

1995

Gregory S. Horrell and Barbara Horrell v. Utah
Farm Bureau Insurance Company, a Utah
corporation, and Farm Bureau Mutual Insurance
Co. : Reply Brief

Utah Court of Appeals

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950059 CA

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 CO.**

Defendants/Respondents.

Case No. 950059-CA

Priority No. 10

(Oral Argument Requested)

APPELLANTS' REPLY BRIEF

**Interlocutory appeal from an Order of the Third District
Court, Kenneth Rigtrup presiding, granting the
defendants' Motion for a New Trial and vacating a jury
verdict in favor of the plaintiffs.**

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SEP 25 1995

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**REPLY RE: FARM BUREAU'S
STATEMENT OF FACTS**

After a three week trial, a jury decided against Farm Bureau on every issue it considered, including issues that are not on appeal. (R.1122). The following facts are part of the evidence the jury considered:

1. On the day of the fire (October 3, 1990), the Horrells experienced several surprises with their electrical system. (R.1885). When the Horrells arrived home from their overnight trip, they found that a gas heating system (which they almost never used and which was turned on by a light switch) operating and the television on. (R.1883, 1885, Tr. 6/8/94, p. 87. The June 8, 1994 volume of the trial transcript was not yet paginated as part of the record when this brief was prepared). Greg Horrell believed both of these items had been turned off when they had left the day before. Later in the day Greg discovered that the main outside panel was tripped. (Tr. 6/8/94, p. 93). Because of these unusual events earlier in the day, Mr. Horrell was a little bit nervous on the evening of the fire. (Tr. 6/8/94, p. 100). Unusual things continued with the electrical system. One of the fire fighters, Shawn Irvine, testified that when he came into the home at the time of the first fire he encountered live, arcing circuits. (R.2132). When lines were hit with water, he would have expected the breakers to go, but they did not. (R.2134). He continued to see arcing even after he had been told the power to the property was off. (R.2136).

2. On the evening of the fire, Marian Vinal, Barbara Horrell's mother, called and invited Barbara to her home to work on craft projects. (R.1955, 1957). This was something they did together frequently. (R.1887). Because it was a night that Greg Horrell customarily set aside to play games as part of his hobby store business, Barbara Horrell took her children and went to her mother's home, with their suitcases still unpacked from the overnight trip. (R.1887). (Farm Bureau states in paragraph 39 of their Statement of Facts that Barbara decided to stay with her mother "allegedly due to power problems." Barbara stated (R.1948) that the power "was one reason, but not the primary reason.") Farm Bureau states in paragraphs 38, 40 of their Statement of Facts that "all of the family (except Greg Horrell), their clothes, and essential necessities were out of the home at the time of the fire." The reference to the record (R.1614) does not support the statement. The underlined portions are false. The only possessions that were out of the home were the few clothes that had been packed for the overnight trip. (R.1887). Even a cursory examination of the Horrells' inventory (Trial Exhibit 12) reveals that except for the few clothes that were taken for the short trip, all of the Horrells' "essential necessities" were in the home at the time of the fire. Family pets were destroyed in the fire. (R.1905).

3. The Horrell residence had a solar heating system that included solar panels on the roof, copper piping that ran from the panels down through the

laundry/pantry area into tanks located beneath the house. The panels, piping and tanks were filled with automatic transmission fluid (ATF), which served as the conductor for the system. Each of the panels on the roof had five to seven gallons of fluid in them. (R.2763, Tr. 6/8/94, p. 135-138). During the course of the fire, the copper tubing through which the ATF ran became so hot it separated and the fluid spewed into the home. (R.2393). The panels broke. The fluid was driven into many areas of the home by water used by the firefighters. There was no dispute at trial that the ATF from the solar system, an accelerant, was throughout the residence. (R.2392, 2427, 2438). Captain Larsen, one of the fire fighters, acknowledged that the flammable liquid he was hitting with his hose (Appellee's Brief, p. 3, para. 2) was coming from the separated tubing of the solar panels. (R.2901).

4. Farm Bureau's assertion that Larsen was "convinced" that the fire was in two locations was actually an "assumption" based on his observation of flames upstairs and down when he arrived at the first fire. (R.2876). Contrary to Farm Bureau's assertion (page 4) Larsen's conclusion was not based on "investigation", because he was not involved in the investigation. (R.2897). Farm Bureau's assertion (footnote 1, p. 4) that flames in two locations is not accidental is made without reference to the record, and ignores the testimony of John Blundell that the fire was able to move rapidly from the pantry area into the second level of the home because

there was no sheetrock on a portion of the ceiling in the pantry, and the fire had direct access to visqueen sheeting that enclosed most of the second floor. (R.3305).

5. After the first fire, Greg Horrell was driven to the home of his mother-in-law, some 20 or more blocks away. (Tr. 6/8/94, p. 127). Greg arrived at his mother-in-law's home at approximately 2:45 a.m., and was there until after dawn the next day. When he returned to his Main Street residence, he learned that the fire in his home had reignited at about 5:30 a.m. (R.1958, 1893) (Tr. 6/8/94, p. 130).

6. The building next to Horrells' residence was damaged as a result of the first fire. A tenant of that property, Don Herbert, testified that after the first fire he spent the rest of the night in his adjoining building sitting next to a burned interior wall. From his vantage point on the second level of that structure he could see through the burned wall towards the Horrell residence. Mr. Herbert testified that during the night after the first fire the wind blew strongly and that he saw and heard the power lines running over the Horrell residence arcing and throwing sparks into the fire damaged home. Mr. Herbert testified that the Utah Power & Light employee who believed he had cut off the power was mistaken. (R.1841, 1842, 1844, 1845, 1847). Mr. Herbert ultimately reported the second fire (R.1846).

