by a preponderance of the evidence. When faced with a "stigma" argument similar to that made by the Horrells, the court responded:

We applied a similar consideration in *Fahrenwald v. Hemphill*, *supra*, where we said that a reason for requiring clear and convincing proof of fraud is that "[t]he stigma of fraud is not lightly laid upon a defendant." . . . This was, however, little more than a maxim, and more analysis is required to establish whether the statutory action for insurance fraud and false swearing alleged at bar is quasi-criminal or threatens the individual involved with "a significant deprivation of liberty or stigma."

Here, the consequences of fraud and false swearing is solely the forfeiture of a contractual benefit.

*Mutual of Enumclaw Ins. Co. v. McBride*, 667 P.2d 494, 499 (Or. 1983).

In fact, the Supreme Court of Connecticut has noted that:

A majority of the states that have examined the burden of proof in civil arson cases have adopted the preponderance of the evidence standard. This rule has been applied in jurisdictions, like Connecticut, that have adopted the "clear and convincing evidence" standard for proof of fraud in a civil action.

*Verrastro v. Middlesex Ins. Co.*, 540 A.2d 693, 695-96 (Conn. 1988). Thus, even those courts recognizing that fraud imposes a stigma sufficient to warrant a higher burden of proof have not found the stigma sufficient to impose a greater burden in breach of contract actions.

Many civil actions impose a "stigma." An assault case implies that the actor is a "bully." A wrongful death case imposes the stigma of being responsible, either intentionally or negligently, for taking another life. The Horrells claim that the defenses asserted by Utah Farm Bureau imply that he is a "cheat." However, do not the Horrells' contentions that Utah Farm Bureau is denying them insurance proceeds to which they are allegedly entitled also imply that Utah Farm Bureau is a "cheat"? If a civil litigant could raise the burden required of his adversary simply by contending that the claims cast him in a poor light with his fellow citizens, clear and convincing evidence would be the rule rather than the exception. The Horrells' "stigma" argument is nothing more than a veiled attempt to gain a litigation advantage in this case.

Moreover, it should be noted that the Horrells brought this claim. They have placed the circumstances of the fire and the performance of the contract into issue. To allow them to close off a part of this inquiry by contending that a stigma will result is unfair to the party *they are suing*. The Horrells' stigma argument should be rejected and the trial court's order mandating a new trial should be affirmed.



**C. UTAH FARM BUREAU DOES NOT SEEK TO AVOID THE CONTRACT AND THUS, A HIGHER STANDARD OF PROOF SHOULD NOT BE APPLIED.**

The Horrells contend that anytime an insurance company asserts an exclusion in the policy as an affirmative defense, the insurer should be required to prove that exclusion by clear and convincing evidence because an exclusion is an "avoidance" of the contract. This assertion is contrary to Utah law and the public policy underlying the "avoidance" decisions.

The Utah Supreme Court has already held that where an insurer invokes an exclusion in the policy to deny coverage, the insurer need only prove its defense by a preponderance of the evidence:

In that connection it is well to have in mind the burden of proof as to the problem here presented: Where a loss occurs which normally would be compensable under an insurance policy, and the company asserts a defense of non-coverage on the ground of an exception in the policy, the general rule of insurance law is that this is in the nature of an affirmative defense; and that the company has the burden of proving by a preponderance of the evidence that the loss comes within the exception stated in the policy.

*Whitlock v. Old American Ins. Co.*, 21 Utah 2d 131, 442 P.2d 26, 27 (Utah 1968).

Thus, even if Utah Farm Bureau's defense can be called one of "avoidance," the Utah Supreme Court has already held that the preponderance of the evidence standard should apply.

In addition, the public policy underlying the "avoidance" cases cited by the Horrells is not applicable to this case. In *Peterson v. Peterson*, 571 P.2d 1360, 1362 (Utah 1977), the Utah Supreme Court identified the types of cases to which the clear and convincing standard applies:

Among the classes of cases to which this special standard of persuasion (clear and convincing proof) has been applied are the following: (1) charges of fraud, and undue influence, (2) suits on oral contracts to make a will, and suits to establish the terms of a lost will, (3) suits for the specific performance of an oral contract, (4) proceedings to set aside, reform, or modify written transactions or official acts on the grounds of fraud, mistake, or incompleteness, and (5) miscellaneous types of claims and defenses, varying from state to state, where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds.

*Id.* In *Peterson*, the Supreme Court held that a defendant holding a joint account with his wife must prove that the funds are not his by "clear and convincing evidence" because there is a "special danger of deception." *Id.* at 1362.

Each of these cases involves a situation where it is "one person's word against another." The Court held that in these cases, the person asserting the claim and seeking to avoid a valid contract must set forth clear and convincing evidence and cannot rely solely upon his own testimony or evidence which he controls and which is not subject to proof.

There is no "special danger" of deception in an incendiarism case. The case is not proven based solely upon the testimony of one witness, but rather is based

almost entirely upon the physical evidence. Utah Farm Bureau does not have sole control over the evidence. On the contrary, all of the evidence in this case was in the sole possession of the Horrells. This case is not unlike any other civil tort case, where evidence is adduced from the other party. The cases cited by the Horrells alleging "avoidance" are simply not applicable here. On the contrary, the Utah Supreme Court has already held that an exclusion in an insurance policy need only be proven by a preponderance of the evidence.

In sum, the overwhelming weight of authority and the compelling public policy arguments support allowing an insurer to prove that the insured breached the contract by a preponderance of the evidence. For this reason, the trial court's order granting a new trial should be affirmed.

**II. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE ERROR REGARDING THE BURDEN OF PROOF WAS HARMFUL.**

**A. THIS COURT SHOULD NOT REVERSE THE TRIAL COURT ABSENT AN ABUSE OF DISCRETION.**

The trial court ordered a new trial on the grounds that Utah Farm Bureau was erroneously required to show incendiarism by clear and convincing evidence rather than a preponderance of the evidence. In doing so, the Court implicitly found that its error was harmful and warranted a new trial. This Court has very recently held:

We will not reverse a trial court's decision to grant or deny a motion for new trial absent an abuse of discretion.

*Rasmussen v. Sharapata*, 895 P.2d 391, 396 (Utah Ct. App. 1995). The Utah Supreme Court long ago stated the purpose for vesting broad discretion in the trial court:

Due to the considerations set forth above, and the advantaged position the trial court occupies with respect to the trial, the prior decisions of this court have been uniformly to the effect that the trial court has a broad discretion in ruling on motions for a new trial and that his action will not be disturbed in the absence of a plain abuse thereof.

*Holmes v. Nelson*, 326 P.2d 722, 726 (Utah 1958). In this case, the trial judge, who had the opportunity to see and hear the witnesses, is far better equipped to determine whether there was a substantial likelihood of a different outcome if the proper burden were imposed. This Court should not overturn the trial court's determination absent a showing that the court abused its discretion. The Horrells have ignored their burden of showing the trial court abused its discretion.

**B. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE ORIGINAL ERROR WAS HARMFUL.**

The Horrells' only argument with respect to harmless error is that a comparison of the jury's response to separate special verdict questions regarding different claims proves that the jury believed Greg Horrell did not intentionally set fire to his own home. However, this argument fails because the jury was asked to determine separate issues based upon the evidence existing at different times.

Initially, the jury was asked to determine whether Mr. Horrell set the fire.

