

Case Study (continued)

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

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 opinion, 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

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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”?

– Karey P. Pond

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Contact Brian Henry @ 860-293-1200 or via e-mail bhenry@tedfordhenry.com



Tedford & Henry
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Tedford & Henry, LLP
750 Main Street, Suite 1600, Hartford, CT 06103

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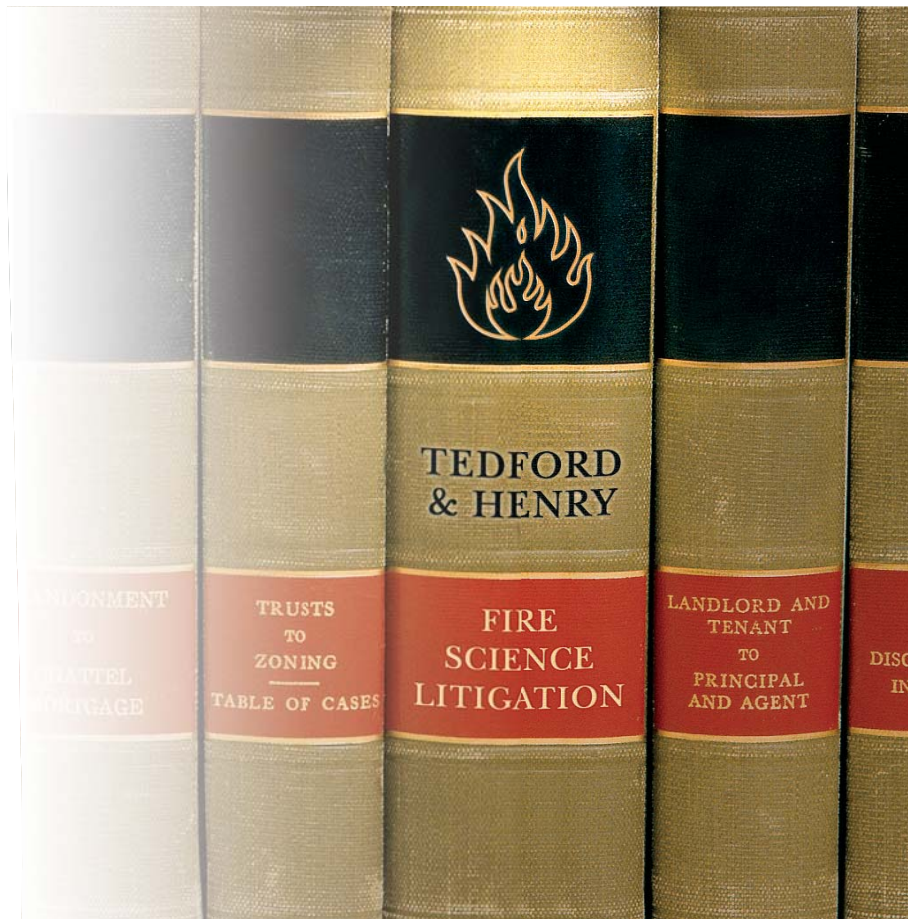


Perspectives from the **Hotseat**

Tedford & Henry **News & Facts**

Brian P. Henry will make a presentation at the NASP Subrogation Litigation: Skills and Management Conference to be held April 15 & 16, 2010, in Tucson, Arizona. His presentation will be entitled "The *Daubert* Disaster: Unintended Consequences Affecting Expert Witnesses." For details, please contact us or go to www.subrogation.org.

Tedford & Henry, LLP is pleased to welcome its newest paralegal, Shannon Barth, to the firm. Ms. Barth has fourteen years' experience as a paralegal and a criminal justice degree. She recently received a Bachelor of Science Degree in Arson Investigation from the University of New Haven.





Fire Litigation Perspectives

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Tedford & Henry, LLP · 750 Main Street, Suite 1600, Hartford, Connecticut 06103 · P (860) 293-1200 · F (860) 293-0685 · www.tedfordhenry.com

Arson

Tedford & Henry, LLP ("T&H"), is pleased to offer this article as the second of a two-part series on arson. In the Winter/Spring 2009 issue of Perspectives, we described two fire investigations where arson was quickly ruled out as the cause of fire and a third investigation where arson was determined to be the cause of the fire, but basic fire science principles were not followed during each investigation, resulting in incorrect conclusions. In this issue of Perspectives, we will discuss in detail why each of these three investigations failed to arrive at the correct cause of the fire. You can find our Winter/Spring 2009 issue of Perspectives on our website at www.tedfordhenry.com.

