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

OPENING BRIEF

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INTRODUCTION

This is a bad faith case involving insurance claims brought by Barbara Sloan after her house and vehicles were destroyed by fire in 2009. Following a 24-day trial, the jury issued a verdict in Farmers' favor based on overwhelming evidence establishing that Farmers had acted reasonably: (a) by initially denying Sloan's insurance claims (which were paid in full after criminal arson charges against Sloan were dismissed in 2010); and (b) by not turning over to Sloan its internal fire investigator's preliminary C&O report and Farmers' claim file until after privilege issues could be judicially resolved.

Nearly two and a half years later, the trial court granted the extraordinary relief available under Rule 60(c)(6), Ariz. R. Civ. P., and overturned the jury's verdict. It did so based upon a 2014 Department of Public Safety Report (DPS Report) finding that two Phoenix Fire Department Captains (Richardson and Andes) had committed misconduct in association with their investigation of Sloan's fire and in securing a criminal indictment against Sloan. Farmers, however, did not rely on the Phoenix Fire Department (PFD) investigation and/or Sloan's indictment to prove an "arson defense." Rather, it presented evidence of the PFD investigation, as well as its own exhaustive claims investigation and other evidence, to prove its conduct was reasonable at the time it initially denied Sloan's insurance claims and her request to turn over Farmers' file and report, both of which occurred in 2009 and 2010. What an agency found in a subsequent investigation over four years later is totally irrelevant to what Farmers based its decisions and conduct on at the time it handled Sloan's claims.

The recent DPS Report would certainly have been relevant in overturning any criminal conviction Sloan might have received. And it would arguably have been relevant had Farmers never paid Sloan's insurance claims in reliance on Captain Richardson's and Captain Andes' investigation and conclusions. Or, it would have supported a new trial had Sloan lost a civil suit for damages against those Captains and/or the fire department. But none of those are at issue here. This is not a criminal case; the State dismissed criminal charges against Sloan back in 2010. Nor is this a civil case Sloan brought against the Captains or fire department in which there was a defense verdict. <u>This is a bad faith case that all parties agreed turned totally on the reasonableness of Farmers' conduct in 2009 and 2010</u>. Farmers paid Sloan's claims shortly after the criminal charges were dismissed in December 2010. The DPS Report is therefore utterly irrelevant to the issues in this case and to the defenses Farmers presented at trial.

Even if the DPS Report had some arguable relevance, Captain Richardson's statements were only a small part of Farmers' defense, and Farmers did not call Captain Andes or focus on his investigation at all. The indictment and PFD investigation were likewise only a small part of Farmers' claims investigation and defense. To the extent the trial court found otherwise, it relied on a few statements Sloan "cherry picked" from Farmers' closing argument which, taken in context, were meant to establish <u>the reasonableness of Farmers' conduct in 2009-2010</u>.

Moreover, the portions of the PFD investigation Farmers did rely on in 2009-2010 centered around the statements and reports of the first responders, not Captains Richardson or Andes. The DPS Report did not address the credibility or conduct of those other firefighters. Nor did it address any other evidence upon which Farmers based its initial denial of Sloan's claims. As shown below, evidence from the first responders and other evidence against Sloan, including her poor credibility and shifting explanations, was overwhelming and <u>that</u> is what collectively informed Farmers' decisions during the relevant timeframe.

Additionally, Sloan's main theory at trial was that Farmers acted unreasonably in failing to turn over its fire investigator's preliminary report and its claim file, which she argued were "exculpatory" and would have aided in her defense against criminal charges in 2009. Farmers presented substantial evidence regarding the reasonableness of its conduct with regard to this so-called exculpatory evidence, as well as evidence showing its conduct did not cause Sloan's damages or result in her indictment. That major aspect of this case had absolutely nothing to do with Richardson's and Andes' conduct.

Finally, at the time of trial, both parties already knew the information about the discrepancies and unreliability of Richardson's and Andes' investigations upon which the DPS Report based its findings. Indeed, DPS obtained most of that information <u>from Sloan</u> after she lost this trial. The parties presented and discussed that information throughout this trial, and Sloan could have presented more had she chosen to do so. The information about Captains Richardson and Andes is therefore not "new" and the DPS Report (assuming its admissibility) would have made no difference in the jury's verdict.

The only part of DPS' Report that is "new" involve DPS' findings of misconduct by Captains Richardson and Andes. But all agree there is no evidence Farmers had any knowledge of that "misconduct," so DPS' opinions to that effect are also irrelevant in determining whether Farmers' handling of Sloan's claims between 2009-2010 was reasonable.

The trial court clearly erred and abused its discretion in ordering the extraordinary remedy of a new trial under Rule 60(c)(6) based upon a report issued two and a half years after the jury verdict, which had little or nothing to do with the relevant issues at trial and would not have made a difference in the verdict.

STATEMENT OF THE CASE

This lawsuit arose from a residential fire that occurred on May 13, 2009. (Index of Record "R" 1). Plaintiff-Appellee Barbara Sloan (Sloan) submitted three insurance claims to Defendants-Appellants Farmers Insurance Company of Arizona (Farmers) for fire damage to her home and two vehicles. (Id. at ¶¶ 14-16). The Phoenix Fire Department conducted an investigation concluding this was an incendiary (arson) fire caused by Sloan, with multiple points of origin. (Trial Exhibit "TE" 79.001). On September 2, 2009, Sloan was indicted for arson and insurance fraud. (R. 345). Farmers engaged its special investigations unit because of the suspicious circumstances surrounding the fire. (RT 4/23/12 at 28).

On October 29, 2009, while the claim investigation and criminal charges were pending, Sloan filed this bad faith action. (R. 1). She alleged in part that Farmers acted in bad faith by denying her claims, and by withholding certain documents she believed were exculpatory and would have benefitted her in defending against the criminal charges. (Id. ¶ 87).

Following a 24-day trial, the bad faith case was submitted to a jury, which returned a defense verdict. (R. 1258). Judgment was entered December 7, 2012. (R. 1323). Sloan moved for a new trial on December 21, 2012 (R. 1325), which was denied on June 7, 2013. (R. 1343). Sloan filed a timely notice of appeal on July 3, 2013, (R. 1344), and filed her Opening Brief on November 6, 2013. (Ct. Apps. No. 1 CA-CV 13-0475). Sloan appealed on two issues: (1) whether it was error to preclude the case disposition worksheet given that the prosecutors were "unavailable" to testify and could not be cross-examined, and (2) whether the C&O experts should have been precluded by Rule 702, where they were also fact witnesses whose opinions formed the basis for Farmers' decisions. As of May 14, 2014, Sloan's Appeal was fully briefed, and on June 26, 2014, this Court granted oral argument. (Id.).

While that appeal was pending, on November 25, 2014, Sloan filed a Motion to Suspend Appeal and Revest Jurisdiction in Superior Court for the purpose of filing a Rule 60(c) motion for relief from judgment, which this Court granted on January 20, 2015. (1 CA-CV 13-0475).

On January 22, 2015, Sloan filed her Rule 60 Motion in Superior Court. (R. 1375-79). The motion was based on events that transpired after trial, which Sloan herself had orchestrated, including a media campaign she launched against the PFD,[1] and a formal complaint she filed with the Arizona Officer Standards and Training Board ("AZ POST"),[2] which resulted in an investigation by the Department of Public Safety ("DPS") of PFD's investigation of the fire at Sloan's residence. On July 22, 2014, DPS issued a report recommending charges of false swearing against Captains Sam Richardson and Fred Andes. (R. 1375-79, Ex. 5). On October 8, 2014, the Maricopa County Attorneys' Office ("MCAO"), declined to pursue charges against Richardson and Andes. (R. 1402). MCAO, however, decided to decline for prosecution any cases previously investigated by both Captains Richardson and Andes. (R. 1402 at 57).

Meanwhile, PFD conducted its own independent, internal investigation. (R. 1402 at 3). It found no wrongdoing by Captains Richardson and Andes. (Id.).

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[1](See http://legacy.12news.com/story/news/2015/07/14/raked-over--coals-part-one/30055449/).

[2] (R. 1402 at 2).

