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.	Court of Appeals Division One No. 1 CA-CV 16-0046 Maricopa County Superior Court No. CV2009-033244

ANSWERING BRIEF OF APPELLEE

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INTRODUCTION

This appeal essentially turns on one question: Did Farmers Insurance use false evidence to portray Barbara Sloan ("Sloan") as an arsonist? Farmers claims it did not portray Sloan as an arsonist; but the trial judge found it did, and the record supports this finding. For example, Farmers' last words in closing argument asked the jury for a defense verdict because Barbara Sloan "**burned her house down**."

Appellant Farmers Insurance Company of Arizona ("Farmers") raises two issues on this appeal. They boil down to the following: First, Farmers argues that Judge Arthur T. Anderson, the trial judge, abused his discretion by granting relief under Rule 60(c)(6), Ariz.R.Civ.P., instead of Rule 60(c)(2). This would ordinarily sound like an innocuous, harmless-error misapplication of the rules, but Farmers obscures the real meaning of its argument, which is that relief under subsection (2) was unavailable, given that the evidence warranting a new trial did not come to light until several years after the jury verdict. Thus, the only available relief was under Rule 60(c)(6).

Second, regarding the core issue, Farmers attacks Judge Anderson's use of subsection (6), arguing that the Judge abused his discretion because he found that Farmers had presented an arson defense to Sloan's claim, and he further found that Farmers' defenses relied on evidence (later proved to be false) from the Phoenix Fire Department ("PFD") and the resulting criminal prosecution of Sloan by the

Maricopa County Attorney's Office ("MCAO"). Thus, Farmers ultimately argues that Judge Anderson abused his discretion in concluding that Farmers' defenses based on these false facts very probably produced an unjust verdict in Farmers' favor.

Farmers claims that Judge Anderson abused his discretion in reaching these conclusions because its defense was (supposedly) that it had only relied on the results of the PFD's investigation and the MCAO's prosecution; Farmers says it did not claim that Sloan committed arson. Farmers' appeal rests squarely on the premise that it never defended the bad-faith claim on the ground that Sloan had committed arson; it argues that its denial was reasonable and in good faith because, in denying Sloan's property damage claim, it merely relied on the fact that the PFD had concluded that Sloan committed arson. Farmers does not argue that there was any integrity in the PFD's conclusions – later proved to have been false – but only that it had the right to rely on those conclusions. Thus, it says it did not accuse Sloan of arson and it did not present an arson defense of any kind.

Judge Anderson, having presided at the six-week jury trial, came to the opposition conclusion:

> **Farmers, to a significant degree, relied on the integrity of law enforcement to say that she was an arsonist**. The two [investigators] were a significant part of that. **And that was the horse you rode throughout the trial.** . . . I think this case is significantly different on retrial. That's my view, because I think a

> large part of the arguments that Farmers relied on just aren't there anymore.

Reporter's Transcript (RT), May 15, 2015, at 31:10-19, App. Ex. 2 at 0288 (emphasis added).

Farmers' argument that it did not accuse Sloan of arson is also sharply contradicted by its own words at trial. Not only did Farmers' counsel tell the jurors in his opening statement that the case was about Sloan (meaning Sloan's actions in burning down the house), but his concluding words in closing argument were that Sloan deserved to recover nothing in her bad-faith claim because "**she burned her house down.**" RT, May 29, 2012, at 102:7, App. Ex. 1 at 0035 (emphasis added).

Given these words, and many others we will point out below, it is a flight of fancy for Farmers to accuse Judge Anderson of abusing his discretion by ruling that Farmers presented a *de facto* arson defense that was later shown to be entirely without basis. It is also a flight of fancy to argue that Farmers' use of derelictions, misstatements, untrue, and intentionally false statements from a now-discredited PFD investigation are neither extraordinary nor unique and therefore do not justify relief under Rule 60(c)(6).

Farmers is wrong on the law and wrong on the facts, and we submit that Judge Anderson's order should be affirmed.

Finally, it should be noted that, in reaching his conclusions, Judge Anderson did not undertake to act as a 13th juror, granting a new trial simply because he disagreed with the verdict. *Compare State v. Fischer*, 238 Ariz. 309, 360 P.3d 105 (App. 2015) (*rev. granted in part* March 15, 2016). He did not need to and did not attempt to reach that kind of conclusion; instead, he merely concluded that: "The question is whether justice was done in this case. The Court cannot conclude that it was." Index of Record ("IR") 1410, Under Advisement Ruling, April 7, 2015 (the "Rule 60 Ruling"), at 3, App. Ex. 3 at 0298.

STATEMENT OF THE CASE

This lawsuit arises out of a bad-faith insurance claim against Farmers, which denied Sloan's insurance claim and suppressed exculpatory evidence when Sloan was at risk of criminal prosecution and imprisonment.

Sloan filed suit against Farmers, and she included claims for breach of contract and insurance bad faith. Just prior to the jury trial, Farmers belatedly admitted that it intended to offer both an arson defense and a separate defense of reasonableness (which did not rely on proving Sloan's guilt for arson). RT, April 13, 2012, at 13:22-14:4. After a six-week jury trial, Farmers obtained a jury verdict in its favor, and Judge Anderson entered judgment on December 7, 2012, in favor of Farmers. IR1323. After her motion for a new trial was denied on June 3, 2013 (IR1342), Sloan filed a timely notice of appeal on July 3, 2013. IR1344.

After the jury trial, the Arizona Department of Public Safety (the "DPS") conducted its own investigation of the PFD arson squad's handling of the case. In its resulting July 22, 2014 report (the "DPS Report"), the DPS was highly critical of the PFD investigators' conduct, and the DPS recommended multiple felony charges against the relevant PFD investigators. IR1375-79 at Ex.5, App. Ex. 1 at 0036-0103. Those investigators were ultimately removed from the PFD arson squad. IR1375-79 at Ex. 1 & Ex. 2, App. Ex at 0017-0022.

Sloan's appeal was fully briefed, and she moved to suspend her appeal and revest jurisdiction in the superior court to pursue a Rule 60 motion. (1 CA-CV 13-0475). The Court of Appeals granted Sloan's motion on January 20, 2015, and Sloan then filed her Rule 60 Motion in superior court. IR1375-79, App. Ex. at 0001-0016. In his Rule 60 Ruling, after Judge Anderson heard argument, he ruled in favor of Sloan, granting the Rule 60 Motion and vacating the jury verdict. IR1410, App. Ex. 3 at 0296-0300.

On May 28, 2015, Farmers filed a motion asking Judge Anderson to amend the December 7, 2012 judgment, to maintain the award to Farmers on Sloan's breach-of-contract claim, and to award Farmers substantial attorneys' fees on that claim. IR1427-28. Sloan responded with a cross-motion for attorneys' fees on her contract claim, arguing that she prevailed because, in the midst of litigation, Farmers belatedly issued full payment on the claim for contract damages. IR1440-42. On November 19, 2015, Judge Anderson signed an amended judgment reflecting that the jury verdict had been vacated, and deferring the issue of attorneys' fees to a later date. IR1464. Farmers filed a timely notice of appeal on December 18, 2015. IR1466.

STATEMENT OF FACTS

A. Farmers' Expert Initially Exonerates Sloan.

On May 13, 2009, Sloan's home burned down. She reported the fire to her insurer, Farmers, which sent its cause and origin fire expert, Robert Laubacher, to investigate. Laubacher interviewed Sloan and inspected the scene, and he told Sloan that "it really doesn't sound like you could have done anything." TE64, 34:19-21. He reported to Farmers that the fire was not suspicious and that he found no evidence of arson. After receiving this report, Farmers' lead claims handler, Won Chang, wrote in the Farmers claim log, "No arson or suspicious fire." TE4, App. Ex. 1 at 0105. Two days later, Chang wrote in the claims log, "the fire is not suspicious." TE5, App. Ex. 1 at 0107. On May 20, 2009, Chang received Laubacher's written report, reflecting a single point of origin for the fire, and Chang again wrote, "No arson or suspicious fire." TE6, App. Ex. 1 at 0109. Laubacher's report would be supported by later information, including lab tests that were negative for any accelerants at the home. TE13.