Question 1 of the special verdict inquired:

1. Do you find by clear and convincing evidence that Gregory Horrell intentionally set the fire which occurred at his residence on October 3, 1990?

(R. 1122, attached as Exhibit "G"). The jury was allowed to consider all of the evidence adduced during trial, regardless of whether the evidence was discovered before or after the claim was denied by Utah Farm Bureau.

However, when considering whether the claim was "fairly debatable," the jury was allowed to consider only that evidence in the possession of Utah Farm Bureau at the time it denied the Horrells' claim. The jury was asked:

6. Do you find by a preponderance of the evidence that the Horrell's claim was "fairly debatable" as that term has been defined in the instructions?

(R. 1123, attached as Exhibit "G"). "Fairly debatable" was defined in the instructions as follows:

"Fairly debatable" means that the laws or facts which support the insurer's position create a reasonable likelihood that the denial of the claim would be upheld in court. In determining whether or not the insurer's position was fairly debatable and reasonably justified, you should consider all laws or facts upon which a reasonable insurance company would rely in deciding whether to pay a claim. *This would include the laws or facts supporting the insured's position that were either known, or that should have been known, by the insurer.*

(R. 1097, attached as Exhibit "H"). In reaching its decision regarding Question 6, the jury was limited to the evidence *at the time the claim was denied*.<sup>8</sup> Thus, an evaluation of the Horrells' argument demonstrates that they are seeking to "compare apples and oranges."

After the claim was denied in March, 1992, the Horrells brought this lawsuit. During discovery in this suit, substantial additional evidence was gained showing that Mr. Horrell set the fires to his home, including:

1. At the time of Mr. Robert Jacobsen's report in February, 1991, law enforcement officials such as Randy Jacobson of the South Salt Lake Fire Department refused to discuss the matter because of the on-going criminal investigation. (See Report of Robert Jacobsen, attached as Exhibit "A"). However, at the time of trial, Mr. Randy Jacobson testified that in his opinion, the fire was incendiary and Mr. Horrell set the fire. R. 2725-2729.
2. At the time of Mr. Jake Jacobsen's cause and origin report, the assumption was that the second fire was a "rekindle" of the first fire. This was based upon the fact that Mr. Horrell stated in his statement that he was given a ride by a Red Cross volunteer to his mother-in-law's home shortly after first fire. Mr. Horrell even produced the volunteer's business card to positively identify this individual. R. 2948. However, at trial, the Red Cross volunteer denied ever giving Mr. Horrell a ride. R. 2848-49.

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<sup>8</sup> Although not necessary for its ruling, the trial court stated as follows in granting the new trial:

THE COURT: The Court is persuaded that there is substantial evidence that the claims were fairly debatable. I make no finding thereon, but simply make the observation.

(Ruling, attached as Exhibit "I").

3. In addition, at the time of Mr. Jake Jacobsen's report, he relied upon Mr. Don C. Herbert's statement that he saw power lines arcing shortly before the second fire began. R. 1842. However, during discovery in this lawsuit, Mr. Kenneth R. Rigby, an employee of Utah Power, testified that he was called shortly after the first fire at that he knows "for a fact I cut the power." R. 2172. Mr. Norman Tateoka, an other employee of Utah Power, testified that when he arrived on the morning after the second fire to turn off the power, it was already off.<sup>9</sup>

4. In his statement to Mr. Jake Jacobsen, Mr. Horrell indicated that while he maintained insurance on his vehicles, he did not maintain insurance on his boats. (See Report of Robert Jacobsen, attached as Exhibit "A"). During discovery in this litigation, Mr. Horrell conceded that he had not maintained insurance on his vehicles, his business, or any property other than the home. R. 1593.<sup>10</sup>

5. In 1986, Mr. Horrell's mother, Shirley Horrell, sent Greg Horrell a check in the amount of \$40,000 made payable to the mortgagee, Arlene Beckstrom, for full payment of the home. R. 2926. Ms. Beckstrom testified that she received only a portion of those funds. R. 2317.<sup>11</sup>

6. Mr. Horrell reported receiving \$2,400 rental income from a home in Alaska in 1989, but failed to report this income to the Internal Revenue Service on his 1989 income tax return. R. 1585-1586.

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<sup>9</sup> In conjunction with Mr. Horrell's false statement regarding the Red Cross volunteer, these facts show that Mr. Horrell had an opportunity to set the second fire. Moreover, Mr. Rigby's testimony eliminates the possibility that the second fire was caused by electrical failure.

<sup>10</sup> The implication of such testimony is that Mr. Horrell may have chosen to destroy the home because it was the only property from which he could obtain insurance benefits.

<sup>11</sup> The implication of such testimony is that Mr. Horrell could not obtain help from his mother in order to avoid the 1990 mortgage foreclosure because she assumed that the loan had been paid.

7. Mr. Horrell claimed in his Examination under Oath before the claim was denied that his income tax returns were destroyed in the fire, but at trial he admitted that he did not even prepare income tax returns for the years 1984-1989 until February, 1991, three months after the fire and that he had copies of the returns he could have given to Farm Bureau but assumed for no particular reason that Farm Bureau only wanted certified copies. R. 1591-1592.

8. Although Utah Farm Bureau was aware that Mr. Horrell had problems with creditors prior to the fire, it was not revealed until discovery in this action that Mr. Horrell had not made any payments to Utah Power & Light since June 25, 1990. R. 2944.

When considering whether the claim was fairly debatable, the jury could consider only that evidence in the possession of Utah Farm Bureau, which excluded the above evidence. In determining whether Mr. Horrell set the fire, the jury could consider both the evidence known to Utah Farm Bureau *plus* the above evidence.

In other words, it is entirely possible for the jury to conclude by a preponderance of the evidence that the claim was not fairly debatable when considering only the evidence in Utah Farm Bureau's possession, but also conclude by a preponderance of the evidence that Mr. Horrell set the fire based upon all of the evidence. To equate the two findings, as the Horrells argue should be done, would necessarily require this Court to hold, as a matter of law, that the information learned after Utah farm Bureau denied the claim is of no value. There



is no basis for such a result because the evidence learned after the denial is certainly relevant to the issue of whether Mr. Horrell set the fire.

The Horrells will characteristically argue that there are plausible explanations for each of the above facts, and they will undoubtedly argue that other witnesses negate the importance of these assertions. However, as the Utah Supreme Court has correctly found: "The jury, not the appellate court, should weigh the evidence and assess witness credibility." *State v. Brown*, 853 P.2d 851, 860 (Utah 1992). In this case, it is for the jury to decide how much importance to attach to each of the above facts.

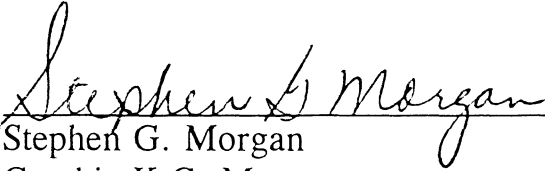
The Horrells' argument should be rejected because it erroneously assumes that the jury was considering the same body of evidence when responding to each inquiry on the special verdict. The trial court did not abuse its discretion in ordering a new trial based upon harmful error.

### **CONCLUSION**

Based upon the foregoing, Utah Farm Bureau respectfully requests that the trial court's ruling granting a new trial be affirmed.

DATED this 16 day of August, 1995.

