

2005

Bear River Mutual Insurance Company v. David and Deanna Williams : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
STATE OF UTAH

BEAR RIVER MUTUAL)
INSURANCE COMPANY,)
)
Plaintiff and Appellee,)
v.)
)
DAVID WILLIAMS and DEANNA) Appellate Case No. 20050618-CA
WILLIAMS)
)
Defendants and Appellants.)

BRIEF OF APPELLEE BEAR RIVER MUTUAL INSURANCE COMPANY

APPEAL FROM THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

APPEAL FROM THE ORDER GRANTING PLAINTIFF BEAR RIVER MUTUAL
INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT OF THE
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.
SALT LAKE DEPARTMENT, THE HONORABLE JUDGE LEON A. DEVER

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JURISDICTION OF THE COURT

Jurisdiction is before this Court pursuant to § 78-2a-3(2)(j) of the Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The policy issued by Bear River Mutual Insurance Company (hereinafter “Bear River”) to David and Deanna Williams (hereinafter “Williams”) specifically excludes coverages for damages caused by vandalism and malicious mischief when property has been vacant for more than 30 consecutive days. The sole issue presented on appeal is whether the trial court correctly determined that since Williams’ home had been vacant for more than thirty consecutive days prior to the loss, the loss was a result of vandalism and malicious mischief, which was excluded by Bear River’s policy.

As to the standard of review, the appellate court reviews the trial court’s grant of summary judgment for correctness, according no deference to the trial court’s legal conclusions. *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

Williams also contend there is an issue as to whether the trial court correctly determined that there were no issues of disputed fact precluding the grant of summary judgment in favor of Bear River. Williams did not identify this issue in their Rule 9 Docketing Statement, as they were required to do and, therefore, the Court should not consider this issue. However, in the event the Court decides to consider such, Bear River has addressed this issue in the Argument section below.

Williams address an additional argument Bear River presented in its Motion for Summary Judgment in the trial court below that there is no coverage afforded by the Bear River policy because the vacant Williams house was not being used for dwelling purposes at the time the fire occurred. However, that argument was not a basis of the trial court's decision to grant summary judgment in favor of Bear River and, consequently, is not an issue on appeal.

STATEMENT OF THE CASE

Nature of the Case: Bear River filed a declaratory action with the trial court, asking the court to declare that there is no coverage for damage done to property owned by the Williams because: (1) the damage to the Williams' property was caused by an act of vandalism and malicious mischief while the property had been vacant for more than 30 consecutive days; and (2) at the time of the loss the property was not being used principally for dwelling purposes as required by the policy.

Course of Proceedings and its Disposition in the Trial Court: At the conclusion of discovery, the parties filed cross motions for summary judgment. The trial court granted Bear River's motion for summary judgment and denied Williams' motion for summary judgment. (See Order Granting Summary Judgment in Favor of Bear River, attached hereto as Addendum A.) Williams now appeal the trial court's decision granting Bear River's motion for summary judgment.

Facts of the Case: Bear River issued a Homeowners Insurance Property policy to

Williams for property they owned at 1163 South West Temple, Salt Lake City, Utah 84115 (hereinafter referred to as the “Williams property”). (See Applicable Insurance Policy, Addendum B, R. 8-29.)

The policy extends coverage to the Williams’ property subject to the terms, conditions, limitations, restrictions and exclusions listed in the policy. (See Applicable Insurance Policy, p. 1, Addendum B, R. 8-29.)

The policy contains a provision that excludes coverage for damage to the Williams property if the damage is a result of an act of vandalism and malicious mischief when the Williams’ property has been vacant for more than 30 consecutive days before the loss. (See Applicable Insurance Policy, Addendum B, p. 4, R. 12.)

The Williams, at all relevant times, were and are owners of the Williams property. (See Williams’ Answer to Declaratory Complaint, ¶ 3, R. 33.) The Williams property was used as a rental property by the Williamses until August 2002. (See Williams’ Answer to Declaratory Complaint, ¶ 18 R. 34.) However, from August 2002 to July 3, 2003, the Williams property was vacant and the windows and doors were boarded up. (See Williams’ Answer to Declaratory Complaint, ¶ 19, R. 34; David Williams Deposition, p. 39, ll. 18-21, p. 43, ll. 21-23, p.44, ll. 15-19, R. 107-109; See Photographs of Williams’ property, R. 148-155.)

From the time the last tenants vacated the Williams property in August 2002, until July 3, 2003, all utilities, including gas, power, water, and telephone had been shut off and/or

were not in service. (See David Williams Deposition, p. 46, ll. 5-8 and 21-23, R. 111; See Public Utility Records, R. 117-132.)

In between August 2002 to July 3, 2003, there were several episodes of individuals breaking and entering into the Williams property and responding officers noted that the Williams property was vacant and abandoned. (See Police Records, R. 133-136.)

In addition, in between August 2002 to July 3, 2003, Salt Lake City Corporation sent several notices to Williams advising them that the property was vacant, unsecured, improperly boarded and that the property was likely to become a haven for vagrants. (See Letters From Salt Lake City Corp. R. 137-141.)

On July 3, 2003, approximately 11 months since the Williams property had been lived in, a fire occurred, causing significant damage to such. (See Affidavit of Rex Nelson, R. 142-144; See Affidavit of Jeffrey Long, R. 145-147.)

Two fire investigators, Rex Nelson and Jeffrey Long, conducted separate investigations to determine the cause and origin of the fire. Both investigators reached the conclusion that: (1) the origin of the fire was at the bottom of the doorway leading into the Williams property; (2) debris piled up at the bottom of the doorway where the fire originated was used as fuel to ignite the fire; (3) no evidence of accidental causes were discovered that would have caused or contributed to the fire; (4) and the fire resulted from an act of arson with the willful intent to cause damage to the home by an individual using available combustibles and a hand-held flame. (See Affidavit of Rex Nelson, R. 142-144; See

Affidavit of Jeffrey Long, R. 145-147; See Rex Nelson Deposition, p. 22, ll. 6-25, p. 23, ll. 1-16, p. 29, ll. 18-23, p. 30, ll. 3-6, p. 31, ll. 1-9, p. 33, ll. 5-9, p. 36, ll. 11-14, p. 37, ll. 17-24, R. 156-164; See Jeffrey Long Deposition, p. 13, ll. 9-14, p. 14, ll. 7-17, p. 16, ll. 10-14, p. 17, ll. 2-6, p. 25, ll. 3-12, p. 26, ll. 5-9, p. 29, ll. 1-6, p. 32, ll. 14-18, p. 33, ll. 7-12, p. 34, ll. 4-25, p. 35, ll. 18-25, p. 36, ll. 1-3, p. 42, ll. 3-11, R. 165-178.)

Williams presented a claim with Bear River, demanding that it provide coverage for the damages done as a result of the fire. (See R. 196.)

Bear River determined that the loss would not be covered by the policy of insurance, Bear River filed a declaratory action, asking the trial court to find no coverage for the damage to the Williams' property because: (1) the damage resulted from an act of vandalism and malicious mischief while the property had been vacant for more than 30 consecutive days before the fire and the Williams' property was not being used principally used for dwelling purposes at the time of the fire. (See Declaratory Complaint, R. 1-7.)

Williams have conceded that the home was vacant for more than 30 consecutive days before the fire. (See Williams' Answer to Declaratory Complaint, ¶ 19 R. 34 .)

SUMMARY OF THE ARGUMENTS

The trial court properly granted summary judgment in favor of Bear River. The damage done to the Williams' property resulted from an act of vandalism and malicious mischief when the property had been vacant for more than 30 consecutive days. Arson is a form of vandalism and malicious mischief.

The exclusion in the policy is clear and unambiguous. A reasonable purchaser of insurance would understand that, consistent with the terms and conditions of the policy, losses to the insured premises-when the premises have been vacant for more than thirty consecutive days-which are a result of vandalism and malicious mischief (including arson) are not covered by the policy.

Furthermore, there are no genuine issues of material fact that would preclude granting Bear River's Motion for Summary Judgment. Two expert fire investigators concluded that the fire was an act of arson. Williams have failed to produce any evidence to suggest that the fire was anything other than an act of vandalism and malicious mischief.

ARGUMENT

I. General Principles and Construction.

Courts must accord terms contained in an insurance policy their plain and ordinary meaning and apply those terms as written unless the terms are ambiguous or against public policy. *Holmes Development, LLC v. Cook*, 48 P.3d 895 (Utah 2002); *Miller v. USSAA Casualty Ins. Co.*, 44 P.3d 663, 676 (Utah 2002); *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834, 836 (Utah 1998).

If an exclusion is clear and unambiguous and does not contravene public policy, it must be applied as written. *First American Title*, 966 P.2d at 836; *Village Inn Apartments v. State Farm Fire & Cas. Ins. Co.*, 790 P.2d 581, 583 (Utah Ct. App. 1994).

