NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1122

SYLVESTER PERKINS

VERSUS

ALLSTATE INSURANCE COMPANY, SHARON BUNCH, JOHN BUNCH AND X INSURANCE COMPANY

Judgment Rendered: May 2, 2008

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C512753

Honorable Donald R. Johnson, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

**WHIPPLE, J.**

This matter is before us on appeal by plaintiff from an adverse jury verdict. Plaintiff instituted suit to recover under a fire insurance policy issued by defendant, after plaintiff's insured house, which was used as rental property, was destroyed by fire. In accordance with the jury's findings that the fire was the result of arson and that plaintiff was responsible for the fire, the trial court rendered judgment dismissing plaintiff's claim. For the following reasons, we affirm. We also deny the motion for new trial filed in this court by Perkins.

## FACTS AND PROCEDURAL HISTORY

Plaintiff, Sylvester Perkins, was the owner of a rental home located at 4106 Old Baker Road in Zachary, Louisiana, which home was adjacent to his personal residence. On August 15, 2003, Perkins's rental home on Old Baker Road was destroyed by fire. Perkins was at his residence next door at the time of the fire. Shortly after the fire, Perkins contacted Allstate Insurance Company, the residential fire insurer of the property, and Allstate thereafter began an investigation of the potential claim. Allstate engaged the services of a forensic fire investigator to determine the cause and origin of the fire. Additionally, Chuck Hebert, a special investigator with Allstate, took a recorded statement from Perkins on August 26, 2003. Thereafter, Hebert requested that Perkins produce certain financial documents and that he submit to an examination under oath.

Because he had already given a recorded statement, Perkins refused to submit to an examination under oath, and he also failed to produce the requested financial documents. Instead, on October 10, 2003, Perkins filed suit against Allstate, seeking to recover for his losses under the Allstate residential fire policy and for damages allegedly caused by Allstate's refusal

to pay the claim.[1] In its answer, Allstate raised affirmative defenses of arson and of breach of contract based on Perkins's actions in refusing to cooperate with its investigation and filing the instant suit before satisfying his obligations under the policy.

Following a three-day jury trial, the jury returned a verdict, finding as fact that: the fire was intentional in origin; the fire was, more probably than not, started with the knowledge or participation of Perkins; and Perkins filed suit in violation of the conditions of the Allstate residential fire insurance policy. Thus, in accordance with the jury's verdict, the trial court rendered judgment dismissing Perkins's claims against Allstate in their entirety, with prejudice.

From this judgment, Perkins appeals, contending that the jury was clearly wrong in: (1) finding that Perkins was responsible for the fire that destroyed his property; (2) finding that Perkins had a financial motive to burn his property; (3) finding that Perkins was responsible for the fire in the absence of fingerprints, DNA, or eyewitnesses; (4) finding that Perkins failed to cooperate with Allstate subsequent to the fire; and (5) finding that Allstate did not act in bad faith when it refused to pay Perkins's claim.[2]

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[1]In his petition, Perkins also named as defendants John and Sharon Bunch, contending that the Bunches had informed Allstate that he was "a big drug dealer" and seeking damages from the Bunches for unlawful interference with contractual relations, defamation of character, and humiliation and embarrassment. Perkins further asserted, in an amended petition, a claim of defamation against Allstate based on Allstate's assertions that the fire was intentional and that it occurred with Perkins's knowledge or participation.

However, shortly after filing suit, the trial court, upon motion of Perkins, dismissed Perkins's claims against the Bunches with prejudice. Additionally, pursuant to a motion for partial summary judgment filed by Allstate, the trial court dismissed Perkins's defamation claim against Allstate.