Fire Investigation #1

T&H was retained to represent a motorcycle manufacturer whose product allegedly caused a fire which totally damaged a \$1.5 million house with a three bay garage. The motorcycle blamed for causing the damage was in the bay closest to the main structure of the house. The area of origin was completely cleaned of all fire debris when we arrived for our inspection and the motorcycle was removed to another location by the subrogation investigator and preserved as evidence. (We learned later that the local authorities had cleaned the area of origin to examine the floor for evidence of arson.)

After completing our origin investigation, we agreed that the fire originated

in the garage bay closest to the main structure where the motorcycle had been parked. At the time of the fire, two off-road vehicles had also been parked in that bay, but were not available for inspection nor preserved as evidence.

Our frustration was somewhat relieved when we were permitted to speak with the homeowner, Mr. X. I chose to have my discussion with Mr. X while standing



in the garage bay closest to the main structure where he stated that he had observed the motorcycle on fire. Mr. X described his observations for us. He stated that he had opened the garage door between the house and the bay closest to the main structure and started his motorcycle. He went into the house for about five

article continues inside...

Welcome to FIRE LITIGATION PERSPECTIVES

This publication is brought to you by Tedford & Henry, LLP, a law firm with a national practice devoted to fire science litigation. Our business colleagues find Perspectives a resource for fire science issues, as well as for interesting developments in the law. To subscribe:

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minutes and re-entered the garage to find the motorcycle on fire with a two foot flame height in the area of the seat. He immediately went back into the house to get a container of water so that he could put the fire out. When he re-entered the garage, he stated that the flames were now reaching the ceiling and his attempt to douse the fire was unsuccessful. He stated that at that point he re-entered the house and immediately turned to his left to climb a set of stairs leading to his daughter's bedroom on the second floor. The stairs ran along the inside of the wall which separated the garage from the main structure of his home. He stated that as he turned to go up the stairs, he was faced with a wall of fire in the stairway which prevented his ascent to the second floor. He stated that he received burns to his arms while making an attempt to reach the second floor. At that point, I asked him to explain how he thought that the fire could have gotten from the motorcycle to the inside stairway in the two to three minutes between his first entry into the garage when he observed a flame height of approximately two feet and his re-entry into the garage three minutes later. The homeowner suggested that the fire must have reached the ceiling of the garage and entered the stairway through the wall structure while he was attempting to put water on the motorcycle. In response to questioning, he told us that the home was newly constructed and that the garage had sheetrock on the walls and ceiling. At that point during our conversation, the two fire investigators looked at each other in amazement having realized that a fire with a two foot flame height at the motorcycle could not have breached

either the ceiling of the garage or the wall separating the garage from the main structure in the time period described by the homeowner. Further, he told us that he passed by the stairway each time he exited or entered the main structure of the home without seeing fire in the stairway to the second floor.

Further investigation revealed that Mr. X had recently been divorced and was in terrible financial difficulty. The claim against the motorcycle manufacturer was dropped. The cause of the fire was arson by the insured. A great deal of expense could have been saved by the

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motorcycle manufacturer and the subrogator if the subrogation investigator had questioned the homeowner more thoroughly about his observation of the fire. I considered his efforts to be sloppy at best.

Fire Investigation #2

Our firm was retained to represent an insurer which inadvertently misplaced a salamander type heater which had been blamed for causing a fire that totally destroyed a nursing home under construction. Tedford & Henry was brought into this case several years after litigation had been commenced against the manufacturer of the heater, the painting contractor who was using the heater to

speed dry the paint, and the general contractor. Our investigation revealed that neither the first arriving police officer nor the 911 caller, a firefighter who participated in extinguishment efforts, had ever been interviewed by any of the fire investigators. Additionally, a video tape taken by an eyewitness had never been reviewed by any of the investigators, including the fire marshal, despite his awareness that the video existed at the time of his investigation.