Furthermore, an insurance contract's language must be construed according to its

plain and ordinary meaning and a court cannot make a forced construction or fashion a new contract for the parties. *St. Paul Fire & Marine Ins. Co. v. Schilling*, 520 N.W.2d 884, 887 (S.D. 1994). An unambiguous policy requires no construction and its plain terms must be given full effect even though they are beneficial to an insurer and detrimental to the insured. *Littrell v. Colony Ins. Co.*, 492 S.E.2d 299 (Ga. Ct. App. 1997).

II. The Trial Court Correctly Granted Bear River's Motion For Summary Judgment And Correctly Held That No Coverage Was Afforded For The Loss Since Williams' Property Had Been Vacant For More Than Thirty (30) Days Prior To The Loss And The Loss Was An Act Of Vandalism And Malicious Mischief

The trial court's decision to grant summary judgment in favor of Bear River should be upheld on appeal because the damage to the Williams property from the fire that occurred on July 3, 2003, resulted from an act of vandalism and malicious mischief while the Williams' property had been vacant for more than 30 consecutive days before the fire.

Bear River agreed to insure against certain types of losses to the Williams' property. However, it did not agree to insure losses to the Williams' property caused by vandalism and malicious mischief if the Williams' property had been vacant for more than 30 consecutive days prior to the loss. Specifically, the policy states:

PERILS INSURED AGAINST

COVERAGE A-DWELLING and COVERAGE B-OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

2. caused by:

- f. vandalism and malicious mischief, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss . . .

(See Applicable Insurance Policy, Addendum B, p. 4, R. 12.)

Williams admit that, at the time the fire occurred on July 3, 2003, the Williams property had been vacant for at least 30 consecutive days. (See Williams' Answer to Declaratory Complaint, ¶ 19, R. 34.) If the fire was an act of vandalism or malicious mischief, the loss would not be covered. In seeking coverage under the policy, Williams claim that "arson" (i.e., the intentional setting of a fire with intent to cause damage) is not an act of vandalism or malicious mischief.

Although there are no Utah cases directly addressing the vandalism/malicious mischief exclusion cited above in regards to arson, several courts throughout the nation have interpreted the same or similar provision in situations involving similar facts and found that arson is an act of vandalism and malicious mischief. For example, in *Government Employees Ins. Co. v. Medley*, 1998 U.S. District LEXIS 8085 (Dist. Ct. of Vir. 1998), a fire occurred at the insured's rental property, which had been vacant for more than 30 consecutive days. *Id.* The property had been condemned by the city because it was uninhabitable, the utilities were cut off, the home boarded up and debris was scattered all throughout the home. *Id.* The insurance policy contained an exclusion from coverage for damage caused by vandalism or malicious mischief if the property had been vacant for more than 30 consecutive days before

the loss. *Id.* The insurer retained an independent fire investigator to examine the property for the cause of the fire, and the city fire marshal also performed a similar investigation for the city. *Id.* Both investigators found that the fire was an act of arson even though the identity of the individual(s) causing the fire was unknown. *Id.* Accordingly, the court held that the policy did not extend coverage to the loss and specifically found that arson is a form of vandalism and malicious mischief. *Id.*

In *Costabile v. Metropolitan Prop. & Cas. Ins. Co.*, 193 F.Supp.2d 465 (D. Conn. 2002), a fire occurred at the insured's rental property, which had been vacant for more than a year and a half. *Id.* at 467. An independent fire investigator and the city marshal both concluded that the fire was the result of an act of arson. *Id.* at 468. In denying coverage for the loss, the insurer relied on the exclusion in the policy for "vandalism or malicious mischief" when the premises are vacant or unoccupied for more than 30 consecutive days immediately prior to the loss. *Id.* The term arson was not defined in the policy. *Id.* The type of policy in that case was the same type of policy at issue in the instant case.¹

In determining whether arson is a form of vandalism or malicious mischief, the court stated that "because vandalism is not defined by the policy, under the Connecticut Rules of

¹Williams claim that malicious mischief/vandalism and fire are listed as separate in Coverage C. However, Coverage C is for damage to personal property and is not an issue in this case. Coverage A (Dwelling) and B (Other Structures) do not list mischief/vandalism and fire as separate. The same policy provisions and language were addressed in *Costabile*, where the court found that arson is a form of vandalism and found there would be no coverage under Coverage A and B even though mischief/vandalism and fire were listed separately in Coverage C.

Construction, it must be given its plain, ordinary meaning.” *Id.* at 477. The court adopted the definitions of vandalism and arson from Webster’s Dictionary. *Id.* Based on the commonality of the definitions, the court found that arson is included in the plain and ordinary meaning of the term “vandalism,” and stated that such conclusion “is further supported by the weight of authority addressing vandalism exclusions under policies that provide all risk coverage and do not list fire and vandalism as separate causes of loss.” *Id.* at 478.

Likewise, in *Estes v. St. Paul Fire & Marine Ins. Co.*, 45 F.Supp.2d 1227 (D. Kan. 1999), the insured owned a home and used it for rental purposes until December 19, 1995. *Id.* at 1228. From December 19, 1995, through July 28, 1996, the home was vacant while the insured attempted to complete repairs demanded by the City. *Id.* at 1229. On or about July 28, 1996, an unknown individual set fire to the home. *Id.* The insured made a claim under the policy for damage done to the home. Relying on the policy exclusion which excluded coverage for vandalism and malicious mischief if the home was vacant for 30 days or more, the insurer denied coverage. *Id.*

Although the policy did not define the terms “vandalism” and “arson”, the court adopted the common definitions of those terms. *Id.* The court noted that the common definition of vandalism is “the wilful or malicious destruction or defacement of things of beauty or of public or private property”, and that the common definition of arson is “the wilful malicious burning of or attempts to burn any building, structure or property of another

(as a house, a church, or a boat) . . . “ *Id.*, citing Webster’s New International Dictionary (1986) at 2532 and 122. The court found that arson of a private dwelling clearly is within the plain and ordinary meaning of vandalism and applied the vandalism exclusion to deny coverage and grant the insurer’s motion for summary judgment. *Id.* at 1229.

In *American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378 (11th Cir. 1989), the insured’s home, which was used as a rental property, was destroyed by a fire set by an unknown arsonist. *Id.* At the time of the fire, the home had been vacant for several months, which the insured admitted in his answer. *Id.* at 379. The insured’s policy contained a provision that excluded damage resulting from vandalism or malicious mischief if the dwelling had been vacant for more than 30 consecutive days prior to the loss. *Id.* Based on that exclusion, the insurer filed a motion for summary judgment.

The court granted the insurer’s motion for summary judgment based on the vandalism exclusion, finding that “a common sense interpretation of the insurance contract ‘Vandalism or Malicious Mischief’ provision which contains the ‘vacancy’ exclusion, suggests that it would apply to a fire set in a vacant house by an unknown arsonist or vandal.” *Id.*

In *Vennemann v. Badger Mut. Ins. Co.*, 334 F.3d 772 (8th Cir. 2003), the insured’s home was damaged by a fire. At the time of the fire, nobody resided in the home, but the insured had been engaged in sporadic remodeling projects for over two months. *Id.* at 773. The insurer denied coverage based on the exclusion in the policy which excluded coverage for losses caused by vandalism and malicious mischief if the dwelling had been vacant for

more than 30 consecutive days immediately before the loss. *Id.* The court held that the fire was an act of vandalism and malicious mischief that occurred when the home was vacant for at least 30 consecutive days prior to the fire.² *Id.* at 774.

In *Lundquist v. Allstate Ins. Co.*, 732 N.E.2d 627 (Ill. Ct. App. 2000), the insured's home was also destroyed by fire set by arsonists. *Id.* at 628. At the time of the fire, nobody had lived in the insured's home on a full time basis for over a year. There had been an incident of vandalism at the insured's home two months prior to the fire. *Id.* at 629. The insurer denied the insured's claim for damages to the home based on the "vandalism or malicious mischief" exclusion, if the dwelling is vacant or unoccupied for more than 30 consecutive days immediately prior to the vandalism or malicious mischief." *Id.*

Again, the court found that the act of arson constituted vandalism or malicious mischief under the policy and that the only question was whether the home had been vacant for the required period of time. *Id.* at 630.

Finally, in *Potomac Ins. Co. of Ill. v. NCUA a/k/a National Credit Union Assn.*, 1996 U.S. Dist. LEXIS 9844 (N.D. Ill. 1996), the insurer also issued an insurance policy, which contained an exclusion for damage occurring to the property as a result of vandalism if the property had been vacant for more than 60 consecutive days before the loss. *Id.* The insured premises became unoccupied and was subsequently boarded up. *Id.* Approximately four

²Notably, the court stated that "a predictable pattern of habitation is significant in the insurance context because when a building is not in use, it is more likely that potential fire hazards will remain undiscovered or unremedied." *Id.*

months later, the property was set on fire by an unknown arsonist. *Id.* The insurer denied coverage based on the vandalism/vacancy exclusion. *Id.*

Because the term “vandalism” was not defined in the policy, the court compared the dictionary definitions of “arson” and “vandalism” and concluded that arson is a type of vandalism. Specifically, the court stated:

Since “vandalism” is not defined in the policy, we must afford the term its plain, ordinary, and popular meaning. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E. 1204, 1215-16. Illinois courts often look to Webster’s International Dictionary for guidance when defining the “usual and ordinary” meaning of contract language, *See Id.*, and this source defines “vandalism” as the “wilful or malicious destruction or defacement of things of beauty or of public or private property.” Webster’s Third New International Dictionary, 2532 (1986); Accord, the American Heritage Dictionary of the English Language 1973 (3rd Edition 1992). Similarly, arson is defined by Webster’s as “the wilful and malicious burning of or attempt to burn any building, structure, or property of another (as a house, a church, or a boat) or of one’s own [usually] with criminal or fraudulent intent.” Webster’s Third New International Dictionary 122 (1986); Accord, the American Heritage Dictionary of the English Language 103 (3rd Edition 1992).