[2]Prior to filing this appeal, Perkins filed a motion for Judgment Notwithstanding the Verdict and, alternatively, new trial, alleging, among other things, jury misconduct. The trial court granted the motion for new trial on the issue of jury misconduct, vacated its July 1, 2005 judgment on the merits, and ordered a new trial. Ultimately, however, this court reversed the trial court's grant of a new trial and reinstated the jury verdict in favor of Allstate. Perkins v. Allstate Insurance Company, 2005-2676R (La. App. 1st Cir. 11/3/06), 950 So. 2d 850, 855. Perkins then filed a second motion for new trial, which was denied by the trial court.

## PERKINS'S MOTION FOR NEW TRIAL

Before addressing the merits of this appeal, we first address the motion for new trial filed by Perkins in this court on January 25, 2008. In examining the record in this matter, this court noticed that there were exhibits missing from the appellate record. Thus, by order dated December 21, 2007, this court remanded the matter to the trial court for the limited purpose of having the trial court supplement the appellate record with the missing exhibits.

On January 10, 2008, the trial court conducted a hearing for the purpose of supplementing the appellate record with these exhibits. Thereafter, the appellate record was supplemented with two exhibit envelopes, containing various exhibits that the trial court determined had been introduced at the trial of this matter.

Perkins then filed a motion for new trial with this court on January 25, 2008, contending that a new trial was warranted because he had been unable to reproduce Plaintiff's Proffer No. 1, a deposition of Melvin Davis, and that it could not be clearly established that other exhibits introduced at the hearing on remand were exact copies of those introduced at trial. Thus, Perkins requested that this court remand the matter to the district court for a new trial.

This court then obtained a transcript of the hearing on remand to fully consider Perkins's arguments in his motion for new trial.

At the outset, we note that the appellant is charged with the responsibility of completeness of the record for review, and the inadequacy of the record is imputable to the appellant. Luper v. Wal-Mart Stores, 2002-0806 (La. App. 1st Cir. 3/28/03), 844 So. 2d 329, 333 n.3. Moreover, to the extent that Perkins complains of his own failure to produce a copy of

Plaintiff's Proffer No. 1, we note that Perkins did not assign error on appeal to the trial court's ruling denying the admissibility of Plaintiff's Proffer No. 1. Further, we find no merit to Perkins's assertion that it could not be clearly established that other exhibits introduced at the hearing on remand were exact copies of those introduced at trial. Instead, we find that the testimony of Holly Cambre[3] thoroughly established the correctness of exhibits introduced on remand.[4] Accordingly, Perkins's motion for new trial is hereby denied.

**ARSON DEFENSE**
**(Assignments of Error Nos. 1, 2 & 3)**

Arson is an affirmative defense against a claim for fire insurance proceeds. By raising the affirmative defense of arson, the insurer has the burden of establishing, by a clear preponderance, that the fire was of incendiary origin and that plaintiff was responsible for it. An insurer need not prove its case beyond a reasonable doubt; it suffices that the evidence preponderates in favor of the defense. Rist v. Commercial Union Insurance Company, 376 So. 2d 113, 113-114 (La. 1979). Proof, of course, may be and invariably is entirely circumstantial. Rist, 376 So. 2d at 113; Sumrall v. Providence Washington Ins. Co., 221 La. 633, 636, 60 So. 2d 68, 69 (1952). As noted by the Fifth Circuit Court of Appeal in Christensen v. State Farm Mutual Automobile Insurance Company, 552 So. 2d 1377, 1379 (La. App.

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[3]Holly Cambre was a paralegal for Allstate's legal counsel, and she was called to testify at the hearing on remand regarding supplementation of the appellate record with certain enumerated exhibits.

[4]Although he did not complain of missing Exhibit P-6 in his motion for new trial, we note that Perkins also failed to reproduce his own Exhibit P-6 at the hearing on remand. Exhibit P-6 consisted of bank statements and payroll records of Perkins apparently produced to Allstate at its request. To the extent this exhibit was introduced to establish Perkins's financial condition, we note that Perkins himself testified as to his financial condition. To the extent that it was introduced to show his compliance with Allstate's request, we note that Perkins also testified as to his compliance. Also, with regard to Allstate's missing proffer, we note that Allstate waived inclusion of any of its proffer exhibits at the hearing on remand.

