IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARBARA A. SLOAN, a single woman, Plaintiff/Appellee, vs. FARMERS INSURANCE COMPANY OF ARIZONA, an Arizona Insurance Company; FARMERS INSURANCE EXCHANGE, a California insurance company; and FARMERS GROUP, INC., a California corporation, Defendants/Appellants.	No. 1 CA-CV 16-0046 Maricopa County Superior Court No. CV2009-033244

REPLY BRIEF

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INTRODUCTION

Sloan's Answering Brief fails to address the two central issues on appeal:

(1) Whether the trial court's ruling can be upheld where the new evidence upon which Sloan's Rule 60(c) motion was based meets none of the requirements of Rule 60(c)(2);[1] and

(2) Whether this new evidence, even if properly considered under Rule 60(c)(6), constitutes "extraordinary circumstances" justifying setting aside the jury's verdict where Sloan fails to show it likely would have changed the verdict.

Sloan ignores the extensive evidence on which Farmers relied at trial to explain its handling of Sloan's insurance claim – evidence consisting of observations and testimony of witnesses and experts *other than* Captains Richardson and Andes. Farmers detailed this evidence in its Opening Brief, both to show the compelling evidence upon which the jury based its verdict and to explain why, given Sloan's theories of bad

[1] Sloan calls this issue a "red herring" and only cursorily addresses it toward the end of her brief. (AB 35-47).

faith, it was necessary for Farmers to present the "arson evidence" to support its defenses.

Instead of addressing this evidence and the theories of the case and defense, Sloan's strategy is to vilify Farmers. She continues to accuse Farmers of presenting an "arson defense" intended to persuade the jury she "burned her house down," knowing this is the only way she can potentially justify setting aside the jury verdict based on evidence that would clearly not have made a difference when the trial record is viewed as a whole and in light of Farmers' defenses. Sloan also focuses on evidence from her criminal case that was not admitted and, in many cases, expressly precluded from this bad faith trial. Were Sloan seeking to overturn a criminal conviction based upon testimony by Captains Richardson and Andes, the new evidence might warrant a new trial. But that is not the situation here.

Any shortcomings in Richardson's and Andes' investigation were known by Sloan before trial. Sloan made strategic trial decisions with respect to PFD's investigation, and those strategies failed. Now, she is trying to capitalize on the new evidence (which resulted primarily from information and documents *she* provided to DPS) to obtain a second bite

at the apple. The trial court erred and abused its discretion in allowing Sloan to make an end run around the jury's verdict (and circumvent Rule 60(c)(2)) based upon this new evidence, none of which warrants overturning the jury's verdict.

Finally, to the extent the trial court's decision was based on its belief that an "injustice" resulted from Richardson's and Andes' conduct, Sloan has a remedy she is actively now pursuing – a lawsuit against these Captains and PFD based on the new evidence. (U.S.D.C. No. 2:16-cv-02176-ESW). But it does not warrant setting aside the jury verdict in this bad faith case where Farmers did nothing wrong and reasonably relied upon the PFD investigation, including primarily the accounts of first responders, as well as its own investigation, in initially denying Sloan's claim due to suspected arson.

REPLY TO SLOAN'S STATEMENT OF FACTS

A. Farmers' Fire Expert Did Not "Exonerate" Sloan.

Sloan erroneously claims that Farmers' fire expert Robert Laubacher initially "exonerated" her and "reported to Farmers that the fire was not suspicious and that he found no evidence of arson." (AB at 7). Sloan's unsupported statement is flatly contradicted by Laubacher's

initial report (the C&O Report). (TE 129). Where Sloan provides citations in this section, they are not to Laubacher's report, but to "log notes" entered by Farmers' claim adjuster, Won Chang, who testified that his notes reflected his interpretation of information. (RT 4/23/12 at 75:22-76:1).

Won Chang, not Laubacher, stated (in his log notes), "no arson," "no suspicion." (TE 4; TE 6; RT 4/23/12 at 113:25-114:9). In contrast, Laubacher's initial report, which was admitted and repeatedly shown to the jury, stated the cause of the fire was "undetermined," but also identified *multiple points of origin*, indicated the *fire may have been aided by ignitable liquids*, and *identified "incendiary"* (arson) as a possible cause. (TE 129). Thus, among other misstatements, Sloan's assertion that Laubacher's initial report reflects a single point of origin is false. Chang's log notes also do not state Laubacher found a single point of origin. (TE 6) ("concluded fire started from unknown source. No arson or suspicious fire.").

Had Laubacher's initial report truly "exonerated" Sloan, she would have used it in her defense against the criminal charges. Instead,

she moved (successfully) to exclude this report and Laubacher from testifying in her criminal case.

B. The Captains' Initial Conclusions Based On the "Arson Dog" Evidence Are Irrelevant.

Sloan claims Captains Andes and Richardson "immediately arrived at an arson conclusion," citing their use of an "arson dog" and the conclusion in Richardson's report: "Arson of Occupied Structure." (AB at 8). But the videotape transcript on which Sloan relies was *never admitted* at trial, nor was Captain Andes ever called by either party. Farmers did not rely on the arson dog evidence, so this entire section is irrelevant to the issues on appeal.

C. Farmers Did Not Instruct Laubacher to Change His Conclusion.

Sloan claims Farmers "instructed" Laubacher to change his opinion to coincide with PFD's arson conclusion, citing Trial Exhibits 22 and 35, but these exhibits say nothing of the sort. (AB 9, 10). After receiving Laubacher's report of an "undetermined" fire, and after learning PFD believed this was an arson fire involving Sloan, Farmers simply asked Laubacher to contact Richardson to "[s]peak with him, collaborate, get a consensus, agree *or disagree* with his findings," and

"figure out where the differences were in their findings." (RT 4/23/12 at 30:4-10; RT 4/19/12 at 120:4-9) (emphasis added).