On May 21, 2009, Chang sought permission to pay over $382,000 on Sloan's property-damage claim. TE7. Had Farmers simply respected the determination of its own fire expert, there would be no lawsuit today.

B. The Captains Immediately Arrive At An Arson Conclusion.

On the day of the fire, PFD arson squad members Captain Sam Richardson and Captain Fred Andes (the "Captains") did their own investigation, and a videotape shows their use of an arson dog. In the transcript of that videotape, Captain Andes, the dog handler, tells Captain Richardson, "Should be a lot more than that though, huh, Sammy," after which Captain Andes, while handling the arson dog, says, "Seek, seek. No, no, you got to put your nose down. **At least fake it for me, okay**." TE61 (emphasis added), App. Ex at 0114.

Before the first day was through, and long before any lab tests or results from such testing, Captain Richardson concluded that the fire was caused by arson. His report, prepared that first day, ended with the conclusion, "Arson of Occupied Structure, A.R.S.13-1704." TE76, App. Ex. 1 at 0121.

C. Farmers Instructs Laubacher to Change His Conclusion.

The Farmers agent who sold the policy (and who would lose a yearly bonus if the claim was paid) learned about Captain Richardson's report and called for Farmers to revise its conclusions. IR1126, including 272:18 - 274:11, App. Ex. 1 at 0123-0126 (Joe Baselice deposition excerpt shown to the jury). Chang checked again with Laubacher, who had listened to Captain Richardson's theories and was not dissuaded from his own conclusion. Laubacher instead reported to Chang that

he "still believes, based on the evidence, the fire is accidental." TE8, App. Ex. 1 at 0128.

Undeterred, the agent contacted Chang's supervisor to allege arson, and Chang was told to stop processing the claim and instead to call Captain Richardson "and listen to what he has to say." TE10. The agent also called another claims supervisor that day to allege arson. TE12. Regardless, Laubacher still rejected Captain Richardson's conclusions and informed a second Farmers claims handler that while the PFD thought the fire was arson, he had "determined this not to be arson." TE13. Laubacher also told a third claims handler that there was a single fire that started in the garage and spread to the home. RT, May 1, 2012, at 82:5-84:10; IR1l36 (Shaw excerpts played at trial) 5:8-9; 150:11-154:16; and TE18.

Two weeks later, Laubacher was told by Farmers to meet with Captain Richardson again; he was also instructed to change his report to match that of Captain Richardson. TE22. After first agreeing to do so, later that day, Laubacher declined to revise his report, warning Farmers that Captain Richardson's conclusions were not supported by the evidence. Specifically, he stated that "he strongly feels that writing the report as discussed above [to find arson], will not be wise, based on his experience and to protect me, him and Farmers." *Id*. After he refused to retreat from his determination that the fire was not arson, Farmers'

claims counsel (Joe Rocco) later told Laubacher not to speak with Sloan or anyone acting on her behalf. TE34.

A few days after warning Laubacher not to speak to Sloan or anyone acting on her behalf, Farmers reiterated its instruction for Laubacher to change his opinion to one "that will coincide w/the Fire Investigator's findings." TE35, App. Ex. 1 at 0134. In addition, the claims log notes indicate that Laubacher spoke with Sloan's investigators regarding the fire "even though [Farmers' claims counsel] Mr. Rocco sent a [*sic*] e-mail and letter explaining the contrary." As a result, "Mr. Rocco suggests we get another [cause and origin expert] to assist Mr. Laubacher in completing the final report." TE36, App. Ex. 1 at 0135. The new expert for Farmers was Jim Hall, who later testified at the trial. Several months after Hall was hired to "oversee" Laubacher, he (Laubacher) produced his "Report Number Two," which did indeed "coincide" with Captain Richardson's arson conclusion. TE130, App. Ex. 1 at 0137-0176. At trial, Laubacher invoked the Fifth Amendment and refused to testify on behalf of Farmers. RT, May 21, 2012, at 32-36.[1]

Thus, Captain Richardson's arson conclusion drove Farmers' investigation and, indeed, this entire case. Farmers almost immediately ceased conducting a good-faith and independent investigation of the fire and instead began to work

[1] In its Opening Brief ("OB"), Farmers states that it retained Hall to "peer review" Laubacher's work after he had initially cleared Sloan. OB at 18.

hand-in-hand with the Captains to build a criminal case against Sloan and thereby avoid a large claims payment.

D. <u>Farmers Only Reveals Documents Calculated To Convict Sloan</u>.

On August 21, 2009, the PFD formally requested all "relevant" information from Farmers. TE40. *Cf*. TE42, 43. In addition to stating that the request for information from the PFD "must be honored," a memorandum from Farmers' claims counsel (Rocco) regarding the PFD request (TE43 at 6 ¶ 3) summarizes the strategy Farmers was pursuing; namely, if Sloan was found guilty of arson, that would be a defense to the insurance claim, and if she invoked her Fifth Amendment rights, that, too, would be a defense based on a violation of the cooperation clause in the insurance policy. TE43 at 2 ¶ 3

Farmers withheld potentially exculpatory information from its production of documents to Captain Richardson; yet it produced those documents that tended to incriminate Sloan. Farmers excluded Laubacher's reports that reflected or supported his opinion that the fire was accidental, and it held back the highly exculpatory claims log entries. For example, see TE45 at 3-4; TE46 at 2-4; TE47 at 5; TE210; TE211; TE480. The suppression of exculpatory evidence is apparently a common practice at Farmers; the jury heard a clip from the deposition of the Farmers' claim manager, Bill Payton, who admitted that it was an unwritten rule at Farmers to withhold potentially exculpatory information from an insured if

the insured is a criminal suspect. Payton admitted he had personally done this five to fifteen times before. R1118; 1126 (clips played at trial) 164:11-165:25; 273:15-278:2; 292:5-294:19.

E. <u>Sloan Is Prosecuted Based On Captain Richardson's Testimony</u>.

On August 26, 2009, Captain Richardson ordered the arrest of Sloan, which took place before any indictment. IR1375-79 at Ex. 19, App. Ex. 1 at 0182-0192. At the September 2, 2009 grand jury proceeding, Captain Richardson was the only witness. TE306, App. Ex. 1 at 194-227. Based **solely** on his testimony, the grand jury issued an indictment against Sloan for arson and insurance fraud. TE472, App. Ex. 1 at 0229-0230.

In early April of 2010 - shortly before Sloan's May 17, 2010, criminal trial date, but seven months after Farmers' September 8, 2009 log entry indicating that new expert reports were to "coincide" with Captain Richardson's report - Farmers disclosed to Sloan Laubacher's "revised" report, along with that of Hall. TE130, TE131. Where Laubacher had previously described a single fire (TE129 at 4-6) and told Chang "No arson or suspicious fire" (TE6; TE13; TE18), his Report Number Two (TE130) squared precisely with that of Hall (TE131) in describing an arson fire with three points of origin. For example, where Laubacher had initially determined that "burn patterns do not support the fire's origination on the kitchen

electric range" (TE129 at 5), he now wrote that a fire had originated on or adjacent to the stove. TE130 at 22, App. Ex. 1 at 0159.

Rather than immediately disclose to the MCAO documents that did not coincide with the PFD investigation, Farmers instead slowly produced them between November 2009 and May 2010. TE45 at 3-4; TE46 at 2-4; TE47 at 5; TE210; TE211; TE480. Sloan's arson trial was later continued to the Fall of 2010.

F. Farmers' Coordination With Richardson Is Recognized By The Criminal Court, And The Criminal Case Against Sloan Is Ultimately Dismissed In The Interest Of Justice.

The close coordination between Farmers and the PFD was later criticized by Judge Christopher Whitten, who presided over Sloan's criminal case. In the criminal case, Sloan moved to exclude Farmers' evidence (including its experts and documents) after it became clear that Farmers and the PFD/MCAO (including Captain Richardson) had withheld exculpatory information, all while working together to develop incriminating "evidence" against Sloan. TE486.

