

Section 7

Summary of Michigan Court of Appeals Opinion in Barr v
Farm Bureau General Insurance Co., Court of Appeals
Case No. 293737, Released for publication April 26, 2011

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February 17, 2011

**RE: Barr v Farm Bureau General Insurance Company
Genesee County Circuit Court Case No. 07-086967 CK
February 15, 2011 Unpublished COA No. 293737**

Ladies and Gentlemen:

In July of 2009 we had the opportunity successfully try a case on behalf of the Farm Bureau General Insurance Company of Michigan in Genesee County Circuit Court. The case involved the denial of Plaintiff's claims under a Farm Bureau homeowner's policy on the basis of arson and fraud; after the jury agreed with Farm Bureau the Plaintiff appealed the adverse verdict to the Michigan Court of Appeals.

We are pleased to provide you with a copy of the Michigan Court of Appeals Per Curiam (unpublished) opinion **affirming** the trial court's denial of Plaintiff's Motion to Exclude the testimony of Farm Bureau's origin & cause investigator, Lewis Draper. We believe this opinion may have a significant impact on how origin & cause investigations are conducted, how NFPA 921 is analyzed by the courts, and how you or your attorneys go about qualifying origin & cause experts under Michigan Rules of Evidence 702-703 and the *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 759, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993) and *Gilbert v. Daimler Chrysler Corp.*, 470 Mich. 749, 779-783; 685 N.W.2d 391 (2004) decisions.

In order to put the Court's opinion in proper context, a summary of the facts is in order. For those of you interested in a complete review of the factual and legal issues presented by this case we have also attached a copy of Farm Bureau's entire Brief on Appeal.

At approximately 3:52 a.m. on Thursday, February 22, 2007, the Flint Fire Department received a telephone call regarding a fire at the structure located at 3014 Leith, Flint, Michigan. As a result of the fire, Mr. Barr submitted claims to Farm Bureau totaling \$93,150 for the dwelling and an additional \$24,916.59 for contents. As part of its investigation, Farm Bureau's SIU investigator obtained information regarding Mr. Barr's financial condition prior to the loss and an Examination Under Oath of Mr. Barr was also conducted. These efforts revealed the existence of a Notice of Judgment Lien in the amount of \$4,766.93 from Security Federal Credit Union; a Notice of Lien Order in the case of *Sharon Campbell v. Terrance Barr* in the amount of \$14,573.46; an outstanding,

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overdue obligation of approximately \$1,000 owed to Consumers Energy, an outstanding overdue bill for water and/or sewer from the City of Flint, and various documents associated with a mortgage sale where the expiration of the redemption period would occur on or about April 4, 2007.

During the course of the trial, Mr. Barr admitted that he not only owed the amounts referenced above but, in reality, the amounts owed were far greater. More importantly, Mr. Barr acknowledged that he misrepresented and concealed material facts regarding his financial condition at his Examination Under Oath and subsequent deposition including: that he knew he was scheduled to be out of the house as a result of the foreclosure on or before April 4, 2007; that he was not going to be able to pay the approximate \$67,000 that would have to be paid in order to redeem the property; that his telephone service through Verizon had been cut off due to non-payment; and that any available credit that he might have relied upon had been used up long before the loss and was no longer available to him. Mr. Barr also acknowledged that he had last been employed in 2005 and that his last regular income was \$169 in food stamps and \$264 a month in financial assistance from the Department of Human Services; however, those monies were only available through the end of November, 2006.

As part of its investigation into the facts and circumstances surrounding the fire of February 22, 2007, Farm Bureau retained the services of origin and cause investigator Lewis Draper. Normally, this would happen immediately after the fire but Mr. Barr delayed notifying Farm Bureau about his claim for two weeks because "I didn't know what to do".

In qualifying Mr. Draper we established that he is a retired Michigan State Police Fire Marshall who operates a private investigation/origin and cause investigation firm known as Guardian Investigation Agency; that Mr. Draper has extensive credentials in the field of origin and cause investigation including the investigation of thousands of fires as a private investigator and as a representative of the Michigan State Police Fire Marshall Division; and that he had, attended numerous certified training courses, college level courses, "on the job training", etc. In addition to conducting origin and cause investigations as a representative of the Michigan State Police and on behalf of numerous insurance companies, county/federal prosecutors, etc., he had also served as an instructor at various origin and cause investigation schools put on by the Michigan State Police, the Michigan Arson Prevention Committee, etc. He had also previously been qualified to testify as an expert witness in excess of 115 times.