Considering the sources and the ordinary meaning of the terms, it is apparent that arson – the wilful or malicious destruction of public or private property through the setting of a fire – is a type of vandalism. Although NCUA argues that the ordinary person would not equate serious acts of arson with petty instances of vandalism, we find the conclusion NCUA draws from this assertion – that arson does not constitute a species of vandalism – untenable. Rather, given the definitions quoted above and the ordinary meanings of the two terms, we must conclude that arson does indeed fall within the definition of vandalism. We are mindful of our obligation to construe policy limitations narrowly. Yet this principle of construction does not permit us to unreasonably interpret a limitation provision out of an insurance contract, but only to give insureds the benefit of an ambiguous term. The language of the Policy in this case is not ambiguous: the wilful destruction of property is not covered if the building has been vacant for 60 consecutive days. Under the facts stipulated for purposes of this motion, Gonsch’s building was vacant for

more than 60 days prior to the fire, and the fire was intentionally set by persons unknown. Thus, under this set of facts, the vacancy provision in the Policy plainly and unambiguously eliminates coverage. Because the policy's clear and unambiguous terms must be applied as written, *Hurst-Rosche Engineers, Inc., v. Commercial Unions Ins. Co.*, 51 F.3d 1336, 1342 (7th Cir. 1995), we must conclude that Potomac has no coverage obligations for the damage by arson at the insured premises. *Id.*

The majority of jurisdictions, as evidenced by the several cases cited above, have found that arson is a form of vandalism and malicious mischief, and have denied coverage on that basis where property has been vacant for 30 or more consecutive days.

The concept of the term "vandalism" (i.e., the "wilful or malicious destruction or defacement of things of beauty or of public or private property"), does not limit "how" the vandalism takes place. A "vandal" may use a baseball bat, a spray paint, a car, a crowbar, a knife, or any number of other "instruments" to accomplish his wilful and malicious destruction. He may use his bare hands. He may use a match. The point is, focus for "vandalism" or "malicious mischief" is not properly placed on the "means" by which the wilful or malicious destruction is accomplished; rather, focus is placed on the "fact" of the destruction itself.

In the instant case, the evidence clearly demonstrates that the July 3, 2003, fire at the Williams' property was an act of vandalism and malicious mischief (i.e., an intentionally set fire/arson). Two independent fire investigators, Rex Nelson of Salt Lake County, and Jeffrey Long of Fire Analysis Investigations, LLC, both came to the conclusion that, in their expert opinions, the July 3, 2003, fire was an intentionally set fire; i.e., an act of arson. Specifically,

both Mr. Nelson and Mr. Long found the following as it relates to the fire: (1) the origin of the fire was at the bottom of a door at the Williams' property's south rear entrance; (2) there was debris piled up at the base of the door that was used as fuel to ignite the fire; (3) no accidental causes were discovered that would have caused or contributed to the origin of the fire; (4) the fire resulted from an act of arson with the wilful intent to cause damage to the home; and (5) the home had been abandoned/vacant for an extended period of time because all of the windows were boarded up, there was no furniture present and there was a significant amount of graffiti and garbage throughout the home. (See Affidavit of Rex Nelson, R. 142-144; See Affidavit of Jeffrey Long, R. 145-147; See Rex Nelson Deposition, p. 22, ll. 6-25, p. 23, ll. 1-16, p. 29, ll. 18-23, p. 30, ll. 3-6, p. 31, ll. 1-9, p. 33, ll. 5-9, p. 36, ll. 11-14, p. 37, ll. 17-24, R. 156-164; See Jeffrey Long Deposition, p. 13, ll. 9-14, p. 14, ll. 7-17, p. 16, ll. 10-14, p. 17, ll. 2-6, p. 25, ll. 3-12, p. 26, ll. 5-9, p. 29, ll. 1-6, p. 32, ll. 14-18, p. 33, ll. 7-12, p. 34, ll. 4-25, p. 35, ll. 18-25, p. 36, ll. 1-3, p. 42, ll. 3-11, R. 165-178.)

In addition to the conclusions of the fire investigators that the fire was the result of arson, it is important to remind the Court of the fact that the Williams' property had experienced several break ins and trespassing/drug incidents within the year prior to the fire. (See Police Records, R. 133-136.) These incidents show that, in the year before the fire, the Williams' property had become a haven for transients and/or other individuals engaging in criminal behavior, including vandalism and malicious mischief.

Further, it is important to note (as discussed hereinafter) that Williams did not submit

any evidence to oppose the conclusions reached by the fire investigators nor did Williams submit any evidence to support any other possible cause of the fire.

One of the purposes of the vandalism/vacancy exclusion in homeowner's policies is to encourage policy holders to maintain a continual presence in the home so as to guard against a substantial increase of risk for vandalism. *Belgrade v. National American Ins. Co.*, 204 Cal.App.2d 44, 47 (Cal. Ct. App. 1962). Williams clearly failed to maintain a continual presence in the home. The property was vacant for at least 11 months and became a target for continuous criminal activity, including the fire that destroyed the home.

Williams claim that because arson is not defined or mentioned in the policy, the term is ambiguous and should not be considered vandalism or malicious mischief. (See Brief of Appellant.) Utilizing such a position, an insurance policy would have to have an endless list of possible instruments of destruction. The policy would have to be co-extensive with the criminal imagination. The law does not impose such a duty on an insurer. Rather, the language of the policy-excluding coverage when a house is vacant for more than 30 consecutive days and damage is done as a result of vandalism or malicious mischief (whatever the instrumentality used)-is clear, plain and unambiguous.

As discussed above, Webster's Dictionary defines vandalism as "the wilful or malicious destruction or defacement of things of beauty or of public or private property"(note, without identifying the means by which such destruction or defacement takes place) and arson as "the wilful malicious burning of or attempts to burn any building,

structure or property of another (as a house, a church, or a boat) . . .” *Id.* Webster’s New International Dictionary (1986) at 2532 and 122.

Furthermore, the Utah criminal code states that a person is guilty of arson if the person by means of fire or explosives **unlawfully** and **intentionally** damages the property of another. Utah Code Ann. § 76-6-102. (Emphasis added). Again, “arson” focuses on the “means”, whereas “vandalism” focuses on the damage by whatever means. “Arson” is a more specific subset of vandalism. Both terms involve the wilful and malicious destruction of property. Arson falls within the definition of “vandalism.”

Williams have only cited two cases, *Battishill v. Farmers Alliance Ins. Co.* and *American States Ins. Co. v. Rancho San Marcos Properties, LLC.*, in support of their position. However, those cases have taken a minority position on the issue of whether arson is a form of vandalism and malicious mischief.

As to *American States Ins. Co.*, that case did not even involve a building that was intended to be used for dwelling purposes; rather, it involved an abandoned commercial building. Also, the policy language in *American States Ins. Co.* is different.

As to *Battishill*, the court based its decision, in part, on the premise that insurance coverage should be extended based on the insured’s reasonable expectation of coverage, and that an insured would reasonably expect coverage for an arson fire. *Battishill*, 97 P.3d at 623-26. However, “the reasonable expectations doctrine” adopted in *Battishill* has been rejected by the Utah Supreme Court. Specifically, in *Allen v. Prudential Property and Cas.*

Ins. Co., 839 P.2d 798 (Utah 1992), the appellant’s child was injured while on the insured property. *Id.* at 799. The appellant subsequently tried to recover for the child’s injuries on a homeowner’s policy, which the insurer rejected based on a household exclusion. *Id.* at 800. The appellant sought to invalidate the household exclusion on the grounds that the insurance policy was an adhesion contract and that the exclusion violated her reasonable expectations of coverage. *Id.* However, the Utah Supreme Court rejected various versions of the reasonable expectations doctrine advanced by the appellant and stated: “the fact that an insurance contract is adhesive is no reason, in itself, to enforce what might be found to be the reasonable expectations of the insured when those expectations conflict with the plain terms of the policy.” *Id.* at 803. “We reject the various versions of the reasonable expectations doctrine advanced by Allen.” *Id.* at 807.

In the instant case, the plain terms of the policy clearly exclude coverage for losses caused by vandalism and malicious mischief when the Williams’ property has been vacant for 30 or more consecutive days.