Judge Whitten granted Sloan's motion, finding that Farmers collaborated and worked "hand-in-hand" with Captain Richardson. TE217, App. Ex. 1 at 0176-0180 (June 29, 2010, minute entry from criminal case) ("The investigator for the State [Richardson] collaborated with Farmers' investigator, including asking him to scientifically examine evidence, consulting about each other's opinions and seemingly working hand-in-hand together."). Judge Whitten continued, noting,

"[i]t appears that Farmers and the investigator for the State worked both separately and together in reaching a conclusion as to the cause and origin of the fire" and "[t]he Court finds that the State's investigator either had exculpatory information received from Farmers or had worked so closely with Farmers in its investigation that the Farmers investigators became agents of his."). *Id.* However, *see also* RT, May 22, 2012, 171:8-177:6 (Judge Anderson ruled that the June 29, 2010 "hand-in-hand" minute entry would be excluded from the jury).

Thus, Farmers worked jointly with Captain Richardson to assist in Sloan's prosecution even though Laubacher (and Farmers) reached an initial determination exonerating her, which they later revised to "coincide" with the Captains' now-discredited arson conclusion. Farmers did this over the objection of its own cause and origin expert, Laubacher. Farmers knew about the highly defective nature of the Richardson investigation, yet it continued to bolster Richardson's conclusion with as much support as possible.

Months after Sloan was arrested and faced criminal trial, the MCAO finally obtained and reviewed all of the investigation documents. The MCAO then determined there were serious problems with the conclusions reached by Captain Richardson (with the assistance of Farmers); in October, 2010, the MCAO dismissed the criminal case "**In the Interests of Justice**." TE3, App. Ex. 1 at 0256 (emphasis added). Before doing so, the MCAO prepared a report (TE1), setting

forth the severe problems with the case, including (1) there was no likelihood of gaining a conviction without the Farmers experts because of the inept investigation conducted by Captain Richardson, (2) no accelerants were found, (3) other PFD investigators agreed with Sloan's expert that the garage fire was the principal if not only fire, and (4) those other PFD investigators also believed that "most of the conclusions by [Sloan's] expert regarding the fire spread and points of origin were correct" and Captain Richardson's conclusions were incorrect. The MCAO's case log (TE2) contains much the same information (collectively, the MCAO log and the report are collectively referred to as the "MCAO Documents"). However, as described below, the MCAO Documents were excluded from the jury trial.

G. Farmers Denies It Is Using An Arson Defense But It Then Raises That Defense At Sloan's Bad Faith Trial.

Sloan sued Farmers for contract damages and bad faith on October 29, 2009. After its effort to have Sloan convicted for arson failed, Farmers read the writing on the wall and, fourteen months after Sloan's lawsuit was filed, Farmers belatedly paid Sloan's property-damage claim. Thus, Sloan was no longer pursuing a contract claim, but she continued to pursue the bad-faith claim.

At trial, Farmers asserted an "arson defense," which requires a demonstration that the insured set the fire at issue. *See Godwin v. Farmers Ins.*

Co., 129 Ariz. 416, 419, 631 P.2d 571, 574 (App. 1981). We know this because Farmers **eventually** informed the Court that it would present an arson defense.

To explain, before the trial, Sloan moved under Rule 702, Ariz.R.Evid., to exclude any fire opinions offered by Messrs. Hall and Laubacher, and Captain Richardson. IR729-34, IR764-65, IR762-63. Judge Anderson heard oral argument on the Rule 702 motions on February 17, 2012. RT, February 17, 2012. At that time, Farmers represented that it was **not** pursuing an arson defense. Farmers argued (as it does in its Opening Brief) that its experts would not be used to show the fire was arson, but only to show that Farmers had a reasonable basis for its handling of Sloan's claim. Farmers argued that, because it was not using its experts to prove arson, it did not matter whether the experts were qualified under Rule 702, stating that Farmers "**could have hired the milkman to do the investigation in the underlying case**." RT, February 17, 2012, at 28:10-29:14 (emphasis added).

Based on Farmers' assurances, Judge Anderson denied Sloan's Rule 702 motions, ruling that "Rule 702 is inapplicable to the circumstances in this case" because the sole issue was whether Farmers and the MCAO "should have relied upon the work and opinions of Laubacher, Hall, and Captain Richardson to reach their decisions." IR873. Thus, based on Farmers' representations about the nature

of its defense, the Judge declined to apply Rule 702 to the opinions of Farmers' experts (or Captain Richardson).

But then, just shortly before trial, Farmers filed proposed jury instructions that included the arson defense. At an emergency telephonic hearing on Friday, April 13, 2012, with the trial to start the following Monday, Farmers was finally forced to admit that it was indeed pursuing an arson defense. But this admission came only after a great deal of back-and-forth discussion, much of it highly misleading on the part of Farmers. *See generally* RT, April 13, 2012. Early in that hearing, Judge Anderson directly asked Farmers if it was pursuing an arson defense:

> THE COURT: * * * He [Plaintiff's counsel] understands Farmers' position is that their defense is to be a defense of the good faith case **and also to show or try to convince the jury that she was an arsonist. He points to three elements to show arson by preponderance of the evidence.**
>
> **Is that a fair statement of the two basic defenses here?**
>
> MR. MYLES: **No, it's not.**

Id. at 7:6-15 (emphasis added). As in the earlier hearing, Farmers again represented that "the defense to this case is that from the date of the fire until we honored the claim, we had a reasonable belief that she did commit arson. **We don't have to prove that she did it.** All we have to prove is we had a reasonable belief that she did it." *Id.* at 7:19-24 (emphasis added).

At least initially, Judge Anderson accepted these assurances and he reiterated his understanding based on the assurances from Farmers:

> THE COURT: * * * **So <u>they</u> <u>don't</u> <u>intend</u> <u>to</u> <u>have</u> <u>to</u> <u>prove</u> that she's an arsonist**, only that they had a reasonable belief to do so and justifiably relied upon that belief in withholding the funds.

Id. at 8:19-22 (emphasis added). Sloan's counsel then read Farmers' arson defense jury instruction to the Judge (*id.* at 9:12-10:13), at which point Judge Anderson focused on trying to get a direct answer from Farmers' counsel. *Id.* at 10:20-14:5.

Farmers' counsel at first responded that the jury instructions were merely preliminary (*id.* at 11:7-12), and he then contended, "We've argued this 702 already." *Id.* at 11:16-20. After that, he professed not to understand the distinction Judge Anderson drew between arguing that Farmers acted reasonably versus arguing that Sloan was an arsonist. *Id.* at 11:21-13:3. This culminated in the following exchange:

> THE COURT: Now, Mr. Poli I think wants to know which horse are you riding, one, the other, or both.
>
> MR. MYLES: Well, for right now, **I'm riding both.**
>
> THE COURT: All right. So you would propose that the jury determine whether or not she [Sloan] actually committed arson, in addition to whether or not Farmers had the right to rely on the information . . . .

Id. at 13:22-14:4 (emphasis added).

In this fashion, on the Friday before the Monday trial date, Farmers finally admitted what it now (again) denies – that it would employ both a strategy predicated on portraying Sloan as an arsonist, and one that did not depend on such a showing. As a practical matter, of course, once the jury was led to believe that Sloan was an arsonist (backed by an assertion that law enforcement had reached the same conclusion after a proper investigation), none of Sloan's arguments stood any chance of succeeding, regardless of Farmers' theory of defense.