Although neither Captains Richardson nor Andes testified in this bad faith trial (and only limited deposition excerpts of Richardson were designated and admitted, together with his report), the trial court granted Sloan's Rule 60 Motion on April 7, 2015. (R. 1410). It then signed an amended judgment on November 19, 2015, which set aside the jury verdict on the bad faith claims, but maintained the directed verdict on the breach of contract and conversion claim and the dismissal of claims against Farmers Group, Inc. (R. 1464). The amended judgment also denied attorneys' fees requested by both parties, given the uncertainty of the bad faith claims. (Id.). Farmers filed a timely notice of appeal on December 18, 2015. (R. 1466).

This Court has jurisdiction pursuant to A.R.S. § 12-2101 (A)(1), (2) and (5)(a).

STATEMENT OF FACTS

I. THE FIRE AND FIRE INVESTIGATIONS.

A. The Fire and First Responders.

On May 13, 2009, PFD personnel were called to Sloan's residence where a fire had been reported. Around that same time, an off-duty "good Samaritan" firefighter, Kurt Henkel, was first on the scene after observing smoke coming from the home. (RT 5/9/12 at 92:21-24, 95:4-15). A neighbor said the woman who lived there had just left on her motorcycle. (Id. at 96:4-18). Concerned someone might still be in the home, Henkel tried to enter through the front door but found it locked. (Id. at 97:24-99:21). He attempted to kick in the door, which loosened but did not completely open. (Id. at 98:14-103:4). Something was blocking the door, so he went to the rear of the home, where he saw the fire had vented through the roof near the kitchen. (Id. at 105:4-106: 24, 115:10-21).

PFD Captain Blaylock arrived with the first engine on the scene. (Id. at 135:10-16, 138:13-14, 143:6-18, 144:16-25, 146:7-20, 150:5-22, 160:18-161:5, 163:19-24, 163:9-12). He assigned another engine to the garage fire and took his company to the front door, which he concluded was barricaded. (Id. at 138:24-144:5-11). When firefighters finally forced the door open, they tripped over furniture, boxes and personal belongings inside. (Id. at 145:17-24, 147:8-21, 151:17-23). Blaylock's crew observed and extinguished a fire in the kitchen. (Id. at 147:23-148:3). Other firefighters also observed the kitchen fire (RT 5/9/12 [Wolf] at 187:9-25, 189:24), and found one of the stove control knobs in the "on" position, which was contrary to Sloan's claim she hadn't used the stove in days. (RT 5/9/12 at 185:7-12; TE 64 at 22:21-23:2, 39:14-23).

Captain Palmer, who was assigned to fight the garage fire, found 2 propane tanks in the garage and heard sounds coming from the laundry room, which he determined to be coming from the flex line connected to the dryer. (RT 5/10/12 at 10:16-20, 13:6-17, 14:2-23). He testified there were two fires—one each in the garage and laundry room. (Id. at 16:11-15, 25:4-8, 28:1-11).[3] When another crew shut off the gas, the laundry room fire extinguished. (Id. at 30:1-16).

[3] Sloan's own fire expert admitted that multiple points of origin, blocked exits and homeowner's presence in the home near the time of fire are "red flags" of arson. (TE 744 at 110-118; RT 5/2/12 [Andler] at 235:9-11, 235:15-17).

B. The Southwest Gas Investigation and Laundry Room Fire.

Another independent witness, Ken Baldwin of Southwest Gas, was dispatched to secure the gas meter and to evaluate and report the role of natural gas in the fire. (RT 5/9/12 at 194:15-197:14-21). In the laundry room, he observed a clothes iron that was plugged in, turned "on" and lying facing down on a towel on top of the dryer. (Id. at 207:14-208:19). He also found gas flowing into the home, which he reported to PFD. (Id. at 207:6-24). Baldwin discovered the flex line to the gas dryer disconnected and the gas valve partially open. (Id. at 207:16-208:-24). Baldwin confirmed and billing records revealed that Sloan had used 141 therms of gas in that cycle, compared with just 4 therms in the prior cycle. (Id. at 214:21-215:14).

Baldwin testified that his "drop test" revealed there were no leaks in the line, and the flex line was not "stripped" (as Sloan later claimed).[4]

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[4] Sloan did not initially report any "leak" or open gas valve to any investigators. (TE 58; TE 64l /RT 5/8/12 [Sloan] at 231:23-232:11). Rather, she said she disconnected the flex line from the dryer one month before the fire so she could paint the laundry room, but could not reconnect it because it was "stripped." (TE 64 at 30-31). Sloan later presented a contrary story, claiming that her boyfriend, Kevin Kauffman, had discovered an open gas valve several weeks before the fire. (TE 771 at SKIP 516). She later changed that story again, claiming

(RT 5/9/12 [Baldwin] at 216:4-217:9; TE 79.0001 at RICHARDSON 0099, 0108-0109). Thus, a leak would not explain the rise in gas usage preceding the fire, and the partially open valve was the only place from where gas escaped the line during the fire.

C. **<u>PFD's Fire Investigation.</u>**

Based on the above information obtained from independent witnesses and first responders, as well as on his interview of Sloan, Captain Richardson prepared a report recommending criminal charges against Sloan, stating:

> The house was for sale for a long period of time. The gas line was taken off the back of the dryer was used as an accelerant. The boxes and dresser drawers were open and the stacked furniture in the rooms were used as fuel for the fire. The iron was lying face down on top of the dryer plugged in the wall outlet and on. The stove burner in the kitchen was turned in the 'on' position these were used as heat sources. Accelerant were used in the kitchen and dining room where Sadie showed intrust [sic]. Barbara's interview with me conflicts with the interview she gave to the Farmers Insurance adjuster. Barbara should be charged with ARS 13-1704, arson of an occupied structure, and endangerment.

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that Kevin discovered the gas in the home just days before the fire. (RT 5/9/12 [Sloan] at 15:15-18:14).

> …
>
> The next day I was contacted by Bob Laubacher, the private fire investigator Farmers hired to investigate the fire. …Bob wrote a preliminary report to Farmers Insurance stating an undetermined fire until all evidence is found in this case.

(TE 79.001).[5] Captain Richardson also relied on Toyota's inspection, which determined that the vehicles in the garage did not cause the fire. (R. 1222-28 at 273:6-14, 326:13-17). After Richardson's final report was submitted to the State, Sloan was indicted. (Id. at 301:11-302:4).

D. Farmers' Claim Investigation.

While PFD conducted its investigation, Farmers conducted its own claim investigation. It initially engaged a subrogation attorney who retained certified fire investigator, Robert Laubacher, to investigate the cause and origin of the fire. (RT 4/23/12 at 24:10-14, 25:2-16). Laubacher prepared two reports. (TE 129, 130). The first was a

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[5] Sloan's own fire expert admitted that the factors Richardson relied on, such as multiple points of origin, blocked exits, financial distress, homeowner's presence in the home near time of fire, flight before fire, origin in close proximity to volatile materials, a stove left on high, an iron left on, and high gas usage and an open gas valve were all "foreboding" signs or "red flags" of arson. (TE 744 at 110-118; RT 5/2/12 [Andler] at 231:2-7; 233:21-235:17).

preliminary report based on his initial inspection of the property, which he prepared just six days after the fire. (TE 129). This preliminary C&O Report contained his initial conclusion that the cause of the fire was "undetermined," but it also included substantial information tending to inculpate Sloan:

> * The physical evidence indicates the fire originated in the southwestern portion of the home in an area that includes the northeast portion of the ***garage and vehicles inside the hall and kitchen area***.
>
> * A complete examination of fire debris in the area of origin uncovered paper, cardboard and plastic boxes, furnishings, two propane tanks, and an ***inordinate*** amount of personal belongs strewn throughout the entire structure.
>
> * The spread of the fire was ***inconsistent with available combustibles***. The fire traveled from the area of origin by convection, conduction and radiation to available combustibles ***and may have been aided by an ignitable liquid***.
>
> * No indications of the fire's originating within the vehicles were noted. All indications are the damage to the vehicles is the result of fire travel.
>
> * Although burn patterns do not support the fire's origination on the kitchen electrical range, the unit's top left-side control appeared to be partially turned on. Investigation revealed the insured had not utilized the range for several days prior to this event. Kitchen countertops were layered with copious amounts of papers and contents.
>
> * Examination of the laundry room revealed the natural gas connection to the unit was disconnected.