7. Shawn Irvine, one of the firefighters who responded to each of the fires, testified that during the course of his work on the second fire, he noticed that the solar

panels were still leaking, that fluid was still dripping from the piping, and that the fluid was dripping in close proximity to where the fire reignited. John Blundell, the expert retained by Horrells, testified that the majority of the second fire was in the attic, an area where a rekindle would be expected. (R.2444). The jury determined that the second fire was a rekindle. (R.1123).

8. No investigation was made of the fire scene after the first fire. (R.2742). The fire scene was not secured between the two fires. (R.2138, 2745). After the second fire, South Salt Lake inspected the scene and turned it back over to the Horrells. (R.2749). South Salt Lake never reported the fire to the State Fire Marshall as a suspicious fire. (R.1834)

9. This was the first fire investigation that Randy Jacobsen, the "fire investigator" for South Salt Lake, conducted on his own. (R.2741). South Salt Lake did not have an electrical engineer look at the home after the fire. (R.2759). Randy Jacobsen never prepared an electrical diagram of the home's wiring plan. (R.2758). There were areas in the second level of the home that Randy Jacobsen never inspected. (R.2750). He never had the basement pumped out so it could be inspected. (R.2759). The only accelerant that Randy Jacobsen saw evidence of was from the solar system, and he did not know when that became involved in the fire. (R.2767, 68). Having

done none of these things, Randy Jacobsen concluded that the fire was intentionally set because he could not determine an accidental cause for the fire. (R.2775).

10. Robert "Jake" Jacobsen was an expert retained by Utah Farm Bureau. (R.3195). Not surprisingly, Jake Jacobsen testified it was his opinion that Greg Horrell set the fires in his residence. (R.3254). Jacobsen did not know what the ignition source was for either the first or second fire. (R.3198). He could not tell by inspecting the home what damage was caused by the first fire or its reignition. (R.3198). He testified that it is not uncommon to have fires set by someone totally unrelated to the fire. (R.3223). During the course of the trial, the Horrells were able to demonstrate that a number of the critical factors that Jake Jacobsen relied upon in reaching his opinion were wrong. For example, he was not aware before reaching his conclusion that the home had a skylight in the second level roof. (R.3207, 3228). Mr. Jacobsen believed that the home was locked when fire fighters arrived. (R.3159, 3162). In fact, the fire fighter that made entry into the home testified that it was not. (R.2132). (Farm Bureau, in para. 16 of its Statement of Facts, fails to disclose this critical error in fact).¹ Another concern to Jake Jacobsen was the fact that the first firemen on the scene saw fire in both levels of the Horrell home. (R.3201).

¹ Farm Bureau states in footnote 2, p. 7, that "the firefighters found no evidence of forced entry. (R.3163)." This reference is to the testimony of their investigator, Jake Jacobson. This statement ignores the fire fighter's testimony that the south door was unlocked. (R.2132).

Apparently overlooked by Jake Jacobsen was the fact that there was an open area over the first floor laundry (where the fire is believed to have started) up into the second level of the home, which was wrapped in plastic visqueen, a very flammable material because improvements in the second level were not completed. (Tr. 6/8/94, p. 178, R.3304, 3305). John Blundell, plaintiffs' expert, testified that a fire starting in the pantry, even without an accelerant, would have been in the second level of the home within five to ten minutes. (R.3305, 2464).

11. John Blundell, an expert retained by the Horrells after the fire, testified that Randy Jacobsen and Jake Jacobsen failed to do or look into a number of things that should have been done or looked into. For example, even though it would be common in this type of fire, no one asked Greg Horrell for his clothes so they could be tested. (R.2420). No one secured the scene, even after the second fire. (R.2419). This allowed the ATF fluid to be tracked throughout the house during the cleanup and before samples were taken. (R.2438, 2436). No one with electrical training inspected the home in spite of the massive amount of arcing. (R.2431). Many of the electrical appliances were not investigated. (R.2430).

12. John Blundell, Horrells' expert testified that it was not reasonable to conclude that Greg Horrell was involved in starting the second fire. (R.2455). He was not able to determine what caused the first fire, or whether it was even

intentionally set because no one investigated it. (R.2461, 2470). He testified that it was not possible to determine whether an accelerant was used to start the fire, or whether it became involved during the course of the fire. (R.2467).

13. Dr. Lantz, a chemist employed by Farm Bureau, testified that he found a "residue of mineral spirits, kerosene, or similar material." He did not specifically find kerosene or mineral spirits as Farm Bureau suggests. (R.3092, 3088). Dr. Lantz also testified that these substances might occur in materials commonly found in homes. (R.3095, 3096).

14. Farm Bureau addressed what is often referred to as the arson triangle - fire, motive and opportunity. (Brief, p. 3). John Blundell testified that he believed that the arson triangle was used in reverse in this case - that the investigators found potential motive, but no cause, and assumed it was intentionally set to complete the triangle. (R.2474, 2475).