It is difficult to imagine an insured would have a “reasonable expectation” that property damaged by a baseball bat, a crowbar, spray paint, a vehicle intentionally driven into a building, a knife, or a multitude of other destructive means would be properly excluded from coverage but property damage caused by a lighted match intended to cause the same damage would be covered.

In sum the vandalism/vacancy exclusion is clear and unambiguous in its inclusion of

arson as a type of vandalism and malicious mischief. Cases throughout the country that have interpreted identical, or nearly identical, policy language have found such. Accordingly, the trial court's decision granting Bear River's Motion for Summary Judgment should be upheld.

III. Contrary To The Williams' Assertions Otherwise, There Are No Issues Of Material Fact That Would Preclude Granting Bear River's Motion For Summary Judgment.

Williams argue that there is an issue as to whether the trial court correctly determined that there were no issues of disputed fact precluding the grant of summary judgment in favor of Bear River. Williams did not identify this issue in the Rule 9 Docketing Statement as required by the *Utah Rules of Appellate Procedure*; rather, the only issue identified by the Williams in their Docketing Statement is whether the trial court correctly determined that arson is a form of vandalism and malicious mischief. (See Addendum C, Docketing Statement.)

Because Williams did not identify the second issue, the Court should not consider such on appeal. However, in the event the Court decides to consider the second issue, Bear River presents the following:

Williams claim that even if this Court holds that arson is a form of vandalism and malicious mischief, a factual issue exists because Bear River's experts cannot prove the fire was set with the intent to damage the Williams' property because the identity of the person(s) who set the fire is unknown. Williams' contentions are without support.

In the trial court, Williams failed to offer any evidence controverting the findings of

Mr. Nelson and Mr. Long that the fire was intentionally set. Williams have presented no affidavits, no sworn testimony, no expert opinion, and no facts to controvert the expert opinions of the fire investigators. If such evidence did exist, which it does not, such evidence should have presented at the trial level; not raised in the appellate court for the first time.

Further, both Mr. Nelson and Mr. Long found that: (1) the origin of the fire was at the bottom of the doorway at the Williams'; (2) debris was piled up at the bottom of the doorway where the fire originated and was used as fuel to ignite the fire; (3) no evidence of accidental causes were discovered that would have caused or contributed to the fire; and (4) the fire resulted from an act of arson with the willful intent to cause damage to the home by an individual using combustibles and a hand-held flame. (See Affidavit of Rex Nelson, R. 142-144; See Affidavit of Jeffrey Long, R. 145-147; See Rex Nelson Deposition, p. 22, ll. 6-25, p. 23, ll. 1-16, p. 29, ll. 18-23, p. 30, ll. 3-6, p. 31, ll. 1-9, p. 33, ll. 5-9, p. 36, ll. 11-14, p. 37, ll. 17-24, R. 156-164; See Jeffrey Long Deposition, p. 13, ll. 9-14, p. 14, ll. 7-17, p. 16, ll. 10-14, p. 17, ll. 2-6, p. 25, ll. 3-12, p. 26, ll. 5-9, p. 29, ll. 1-6, p. 32, ll. 14-18, p. 33, ll. 7-12, p. 34, ll. 4-25, p. 35, ll. 18-25, p. 36, ll. 1-3, p. 42, ll. 3-11, R. 165-178.)

Specifically, Mr. Nelson testified in his deposition as follows:

- Q. It's my understanding from the testimony that I've heard today that-well, first of all let me ask you an initial question. Would you tell us what your definition would be of an act of arson?
- A. Act of arson is an intentionally set fire. When I said earlier in the deposition it was a man caused fire that would probably be my opinion that it's a man caused fire and it most likely is arson.

(See Rex Nelson Deposition, p. 29, ll. 24-25, p. 30, ll. 1-6, R. 159-160.)

Mr. Nelson further testified as follows:

Q. As a fire investigator is it your experience that you can generally determine the cause and origin of a fire without identifying the identity of the person or source that set the fire?

A. Sure.

Q. And can you also determine that a fire was intentionally set without knowing the identity of the individual that set the fire?

A. Sure.

Q. And in this case, based on the evidence that you observed and collected, is it your opinion that this was most likely an intentionally set fire or an act of arson?

A. That would be my opinion.

(See Rex Nelson Deposition, p. 32, ll. 21-25, p. 33, ll. 1-9, R. 162.)

Lastly, Mr. Nelson testified as follows:

Q. So you have to sort of leave it open that it was an intentional fire?

A. Well, we do that, but based on my experience in looking at these fires, this fire started on the outside of the house. There was no accidental way for it to have started. So I felt that the most likely possibility was a hand held flame or somebody wanting to either burn the house down or maybe they saw a pile of debris and just wanted to light it on fire . . .

Q. Although you testified you don't know for sure the intent of the individual that you believe set the fire, you believe it's likely that the fire resulted from an act of arson with the intent to cause destruction?

A. That's my opinion, yes. I believe it's an intentionally set fire.

(See Rex Nelson Deposition, p. 36, ll. 9-19, p. 37, ll. 18-24, R. 163-164.)

Mr. Long testified as follows as to his opinion as to the cause of the fire:

Q. I have a few questions. As a fire investigator, Jeff, can you determine the cause and origin in the fire without knowing the identity of the person who caused the fire?

A. Sure.

Q. And can you make a determination that a fire was the result of arson without knowing the identity of the person who set the fire?

A. Yes.

Q. Did you find any evidence that would indicate that this fire we are talking about here today was accidentally caused?

A. I found no evidence that it was accidentally caused. I removed all accidental causes.

(See Jeffrey Long Deposition, p. 32, ll. 5-16, R. 173.)

Mr. Long further testified as follows:

Q. And then going back to my question, it's more likely than not that this was the result of arson?

A. Yes. If I would-if it had been my fire working as a criminal investigator if I would have found the person who did it I would have screened the case with the district attorney for a charge of arson.

Q. But even not knowing the identity of the person you can still make a determination more likely than not it was arson?

A. Yes.

(See Jeffrey Long Deposition, p. 35, ll. 18-25, p. 36, ll. 1-3, R. 176-177.)

Lastly, Mr. Long testified as follows:

Q. I just have one more question. And just to be clear, can you look at paragraph 12 of your affidavit, Jeff.

A. Paragraph 12, yes.

Q. It reads, it is my opinion that the fire resulted from an act of arson with the wilful intent to cause damage to the home. Is that statement correct?

A. Yes.

(See Jeffrey Long Deposition, p. 42, ll. 3-11, R. 178.)

Contrary to the Williams' assertions, Mr. Long did not repudiate paragraph 12 of his Affidavit; rather, he affirmed it. He testified that although he does not know the exact intent of the unknown arsonist, it is his opinion that the fire resulted from an act of arson. (See Jeffrey Long Deposition, p. 42, ll. 3-11, R. 178.)

Again, this evidence was uncontroverted at the trial level. Moreover, this Court has held that intent may be inferred from the nature of the act and the accompanying reasonable foreseeability of harm. *Fire Ins. Exch. v. Rosenberg*, 930 P.2d 1202 (Utah Ct. App. 1997); *State Farm & Cas. Co. v. Geary*, 869 P.2d 952 (Utah Ct. App. 1994). An effect which is the natural and probable consequence of an act or course of action is not an accident; whether an intentional act leading to unintended harm is considered accidental or not generally depends on the likelihood that the intentional act will result in harm of the type that in fact occurred. *Id.*

In this case, the natural and probable consequence of the unknown arsonist's act of igniting the fire at the base of the door where debris was piled up was that it would destroy

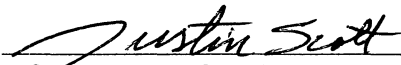
or cause significant damage to the Williams' property. The inferred intent of the unknown arsonist(s) is that he/she intended to cause damage to the Williams' property. If there was another explanation, Williams could have presented such evidence at the trial level. They did not.

CONCLUSION

Bear River requests that this Court affirm the trial court's summary judgment order, which states that there is no coverage for the damages to the Williams' property located at 1163 South West Temple, Salt Lake City, Utah, because the damage resulted from an act of vandalism and malicious mischief (arson) while the property had been vacant for more than 30 consecutive days.

DATED this 12 day of January, 2006.