> * The available heat and possible ignition sources in the area of origin include an electrical event or malfunction of household wiring or appliances, an unintentional human act, ***and incendiary.***

(TE 129 at 3-6) (emphasis added).

Notwithstanding Laubacher's findings, Farmers initially planned to pay the insurance claims until PFD reported to Farmers several "red flags" indicating arson. (RT 4/23/12 at 27:9-29:15; TE 264 at FICA 9648-9649). Captain Richardson told Farmers there were many unusual circumstances, including that: (1) they found all closet doors and dresser drawers open and furniture piled high; (2) the gas line to the dryer was disconnected and active, and the fire could not be contained until the gas line was shut off; and (3) although Sloan said she left that day through the front door, firefighters found it barricaded by furniture. Captain Richardson told Farmers that in his opinion, the fire was incendiary and caused by Sloan or her boyfriend. (RT 4/23/12 at 29:1-30:10, 45:17-46:11; TE 264 at FICA 9648-9649).

After learning this information, Farmers engaged a special investigation unit ("SIU") to conduct background checks and interview neighbors. (RT 4/23/12 at 28:24-4). On August 10, 2009, it retained attorney Joseph Rocco to conduct Sloan's examination under oath ("EUO") and provide legal counsel regarding coverage. (RT 5/10/12 at 47:25-48:14). Rocco retained several experts to further investigate the fire for Farmers, including an additional certified fire investigator, an electrical engineer, a natural gas expert, and a forensic accountant. (Id. at 101, 119:6-16).

From September 2009 through February 2010, Farmers' investigation continued with Rocco gathering documents, conducting scene and vehicle examinations with experts, and attempting to conduct Sloan's EUO. (Id. at 90:11-24, 92:22-93:3, 94:5-17, 95:16-21, 96:14-97:3). On February 1, 2010, Rocco received a "privilege" request from Captain Richardson pursuant to A.R.S. § 20-1902. (Id. at 97:25-98:3; TE 360). Rocco provided a detailed response with over 1,300 pages of documents from his file. (Id. at 98:4-14). When Rocco confirmed Richardson was looking for financial records, he explained that Farmers' investigation was not yet complete and that some documents were privileged. (RT 5/10/12 at 98:18-99:1).

Sloan finally appeared for her EUO on April 9 and 15 of 2010. (Id. at 97:12-24). During the examination, Sloan revealed new information warranting further investigation. (Id. at 100:5-17). Specifically, she alleged having fumigated her house with "bug bombs" prior to the fire, and indicated she had a second boyfriend, Randy Guinn, who may have had access to the home. (Id. at 100:5-11).

In April-May 2010, Rocco received several reports, including one from another certified fire investigator, Jim Hall, who Rocco had retained in part because of his expertise in vehicle fires, and in part to conduct a "peer review" of Laubacher's investigation. (RT 5/10/12 at 88:15-24, 89:6-17, 101:1-13; TE 131). Rocco relied on Hall's report, which concluded that the fire was incendiary, and which was admitted at trial. (Id. at 101:16-102:1; TE 131). Hall concluded the fire was intentionally set in the garage, kitchen and laundry room, and that "[a]ll other potential causes for the fires were explored, examined and eliminated." (TE 131). Rocco also relied on Laubacher's second C&O Report, which was based on his complete investigation and concluded the fire was "incendiary" and involved "at a minimum … three separate fires." (TE 130 at 22; RT 5/10/12 at 108:6-110:9).

Rocco additionally relied on Forensic and Professional Engineer George Hogge, who provided expertise on electrical issues associated with the home, appliances and the vehicles. (RT 5/10/12 at 111:4-15; TE 136). Following testing, Hogge eliminated as possible sources of the fire: (1) the house electrical systems, (2) microwave oven, (3) refrigerator, (4) gas water heater, (5) vehicles and (6) gas dryer. (TE 136 at 13-14; RT 5/10/12 at 112:1-12). Rocco also relied on the opinions of a natural gas expert, Jay Freeman. (TE 240 at 19).

On May 19, 2010, Rocco prepared a report recommending denial of coverage. (Id. at 120:2-23; TE 240). His report summarized the investigations by Hall and his other retained experts, the PFD investigation, and his own coverage determination. (Id. at 120:24-121:14). Rocco also analyzed Sloan's theories, including that the fire started in the Corolla. (Id. at 121:15-122:4). He learned from Hall that a Toyota fire investigator had attended inspections and concluded that the vehicles did not cause the fire. (Id. at 122:17-124:6).[6]

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[6] Roger Brown, a mechanical engineer experienced with Toyota automotive systems, also excluded the Corolla. (RT 5/17/12 at 52:17-54:19, 125:6-11). The wire Sloan alleged caused the damage was not energized so that could not have caused the fire. (Id. at 95:15-97:2, 124:10-22). The Corolla was exposed to heat from the exterior, not from within the engine compartment. (Id. at 108:24-109:7).

Rocco also found Sloan had a financial motive to start the fire. (TE 240). He relied on a report of Sloan's financial condition prepared by forensic accountant, Kevin Reed, CPA, which showed Sloan was experiencing serious financial problems including more than $117,000 in credit card debt and a negative cash flow of more than $6,000 per month. (RT 5/10/12 at 119:6-16; TE 240 at 4).[7]

E. <u>Farmers' Ultimate Handling of Sloan's Claims.</u>

On June 3, 2010, Farmers denied Sloan's insurance claims based on its determination that the fire was caused by an intentional act of the insured. (RT 5/10/12 at 112:20-23; TE 241). After criminal charges were dismissed, however, Farmers gave its insured the benefit of the doubt and paid Sloan's claims in December 2010. (TE 242). She was paid $659,000 for the house, which was enough to pay off the $500,000 mortgage. (RT 5/17/12 at 195:10-17). She was also paid $266,000 for her personal belongings and $97,000 for living expenses incurred while living in her other home. (Id. at 195:18-19, 196:4-6).

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[7] At trial, forensic accountant, Joseph Epps also testified about Sloan's serious financial problems. (RT 5/17/12 at 172-194). Sloan's own testimony confirmed these findings. (RT 5/9/12 at 39:22-40:16, 41:7-19).

II. THEORIES OF THE CASE AND DEFENSE.

A. Sloan's Theories of the Case.

Sloan asserted two main theories against Farmers: first, that it acted in bad faith by failing to turn over "exculpatory" evidence to Sloan to use in her criminal case; and second, that Farmers both breached its contract and acted in bad faith by delaying payment of her claims. Just before trial, Sloan indicated to the trial court that she would only be presenting evidence regarding the first theory – the failure to provide "exculpatory" evidence. She refused, however, to dismiss her breach of contract claim based on delayed payment of Sloan's claims, forcing Farmers to present evidence defending against both claims.

Sloan's evidence and argument at trial focused heavily on the failure of Farmers to turn over Laubacher's preliminary C&O Report and Farmers' claim file. (RT 5/10/12 at 73:2-74:1). She argued that it contained exculpatory information that would have helped her to defend against the charges in her criminal case. (TE 183, 197; RT 5/10/12 at 73:2-14). Her counsel argued in closing that Farmers had committed bad faith by withholding evidence from Sloan, withholding evidence from PFD, and by unreasonably asserting privilege with respect to those documents.

Sloan also argued that Farmers had conducted an inadequate investigation by "pressuring" fire expert Laubacher into changing his report, and she addressed the "red flags" Farmers had relied on in initially denying the claims. She also presented testimony purporting to show that Farmers had withheld evidence on 5 to 15 other occasions in attempting to prove Farmers' conduct was intentional and was a "pattern and practice" warranting punitive damages. And she presented testimony from a prior prosecutor, Grant Woods, in support of her theory that a "reasonable prosecutor" would not have taken her case to the Grand Jury had Farmers turned over the preliminary report and its claim file earlier.

B. Farmers' Theories of Defense.

1. Farmers Acted Reasonably in Not Turning Over Privileged Documents Until Ordered by the Court.

As to Sloan's "exculpatory evidence" theory, Farmers presented extensive evidence showing that: (a) Farmers acted reasonably in its assertions of privilege as to the claim file and preliminary C&O report;

(b) the evidence Sloan sought was not, in fact, "exculpatory;" and (c) that turning the evidence over earlier in her criminal case would not have made any difference to the State's decision to prosecute.