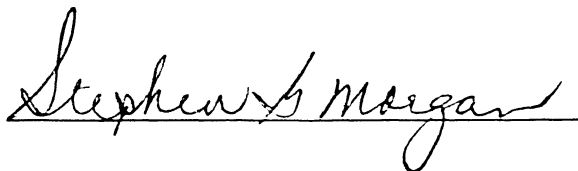
MORGAN & HANSEN

  
Stephen G. Morgan  
Cynthia K.C. Meyer

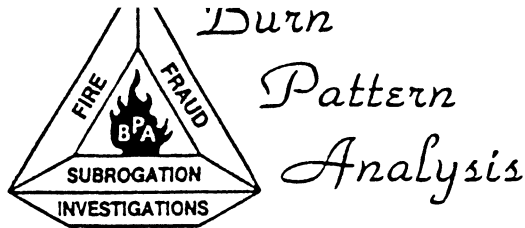
CERTIFICATE OF MAILING

I certify that on this 16 day of August, 1995, I caused a true and correct copy of the foregoing BRIEF OF APPELLEE to be mailed via first-class mail, postage prepaid, to the following:

Keith W. Meade  
COHNE, RAPPAPORT & SEGAL, P.C.  
Attorneys for Plaintiffs/Petitioners  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, UT 84147-0008



Tab A



*"Our Expertise Could Be Your Best Protection"*

**PRIVILEGED/CONFIDENTIAL REPORT  
PRELIMINARY REPORT**

Utah Farm Bureau  
5300 South 360 West, #210  
Murray, Utah 84123

ATTN: Jerry Schaft

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**INSURED:** Greg Horrell

**DATE OF LOSS:** 10/3/90

**LOSS DESCRIPTION:** Single family dwelling

**LOSS LOCATION:** 2770 South Main (rear)  
Salt Lake City, Utah 84115

**POLICY/CLAIM #:** 5193692

**EVIDENCE LOCATION:** Evidence lock-up of this office

**BPA FILE #:** 90-1170 SL

**OCCUPANT/OWNER:** Same

**CAUSE AND ORIGIN:** Arson or incendiary fire that occurred in utility room of first level through the use of a suspected flammable liquid. A subsequent second fire occurred in the approximate same area of origin shortly after extinguishment which is also suspected to be incendiary in nature.

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This report is confidential and the exclusive privileged property of the addressee. Dissemination of this report or any content of the same to anyone is the sole responsibility of the addressee.



*Pattern  
Analysis*

*"Our Expertise Could Be Your Best Protection"*

**PRIVILEGED AND CONFIDENTIAL  
Preliminary Report**

Utah Farm Bureau  
5300 South 350 West, #210  
Murray, Utah 84123

RE INSURED: Greg Horrell  
DATE OF LOSS: 10/03/90  
POLICY #: 5192692  
OUR FILE: 90-1170 SL

Attn: Jerry Schaft

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90-1170 SL

-1-

February 4, 1991

**ASSIGNMENT:**

This case assignment was received on October 8, 1990 through a telephone conversation with Jerry Schaft, Supervisor for Utah Farm Bureau Insurance. The concern of this assignment was to conduct an origin and cause investigation of a fire that occurred on October 3, 1990 in the home of the insured, Greg Horrell. This fire was one of many bizarre circumstances that occurred at the time of the fire and information of those will be provided by law enforcement personnel at some point during the investigation, as they had not concluded their preliminary investigation at the time of this assignment.

**RISK:**

The fire of concern occurred in a single family residence of approximately 1,800 square feet of living space. This was a two-story structure that was 2 x 4 framed with a pitched roof. Many remodeling projects had occurred to this residence since its time of construction. Those projects have not been defined at this point of the investigation. It is suspected, however, that this house is

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approximately 45 years old.

Exterior surfaces of the roof were of asphalt shingles throughout. There was also a multi-paneled solar heating system located on the southwest surface of the roof. The inner walls and ceilings were both sheetrock and lath and plaster, and even portions of missing ceiling coverings which gave the appearance of an unfinished remodeling project.

There was a heating system located in the crawl space below the main floor which was not inspected due to the extreme amount of water in the crawl space. Attempts to inspect this were impossible as this unit was submerged at the time of the investigation. However, a solar heating system supplemented the forced air heating unit in the partial basement. This was a natural gas forced air heater, unknown manufacturer model or serial number. The inner surfaces of the walls were painted and wallpapered. There was carpeting on most of the floors throughout the residence.

Electrical service was an overhead supply attached on the north center portion of the residence through a weather head and meter base mounted at that point. Main breaker panel was mounted directly through the wall interiorly in a utility room which also contained a washer and dryer, as well as some storage. Within this room, access to the partial basement was found. Also found outside at the northeast corner was the natural gas service meter.

#### **INVESTIGATION:**

Due to the fact the fire department had not released the fire scene

and an on-going investigation was being conducted, this office made contact with South Salt Lake Fire Department to provide a clearance to conduct a fire scene investigation. At that time, it was made known to this office that Randy Jacobson represented South Salt Lake Fire Department in the investigation conducted by that jurisdiction. Mr. Jacobson stated that the scene had been released at this point and it was clear to conduct an investigation. The insured was also called and agreed to meet this office the following day to provide access to the residence as well as information about the fire incident.

The preliminary scene investigation was conducted on October 9, 1990 at which time the external and internal portions of the residence were photographed through the use of an Olympus OM1 35mm SLR camera using 24mm wide angle lens and 50mm lenses. Where necessary, flash photography was provided through a Vivitar 283 flash attachment. Kodacolor Gold 100 film was used in the photographing process. Copies of photographs taken during this investigation accompany this report.

This office arrived early on the morning of the day of the investigation to find that no one had reported to the residence at that time. Therefore, an interview was conducted with Mrs. Meyer who lived in the house adjacent to the property to the west. Mrs. Meyer was one of the first individuals to notice the fire and provided an recorded interview concerning the details and circumstances surrounding this fire incident. Later during the day, this office met with the insured, Greg Horrell, who was discussing details concerning this fire with the South Salt Lake fire investigator and

also Detective Diane Hollis of the South Salt Lake Police Department.

It was at this time it was learned that allegedly gunshots had been fired at the insured prior to the fire incident and in relationship to the fire. More information and details about these circumstances will be discussed later in this report. Mr. Horrell stated that prior to the fire, he had been in the shop (business) which is a building located to the east of the residence and fronts Main Street with some friends participating in some hobby activities up until the time of the alleged gunshots and fire incident. Mr. Horrell has a wife and two children who were not home at the time this incident occurred.

The external inspection was conducted at this time which revealed severe fire damage to the northeast central and west sections of the roof and second level. Many of the windows had been broken out of the first level and almost all windows and been broken in the upper level. The roof had collapsed in the center portion and northeast sections of the second level. Severe fire damage had occurred throughout the residence. It was learned that a rekindle or subsequent second fire occurred at approximately 5:36 a.m. on the day following the initial fire incident. The second fire occurred approximately two hours after the fire crews had left the scene from the initial fire.

Entrance into the residence was gained through the south center portion of the residence known as the den or "yellow room" where heavy fire debris and damage was found throughout this room. This provided access to all other areas of the home. It was noticed upon



the inspection of this room that fire had breached through not only the ceiling, but the roof of this room at the north section. Attached to the den was a utility room where severe fire damage had occurred both to the inner contents of the room and the roof and ceiling surfaces. Directly above this area was the piping and supply of the liquid coolant for the solar system. It was apparent through the inspection of these areas that the most fire damage had occurred at this point. It is unknown whether this had occurred in the first or second fire.