SMITH & GLAUSER

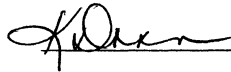


LOWELL V. SMITH
JUSTIN E. SCOTT
Attorneys for Appellee Bear River

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing BRIEF OF APPELLEE BEAR RIVER MUTUAL INSURANCE COMPANY was mailed, postage prepaid, this 12th day of January, 2006 to:

Shawn D. Turner
Larson Turner Fairbanks & Dalby, L.C.
1218 W. South Jordan Pkwy, #B
South Jordan, UT 84095



Tab A

JUN 13 2005

SALT LAKE COUNTY

By _____ Deputy Clerk

LOWELL V. SMITH, #3006
JUSTIN E. SCOTT, #9162
SMITH & GLAUSER, P.C.
7351 S. Union Park Ave., Suite 200
Salt Lake City, Utah 84047
Telephone: (801) 562-5555
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY,)	ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF, BEAR RIVER MUTUAL INSURANCE COMPANY
Plaintiff,)	
v.)	AND
DAVID WILLIAMS and DEANNA WILLIAMS,)	ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
Defendants.)	Civil No. 030923716
)	Judge L.A. Dever

Plaintiff, Bear River Mutual Insurance Company, and Defendants, David Williams and Deanna Williams, filed Motions for Summary Judgment, pursuant to Rule 56, Utah Rules of Civil Procedure. These motions came before the Honorable L. A. Dever for oral argument on May 31, 2005. Plaintiff was represented by Justin Scott, Smith & Glauser, P.C. Defendants were represented by Shawn Turner, Larson, Turner, Fairbanks & Dalby, P.C.

The Court, having reviewed the motions for summary judgment and supporting memoranda, having considered oral argument presented in support of and in opposition to the motions for summary judgment, and being fully advised in the premises, hereby, ORDERS, ADJUDGES AND DECREES that:

1. There are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law, pursuant to Rule 56, Utah Rules of Civil Procedure.

2. Plaintiff's Motion for Summary Judgment is hereby granted. The policy issued by Bear River Mutual Insurance Company specifically excludes coverage for damages caused by vandalism and malicious mischief when the property has been vacant for more than 30 consecutive days. Arson is a form of vandalism and malicious mischief, consistent with the exclusion contained in the policy. There is no coverage for the damages to the defendant insureds' property located at 1163 South West Temple, Salt Lake City, Utah, which resulted from an act of vandalism and malicious mischief on July 3, 2003 when the property had been vacant for more than 30 consecutive days.

3. Defendants' Motion for Summary Judgment is hereby denied.

DATED this 11 day of June, 2005.

BY THE COURT:



THE HONORABLE L.A. DEVER
Third District Court Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing ORDER ON MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 31st day of May, 2005 to:

Shawn D. Turner
Larson Turner Fairbanks & Dalby, L.C.
1218 W. South Jordan Pkwy, #B
South Jordan, UT 84095

 _____

Tab B

Bear River Mutual Insurance Company
MURRAY, UTAH

DWELLING FIRE INSURANCE DECLARATION PAGE

This Declaration Page and the non-assessable dwelling policy provisions are the contractual obligations assumed by the Insured and Bear River Mutual Insurance Company, Murray, Utah.

NAMED INSURED

WILLIAMS, DAVID AND DEANNA
PO BOX 25670

HONOLULU, HI 96825

Print Date 01/06/2003

Policy Number F178238

Agent Info

Agent No. 85 Sub-Agent
MONSON INSURANCE
635 W 5300 S STE 201

MURRAY UT 84123
801-269-1999

MAILING ADDRESS

WILLIAMS, DAVID AND DEANNA
PO BOX 25670

HONOLULU, HI 96825

Renewal Declaration

Policy Term: 12:01 a.m. MST at Location of Property Described **From:** 03/05/2003 **To:** 03/05/2004

Yr. of Const. 1945

Insured Property Location

1163 SOUTH WEST TEMPLE
SALT LAKE CITY, UTAH 84115

Type of Const. Frame

Prot. Class 3

Number of Units

On each dwelling the insurance is afforded only with respect to the dwelling as indicated and by a specific premium charge or charges. The limits of the Company's liability against each such coverage or peril insured against shall be stated herein for which a premium is charged subject to the provisions of the policy and endorsements added thereto. Insurance is provided only with respect to the following coverages for which a limit of liability is specified, subject to all conditions of this policy.

Coverages	Limits of Liability	Premium
Dwelling	50,000	94.00
Contents		0.00
Liability (DLC)	300,000 / 1,000 MED	55.00
Total Premium		149.00

Form and Endorsement made part of this Policy at time of issue. ISO Form Number(s)
SPECIAL PROVISIONS - UTAH
DP3,DLC,

DEDUCTIBLE -- All Coverage and Endorsements are subject to a 250 deductible.

Mortgagee (s) as their interest may appear.

Premium Payable By Mortgagee No



AGREEMENT

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

DEFINITIONS

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We," "us" and "our" refer to the Company providing this insurance.

COVERAGES

This insurance applies to the Described Location, Coverages for which a Limit of Liability is shown and Perils Insured Against for which a Premium is stated.

COVERAGE A – Dwelling

We cover:

1. the dwelling on the Described Location shown in the Declarations, used principally for dwelling purposes, including structures attached to the dwelling;
2. materials and supplies located on or next to the Described Location used to construct, alter or repair the dwelling or other structures on the Described Location; and
3. if not otherwise covered in this policy, building equipment and outdoor equipment used for the service of and located on the Described Location.

This coverage does not apply to land, including land on which the dwelling is located.

COVERAGE B – Other Structures

We cover other structures on the Described Location, set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

This coverage does not apply to land, including land on which the other structures are located.

We do not cover other structures:

1. used in whole or in part for commercial, manufacturing or farming purposes; or
2. rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.

COVERAGE C – Personal Property

We cover personal property, usual to the occupancy as a dwelling and owned or used by you or members of your family residing with you while it is on the Described Location. At your request, we will cover personal property owned by a guest or servant while the property is on the Described Location.

Property Not Covered. We do not cover:

1. accounts, bank notes, bills, bullion, coins, currency, deeds, evidences of debt, gold other than goldware, letters of credit, manuscripts, medals, money, notes other than bank notes, passports, personal records, platinum, securities, silver other than silverware, tickets and stamps;
2. animals, birds or fish;
3. aircraft and parts. Aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo;
4. motor vehicles or all other motorized land conveyances. This includes:
 - a. their equipment and accessories; or
 - b. any device or instrument for the transmitting, recording, receiving or reproduction of sound or pictures which is operated by power from the electrical system of motor vehicles or all other motorized land conveyances, including:
 - (1) accessories or antennas; or
 - (2) tapes, wires, records, discs or other media for use with any such device or instrument;while in or upon the vehicle or conveyance.

We do cover vehicles or conveyances not subject to motor vehicle registration which are:

- a. used to service the Described Location; or
 - b. designed for assisting the handicapped;
5. watercraft, other than rowboats and canoes;
6. data, including data stored in:
- a. books of account, drawings or other paper records; or
 - b. electronic data processing tapes, wires, records, discs or other software media.

However, we do cover the cost of blank recording or storage media, and of pre-recorded computer programs available on the retail market;

7. credit cards or fund transfer cards.

If you remove personal property from the Described Location to a newly acquired principal residence, the Coverage C limit of liability will apply at each residence for the 30 days immediately after you begin to move the property there. This time period will not extend beyond the termination of this policy. Our liability is limited to the proportion of the limit of liability that the value at each residence bears to the total value of all personal property covered by this policy.

COVERAGE D – Fair Rental Value

If a loss to property described in Coverage A, B or C by a Peril Insured Against under this policy makes that part of the Described Location rented to others or held for rental by you unfit for its normal use, we cover its:

Fair Rental Value, meaning the fair rental value of that part of the Described Location rented to others or held for rental by you less any expenses that do not continue while that part of the Described Location rented or held for rental is not fit to live in.

Payment will be for the shortest time required to repair or replace that part of the Described Location rented or held for rental.

If a civil authority prohibits you from use of the Described Location as a result of direct damage to a neighboring location by a Peril Insured Against in this policy, we cover the Fair Rental Value loss for no more than two weeks.

The periods of time referenced above are not limited by the expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

COVERAGE E – Additional Living Expense

If a loss to property described in Coverage A, B or C by a Peril Insured Against under this policy makes the Described Location unfit for its normal use, we cover your:

Additional Living Expense, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living.

Payment will be for the shortest time required to repair or replace the Described Location or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

If a civil authority prohibits you from use of the Described Location as a result of direct damage to a neighboring location by a Peril Insured Against in this policy, we cover the Additional Living Expense loss for no more than two weeks.

The periods of time referenced above are not limited by the expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

OTHER COVERAGES

1. **Other Structures.** You may use up to 10% of the Coverage A limit of liability for loss by a Peril Insured Against to other structures described in Coverage B.

Use of this coverage does not reduce the Coverage A limit of liability for the same loss.

2. **Debris Removal.** We will pay your reasonable expense for the removal of:

- a. debris of covered property if a Peril Insured Against causes the loss; or
- b. ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.

Debris removal expense is included in the limit of liability applying to the damaged property.

3. **Improvements, Alterations and Additions.** If you are a tenant of the Described Location, you may use up to 10% of the Coverage C limit of liability for loss by a Peril Insured Against to improvements, alterations and additions, made or acquired at your expense, to that part of the Described Location used only by you.

Use of this coverage does not reduce the Coverage C limit of liability for the same loss.

4. **World-Wide Coverage.** You may use up to 10% of the Coverage C limit of liability for loss by a Peril Insured Against to property covered under Coverage C except rowboats and canoes, while anywhere in the world.