First, as to privilege, Farmers called Rocco who testified that he took the position the preliminary C&O Report and claim file were privileged because: (1) Farmers' SIU investigation was ongoing; (2) Sloan's representatives had threatened litigation; and (3) the preliminary C&O Report was prepared by Farmers' consulting expert. (TE 196; 44).[8] The parties ultimately resorted to the judicial process, which was initiated by Sloan's criminal attorneys subpoenaing the preliminary C&O Report. (RT 5/10/12 at 75:21-25). Indeed, when Sloan filed this action, the privileged nature of the preliminary C&O Report was being actively litigated in the criminal case. Once this civil suit was initiated, the trial court appointed a special master who reviewed thousands of

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[8] At trial, several of Sloan's experts admitted that asserting privilege with respect to C&O Reports and insurance claim files was appropriate. (RT [Goldstein] 4/24/12 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" expert admitted he had never in his career presented insurance claim file log notes to a grand jury. (RT 4/30/12 [Woods] at 139:14-17, 141:22-142:9).

documents and issued a series of orders in April-May 2010 regarding his conclusions on privilege. (R. 345). In accordance with various special master and court orders in the civil and criminal cases between November 2009 and July 2010, Farmers disclosed all documents determined to be non-privileged, including Laubacher's preliminary C&O Report. (TE 478, 479; R. 44, 46, 78, 345, 385).[9]

Farmers also presented evidence at trial that these documents were not, in fact, "clearly exculpatory," and to the extent that portions were, the PFD and prosecution had those portions already in their possession. Sloan's expert even admitted that Laubacher's report contained potentially inculpatory information, but he viewed the "undetermined" conclusion as exculpatory. (RT 4/24/12 [Harrison] at 214:8-21; TE 449).[10] Importantly, however, Laubacher's "undetermined"

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[9] 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 to be improper. (Id.).

[10] Sloan's other experts agreed. (RT 4/20/12 [Woods] at 146:13-147:19). Sloan's experts also admitted that 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).

conclusion had been expressly incorporated into Captain Richardson's report,[11] so the PFD was well aware of that information long before production of the preliminary C&O report. (TE 79.001; RT 4/30/12 at 152:21-153:9). Because Richardson gave the entire police/fire report to the State prior to Sloan's arrest, prosecutors also already knew about Laubacher's preliminary "undetermined" finding. (R. 1222-28 at 301-02).

Finally, Farmers presented evidence discrediting Sloan's theory that earlier disclosure of these documents would have prevented the filing of criminal charges or led to their earlier dismissal. Toward that end, Farmers presented evidence supporting the criminal charge of arson to show that, even with the preliminary report and claim file, a reasonable prosecutor would have charged Sloan based on the overwhelming arson evidence. (R. 1386-87, Ex. 7).

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[11] Captain Richardson's report stated:

> The next day I was contacted by Bob Laubacher, the private fire investigator Farmers hired to investigate the fire. …***Bob wrote a preliminary report to Farmers Insurance stating an undetermined fire until all evidence is found in this case.***

(TE 79.001) (emphasis added).

Farmers also presented evidence that, in fact, the State did not dismiss the charges after receiving the preliminary C&O Report in November 2009, or even upon receiving the rest of Farmers' non-privileged files between February and May 2010. (TE 3). Instead, and contrary to her insistence that the Report and files were "exculpatory," Sloan successfully moved to exclude all of that evidence from the criminal trial. (R. 78, 345). Even then, the State continued to pursue criminal charges for four more months, relying on other non-excluded evidence, such as the other firefighters' observations, witness interviews (including Sloan's), and the Southwest Gas investigation. (R. 345; RT 5/21/12 at 295:23-296:5). The State did not dismiss the criminal case until October 2010 after deposing Captain Richardson, who admitted substantial doubt regarding Sloan's culpability. (TE 3; R. 345; RT 5/21/12 at 295:23-296:5). The dismissal's proximity to Richardson's deposition gave rise to a strong inference that the State could not continue with the prosecution due to Richardson's poor testimony and admitted weaknesses in his investigation, and had nothing to do with the disclosure of the Farmers' evidence.

2. Farmers Acted Reasonably in Delaying Payment.

Farmers was also forced to present evidence showing its delay in paying the claims was reasonable and done in good faith. Thus, Farmers presented evidence showing it initially denied the claims because it reasonably believed Sloan had caused the fire. This is why the trial court admitted evidence pointing to Sloan's culpability, not because (as Sloan claimed in Rule 60 proceedings) Farmers presented an affirmative "arson defense," which would have allowed Farmers to void its contractual obligations under the policy if proven by a preponderance of the evidence.[12] (RT 2/17/12 at 31:13-25; RT 4/13/12 at 8:9-18). Farmers' defense to this claim did not center on Captain Richardson's or Andes' reports or testimony, as neither were called as witnesses, and only limited portions of Richardson's deposition transcripts were admitted at trial based on designations by both parties. Rather, Farmers primarily relied upon the following independent testimony and evidence – in addition to Rocco's claim investigation -- in defending against this bad faith theory:

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[12] *See Godwin v. Farmers Ins. Co.*, 129 Ariz. 416, 419 (App. 1981).

a. **Testimony of the First Responders.**

As set forth above, the independent PFD firefighters provided compelling testimony regarding the "red flags" they encountered in fighting the fire at Sloan's home. These PFD firefighters were fact witnesses; they were not PFD investigators, and they were not among those whose credibility was implicated post-trial by DPS. They included off-duty firefighter Kurt Henkel, Greg Wolf, Captain Palmer, Captain Blaylock, and Blaylock's company of firefighters who could not get through the front door because it was "barricaded" by furniture, boxes and personal belongings they tripped over when they finally forced their way inside. The first responders, including Blaylock's crew and Captain Palmer and his crew, also reported multiple fires, including the fire in the kitchen discovered and extinguished by Blaylock's crew, and fires in the garage and laundry room discovered by Captain Palmer, who found 2 propane tanks in the garage and discovered gas coming from the flex line connected to the dryer. As all experts (including Sloan's) testified, evidence of multiple points of origin and blocked exits strongly supports an inference that the fire was incendiary.

b. The Southwest Gas Investigation and Laundry Room Fire.

Farmers also relied on independent witness, Ken Baldwin of Southwest Gas, who (as shown above) found a clothes iron in the laundry room that was plugged in, turned "on" and lying face down on a towel on top of the dryer. Baldwin also discovered the flex line to the gas dryer disconnected and the gas valve partially open, and his research of the billing records for the home revealed that Sloan had used 141 therms of gas in that cycle, compared with just 4 therms in the prior cycle. Baldwin also conducted tests showing there were no mechanical leaks and the line was not stripped, as Sloan later asserted.

c. Sloan's Inadequate and Changing Explanations

i. Sloan's evolving testimony regarding the gas line and usage.

At trial, Farmers also focused on the fact that Sloan had an evolving, unconvincing explanation regarding the open gas line and her gas usage, which further supported the conclusion of intentional arson in the laundry room. During recorded interviews shortly after the fire, Sloan reported to both Richardson and Laubacher that she had an electrical problem with light fixtures in the laundry room. (TE 58; TE 64 at 6-7; TE 240 at 8). Sloan also told Laubacher she disconnected the flex line from the dryer one month before the fire, allegedly so she could paint the laundry room, and claimed she could not reconnect it because it was "stripped." (TE 64 at 30-31; TE 240 at 8). Notably, she did not report to either investigator that she had found an open gas valve in her home. (TE 58; TE 64; RT 5/8/12 [Sloan] at 231:23-232:11).

Later, on June 2, 2009, Sloan went to Southwest Gas to determine how her account would be handled during the rebuilding process, and was informed that her account had been flagged as likely having a gas leak. (TE 769). On August 10, 2009, Sloan wrote in an email to her public adjuster that the gas leak "was news to me, as no one had ever mentioned I had a gas leak!" and she was "shocked" at her gas bill. (TE 769; RT 5/9/12 [Sloan] at 11:21-25). Her public adjuster called this "compelling evidence" that the fire was caused by a gas leak, and said they will provide this information to Farmers "at the right time and place." (TE 770). At that point, Sloan had not yet reviewed the PFD report, which contained the findings of Southwest Gas – namely, that there was, in fact, no gas leak. (RT 5/8/12 [Sloan] at 141:3-9; TE 79.001).