5th Cir. 1989), writ denied, 558 So. 2d 572 (La. 1990), "the very act of arson necessitates an environment where there are no witnesses and little direct evidence pointing toward the responsible party." Thus, the fact finder is usually forced to rely heavily on circumstantial evidence.

Proof of motive and of an incendiary origin of the fire is, in the absence of believable rebuttal evidence, sufficient to sustain the affirmative defense of arson. Sumrall, 221 La. at 641, 60 So. 2d at 70; Chisholm v. State Farm Fire & Casualty Co., 618 So. 2d 1059, 1062 (La. App. 1st Cir. 1993). Whether the insurer has adequately proven the arson defense is a factual determination subject to the manifest error standard of review. Miley v. United States Fidelity and Guaranty Company, 94-1204 (La. App. 1st Cir. 4/7/95), 659 So. 2d 792, 794, writ denied, 95-1101 (La. 6/16/95), 660 So. 2d 436.

Regarding the incendiary nature of the fire at issue, we note that while Perkins did not specifically set forth an assignment of error challenging the jury's finding that the fire was caused by arson, in argument addressing assignments of error numbers one and three, Perkins contends that the fire at issue could have been the result of spontaneous ignition of aerosol cans located near the hot water heater or charcoal lighter fluid in the adjacent room. He avers that because the fire occurred in August, the hottest month of the year in Louisiana, and because there were aerosol cans located "within a short distance" of the gas-operated hot water heater in the home, the fire could have been the result of self-ignition. Perkins further contends that spontaneous combustion would explain why there were no eyewitnesses, no fingerprints, and no DNA evidence at the scene.

The record on appeal demonstrates that after the fire was extinguished, Zachary Fire Chief Daniel Wallis walked through the property

and determined that the fire had originated in the bathroom. Wallis noted that there was an area on the bathroom floor that was burned through this raised structure, an indicator that an accelerant or flammable material may have been present, causing the fire to burn down through the floor.[5]

Thereafter, on August 19, 2003, Robert Green, a forensic fire investigator with Unified Investigations & Sciences, Inc., conducted a cause and origin investigation at the request of Allstate. Based on his investigation, Green determined that the fire had originated in the bathroom, where there was an area of "abnormal" or "unusual" burning on the floor of the bathroom causing the fire to burn holes through the floor.

Because Green suspected that an ignitable liquid had been introduced at this site, he submitted samples of the fire debris in that area to AK Analytical, a company that analyzes fire debris to determine the presence or absence of ignitable liquids. Dennis Akin, a forensic scientist who owns AK Analytical, tested the fire debris submitted by Green and found the presence of a chemical substance used in charcoal lighter fluid and lamp oil. Based on Akin's analysis of the fire debris and Green's own investigation of the fire scene, Green concluded that the cause of the fire was "a human introducing an ignitable liquid into the bathroom and igniting with an open flame." According to Green, there was no doubt in his mind that this fire was intentionally set.

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[5]At that point, because of the circumstances surrounding the fire and the intensity of the fire, Wallis requested the assistance of the Baton Rouge Fire Department to investigate the fire. Wallis was unaware of whether the Baton Rouge Fire Department ever issued a report with regard to the fire, explaining that once he seeks the Baton Rouge Fire Department's assistance in a fire investigation, he is not involved in the investigation and is not notified of the results. Wallis further explained that because of its workload and as a matter of resources, the Baton Rouge Fire Department is selective about which fires warrant further investigation.

With regard to the presence of aerosol cans located near the origin of the fire, which Perkins contends on appeal could have been the source of the fire, the record reflects that Green was questioned at trial as to whether those cans could have been a cause of ignition, and Green soundly rejected that hypothesis. While Green acknowledged that leaking aerosol cans can be ignited by a source, he explained that in the instant case, the aerosol cans could not have been the cause of the fire herein because the chemicals contained in the aerosol cans were not consistent with the chemicals found in charcoal lighter fluid or lamp oil, as was found in the debris sample.