Use of this coverage reduces the Coverage C limit of liability for the same loss.

5. Rental Value and Additional Living Expense.

You may use up to 10% of the Coverage A limit of liability for loss of both fair rental value as described in Coverage D and additional living expense as described in Coverage E.

Use of this coverage does not reduce the Coverage A limit of liability for the same loss.

6. Reasonable Repairs. In the event that covered property is damaged by an applicable Peril Insured Against, we will pay the reasonable cost incurred by you for necessary measures taken solely to protect against further damage. If the measures taken involve repair to other damaged property, we will pay for those measures only if that property is covered under this policy and the damage to that property is caused by an applicable Peril Insured Against.

This coverage:

- a. does not increase the limit of liability that applies to the covered property;
- b. does not relieve you of your duties, in case of a loss to covered property, as set forth in Condition 4.b.

7. Property Removed. We insure covered property against direct loss from any cause while being removed from a premises endangered by a Peril Insured Against and for no more than 30 days while removed.

This coverage does not change the limit of liability that applies to the property being removed.

8. Trees, Shrubs and Other Plants. We cover trees, shrubs, plants or lawns, on the Described Location for loss caused by the following Perils Insured Against: Fire or lightning, Explosion, Riot or civil commotion, Aircraft, Vehicles not owned or operated by you or a resident of the Described Location or Vandalism or malicious mischief, including damage during a burglary or attempted burglary, but not theft of property.

The limit of liability for this coverage will not be more than 5% of the Coverage A limit of liability, or more than \$500 for any one tree, shrub or plant. We do not cover property grown for commercial purposes.

This coverage is additional insurance.

9. Fire Department Service Charge. We will pay up to \$500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Peril Insured Against. We do not cover fire department service charges if the property is located within the limits of the city, municipality or protection district furnishing the fire department response.

This coverage is additional insurance. No deductible applies to this coverage.

10. Collapse. We insure for risk of direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

- a. Perils Insured Against in Coverage C – Personal Property. These perils apply to covered building and personal property for loss insured by this Other Coverage;
- b. hidden decay;
- c. hidden insect or vermin damage;
- d. weight of contents, equipment, animals or people;
- e. weight of rain which collects on a roof;
- f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b, c, d, e and f unless the loss is a direct result of the collapse of a building.

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged covered property.

11. Glass or Safety Glazing Material. We cover:

- a. the breakage of glass or safety glazing material which is part of a covered building, storm door or storm window; and
- b. damage to covered property by glass or safety glazing material which is part of a building, storm door or storm window.

This coverage does not include loss on the Described Location if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

Loss for damage to glass will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

This coverage does not increase the limit of liability that applies to the damaged property.

PERILS INSURED AGAINST

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

1. involving collapse, other than as provided in Other Coverages 10;
2. caused by:
 - a. freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:
 - (1) maintain heat in the building; or
 - (2) shut off the water supply and drain the system and appliances of water;
 - b. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:
 - (1) fence, pavement, patio or swimming pool;
 - (2) foundation, retaining wall or bulkhead; or
 - (3) pier, wharf or dock;
 - c. theft of property not part of a covered building or structure;
 - d. theft in or to a dwelling or structure under construction;
 - e. wind, hail, ice, snow or sleet to:
 - (1) outdoor radio and television antennas and aeri-als including their lead-in wiring, masts or towers; or
 - (2) trees, shrubs, plants or lawns;
 - f. vandalism and malicious mischief, theft or attempted theft if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;
 - g. constant or repeated seepage or leakage of water or steam over a period of weeks, months or years from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;
 - h.
 - (1) wear and tear, marring, deterioration;
 - (2) inherent vice, latent defect, mechanical breakdown;
 - (3) smog, rust or other corrosion, mold, wet or dry rot;

- (4) smoke from agricultural smudging or industrial operations;
- (5) discharge, dispersal, seepage, migration release or escape of pollutants.
Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed;
- (6) settling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings; or
- (7) birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

3. excluded under General Exclusions.

Under items 1 and 2, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

COVERAGE C – PERSONAL PROPERTY

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in the General Exclusions.

1. Fire or lightning.

2. Windstorm or hail.

This peril does not include loss to:

- a. property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof or wall and the rain, snow, sleet, sand or dust enters through this opening;
- b. canoes and rowboats; or
- c. trees, shrubs or plants.

3. Explosion.

4. Riot or civil commotion.

5. Aircraft, including self-propelled missiles and spacecraft.

6. Vehicles.

7. **Smoke**, meaning sudden and accidental damage from smoke.

This peril does not include loss caused by smoke from agricultural smudging or industrial operations.

8. **Vandalism or malicious mischief.**

This peril does not include loss by pilferage, theft, burglary or larceny.

9. **Damage by Burglars**, meaning damage to covered property caused by Burglars.

This peril does not include:

- a. theft of property; or
- b. damage caused by burglars to property on the Described Location if the dwelling has been vacant for more than 30 consecutive days immediately before the damage occurs. A dwelling being constructed is not considered vacant.

10. **Falling Objects.**

This peril does not include loss to property contained in the building unless the roof or an outside wall of the building is first damaged by a falling object.

Damage to the falling object itself is not covered.

11. **Weight of ice, snow or sleet** which causes damage to property contained in the building.

12. **Accidental discharge or overflow of water or steam** from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance.

This peril does not include loss:

- a. to the system or appliance from which the water or steam escaped;
- b. caused by or resulting from freezing except as provided in the peril of freezing below; or
- c. on the Described Location caused by accidental discharge or overflow which occurs off the Described Location.

In this peril, a plumbing system does not include a sump, sump pump or related equipment.

13. **Sudden and accidental tearing apart, cracking, burning or bulging** of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

This peril does not include loss caused by or resulting from freezing except as provided in the peril of freezing below.

14. **Freezing** of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

This peril does not include loss on the Described Location while the dwelling is unoccupied or being constructed, unless you have used reasonable care to:

- a. maintain heat in the building; or
- b. shut off the water supply and drain the system and appliances of water.

15. **Sudden and accidental damage from artificially generated electrical current.**

This peril does not include loss to a tube, transistor or similar electronic component.

16. **Volcanic Eruption** other than loss caused by earthquake, land shock waves or tremors.

GENERAL EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

a. **Ordinance or Law**, meaning enforcement of any ordinance or law regulating the use, construction, repair, or demolition of a building or other structure, unless specifically provided under this policy.

b. **Earth Movement**, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

- (1) fire;
- (2) explosion; or

(3) breakage of glass or safety glazing material which is part of a building, storm door or storm window;

ensues and then we will pay only for the ensuing loss.

c. **Water Damage**, meaning:

(1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

(2) water which backs up through sewers or drains or which overflows from a sump; or

(3) water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire or explosion resulting from water damage is covered.

- d. **Power Failure**, meaning the failure of power or other utility service if the failure takes place off the Described Location. But, if a Peril Insured Against ensues on the Described Location, we will pay only for that ensuing loss.
- e. **Neglect**, meaning your neglect to use all reasonable means to save and preserve property at and after the time of a loss.
- f. **War**, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.
- g. **Nuclear Hazard**, to the extent set forth in the Nuclear Hazard Clause of the Conditions.
- h. **Intentional Loss**, meaning any loss arising out of any act committed:
 - (1) by or at the direction of you or any person or organization named as an additional insured; and
 - (2) with the intent to cause a loss.

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

- a. **Weather conditions**. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;
- b. **Acts or decisions**, including the failure to act or decide, of any person, group, organization or governmental body;
- c. **Faulty, inadequate or defective**:
 - (1) planning, zoning, development, surveying, siting;
 - (2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
 - (3) materials used in repair, construction, renovation or remodeling; or
 - (4) maintenance;
of part or all of any property whether on or off the Described Location.

CONDITIONS

- 1. **Policy Period**. This policy applies only to loss which occurs during the policy period.
- 2. **Insurable Interest and Limit of Liability**. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:
 - a. for an amount greater than the interest of a person insured under this policy; or
 - b. for more than the applicable limit of liability.
- 3. **Concealment or Fraud**. The entire policy will be void if, whether before or after a loss, you have:
 - a. intentionally concealed or misrepresented any material fact or circumstance;
 - b. engaged in fraudulent conduct; or
 - c. made false statements;
relating to this insurance.
- 4. **Your Duties After Loss**. In case of a loss to covered property, you must see that the following are done:
 - a. give prompt notice to us or our agent;
 - b. (1) protect the property from further damage;
 - (2) make reasonable and necessary repairs to protect the property; and
 - (3) keep an accurate record of repair expenses;
- c. prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;
- d. as often as we reasonably require:
 - (1) show the damaged property;
 - (2) provide us with records and documents we request and permit us to make copies; and
 - (3) submit to examination under oath, while not in the presence of any other named insured, and sign the same;
- e. send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:
 - (1) the time and cause of loss;
 - (2) your interest and that of all others in the property involved and all liens on the property;
 - (3) other insurance which may cover the loss;
 - (4) changes in title or occupancy of the property during the term of the policy;

- (5) specifications of damaged buildings and detailed repair estimates;
- (6) the inventory of damaged personal property described in 4c;
- (7) receipts for additional living expenses incurred and records that support the fair rental value loss.