H. Farmers Portrays Sloan As An Arsonist At The Jury Trial And Uses Law Enforcement To Do So.

1. Farmers Invokes The Arson Defense And Law Enforcement In Its Opening Statement.

Precisely as described by Judge Anderson in his Rule 60 Ruling (and as belatedly admitted by Farmers' counsel on the Friday before the trial started), Farmers employed a *de facto* arson defense, which was bolstered by the supposed agreement of law-enforcement entities. At the very beginning of its opening statement, Farmers brandished Sloan's indictment and the PFD investigation to portray Sloan as an arsonist:

> **This Case isn't about an insurance company. This case is about Barbara Sloan. Barbara Sloan was arrested by the fire department, the police department**, because they had probable cause, based upon their investigation, that she committed arson. Thereafter, **when it was sent to the county attorney, the county attorney did an analysis and determined there was probable cause to take it to a grand jury.** The evidence was taken to a grand jury, **people much like yourselves**, who made the determination that

> probable cause existed to hold her for trial, that she had started the fire.

RT, April 19, 2012, at 19:11-22, App. Ex. 1 at 0025 (emphasis added). Thus, in just one paragraph, Farmers invoked the authority of the fire department, the police department, criminal prosecutors, and the grand jury. Setting the course it would pursue throughout the trial, Farmers returned to the highly prejudicial indictment throughout the opening statement:

> That's definitely a red flag that was considered **by the grand jury and the fire department** in coming to the determination probable cause existed.

Id. at 22:20-22, App. Ex. 1 at 0026 (emphasis added). *See also*:

> The fire department, along with the county attorney, took their investigation, and they had her arrested in August. They took it to a **grand jury, and she was indicted**, finding probable cause existed **based upon that investigative information with the fire department that she had committed arson**.

Id. at 45:23-46:3, App. Ex. 1 at 0029-0030 (emphasis added).

The Captains' investigation, and Sloan's subsequent arrest and indictment resulting from that investigation, were central components of Farmers' defense. Yet all of those components were later discredited.

2. Farmers Employs The Credibility Of The PFD And The MCAO To Support Its Defenses.

Farmers presented no expert arson opinions that could have withstood Rule 702 inquiry. Laubacher, its own investigator, invoked the Fifth Amendment

and refused to testify. RT, May 21, 2012, at 32-36. Farmers then resorted to the opinions of Hall, the "minder" who was inserted into the investigation to ensure that Laubacher would "coincide" with the Captains' arson conclusion.

Hall's cross-examination testimony demonstrated why Farmers worked diligently to avoid subjecting him to a Rule 702 inquiry. For example, with regard to his theory about a point of origin on or adjacent to the stove, Hall admitted that post-fire photos showed that there was no pot on the left-front burner in question (RT, May 16, 2012, at 116:19-23; 161:19-162:4), that any supposed contents in the pot could not have caused the fire unless it was on the left-front burner (172:8-15), that he reached his conclusion with regard to the pot based on his naked eye observation (198:21-25), that it was not supported by any testing (200:2-10), that Farmers' lab results contradicted his theory (197:23-198:20), and that no evidence justified his assumption regarding the stove. RT, May 17, 2012, at 23:13-24:3.

Similarly, Farmers claimed that the laundry room contained a point of origin, despite the undisputed lack of any flame or fire damage in that room; Hall admitted that his "fugitive gas" theory (in which a supposed gas explosion occurred so quickly that it left no trace on the walls or anywhere else) was not supported by any physical evidence (RT May 16, 2012, at 134:21-135:13; 138:8-15; 142:13-20; 149:3-7), and if he were to opine about any supposed point of origin in the laundry room, he would be "guessing." 133:17-134:2. Most critically,

Hall admitted that his various theories lacked "a reasonable degree of scientific certainty." *Id.* at 133:17-134:2; RT, May 17, 2012, at 19:5-18; 23:13-24:3.

Bereft of its own experts to support its allegations, Farmers argued the inherent unreliability of all paid experts, generally. RT, May 29, 2012, at 64:9-11 ("Expert opinion. You're not bound by it. You can accept it or reject it."); *id.* at 66:18-20 ("The [Plaintiff's] experts in this case have been paid over $500,000 to convince you to **abandon your common sense on what you know happened**.") (emphasis added); *id.* at 66:17-18 ("Here's what they paid for their experts. Mr. Andler, Mr. Harrison, Mr. Kennedy, 566,000.").

Farmers contrasted Sloan's expert testimony with the purportedly neutral testimony of the PFD personnel supporting the arson defense, the latter of whom were, supposedly, intrinsically credible. *Id.* at 68:5-6 ("These firefighters aren't getting paid for their testimony, have no ax to grind whatsoever."); 67:12-14 ("The facts changed when the fire department said, 'We think it's arson, and we think she did it.'"). This was done with an eye to the favorable view that jurors routinely have of firefighters and law-enforcement personnel. The prestige that officers such as the Captains enjoy in the public eye is well known and recognized by Arizona courts. *See Kott v. City of Phoenix*, 158 Ariz. 415, 419, 763 P.2d 235, 239 (1988) ("jurors may lend great credence to the testimony of trained, experienced police officers"); *see also Bogard G.M.C. Co. v. Henley*, 92 Ariz. 107, 112, 374 P.2d 660,

663 (1962) ("It is probable that the statements of the highway patrolman, by virtue of his position, were given great weight and credence by lay jurors").

Sloan did not call Captain Richardson as a witness because, at that time, doing so would have resulted in a uniformed fire investigator expressing his certainty that Sloan was an arsonist. Farmers elected to use Captain Richardson's videotaped deposition testimony. As a result, the jury heard testimony from Captain Richardson to the effect that he was certain, based on the evidence, that Sloan had committed arson. At trial, Richardson (wearing his PFD uniform for the video deposition) enjoyed the color of tremendous authority as a PFD fire investigator and captain. IR1222-1228 at 92:6-9 (in a video clip shown to the jury, Farmers' counsel corrects a reference to "Mr." Richardson and instead insists that he be addressed as "Captain" Richardson).

Wearing his PFD uniform and referring to his own investigation, Captain Richardson's video deposition offered lengthy testimony in which he unequivocally accused Sloan of lying and of arson, including his assertion that the "[t]otality of the evidence leads me to believe that Barbara Sloan lit that fire." *Id.* at 242:15. Farmers chose to use this portion of Captain Richardson's deposition, but it now argues it did not accuse Sloan of arson. Yet in actuality, Farmers created a credibility contest between Sloan and numerous components of Arizona's law-enforcement community (a contest that was very hard for Sloan to win).

3. Farmers Inaccurately Argues That Sloan's Criminal Case Was Dismissed Only Because Of A "Technicality".

A reasonable juror may have wondered why Sloan was not prosecuted, if the PFD and the MCAO were so certain of her guilt. Farmers handled this issue by falsely stating to the jury that the MCAO dismissed the criminal case "because of a technicality," and by falsely informing the jury that the MCAO would otherwise have pursued the case with vigor, telling the jury that "The criminal case was dismissed **because of a technicality by the prosecutor not disclosing evidence.**" RT, May 29, 2012, at 100:7-12; 101:14-16 (emphasis added). Because the MCAO Documents (which stated the opposite) were excluded from the jury, Farmers was effectively able to mislead the jury on this critical issue.

Thus, in summary, Farmers repeatedly argued to the jury that the prosecutors in Sloan's criminal case believed she was guilty of arson and the MCAO dismissed the criminal case merely because of a "technicality," *i.e.*, they made a mistake unrelated to the merits of the case.

Sloan enjoyed no opportunity to rebut this false contention because Judge Anderson excluded the MCAO Documents. This ruling is one of the issues presented in the prior appeal. (1 CA-CV 13-0475).

4. **Farmers Pointedly Accuses Sloan Of Arson.**

Throughout the trial, the major theme of Farmers' defense was that "common sense" indicated Sloan was an arsonist, and this theme was strongly reiterated by Farmers in its closing argument. RT, May 29, 2012, at 64:1-3 ("What's your common sense and your gut telling you?"); 91:17-19 ("What's your common sense tell you about whether or not she's being honest about is she fencing to try and avoid answering the question?"). Lest there be any doubt about this "common sense" argument (that Sloan was an arsonist), Farmers ensured that no confusion could exist in its final words to the jury, by contending, once again, that Sloan committed arson, and stating that the "facts" (which notably included the Captains' investigation, as well as the indictment and arrest based on the Captains' investigation) inevitably led to an arson conclusion:

> You've seen all the evidence, so I ask you, rely on your **common sense.** Because after this case is over, you'll be released to discuss this case with your friends, relatives, everyone else. And it isn't going to take you six weeks to tell them what was the case about. And when you give them the facts of the case in five or 10 minutes they're going to look at you and say **she burned her house down**.