On September 8, 2009, contrary to her prior statement to her public adjuster that she was "shocked" by the gas bill and gas leak, Sloan presented a new story via email to her attorney and public adjuster that there was an "obvious" leak prior to May 13, which "can be explained" by her boyfriend, Kevin Kauffman, who she claimed had discovered the leak ***several weeks*** before the fire. (TE 771 at SKIP 516). Sloan later changed her story again, claiming Kevin came over the Saturday just before the fire (5/9/09). (RT 05/09/12 at 15:15-18). She claimed he smelled and heard the gas hissing, found the valve partially opened, turned off the valve, and aired out the house. (RT 05/09/12 at 15:15-18:14).

Upon reviewing the Southwest Gas findings, Sloan clearly realized there were no mechanical leaks and that she needed to explain why the gas usage was so high. The problem with this explanation, however, was that if she and Kevin discovered the open valve and gas in the home just days before the fire, there would no reason for her to be shocked at the gas bill. It is also suspicious that she never reported the open valve in any of the interviews she gave immediately after the fire.

Sloan has never been able to explain how the gas came to be turned on.[13] (RT 5/9/12 at 18:8-14). Nor could she explain why the iron was left on face down on a towel in the laundry room. (RT 5/9/12 [Sloan] at 33:3-13). The evidence regarding the disconnected and active gas line and the iron strongly indicated that the laundry room was intentionally "set up" to burn. More importantly, Sloan's evolving explanation regarding the gas severely undermined her credibility.

ii. <u>Sloan's failure to explain the barricaded door and stove.</u>

Sloan also had no explanation for why the front door was barricaded when the first responders arrived. This was the same door through which Sloan said she had left the house that morning, yet she claimed it was not barricaded when she left. (RT 5/8/12 at 163:1-6; RT 5/9/12 at 32:22-34:3; TE 58 at 7:11-14). Nor could she explain why the kitchen stove was left on that day. (RT 5/9/12 at 32:22-33:2).

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[13] Notably, Sloan forgot to provide her own expert with her stories regarding Kevin "discovering" the open gas valve. (RT 5/2/12 [Andler] at 229:11-25).

iii. <u>Sloan's changing explanation regarding the unusual way in which her belongings were strewn throughout the home.</u>

When firefighters and investigators responded to the scene, they found numerous cardboard boxes of crumpled newspaper, drawers and closet doors open, and personal belongings strewn throughout the house. (TEs 58, 64, 79:001, 130, 240). A wedding dress was laid out on a bed, a Christmas tree was standing in the living room, bags of leaves and grass were in the garage, and "beanie babies" were spread out on the floor and on the bed in one of the bedrooms. (Id.).

In recorded interviews immediately after the fire, Sloan vaguely explained she had been sorting through her belongings to try to figure out what to do with them. (TE 58). She had no concrete plans to move, but was "probably" moving into her other house or possibly buying a house with Kevin. (TE 64). It was not until 11 months after those interviews, during Sloan's EUO, that she first said the contents were spread out because she had fumigated the house with "bug bombs" just 3 days before the fire. (TE 240; RT 5/8/12 at 194:22-195:12). This would have been significant information to Farmers, PFD and the prosecutor because in addition to helping to explain the home's condition, it might have been significant if the bug bomb was flammable. Sloan could not explain why she had not provided this information sooner except to say no one had asked her – a curious response given that she was facing felony charges and prison time. (RT 5/3/12 [Miller] at 242:3-22).

iv. <u>The neighbors, the mail, and Sloan's poor explanations of her whereabouts.</u>

There were additional discrepancies with Sloan's story, which Farmers presented as evidence upon which it reasonably relied in initially denying her claims. On the day of the fire, in a recorded interview, Sloan reported that she had left the house at 5:00 a.m. through the front door and arrived at her office at Scottsdale Insurance at Gainey Ranch in Scottsdale at 5:33 a.m. (TE 58; RT 5/8/12 [Sloan] at 163:1-6; TE 541). Sloan stepped out of the building to make a 9 minute phone call to one of her boyfriends, Randy Guinn. (RT 5/8/12 at 167:10-168:13). She "badged" back into the building at 10:11 a.m. (TE 541; RT 5/8/12 at 167:10-168:13). Thereafter, sometime between 10:11 and 11:00 a.m., she left work and went back to her house to pick up her mail. (TE 58; RT 5/8/12 at 159:13-20; RT 5/9/12 at 28:2-9). Upon her return to her house at 40th Street and Campbell, she parked her motorcycle, walked up to her mailbox (near her front door), and retrieved her mail, all of which took no longer than five minutes. (RT 5/8/12 at 172:3-5; RT 5/9/12 at 26:24-27:7). She did not observe any fire or smoke, did not smell any gas, and did not go inside the home. (RT 5/8/12 at 171:18-23; TE 58).

Sloan then drove to a Shell station to get gas, which was located at the Pavilions in Scottsdale. (RT 5/8/12 at 175:1-7, 175:20-21; 179:1-11). The gas station receipt shows a time of 11:56 a.m., which was 22 minutes after the initial 911 call placed at 11:34 a.m. (RT 5/8/12 at 181:9-11; RT 5/9/12 at 4-7). She testified that it took her approximately 20-25 minutes to travel from her office to her home, and the same amount of time to travel from her home to the gas station. (RT 5/9/12 at 27:8-12).

Based on Sloan's testimony of her whereabouts and the known time of Sloan's badge swipe, the 911 call, and the gas station receipt, Sloan was either at the house when the fire started, or there were unexplained gaps of time in her story. (RT 5/9/12 at 24:24-32:17). Apparently attempting to counter the timeline Farmers presented at trial, Sloan asserted ***for the first time at trial*** that she encountered construction traffic while driving to the gas station after leaving her home. (RT 5/8/12 at 178-182). This new testimony, along with the evasive testimony she provided regarding her whereabouts, clearly harmed Sloan's credibility with the jury and reinforced Farmers' position that it acted reasonably in initially denying Sloan's claims. (RT 5/8/12 at 181:9-188:22).

Sloan's explanation for why she needed to run home mid-day to check her mail in the middle of work also lacked credibility. She said something "reminded" her that she needed to check her mail because she was expecting a PIN for her 401K account, but she could not identify what it was. (Id. at 171:24-172:2; 172:23-173:6; TE 58). Sloan's testimony as to why she would go all the way home to pick up a seemingly insignificant piece of mail was also evasive, and her return home mid-day seemed odd, given that she presumably could have retrieved her mail after work that afternoon. (RT 5/8/12 at 173:2-174:25)

Additionally, Sloan's testimony that she did not smell gas when she returned home was contradicted by independent witnesses – the neighbors and the mail carrier. The mail carrier reported that she smelled natural gas for approximately one week prior to the fire. (TE 240). A neighbor walking her dog between 6:00-6:30 a.m. the day of the fire also smelled natural gas as she approached Sloan's home, and was so alarmed that she went home and reported it to her husband who worked for SRP. (TE 240; TE 79.001). A second neighbor reported smelling gas through her open window. (Id.).

All of these discrepancies and inconsistencies in Sloan's explanations supported Farmers' initial denial of her claims as having been made in good faith. They also supported the jury's verdict, completely independent of the Richardson and Andes investigation.

III. EVIDENCE RELATING TO CAPTAINS RICHARDSON AND ANDES AT TRIAL.

Although the trial court granted Sloan's Rule 60 Motion based on the DPS Report regarding Captains Richardson and Andes, neither were called as witnesses at trial. Nor did Farmers present any evidence about the arson dog, Sadie. Only Captain Richardson's report was admitted toward the end of trial, and excerpts of his videotaped deposition were played for the jury, the latter of which resulted from designations by both parties. (R. 1222-1228).

Farmers did play one clip from Richardson's deposition during closing, but only to show that Farmers' "exculpatory" evidence made no difference to him or to the prosecutor because both believed they had enough other evidence to prosecute. Farmers' counsel specifically prefaced his playing of the Richardson clip by saying: "so you can see there's no doubt that these log notes [from the claim file] and [Laubacher's] report made absolutely no difference in whether or not she was going to be prosecuted by a reasonable prosecutor..." After playing the clip, Farmers' counsel stated: "That's the testimony. He had everything…It made no difference."