Our investigation disclosed that the fire was first observed on the porch outside the main entrance to the nursing home, a significant distance from the location of the salamander heater which was located in the basement of the nursing home at the opposite end of the building. The first public service person on the scene, a police officer, confirmed that when he arrived the only place he observed fire was on the front porch. The video tape clearly demonstrated that the fire occurred on the front porch of the nursing home and burned upward and across the upper levels of the two-story structure and eventually burned down into the basement. The 911 caller verified that the fire he reported was at the front door of the building.

Our investigation further developed evidence that, on the morning of the fire, the fire marshal was told by the building inspector that he suspected arson as the cause of the fire. He based this suspicion on his observations of violently angry employees of one of the subcontractors who were being pushed hard to complete construction by a deadline set by the building owner. The fire marshal had discounted arson solely on the basis of the accelerant detection canine's failure to alert to the presence of an accelerant.

Arson (continued)

Following the completion of our investigation, the 13 million dollar suit was settled for nuisance value. It is safe to say that the poor investigation of this fire resulted in the expense of hundreds of thousands of dollars in defense and subrogation costs.

Fire Investigation #3

Tedford & Henry was retained by the defendant in a criminal arson fire where the fire marshal concluded that the total destruction of a three story home was an arson fire set by the homeowner. The home was a total burn and the basis of the arson determination was alleged to be the ruling out of all accidental causes

in the area of origin.

Our investigation concluded that the cause of the fire was undetermined. The home was so badly damaged that the area of origin could not be narrowed to an area smaller than the first floor of the structure. The first eyewitnesses observed that the home was fully involved, further inhibiting investigators' ability to arrive at a conclusion about the fire's origin. The homeowner narrowly escaped the fire.

Arc mapping of the electrical circuits on the first floor could not be accomplished because of the damage and there was evidence of malfunctioning electrical circuits on the first floor prior to the

fire. The fire marshal relied heavily upon evidence of a pending acrimonious divorce as a basis for his conclusion that it was an arson fire. The area of origin was not well defined as required by NFPA 921 when relying on the process of elimination to make the determination that a fire was incendiary. Further, all accidental causes could not be identified let alone ruled out. The result was that a homeowner was charged with arson based on circumstantial motive evidence,

The balance of this article and additional facts and comments on the three fires can be found on the Tedford & Henry website at: www.tedfordhenry.com/articles.

Editorial: Arson

According to the most recent data available from the Nation Fire Protection Association (NFPA), there were 30,500 intentionally set structure fires in 2008. In addition, there were an estimated 17,500 intentionally set vehicle fires for the same year. The structure fires resulted in \$866,000,000 in property loss while the vehicle fires cost this nation \$139,000,000 in property loss. For more information and statistics see www.nfpa.org.

These figures are only estimates and are probably significantly lower than the actual numbers. The data was reported by fire departments that responded to the NFPA's 2008 Fire Experience Survey and is based on the U.S. Fire Administration's National Fire Incident Reporting System (NFIRS). Such public service personnel are usually more inclined to list the cause of a fire as something other than arson. However, the reported estimates highlight a significant causal factor in structure and automobile fires.

At Tedford & Henry, LLP, it has been our experience that arson fires are significantly under reported. This is especially true when there is heavy fire damage. In "total burn" or near "total burn" fire scenes, accelerant detection canines are often relied

upon to identify the presence of an accelerant. With fire debris piled several feet deep and little remaining evidence of burn patterns associated with the initial ignition of the fire, the canines are often led through the fire scene without any preliminary work being done to de-layer potential areas of origin to provide the canine with a better opportunity to detect the presence of an accelerant. Often, when the canine does not alert, arson is ruled out and the conclusion is quickly drawn that the fire was accidental. (See editorial by Mr. Andrew C. Fardy in the Winter/Spring 2008 Edition of *Perspectives*.)

In this issue of *Perspectives* we conclude our two-part series on arson to draw attention to this issue and to provide our insight into the reasons why arson fires are under reported.

– Frederick B. Tedford



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 Hanslmaier. 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 Stone¹, 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 Hanslmaier was the senior officer and served as the fire and origin investigator because of his superior rank. Hanslmaier 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 Hanslmaier; but rather, in the area of the stove due to the

The Court quickly rejected the qualification challenge posed by Allstate.

failure of the occupants to maintain a proper clearance between the stove and the plastic tool box.

The plaintiff Allstate moved to preclude Hanslmaier'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 Hanslmaier 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.

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

article continues on opposite panel...

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.