Id. at 102:1-8, App. Ex. 1 at 0035 (emphasis added). Whether or not Sloan was an arsonist was, by Farmers' design, the core issue presented to the jury.

Farmers now wants the best of both worlds. It spent six weeks presenting evidence that Sloan was an arsonist, and it said so expressly in its opening

statement and closing argument. But Farmers now claims the jury disregarded and was not affected by its statements that "[t]his case is about Barbara Sloan" and her arrest and that "she burned her house down."

As Judge Anderson concluded, the truth is that Sloan's supposed guilt of arson was the very essence of Farmers' defense. RT, May 15, 2015, at 31, App. Ex. 2 at 0288. In light of the foregoing, Judge Anderson's conclusions in granting the Rule 60 Motion were not merely discretionary; rather, his conclusions were based on almost undeniable facts. Farmers' portrayal of Sloan as an arsonist was based on the falsehoods of the PFD and was bound to improperly affect the jury no matter what theory Farmers presented.

I. The Captains' Misconduct Is Disavowed By Arizona Law Enforcement.

The DPS Report has rendered virtually everything that Farmers told the jury about Captain Richardson's investigation or the indictment untrue. On February 28, 2014, the DPS Special Investigations Unit was asked to assist the Phoenix Police Department in its investigation of the Captains, as well as PFD Director Jack Ballentine, for criminal negligence in their investigation of Sloan's fire. IR1375-79 at Ex. 5, BASDPS 003, App. Ex. 1 at 0039.

DPS Detectives Carlos Contreras and Eddie Rogers investigated the Captains for criminal negligence in their investigation of the Sloan fire. *Id.* Specifically, the DPS examined these individuals' adherence to crime-investigation

procedures and methodologies employed by law-enforcement officials. It is axiomatic that the high prestige afforded by the public to law-enforcement entities arises from their supposed adherence to such standards and techniques.

After months of interviews and collecting evidence, the DPS concluded its investigation on July 22, 2014. The DPS recommended six felony charges against Captain Richardson for violations of A.R.S. § 13-2703 (false swearing), and one count for the same violation against Captain Andes. *Id*. at BASDPS 005, App. Ex. 1 at 0041.

The 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.

The DPS further concluded that Captain Richardson had misrepresented the scope of his conversations with various witnesses, particularly with regard to Laubacher. The DPS Report described Captain Richardson's conflicting statements to the DPS about his communication with Laubacher, apparently in an effort to conceal the high degree of coordination.

The DPS uncovered a breathtaking failure to adhere to the most basic investigative techniques, and outright deception by Captain Richardson in reporting his conclusions. After reviewing the DPS Report, Keith Manning of the

MCAO sent an October 8, 2014 letter to PFD Chief Kara Kalkbrenner. Citing serious questions about the Captains' "competence and credibility," Mr. Manning announced that:

> "Effective immediately, MCAO **will decline for prosecution <u>any</u> cases** previously investigated by both Captain Richardson and Captain Andes. In addition, MCAO will also decline to rely on any work conducted by any improperly documented canine acceleration detectors prior to this date. These decisions are made **in the interest of justice and to prevent any further damage** to the Phoenix Fire Department Arson Investigation program."

IR1375-79 at Ex. 2, App. Ex. 1 at 0021 (emphasis added).

Maricopa County Attorney Bill Montgomery subsequently clarified as follows: "To be clear, it's not cases in which both of them were investigating. It's cases in which either one of them may have been investigating." *Id*. at Ex. 1, App. Ex. 1 at 0019. He also offered his own thoughts:

> "**This is the first case [the Sloan case] I've been involved in – either as a county attorney or as a reviewing prosecutor – where we saw such an utter breakdown in basic investigative techniques and procedures."**

IR1375-79 at Ex. 1, App. Ex. 1 at 0018 (emphasis added). The MCAO instructed the PFD to re-evaluate its canine accelerant-detection program, and also to provide a written description to the Arizona Peace Officer Standards and Training Board ("AZ POST") of an "extensive re-training program" for Captains Richardson and Andes. Upon completion of this extensive retraining, the AZ POST would

evaluate these investigators "to determine if they can and should be put back into the field." Finally, the Captains were both placed on the MCAO's Officer Integrity Database, or Brady List. IR1375-79 at Ex. 2, App. Ex. 1 at 0021-0022.[2]

But at Sloan's trial, the jury heard none of this and, Judge Anderson concluded, obviously attached great credibility to Farmers' arguments because they were purportedly supported by Arizona's law-enforcement system.

J. Judge Anderson Grants Rule 60 Relief.

The DPS Report was released over two years after Sloan's trial. As a result of that report, as well as the steps taken to remedy the damage caused by the Captains' investigation, Sloan moved to suspend her ongoing appeal of the adverse jury verdict, so she could file the Rule 60 Motion. This Court granted the motion to suspend, and Judge Anderson subsequently granted the Rule 60 Motion. IR1410, App. Ex. 3 at 00296-0300. Judge Anderson's conclusions are well supported.

[2] In the first footnote of its Opening Brief, Farmers included a link to a web-site with regard to reporting about the Captains. Presuming that such links are good for both "goose and gander," an additional link from USA Today, below, notes that, after the Rule 60 Motion was granted, the Captains' certifications were revoked by the International Association of Arson Investigators (the "IAAI"), the international accrediting organization for arson investigators, for unethical and un-professional conduct (http://ux.usatoday.com/story/news/investigative/2016/01/06/former-phoenix-arson-investigators-certification-revoked-unethical-conduct/78373580/).

In its argument against the Rule 60 Motion, Farmers made precisely the same arguments that are now repeated in its Opening Brief, by denying that it had pursued a *de facto* arson defense or that the jury might well have found the untrue opinions of Arizona law enforcement to be particularly and unfairly damaging to Sloan. *See generally* IR1386-87. Judge Anderson rejected each of Farmers' arguments in his Rule 60 Ruling, which at times quoted the statements and arguments of Farmers' counsel:

> The issue at trial was whether Farmers acted reasonably in handling Sloan's claims. In arguing that it did, Farmers relied on a de facto arson defense. Farmers told the jury during opening statement, "this case isn't about an insurance company. This case is about Barbara Sloan." (Tr. Apr. 19, 2012 at 19**.) For Farmers to dispute it defended this case on the basis that Sloan "burned her house down" simply belies the facts**. (Tr. May 29, 2012 at 102.)
>
> To be sure, Farmers presented evidence of its own fire investigation. **But its central argument throughout weeks of trial was that the MCAO and grand jury ("people much like yourselves") believed Sloan was an arsonist.** (Tr. Apr. 19, 2012 at 19.) **And the tree from which this argument grew was the integrity of the PFD investigation**. "The facts changed when the fire department said, 'We think it's arson, and we think she did it.'" (Tr. May 29, 2012 at 67.) Richardson was unequivocal in his opinion that Sloan had committed arson, and "[Richardson] had everything. He had every single [bit] of exculpatory evidence that we talked about in this case…It made no difference." (Tr. May 29, 2012 at 100-01.) "[F]irefighters aren't getting paid for their testimony, [they] have no ax to grind whatsoever." (Tr. May 29, 2012 at 68 (referring to other firefighters).) **The Court agrees with Sloan that the jury likely gave the PFD investigation great weight.** *See Kott v. City of Phx*., 158 Ariz. 415, 419 (1988); *Bogard G.M.C. Co. v. Henley*, 92 Ariz. 107, 112 (1962).