ISSUES PRESENTED FOR REVIEW

(1) Did the trial court err and abuse its discretion by deciding Sloan's motion under Rule 60(c)(6) instead of Rule 60(c)(2) where it was based solely on the purported "new evidence" contained in DPS's post-trial report regarding the conduct of Captains Richardson and Andes?

(2) Did the trial court err and abuse its discretion in granting extraordinary relief under Rule 60(c)(6) and overturning the jury's verdict based on the *post-trial issuance* of the DPS Report where:

(a) this recent development was not relevant to the central issues of whether Farmers' *pre-trial conduct* in initially denying Sloan's claims and asserting privilege as to documents in their claim file was reasonable;

(b) neither Richardson nor Andes were called as witnesses, and only limited excerpts of Richardson's deposition were admitted pursuant to both parties' designations;

(c) the allegations against Richardson and Andes upon which the DPS Report was based were known (and referenced) by both parties at trial; and

(d) there is no evidence Farmers knew during its 2009-2010 claim investigation that Captains Richardson or Andes had engaged in any "misconduct?"

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

"Although trial courts enjoy broad discretion when deciding whether to set aside judgments under Rule 60(c), that discretion is circumscribed by public policy favoring finality of judgments and termination of litigation." *Panzino v. City of Phoenix*, 196 Ariz. 442, 448, (2000) (internal quotation omitted). "Parties to a legal action should thereafter be entitled to rely upon such adjudication as a final settlement of their controversy." *Id.* (internal quotation omitted); *see also Rogers v. Ogg*, 101 Ariz. 161, 164 (1966). *overruled on other grounds by U S W. Commc'ns, Inc. v. Arizona Dep't of Revenue*, 199 Ariz. 101 (2000). "Under Rule 60(c)(6), the court may relieve a party from a final judgment for 'any ... reason justifying relief,' provided that the movant can show *extraordinary hardship or injustice for a reason other than the five specified in Rule 60(c)(1).. through (5).*" *Rogone v. Correia*, 236 Ariz. 43, 48 ¶12 (App. 2014) (emphasis added).

II. <u>THE TRIAL COURT ERRED BY DECIDING SLOAN'S MOTION, WHICH WAS BASED ON "NEW" EVIDENCE, UNDER RULE 60(C)(6) INSTEAD OF UNDER RULE 60(C)(2).</u>

A motion for Rule 60(c) relief based on new evidence is only proper when the newly discovered evidence, "by due diligence could not have been discovered in time to move for a new trial under Rule 59(f)." Rule 60(c)(2), Ariz. R. Civ. P.; *see also Rogers*, 101 Ariz. at 164; *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987). Importantly, Rule 60(c)(2) motions must be brought *within six months* after the judgment.

Here, it is undisputed that Sloan's motion, which was unquestionably based on "new evidence" in the form of the DPS, MCAO and PFD opinions and administrative actions regarding Richardson's and Andes' conduct in Sloan's fire investigation, was not brought within six months of the judgment. Thus, as a matter of law, the trial court lacked jurisdiction to consider the motion and was required to summarily deny it. Its failure to do so constitutes reversible error. *Andrew R. v. Arizona Dep't of Econ. Sec.*, 223 Ariz. 453, 459 (App. 2010) (trial court lacked authority to grant Rule 60(c) relief where motion not brought within six months).

To avoid the six month deadline, Sloan instead presented her claim as one under Rule 60(c)(6), arguing that the new evidence of the findings and opinions of DPS and MCAO reveal Richardson's statements constituted a "fraud on the court." Although under Rule 60(c)(6), the court may relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment," the six month time limit for bringing a Rule 60(c)(2) motion may not be avoided merely by asserting that relief is sought under clause (6) "any other reason justifying relief," when the grounds upon which relief is actually sought are among those enumerated in clauses (1)-(5). *Vander Wagen v. Hughes*, 19 Ariz. App. 155, 158 (1973); *see also Rogone*, 236 Ariz. at 48; *Fry v. Garcia*, 213 Ariz. 70, 73, n. 3, (App.2006); *Birt v. Birt*, 208 Ariz. 546, 551, ¶ 22 (App. 2004).

Because the *actual* basis for Sloan's motion – newly discovered evidence -- is clearly a reason specified in Rule 60(c)(2), the trial court erred and abused its discretion by allowing Sloan to avoid the 6 month time limit by instead deciding it under Rule 60(c)(6). In a similar case, this Court specifically held that because the movant's Rule 60(c) motion was premised on grounds provided for by a different subsection of the rule, her motion could not properly "rely on subsection (6) to circumvent the timeliness requirement." *Andrew R.*, 223 Ariz. at 459. Yet, that is precisely what the trial court here permitted Sloan to do.

Although recognizing this categorical rule, the trial court relied on *Amanti Elec., Inc. v. Engineered Structures, Inc.,* 229 Ariz. 430, 433 (App. 2012) (emphasis added), which held that the fact that relief might have been available under one of the first five clauses of Rule 60(c) but for the time limits elapsing, doesn't preclude relief under clause (6) "if the motion also raises exceptional *additional* circumstances that convince the court the movant should be granted relief in the interest of justice." (R. 1410 at 3 n. 5). *Amanti* is clearly distinct. There, the grounds raised were fraud, misconduct, misrepresentation and mistake because the opposing party, which had recently settled with Amanti, had stopped payment on a check intended to be part of a settlement of the case, and refused to re-issue another. *Amanti,* 229 Ariz. at 431. Thus, the failure to grant relief not only would have resulted in a fraud on the court and sanctioning the opposing party's misconduct, but it would have resulted in that party receiving a huge windfall, which was clearly unjust given the terms of the settlement. Here, in contrast, DPS' opinion that Captains

Richardson and Andes mishandled PFD's investigation clearly falls in the category of new evidence. This new evidence was irrelevant to the issues at trial and would not have impacted the jury's determination of whether Farmers acted reasonably by initially denying Sloan's claims and/or by withholding its claim file *based on the available evidence and investigations Farmers relied upon at that time (2009-2010).* Moreover, although Sloan argued that the DPS Report revealed a "fraud on the court," the trial court did not make any such finding or grant Rule 60 relief on that basis. As noted above, the trial court's findings indicate the contrary. Thus, the trial court also clearly erred in allowing Sloan to effectively circumvent the time requirement for Rule 60(c) motions based on new evidence by its erroneous finding that justice required the court to grant relief under Rule 60(c)(6).

III. SLOAN FAILED TO SHOW THE "EXTRAORDINARY CIRCUMSTANCES" REQUIRED FOR RELIEF UNDER RULE 60(C)(6).

Relief under Rule 60(c)(6) should be given "*only* when our systemic commitment to finality of judgments is *outweighed by extraordinary circumstances of hardship or injustice*." *Panzino*, 196 Ariz. at 445 (emphasis added); *see also Webb v. Erickson,* 134 Ariz. 182, 186 (1982) (only in "extraordinary circumstances" must need for finality give way). Thus, even if this Court finds the trial court could properly consider Sloan's Motion under Rule 60(c)(6), despite the fact that its basis falls squarely under Rule 60(c)(2), relief under Rule 60(c)(6) was also not warranted here, as there has been no "fraud on the court" and no other "extraordinary circumstances" justified overturning the jury's verdict.

A. **Information Developed Post-Trial Is Not Relevant To The Central Issues Litigated At Trial.**

The tort of bad faith arises when an insurance company intentionally denies, fails to process, or fails to pay a claim without a reasonable basis for such action. *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 538 (1982); *Noble v. National American Life Ins. Co.*, 128 Ariz. 188, 190 (1981). "No matter how the test is defined, bad faith is a question of reasonableness under the circumstances." *Brown v. Super. Ct. In and For Maricopa County*, 137 Ariz. 327, 336 (1983); *see also Sparks,* 132 Ariz. at 538. Evidence that explains how the company processed and considered an insured's claim, and why it rejected the claim, are relevant to these issues. *Brown*, 137 Ariz. at 336. Other evidence is simply not relevant. *Id.* at 332. Thus, the only evidence relevant to

Sloan's bad faith claims against Farmers is evidence upon which Farmers processed and considered Sloan's insurance claims between 2009 and 2010.