15. Randy Jacobsen and Jake Jacobsen each focused considerably upon their perception that Greg Horrell was financially motivated to start the fire. (R.2725, 3151). There was a tremendous body of evidence at trial to support exactly the opposite conclusion, i.e., that Greg Horrell had no financial motive. While Greg Horrell was notoriously poor at paying bills on any regular basis, he ultimately did so. (Tr. 6/8/94, p. 67-70). The Horrells' home was being purchased on a Note and Trust

Deed. (Tr. 6/8/94, p. 14). In approximately 1985, Horrells became delinquent on the Note. A notice of sale was issued, but Horrells brought the obligation current before any sale occurred. (Tr. 6/8/94, p. 41-45). In the winter of 1990, Horrells again defaulted on the Trust Deed, but had spoken with the sellers and believed that satisfactory arrangements had been made. (Tr. 6/8/94, p. 60-63). While a Notice of Trustee's Sale was signed one day prior to the fire, the Trustee that signed the notice testified that Horrells would not have received the notice prior to the fire. (R.1980-83). Between 1983 and 1990, the Horrells had reduced their obligation on the Trust Deed from approximately \$63,000 to approximately \$15,000. (Tr. 6/8/94, p. 66). Within a few months after the fire, the Horrells paid the entire balance due on the Note. Within a few months after the fire, the Horrells paid all amounts due utility companies. (Tr. 6/8/94, p. 66-69). Shirley Horrell, Mr. Horrell's mother, testified that while she had given Greg \$40,000 in connection with the 1985 default, she understood that not all of that money would be going to the Beckstroms. (R.1764).

16. Mr. Horrell received gifts of money from his parents on a regular basis. Between 1983 and 1990, Mr. Horrell received over \$240,000 in cash and gifts from his parents. (Tr. 6/8/94, p. 39).

17. Shortly after the fire, Farm Bureau employed David Rawlings to do a "complete adjustment" of the loss. (R.2031). Mr. Rawlings testified that it was his

job to document the Horrells' loss and present it to Farm Bureau. (R.2208). In February, 1991, at about the time the Horrells were completing gathering the information that Farm Bureau had requested, but before the Proof of Loss was complete, Mr. Rawlings was told by Farm Bureau to put his work on hold. (R.2251, 2227, 2242). Mr. Rawlings testified that he knew that Greg Horrell was looking to him for the information to complete the Proof of Loss, specifically lines 6, 7, and 8. (R.2234).

18. Between the middle of February, 1991 and the middle of September, 1991, Farm Bureau never contacted the Horrells regarding the claim. (R.2023). This was so even though Farm Bureau had rejected Horrells' Notice of Loss, ostensibly upon the basis that it did not contain a statement of the value of Horrells' loss, information Horrells believed Rawlings was providing. (R.2028, 2029, 1526). In response to questions regarding Regulation 540-89-11, 12, Utah Admin. Code, (dealing with an insurer's duty to communicate with its insured) Larry Bachman of Farm Bureau testified as follows:

Q. But you didn't get back to them [Horrells] in thirty days and tell if you could admit or deny the claim, did you?

A. No. We did not because he had not fulfilled his obligation.

Q. And you didn't feel an obligation? You didn't feel an obligation, Farm Bureau didn't feel an obligation, to call them up and say what's happening with this claim, where is this completed proof of loss?

- A. No.
Q. You didn't feel any obligation to do that?
A. None.
Q. You hoped he would go away, didn't you?
A. Well, to be honest, there is 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).²

ARGUMENT IN REPLY

I.

THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL BASED UPON THE BURDEN OF PROOF.

A burden of proof serves two inter-related functions. "First, it allocates the 'risk of error' between the parties. Addington v. Texas, 441 U.S. 418, 423 (1979). Second, it indicates the relative importance attached to the ultimate decision. Id." Disner v. Westinghouse Electric, 726 F.2d 1106 at 1110 (6th Cir. 1984).

A. There is no controlling Utah law.

Farm Bureau argues, half-heartedly, that the Utah Supreme Court has already determined the burden of proof to be applied in Whitlock v. Old American Insurance Co., 442 P.2d 26 (Utah 1968). Whitlock did not involve an arson defense. Whitlock,

² Farm Bureau accuses Horrells' counsel of misleading the Court with respect to this testimony. (Brief, p. 2, 3). The testimony relied upon is quoted in its entirety. Mr. Bachman's actions, dismissing the claims adjuster at a time when he knew or should have known the Horrells were relying on the adjuster to complete the form, and his conduct in filing the claim away and not communicating with the Horrells for over seven months, confirm the Horrells' characterization of his testimony.

supra, involved no issue of alleged deception, misrepresentation, or fraud. The issue in Whitlock was whether or not the insured died of cancer (covered) or injuries sustained in an auto accident (not covered). No contention was made in Whitlock that the insured had attempted to deceive the insurer or had committed some criminal act.

No Utah appellate court has ever decided the specific issue presented in this case, i.e., the burden of proof to be applied in a case where affirmative fraudulent conduct is alleged as a defense to the insurer's otherwise absolute obligation to pay.

B. Farm Bureau's defense is based on allegedly fraudulent conduct.

Farm Bureau's assertion that its defenses are not based in fraud ignores its own characterization of the defense prior to and during the course of the litigation. For example, in the letter that denied Horrells' claim, Farm Bureau stated (Trial Exhibit 46):

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 [sic] 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. . . .³ (Emphasis added).

After Farm Bureau refused to pay the claim and in their Answer to the Horrells' Complaint, Farm Bureau alleged in their Ninth Defense that

". . . plaintiff has intentionally made misrepresentations of material fact relating to his loss in violation of the following general condition in the policy:

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. (Emphasis added, R.21).

Throughout the claim process and during the trial, Farm Bureau viewed this as a case involving fraud and misrepresentation.

Farm Bureau's reference to "incendiarism" as a separate defense warranting a lower burden of proof is misleading. The policy that Farm Bureau issued to the Horrells was an "all risk" policy. It insured against all losses from fire, including incendiary fires. (R.1201, para. 1.h., 2530). Thus, not only was Farm Bureau

³ Farm Bureau did not request a question on the Special Verdict on either of the other two reasons stated in the letter for denying the claim. (R.1122).

required to prove that the fire was incendiary, but also that it was purposefully caused by an insured.

The first issue in this appeal is whether Farm Bureau is entitled to the benefit of a lower burden of proof in connection with its denial of liability.