Sloan claims Laubacher "rejected Captain Richardson's conclusions," and "warned Farmers that Richardson's conclusions were not supported by evidence." (AB at 9). But her record citation does not support these assertions and are, again, only to Chang's log notes. (TE 22).[2] After Laubacher obtained and considered information from Richardson regarding PFD's investigation, he continued his own investigation and ultimately concluded this was arson, as did Jim Hall, a certified vehicle expert Farmers retained to specifically address Sloan's vehicle fire theory. (TE 22, 129, 130, 210).

D. Farmers Did Not Reveal Only "Documents Calculated to Convict Sloan."

Sloan claims Farmers only produced documents "calculated to convict Sloan." In addition to being irrelevant to whether Rule 60(c)

[2] Laubacher did not testify at trial. Won Chang's notes regarding his conversations with Laubacher are therefore hearsay and must be viewed as reflecting only Chang's thought processes. Laubacher testified during deposition he was not pressured to change his opinions, although his deposition is not part of the record.

relief was properly granted, Sloan does not identify any "inculpatory documents" Farmers produced.

Moreover, as to Farmers' supposed withholding/suppression of "exculpatory evidence," Farmers did initially withhold its C&O Report and internal log notes as privileged, but even Sloan's experts agreed those items could be characterized as *both* inculpatory and exculpatory. (RT 4/24/12 [Harrison] at 214:8-21; TE 449; RT 4/30/12 [Woods] at 146:13-147:19).[3] The C&O Report was inculpatory because it identified three points of origin and said the fire may have been aided by ignitable liquids. (TE 129; RT 5/10/12 [Rocco] at 53:3-19).

Although Sloan claims "the suppression of exculpatory evidence is apparently a common practice at Farmers," even Sloan's experts agreed Farmers' practice of asserting privilege with respect to C&O Reports and insurance claim files is appropriate. (RT 4/24/12 [Goldstein] at 158:15-159:42, 173:4-14, 175:25-176:9, 176:10-17; RT 5/3/12 [Miller] at 209:15-2, 214:8-17, 234:6-10). Sloan's "reasonable prosecutor"

[3] Sloan's experts also admitted log notes could be self-serving, conflicting, inaccurate, and contain hearsay. (RT 4/24/12 [Goldstein] at 171:24-172:20; RT 4/30/12 [Woods] at 142:11).

expert likewise admitted he had never presented insurance claim file log notes to a grand jury. (RT 4/30/12 [Woods] at 139:14-17, 141:22-142:9).

Sloan's brief later claims Farmers produced documents "slowly." (AB at 13). The record shows, however, that Farmers produced all of its non-privileged file pursuant to the rules of discovery and in accordance with the special master's orders. (TE 478, 479; R. 44, 46, 78, 345, 385). Neither the special master nor the criminal judge ever found Farmers' assertion of privilege to be improper or its disclosures delayed beyond the time needed to sort out privileged and non-privileged documents.[4] Regardless, the speed of Farmers' disclosures is irrelevant to this appeal.

E. Captain Richardson's Role in Sloan's Criminal Prosecution is Irrelevant in this Bad Faith Case.

Although Captain Richardson ordered Sloan's arrest and was the sole Grand Jury witness, he did not play a pivotal role in this bad faith trial. Nor did Captain Andes. Neither were called as witnesses, and only select deposition excerpts of Richardson were played for the jury.

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[4] Although the judge in the criminal case ordered production of the preliminary C&O Report, she found it was not clearly exculpatory because Laubacher was unable to determine the fire's origin. (TE 197 at 16; RT 5/10/12 at 53:3-55:5). She did not find Rocco's assertion of privilege improper. (Id.).

Thus, the more prevalent role Captain Richardson played in the criminal case is of no consequence to the Court's Rule 60(c) analysis.

F. Criminal Court Findings Regarding Farmers' "Cooperation" With PFD Are Irrelevant and Were Specifically Excluded by the Trial Court.

The Court should disregard the entirety of Sloan's Section F. Four of five Trial Exhibits she relies upon were *not admitted* in this case. (TE 486, TE 217, TE 1, TE 2). Plus, Farmers' employees and experts were *compelled by law* to cooperate with law enforcement so cooperating cannot be "improper." (R. 1375-79, Ex. 5) ("fire investigators are required to have a partnership between private investigators").

More importantly, Sloan's claim that Farmers' purported coordination with Captain Richardson was "recognized by the criminal court"(AB at 13), is based upon a criminal case minute entry that was *specifically excluded* in this bad faith case (TE 217), and on Sloan's self-serving criminal Motion to Exclude all Farmers' Evidence (also never admitted). (TE 486). Citing to this order and motion is particularly unfair because the prosecution never responded to Sloan's motion, and Farmers was not a party in that case and could not respond. Moreover, no other documents from the criminal case were admitted that could

provide context to the criminal court's findings. Notably, Sloan opposed Farmers' attempt to admit the *entire* criminal record in this case, perhaps because it would have undermined her claim that Farmers caused her damages (as opposed to PFD and MCAO).[5] (R. 1113-15, 1130, 1147; RT 5/24/12 at 32:7-36:13).

Sloan cannot fight admission of the criminal record at trial, then rely on excluded portions of it to help her argument on appeal. Because this section of Sloan's brief relies entirely on trial exhibits from Sloan's criminal case that were specifically excluded here, it should be disregarded. (R. 808, 809; RT 5/22/12 171:8-177:6). The trial court's citation in its Rule 60 ruling to the excluded minute entry finding coordination between Farmers and Richardson was likewise erroneous. (R. 1410 at 4 fn. 8).

G. The Criminal Case Was Not Dismissed Because MCAO Found "Serious Problems" with "Conclusions Reached by Captain Richardson with the Assistance of Farmers."

