

**EXPERT'S OPINION THAT DEFENDANT COMMITTED ARSON
WAS NOT BASED ON SCIENTIFIC ANALYSIS, INVADED
PROVINCE OF JURY, AND THEREFORE, WAS IMPROPERLY
ADMITTED**

In the case of *State of Connecticut v. Beavers*, ---A.2d---, 2009 WL 294364 (Conn. 2009); the Connecticut Supreme Court, upheld the defendant's convictions of arson murder, attempted murder, and arson in the first degree, concluding that the improper admission of expert testimony that the fire was intentionally set, which was not based on a scientific investigation, was harmless error.

On December 9, 1998, the date of the fire, the defendant resided in a townhouse in Bristol Connecticut, with his mother, his teenage son, the victim, and the victim's boyfriend. At approximately 4:00 in the morning, the defendant ran to a neighbor's house and asked her to call the fire department. When the first police officer arrived on scene, the residence was engulfed in flames; the victim could be seen lying on the floor inside the front door, but could not be rescued due to the intense heat. The victim died of smoke inhalation.

Members of various law enforcement agencies investigated, including a detective with the Bristol Police Department, Christopher Lennon. Lennon interviewed the defendant and when asked to empty his pockets so that Lennon could secure his clothes; the defendant produced a lighter and book of matches. He claimed they were needed to light a blowtorch at his place of work. (It was later learned that he had not been employed for several weeks.) At a subsequent interview, he also stated that his son had confessed to him that he smoked cigarettes in the basement, had knocked over an ashtray in the area of the washer and dryer, but may not have cleaned up all the cigarette butts. (The son later stated that he smoked filtered cigarettes, but did not do so in the basement.) Two state troopers and certified fire marshals, Joseph Paola and Kevin McGurk, investigated the fire for the state fire marshal's office and concluded that the fire's burn pattern indicated it had started in the basement in and around the area where the defendant had described the knocked over ashtray as being. However, the investigators concluded that cigarettes did not start the fire as there were no ashtrays, cigarettes or remnants of cigarette filters (which are noncombustible fiberglass) in the area of origin. They further ruled out a cigar as the ignition source which was found in a pile of clothing in the basement since the cigar did not appear burned, nor did the clothing on top of it. After ruling out thermonuclear, electrical, mechanical and providential causes, the investigators concluded that the fire was started by human intervention, either accidental or intentional, via open flame. The fire was not classified as intentionally caused until after results from Lennon's interviews with the defendant and others became available.

At trial, McGurk testified that Lennon had provided him with additional information obtained from his interviews with the defendant, his son, and the victim's boyfriend, which caused him to change his conclusion with respect to the cause of the fire. Over the defendant's objection, McGurk testified that he determined that the fire had been

intentionally set; and that the interviews eliminated accidental ignition as a cause of the fire.

On appeal, the defendant contended that the trial court improperly admitted McGurk's testimony that the fire was intentionally set because it addressed the ultimate issue in the case and was not necessary to aid the jury's determination about whether the fire was intentionally set because it was not derived from his expert scientific knowledge or skill.

The Supreme Court agreed that, inasmuch as the defendant's theory was that the fire was accidentally caused by the cigar or the son's smoking, the cause of the fire was an ultimate issue to be decided in the case. The Court declined to adopt a *per se* rule barring all ultimate issue testimony in arson cases; but concluded that the trial court improperly admitted McGurk's specific conclusion that the fire was intentionally set. In so doing, the Court explained:

In contrast to the testimony of McGurk and Paola, which took the court and the jury through their painstaking analysis of the fire scene to conclude that the fire was caused by human hands *in some manner*, McGurk's ultimate conclusion that the fire was intentionally set was not based on that scientific process, but rather, on the nonscientific information he learned from Lennon's investigation. Put differently, McGurk's ultimate conclusion that the fire was intentionally set was founded not on his scientific investigation, but rather, on an assessment of the defendant's credibility with respect to his explanation of how the fire started, as well as the other circumstantial evidence offered by the state, such as the defendant's motive and history of starting fires.

Id. at *13 (Emphasis in original.)

The Court went on, however, to conclude that the admission of the expert's opinion on this matter was "harmless error"; and thus, did not warrant reversal. Specifically, the Court held that McGurk's testimony that the fire was intentionally set was not as significant given the "enormity of the circumstantial evidence against the defendant, namely, his motive, his opportunity, his knowledge that the fire started in the basement, his possession of fire starting supplies on the morning of the fire, his intent as shown through prior bad acts, and the uncontroverted and properly admitted evidence that refuted his attempt to blame the fire on the son's smoking." *Id.* at *14. Notably, the Court further found it significant that the defendant had opportunity to cross-examine McGurk and; in fact, "emphasized during summations that McGurk had classified the fire as intentional despite the existence of a National Fire Protection Association guideline cautioning investigators against drawing such conclusions in the absence of physical evidence of an incendiary fire." *Id.* As such, the Court concluded that the defendant had not satisfied his burden on appeal to show that the admission of McGurk's testimony, though improper, substantially affected the jury's verdict.

In sum, the *Beaver* case is yet another example of how an investigator's expert testimony concerning the incendiary nature of a fire can be called into question. While the Court did not expressly hold that McGurk's consideration of circumstantial evidence was improper under the National Fire Protection guidelines (*NFPA 921, Guide for Fire & Explosion Investigations*) and; therefore, inadmissible; the implication of the ruling is clear. First, it appears that the Court deemed an investigator's adherence to *NFPA 921* as significant. Certainly, the prejudicial effect of McGurk's conclusory opinion testimony was diminished in the Court's view in part because his failure to adhere to *NFPA 921*'s methodology was presented to the jury. Notably, McGurk's testimony was not the subject of a challenge under *State v. Porter*, 241 Conn. 57, 698 A.2d 739 (1997); the Connecticut case adopting the test for determining the admissibility of scientific evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Nevertheless, had McGurk adhered strictly to the methodology prescribed by *NFPA 921*, as indicated by the Court's ruling, the convictions still would likely have resulted in light of the evidence in the case.

~ **Karey P. Pond** ~