Fraud is fraud and where it's raised as a defense in a fire insurance case should not lower the standard of proof. The absolute necessity of the high standard of proof is made particularly clear in this case where the insurer was allowed to introduce evidence of an aborted criminal investigation.⁴

Pacheco v. Safeco Ins. Co., 780 P.2d 116 at 134 (Idaho 1989) (Bistline dissenting).

Blacks Law Dictionary (Revised 4th Edition) defines fraud as:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. . . .

Farm Bureau argues that because a majority of courts have applied the preponderance of the evidence standard in arson cases, that this Court should do the same. As Horrells discussed in their Opening Brief, many of the decisions cited, particularly in the Verrastro v. Middlesex Insurance Co., 540 A.2d 693 (Conn. 1988)

⁴ Which also occurred in this case, see R.2798-2843, 2647.

case, involved little, if any, analysis of why the burden of proof was applied. In many of the cases, the burden of proof was not at issue. In other cases, the insurer had lost at trial on the lower burden of proof and neither party was contending that any higher burden of proof should be required. (Horrells' Opening Brief, p. 20). In other cases the courts actually adopted a higher burden of proof. For example, some courts have stated that the burden of proof requires "evidence [that] is of such impact that it will sustain no other reasonable hypothesis but that the claimant is responsible for the fire." Cliffton v. Louisiana Farm Bureau Casualty Insurance Co, 510 S.2d 759, 760 (La. App. 1987).

Contrary to Farm Bureau's suggestion at p. 21 of its memorandum that *Couch*, *Encyclopedia of Insurance Law*, has concluded that the burden of proof is by a preponderance, *Couch* has also stated that:

Some courts in effect have followed the "preponderance" rule but have been reluctant to so declare and have stated that it is sufficient if enough facts are established to form the basis for a reasonable finding of willful burning.

On the other hand, some courts adhere to the rule that the evidence must be the same as in the case of a criminal charge of arson, namely, that the fact must be established beyond a reasonable doubt, and other courts seem to gravitate toward the criminal law standard although purporting to retain the civil litigation pattern. Thus, it has been stated that the claim of willful destruction of the insured property must be established by proof of facts and

circumstances of such a nature that no other conclusion can fairly or reasonably be drawn therefrom. (Emphasis added).

Couch on Insurance, §79:499 (1983).

Because many of the cases relied on by Farm Bureau are either poorly reasoned or not reasoned at all, their number is of little significance. As discussed in Horrell's opening Brief, a number of better reasoned cases support the proposition that the burden of proof in cases involving an incendiarism defense must be proven either by clear and convincing evidence, or evidence which is of such a nature that only one conclusion can fairly and reasonably be drawn therefrom. Mize v. Hartford Insurance Co., 567 F. Supp. 550 (W.D. Va. 1982); Virginia Fire Marine Insurance v. Hogue, 54 S.E.8 (Va. 1906); McGory v. Allstate Insurance Co., 527 So.2d 632 (Miss. 1988); Hutt v. Lumbermans Mutual Casualty Co., 466 N.Y.S.2d 28 (NY App. 1983); Natalini v. Northwestern Fire & Marine Insurance Co., 259 N.W. 577 (Iowa 1935); Carpenter v. Union Insurance Society, 284 F.2d 155 (4th Cir. 1960); Ziegler v. Hustisford Farmers Mutual Insurance Co., 298 N.W. 610 (Wisc. 1941); Jonas v. Northeastern Mutual Fire Insurance Co., 171 N.W.2d. 195 (Wisc. 1969); Hayseeds, Inc. v. State Farm Fire & Casualty, 352 S.E.2d 73 (W. Va. App. 1986).

Farm Bureau's correspondence and denial of the claim was based on allegedly fraudulent conduct. Well reasoned cases recognize that the arson defense is based in fraud. The burden of proof used for fraud should be used in this case.

C. Farm Bureau's defenses are not simple contract claims.

A fundamental issue in this appeal is whether an insurer should be entitled to change a defense of fraud to a defense of breach of contract by simply calling it breach of contract in its policy or in its pleadings. This attempt to transform the defense has potentially onerous consequences for every Utah homeowner. Farm Bureau's attempt to claim that its defense is based upon something other than fraud ignores the plain, common meaning of fraud and invites this Court to apply strained legal fictions which have no place in insurance contracts. An insured is entitled to the broadest protection he could reasonably have understood to be provided by an insurance policy. Fuller v. Director of Finance, 694 P.2d 1045 (Utah 1985). That broadest protection should not allow an insurer to convert a defense of fraud into a defense of breach of contract by mere words in a non-negotiable contract.

An insurance contract is of great significance to the consumer. It is not a negotiated agreement. It is from this position of strength that Farm Bureau argues that it should be entitled to lower its burden to prove fraudulent conduct by simply listing it as an exclusion in the policy. Just because Farm Bureau chose to list fraudulent

conduct as an exclusion in its contract should not change its burden of proof to prove fraud.

Whether a claim is based in contract or otherwise, the first consideration in determining the burden of proof should still be an analysis of its function -- the risk of error and its relative importance. Disner, supra. (These factors are discussed at p. 23-25). The Utah courts have not applied a lower burden of proof where fraud is alleged in a contract setting. See Jensen v. Eddy, 514 P.2d 1142 (Utah 1993) and Peterson v. Peterson, 571 P.2d 1360, 62 (Utah 1977) ("recognizing a special danger of deception.")