In Sections F and H(3), Sloan seriously mischaracterizes the facts leading to dismissal of the criminal case and again improperly relies on

[5] As noted above, Sloan has now filed suit against these captains and PFD based upon the DPS Report and MCAO/PFD decisions, which this Court can judicially notice. (U.S.D.C. No. 2:16-cv-02176-ESW).

exhibits from the criminal case the trial court specifically excluded in this case, namely, MCAO's "Case Disposition Worksheet" and "Case Logs." (TE 1, 2; R. 1116). Sloan claims that because these exhibits were excluded, Farmers "misled" the jury by claiming the dismissal was due to a "technicality." (AB at 24).

First, Sloan has waived any ability to object to Farmers' characterization of the dismissal by not objecting at trial. Second, because the jury did not consider these MCAO exhibits, they are irrelevant to this appeal.

Most importantly, Sloan misstates why the criminal case was dismissed. It was not due to a finding that Sloan was "innocent" or "exculpated" by Laubacher's report or Farmers' log notes. Instead, these (excluded) exhibits show the criminal case was dismissed primarily because of *preclusion of the State's evidence due to disclosure violations,* ***which were prompted by Sloan's Motion to Exclude the Farmer's Evidence***, including the purported "exculpatory" evidence. (OB at 26). In claiming dismissal was based on MCAO's determination that there were "serious problems" conclusions Richardson reached "with the assistance of Farmers," Sloan omits verbatim language from

MCAO's Case Disposition Worksheet stating that "much of the State's case was precluded because of … discovery and disclosure violations in which the Court ruled that the concurrent insurance investigation [] was not timely or properly disclosed [by the State]." (TE 1). Although the State also concluded it could not rely on Captain Richardson's testimony alone, that was due to his October 2010 deposition where he stated he had substantial doubt regarding Sloan's culpability. (OB at 26). The only criminal exhibit Sloan cites that was considered by the jury was the minute entry showing MCAO dismissed the case "In the Interests of Justice." (TE 3).

H. Farmers Did Not Employ an "Arson Defense" or Use "Arson Evidence" Except As Necessary to Initially Defend Against the Breach of Contract Claim, and to Show its Conduct was Reasonable.

Sloan's insistence that Farmers presented an "arson defense" ignores that Farmers had no choice but to initially proceed with and propose instructions for such a defense because Sloan refused to dismiss her breach of contract claim, to which an arson defense would have been relevant. (R. 1204.) Until the trial court entered JMOL on the breach of

contract claim (R. 1233), Farmers was forced by Sloan to ride two horses, and her tactical decisions do not entitle her to a new trial.

Sloan also ignores that Farmers had to present "arson evidence" to show why its handling of Sloan's claim in 2009 and 2010 was reasonable and why earlier disclosure of its file would not have made any difference in MCAO's decision to criminally prosecute. Even if the DPS Report were available at Sloan's trial, Farmers' defenses would have remained the same.

Sloan takes issue with Farmers' reference in closing to instructions permitting jurors to consider evidence of bias, to accept or reject expert opinion, and to rely on their common sense. Farmers' reference to these instructions relative to the PFD employees was not misleading or improper because it is true that the firefighter witnesses were not paid for their testimony (and their credibility is unaffected by the DPS Report). Moreover, these instructions were proposed by Sloan and she had an equal opportunity to argue bias as to Farmers' witnesses.

Farmers' description in Opening Statement of events that *actually occurred* – Sloan's criminal arrest, indictment and prosecution -- are simply facts of the case. And Farmers' suggestion in closing argument

that "friends relatives, and everyone else" would believe she burned the house down went directly to the reasonableness of Farmers' handling of Sloan's claim, which is evident when these comments are viewed in context of the closing as a whole, as opposed to taken out of context as Sloan has done throughout her brief. Finally, neither opening statements nor closing arguments are evidence and Sloan failed to object to either.

I. Farmers Did Not Use The "Credibility" of PFD and MCAO to Support its Own Defenses.

Apparently attempting to bolster the significance of the DPS Report and MCAO/PFD's decisions, Sloan claims Farmers needed to rely on the PFD investigation because it "presented no expert arson opinions that could have withstood Rule 702 inquiry." (AB at 20).

Jim Hall's testimony was the subject of extensive litigation and is the focus of Sloan's initial appeal, which is pending and has been stayed until this appeal is resolved. In short, the trial court found Hall's analysis and opinions were part of the "arson evidence" upon which Farmers relied in initially denying Sloan's claims. Hall and Laubacher were not presented as "independent experts." The qualified or unqualified nature of Hall's (and Laubacher's) opinions went only to the

reasonableness of Farmers' reliance on them, not to their admissibility (though Farmers maintains Hall would qualify under Rule 702).

As to Laubacher, Sloan misleads the Court regarding why he invoked the Fifth Amendment, which was unrelated to his investigation or the fact that he ultimately reached a different opinion regarding cause of the fire (arson) than in his initial preliminary report (undetermined). Rather, his invocation related to a violation of the rule of witness exclusion. (RT 5/16/12 at 3:4-7:22, 24:6-28:19). Although Farmers was ultimately unable to present his testimony, his reports were admitted and presented through other witnesses.

Most importantly, neither Sloan's cross-examination of Hall nor Laubacher's privilege assertion caused Farmers to rely more heavily at trial on Captain Richardson. Hall's testimony in particular provided powerful support for Farmers' belief that Sloan had committed arson and that its handling of her claim was therefore reasonable. As for Farmers' reasonable reliance on the other PFD employees and first responders (as well as Southwest Gas employees and other witnesses), their credibility is unaffected by the DPS Report. Plus, as set forth in the Opening Brief and in Farmers' Response to the Rule 60 motion, many if

not most of the critical observations of the other PFD employees and first responders were *consistent* overall with Captain Richardson's report. To the extent that portions of Richardson's deposition testimony were played, **both** parties designated his testimony, not just Farmers.