It was also obvious, through the inspection of the entire residence, that a large accumulation of debris had been thrown throughout the residence subsequent to the fire. In fact, the den appeared to have rubble and debris thrown about in a random fashion for purposes unknown at the time of this investigation. An appearance of complete disarray was found in all of the rooms of the residence including the upper level. It also appeared that some of the contents of the residence had been removed prior to the involvement of this office.

The upper floor was inspected to determine burn patterns and the travel and extension of fire during both fire incidents. It was quickly noticed that on the northeast section of the residence, heavy fire damage had occurred at that level. It gave the impression that very possibly the first fire may have started in this room. The strange configuration of the roof line and the addition of rooms as well as spaces of the ceiling that had been removed prior to the fire incident caused concerns with the travel of fire and avenue for extensions. Those configurations may have accounted for the increased burning within this room. However, that has not been

confirmed.

Burn patterns of the first fire were confused and changed due to the second fire, but through the interviews conducted with fire department personnel, it was learned that the initial fire scene was one which involved mostly the heavy involvement of fire in the utility room and in the northeast room of the second level. The first fire noticed by arriving crews was coming out the north window of the second level.

There very well could have been two points of origin involving the first fire. The second fire, very clearly, had involved the utility room and den of the main level. It also appeared that fire involved the child's bedroom situated on the west side of the first level. Both fires included the involvement of an accelerant in the areas of origin. Samples of fire debris and control samples were taken at the time of this investigation. Those samples were sent to a lab for content identification purposes.

During the inspection of the second level, it was noticed that heavy burning and damage occurred on the top surfaces of the floor joists/trusses in the room on the northeast corner of the house. A roll-over effect from the fire also involved severe damage to the east surface ceiling trusses and subroof which gave the appearance of an extremely hot, rapidly accelerating fire. A glazed affect on the surface confirmed these findings. The large configuration alligatoring on the wooden surfaces gave the appearance of an accelerated and hot fire. As this office was not involved in the investigation after the first fire, the type of burning and damage is

not known.

In talking with fire crews, they indicated that very little fire damage had occurred to adjacent rooms in the first level. With the exception of the utility room and some burning into the den area, most other rooms were intact and free from any extensive fire damage. The door to the children's bedroom had been closed and only minor smoke damage had occurred in this room after the first fire.

Due to the location of the fire which occurred in the utility room, fire department personnel were concerned with the possibility of the electrical panel and circuits being involved with the cause of the fire. This panel had been removed prior to the involvement of this office by the fire department and was held in their evidence lock-up for purposes of analysis. Subsequent investigations conducted by this office included the visual inspection of this panel and all connective circuitry. It was indicated by the inspection at that time that no obvious failures or arcing was evident within this panel. It did appear that the damage caused to all circuitry, conductors, and components was from external heat. The information provided by the insured stated that the power was off earlier that day prior to the fire incident. Information also provided by the insured stated that there had been no electrical problems with this service at any time prior to the fire. In fact, a remodeling project a year or two earlier provided a new panel, breakers, and some of the electrical circuits throughout the house.

Also on a subsequent investigation, a visit to the residence and business, this office found a notice of Trustee Sale posted on the

front door of the office. According to that notice, Associated Title under Document #3818010 recorded on the 13th day of July, 1983, Book 5474, page 2083, involved the sale of the property which included the house and business owned by Greg S. and Barbara J. Horrell. This sale was to be conducted on October 29, 1990 at 10:00 for the purposes of foreclosing on that property and trust deed.

The specific details leading up to that foreclosure are not known at the time of this investigation, but it did appear through information provided by other individuals involved that the property and the payments were in severe arrears which had forced the foreclosure by Associated Title. It is also known by this office and determined during the investigation that the property has a second mortgage agreement contract with Gordon and Arlene Beckstrom. These individuals are the original owners of the home, and the purchase agreement through Mr. Horrell was conducted through the Beckstroms.

The foreclosure being conducted by Associated Title and their position in the property liens is not known at this time of the investigation. The insured denies there being any other liens and encumbrances on the property and there are no other interested parties. He also denies that there have been any other encumbrances or liens on this property at any other time. The aforementioned statements are only a few of many inconsistent statements surfaced during this investigation.

Enclosed with this report are four transcribed interviews taken of the insured and the three individuals involved with him on the night of this incident. A review of those transcribed statements will

provide specific details with regard to matters concerning this investigation. However, to provide a synopsis of some of the other inconsistencies that are within the transcribed interviews, and also an interview taken on the day of the preliminary investigation with Mr. Horrell suggest that many items have been reported differently throughout the investigation.

Besides the conflicting statements made during the investigation, other items of concern suggest that possible deception or incorrect reporting of information by the insured has been conducted. Some of these items would be the fact that Mr. Horrell indicates that he has had no problems with any of his vendors, obtaining merchandise or obtaining credit. During the investigation, several utility bills were strewn about the debris and rubble within the house that showed not only an extremely large balance due, but indications of termination of service with lack of payment. Additionally, canceled checks were found for several different checking accounts that Mr. Horrell does not admit to during the interview. Of course, of most concern is the alleged shooting incident that took place on the evening of the fire incident.

#### **INTERVIEWS:**

In addition to the interviews conducted with eye witnesses and other individuals involved with the fire incident on the evening of its occurrence, this office talked to fire department personnel and neighbors in the area about the fire incident.

**Captain Mike Larson** of the South Salt Lake Fire Department indicated that his truck was the first unit arriving on the initial fire

response at 11:29 p.m. Captain Larson stated that as they were leaving the fire station located at approximately 2400 South between State and Main (approximately three blocks away), he and his crews could see flames showing above the residence indicating a fully involved fire. In addition to this, smoke had already reached the freeway to the north indicating that the fire was heavily involved and a small wind carried smoke from the south to the north. He evidenced, upon arrival, fire coming from the northeast bedroom and also from the utility room window also on the north side center portion center of the house.

Their initial attack was gained through the "yellow room" door which put them directly in line with the utility room for a rapid attack. Captain Larson stated that the fire was extremely hard to extinguish and gave the appearance of an accelerated flammable liquid fire. The fire had already broken through the roof line in the center portion of the home directly above the utility room and had heavily involved the adjacent front room and upper levels toward the east of the attic and the rooms within it.

Captain Larson stated that once the fire was extinguished, an overhaul revealed that very little, if any fire had occurred within the children's bedroom on the west side of the main level and that only minimal damage had occurred to the other living room, dining room, and upstairs bedroom occupying Mr. and Mrs. Horrell's bedding and clothing. Captain Larson stated that in addition to the three engines from South Salt Lake, a back-up and support engines from Salt Lake County and one from Salt Lake City assisted fire suppression. Fire crews remained at the scene until approximately 2:48 a.m. the

next morning in an effort to clean up and make sure all hot spots were extinguished.

The subsequent fire at 5:36 a.m. was listed as a rekindle by South Salt Lake Fire Department personnel. The same areas were involved, and upon arriving, an advanced and highly accelerated fire was in progress. Captain Larson indicated he felt that the fire of this magnitude was unusual for any type of rekindle. In spite of the flammability of the liquid found within the solar panel, Captain Larson felt that this fire was suspicious and very possibly assisted with other accelerants in the initial ignition of this fire.