Farm Bureau argues (p. 26) that because it was not required to allege and prove each of the nine elements of fraud, that its defense is not like fraud and that a lower burden of proof should be applied. In a case such as this, where the insurance company has not paid a claim because it contends it is fraudulent, it is obviously not required to prove that it acted reasonably and relied upon the alleged misrepresentation. Farm Bureau's burden is already reduced because it does not have to prove any of the "reliance" elements. There is also no dispute that Horrells made representations to Farm Bureau regarding the fire. The only element of fraud which was in dispute was whether Horrells' statements were misrepresentations of material fact. This circumstance, i.e., that certain elements of fraud are not in dispute, does

not warrant the next step in the analysis, i.e., that the defense is not based in fraud. This circumstance does not justify lowering the burden of proof on the disputed elements of fraud.

The incongruity that Farm Bureau attempts to justify is revealed by its discussion at page 27, where, after quoting the "Concealment of Fraud" language from its policy, Farm Bureau argues that it plead that Greg Horrell made "intentional misrepresentations of material fact" and not that he "engaged in fraudulent conduct." This is a difference without a distinction.

The case of St. Paul Mercury Ins. v. Salovich, 705 P.2d 812 (Wash. App. 1985) cited by Farm Bureau is of no assistance on this issue. The Washington Supreme Court had previously adopted a "fair preponderance of evidence" test and the Court of Appeals stated its belief that its hands were tied in establishing the burden of proof. The Horrells do not quarrel with the conclusion reached in Salovich, supra, and Rego v. Connecticut Ins. Plcmt. Fac., 593 A.2d 491, 495 (Conn. 1991) that there are some elements of fraud that the insurer need not prove because they are not in dispute. It does not necessarily follow, however, that the burden of proof for the disputed elements should be reduced.

A horse by any other name remains a horse. Intentional burning of one's home for the purpose of recovering insurance proceeds, whether it be called incendiarism,

or an exclusion to a contract, is fraudulent conduct to be proven by clear and convincing evidence.

D. The criminal nature and stigma of arson should be considered in determining the burden of proof.

One of the functions of the standard of proof is to indicate the relative importance attached to the ultimate decision. Disner, *supra*, at 1110. It has been frequently recognized that one of the reasons that a higher burden of proof is required to prove fraud is that the evidence must be sufficient to overcome the presumption that men are honest and innocent of moral turpitude or crime. Bland v. Mentor, 385 P.2d 727 (Wash. 1963); Apolito v. Johnson, 413 P.2d 291, mod. on other grds. 414 P.2d 442 (Ariz. 1966). This presumption should also exist in cases of this type.

Farm Bureau cites the case of Autowest, Inc. v. Baggs, 678 P.2d 286 (Utah 1984) as though it is dispositive of the burden of proof to be applied in all civil cases arising out of conduct that is also criminal. In Autowest, *supra*, the defendant claimed that the plaintiffs had slandered him by accusing him of having committed a crime. The plaintiffs defended the counterclaim on the basis of truth. In Utah, it is recognized that insignificant inaccuracies of expression are immaterial, providing that the defamatory charge is true in substance. Crellin v. Thomas, as cited at 678 P.2d 291. The Autowest case might have some application if Horrells were suing Farm

Bureau for slander, which they are not. The case certainly does not hold that in every instance where criminal conduct is asserted as a defense to a civil claim that the burden of proof is a mere preponderance. This is particularly true where, as acknowledged in Autowest, that it is not necessary in a slander case to prove the literal truth of the precise statement made.

The Horrells are aware of no Utah case which makes any sweeping conclusion regarding the burden of proof to be used in civil cases where criminal conduct that rises to the level of a felony is a basis of a defense. Neither Farm Bureau nor Horrells are aware of any Utah cases which discuss the civil burden of proof where arson is the alleged crime.

The analogies attempted by Farm Bureau at page 30 of their memorandum, comparing civil actions and certain criminal actions ignore several critical factors. For example, the civil action of wrongful death involves the concept of comparative negligence, thus comparing the relative negligence of the parties. Arson involves no such sliding scale of fault or recovery. The types of evidence admissible in a wrongful death action are restricted by statute. U.C.A. §78-11-12. Criminal negligence, required for a determination of negligent homicide, involves a "gross deviation" from the standard of care exercised by an ordinary person. U.C.A. §76-5-206; U.C.A. §76-2-103. Another distinguishing factor lies in the degree of the crime. Assault, for

example, is a Class B misdemeanor. U.C.A. §76-5-102. Arson, on the other hand, as alleged by Farm Bureau, is a second degree felony. There are no civil actions for speeding, following too closely, or failing to signal. They are minor infractions, certainly not rising to the level of a felony.

Another reason that a higher burden of proof should be required is because of the stigma that attaches to the insured. Consideration of the stigma factor recognizes the "relative importance" of the ultimate decision. Disner, supra. Farm Bureau asserts that (p.36) Transamerica Insurance Co. v. Bloomfield, 637 P.2d 176 (Ore. App. 1981) has been overruled by Mutual of Enumclaw Ins. Co. v. McBride, 667 P.2d 494 (Ore. 1983). Contrary to Farm Bureau's statement, Mutual of Enumclaw did not overrule Transamerica. Different issues were considered in the two cases. (Footnote 2, 667 P.2d at 495). In Oregon, the burden of proof for common law fraud was a "preponderance." The claim in McBride, supra, was based upon an Oregon statute dealing with fraud and false swearing. The result of the Enumclaw case was controlled by an Oregon statute (ORS. 10.095(5)) declaring the burden of proof to be a "preponderance" of the evidence.

While Mutual of Enumclaw is critical of the "stigma" discussion in Transamerica, it is significant that the same Oregon court, in Riley Hill v. Tandy Corp., 737 P.2d 595 (Ore. 1987) took the step it declined in the Mutual of Enumclaw

case, and applied the higher (clear and convincing) burden of proof in a case involving deceit, finally making an exception to the preponderance standard that had previously been applied in Oregon civil cases of common law fraud. One of the factors relied upon by the Oregon court in raising the burden of proof was the express recognition (at 603) that a party accused of deceit is "branded with something akin to guilt".