J. Facts Regarding Post-Trial DPS Report.

Sloan astoundingly claims "The DPS Report has rendered virtually everything that Farmers told the jury about Richardson's investigation or the indictment untrue." (AB at 26). Sloan cannot support this and has not shown how anything in the DPS Report disputes the portions of Richardson's testimony presented to this jury. Sloan admits DPS focused on Richardson's Grand Jury testimony. But Farmers did not rely on the Grand Jury testimony in investigating or handling the claim or in making its determinations of privilege regarding its file. (OB at 58). Although Sloan points to self-serving statements in the *conclusions* by DPS, MCAO, and PFD, she does not identify any evidence contradicting the testimony presented at this bad faith trial.

Moreover, the DPS Report opinions do not constitute *proof* that all of Richardson's statements were untrue. First, the DPS Report was

based largely on incomplete transcripts Sloan supplied to DPS. (R. 1375-79, Ex. 5 at BAS DPS 008). Also, DPS conducted interviews *five years* after the fire investigation whereas the witnesses' depositions and trial testimony in this case were in much closer proximity to the fire and therefore more reliable. Based on the limited information Sloan provided, DPS found Richardson's statements to the Grand Jury were not supported by his report and found testimonial "discrepancies." Despite these "discrepancies," an overwhelming amount of *other* evidence was presented at this trial to support the statements made by Richardson, which DPS either ignored or was never provided.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED BY DECIDING SLOAN'S MOTION UNDER RULE 60(C)(6) INSTEAD OF RULE 60(C)(2).

A. Sloan's Request to Set Aside the Jury Verdict Is Based on New Evidence and Must Be Evaluated Under Rule 60(c)(2).

Sloan fails to refute that her motion was based on "new evidence" in the form of the DPS Report and MCAO/PFD decisions and therefore should have been evaluated under Rule 60(c)(2), not Rule 60(c)(6). Sloan argues that because this evidence came into being after trial, it is not "newly discovered evidence" for purposes of Rule 60(c)(2). (AB at 45–

46). *See Rogers v. Ogg*, 101 Ariz. 161, 163 (1966), *overruled on other grounds by U S W. Communc'ns, Inc. v. Ariz. Dept. of Revenue*, 199 Ariz. 101 (2000) ("newly discovered evidence" refers to evidence that existed at the time of trial or judgment).

That is precisely the point. Sloan moved for relief under Rule 60(c)(6) rather than 60(c)(2) because, as discussed below, she failed to meet Rule 60(c)(2)'s requirements based on "newly discovered evidence" and did not file her motion within the six-month time limit. But Sloan cannot simply avoid these requirements by moving under the catchall provision of Rule 60(c)(6). *See Edsall v. Super. Ct.*, 143 Ariz. 240, 243 (1984) (reason advanced for setting aside judgment under Rule 60(c)(6) "must *not* be one of the reasons set forth in the five preceding clauses"); *Andrew R. v. Ariz. Dept. of Econ. Sec.*, 223 Ariz. 453, 459, ¶ 21 (App. 2010) (Rule 60(c)(6) motion "cannot be premised on a ground provided for by the first five subsections of the rule"); *see also* Daniel J. McAuliffe & Shirley J. McAuliffe, ARIZ. CIVIL RULES HANDBOOK, R. 60 (2016) (six-month time limit for Rule 60 motion "may not be avoided merely by asserting that relief is sought under clause 6 . . . when the

grounds upon which relief is actually sought are among those enumerated in clauses 1–5").

As the Federal Circuit Court of Appeals remarked in a similar situation with respect to the analogous federal rule, "[j]ust as Rule 60(b)(6) is unavailable to reopen a judgment on grounds of newly discovered evidence (existing at the time of trial), *it is unavailable to reopen a judgment on the grounds that new evidence has come into being after the trial has been concluded*." *Fiskars, Inc. v. Hunt Mfg. Co.*, 279 F.3d 1378, 1383 (Fed. Cir. 2002) (emphasis added)[6]; *see also Panzino v. City of Phoenix*, 196 Ariz. 442, 446, ¶¶ 11, 12 (2000) (party who failed to show excusable neglect under Rule 60(c)(1) could not seek relief based on *in*excusable neglect under Rule 60(c)(6)). Any other result would render meaningless Rule 60(c)(2)'s requirement that "newly discovered evidence" have existed at the time of trial. *See Rogers*, 101 Ariz. at 163. Similarly here, Sloan's avenue of relief from the judgment (if any) based on new evidence was to move under Rule 60(c)(2). The fact that she

[6] "It is appropriate to look to federal courts' interpretations of federal rules that mirror Arizona rules." *Haroutunian v. Valueoptions, Inc.*, 218 Ariz. 541, 548 n. 8, ¶ 18 (App. 2008).

cannot meet Rule 60(c)(2) requirements is no reason to grant her second bite at the apple under Rule 60(c)(6) instead. Otherwise, there would be no limit on the ability of dissatisfied parties to reopen judgments years or even decades later based on evidence that did not exist at the time of trial. This would destroy the finality of judgments, which is precisely what Rule 60(c)(2)'s six-month time limit is designed to avoid. *See Webb v. Erickson*, 134 Ariz. 182, 186 (1982) (emphasis added).