Other law enforcement individuals have talked to this office about the fire incident. However, due to the fact that the investigation is on-going and that the fire has been listed as a suspicious fire, no information will be provided by law enforcement personnel until the conclusion of their investigation. Possibly, at this time, results of lab tests on the electrical components and debris samples taken by the jurisdiction may be provided. At this time, this office has no knowledge of any of those results.

#### **COMMENTS AND CONCLUSIONS:**

With the information, details, and evidence gathered at this point of the investigation, a preliminary cause and origin and been determined. It is clear with the information obtained during this investigation that this fire is definitely an incendiary/arson fire due to the suspicious circumstances surrounding the fire incident. There is little doubt that this fire and its origin of the initial fire occurred within the utility room and simultaneously in the

second level northeast attic bedroom. Due to the second fire, which appears also to be incendiary, several of the burn patterns from the initial fire have been changed and even obliterated due to increased burning and the accelerated condition of the second fire.

The possibility of a rekindle on the second fire incident cannot be ruled out. However, the first fire clearly is an intentionally set fire.

To identify the specific individual involved with the initial fire, many factors and much information must be defined to eliminate the insured and his possible involvement with this incident. One of the most confusing details in this scenario is, of course, the alleged shooting involved with it and its intentions. As the only eye witness to this incident is the insured, himself, one must analyze the details provided during this investigation by him to construct a relevant story.

It is of concern that the complexion of this incident, when taken at face value, suggests that the insured was attacked by some unknown individual who not only attempted to burn his house, but also attempted to murder him. From the information provided by the insured, this is the bottom line definition of the bizarre set of circumstances involved in this fire incident. Of extreme concern when trying to analyze and understand this incident, is the acute lack of any individual, known or unknown, by the insured or any of his friends or relatives, that may have intentions to do him in. There is no evidence found anywhere in this incident that would suggest strongly or even remotely anyone who would want to do this to him.



Upon his own admission, there is no history nor current problems with anyone that would make these attacks.

Also of significant concern is the lack of any motive for anyone to do this. It would suggest that possibly a burglar or vandal entered the home for those specific reasons. However, no evidence has been identified to indicate this. On the other hand, when trying to analyze motive for the fire incident, a strong reflection upon the insured is suggested through the cursory information already obtained during this investigation. It does appear through this evidence that the insured is having a heavy financial problem and it also appears that the family income is insufficient to meet the everyday expenses. In addition to this, the previously mentioned foreclosure, and also it's been learned since the fire incident, that the insured has made application for and filed bankruptcy. However, during the interview conducted by this office, he now indicates that this has been dismissed through the bankruptcy court of Utah.

A laboratory analysis of the fire scene debris was conducted with the following results. Through the use of Rocky Mountain Instrumental Laboratories located at 456 South Link Lane, Ft. Collins, Colorado 80524; telephone number (303) 221-3116, indicated through the laboratory report included in this report that the carpet sample and control samples taken contained small concentrations of petroleum distillate and moderate concentrations of benzene, toluene, and xylene and/or styrene. The debris samples taken of the areas of origin contained moderate to large concentrations of the same or very similar mixtures of aromatics and low to high molecular weight petroleum distillates.

A synopsis of this lab result would indicate that the possibility of a kerosene product was involved in the fire scene as well as the components of the solar system. To isolate the specific chemicals and determine other flammables in that debris, other tests would have to be conducted. However, without any doubt, there was a large concentration of flammable accelerants within the fire scene and within the debris and rubble.

Complications are drawn in evaluating these lab results because of the fact that the large amounts of the flammable liquid within the solar system confuse or even cover and possibly dilute the types of flammable liquids used in the initial ignition of this fire. In fact, the exact accelerant used to cause this fire may never be determined because of this fact, and also due to the possibility of all of the components in that accelerant being consumed during combustion phase of both fires. Therefore, the validity and importance of these tests are left in question at this point of the investigation.

This office would suggest that, to better identify or eliminate individuals indicated in this fire incident, further investigation must be done. At this point of the investigation, the insured cannot be eliminated as having been involved with this fire situation. This office would also recommend that a verification of property ownership and past or present encumbrances be identified. It would also be of interest to determine whether, in fact, the mortgages and liens have been cleared as indicated by Mr. Horrell. A background investigation into the utility payment history would also identify specific

financial problems with payment of these utility bills. Further research into the known and suspected checking accounts would also provide additional financial history.

As indicated by individuals and witnesses interviewed, there could be a possible problem and legal battle with UPS concerning vendors involved with Mr. Horrell's business. These facts should also be investigated to determine their validity. Additionally, an interview with Mrs. Horrell concerning the fire incident and details prior to it may give additional information about why she wasn't home on the night of the fire. The several vehicles identified in this investigation and their specific owners and previous owners may also be beneficial.

Of course, a comparison analysis of the statements made by the insured and transcribed and included with this report would identify inconsistencies and confused statements in both of those transcriptions. Generally speaking, the general analysis of those statements would give the appearance of deception by the insured to specific questions regarding the fire incident. This is also true about statements made by the insured concerning his financial position. As the insured has indicated that he will cooperate in obtaining any information necessary to assist with the investigation, it may behoove this office to instruct, by letter form, the insured to obtain all of the utility records, financial records, and other financial materials of concern prior to and up until the day of the fire.

Due to these inconsistencies and also due to the bizarre

February 4, 1991

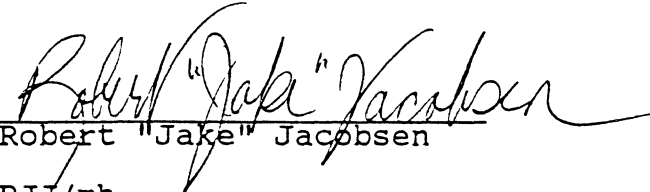
circumstances involved with this incident, a clearly defined cause of this fire incident with respect to who is involved has not been determined. Further investigation and the answering of several questions must be conducted before that can be finalized. The necessity of and the final determination of the supplemental assignments will be left up to the decision of the client.

Due to the complexity of this case, it may also be in the best interest of the client to obtain legal counsel in providing assistance with the course of direction of the investigation. This office will assist wherever requested in any follow-up or supplemental work necessary during this investigation. All evidence obtained during the preliminary investigation will be held for future needs as necessary and for as long as requested by the client.

This case assignment is complete with the filing of this preliminary report pending further requests of the client.

Sincerely,

**BURN PATTERN ANALYSIS**

  
Robert "Jake" Jacobsen  
RJj/mh

Enclosures: Copy of Consent Form for Fire Scene Examination and Authorization Form from insured  
Fire reports from South Salt Lake Fire Department  
Laboratory report from Rocky Mountain Instrumental Laboratories  
Copies of newspaper articles from Salt Lake Tribune  
61 mounted, 54 loose photographs

Tab B



ROCKY MOUNTAIN INSTRUMENTAL LABORATORIES, INC. • 456 S. Link Lane, Fort Collins, Colorado 80524 • 303-221-3116

LABORATORY REPORT

CLIENT: Robert Jacobsen  
Burn Pattern Analysis, Inc.  
Suite 203  
3191 S. Valley St.  
Salt Lake City, UT 84109 801-487-3501

SUBJECT: Utah Farm Bureau 90-1170-SL FML 90-1442-F Horrall

ANALYSIS: GC identification of volatile flammables.