Because of the existence of electrical equipment in what was determined to be the room of origin, Farm Bureau also retained the services of Mr. Allen Topor, a Certified Electrical Engineer. Mr. Topor provided a report which eliminated the possibility that the fire in question was electrical in origin. After the completion of the investigations conducted by Mr. Draper and Mr. Topor, Farm Bureau was advised (in the form of their reports and photographs) that the fire of February 22, 2007

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was classified as “incendiary” as that term is defined by the National Fire Protection Agency in its document entitled: NFPA 921 Guide for Fire and Explosion Investigations (2004 Ed. § 19.2.1.3)

Interestingly, the deposition of Mr. Draper was not conducted until Thursday, June 25, 2009; trial proceedings were scheduled to begin on Tuesday, June 30, 2009. At approximately 2:00 p.m. on Monday, June 29, 2009, Plaintiff faxed his Motion in Limine (**without Exhibits**) indicating that the “hearing” on the matter would be scheduled for 8:30 a.m. **the following day**, June 30, 2009.

Plaintiff argued in his Motion in Limine that the presence of an ignitable liquid should be confirmed by laboratory analysis and that the determination of a pattern as being caused by the ignition of a flammable liquid should not be based solely upon visual interpretations of the pattern. Since Mr. Draper had not taken any samples, and the sample taken by the Flint Police Department tested negative, Plaintiff argued that according to the “Gold Standard”, NFPA 921, Mr. Draper’s opinion was based upon a flawed methodology and, therefore, his opinion should not be allowed into evidence.

Farm Bureau emphasized that, contrary to the plaintiff’s repeated assertions, NFPA 921 is **not a standard** that establishes the **standards** for origin and cause fire investigation. The document itself is specifically identified by the National Fire Protection Association as a **“Guide”** which it defines as:

“A document that is **advisory or informative** in nature and that contains **only non-mandatory provisions**. A guide may contain mandatory statements such as when a guide can be used, but the document as a whole is not suitable for adoption into law.” (emphasis added)

A **“Standard”** is defined by the NFPA as a:

“A document, the main text of which contains **only mandatory provisions using the word “shall” to indicate requirements** and which is in a form generally suitable for mandatory reference by another standard or code or for adoption into law. Non-mandatory provisions shall be located in an appendix or an annex, footnote, or fine-print note and are not to be considered a part of the requirements of a standard.” (emphasis added).

Moreover, as the Court of Appeals noted, NFPA 921 specifically indicates at §1.3 that deviations from these procedures, categorized above as advisory or informative in nature and non-mandatory, “are not necessarily wrong or inferior but need to be justified.” NFPA 921 acknowledges at §6.17.8.2-6.17.8.3, the very patterns that Mr. Draper observed could be classified as an ignitable liquid pattern when other potential causes are eliminated. As noted at §6.17.8.2.3:

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“When overall fire damage is limited, however, and small, or isolated, irregular patterns are found, the presence of ignitable liquids may be more likely, although the use of supporting evidence is still recommended.”

The focal point of Farm Bureau’s position was that the concerns expressed by NFPA 921 about a burn pattern being classified as resulting from ignitable liquids on the basis of **shape alone** deals with the possibility that other conditions may cause patterns which “mimic” those typically associated with the distribution and ignition of a flammable liquid. NFPA 921 §6.17.8.2 - 6.17.8.3 specifically identifies those situations in which “mimic patterns” might exist, more or less limiting them to:

- a. Cases of “full room involvement”;
- b. Post-flashover conditions;
- c. Fire involving long extinguishment times;
- d. Building collapse; and
- e. Radiant heat.

Farm Bureau argued that no legal opinion had ever been issued by a Michigan Appellate Court that classified NFPA 921 as a “standard” or that it is anything more than a recommended procedures guide. Farm Bureau also provided the court with an unpublished opinion issued by the Michigan Court of Appeals (*People v. Jackson*, Court of Appeals Case No. 272776, May 13, 2008), and an opinion from the United States District Court for the Northern District of Illinois, Eastern Division (*Abu-Hashish v. Scottsdale Insurance Co.*, 88 F. Supp.2d 906; US DC Northern Dist. Ill., Eastern Div. 2000), both of which involved situations virtually identical to that at issue and concluded that the experts testimony was admissible.