5. Loss Settlement. Covered property losses are settled as follows:

- a. (1) Personal property;
 - (2) Awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to buildings; and
 - (3) Structures that are not buildings;

at actual cash value at the time of loss but not more than the amount required to repair or replace.
- b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:
 - (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
 - (a) the limit of liability under this policy that applies to the building;
 - (b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or
 - (c) the necessary amount actually spent to repair or replace the damaged building.
 - (2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:
 - (a) the actual cash value of that part of the building damaged; or
 - (b) that proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

- (3) To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

- (a) excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;
- (b) those supports in (a) above which are below the surface of the ground inside the foundation walls, if there is no basement; and
- (c) underground flues, pipes, wiring and drains.

- (4) We will pay no more than the actual cash value of the damage unless:

- (a) actual repair or replacement is complete; or
- (b) the cost to repair or replace the damage is both:
 - (i) less than 5% of the amount of insurance in this policy on the building; and
 - (ii) less than \$2500.

- (5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability on a replacement cost basis.

6. Loss to a Pair or Set. In case of loss to a pair or set we may elect to:

- a. repair or replace any part to restore the pair or set to its value before the loss; or
- b. pay the difference between actual cash value of the property before and after the loss.

7. Glass Replacement. Loss for damage to glass caused by a Peril Insured Against will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

8. Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the Described Location is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

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Each party will:

- a. pay its own appraiser; and
- b. bear the other expenses of the appraisal and umpire equally.

9. Other Insurance. If property covered by this policy is also covered by other fire insurance, we will pay only the proportion of a loss caused by any peril insured against under this policy that the limit of liability applying under this policy bears to the total amount of fire insurance covering the property.

10. Subrogation. You may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, the person insured must sign and deliver all related papers and cooperate with us.

11. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

12. Our Option. If we give you written notice within 30 days after we receive your signed, sworn proof of loss, we may repair or replace any part of the damaged property with like property.

13. Loss Payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

- a. reach an agreement with you;
- b. there is an entry of a final judgment; or
- c. there is a filing of an appraisal award with us.

14. Abandonment of Property. We need not accept any property abandoned by you.

15. Mortgage Clause.

The word "mortgagee" includes trustee.

If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

- a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

- b. pays any premium due under this policy on demand if you have neglected to pay the premium; and
- c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If we decide to cancel or not to renew this policy, the mortgagee will be notified at least 10 days before the date cancellation or nonrenewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

- a. we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or
- b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

16. No Benefit to Bailee. We will not recognize any assignment or grant any coverage that benefits a person or organization holding, storing or moving property for a fee regardless of any other provision of this policy.

17. Cancellation.

- a. You may cancel this policy at any time by returning it to us or by letting us know in writing of the date cancellation is to take effect.
- b. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations.

Proof of mailing will be sufficient proof of notice.

- (1) When you have not paid the premium, we may cancel at any time by letting you know at least 10 days before the date cancellation takes effect.
- (2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by letting you know at least 10 days before the date cancellation takes effect.

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(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

- (a) if there has been a material misrepresentation of fact which if known to us would have caused us not to issue the policy; or
- (b) if the risk has changed substantially since the policy was issued.

This can be done by letting you know at least 30 days before the date cancellation takes effect.

(4) When this policy is written for a period of more than one year, we may cancel for any reason at anniversary by letting you know at least 30 days before the date cancellation takes effect.

- c. When this policy is cancelled, the premium for the period from the date of cancellation to the expiration date will be refunded pro rata.
- d. If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

18. Non-Renewal. We may elect not to renew this policy. We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 30 days before the expiration date of this policy. Proof of mailing will be sufficient proof of notice.

19. Liberalization Clause. If we make a change which broadens coverage under this edition of our policy without additional premium charge, that change will automatically apply to your insurance as of the date we implement the change in your state, provided that this implementation date falls within 60 days prior to or during the policy period stated in the Declarations.

This Liberalization Clause does not apply to changes implemented through introduction of a subsequent edition of our policy.

20. Waiver or Change of Policy Provisions. A waiver or change of a provision of this policy must be in writing by us to be valid. Our request for an appraisal or examination will not waive any of our rights.

21. Assignment. Assignment of this policy will not be valid unless we give our written consent.

22. Death. If you die, we insure:

- a. your legal representatives but only with respect to the property of the deceased covered under the policy at the time of death;
- b. with respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

23. Nuclear Hazard Clause.

- a. "Nuclear Hazard" means any nuclear reaction, radiation or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these.
- b. Loss caused by the nuclear hazard will not be considered loss caused by fire, explosion, or smoke, whether these perils are specifically named in or otherwise included within the Perils Insured Against.
- c. This policy does not apply to loss caused directly or indirectly by nuclear hazard, except that direct loss by fire resulting from the nuclear hazard is covered.

24. Recovered Property. If you or we recover any property for which we have made payment under this policy, you or we will notify the other of the recovery. At your option, the property will be returned to or retained by you or it will become our property. If the recovered property is returned to or retained by you, the loss payment will be adjusted based on the amount you received for the recovered property.

25. Volcanic Eruption Period. One or more volcanic eruptions that occur within a 72-hour period will be considered as one volcanic eruption.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SPECIAL PROVISIONS – UTAH

OTHER COVERAGES

10. In Forms **DP 00 02** and **DP 00 03**, **Collapse** is deleted and replaced by the following:

10. Collapse

a. With respect to this Other Coverage:

- (1) Collapse means an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose.
- (2) A building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse.
- (3) A part of a building that is standing is not considered to be in a state of collapse even if it has separated from another part of the building.
- (4) A building that is standing or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion.

b. We insure for direct physical loss to covered property involving collapse of a building or any part of a building if the collapse was caused by one or more of the following:

- (1) Perils Insured Against in Coverage **C** – Personal Property. These perils apply to covered building and personal property for loss insured by this Other Coverage;
- (2) Decay that is hidden from view, unless the presence of such decay is known to you prior to collapse;
- (3) Insect or vermin damage that is hidden from view, unless the presence of such damage is known to you prior to collapse;
- (4) Weight of contents, equipment, animals or people;
- (5) Weight of rain which collects on a roof; or
- (6) Use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under Items **(2)**, **(3)**, **(4)**, **(5)**, and **(6)** unless the loss is a direct result of the collapse of a building or any part of a building.

This coverage does not increase the limit of liability applying to the damaged covered property.

11. In Forms **DP 00 02** and **DP 00 03**, **Glass or Safety Glazing Material** is deleted and replaced by the following:

11. Glass Or Safety Glazing Material

a. We cover:

- (1) The breakage of glass or safety glazing material which is part of a covered building, storm door or storm window;
- (2) The breakage, caused directly by Earth Movement, of glass or safety glazing material which is part of a covered building, storm door or storm window; and
- (3) The direct physical loss to covered property caused solely by the pieces, fragments or splinters of broken glass or safety glazing material which is part of a building, storm door or storm window.

b. This coverage does not include loss:

- (1) To covered property which results because the glass or safety glazing material has been broken, except as provided in **a.(3)** above; or
- (2) On the Described Location if the dwelling has been vacant for more than 30 consecutive days immediately before the loss, except when the breakage results directly from Earth Movement as provided for in **a.(2)** above. A dwelling being constructed is not considered vacant.

Loss to glass covered under this Other Coverage **11.** will be settled on the basis of replacement with safety glazing materials when required by Ordinance or Law.

This coverage does not increase the Limit of Liability that applies to the damaged property.

The following Other Coverage is added to all forms except **DP 00 01**. When you are a tenant of a Described Location covered under this policy, the words 'covered building' used below, refer to property at such a Described Location covered under Other Coverage **3. Improvements, Alterations And Additions**.

12. Ordinance Or Law

a. The Ordinance Or Law Limit of Liability determined in **b.** or **c.** below will apply with respect to the increased costs you incur due to the enforcement of any ordinance or law which requires or regulates:

- (1) The construction, demolition, remodeling, renovation or repair of that part of a covered building or other structure damaged by a Peril Insured Against;
- (2) The demolition and reconstruction of the undamaged part of a covered building or other structure, when that building or other structure must be totally demolished because of damage by a Peril Insured Against to another part of that covered building or other structure; or
- (3) The remodeling, removal or replacement of the portion of the undamaged part of a covered building or other structure necessary to complete the remodeling, repair or replacement of that part of the covered building or other structure damaged by a Peril Insured Against.

b. If you are an owner of a Described Location, and that location:

- (1) Is insured for Coverage **A** or Unit-Owners Building Items, you may use up to 10% of the Limit of Liability that applies to Coverage **A** or Unit-Owners Building Items at each Described Location; or
- (2) Is not insured for Coverage **A** or Unit-Owners Building Items, you may use up to 10% of the total Limit of Liability that applies to Coverage **B** at each Described Location.

c. If you are a tenant of a Described Location, you may use up to 10% of the Limit of Liability that applies to Improvements, Alterations And Additions at each Described Location.

d. You may use all or part of this ordinance or law coverage to pay for the increased costs you incur to remove debris resulting from the construction, demolition, remodeling, renovation, repair or replacement of property as stated in **a.** above.

e. We do not cover:

- (1) The loss in value to any covered building or other structure due to the requirements of any ordinance or law; or
- (2) The costs to comply with any ordinance or law which requires you or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, pollutants on any covered building or other structure.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

This coverage is additional insurance.