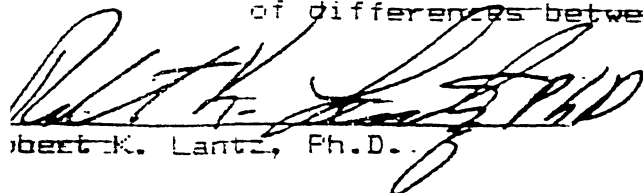
METHOD: Hewlett-Packard 5890 gas chromatograph, H-P 3393 computer integrator, J&W DB-5+ quartz capillary column 30m x 0.53mm ID#93454, 3mL/min He, 60-240C @10 C/min, 1 IH, SFH, 200uL HS.

EVIDENCE: Received from Jacobsen 3 NOV 90 via USPS, seals intact, four samples fire debris and one control sample:

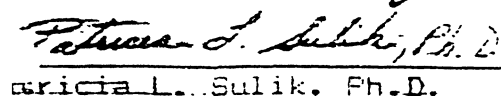
U1: Can fire debris, #1.  
U2: Can fire debris ID as carpet and pad, doorway, #2.  
U3: Glass samples from window.  
U4: Carpet control. NW corner child BR, #4.  
U5: Plastic can ID as control sample of liquid, #5.

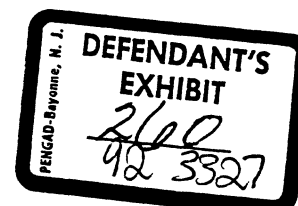
RESULTS: U3 is negative for volatile flammables. U4 (carpet control) contains small concentrations of petroleum distillate and moderate concentrations of benzene, toluene and xylene and/or styrene. U1, U2, and U5 contain moderate to large concentrations of the same or very similar mixtures of aromatics and low to high molecular weight petroleum distillate. Included in these samples are benzene, toluene, xylenes and/or styrene, C9 and C10 aromatics, and alkanes C6 through approximately C10. GC/MS would allow the differentiation of p-xylene, styrene and nonane.

CONCLUSIONS: U1, U2, and U5 contain the same or very similar mixture of volatile flammable materials. GC/MS may allow the detection of differences between the samples.

  
Robert K. Lantz, Ph.D.

19 NOV 90

  
Patricia L. Sulik, Ph.D.




1000133

Tab C

WITNESS STATEMENTS TAKEN BY ROBERT JACOBSEN AND DEPOSITIONS				EXAMINATION UNDER OATH 12/30/91 AND DEPOSITION	EXAMINATION UNDER OATH 12/3 AND DEPOSITION
ROD ADAMSON 11/2/90	DAVE WIGGINS 11/2/90	JACQUES D'EMAI 11/01/90	GREG HORRELL 1/22/91	GREG HORRELL	BARBARA HORRELL
VACATION TRIP	VACATION TRIP	VACATION TRIP	VACATION TRIP	VACATION TRIP	VACATION TRIP
	Saturday before fire, Greg said he was taking family to mountains, would be back Wed about 5:00 p.m. and game was still on P21:6-12 Dep		Trip to Dinosaurland for couple of days P18:19-32	Arranged to close store: Wed., Thurs. and Fri. to go on trip to Dinosaurland; left note on store that he would be closed P99 Dep	
POWER PROBLEMS	POWER PROBLEMS	POWER PROBLEMS	POWER PROBLEMS	POWER PROBLEMS	POWER PROBLEMS
known of over 2 years P6:48-52	Out on arrival at 5:00 P6:38-41	Doesn't recall power problems P60 Dep.	Family there, no power 5:00 - 7:00 P20:5-59 - P21:22	No problems with electrical P81 EUO	Doesn't recall any power pro P57 Dep
hear about prowler P4:43	If you had prowler why didn't you call police at 5:00? P18:54-57	Never mentioned electrical problems P8:18-21		Thunderstorms; fairly stormy P66-67 EUO	
WIFE LEAVING	WIFE LEAVING	WIFE LEAVING	WIFE LEAVING	WIFE LEAVING	WIFE LEAVING
er saw wife P8:26-27	Never saw wife P8:29-30		Wife brought dinner to him 7:45 P22:39-45; 23:11-31	Wife came to store to say she was leaving P54 EUO	Went to store to tell Greg was leaving P59 Dep
said wife up at mother's P8:26-27	Horrell said wife up at mother's P4:18-19		Family went to mother's house, took Volvo 8:00 P23:19-39	Wife left at 8:00; he suggested to her she might want to go up there P50 EUO	Power off mostly reason for ing overnight with mother P59 Dep
INTERCOM - MONITOR	INTERCOM - MONITOR	INTERCOM - MONITOR	INTERCOM - MONITOR	INTERCOM - MONITOR	INTERCOM - MONITOR
p 8:00 when play started P4:35-37	Greg said he was listening for p-owers P4:7,17,45			Set up; Barbara yelling; turned down P78 EUO; P122 Dep	Sensitive; could hear people ing around P67 Dep
ed 9:00 - 9:15 P5:23-24	Stopped 9:00 - 9:15 P5:26-27				
TRIPS TO HOUSE	TRIPS TO HOUSE	TRIPS TO HOUSE	TRIPS TO HOUSE	TRIPS TO HOUSE	TRIPS TO HOUSE
Four times P4:6-7 l to go to home when games played P5:37-43	Back and forth all night P4:25 Not usual to go to home when games played P5:45	Greg gone for 10 minutes to get something to eat at 10:00 P4:45-54	Went to house for snack at 9:30 P23:51-53	One trip to house at 9:30 P77 EUO	
ry 1/2 hr. to 3/4 hr. P5:57-60; P6:5-5 st time 8:00 P4:26-31 5-10 min. P6:25-26,32	Every 1/2 hr. to 3/4 hr. P6:7	Went to house 6 times P26 Dep Varying amounts of time (1-10 min.) P58 Dep	Never left store 9:30 - 11:00 P23:55-56; P26:13-16		
	Horrell acting nervous P5:46	Acting nervous P16:17-27 Something bothering Greg P74 Dep			
	Dozed off 9:10-10:00 P6:7-13 Woke up, Horrell out back P6:7-13	Can't remember why they stopped playing night of fire P11 Dep			