Farm Bureau also established that Mr. Draper’s testimony was not based solely upon a visual interpretation of the pattern alone. We also pointed out that there was no testimony to the effect that the conclusions of Mr. Draper were based on anything other than reliable facts and methodology and the proper interpretation of those facts; that Mr. Draper’s specific opinion that the fire was “incendiary” was consistent with the description/methodology referenced in NFPA 921 §19.2.1.1 - 19.2.1.4; and that Mr. Draper’s methodology included the elimination of other potential causes before coming to the conclusion that the fire in question was “incendiary”.

Through a careful presentation of the facts during trial Farm Bureau established that Mr. Draper’s systematic approach was consistent with the methodology identified in NFPA 921:

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- a. Mr. Draper identified the problem and collected data both visually (through observation) and also through interviews and photographs;
- b. Mr. Draper analyzed the data, made a hypothesis and tested that hypothesis against facts and known information before coming to the conclusion that the fire was "incendiary."
- c. He confirmed the fact that there was literally no fire damage anywhere in the structure other than the room of origin. Based not only upon his physical observation but interviews with Mr. Barr, Mr. Draper determined that the room of origin had extremely limited potential sources of ignition, and those sources of ignition were eliminated by virtue of his methodical investigation; and
- d. He also prepared a report which contained his photographs, the factual basis for his conclusion, and his conclusion.

At the close of the hearing on Plaintiff's Motion to Exclude Mr. Draper's testimony the trial court acknowledged that Mr. Draper recognized NFPA 921 as a source reference, even authoritative on some points, although he did not agree with it in its entirety. The judge then went on to say that Mr. Draper's investigation had met the basic requirements of the law and NFPA 921 and allowed him to testify as an expert on the origin and cause of the fire.

Plaintiff's appeal centered on the answer to one question submitted to Mr. Draper during his deposition, and the incorrect inference that Plaintiff attempted to draw from that answer. More specifically, Mr. Draper was asked a variation of the following question on three occasions during the course of his deposition:

Q: Is there any peer review published document anywhere that says you can just go in and make a visual inspection and determine the cause and origin of an arson fire without taking samples and/or that says you can totally disregard the samples? Is there any peer review published article that says what you're saying?

A.: Not that I am aware of. (underlining added)

Plaintiff then asserted that Mr. Draper's conclusion that the fire was "arson" was based solely upon visual observations of a burn pattern. Plaintiff criticized the fact that Mr. Draper did not take a sample from the home for gas chromatographic analysis to determine if residue of an ignitable liquid remained in the area of the floor in the room of origin and/or that he ignored the negative result of the Flint Police Department sample.

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During trial, and prior to Mr. Draper being formally offered as an expert witness, Defendant went through a thorough qualification process to establish not only his background credentials, but also to help establish the methodology that was utilized by Mr. Draper in coming to his conclusions. Although this should be done in every case, special attention was paid to the process in this case because Plaintiff's counsel had clearly indicated that the court's denial of the motion to exclude Mr. Draper was going to be appealed. In that regard, Mr. Draper testified about the following:

- a. His extensive credentials;
- b. The fact that NFPA 921 is a "guide" as opposed to "standard" with respect to the investigation of fires and explosions. He testified that a guide is an advisory, informative, and non-mandatory ;
- c. He provided the court with series of definitions of terms utilized by origin and cause experts and explained how they were used by him in his investigation ;
- d. He testified that deviations from the procedures are not necessarily wrong or inferior but needed to be justified;
- e. He explained not every portion of the document is applicable to every fire or explosion incident and that it is up to investigators, depending on their responsibility, as well as the purpose and scope of their investigation, to apply the appropriate recommended procedures to a particular incident;
- f. With respect to the definitions, Mr. Draper was asked to define the very terms that were referenced by NFPA 921 as representing those situations in which patterns may be formed which "mimic" flammable liquid burn patterns: conduction, convection, radiation, and flashover;
- g. He described in detail the systematic approach he had been utilizing long before NFPA 921 came into existence, since that was exactly how he was taught when he received his training from the Michigan State Police in 1977;
- h. He described the six step formula described by NFPA 921 as the "scientific method" including the identification of the problem, the collection of data, the analysis of data, the creation of a hypothesis and the testing of the hypothesis; and
- i. He testified that he followed the NFPA 921 suggestion that he prepare a report that summarizes the results of his investigation from a factual and opinion perspective. In addition to his written report, Mr. Draper testified that he took dozens of photographs that gave a visual record of how he

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conducted his investigation, the observations that he made, etc. The report also contains the results of his numerous interviews and other background information.