Additionally, with regard to the possibility that charcoal lighter fluid located in the adjacent bedroom caused the fire, Green testified that if chemicals such as charcoal lighter fluid were located in another room, the chemicals would have burned fully in that location, and there would not have been enough quantity of fluid for it to spread to the next room.[6] According to Green, there would have had to be several **gallons** of ignitable fluid present for it to have spread from one room to another. Additionally, Green explained that if the fire had started in the adjacent bedroom, the burned-through holes in the bathroom floor would not have been present.

Chief Wallis similarly opined that if a conventional container of lighter fluid were present in the next room, there would not be enough volume of liquid to extend into the bathroom to cause the burned-through area on the bathroom floor. Rather, he explained that because it burns so hot, the lighter fluid would have burned where it was located.

Finally, with regard to Perkins's contention on appeal that the fire could have been the result of spontaneous combustion, we note that, in

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[6]Linda Armwood, Perkins's tenant who was in the process of moving out of the home, testified that she may have had some charcoal lighter fluid boxed up in the bedroom adjacent to the bathroom where Green determined the fire originated.

advancing this theory, Perkins attempts to rely upon documents,[7] which he offered in support of his second motion for new trial and which he contends were "new[ly] discovered." However, the trial court denied Perkins's motion for new trial, a ruling that has not been challenged herein, and the relied-upon documents were never accepted into evidence in this matter. Documents not introduced into evidence in the trial court below cannot be considered by the appellate court on appeal. Greenfield v. Lykes Brothers Steamship Company, 2002-1377 (La. App. 1st Cir. 5/9/03), 848 So. 2d 30, 33. Accordingly, we will not consider these documents relied upon by Perkins.

Based on our review of the evidence, we conclude that the record amply supports the jury's factual determination that the fire herein was the result of arson. Thus, the next question we must address is whether the jury manifestly erred in concluding that Perkins was responsible for the fire. As stated above, where there is proof that a fire is of incendiary origin, proof of the insured's motive, absent believable rebuttal evidence, is sufficient to sustain the defense of arson. Sumrall, 221 La. at 641, 60 So. 2d at 70; Chisholm, 618 So. 2d at 1062.

Regarding Perkins's motive to set the fire, the record establishes that Perkins purchased this two-bedroom, one-bath, 504-square-foot home in October 1999, for the purchase price of $9,000.00. An appraisal performed around the time of the purchase indicated that the property was valued at

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[7]These documents consisted of a newspaper article, allegedly published after the trial in this matter, about alleged wrongful arson convictions and excerpts from a book, with an undisclosed publication date, entitled Scientific Protocols for Fire Investigation, written by John J. Lentini. Perkins contended that the excerpts of the book cast doubts upon the testimony that arson was involved herein to the extent that such testimony was based upon the "myths" of burn patterns and the intensity of the fire as indicators of arson.

$10,000.00. Nonetheless, immediately after purchasing the property, Perkins insured the home with Allstate for $33,000.00.

Perkins used the home as rental property, and he was charging $260.00 per month in rent at the time of the fire. The first tenants began renting the property in 2000, and Perkins had to evict them after about one year for non-payment of rent. Perkins also evicted his second tenants for non-payment or late payment of the rent, and on July 20, 2003, less than one month before the fire, Perkins filed eviction proceedings against Linda Armwood, his third and last tenant, for non-payment of rent. At the time of the fire, Armwood was in the process of moving out of the home, and while she still had some possessions in the house, many of her possessions had been loaded into a pickup truck that was parked in the driveway.[8]