Sloan's attempt to circumvent the time limit and requirements of Rule 60(c)(2) finds no support in *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430 (App. 2012), which did not involve new evidence. There, as explained in the Opening Brief, relief was warranted under Rule 60(c)(6) (even though the party also raised grounds under Rule 60(c)(1) and (3)) because a failure to grant relief not only would have resulted in a fraud on the court, it would have substantially deprived the moving party of the benefits of a settlement agreement and granted a windfall to the opposing party. The court held that this presented "exceptional *additional* circumstances" warranting relief from the judgment "in the interest of justice." *Id.* at 433, ¶ 10 (emphasis added). For the reasons discussed more fully in Argument II, this case

does not present such "exceptional additional circumstances," nor would declining to overturn the jury's verdict result in "injustice" on Sloan, to whom Farmers paid over one million dollars in full compensation for her loss after criminal charges were dismissed.

B. Sloan's New Evidence Does Not Meet the Requirements of Rule 60(c)(2).

Evaluated under the proper standard, Sloan's new evidence did not warrant setting aside the jury verdict.

1. The new evidence was created after trial.

"Newly discovered evidence" under Rule 60(c)(2) means evidence that existed at the time of trial or judgment. *Rogers*, 101 Ariz. at 163. For example, as noted above, first responders reported furniture and boxes blocking Sloan's door. If Sloan discovered evidence after trial that the first responders moved the items there themselves, and that Farmers knew and failed to disclose this, it might constitute "newly discovered evidence" warranting a new trial. *See, e.g., Limon v. Double Eagle Marine, L.L.C.*, 771 F. Supp. 2d 672 (S.D. Tex. 2011) (granting relief from summary judgment under Fed. R. Civ. P. 60(b)(2) based on newly discovered evidence that defendants moved barge to area where barge

accident occurred after defendants denied this at trial). In that situation, if the evidence had been properly disclosed, Sloan could have used it to show Farmers' reliance on the first responders' statements and reports was not reasonable.

That is not the situation here. The DPS Report was issued over two years after trial ended. (AB App. Tab 1, Ex. 5 at 37-103). The MCAO/PFD decisions came even later. (Id., Ex. 2 at 21-22). This evidence cannot constitute grounds for overturning the jury verdict under Rule 60(c)(2).

2. <u>The new evidence is inadmissible.</u>

Evidence *must* be admissible to qualify as "newly discovered evidence" under Rule 60(c)(2). *U.S. v. McGaughey*, 977 F.2d 1067, 1075 (7th Cir. 1992); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1120 (W.D. Wash. 2010); *see also Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 595, ¶ 17 (App. 2007) (newly discovered evidence must be such that it would have changed the result). Here, the trial court expressly declined to "make[] [any] findings with regard to the relevance or admissibility of these post-trial investigations." (R. 1410).

Granting Sloan's Rule 60 motion without determining the admissibility of the new evidence was itself reversible error.

Moreover, the new evidence Sloan seeks to introduce would be *in*admissible in a new trial. The only issue at trial was whether Farmers acted reasonably in handling Sloan's insurance claim and her requests to turn over portions of Farmers' file in 2009 and 2010. *See Brown v. Super. Ct.*, 137 Ariz. 327, 336 (1983). Evidence that DPS recommended criminal charges against two of the PFD investigators *four years later* in 2014, or that the MCAO subsequently refused to prosecute cases involving these investigators, has no bearing on the reasonableness of Farmers' actions given the circumstances at that time. It is therefore irrelevant and inadmissible. *See* Ariz. R. Evid. 401, 402.

The DPS Report and MCAO/PFD decisions are also inadmissible hearsay. *See* Ariz. R. Evid. 801(c), 802. Unlike police reports, they do not fall within the public records exception to hearsay for "a matter observed while under a legal duty to report." *See* Ariz. R. Evid. 803(8)(A)(ii); *cf. Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 484, ¶ 31 (App. 2009) (reports reflecting matters a public official *observed or heard* and reported pursuant to official duties are admissible in civil cases

under public records exception to hearsay rule). Even if Sloan *could* somehow fit them into the public records exception, she would still have to establish foundation for the documents by having the DPS detective who authored the DPS report, Maricopa County Attorney Bill Montgomery, and others who authored the evidence Sloan seeks to admit testify at a new trial.[7]

C. To the Extent the DPS Report Described Events Before Trial, the Information Was Already Known, Was Cumulative, and Would Not Have Affected the Outcome.

Evidence created after trial can be "newly discovered" within the meaning of Rule 60(c)(6) if the events it purports to describe took place before judgment was entered. *See, e.g., In re Nexium (Esomeprazole) Antitrust Litig.*, 309 F.R.D. 107, 132 (D. Mass. 2015). Here, the DPS Report was certainly based on events that happened before trial. But all of the documents, witness testimony, and Grand Jury materials that the DPS investigator reviewed were in Sloan's possession at the time of trial.

[7] Any arguable probative value of evidence that DPS recommended criminal charges against these Captains or that MCAO refused to prosecute cases they investigated, would also be vastly outweighed by prejudice to Farmers and the likelihood of confusing and misleading the jury into erroneously thinking Farmers must prove Sloan *actually* committed arson. *See* Ariz. R. Evid. 403.

Indeed, she was the one who provided most of the materials to DPS. (AB App. 44).[8]

None of this material is even arguably "newly discovered" as it was obtained by Sloan well before trial, presented by Sloan during trial, and discovered in plenty of time for her to move for a new trial within the time required under Ariz. R. Civ. P. 59(d). *See Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211–12 (9th Cir. 1987) (expert's testimony was not "newly discovered" when evidence on which testimony was based had been in movant's possession since start of litigation). And as discussed more fully in Argument III below, the evidence was cumulative and would not have made a difference in the verdict. *See Ruesga*, 215 Ariz. at 595, ¶ 17. It therefore cannot be the basis for setting aside the jury verdict under Rule 60(c)(2).