In response to the Plaintiff's objection the trial judge then summarized the legal requirements of MRE 702, analyzed the situation and his role as the "gatekeeper," and concluded that a sufficient factual basis had been laid to allow Mr. Draper to testify as an expert. Mr. Draper then went on to provide the jury with a very detailed description of all that he did, his hypothesis, the factors supporting his hypothesis, and his elimination of all other potential causes other than "incendiary." Based upon all of the factors described above, the existence of a continuous erratic pattern at floor level that burned completely across the bedroom, melted an aluminum threshold, and ended in a circular pool pattern in the hallway, Mr. Draper classified the pattern as that of a liquid accelerant burn pattern. In support of that proposition, he also indicated that in his experience there was nothing else that could cause a continuous irregular pattern at floor level, working laterally across a carpeted floor, creating sharp lines of demarcation that actually burned into the wood and also melted an aluminum strip at floor level.

Aware that NFPA 921 is concerned about the classification of patterns as resulting from ignitable liquids, Mr. Draper also took into account the four basic categories described by NFPA 921 as possibly being the cause of patterns that "mimic" ignitable liquid burn patterns. Mr. Draper went through each individual possible cause of the "mimic" patterns and specifically testified/established that they **did not** exist in this fire scene.

The jury agreed with Mr. Draper's conclusion and determined that the fire was not only incendiary, but that the plaintiff had a guilty connection with it. The jury also found that the plaintiff committed fraud and false swearing in connection with the submission of his claim and during his EUO.

The Court of Appeals panel unanimously, and unequivocally, affirmed the trial courts' decision to allow Mr. Draper to testify. A careful review of the opinion reveals that the court fully endorsed how Farm Bureau dealt with the claim that Mr. Draper not only "failed" to take samples but refused to take into consideration the sample taken by the Flint Police Department. The opinion acknowledges that Mr. Draper had a valid reason for not taking samples (three weeks had passed before he was retained), that he did not ignore the Police sample and that he did not conclude that the fire was of incendiary origin solely on the basis of visual observation. We are particularly pleased with the court's acceptance of how we dealt with the issue of "mimic patterns"; the opinion basically adopts our brief in this regard. Perhaps most importantly, the Court twice referred to NFPA 921 as a "guide" and did not classify it as a "standard". Although there is little doubt but that NFPA 921 is, and will remain, the principle point of reference for all origin and cause investigations, we are confident that the opinions in both Barr and Jackson should be sufficient to defeat any attempt to turn NFPA 921

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into make a "standard" (as that term is typically used by the legal system) let alone the "Gold Standard".

It has been consistently argued that NFPA 921 **requires** a positive sample test result before the O & C investigator can classify the patterns as an "ignitable liquid burn pattern". Then it is argued that NFPA 921 also states that you cannot classify a fire as "incendiary" or that it had its origin in the distribution and ignition of flammable/ignitable liquid unless you have a positive sample since that would mean the investigator is basing his/her opinion solely on visual observations. This argument is primarily based on the idea that certain conditions can exist during a fire which create patterns that "mimic" ignitable liquid burn patterns even though no ignitable liquids were present (flashover and radiant heat for example).

In the past few years there have been no less than 4 television shows on this topic as well as an extensive article in the New Yorker magazine (which was actually attached to plaintiff's appellate brief) about a case where a man was executed after an arson conviction; all of these situations involved an attack on the "experts" testimony that the patterns observed were "flammable liquid burn patterns" despite the lack of a positive Gas Chromatograph test result. Basically they are efforts to attack every expert who classifies a fire as "incendiary" without a positive sample. The legal argument is that the expert's methodology must be unreliable and, therefore, not admissible; that is exactly the approach plaintiff Barr unsuccessfully attempted to utilize.

Hopefully this will be the end of the line for the theory that an origin and cause investigator cannot classify a burn pattern as an "ignitable liquid burn pattern" without the existence of a positive Gas Chromatograph test result. We trust this summary is of some assistance to you in your role as an insurance company representative, origin & cause investigator, or attorney. If you have any questions please do not hesitate to contact us at your convenience.

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