DEFENDANT  
 EXHIBIT  
 222  
 92 332



AND DEPOSITIONS		AND DEPOSITIONS	
DAVE WIGGINS 11/7/90	GREG HORRELL 11/7/91	GREG HORRELL	BARBARA HORRELL
WALKABOUT	WALKABOUT	WALKABOUT	WALKABOUT
	Checked van, walked down Main Street, up side street and alley -- does every night to lock up P26:17-21	Adamson had left and Wiggins was just leaving when he got back from walkabout P55 EUO	
JACQUES D'EMAL 11/1/90			
TIME OUT BACK -- SHOOTING	TIME OUT BACK -- SHOOTING	TIME OUT BACK -- SHOOTING	TIME OUT BACK -- SHOOTING
No idea how long Greg was out back before he came running through store P71 Dep  Greg not in room when he left, Greg had gone out back P78 Dep  Heard 2 shots; Horrell said someone shooting at him; Jacques ran across street, hid for a couple of minutes; noticed smoke, embers flying P6:31-P7:5  Last time he saw Greg and hearing shots was 2-3 to 5 minutes P78-81 Dep  At the very least 2-3 minutes P81 Dep  It was 5 seconds from shots to Greg saying "Someone is shooting at me" P84 Dep	Stepped out back; shots fired; ran out through business; didn't see any fire; reported shooting P27:27-31  Fire not accidental; set by shooter P45:6-13, 54-57; P70:12-17  Gun was his P31:55-60 Fully loaded - 4 rounds in it P32:56-60; 33:1-4  No enemies, no one upset with him P31:3-20	2-3 to 5 minutes to walk down Main to Russell and up Russell to alley and back P127 Dep  No reason to believe fire was electrical P81 Dep  Believes he interrupted a robbery P149 Dep  Saw 2 bright flashes of light; circular in nature; reddish white P129-130, 138 Dep  No enemies or people with grudges against him P20 EUO	Shooting and fire seemed connected to both her and Greg P65-66 Dep  "Whoever shot at Greg must have had something to do with fire" P66 Dep Greg interrupted a thief P74 Dep
SEEING THE FIRE	SEEING THE FIRE	SEEING THE FIRE	SEEING THE FIRE
Saw fire within 2 minutes of running across street P45-45 Dep	Didn't know house on fire when he ran to neighbors' house P67-68, 132 EUO		
CALLING WIFE	CALLING WIFE	CALLING WIFE	CALLING WIFE
	12:00 noon got hold of wife, told her about TV and heat being on P18:49, 60; 19:1-3	11:00 - 11:30 a.m. called wife; told her about TV and heat being on; nothing disturbed P99-100 Dep	
Saw Horrell at scene, asked if he'd called his wife yet P8:3-6		Greg didn't call wife to report fire P167 Dep	
GREG ASKING FOR RIDE	GREG ASKING FOR RIDE	GREG ASKING FOR RIDE	GREG ASKING FOR RIDE
Greg asked for ride early that night, probably before the game started P32:8-15 Dep		Greg asked for ride at 10:45 p.m. at end of game P55 EUO	
First time he had asked for ride P35 Dep			
	LOCKS	LOCKS	LOCKS
	Wife locks house when she leaves P34:56-58  Said he locked doors in first interview (Oct. 9, 1990) Now not sure if he did P34:48-54; 35:8-12	Wife normally locks doors P125-126 Dep  Different key for each door P79  Locked front door at 9:30 P54-79 EUO	Habit of locking doors when she leaves P84 Dep  Made sure things were locked when she left P84 Dep
	Not aware of any forced entry P35:14-18  Window in laundry room open; screen on window; not cut or anything like that P31:27-39	Latch on windows -- dryer vented through laundry room window P40-41 EUO	Doors and windows were locked before fire P35 EUO
	Greg, Barbara, mother-in-law only people with keys P35:38-41	Greg, Barbara, mother-in-law had keys P117 Dep	

Tab D

## NOTICE OF TRUSTEES SALE

THE FOLLOWING DESCRIBED PROPERTY WILL BE SOLD AT PUBLIC AUCTION TO THE HIGHEST BIDDER, PAYABLE IN LAWFUL MONEY OF THE UNITED STATES AT THE TIME OF SALE, AT THE NORTH FRONT DOOR OF THE SALT LAKE COUNTY COURTHOUSE, 240 EAST 400 SOUTH, S.L.C., UTAH ON 29 OCT 1990, AT 10:00 O'CLOCK A.M. OF SAID DAY FOR THE PURPOSE OF FORECLOSING THAT CERTAIN TRUST DEED DATED 11 JUL 1983, AND RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SALT LAKE, STATE OF UTAH, AND BEING DESCRIBED AS FOLLOWS:


TRUSTOR: GREGORY S. HORRELL AND BARBARA J.  
HORRELL, HUSBAND AND WIFE  
TRUSTEE: ASSOCIATED TITLE COMPANY  
BENEFICIARY: \*\*\*  
RECORDED: 13 JUL 1983  
ENTRY NO.: 3818010  
BOOK: 5474  
PAGE: 2083

AND COVERING REAL PROPERTY MORE PARTICULARLY DESCRIBED AS FOLLOWS:

ALL OF LOT 148 SOUTHGATE PARK, A SUBDIVISION OF LOTS 8 AND 10, AND THE SOUTH ONE-HALF OF LOT 9, BLOCK 33 TEN ACRE PLAT "A", BIG FIELD SURVEY.  
LESS THE 7 FEET CONVEYED TO SALT LAKE COUNTY AS EVIDENCED BY THE RIGHT OF WAY DEED DATED MARCH 29, 1940, AND RECORDED APRIL 2, 1940 AS ENT. NO. 87445, IN BOOK 249, AT PAGE 214, SALT LAKE COUNTY RECORDER'S OFFICE.

DATED THIS 2ND DAY OF OCTOBER, 1990.

ASSOCIATED TITLE COMPANY,  
A UTAH CORPORATION  
TRUSTEE

BY:   
BLAKE T. HEINER  
ITS: VICE-PRESIDENT  
FC-1386  
LOAN NO:

\*\*ARLENE E. BECKSTROM, AS PERSONAL REPRESENTATIVE OF MARIE K. OLSEN,  
S TO AN UNDIVIDED 1/2 INTEREST, AND ARLENE E. BECKSTROM, N. ALLEN HEDBERG,  
S. TRUSTEE FOR GARY LEE McDONALD, AS TO AN UNDIVIDED 1/2 INTEREST.

Tab E

**PLAINTIFF'S  
EXHIBIT**

4  
97-3527 CV

**PROOF OF MAILING**

**GREG MORRELL  
2770 S MAIN ST  
SALT LAKE CITY UT 84115**

**5193692 NO**

**Policy Number and Description**

**October 4, 1990**

**Cancellation Date of Insurance  
Effective 12:01 A.M., Standard Time**

**August 31, 1990**

**Date Notice Mailed**

**NOTICE OF CANCELLATION - UTAH**

In accordance with the law and the terms of the above numbered policy, we are sending this notice to inform you that your policy is being cancelled.

Your policy will not provide coverage beyond the cancellation date and time shown above.

**Premium Adjustment:**

If a refund of premium for the unexpired term of this policy is due you, it is enclosed or will be sent to you.

**Reason(s) for Cancellation:**

**Ineligible due to unacceptable credit report**

**PS to agent: We suggest you contact FBL Brokerage for possible coverage.**

**Information for Insured:**

1. If the reason shown above does not state with reasonable precision the facts on which our decision was based, you may request in writing clarifying information. We must respond within 10 working days of receipt of your request.
2. You have the right to request claim loss information regarding this policy. We will provide you with this information within 30 days of receipt of your request.
3. ☒ If indicated, this action is based on information provided to us in a report made at our request. Questions regarding this information should be sent to: \_\_\_\_\_

**Trans Union Credit Report, Box 3110, Fullerton Ca 92634**

Thank you for allowing us to serve your insurance needs. We regret we cannot continue this insurance coverage.