D. Sloan failed to file her motion within six months.

Even assuming Sloan could somehow overcome these hurdles, she still failed to file her motion within six months after entry of judgment. *See* Ariz. R. Civ. P. 60(c). The trial court therefore lacked authority to

[8] Because all of this evidence was in Sloan's possession, she had plenty of opportunities to impugn the Captains' investigation at trial, and she took full advantage of them.

overturn the judgment. *See McKernan v. Dupont*, 192 Ariz. 550, 554, ¶ 12 (App. 1998), *disapproved of on other grounds by Panzino v. City of Phoenix*, 196 Ariz. 442 (2000); *see also Andrew R. v. Arizona Dept. of Econ. Sec.*, 223 Ariz. 453, 461, ¶ 25 (App. 2010).

II. EVEN IF THE TRIAL COURT COULD CONSIDER THE NEW EVIDENCE UNDER THE "CATCH ALL" PROVISION OF RULE 60(C)(6), THESE DID NOT CONSTITUTE "EXTRAORDINARY CIRCUMSTANCES."

Rule 60(c)(6) authorizes a court to vacate a judgment for "any other reason justifying relief from the operation of the judgment" beyond the specific reasons listed in subsections one through five. It may be applied *only* when: (1) relief is not available under any of the other subsections to the rule; (2) the "other reason" advanced is one that justifies relief; and (3) Arizona's "systemic commitment to finality of judgments is outweighed by extraordinary circumstances of hardship or injustice." *Panzino*, 196 Ariz. at 445, ¶ 6.

This Court has found that "extraordinary circumstances of hardship or injustice" warranted relief from a final judgment when post-judgment *events* created an injustice, such as where a husband's post-divorce decree bankruptcy potentially left the wife solely responsible for

community debts the decree equitably divided, *Birt v. Birt*, 208 Ariz. 546, 556, ¶ 37 (App. 2004), or where a later appeal rendered the post-judgment interest rate stated in the judgment incorrect, *Minjares v. State*, 223 Ariz. 54, 61, ¶¶ 29-32 (App. 2009). Arizona Courts have also found 60(c)(6) relief appropriate in cases where a party: (1) had a lawsuit dismissed for lack of prosecution despite diligent prosecution and a meritorious claim, *e.g. Jepson v. New*, 164 Ariz. 265, 277 (1990); (2) had summary judgment entered against him while on active military duty preparing for deployment, which the trial court knew about, *Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, 364 ¶¶ 26–27 (App. 2015); and (3) filed a delayed appeal despite diligent efforts to check entry of judgment because the court misplaced the case file, *Davis v. Davis*, 143 Ariz. 54, 57–59 (1984).[9] Farmers did not find a single Arizona case in which Rule 60(c)(6) relief was granted to vacate a jury verdict and order a new trial based on "new evidence" that was not even created until years after judgment was entered. Notably, Sloan cites no such case, either.

[9] This list is illustrative rather than exhaustive.

Nor is this a case where the policy favoring finality of the judgments is outweighed by additional, "extraordinary circumstances of hardship or injustice." Sloan had her day in court and presented all the evidence on which the DPS Report relied. Farmers has fully compensated Sloan for her loss by paying her over $1 million under the policy. Criminal charges against Sloan were dropped. To the extent Sloan was harmed by the real wrongdoers— Captains Richardson and Andes—Sloan has filed a lawsuit against them which is pending.

Sloan's sole argument for why this case presents "extraordinary circumstances" warranting relief from a final judgment under Rule 60(c)(6) is Farmers' alleged use of a "de facto arson defense" at trial and purported reliance on the PFD investigation in support of that defense. Sloan contends: "Farmers could have pursued its defenses without arguing to the jury that Sloan burned her house down, but it elected not to do so. Farmers' intentionally prejudicial use of law enforcement in this effort lent undeserved and inaccurate credibility to Farmers' arguments, no matter what Farmers says now." (AB at 40). This is essentially the same reason the trial court gave for granting relief from the judgment under Rule 60(c)(6). (R. 1410) (". . . Farmers relied on a de

facto arson defense. . . . [I]ts central argument . . . was that the MCAO and grand jury ('people much like yourselves') believed Sloan was an arsonist. . . . And the tree from which this argument grew was the integrity of the PFD investigation.")

The characterization of Farmers' theory at trial as a "de facto arson defense" is simply not supported by the record for the reasons discussed on pages 22 through 27 of the Opening Brief. Farmers presented arson evidence to support its defense that it had acted reasonably in its initial denial of Sloan's claims and its handling of Sloan's request for Farmers to turn over its C&O Report and claim file. Evidence that Sloan set fire to her own house was highly relevant to this defense because it tended to show that a reasonable insurer would have denied the claim based on arson. To the extent that Farmers was "riding two horses" at the beginning of trial (*i.e.,* arguing that it acted reasonably *and* that Sloan committed arson), this was wholly driven by Sloan's refusal to voluntarily withdraw her breach of contract claim even though Farmers had already paid her over one million dollars under the policy and asked her to dismiss this claim prior to trial. (OB at 47-49). Farmers did not know that the breach of contract claim was formally out of the case

until the trial court granted JMOL on this claim to Farmers midway through its presentation. (R. 1240). Until then, Farmers had no choice but to lay the groundwork for an arson defense through its preliminary jury instructions, opening statement, and trial evidence. Most of that trial evidence had nothing to do with Captains Richardson or Andes, and instead relied on the observations of first responders, a Southwest Gas investigator, and Farmers' own investigation.

Sloan mischaracterizes the record in claiming Farmers presented a "de facto arson defense" during closing argument. She repeatedly takes out of context one phrase at the end of Farmers' closing suggesting that "friends relatives, and everyone else" would believe "she burned her house down." When viewed in context of the closing and the trial as a whole, it is clear that this argument went directly to the reasonableness of Farmers' handling of Sloan's claim, which was the actual focus of Farmers' closing argument. (OB at 46-52).