In describing the condition of the house prior to the fire, Susan Wistrand, a neighbor and a friend of Perkins and of Armwood, testified that the house needed a lot of work and agreed that the house was in "deplorable" condition. Specifically, she stated that there were slits in the walls where daylight could be seen through the walls. Also, there was insulation falling down from the ceiling inside the home. And, while Armwood claimed that the condition of the interior of the house was "nice" when she moved in about one year before the fire, she further admitted that prior to the fire, the roof was leaking badly, the ceiling in one room was caving in, and there was insulation hanging from the ceiling.[9]

Despite the poor condition of the original structure, Perkins had started to build an addition to the house prior to the fire to add more

[8]The record demonstrates that Armwood did not have renter's insurance to cover the loss of her remaining possessions in the home.

[9]Perkins, on the other hand, testified that the home was in "fair condition" and that he had begun to repair the roof at the time of the fire.

bedrooms. However, when neighbors voiced concerns to the City of Zachary about the unsafe condition of the construction, Amanda Castello, the chief building official for the City of Zachary, inspected the property and informed Perkins that he could not construct an addition to the home without a building permit. After Perkins obtained a building permit on April 2, 2003, Castello inspected the construction and found numerous problems. According to Castello, Perkins was using materials that were not rated for the purpose for which he was using them. She noted that Perkins had stacked landscape timbers along the perimeter of the addition in an attempt to support the load of the addition. Also, the roof rafters were not cut to the same length and were not evenly spaced. During that inspection, Castello discussed with Perkins the remedial measures he needed to take so that the construction could pass inspection.

Castello again inspected the property on May 19, 2003, and found that while Perkins had replaced the landscape timbers with concrete piers, there were still extensive deficiencies that made the construction unready for a framing inspection. Specifically, the roof rafters were still of different lengths and were still spaced irregularly. Also, the floor of the addition was uneven, and there were still foundation problems. As a favor to Perkins, rather than listing the construction as having failed inspection, Castello discussed the deficiencies with him on May 20, 2003, and provided him with information to help him correct the problems.

According to Cheryl Sanders, a licensed sales associate with Allstate, on the following day, May 21, 2003, Perkins contacted Allstate, seeking to increase his coverage on the rental house, indicating that he had added square footage to the home. Based solely on Perkins's representations about the addition and the receipt of a copy of the building permit, Allstate

increased Perkins's coverage from $33,000.00 to $63,000.00, effective May 22, 2003. The policy further provided replacement-cost coverage in the amount of $53,158.00.

The record is devoid of evidence that Perkins made any further effort to repair the property or to complete the addition. Instead, regarding whether any further work was performed on the addition from May 20 until the time of the fire on August 15, Castello testified at trial that she did not inspect the property again prior to the fire, but that in passing by the residence, she specifically noted that it did not appear that any more work had been done on it.

Additionally, Charles Jordon, an expert real estate appraiser, performed an appraisal to determine the value of the property immediately prior to the fire, and based on a review of the floor plan and photographs and a comparison of comparable properties, Jordon opined that the property was valued at approximately $9,000.00.

Thus, in determining Perkins's motive, the jury was presented with evidence that Perkins had experienced difficulties in collecting rent from his tenants who rented the Old Baker Road house; he had attempted to add on to the structure to increase the square footage, but had encountered significant problems with the property passing inspection due to construction deficiencies; and he had nonetheless increased his insurance coverage on the structure to $63,000.00, less than three months before the fire. Accordingly, the jury could have reasonably concluded that Perkins had motive to set the

fire.[10]

Moreover, no evidence was offered at trial to clearly establish anyone else who would have had a motive to burn Perkins's rental house.[11] While Perkins testified that he was in a solid financial position prior to the fire and, thus, had no financial motivation to set the fire, we note that Perkins's credibility was seriously challenged at trial. For example, in a June 17, 2004 examination under oath, Perkins was questioned about whether he had been involved in any other insurance claims in the past ten years, and he responded that he had made no more than one or two claims in the past ten years. Additionally, when questioned about his involvement in any lawsuits as either a plaintiff or a defendant, Perkins had responded that, years ago, he had been involved in a car accident. He denied at the time of his sworn statement that he was involved in any litigation.