Farm Bureau argues that it can perceive of no basis to permit an "imbalance in the burdens of proof" between Farm Bureau and Horrells. (Page 31). Perhaps the better question is why Farm Bureau should be the beneficiary of two different burdens of proof (preponderance and clear and convincing -- see Special Verdict questions 1 and 2) and be permitted to prove the fraud they want to relabel as a breach of contract by any lesser burden of proof.

In the context of Disner, supra, the determination that someone has committed arson is "of relative" importance. It defeats a fundamental presumption that people are honest and innocent of moral turpitude. The determination labels and stigmatizes people. These are all reasons to apply the higher burden of proof in this case.

E. The burden of proof should not be reduced because proof of arson is often circumstantial or because of public policy.

Farm Bureau argues that its burden of proof should be a "preponderance" because proof of arson is often circumstantial (page 31, 33). Farm Bureau argues

(p.33) that to require clear and convincing evidence would require the insurer to present direct evidence of who lit the fire. Criminal convictions which require an even higher burden of proof are frequently obtained without "direct" evidence. As discussed in Disner, *supra*, the first function of a standard of proof is to allocate the risk of error between the parties. One of the reasons that courts apply the more exacting burden of proof to fraud is because fraud often requires proof by circumstantial evidence. Courts have recognized that fraud is seldom provable by direct evidence. It is also recognized that circumstantial evidence of fraud may actually be of more force than direct testimony in proving fraud. 37 Am.Jur.2d, *Fraud and Deceit* §472. The higher burden of proof guards against the risk of error that is more likely to arise in cases involving circumstantial evidence. Disner, *supra*, at 1110. The risk of error is heightened in this case because the plaintiff must also resort to circumstantial evidence. Proving that one did not do something is, in most instances, impossible.

Farm Bureau argues (p. 34) that it would hinder the public policy of discouraging arson to require proof of its arson defense by clear and convincing evidence. Fraud, conduct equally contrary to public policy, has long required proof by clear and convincing evidence. In support of its limited public policy analysis, Farm Bureau relies upon Dairy Queen of Fairbanks v. Travelers Indemnity Co., 748

P.2d 1169 (Alaska 1988). As Horrells discussed in their Opening Brief (p. 21), Alaska is a state that does not recognize a higher burden of proof for civil fraud. Given this fact, it would be unreasonable to expect Alaska to impose a higher burden of proof in arson cases. In other words, the "usual" burden of proof for civil cases in Alaska, whether based in fraud or otherwise, is by a preponderance.

Farm Bureau argues that the Utah Legislature has not hesitated to lower the burden of proof when public policy requires. U.C.A. §78-18-1(1)(b) 1992. It is equally significant that the legislature has not reduced the burden of proof in civil cases involving alleged insurance fraud or arson. The burden of proof sought by Horrells does not require that the evidence be conclusive or so strong as to dispel every doubt. The evidence need only be "clear and convincing."

Where public policy is involved, courts generally weigh a variety of factors before reaching decisions. Factors that might be weighed here include: 1) the ease with which the allegation of arson can be made, 2) the grossly unequal resources available to the parties to prove or disprove the charge, 3) the reliance of the insured upon the insurer to insure him for fires of unknown origin, 4) the reliance of the insured upon the insurer to conduct an investigation and the unlikelihood that insureds will involve their own investigator at any meaningful time, 5) the fact that every homeowner has access to his property, and at various times in his life may have

financial motive, thus satisfying two of the three sides of the "arson triangle" relied on by insurers, 6) the presumption that every person is honest, 7) the circumstantial nature of the proof for both parties, 8) the stigma that attaches, 9) the risk of error, and 10) the desire to discourage people from committing arson. Consideration of these factors mandates the higher burden of proof.

The policy holder's dilemma is clearly demonstrated by this case. The cause of the fire was never determined, and an allegation of fraud is made. But the allegation was not made until 18 months after the fire, and it was two years after the fire before the insured realized he needed to employ his own investigator. (R.2377). Under the circumstances, a charge of arson is easily made and virtually impossible to defend.

F. In this case, Farm Bureau is attempting to avoid the contract.

Contrary to Farm Bureau's assertion, the Horrells do not contend that every time an insurance company asserts an exclusion in the policy, the insurer is required to prove the exclusion by clear and convincing evidence. The Horrells can only argue the law as it fits this case. This case involves allegedly fraudulent conduct. Farm Bureau has not paid because of the allegedly fraudulent conduct.

Farm Bureau acknowledges that the Utah Supreme Court has required clear and convincing evidence in cases where "there is a special danger of deception." Peterson

v. Peterson, 571 P.2d 1360, 1362 (Utah 1977). Farm Bureau acknowledges that these cases generally involve a situation where it is "one person's word against another." (p. 39). This case, where arson is alleged, fits squarely within the "special danger" concern recognized in the Utah cases where it is "one person's word against another." Greg Horrell has flatly denied any involvement in the fire. The cause of the fire is not known. (R.3198, 2461, 2470). Greg Horrell's word is pitted against the word of Jake Jacobsen and Randy Jacobsen.

Farm Bureau argues that some distinction should be made based upon control of the evidence. The only evidence samples collected or available at the time of trial in this case were those collected by Utah Farm Bureau. Farm Bureau's experts had unlimited access to the property. Horrells' expert had none. (R.2378).

SUMMATION

To fasten upon a man the act of willfully and maliciously setting fire to his own building should certainly require more evidence than to establish the fact of payment of a Note, or the truth of an account in set off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other.