**Ronald Kuehler  
Auto/Personal Lines Underwriter**

**RK:ja**

**cc: Agency Agent File  
Your Servicing Agent is  
752-4831 (9-89)**

**Berrie Love 801-467-9220**

Tab F

March 18, 1992



CERTIFIED LETTER  
RETURN RECEIPT REQUESTED  
PERSONAL AND CONFIDENTIAL

Mr. Greg & Barbara Horrell  
%Keith W. Meade  
Cohne, Rappaport & Segal  
525 E. First S., 5th Floor  
Salt Lake City, UT 84102

Our Insured	Greg & Barbara Horrell
Our Policy #	5193692
D/L	10/3/90

Dear Mr. & Mrs. Horrell:

We have carefully reviewed the pertinent facts and circumstances of your claim and find that we must decline payment to you for one or more of the following reasons:

1. The fire appears to be of incendiary origin, for which an insured is responsible, and, therefore, you are guilty of fraud and false swearing within the meaning of the terms of your policy of insurance.
2. You have breached the conditions of your policy by misrepresenting an insured's involvement in the burning or the procuring the burning of the dwelling in question.
3. The Proof of Loss is fraudulent in that you deny any knowledge of the origin of the fire.
4. The Proof of Loss is fraudulent as to the items destroyed in the fire, the value of the items destroyed, and the place of purchase of some of the items destroyed.
5. You have breached the policy conditions by not completing the Proof of Loss within a reasonable length of time. Your failure to do so has prejudiced the rights of Farm Bureau Mutual Insurance Company.
6. You have breached the policy conditions by not producing documents requested at the Examination Under Oath. Namely, the income tax returns for 3 years.

Your policy provides: CONCEALMENT OR FRAUD

This entire policy shall be void, whether before or after the loss, any insured has intentionally concealed or misrepresented any material fact or circumstances related to this insurance.

0000200

Greg A. Bachmann

Policy #5193692

Page 2

We hereby expressly reserve the right to assert all other defenses that we may have to your claim, even though not enumerated above, as they become known to this company or as counsel may advise.

If you intend to proceed with litigation, strict compliance with the provision of the policy will be required including the requirement to commence any action within 3 years after the date of the fire. By this letter, we do not intend to waive or relinquish any of the rights or defenses under the terms of this policy.

Sincerely,

Larry L. Bachmann  
Property Lines Claim Manager

jr

0000201



Tab G

JUN 24 1994

By K. Howard <sup>SALT LAKE COUNTY</sup>  
Deputy Clerk

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

-----

GREGORY S. HORRELL and	:	SPECIAL VERDICT
BARBARA HORRELL,	:	
Plaintiffs,	:	CASE NO. 920903327
vs.	:	
UTAH FARM BUREAU INSURANCE	:	
COMPANY, a Utah corporation,	:	
and FARM BUREAU MUTUAL	:	
INSURANCE CO.,	:	
Defendants.	:	

-----

After consideration of the Court's instructions, you the jurors are requested to answer the following questions. Six or more of you must agree on the answer to each question.

1. Do you find by clear and convincing evidence that Gregory Horrell intentionally set the fire which occurred at his residence on October 3, 1990?

ANSWER: Yes \_\_\_\_\_ No X

2. Do you find by clear and convincing evidence that either Gregory or Barbara Horrell intentionally misrepresented to Farm Bureau material facts concerning their claim as defined in the jury instructions?

ANSWER: Yes \_\_\_\_\_ No X

If you have answered questions 1 or 2 "yes," then you should sign and return this Special Verdict.

3. Do you find by a preponderance of the evidence that the second fire was a rekindling of the first fire?

ANSWER: Yes X No \_\_\_\_\_

4. Do you find by a preponderance of the evidence that Farm Bureau failed to diligently investigate the facts surrounding Horrells' claim to determine whether the claim was valid?

ANSWER: Yes X No \_\_\_\_\_

5. Do you find by a preponderance of the evidence that Farm Bureau breached any of its other contractual duties of good faith and fair dealing owed to Horrells, including the duties to: fairly evaluate the claim; act promptly and reasonably in either rejecting or settling the claim; deal with the Horrells as laymen and not as experts in the subtleties of law and insurance; refrain from injuring the Horrells' ability to obtain the benefits of the insurance policy?

ANSWER: Yes X No \_\_\_\_\_

6. Do you find by a preponderance of the evidence that the Horrells' claim was "fairly debatable" as that term has been defined in the instructions?

ANSWER: Yes \_\_\_\_\_ No X

7. If your response to Question 3 is "no," you may award only damages resulting from the first fire. If your response to question 3 is "yes," then you may award the Horrells damages suffered as a result of both fires. Based upon this possible limitation, what by a preponderance of the evidence are the damages suffered by the Horrells as a result of the fires and/or as a result of Farm Bureau's conduct for:

Damage to the Horrells' residence  
(not to exceed \$46,500.00)

\$ 46,500.00

Damage to the Horrells' personal property  
(not to exceed \$77,000.00)

\$ 60,000.00

Damage for Horrells' loss of use of the  
property (not to exceed \$5,950.00)

\$ 5,950.00

Demolition

\$ 2,950.00

Other general and consequential damages,  
as described in the jury instructions,  
but not including attorney's fees

\$ 34,600.00

**TOTAL**

\$ 150,000.00

Dated this 24 day of June, 1994.

  
\_\_\_\_\_  
FOREPERSON

Tab H

INSTRUCTION NO. 25

If the insurer has reasonable justification to deny the claim, its refusal to negotiate or settle may not constitute a breach of its duty.

An insurer may be reasonably justified in denying a claim if the supporting law or facts are "fairly debatable" and would lead a reasonable insurance company in similar circumstances to deny the claim. "Fairly debatable" means that the laws or facts which support the insurer's position create a reasonable likelihood that the denial of the claim would be upheld in court. In determining whether or not the insurer's position was fairly debatable and reasonably justified, you should consider all laws or facts upon which a reasonable insurance company would rely in deciding whether to pay a claim. This would include the laws or facts supporting the insured's position that were either known, or that should have been known, by the insurer.

Tab I

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1 THE COURT: The Court is persuaded that  
2 there is substantial evidence that the claims were  
3 fairly debatable. I make no finding thereon, but  
4 simply make the observation.

5 I am convinced and persuaded that the  
6 Court ought not to surrender to overzealous  
7 advocacy. And it is a more orderly way to proceed in  
8 following the law of the case that that was  
9 established by the Court's order April the 19th,  
10 1994, in which I had concluded in written form that  
11 the issues on the defenses would be submitted to the  
12 jury on a preponderance of the evidence. Wherein in  
13 the heat of battle that was or didn't come to my  
14 attention or didn't at least get from counsel to the  
15 Court's mind clearly is beyond me. But as bad as I  
16 hate to do it, the Court's going to grant a new  
17 trial. I think that makes the other rulings moot.

18 MR. MEADE: Your Honor, we did discuss  
19 that at the time, and -- I mean, there is no -- there  
20 is no case law that supports this one way or the  
21 other in this state. And I realize that you've  
22 spoken, but the fact of the matter is that a new  
23 trial in this case is going to take a lot of time and  
24 cost a lot of money. And we could try this case on  
25 this different standard and we could go up and you



1 could be wrong and we will be back. The worst case  
2 after an appeal is that we try the case twice. Now,  
3 you are subjecting the parties to the chance that  
4 they may have to try this case three times. And, I  
5 submit that the -- that there's no logic involved in  
6 that given the fact that there's no controlling case  
7 law. You are just taking a shot at it as to what the  
8 burden might be. And we ought to find out from some  
9 appellate court what the burden is going to be. And  
10 why spend another \$50,000 to get there?

11 THE COURT: I agree with the practical  
12 effects.

13 New trial is granted.

14 (Hearing adjourned.)  
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