However, at trial, Perkins acknowledged that, in fact, he had asserted or been involved in numerous insurance claims and lawsuits in the past ten years, including a bodily injury claim against Waste Management, a claim against St. Paul Insurance Company, a workers' compensation claim against the State of Louisiana, a claim against Allstate and his ex-wife for negligent injury to his sons, a claim for the loss of his vehicle by fire, a personal injury

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[10]In addressing the issue of whether an insured has been shown to be responsible for a fire, the courts have at times looked to opportunity in addition to motive. See Rist, 376 So. 2d at 115; see also Miley, 659 So. 2d at 798-799. In the instant case, as stated above, Perkins was at his residence next door on the night of the fire. Moreover, although he and Armwood both claimed that he did not have a key to the Old Baker Road home at the time of the fire, the record demonstrates that the only lock on the front door of the home was a standard twist-type door lock on the knob and that a lock of that type can be easily defeated with a pocket knife, credit card, or a driver's license.

[11]While Perkins offered some testimony to suggest that the Bunches, neighbors who lived across the street from the Old Baker Road house, had inquired about purchasing the Old Baker Road house both before and after the fire, and had complained to the City of Zachary about the safety of the construction of the addition, the jury obviously rejected any inference that their desire to purchase the property or their concerns about the addition established a motive to burn the house.

claim against Progressive Insurance Company, a personal injury claim against State Farm, a personal injury suit against Cajun Pest Control, and a suit against Popeye's for a slip and fall injury.

Moreover, Perkins's testimony also conflicted in some respects with the testimony of Hebert regarding whether Perkins had submitted to an examination under oath prior to filing the instant lawsuit and with Perkins's prior deposition testimony on other issues. When findings of fact are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the findings of the trier of fact. Diez v. Schwegmann Giant Supermarkets, Inc., 97-0034 (La. App. 1st Cir. 2/20/98), 709 So. 2d 243, 247.

Considering the foregoing and the record as a whole, we conclude that there was a reasonable factual basis in the record to support the jury's findings that the fire at issue was incendiary in nature and that Perkins was responsible for the fire. Moreover, given the credibility issues that the jury was required to resolve, the record does not support any reasonable hypothesis other than that Perkins was responsible for the fire. Thus, we find no manifest error in the jury's determination that Allstate proved its defense of arson by a preponderance of the evidence herein. These assignments of error lack merit.

**PERKINS'S FAILURE TO COOPERATE WITH ALLSTATE'S INVESTIGATION**
**(Assignment of Error No. 4)**

In this assignment of error, Perkins contends that the jury was clearly wrong in finding that he failed to cooperate with Allstate in its investigation subsequent to the fire. However, given our resolution of assignments of error numbers one through three above and our conclusion that the jury's

determination that Allstate had proven its defense of arson was not manifestly erroneous, we pretermit this assignment of error as moot.

**PERKINS'S CLAIM OF BAD FAITH**
**(Assignment of Error No. 5)**

In his final assignment of error, Perkins contends that the jury was manifestly erroneous in finding that Allstate did not act in bad faith in refusing to pay his claim herein. Because we have concluded that the jury was not manifestly erroneous in its finding that Allstate satisfied its burden of proving the defense of arson, we find no merit to this assignment of error.

**CONCLUSION**

For the above and foregoing reasons, the motion for new trial filed in this court by Sylvester Perkins is denied. Moreover, the July 1, 2005 judgment of the trial court, dismissing with prejudice Sylvester Perkins's claims against Allstate Insurance Company, is affirmed. Costs of this appeal are assessed against plaintiff, Sylvester Perkins.

**MOTION FOR NEW TRIAL DENIED; AFFIRMED.**