Sloan further misrepresents Farmers' closing argument in contending that Farmers improperly touted Captain Richardson's credibility to support its defenses. In reality, Farmers relied very little on

Richardson, and focused instead on first responder accounts, as the following passage demonstrates when placed in context:

> Here are the people who came in and testified. ... These firefighters aren't getting paid for their testimony, they have no ax to grind whatsoever. **Captain Palmer, Captain Henkle, Blaylock**.

(RT 5/29/2012 at 68:3-7; see also 68:8-70:2 (discussing Henkel and Blaylock testimony) (emphasis added)). The *only* reason Farmers mentioned Captain Richardson and played a clip of his deposition during closing was to rebut Sloan's argument that she never would have been prosecuted if Farmers had disclosed its log notes and the C&O Report to her earlier, as Farmers' introduction to the clip made clear:

> I want [to] play this one by Richardson, the clip of the trial testimony, so you can see there's no doubt that these log notes and this report made absolutely no difference in whether or not she was going to be prosecuted by a reasonable prosecutor or not.

(RT 5/29/2012 at 100:16-21; see also 80:16-81:23). It is absurd to argue Farmers should have completely ignored evidence of what the first responders found, when the DPS Report did not question their credibility at all, and when Sloan put this evidence directly at issue by accusing Farmers of bad faith.

Even assuming for argument's sake Farmers: (1) asserted a "de facto arson defense"; and (2) relied on the "integrity" of Captains Richardson and Andes, Sloan waived any error by failing to object at trial or include this argument in her new trial motion. *See Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 364, ¶ 56 (App. 2014) (party's assertion of improper closing arguments waived on appeal because party failed to object at trial). After JMOL was granted on the breach of contract claim, a de facto arson defense would be no more "improper" or "prejudicial" *after* the DPS Report was issued than beforehand. The DPS Report relied on facts and evidence *already known to Sloan* and, in many cases, provided to DPS by her. Sloan *knew* at trial that the investigation conducted by Captains Richardson and Andes was (in her opinion) highly flawed, and she made this known to the jury. (OB at 55-56). By closing argument, Sloan also knew her breach of contract claim was no longer at issue. If Farmers had truly asserted an improper and prejudicial "de facto arson defense" during closing argument based on the "integrity" of a compromised PFD investigation, Sloan should have objected and moved for a new trial on this basis, but she did not.

A waived legal theory for reversal is not the type of "extraordinary circumstances of hardship or injustice" warranting relief under Rule 60(c)(6), with or without "new evidence." *See Tippit v. Lahr*, 132 Ariz. 406, 408–09 (App. 1982) (Rule 60(c)(6) is intended to address "extraordinary circumstances *that cannot be remedied by legal review*") (emphasis added). Sloan cannot use Rule 60(c)(6) to relieve herself from the "free, calculated and deliberate choice[ ]" she made not to object to what she now claims was prejudicially improper argument. *See Park v. Strick*, 137 Ariz. 100, 104 (1983).

"'As a matter of public policy, a judgment must at some time become final, . . . [or] there could never be any certainty as to the rights acquired thereunder.'" *Panzino*, 196 Ariz. at 448, ¶ 18 (quoting *Vazquez v. Dreyfus*, 34 Ariz. 184, 188 (1928)). No injustice or hardship in this case warrants vacating a jury verdict that was rendered after a fully and fairly litigated trial. The trial court accordingly abused its discretion in granting Sloan's motion under Rule 60(c)(6).

III. THE NEW EVIDENCE WAS ALSO CUMULATIVE AND WOULD NOT HAVE CHANGED THE VERDICT.

It has long been the standard in Arizona that Rule 60(c) relief cannot be granted based on newly discovered evidence that is either cumulative or would not have made a difference at trial. *See, e.g., Ruesga*, 215 Ariz. at 595, ¶ 17 ("'[A] judgment will not be reopened if the evidence is merely cumulative and would not have changed the result.'") (quoting *Ashton v. Sierrita Mining & Ranching*, 21 Ariz. App. 303, 305 (1974)). This is also the standard under the federal rules. *See, e.g., United States v. Int'l Broth. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (movant must demonstrate new evidence was "of such importance that it probably would have changed the outcome" and "not . . . merely cumulative or impeaching"); *Jones v. Aero/Chem Corp*., 921 F.2d 875, 878 (9th Cir. 1990) (movant must show new evidence "was of such magnitude that production of it earlier would have been likely to change the disposition of the case"). Sloan's new evidence does not meet these requirements, and she should not be permitted to avoid them simply because the evidence for which she seeks a retrial was created after entry of judgment.

A. The New Evidence Is Cumulative.

Sloan fails to refute that the information in the DPS Report is cumulative of evidence available to her at trial. (OB at 54-59). For example, Sloan contends that "[t]he DPS Report particularly focused on the testimony that Captain Richardson provided to the grand jury, finding that he had provided false testimony on multiple critical issues, including the work he had performed investigating the garage fire, the supposedly barricaded front door, and the gas line." Sloan provides no record citation for these statements, but the alleged discrepancies are discussed at pages 9 through 13 of the DPS Report. (AB App. 49–53). Detective Contreras identified the discrepancies primarily based on: (1) Richardson's PFD report numbers 2009-90738252 and 2009-90774688; (2) a supplement to PFD report number 2009-90774688 authored by Southwest Gas employee Ken Baldwin; (3) the grand jury transcripts; (3) Richardson's May 14, 2010 and September 29, 2010 depositions and exhibits thereto; (4) the deposition transcript of PFD Firefighter Kurt Henkel; (5) the deposition transcript of PFD Captain Robert Blaylock. (Id). Sloan possessed all of these materials before trial.

