

## **EXPERTS' FAILURE TO ELIMINATE ALL POTENTIAL IGNITION SOURCES RESULTS IN OVERTURNED ARSON AND FRAUD CONVICTIONS IN NEW YORK**

In the case of *The People of the State of New York v. James Richardson*, ---N.Y.S.2d -, 2008 WL 442 5918 (N.Y.A.D. Third Dept.)(October 2, 2008); the Supreme Court, Appellate Division, Third Department, New York, reversed convictions of arson in the third degree and insurance fraud in the third degree having concluded that the jury verdicts were not supported by the weight of the evidence. The standard on review required the Court to independently review the evidence and make a determination of whether the evidence was “of such weight and credibility as to convince [the Court] that the jury was justified in finding the defendant guilty beyond a reasonable doubt.” *Id.* at \*3.

On February 15, 2007, the defendant’s home was involved in a fire which caused severe damage, particularly to the kitchen area of the property. The fire was discovered approximately two hours after the defendant had left the premises and it was undisputed that the defendant had sole access to the property. Two arson investigators concluded that the fire originated in the kitchen where a space heater, refrigerator, stove, microwave, water cooler, and outside light were all plugged into and powered by a single electrical outlet through the use of a power strip. Both investigators testified that they ruled out all accidental causes. Moreover, a laboratory report confirmed the presence of a medium petroleum distillate on a portion of the baseboard where the fire originated.

However, both fire investigators, one being trained just five months prior to the fire and employed by the City of Albany Fire Department, and the other having been retained by the defendant’s insurance company, admitted that they were unable to pinpoint the actual cause of the fire. Further, and critical to the Court, was the fact that while the experts claimed to have eliminated the possibility of mechanical sources as the cause of the fire, neither had the majority of the kitchen appliances inspected, all of which were grouped together in the same area of the small, compact kitchen. Further, the investigators noticed three tripped circuit breakers, indicating a possible circuit overload, but did not determine the reason for the breakers’ failure or even determine with which appliances they were associated. Rather, the Court criticized, one of the investigators relied on an expert report issued by an engineer specializing in failure analysis who examined the space heater, the electrical outlet, power strip and the remains of several electrical wires, but who failed to examine the scene, investigate the tripped circuit breakers or examine the remaining electrical appliances in close proximity to the fire’s origin.

Further, the Court found of equal importance that the defendant had testified that he was in the process of repainting the kitchen at the time of the fire and also stored charcoal lighter fluid in a box near the space heater. In fact, cans of paint were discovered in the kitchen in the fire debris, most of which spilled during the fire department’s efforts to extinguish the fire. Thus, while investigators testified as to the presence of medium petroleum distillate—examples of which include paint thinner and some brands of charcoal lighter fluid—neither identified the specific distillate found on the baseboard and neither provided “unequivocal testimony” excluding paint thinner, turpentine or charcoal lighter fluid as the source of the distillate. The Court was also

troubled by the fact that testing of a burn pattern on the floor was negative for the presence of ignitable fluids.<sup>1</sup>

The opinion, however, was a divided one and Judge Carpinello and Presiding Judge Cardona dissented. The dissenters noted that on appeal that the Court could not evaluate the demeanor of the defendant while testifying at trial. The dissent further noted that there was no sign of forced entry at the property and stressed the fact that two certified fire investigators *did* eliminate all accidental causes of the fire based on their physical inspection of the premises.

In discussing particular evidence in the case, the dissent took exception to the majority's conclusion that the experts did not "reasonably" exclude the possibility of an electrical fire and pointed to the following: (1) the precise origin identified by a "v-pattern" on the wall was in the corner of the kitchen, near the stove; (2) none of the appliances referred to by the majority were at the base of that "v-pattern"; (3) the stove and refrigerator were examined and eliminated as potential sources; (4) the tripped circuit breakers may simply have been tripped due to the heat of the fire; (5) the baseboard at the origin of the fire tested positive for medium petroleum distillate; (6) there was an unusual burn pattern on the floor consistent with a liquid burning across the floor surface; and (7) an engineering examination of the electric heater as well as statements from the defendant eliminated it as the cause of the fire.

While the Court's opinion makes no mention of *NFPA 921 Guide for Fire & Explosion Investigations*, it demonstrates that it is critical for arson investigators to eliminate *all* potential causes of fire before concluding that a fire is incendiary. In fact, in this case, the experts' failure to examine and eliminate certain potential ignition sources in the area of origin was pivotal in overturning the defendant's convictions.

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<sup>1</sup> The author notes that the Court did not discuss the possibility or likelihood that a distillate may be consumed during a fire such that no residue is detected; it was not clear whether this was raised at trial.