> Farmers urges that PFD malfeasance or incompetence is irrelevant to whether Farmers acted reasonably at the time. Farmers also urges that the DPS Report is unreliable and factually erroneous. Farmers further claims that the DPS Report does not tell the entire post-trial story. To be clear, the Court makes no findings with regard to relevance or admissibility of these post-trial investigations. It is enough that **the DPS Report casts heavy shadows on the integrity of the PFD investigation that was the bedrock of Farmers' trial defense.**

IR1410 at 3-4, App. Ex. 3 at 0298-0299 (footnotes omitted) (emphasis added).

After Judge Anderson granted the Rule 60 Motion, Farmers still endeavored to collect a substantial attorneys' fee award against Sloan with regard to the breach-of-contract claim. IR1427-28. Judge Anderson refused to award any fees. IR1464. During oral argument on the fee motion, Farmers stated that it stood a good chance of prevailing in an appeal of the Rule 60 Motion, prompting Judge Anderson to further explain his Rule 60 Ruling:

> **Farmers, to a significant degree, relied on the integrity of law enforcement to say that she was an arsonist. The two [investigators] were a significant part of that. And that was the horse you rode throughout the trial.** So I disagree that you have a good chance to prevail at the Court of Appeals. I don't think you do. I think this case is significantly different on retrial. That's my view, because **I think a large part of the arguments that Farmers relied on just aren't there anymore.**

RT, May 15, 2015, at 31:9, App. Ex. 2 at 0288 (emphasis added).[3]

[3] The PFD retained an employment lawyer at Jennings Strouss, a local law firm with a lobbying practice, to investigate the extent of its own culpability for the Captains' misconduct. Unsurprisingly, the ensuing report limited the PFD's responsibility to inadequate training. IR1402.

K. Farmers Had No Reasonable Belief In The Captains' Investigation.

Farmers claims in its Opening Brief that "there is no [evidence] that Farmers had any knowledge of that [PFD] 'misconduct'" prior to the DPS Report. OB at 5. But Farmers' knowledge or lack of knowledge is irrelevant. The simple fact is, Farmers won this case using evidence that turned out to be false. Even so, Farmers is not as innocent as it would have us believe. Judge Whitten, the criminal trial judge, stated, "The Court finds that the State's investigator [Captain Richardson] either had exculpatory information received from Farmers or had **worked so closely with Farmers in its investigation that the Farmers investigators became agents of his**."). TE217 at 2, App. Ex. 1 at 0179 (emphasis added) (another document excluded from the jury at trial).

Also, early on, Farmers conducted its own investigation (which exonerated Sloan), and it knew from doing so that the Captains' investigation was incompetent in its methods and inaccurate in its conclusions. Farmers nevertheless instructed Laubacher to work with Captain Richardson, and even to change his opinions to "coincide" with those of Richardson. Farmers was expressly warned about this decision by its own cause and origin expert (Laubacher), and it responded by assigning another expert (Hall) to carry out and enforce its strategy. TE4; TE6; TE8; TE13; TE16; TE25; TE35; TE36.

Farmers' claims counsel, Joseph Rocco, also harbored no illusions about Captain Richardson, whom he found to be inexperienced and incompetent. RT, May 10, 2012, at 203:4-15. Despite all of this knowledge, Farmers and Mr. Rocco forged ahead in committing the significant resources of Farmers to bolstering Captain Richardson's inept and unsupported conclusions, even to the point of withholding Farmers' own exculpatory findings and claims-log notes.

Farmers primed the jury to believe the Captains' conclusions of arson over those of virtually any paid expert. But Farmers itself had no basis to share such a simplistic belief. Certainly, Farmers is not entitled to a presumption that it was unaware of such spectacular violations of basic investigative techniques and procedures. Ultimately, though, whether or not Farmers was truly unaware of the PFD misconduct is not relevant to the real issue: It is undisputed, when one looks at the record described above, that Farmers accused Sloan of arson based on the **false** conclusions of law enforcement. Also, as Judge Anderson found, those false conclusions played a major role in the jury verdict for Farmers.

L. Farmers' Revised Factual Arguments Miss The Point - Farmers Employed Law Enforcement To Prevail In Determinations Of Fact.

Farmers essentially attempts to relitigate its case in the Opening Brief. Sloan generally declines to follow suit, because Farmers' revised rendition of the evidence it presented to the jury has little to do with this appeal.

As Judge Anderson recognized, both parties presented a tremendous amount of conflicting evidence, which required the jury to make a credibility assessment. After supposedly foregoing the use of expert-witness testimony under Rule 702, Farmers intentionally employed Arizona law-enforcement institutions to seek an advantage by touting the Arizona law-enforcement community's supposed certainty that Sloan was an arsonist, so as to lend credibility to its arson defense. Farmers argued that the jury should believe Sloan was an arsonist because seemingly trained and neutral law-enforcement officers and prosecutors reached that conclusion based on the evidence.

Judge Anderson identified this strategy in stating that Farmers "to a significant degree, relied on the integrity of law enforcement to say that she was an arsonist." RT, May 15, 2015, at 31:9-11, App. Ex. 2 at 0288. He also noted this tactic in his Rule 60 Ruling, writing, "To be sure, Farmers presented evidence of its own fire investigation. **But its central argument throughout weeks of trial 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." IR1410 at 3, App. Ex. 3 at 0298 (citation omitted) (emphasis added).

Indeed, Farmers expressly told the jury that the MCAO and the PFD's arson squad had already considered, and then rejected, the evidence that Sloan presented

during the trial. RT, May 29, 2012, at 100:22-101:1 ("[Captain Richardson] had everything. He had every single bit of exculpatory evidence that we talked about in this case.").

The jury was thus presented with a credibility contest between an "arsonist" versus the combined weight and respect of the PFD, the MCAO, the grand jury, and Farmers. This advantage was later proved to have been unjust, in Judge Anderson's view, after the very same law-enforcement entities found the PFD investigation to be irredeemably compromised and disavowed it, revoking the credentials and positions of the PFD investigators who accused Sloan of arson.

ISSUES PRESENTED FOR REVIEW

1. Did Judge Anderson abuse his considerable discretion under Rule 60(c)(6) in determining that, as a result of Farmers' reliance on Arizona law enforcement to bolster its arguments, an injustice had been created that required vacating the judgment?

2. Does sufficient evidence exist in the record to support Judge Anderson's determination that Farmers accused Sloan of arson and relied on Arizona law enforcement to bolster its arguments during trial, and that the subsequent disavowal by those institutions of the conclusions used by Farmers merits Rule 60(c)(6) relief?

LEGAL ARGUMENT

A. Standard of Review.

A trial court has broad discretion with regard to a Rule 60(c) motion, which is reviewed for abuse of discretion. *Birt v. Birt*, 208 Ariz. 546, 549 ¶ 9, 96 P.3d 544, 547 (App. 2004) ("We review a trial court's denial of relief under Rule 60(c) for abuse of discretion.").

On review, the trial judge's decision in granting a new trial is afforded "wide deference." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 403 ¶ 88, 276 P.3d 11, 37 (App. 2012); *see also Evans v. Abbey*, 130 Ariz. 157, 159, 634 P.2d 969, 971 (App. 1981) ("The decision to declare a mistrial is within the sound discretion of the trial court and is entitled to great deference."). This is because the trial court is best positioned to evaluate the tenor of the trial and the impact of competing arguments and evidence, as described by the Arizona Supreme Court in *Hutcherson v. City of Phoenix*:

> We review the trial judge's decision to deny post-trial motions for an abuse of discretion, recognizing that he had substantial latitude in deciding whether to upset the verdict. Our reason for deference is clear. "**The judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record**."

192 Ariz. 51, 53 ¶ 12, 961 P.2d 449, 451 (1998) (citation omitted) (emphasis added) (citing *Reeves v. Markle*, 119 Ariz. 159, 163, 579 P.2d 1382, 1386 (1978)).