Sloan argues the DPS Report also reflected "twelve interviews and independent research by DPS officers." (AB at 45).[10] But she fails to point to a single piece of information divulged in either the interviews or the "independent research" that was new to the parties or would have changed the jury verdict.

B. The New Evidence Would Not Have Changed the Result.

Sloan fails to point to a single piece of information in the DPS Report or MCAO/PFD decisions that would have changed the result at trial. Sloan argues that "[a]t the time of the jury verdict, no formal determination existed with regard to the Captains' purported credibility or status." (AB at 46). But her argument conveniently ignores the fact that the Captains' investigation played only a small part at trial: (1) neither Richardson nor Andes was called as a witness; (2) Farmers did not present any "arson dog" evidence; (3) only Richardson's report was admitted toward the end of trial, and excerpts of his deposition were played as designated by *both parties*; and (4) Farmers played one clip from Richardson's deposition during closing to show that Farmers'

[10] All but four of the interviewees were deposed as part of the civil and/or criminal case. (Compare AB App. 44 with AB App. 101.)

"exculpatory" evidence made no difference to him or the prosecutor in deciding they had enough evidence to prosecute. Sloan also ignores the extensive evidence supporting Farmers' decisions that had nothing to do with the Captains' investigation, which is set forth at length on pages 10 through 38 of the Opening Brief and in Farmers' Reply to Sloan's Statement of Facts above.

The relevant question for purposes of relief under Rule 60(c)(2) is whether the jury could have reached the same verdict even if it completely disregarded the findings and testimony of Captains Richardson and Andes. Because the answer is unequivocally "yes," Sloan's attempt to overturn the verdict must be denied.

To the extent Sloan relies on MCAO's decision not to prosecute cases investigated by Richardson and Andes and/or the PFD's placement of the Captains in the Maricopa County Law Enforcement Integrity Database, these events took place years after Farmers conducted its investigation and made its coverage decisions. They simply have no relevance to whether Farmers acted reasonably in light of the circumstances at that time and would be inadmissible in a new trial.

In short, evidence of the DPS Report and MCAO/PFD decisions is cumulative at best and completely irrelevant at worst, and there is no reason to believe it affected the jury's verdict or would change the result on retrial. The trial court therefore abused its discretion in granting Sloan's motion whether analyzed under Rule 60(c)(2) *or* 60(c)(6).

IV. RELIEF WAS NOT ALTERNATIVELY APPROPRIATE DUE TO A "FRAUD ON THE COURT."

Sloan briefly argues relief is also warranted under Rule 60(c)(6) because there was a "fraud on the Court." The trial court did not set aside the jury's verdict on this basis, nor should it have. As set forth in the Opening Brief and in Farmers' Response to Sloan's Rule 60(c) motion, other evidence shows PFD's arson conclusion was correct, Farmers had a right to rely on its investigation, and no "fraud on the court" occurred. (R. 1386-87). Even assuming Richardson's Grand Jury testimony was false and/or his findings could be characterized as "fraudulent," there is no evidence Farmers knew about any "fraud" or false statements by Richardson when it handled Sloan's insurance claim. At oral argument on the Rule 60(c) motion, the trial court *repeatedly* asked Sloan's counsel to identify what evidence showed Farmers knew

of the alleged misconduct identified by DPS, but he was unable to identify any. (RT 3/24/15 at 17:24-18:10, 29:11-31:7, 31:8-32:24). Thus, Richardson's conduct cannot be attributed to Farmers. Regardless, Farmers initially denied the claim based on evidence developed during its own investigation, including PFD's report and the indictment. Whether that information now turns out to be true or false has no bearing on whether it was reasonable for Farmers to rely on that information at the time.

Sloan's reliance on *Hazel-Atlas* and other cases regarding "fraud on the court" is misplaced as those cases involved a fraudulent scheme *by a party*, or situations where the court actually *denied* the requested relief on similar facts. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). In *Hazel-Atlas*, relief was granted but the actual fraud was much more egregious than DPS' partially informed opinions regarding the truthfulness of Richardson's Grand Jury testimony. *Hazel-Atlas* also distinguished the very situation presented here:

> *This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.* Here, even if we consider nothing but Hartford's sworn admissions, *we find*

> *a deliberately planned and carefully executed scheme to defraud* not only the Patent Office but the Circuit Court of Appeals.

322 U.S. at 245 (emphasis added); *see also Rogone v. Correia*, 236 Ariz. 43, 335 P.3d 1122, 1127 (App. 2014).

In sum, even if the testimony and/or findings by Captains Richardson or Andes in the criminal case were false, this does not constitute a "fraud on the court," a point with which the trial court clearly agreed.

CONCLUSION

For the reasons set forth above and in the Opening Brief, Farmers respectfully requests the Court to reverse the trial court's order granting Rule 60(c) relief and to reinstate the jury's verdict and Judgment.

DATED this 3rd day of October, 2016.

JONES, SKELTON & HOCHULI, P.L.C.

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CERTIFICATE OF COMPLIANCE

1. This Certificate of Compliance concerns:

X A brief, and is submitted under Rule 14(a)(5)

___ An accelerated brief, and is submitted under Rule 29(a)

___ A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)

___ A petition or cross-petition for review, a response to a petition or cross-petition for review, or a combined response and cross-petition, and is submitted under Rule 23(h).

___ An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the attached brief, motion or petition uses type of at least 14 points, is double-spaced, and contains 7,842 words.

3. The document to which this Certificate is attached [ ] does not, or [X] does exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

/s/ Lori L. Voepel

CERTIFICATE OF SERVICE

Lori L. Voepel, being first duly sworn, upon oath states that on this 3rd day of October, 2016, she caused the original of the foregoing REPLY BRIEF to be electronically filed through AZTurboCourt and that she caused a copy of the foregoing brief to be deposited in the United States Mail, postage prepaid, to:

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