2 Jones, Commentaries on Evidence, 2nd Ed. §563, p. 1036.

II.

**IN LIGHT OF OTHER FACTUAL FINDINGS MADE BY THE JURY,
ANY ERROR IN THE CHALLENGED SPECIAL VERDICT
QUESTION WAS HARMLESS ERROR.**

A. Standard of review.

Farm Bureau argues, without discussion of the many recent Utah decisions addressing the standard of review, that the harmless error issue should be reviewed under an "abuse of discretion" standard. More careful analysis demonstrates that this is not the standard to be applied in this case.

In State v. Pena, 869 P.2d 932, 937 (Utah 1994), the Utah Supreme Court stated its belief that the term "abuse of discretion" has no tight meaning. Speaking in terms of fences and pastures, the Pena Court addressed a spectrum of discretion, varying from case to case depending upon various factors. Horrells acknowledge that one area where trial courts have lots of pasture is when a new trial is granted based upon an insufficiency of evidence. Pena, at 938. This is not such a case. The trial court in this case expressly declined to make such a finding. (R.1392, 93). Of the seven listed reasons a new trial can be granted under Rule 59, the only reason identified by the trial judge in his order granting a new trial was an error of law. (Court's Minute Entry is at R.1391).

In the Special Verdict, the jury after listening to three weeks of evidence determined by a preponderance of the evidence that 1) the second fire was a rekindle of the first (and not a set fire as Farm Bureau's experts opined), 2) that Farm Bureau failed to diligently investigate the facts surrounding Horrells' claim, and, most

significantly, 3) that the Horrells' claim was not "fairly debatable" as that term was defined in the instructions. (R.1123). The trial court, after concluding that an error of law had been made, stated that the balance of the issues raised in the post trial motions were "moot." (R.1442). If the trial court's ruling were taken literally, it would have clearly been an abuse of discretion for the trial court to fail to consider whether the error was harmless error. But if it is assumed that the trial judge considered the issue of "harmless error", further analysis is required.

A trial court should not grant a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury. Mere disagreement is not a sufficient basis to order a new trial. Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991). In this case, the trial court expressly refused to find an insufficiency in the evidence to sustain the jury's "fairly debatable" determination. The best conclusion to be drawn from these circumstances is that the trial court based its grant of a new trial on its determination that as a matter of law, the jury's response to the "fairly debatable" question in the special verdict did not reflect their decision that Greg Horrell did not start the fire.

Judge Jackson, in his article, "Utah Standards of Appellate Review," 7 *Utah Bar Journal* at 9 (Oct. 1994), recognized that if a trial judge makes a determination regarding a new trial based upon questions of law, as was done here, that decision is

reviewable under a "correctness standard." See Crookston v. Fire Ins. Exchg., 860 P.2d 937, 938 (Utah 1993), and other cases cited in footnote 18 to the Article.

The Horrells submit that, given the posture of this case on appeal, the standard of review is most closely addressed in the case of State v. Thomas, 830 P.2d 243 (Utah 1992). In State v. Thomas, the Supreme Court remanded a case to the district court for consideration of issues that arose when a juror failed to correctly answer questions posed during jury selection. On remand, the trial court was to determine whether the defendant was entitled to a new trial under the McDonough test. On remand, the trial court failed to address one of the prongs of the McDonough test. The Utah Supreme Court said that the unanswered question was therefore reviewable by them as a matter of law. In this case, the unanswered question is whether the error was harmless error. This is an issue of law with which appellate courts are familiar. This Court should review the harmless error issue as a matter of law.

Even if the question was answered by the trial court, in light of Pena and its endorsement of a "continuum" of review (p.936), and because the trial court's ruling is not based on factual determinations, the scope of review in this case should be very near the "correctness" standard, where this Court makes its own conclusion with little deference to the trial court's conclusion of law.

B. The error, if any, was harmless.

The jury was asked to consider and respond to seven questions in the Special Verdict. On every question, the jury found against Farm Bureau. In addition to the contested question, the jury found that the Horrells had not intentionally misrepresented facts regarding their claim to Farm Bureau (by clear and convincing evidence); that the second fire was a rekindle of the first; that Farm Bureau failed to diligently investigate the facts surrounding Horrells' claim; that Farm Bureau breached contractual duties of good faith owed to Horrells'; and most significantly, the jury

found: 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

In every conceivable manner, based upon each burden of proof, both "clear and convincing" and a "preponderance", the jury found that Greg Horrell did not set the fire.

Farm Bureau did not object to the following jury instruction which defined "fairly debatable" (R.1097, 3381-85):

"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 insurers 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. (Emphasis added).

Farm Bureau argues that the jury's finding that the claim was not debatable does not equate to a jury finding that Greg Horrell did not set the fire. Their entire argument is premised upon the claim (p. 41) that the "jury was asked to determine separate issues based upon the evidence existing at different times." (Farm Bureau did not make this argument to the trial court). This premise is incorrect.

Initially, the instruction is very broad and invites the jury to consider not only what Farm Bureau knew, but what it should have known. The instruction directs the jury to consider, without reference to time, all of the law or facts that a reasonable insurance company "should have known." This clearly contemplates things it learned later. Contrary to what Farm Bureau now argues, the jury was not instructed to consider only the facts that Farm Bureau knew when it denied the claim.

Farm Bureau's argument fails for a second reason. Farm Bureau offered no evidence at trial to support the position it takes in its brief that it could not have known certain things it learned later when it denied the claim.