The Court of Appeals explained the basis for this deference in upholding a trial court's decision to vacate a jury verdict in *Cal X-Tra*:

> **Judge Burke had the unique opportunity to hear the testimony and argument, observe its effect on the jury, and determine through his observations that the trial had been unfairly compromised**; in contrast, **we have only a cold record**, which does not convey voice emphasis or inflection, or **allow us to observe the jury and its reactions.**

229 Ariz. at 405 ¶ 92, 276 P.3d at 39 (emphasis added); *see also Creamer v. Troiano,* 108 Ariz. 573, 575, 503 P.2d 794, 796 (1972) (A trial court's "ruling on additur, remittitur, and new trial, because of an inadequate or excessive verdict, will generally be affirmed, because it will nearly always be more soundly based than ours can be.").

Courts are particularly deferential where, as here, the trial judge granted a new trial, because Farmers has not lost the ability to prevail again in a new trial. *Sadler v. Arizona Flour Mills Co.*, 58 Ariz. 486, 490, 121 P.2d 412, 413 (1942) ("The granting of a new trial is different from an order refusing a new trial, for in the former the rights of the parties are never finally disposed of as in the latter they may be. **The courts accordingly are more liberal in sustaining an order for new trial than where it is denied**.") (emphasis added).

When reviewing for an abuse of discretion, the Court must review the record in the light most favorable to upholding the trial court's decision. *Michaelson v. Garr*, 234 Ariz. 542, 544 ¶ 5, 323 P.3d 1193, 1195 (App. 2014). If there is any basis upon which the trial court's ruling may be upheld, then it should be upheld.

B. <u>Rule 60(c)(6) Requires A Case-by-Case Analysis</u>.

Pursuant to Rule 60(c)(6), the Court may grant relief from its prior judgment in certain limited circumstances:

> On motion and upon such terms as are just the court may relieve a party . . . from a final judgment . . . for the following reasons: . . . or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(c)(6) "**is a catch-all provision that has been described as a grand reservoir of equitable power to do justice in a particular case**." *Amanti Electric, Inc. v. Engineered Structures, Inc*., 229 Ariz. 430, 432 ¶ 7, 276 P.3d 499, 501 (App. 2012) (internal punctuation omitted) (emphasis added); *see also Webb v. Erickson,* 134 Ariz. 182, 186, 655 P.2d 6, 10 (1982) (describing the "broad equitable power of Rule 60(c)(6)").

Although the language of Rule 60(c)(6) may appear restrictive, relief "has been granted with a more liberal dispensation than a literal reading of the rule would allow in cases of extreme hardship or injustice." *Amanti,* 229 Ariz. at 432

¶ 6, 276 P.3d at 501 (internal punctuation omitted). The *Amanti* Court prescribed a case-by-case analysis:

> In determining the merits of motions for relief from judgment under Rule 60(c)'s federal analogue, courts have considered factors relating to "the nature and circumstances of the particular case," including "the timing of the request for relief, the extent of any prejudice to the opposing party, the existence or non-existence of meritorious claims of defense, and the presence or absence of exceptional circumstances." **These factors are not applied rigidly, but "are incorporated into a holistic appraisal of the circumstances," which "may - or may not - justify the extraordinary remedy of vacatur**."

Id. at 432 ¶ 8, 276 P.3d at 501 (emphasis added) (citations omitted). The DPS, the MCAO, and the PFD have undertaken every measure available to remedy the damage caused by the Captains' incompetent and fraudulent work. Rule 60(c)(6) allows the Court to do the same in this case, and Judge Anderson exercised that available remedy.

C. Exceptional Circumstances Certainly Exist Here.

1. Farmers Relied On Law Enforcement To Accuse Sloan Of Arson.

Farmers argues that, although it finally admitted its arson defense to Judge Anderson just prior to trial, and it repeatedly informed the jury during trial that Sloan was an arsonist, it actually eschewed a *de facto* arson defense. Judge Anderson, who sat through the trial, rejected this argument because it "simply belies the facts." IR 1410 at 3.

There is an obvious disparity between, for example, Farmers' closing argument to the jury (that Sloan "burned her house down") and the claim by Farmers in its Opening Brief that it did not engage in anything like an arson defense. Farmers attempts to reconcile this conflict by describing its purported motivation in accusing Sloan of arson. Farmers' supposed motivation is entirely inapposite – Farmers used the status of law enforcement to swing the jury in its direction and against Sloan by portraying her as an arsonist. 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.

2. <u>It Was Clear That The Jurors' Faith In Arizona's Criminal Justice Institutions Had Resulted In An Extraordinary Miscarriage Of Justice, And Judge Anderson Vacated The Verdict</u>.

Farmers' highly prejudicial arguments obviously informed the jury's analysis, but those arguments were fatally undermined by subsequent revelations. *See Richardson v. National R.R. Passenger Corp*., 150 F.R.D. 1, 7 (D.D.C. 1993) ("A court can provide relief from judgment under Rule 60(b)(6) for fraud perpetrated by a third party, including an adversary's witness."); *see also Metlyn Realty Corp. v. Esmark, Inc*., 763 F.2d 826, 832 (7th Cir. 1985) ("Unless the false

testimony can be traced to the adverse party, the case must be decided under the residual category of Rule 60(b)(6)"); 11 C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE & PROCEDURE § 2864 (2d ed. 2010) ("Fraud by . . . a third-party witness does not fit within clause (3) of the rule, which requires fraud by an adverse party. Thus, relief has been granted under clause (6) instead."). The drastic measures undertaken by the MCAO and the DPS to protect the public from the Captains' misconduct strongly indicate that the jury verdict constitutes an unjust result.

Even if Farmers' reliance on the PFD's investigation was entirely innocent (which it was not), its accusations against Sloan, supported as they were by the supposed integrity of law enforcement, poisoned Sloan's case and destroyed the integrity of the trial. A fair trial and a just result could not be reached with such evidence permeating the case (and destroying Sloan's credibility). Justice was not done, and Rule 60(c)(6) relief was appropriate.

Farmers argues that there was no prejudice here because Sloan argued to the jury that Richardson's conclusions were defective. However, neither the jury nor Sloan knew that the "facts" on which Farmers relied were all false. Farmers prevailed by directly informing the jury that its defense enjoyed the imprimatur of both the PFD and the MCAO, and that both of these entities had fully and properly investigated Sloan and had determined her to be an arsonist (and still believed such to be the case at trial). It is now apparent that these facts were far from true.

Finally, Farmers repeatedly claims that the DPS Report does not create an "extraordinary circumstance." Certainly, the PFD disagrees, as it has removed and reassigned the Captains. The MCAO also disagrees, as it refuses to even touch any case involving either of the Captains, regardless of the apparent merits of the case. The DPS disagrees, because it found felony charges to be appropriate. The IAAI disagrees, because it has revoked the Captains' credentials for ethical violations. Judge Anderson also disagrees. All of these institutions have taken dramatic steps to remedy the damage caused to Arizona's law-enforcement system by the Captains' failure to adhere to its most fundamental tenets. One hopes that it is indeed "extraordinary" for law enforcement to give intentionally false evidence that is used by a civil litigant to present defenses that otherwise had no substance.

As demonstrated by the plain language of Rule 60(c)(6), that provision is a catch-all that provides the Court with an opportunity to grant relief in the face of extraordinary circumstances. Such circumstances clearly exist here, and Rule 60 relief was appropriate.

D. <u>There Was A Fraud On The Court</u>.

Relief under Rule 60(c)(6) would also be appropriate because there was a fraud on the Court. Faith in the judicial process is precisely what Rule 60(c)(6) is designed to protect. *See Rogone v. Correia*, 236 Ariz. 43, 48 ¶ 11, 335 P.3d 1122, 1127 (App. 2014) ("Under Rule 60(c)(6), the Court may set aside a judgment for

fraud on the court at any time because such fraud harms the integrity of the judicial process and is a wrong against the institutions set up to protect and safeguard the public.") (internal punctuation omitted).

