CHRISTINE BENE	*	**NO. 2000-CA-1059**
VERSUS	*	**COURT OF APPEAL**
AUDUBON INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 85-659, DIVISION "C"
Honorable J. Wayne Mumphrey, Judge

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Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris Sr.)

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AFFIRMED

Plaintiff/Appellee, Christine Bene, filed suit for damages to her home burned by fire after her insurer, Defendant/Appellant, Audubon Insurance Company, denied her insurance claim and raised arson as a defense. Audubon's defense did not prevail in district court, which found in favor of Ms. Bene. Audubon Insurance Company now appeals.

Facts

On August 26, 1997, an intentionally set fire damaged the house and movable property of Christine Bene at 14 Jamies Court, Violet, Louisiana. Consequently, Ms. Bene filed a claim with her property insurer, Audubon Insurance Company (hereinafter "Audubon"), which claim was denied. Ms. Bene filed suit and Audubon asserted the arson defense, alleging that Ms. Bene caused the fire to be set which would bar her recovery.

A neighbor, Mr. Otto Martin, testified that he witnessed the fire. He testified that he came upon the scene shortly after the blaze had begun and that he heard a vehicle in the area prior to the commencement of the fire. He also testified that he was able to see into the burning home from a hole in the window of the room in which the fire had commenced. He further testified that he witnessed a small fire on the bed in that room. The fire investigator,

Robert Green, testified that the window had been blown out by the fire and implied that the fire must have been set by someone with a key since the doors were locked.

The district court in its reasons for judgment did not dispute that arson was the cause of the fire, however, the district court did not find that there was sufficient evidence to conclude that Christine Bene was at fault in causing the fire.

The sole issue on review is whether the district court erred by not allowing Audubon's arson defense to prevail and finding in favor of Christine Bene.

Audubon argues that Ms. Bene set the fire herself or caused the fire to be set. Contractually, Ms. Bene would be barred recovery if she was found to have intentionally set her home on fire. Audubon did not have direct evidence to support this claim, but based its defense on Ms. Bene's financial condition. Audubon submitted the following circumstantial evidence demonstrating: 1.) Ms. Bene's inability to pay her mortgage, 2.) that Ms. Bene's expenses exceeded her income, 3.) Ms. Bene's inability to pay her utility bills, 4.) that Ms. Bene was scheduled to sell the property for $20,000, but the arson changed this to an insurance claim worth significantly more than that, and 5.) that Ms. Bene had no enemies nor had been threatened.

Ms. Bene argues that she has a valid policy with Audubon insuring the loss of her home and movable property therein due to arson, and is entitled to collect on the insurance policy to recoup her losses. She further argues that the fire was not set inside the home; her financial condition at the time of the fire was insufficient to find that she caused the arson and that Audubon failed to meet it's burden of proving that she was responsible for the fire.

Our review of the record indicates that the district court did not err in its finding in favor of Christine Bene. In order for the arson defense to have prevailed, "the burden rested upon the insurer [Audubon] to establish, by convincing proof, that the fire was of incendiary origin and that plaintiff was responsible for it. *Brinston v. Automotive Casualty Insurance Company*, 96-1982, p. 3, (La. App. 4 Cir. 12/3/97), 703 So.2d 813, 815, citing *Sumrall v. Providence Washington Insurance Company*, 221 La. 633, 60 So.2d 68 (La. 1952), *Rist v. Commercial Union Insurance Company*, 376 So.2d 113 (La. 1979). There is no dispute that arson was the cause of the fire, but rather whether Ms. Bene caused the fire.

> It is well settled that the insurer need not prove its case against a plaintiff beyond a reasonable doubt; it suffices that the evidence preponderates in favor of the defense. Proof, of course, may be and invariably is entirely circumstantial. And, in these

> instances, a finding for defendant is warranted where the evidence is of such import that it will sustain no other reasonable hypothesis but that the claimant is responsible for the fire.

Brinston v. Automotive Casualty Insurance Company, 96-1982, p. 3, (La. App. 4 Cir. 12/3/97), 703 So.2d 813, 815, citing, *Sumrall v. Providence Washington Insurance Company*, 221 La. 633, 60 So.2d 68 (La. 1952). Additionally, "whether an insurer has adequately proved an arson defense is a factual determination". *Brinston v. Automotive Casualty Insurance Company*, 96-1982, p. 3, (La. App. 4 Cir. 12/3/97), 703 So.2d 813, 815. "Factual determinations of the district court are entitled to great weight, and a court of appeal may not overturn those findings unless its review of the record convinces the appellate court that the determinations are clearly wrong." *Stobart v. State through DOTD*, 617 So.2d 880 (La. 1993).

In the case *sub judice*, the district court did not find that Audubon provided enough circumstantial evidence to prove that Ms. Bene was responsible for the fire. The district court found the testimony of Mr. Martin, in particular, extremely credible. Mr. Martin, the Appellee's neighbor, came upon the scene shortly after the blaze had begun. He testified that he saw a hole in the window of the room in which the fire had commenced. He further stated that he witnessed a small fire on the bed in that room. Conversely, the Appellee possessed the keys to the home.

Further, when the fire department arrived they found the doors to the home locked. It was doubtful to the district court that one who has access to a home would ignite a fire in such a manner.

Additionally, the district court was unimpressed with the expert testimony of Mr. Robert Green which essentially explained that the window was blown out by the heat of the fire.

The testimony of Mr. Martin, provides the district court with a reasonable hypothesis other than that the insured was responsible for the fire. Furthermore, it is within the district court's discretion to accept the demeanor, tone, impartiality and firsthand knowledge of Mr. Martin as the evidence that it was willing to base its decision, and we should not interfere with that determination. Further, it was this testimony that provides the weakest link in the chain of circumstantial evidence set forth by the defense. Thus, it was reasonable for the district court to have valued testimony of an eye-witness over the after-the-fact speculation of an expert witness.

We agree with the district court and find that the aforementioned evidence drastically outweighs evidence of motive and other evidence presented by the Appellant; and most importantly, that all evidence combined does not preponderate in favor of the Appellant.

DECREE

For the foregoing reasons, we hereby affirm the judgment of the district court. All costs are assessed to Audubon Insurance Company.

AFFIRMED