1. **Although Farmers Properly Presented Arson Evidence to Defend Its Conduct as Reasonable, Farmers Did Not Rely on an Arson Defense.**

Notably, Sloan's argument in seeking Rule 60(c) relief was that the post-trial DPS Report shows Richardson's "false" statements perpetrated a "fraud on the court." (R. 1375-79 at 12-15). The trial court, however, did not grant relief for that reason or even make any findings in that regard. (R. 1410). To the contrary, and in response to Farmers' arguments that the DPS Report is unreliable, factually erroneous and fails to tell the entire post-trial story, the trial court emphasized: "To be clear, the Court *makes no findings with regard to the relevance or admissibility* of these post-trial investigations." (Id. at 4) (emphasis added).[14] Instead, the trial court's *sole* reason for granting Rule 60(c)(6)

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[14] Had the court done so, it would have had to consider, among other things, that the DPS Report was based on incomplete transcripts supplied to DPS by Sloan. (R. 1375-79, Ex. 5). Also, DPS conducted interviews five years after the fire investigation whereas the depositions and trial testimony were much closer in time to the fire. As such, the

relief was its determination that "Farmers relied on a de facto arson defense" and "the DPS Report casts heavy shadows on the integrity of the PFD investigation that was the bedrock of Farmers' trial defense." (Id. at 3-4).

Ironically, the court's pre-trial rulings reflected its understanding (which it also acknowledged in its Order) that the real issue at trial was whether "Farmers acted reasonably in handling Sloan's claims." (Id. at 3; see also RT 2/17/12 at 31:13-25; RT 4/13/12 at 8:9-18). Thus, the trial court's ruling plainly overlooks the fact that anything occurring <u>after</u> Farmers handled Sloan's claims is necessarily irrelevant, including whatever determinations DPS made in a post-trial investigation of Richardson and Andes.

As set forth above in the Statement of Facts, Sloan's theories of how Farmers acted unreasonably and in bad faith necessitated Farmers' presenting arson evidence to support its defense that it had acted reasonably both in: (a) initially denying Sloan's claims and (b) its handling of Sloan's request for Famers to turn over Laubacher's

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statements made to DPS are much less reliable than the evidence available and presented at trial.

preliminary report and Farmers' claim file (the supposed "exculpatory evidence."). Thus, although Farmers was not presenting an "arson defense" (because it had already paid Sloan's claims),[15] the arson evidence from all of the investigations was admissible given that Farmers' defense to Sloan's bad faith claim has *always* been that its handling of her claims was reasonable because *the evidence at the time of its claim investigation supported a reasonable belief that Sloan was involved in setting the fire.* The trial court fully understood this important aspect of the case in making its determinations before and at trial that the arson evidence available to the parties at the time of the investigations was relevant and admissible to Farmers' defense that it acted reasonably based on the information it had at the time:

> THE COURT: … Apparently there's going to be evidence upon which they relied which suggested to them that she was responsible for the fire, and that evidence will, in their view, explain the reasons why they did certain things, including the indictment and so on. ...

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[15] On October 18, 2010, the State dismissed the criminal charges [TE 3], after which Farmers gave its insured the benefit of the doubt and paid Sloan *over one million dollars* on her insurance claims. [TE 242; RT 5/22/12 at 95:24-96:5].

> So whether they prove it or whether or not they're able to … ***they intend to put on evidence upon which they relied to suggest she may have been the arsonist, and therefore [its] conduct was reasonable in the context of that evidence.***

(RT 2/17/12 at 31:13-25 [emphasis added]; RT 4/13/12 at 8:9-18).

In admitting the arson evidence, the trial court understood that although the "arson defense" would have been available as an absolute defense to the breach of contract claim, the jury was not instructed on the arson defense because directed verdict was entered on the contract claim based on Farmers' payment of Sloan's insurance claims after the criminal charges were dismissed in 2010. (Exhibit 7, R. 1243 [Final Jury Instructions]; see also R. 1212).[16] But, as the trial court properly recognized ***prior*** to trial, the evidence needed to show that Farmers'

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[16] Farmers emphasized in pretrial proceedings that its payment of Sloan's claims in December 2010 fulfilled its contractual duties. (Id. at 30:7-11). Thus, it no longer made sense to argue that it was not contractually required to pay the claims due to arson. (Id. at 30:3-13). As a result, Farmers requested Sloan to withdraw the breach of contract count, but she refused. (RT 4/19/12 at 192:16-24; R. 406). This forced Farmers to propose *preliminary* jury instructions on the arson defense and to more directly argue Sloan's involvement in the fire. Farmers did not, however, propose an arson defense instruction with its final submission of instructions. And following directed verdict on breach of contract, Farmers focused on the fact that it did not act in bad faith in initially denying the claims and that the preliminary report and claim file made no difference in the State's decision to prosecute Sloan.

conduct was reasonable ***at the time it initially denied the claims*** mirrored that needed for an arson defense, as that is, in fact, what Farmers relied on in handling Sloan's claims. Thus, Farmers was allowed to present evidence it had relied upon from the time of the fire in 2009 through its payment of the claims in December 2010. It was for this very reason (proving Farmers was reasonable in its belief that Sloan committed arson) that Farmers made the arguments it did in closing suggesting that Sloan "burned her house down." (RT 5/29/12 at 102). Sloan cherry picked and took portions of that closing argument out of context in her Rule 60 motion, which the trial court relied upon in granting relief. (R. 1410 at 3).

Additionally, Farmers had to present the arson evidence, including portions of Richardson's investigation, in defending against Sloan's theory that Farmers acted in bad faith by failing to promptly disclose the purported "exculpatory information," namely, Laubacher's preliminary report and Farmers' claims file. In proving that the Farmers evidence would not have made any difference in Sloan's criminal case (and that the delay in disclosing did not therefore cause Sloan's damages), Farmers had to show the arson evidence *on which the State* *relied in bringing the criminal charges against Sloan in 2009 and in not dismissing those charges until December 2010.* This entailed to some extent, Farmers having to show that the prosecutor and Captain Richardson were convinced of Sloan's guilt and were determined to obtain a conviction no matter what evidence Farmers had in its possession.

<u>This</u> is why Farmers played the video clip of Richardson's deposition in closing and made the comments about Richardson referenced in the trial court's order; it was not to try to persuade the jury that Sloan was, in fact, an arsonist. (R. 1410 at 3-4). The purpose of Farmers' argument in that portion of the closing was to make the point that the Farmers' evidence made no difference whatsoever to Captain Richardson or to the prosecutor, as they believed they had enough evidence to prosecute Sloan, regardless of Farmers' file and Laubacher's preliminary report. (See RT 5/29/12 at 100:16-101:1) (Farmers' counsel explaining Richardson's deposition clip in closing by stating: "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." [Clip Played of Richardson saying he believed Sloan burned down her house] "That's

the testimony. He had everything. He had every single [bit] of exculpatory evidence that we talked about in this case…It made no difference.”).

2. <u>**Evidence Available at the Time Farmers Handled the Claims Is the Only Evidence Relevant to the Jury’s Determination of Whether Farmers’ Conduct Was Reasonable.**</u>

As set forth in the Statement of the Facts, Farmers initially denied Sloan’s insurance claims based on the evidence its own investigation revealed, which included, among other things, the PFD report and the indictment. Whether the information upon which either of those were based is now true or untrue has no bearing on whether it was reasonable for Farmers to rely on that information <u>at the time it investigated Sloan’s claims</u>. It might be different if Farmers had never paid Sloan’s claims based on its reliance on the Captains’ testimony and conclusions. After the criminal charges were dismissed, however, Farmers gave Sloan the benefit of the doubt (regardless of what its own investigation revealed) and paid her claims in full. In short, **the fire investigation evidence available at the time Farmers investigated and handled Sloan’s claims was the evidence relevant to Farmers’ defense**

that it acted reasonably in handling those claims. Any new evidence developed since that time -- including issuance of the DPS Report, demotion of the Captains, and the County Attorney's avowal to no longer rely on investigations conducted by Andes and Richardson -- is irrelevant to the central issues litigated at trial. This new evidence has no bearing whatsoever on whether Farmers' handling of Sloan's claims was reasonable given the evidence at the time of its claim investigation, which Farmers argued (and the jury obviously found) supported a reasonable belief by Farmers that Sloan was involved in setting the fire.