The seminal Rule 60 case for fraud on the Court is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), *overruled on other grounds, Standard Oil Co. v. U.S.*, 429 U.S. 17, 18 (1976). In *Hazel-Atlas*, Hartford-Empire sought a patent for a product, and included in its application a trade publication article touting the product. Although signed by the president of an industry union, the article was actually written by Hartford-Empire officials and Hartford-Empire's patent attorney. 322 U.S. at 240. This fraud on the Patent Office succeeded; Hartford-Empire obtained its patent and later prevailed in a lawsuit against Hazel-Atlas for violation of the patent. *Id.* at 241. Almost ten years later, Hazel-Atlas learned that the union president had not penned the article, and it sought to have the earlier judgment set aside. The Supreme Court granted relief on the basis of Hartford-Empire's fraud on both the Patent Office and the federal court, writing: "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* at 246.

Here, as in *Hazel-Atlas*, a fraud was perpetrated by the PFD, and that same fraud was later used to prevail in a civil case. *Id.* at 250; *see also Toscano v. Comm'r*, 441 F.2d 930, 935 (9th Cir. 1971) ("In the case before us, the original fraud was not upon the Tax Court, but upon the Commissioner, just as in *Hazel-Atlas* it was upon the Patent Office."). In both instances, though, there was eventually a fraud on the Court. Also, while fraud on the Court is often committed by a member of the bar, this is not a requirement and was not the case in *Hazel-Atlas*. *See, e.g., Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982) ("Other circuits have also recognized that fraud on the court can occur without the involvement of attorneys."); *In re Intermagnetics America, Inc.*, 926 F.2d 912, 917 (9th Cir. 1991) (CEO of debtor-in-possession committed fraud on the court); *Toscano*, 441 F.2d at 933-34 (setting aside judgment based on a third party's sham declaration of marriage); *Lim Kwock Soon v. Brownell*, 369 F.2d 808, 809 (5th Cir. 1966) (vacating judgment "to correct the fraud perpetrated upon the courts" by certain non-citizens); *In re Tri-Cran, Inc.*, 98 B.R. 609, 617 (Bankr.D.Mass. 1989) ("Certain non-attorney parties may also be perpetrators of fraud on the court."). By taking action against Captain Richardson based on his grand jury testimony, the DPS, the PFD, and the MCAO each determined that a fraud on the Court had occurred in this matter that required a remedy. Rule 60(c)(6) relief was entirely appropriate in this circumstance.

E. The Rule 60 Motion Was Not Based On "New Evidence."

Among its many "red herring" arguments, Farmers incorrectly argues that the Rule 60 Motion actually sought relief under Rule 60(c)(2). This argument lacks merit; it was also rejected by Judge Anderson. IR1410 at 3, n.5, App. Ex. 3 at 0298. As an initial matter, the DPS Report did not merely summarize existing facts. It reflects the results of an investigation (including twelve interviews and independent research by DPS officers) conducted several years after the conclusion of the trial, as part of an internal inquiry by Arizona law enforcement to determine whether the Captains adhered to proper standards in their work on the Sloan case. The DPS Report was the first formal acknowledgement that the Captains fell woefully short of all reasonable expectations in their work.

However, the Rule 60 Ruling was not predicated merely on the DPS Report or its supporting investigation. Farmers misstates the nature of the events giving rise to relief under Rule 60, which was not just evidence of the nature of the Captains' conduct. Rather, Judge Anderson's Rule 60 Ruling was based on Farmers' intentionally prejudicial argument that the jury should consider Sloan to be an arsonist because Arizona law enforcement and the MCAO believed this to be the case. RT, May 15, 2015, at 31:10-11, App. Ex. 2 at 0288 (Farmers "relied on the integrity of law enforcement to say that she was an arsonist."). The extraordinary circumstances that caused Judge Anderson to grant Rule 60 relief

include the extraordinary and aggressive actions undertaken by Arizona law enforcement and justice entities to disavow and unwind the damage caused by the Richardson investigation and Sloan's indictment. These actions destroyed the entire premise of Farmers' defense strategy, which was to employ the credibility of law enforcement as the foundation on which Farmers constructed its defense. RT, May 15, 2015, at 30:17-18, App. Ex. 2 at 0288 ("[A] large part of the arguments that Farmers relied on just aren't there anymore.").

The DPS Report was the first step in a wholesale disavowal of the Captains' investigation by each of the entities upon which Farmers had relied. These actions, by the relevant law enforcement institutions, did not occur until over two years had passed from the jury verdict. At the time of the jury verdict, no formal determination existed with regard to the Captains' purported credibility or status. To permit a jury verdict that was predicated on the integrity of law-enforcement institutions to stand, after those same institutions have entirely disavowed the conclusions attributed to them, would be extraordinarily unjust.

Finally, **although the Rule 60 Ruling was not based on "new evidence," it would make no difference if it had been**. This is because, as pointed out in *Amanti*, a trial court enjoys broad discretion to take appropriate measures to effect justice in the event of extraordinary circumstances, the likes of which undeniably exist here. 229 Ariz. at 432 ¶ 10, 276 P.3d at 433 ("even when relief might have

been available under one of the first five clauses but for the fact that the time limits of the rule had elapsed, this does not necessarily 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."). Judge Anderson's Rule 60 Ruling was correct with regard to the facts, and it was correct under the law.

CONCLUSION

This was a close case. The jury was out for several days and, even then, the verdict was not unanimous (7-2). Judge Anderson's finding that Farmers' use of the Captains' investigation had a very strong effect on the majority verdict is well supported. Now that the DPS, the MCAO, and the PFD have all taken extraordinary steps to repair the damage caused by the PFD investigation of Sloan, similar action is appropriate here. Rule 60(c)(6) was devised to remedy just such an injustice, and Judge Anderson properly exercised his broad discretion to avail himself of the rule here.

In fact, justice required Judge Anderson to do so under these circumstances. An explanatory hypothetical may shed additional light on the propriety of the Rule 60 Ruling: a plaintiff sues a pedestrian for injuries sustained in an auto accident, and the defendant claims the plaintiff was contributorily negligent because the police department's radar equipment showed the plaintiff was traveling at 80 miles

per hour in a 25 mile per hour zone. Although plaintiff contends he was only traveling at 25 miles per hour, the jury finds that the plaintiffs' negligence is the sole cause of the accident, based on the radar equipment and a police officer's testimony about the accuracy of the radar. Years later, a police investigation shows the radar equipment was faulty and its results were totally unreliable. Would the trial judge abuse his or her discretion by granting the plaintiff a new trial based on Rule 60(c)(6)? The answer to this question should be no.

Farmers offers an array of arguments about its presentation of the defense, many of which directly conflict with what it actually presented at trial. Judge Anderson, on the other hand, heard every word that Farmers told the jury. The trial court is afforded very broad discretion for this reason – Judge Anderson saw the impact on the jury of a uniformed PFD officer accusing Sloan of arson. He witnessed the impact of Farmers' final sentences in the trial – the idea intended to be foremost in the jurors' minds as they leave to deliberate – in which Farmers flatly stated: "she burned her house down."

Sloan respectfully urges the Court to consider the fact that Judge Anderson accurately recalled the jury trial he had witnessed and, therefore, he did not abuse his discretion in granting the Rule 60 Motion.

RESPECTFULLY SUBMITTED this 27th day of July, 2016.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARBARA A. SLOAN, a single woman,

Plaintiff/Appellee,

v.

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

CERTIFICATE OF COMPLIANCE

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, 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 brief/motion for reconsideration/ petition or cross-petition for review to which this Certificate is attached uses type of at least 14 points, is double spaced, and contains 11,405 words.

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DATED this 27th day of July, 2016.

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CERTIFICATE OF SERVICE

I, Michael N. Poli, hereby certify that on July 27, 2016, Appellee's Answering Brief and Appendix to Answering Brief were electronically filed with the Clerk of the Arizona Court of Appeals, Division One.

The undersigned further certifies that on July 27, 2016, a true and correct copy of Appellee's Answering Brief and Appendix to Answering Brief were served on counsel for Appellants, by first-class mail, postage prepaid, addressed as follows:

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