The Horrells' claim was denied by Farm Bureau on March 18, 1992, (Plaintiffs' Exhibit 46), eighteen months after the fire. In eight numbered paragraphs (pp. 43-45) Farm Bureau attempts to identify additional evidence it claims was obtained after the claim was denied in March, 1992. Its argument misses the point. Farm Bureau does

not contend that this information "should not have been known" in the eighteen months before the claim was denied. In paragraphs 1 and 2, Farm Bureau refers to a February, 1991 report of Jake Jacobsen. This report was prepared 13 months prior to the time that the claim was denied. The report is replete with requests from Jacobsen to Farm Bureau to permit additional investigation. Presumably, these requests identify information that should have been known by the insurer.

Many of the contentions made by Farm Bureau in the eight numbered paragraphs are inaccurate or misleading. The opinion of Randy Jacobsen was heard by the jury. (R.2725). They were not persuaded. Jake Jacobsen's opinion remained the same. (R.3192). There was no evidence that Mr. Horrell remained at the scene between the two fires so as to have the opportunity to set the second fire as Farm Bureau contended. Mr. Horrells' mother in law and wife both testified that he was at his mother in law's home between approximately 2:45 a.m. until after the second fire was extinguished. (R.1958, 1892). While a Red Cross volunteer who testified at trial denied giving Mr. Horrell a ride home, Mr. Horrell explained his confusion about who gave him the ride at trial. (R.3297). In paragraph 3, Farm Bureau contends that Jacobsen relied in his report upon statements from Don Herbert. Jacobsen could not recall when he spoke with Herbert. (R.3179). Herbert did not recall speaking to Jake Jacobsen at all. (R.1852). In any event, no reason was shown

why Jacobsen did not speak to Herbert, the owner of the adjoining property, prior to the time that the claim was denied. Any of the factors regarding electricity were things that should have been known to both Jacobsen and Farm Bureau before the claim was denied.

In paragraph 4 (p. 44) Farm Bureau refers to insurance on vehicles and boats. The report contains no such reference. What Farm Bureau never explained throughout this whole ordeal was why Mr. Horrell, who had obtained hundreds of thousands of dollars from his parents simply by asking, would burn his home to obtain money. In paragraph 5, Farm Bureau discusses the \$40,000.00 check given to Greg in 1986. As discussed earlier, Shirley Horrell testified that she knew that not all of those funds were going to the Beckstroms. (R.1764). Shirley Horrell spoke with Farm Bureau before the claim was denied. (R.1776). Apparently Farm Bureau chose not to ask her questions about the money she had given her son. In paragraph 6, Farm Bureau discusses information allegedly left off Greg Horrell's 1989 income tax return. What Farm Bureau fails to reveal is that even if this income had been listed, Mr. Horrell still would have had no income tax liability. (Tr. Exh. 102). In paragraph 7, Farm Bureau refers to confusion that existed in Greg Horrell's mind at the time of his examination under oath regarding tax returns. It is impossible to imagine what significance this might have, except to show that there was the usual lack of

communication from Farm Bureau. In paragraph 8, Farm Bureau discusses Mr. Horrell's UP&L payments. There is no suggestion that this information should not have been known to Farm Bureau prior to the time the claim was denied. Farm Bureau also fails to disclose that in the one year prior to the fire, the Horrells' paid over \$2,000.00 to Utah Power & Light, and that within a few months after the fire all of the balance due UP&L was paid. (Tr.2944,45).

Farm Bureau misses the point. Whether or not they actually had the information, it was all available to Farm Bureau simply by asking. They were the professionals. There was no evidence that any of this information "should not have been known" to Farm Bureau.

Finally, there is nothing in the record, including the jury instructions, to support Farm Bureau's premise that the jury either did consider or was instructed to consider different bodies of evidence in answering the "fairly debatable" question on the special verdict.

The jury's response to the "fairly debatable" question conclusively reflects the jury's decision that, by a preponderance of the evidence, Greg Horrell did not start the fire. The "fairly debatable" question can be likened to "probable cause" determination in a criminal investigation. The special verdict asked the jury to determine if there is was enough evidence for Farm Bureau to even debate the issue. The jury said there

was not. This factual determination made by the jury unquestionably supports the conclusion that the jury determined, by a preponderance of the evidence, that Greg Horrell did not start the fire.

The jury's response to another interrogatory in the special verdict further evidences the jury's conclusion reached by a preponderance of the evidence, that Greg Horrell was not involved. An integral part of Farm Bureau's theory of the cases was that Greg Horrell started both the first fire and the second fire. (R.430, para. 7). In their response to the third question of the special verdict (R.1123), the jury found, by a preponderance of the evidence "that the second fire was a rekindling of the first fire." and was not a fire set by Greg Horrell.

The jury's finding on these issues was based upon a "preponderance standard." The trial court expressly declined to find that there was insufficient evidence to support the jury's answer to the "fairly debatable" question. (Rule 59(6), U.R.C.P.). The trial court was wrong, as a matter of law, if it determined that the error was not harmless error. Any error was harmless error. Howell v. Parker, 297 P.2d 542 (Utah 1956) cert. den. 352 U.S. 943; Walker v. Eason, 643 SW.2d 390 (Tex. 1983).

At inconceivable expense, a jury has weighed the evidence and assessed the credibility of witnesses in this dispute. Farm Bureau has been afforded its days before a jury and that jury has decided against it on every issue and by every burden of

proof. There is no likelihood, given the jury's findings on other issues, that the error affected the outcome of the proceedings. This Court can determine that any error in the contested question was harmless error.

CONCLUSION

For the foregoing reasons, the order granting a new trial should be set aside and the judgment entered on August 8, 1994 based on the special verdict should be affirmed.

ORAL ARGUMENT

The Horrells request the opportunity to present oral argument on the issues presented.

DATED this 25 day of September, 1995.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing was mailed, postage fully prepaid, on the _____ day of September, 1995, to the following:

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