3. <u>Whether Richardson's Testimony was False is Also Irrelevant to the Reasonableness of Farmers' Conduct Absent Evidence that Farmers Knew of Its Falsity.</u>

To the extent Richardson may have lied in connection with his investigation of Sloan's fire, he lied to Farmers too. No amount of new evidence now calling his or Andes' credibility into question can change what Farmers relied on in handling Sloan's claims between 2009 and December 2010. Even assuming Richardson provided false testimony in his depositions, in his investigation or report, and/or in his testimony to the grand jury, Farmers was certainly not aware of it. Nor does Sloan point to any evidence showing Farmers had any such awareness, so any misconduct by Richardson cannot properly be attributed to Farmers.[17] Indeed, if Sloan had a shred of evidence that Farmers knew Richardson had lied, it would have been revealed at some point during the course of three years of pre-trial litigation and the seven-week trial.

B. <u>The Information Upon Which the Post-Trial DPS Report Was Based Was Cumulative and Would Not Have Changed the Jury's Verdict.</u>

A judgment will not be reopened based on new evidence if the evidence is merely cumulative and would not have changed the result. *Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589 (App. 2007); *see also Ashton v. Sierrita Mining & Ranching*, 21 Ariz. App. 303, 305 (1974) ("Cumulative evidence is insufficient to warrant setting aside a judgment."). Here, the information contained within the DPS Report regarding the discrepancies in Richardson's and Andes' investigations and reports was cumulative to the information and evidence discovered

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[17] At oral argument on Sloan's Rule 60 motion, the trial court asked Sloan several times to identify what evidence she had showing Farmers knew of the alleged misconduct identified by DPS, but Sloan's counsel was unable to identify anything other than his own beliefs and theories. (RT 3/24/15 at 17:24-18:10, 29:11-31:7 , 31:8-32:24). Unable to point to any evidence, Sloan's counsel retreated by arguing that whether Farmers had knowledge of the misconduct was immaterial and that he was not required to show Farmers' culpability. (Id. at 18:24-19:5; 32:18-24; 35:8-15).

by the parties before this trial. Indeed, Sloan took advantage at every opportunity to criticize the PFD investigation, and Andes and Richardson in particular, based on these discrepancies.

For example even though neither Andes nor Richardson actually testified at trial,[18] Sloan elicited testimony from her experts regarding Andes' part of the investigation. Sloan's fire expert, Patrick Kennedy, severely criticized Andes' investigative techniques. (RT 4/25/12 Kennedy at 147:10-23; 148:7-11). Similarly, even though Richardson never testified at trial, and only select portions of his deposition testimony were played by both parties for the jury,[19] Richardson's investigative techniques were also severely and repeatedly criticized by Sloan's experts. This included criticism by Sloan's fire expert, Patrick Kennedy,[20] and her criminal prosecution expert, Grant Woods.[21] Sloan

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[18] As noted above, with regard to Andes in particular, the DPS findings and his demotion and placement on the officer integrity database are completely irrelevant here, as Andes never testified at Sloan's bad faith trial, and none of his depositions were read into evidence or played for the jury.

[19] Richardson's deposition excerpts were read to the jury on May 21, 2012. (R. 1222-28).

[20] (RT 4/25/12 [Kennedy] at 160:1-7 [the scope of Kennedy's engagement was to critique Richardson]; 167:19-168:22 [Richardson had

also presented the videotaped deposition of PFD Captain Ray Wilson for the sole purpose of criticizing Richardson's and Andes' investigations. (R. 1166). Sloan even elicited criticism of Richardson from attorney Joseph Rocco, who was Farmers' primary defense witness and who testified that he had serious concerns with Richardson's investigation and did not believe it to be fully competent.[22] Sloan's counsel emphasized this admission in her closing argument, quoting Rocco's testimony. (RT 5/29/12 at 39:7-12).

Moreover, Sloan had before trial the benefit of all four of the transcripts from Richardson's depositions from both the criminal and civil cases as well as the Grand Jury transcript. She had <u>ample</u>

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no basic knowledge of fire science]; 157:20-157:5 [Richardson's opinions were erroneous, amateurish, incompetent]; 170:4-172:11 [criticism for no ignition source, not investigating the garage, and for accusing Sloan solely because she was the homeowner]; 176:3-176:3 [Richardson's investigation biases]).

[21] (RT 4/30/12 [Woods] at 151:5-20 [Richardson admitted his report was "made up" and "speculation"]; 153:17-19 [Richardson's testimony to the grand jury was "beyond poor"]; 156:25-157:12 [Richardson's testimony to the grand jury and his report were not reliable in any way]).

[22] (RT 5/10/12 [Rocco] at 199:10-200:21 [problems with report, photos, evidence security]; 203:4-15 [concerns with competence of investigation]; 199:10-200:17).

opportunity to call Richardson as a witness and impeach his credibility in front of the jury but chose not to do so. With regard to the DPS findings, Sloan had in her possession, prior to trial, all of the evidence DPS was provided. She therefore had every opportunity (and indeed took advantage of those opportunities) to present the same "discrepancies" identified in the DPS Report.[23]

Sloan argued in her Rule 60 motion that Farmers had "touted" and "brandished" the indictment and investigation at trial as having been unbiased and proper. To the contrary, Farmers *admitted* to learning of the weaknesses in the PFD investigation. As a result, Farmers embarked on its own independent and profoundly more thorough investigation by hiring its own experts (cause and origin, electrical, natural gas, and forensic CPA), and conducting independent interviews and scientific analyses. (TE 240 [Rocco's Report]). Farmers presented all of the evidence it relied on in forming its conclusion that the fire was

[23] For example, Sloan's expert criticized Richardson for changing his testimony regarding whether he entered or investigated the garage (RT 4/25/12 [Kennedy] at 171:18-172:11), and specifically criticized Richardson's grand jury testimony. (RT 4/30/12 [Woods] at 153:17-19).

intentionally set by Sloan, and Richardson was only a small piece of its overall investigation and trial evidence. (TE 240; RT 5/29 at 58-102).

To the extent that Farmers did rely on Richardson's investigation, Sloan had ample opportunity to argue at trial that its reliance was unreasonable. She simply chose not to aggressively pursue that strategy, presumably because she was well aware that Farmers had completed its own investigation and did not, in fact, rely on him. Sloan should not get a second bite at the apple merely because the DPS investigators made findings after trial consistent with what both parties and their experts already knew and presented at trial regarding the flaws in Richardson's report and investigation.

Finally, as to DPS' findings regarding Richardson's testimony to the Grand Jury, Farmers did not even have the Grand Jury transcript at the time of its claim investigation and did not rely on it in handling Sloan's insurance claims. Farmers' defense counsel obtained the transcript later as part of the bad faith case and had it before trial. Although Farmers remarked in opening and closing that Sloan had been indicted, this was just an underlying fact of the case Farmers learned about when conducting its own investigation of the fire and the claims.

To the extent that the criminal indictment was flawed because it was based on Richardson's testimony, this too was revealed to the jury at trial, as it was informed that the prosecutor dismissed the criminal charges "in the interests of justice" after interviewing Richardson. Moreover, as noted above, Sloan elicited testimony and opinions from her experts regarding the unreliability of Richardson's Grand Jury testimony. (E.g. RT 4/30/12 [Woods] at 153:17-19, 156:25-157:12).

In sum, the information upon which the DPS Report was based was already in Sloan's possession <u>and</u> used by Sloan at trial to impeach the credibility of Richardson's report and Grand Jury testimony, and the credibility of Andes' investigative techniques. The DPS and MCAO evidence is therefore cumulative to the evidence presented at trial and would not have changed the jury's verdict if available at the time of trial. Thus, the post-trial release of this evidence does not constitute the type of "extraordinary circumstances" required to justify Rule 60(c) relief. *Ruesga*, 215 Ariz. 589.

CONCLUSION

The trial court's order granting the extraordinary relief under Rule 60(c)(6) and overturning the jury's unanimous verdict was clear error and an abuse of discretion. Farmers therefore respectfully requests the Court to vacate the trial court's order and amended judgment, and to reinstate the jury's verdict and the original judgment.

DATED this 27th day of April, 2016.

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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 11,717 words.

3. The document to which this Certificate is attached [XX] does not, or [ ] 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 27th day of April, 2016, she caused the original of the foregoing OPENING BRIEF to be electronically filed through AZTurboCourt and that she caused two copies of the foregoing brief to be deposited in the United States Mail, postage prepaid, to:

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