

CASE STUDY

Allstate Insurance Company a/s/o Thomas Lothridge v. Gonyo, 2009 WL 1212481 (N.D.N.Y.): Lack of Strict Adherence to NFPA 921 Does Not Warrant Preclusion, But Leaves Open Questions

In the case of Allstate Insurance Company a/s/o Thomas Lothridge v. Gonyo, the United States District Court for the Northern District of New York denied the plaintiff insurance company's motion to preclude the defendant's expert, George Hans Maier. Stopping short of stating that the expert did not comply with NFPA 921 altogether, the Court held that a failure to strictly follow NFPA 921 did not warrant preclusion of the expert's testimony.

On November 14, 2006, the defendant Albert Gonyo and his hunting companion, Charles Stone,¹ rented a cabin located in Chenango County, New York, from the plaintiff's insured, Thomas Lothridge, as they had done on occasion in the past. On this particular day, Mr. Gonyo lit a fire in a wood burning stove in the cabin while Mr. Stone gathered firewood. The two then left the cabin for approximately 45 minutes to scout for deer. In their absence, a fire started and, upon their return they observed black smoke and, through the cabin's windows, flames within.

The New Berlin Fire Department responded and, with the assistance of other companies, extinguished the fire. During the fire, Fire Chief George Handsomer was the senior officer and served as the fire and origin investigator because of his superior rank. Hansmaier concluded that the fire started due to heat from the chimney which ignited the roof and; further, spread due to "drop down" fire. He completed his report upon return to the station.

A few days later, the plaintiff Allstate conducted its own fire origin and cause investigation through its expert, Dennis A. Ware. Upon his inspection, he discovered the remains of what appeared to be a plastic tool chest approximately six inches from the wood burning stove. He opined that the fire did not start in the roof line as reported by Hansmaier; but rather, in the area of the stove due to the failure of the occupants to maintain a proper clearance between the stove and the plastic tool box.

The plaintiff Allstate moved to preclude Hansmaier's testimony under Daubert v. Merrill-Dow, Pharm. Inc., 509 U.S. 579 (1993) and Fed. R. Evid. 702; in particular, challenging his qualifications and the reliability of his conclusions.

The Court quickly rejected the qualification challenge posed by Allstate. The Court emphasized Hansmaier was qualified based on experience alone citing his twenty-five years' experience as a volunteer firefighter, as a fire chief for more than a decade, and on approximately sixteen fires per year determining cause and origin.

¹ Mr. Stone was initially a named defendant; however, in 2008, the parties filed and the Court entered a Stipulation of Discontinuance as to him.

Turning to the reliability of his testimony, Allstate asserted that Hanslmaier (1) did not arrive at his own opinion, but that it was a “group effort”; (2) did not follow NFPA 921 as he did not take photographs, conduct interviews, conduct further investigation, or test his origin theory; (3) did not eliminate other possible origins and had no opinion of fire spread; and (4) issued opinions in direct contradiction to Gonyo’s observations.

Hanslmaier testified that he was familiar with NFPA 921 and conducted his investigation in accordance with it. Most notable of his observations, is that most of the damage was high up on the roof, rather than lower in the structure. He did not see a “classic V pattern” which he would have expected with a fire that started lower in the structure. He opined that the chimney pipe was too hot, causing the framing around it to ignite. He also testified to a hole in the roof which indicated, to him, that the “hottest amount of heat was in [that] area.” He did not recall any evidence of burnt plastic near the wood burning stove. Hanslmaier did not take photographs or draft any diagrams. It is unclear from the facts of the case, whether Hanslmaier or one of his team members spoke with” two occupants.”

Gonyo stated that upon returning to the cabin he observed flames inside the cabin, not in the roof, where Hanslmaier places the origin. Hanslmaier offered that it was possible to see the flames inside before they were visible at the roof because interior fire on the ceiling may have caused drop down fire spread before the flames could breach the metal roofing.

The Court held that “[a]lthough Hanslmaier may not have ardently and strictly followed each step of NFPA, these shortcomings will not be fatal to him testifying before the jury or having his opinion tested. He used an individually tailored process which was basically consistent with NFPA. If there is any question that Hanslmaier did not eliminate every cause for the fire, this will not be determinative as to whether he will testify; all that it suggests is that the credibility of his decision may be subject to an attack.” The Court held likewise for the failure to take photographs, personally interview key witnesses, and his consideration of others’ opinions about the fire origin, noting that the Federal Rules anticipate that an expert may rely on facts or data perceived by others. Finally, as to the testability of Hanslmaier’s testimony, the Court held that it is a matter of whether it is capable of being tested and, in fact, “that test can occur within the crucible of cross-examination.” As such, Allstate’s Motion to Preclude Hanslmaier was denied.

Conclusion:

In this case, the defendant’s expert escaped a challenge to his credentials and to the reliability of his opinions. This case should be carefully scrutinized by the bar when relying on it for guidance in future cases; not necessarily because of its conclusions, but because of its phraseology. Specifically, it leaves unresolved the question of what Hanslmaier did not do that led the Court to conclude that he did not strictly following NFPA 921 or how it was that his “individually tailored investigative process” sufficiently met the spirit of NFPA 921.

Certainly, there is nothing in NFPA 921 which limits an investigator to using facts and data only collected by him personally. Indeed, experts often are not even given the opportunity to inspect a scene, but develop their opinions from photographs, reports, and testimony about an event. Further, that Hanslmaier's theory could be "tested" on cross-examination indicates that Hanslmaier conducted the type of deductive reasoning contemplated by NFPA 921. The concern that Hanslmaier did not rule out other causes, which seemingly would raise greater concern, is not discussed at length in the opinion. Presumably, this relates to his purported failure to consider the ignition of the plastic tool box as a potential source of the fire. Query whether he ruled it out based on the content of the "occupants" statements or the lack of evidence of its debris? Indeed, many facts which may make a difference to future investigators or attorneys are not mentioned either because they were not presented to the Court or simply were not deemed relevant by the parties. For example, was there evidence that the chimney pipe was a competent source to ignite the framing of the cabin? We are left with more questions than answers. Thus, after Allstate v. Gonyo, attorneys and investigators may be left wondering, what is the distinction between strict compliance with NFPA 921 and an "individually tailored investigative process which was basically consistent with NFPA"?

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