GENERAL EXCLUSIONS

1. Ordinance or Law is deleted and replaced by the following:

1. Ordinance Or Law, meaning any ordinance or law:

- a.** Requiring or regulating the construction, demolition, remodeling, renovation or repair of property, including removal of any resulting debris. This Exclusion **1.a.** in Form **DP 00 02**, **A.1.a.** in Form **DP 00 01**, and **1.a.(1)** in Form **DP 00 03**, does not apply to the amount of coverage that may be provided under Other Coverages, Glass Or Safety Glazing Material or Ordinance Or Law;
- b.** The requirements of which result in a loss in value to property; or
- c.** Requiring you or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

This exclusion applies whether or not the property has been physically damaged.

(This is Exclusion **A.1.** in Form **DP 00 01** and Exclusion **1.a.** in Form **DP 00 03**.)

2. For all forms other than **DP 00 01, Earth Movement** is deleted and replaced by the following:
2. Earth Movement, meaning earthquake, including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting; unless direct loss by:

- a. Fire; or
- b. Explosion;

ensues and then we will pay only for the ensuing loss.

(This is Exclusion **1.b.** in Form **DP 00 03.**)

4. **Power Failure** is deleted and replaced by the following:

4. Power Failure, meaning the failure of power or other utility service if the failure takes place off the Described Location. But if the failure of power or other utility service results in a loss, from a Peril Insured Against on the Described Location, we will pay for the loss or damage caused by that Peril Insured Against.

(This is Exclusion **1.d.** in Form **DP 00 03.**)

CONDITIONS

3. **Concealment or Fraud** is deleted and replaced by the following:

3. Concealment Or Fraud

With respect to all persons insured under this policy, we provide no coverage for loss if, whether before or after a loss, one or more persons insured under this policy have:

- a. Intentionally concealed or misrepresented any material fact or circumstance;
 - b. Engaged in fraudulent conduct; or
 - c. Made false statements;
- relating to this insurance.

Under **4. Your Duties After Loss**, Paragraph **a.** is deleted and replaced by the following:

- a. Give prompt notice to us or our agent. One means you may use to fulfill this requirement is mailing the notice to us, postage prepaid, through first class mail deposited in a United States Post Office;

Under **4. Your Duties After Loss**, the following is added to Item **e.**:

One means you may use to send the requested proof of loss is mailing it to us, postage prepaid, through first class mail deposited in a United States Post Office.

Failure to submit the requested proof of loss within 60 days does not invalidate your claim, if you show that it was not reasonably possible to do so and also show that you submitted the proof of loss to us as soon as reasonably possible.

11. **Suit Against Us** is deleted and replaced by the following:

11. Suit Against Us

No action can be brought unless the policy provisions have been complied with and the action is started within three years after the date of loss.

13. **Loss Payment** is deleted and replaced by the following:

13. Loss Payment

We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable within 30 days after we receive your proof of loss and:

- a. Reach an agreement with you;
- b. There is an entry of a final judgment; or
- c. There is a filing of an appraisal award with us.

17. Cancellation

Paragraph **b.** is deleted and replaced by the following:

- b. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. The cancellation notice may be delivered to you or mailed through first class mail to your last address known to us.

Proof of mailing will be sufficient proof of notice.

- (1) When you have not paid the premium, we may cancel at any time by letting you know at least 10 days before the date cancellation takes effect.
- (2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by letting you know at least 10 days before the date cancellation takes effect.
- (3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel if:
 - (a) There has been a material misrepresentation;

- (b) The risk has changed substantially since the policy was issued, unless we could have reasonably foreseen the change or contemplated the risk in writing the policy; or
- (c) There has been a substantial breach of a contractual duty, condition or warranty.
This can be done by letting you know at least 30 days before the date cancellation takes effect.
- (4) When this policy is written for a period of more than one year or for an indefinite term, we may cancel for any reason at anniversary by letting you know at least 30 days before the date cancellation takes effect.

18. Nonrenewal is deleted and replaced by the following:

18. Nonrenewal

We may elect not to renew this policy. If we elect not to renew, we will let you know in writing at least 30 days before the expiration date of the policy. The nonrenewal notice may be delivered to you or mailed through first class mail to your last address known to us. Proof of mailing will be sufficient proof of notice.

All other provisions of this policy apply.

**DWELLING FIRE - UTAH
PERSONAL DWELLING
LIABILITY COVERAGE POLICY
(DLC)**



778 E. Winchester Street (6600 South)
PO Box 571310
Murray, Utah 84157-0130

Bear River Mutual Insurance Company is the oldest, non-profit mutual insurance company incorporated in the State of Utah. Please read your policy to make certain you understand the coverage that is provided. You may call the company to help and assist you in any questions you may have.

The contractual obligations of this policy are assumed by Bear River Mutual Insurance Company and by the insured named in the Declarations and Policy.

PERSONAL DWELLING LIABILITY AGREEMENT

AGREEMENT

We will provide the insurance described in this policy in return for the premium and in compliance with and according to the provisions of this policy and the declarations, including the limits of liability.

DEFINITIONS

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We", "us", and "our" refer to the Company providing this insurance. In addition, certain words and phrases are defined as follows:

1. **"Bodily Injury"** means bodily harm, sickness or disease, including required care, loss of services and death that results.
2. **"Business"** means a trade, profession or occupation, including all farming, ranching, dairying and agricultural activities, whether full or part time, by one engaged in any commercial activity for gain or livelihood, including employees of their employer, executives and traveling salesmen.
3. **"Motor Vehicle," "auto" or "car"** means a private passenger vehicle, pickup truck, panel truck or van, truck, tractor, motorcycle, or similar vehicle which is designed for use on public roads, including equipment, accessories and machinery.
4. **"Recreational Vehicle"** means a self-propelled land vehicle regardless of the method of surface conduct, including its trailer and all parts that are designed or used for leisure time activities. This includes, but does not exclude, all-terrain vehicles, motor homes or similar vehicles, whether or not they have four wheels or not.
5. **Insured** if shown on the declaration as:
 - a. an "individual," insured means you, and residents of your household who are your relatives; and other persons under the age of 21 in the care of any person named above;
 - b. a "partnership" or a "joint venture," insured means you, all partners and members and spouses, but only with respect to their liability as such;
 - c. an "organization" (other than a "partnership" or a "joint venture"), insured means the organization and all of its executive officers, directors or stockholders, but only with respect to their liability as such;
 - d. an organization or a person not including your employee or employees while acting as your real estate manager;
 - e. your legal representative if you die while this policy is in force and effect and while your personal representative is acting within his/her legal duties and responsibilities but only with respect to the property as provided for under this policy under the definition of insured location.
6. **"Insured Location"** means:
 - a. the dwelling shown in the declarations and the premises on which the dwelling is located, and not to exceed four rental units located thereon;
 - b. incidental other buildings and structures at the premises as shown in the Declarations at the "insured location;"
 - c. individual or family cemetery plots or burial vaults of an "insured;"
 - d. rights of way, easements and roadways for access to the "insured location."
7. **"Occurrence"** means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in:
 - a. "bodily injury;" or
 - b. "property damage."

8. **“Property Damage”** means physical injury to, destruction of, or loss of use of tangible property.
9. **“Limits of Liability”** means the limit of liability that applies for the coverage.
10. **“Provisions or terms of this Policy”** means all terms, limitations, exclusions, conditions and limits of liability and definitions of this coverage.
11. **“Declaration page”** your personal dwelling liability coverage page is attached to the policy with your name, address, the “insured location”, policy period, coverages and the amount of insurance based upon the premium paid, and your statements, representations and declarations.
12. **“Declarations”** means the Declaration Page.

LIABILITY COVERAGES

Coverage L - Bodily Injury or Property Damage

We will pay for damages for bodily injury or property damage for which an “insured” becomes legally responsible caused by an “occurrence” arising out of the “insured location” or its incidental operation subject to the limits of liability. We will:

1. pay up to our limit of liability for the damages for which the “insured” is legally liable. Damages include prejudgment interest awarded against the “insured;”
2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the “occurrence” equals our limit of liability.

Coverage M – Medical Payments to Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing “bodily injury,” subject to the limits of liability as provided in the declarations and the provisions and terms of this policy. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household. As to others, this coverage applies only:

1. to a person on the “insured location” with the permission of an “insured;” or
2. to a person off the “insured location,” if the “bodily injury:”
 - a. arises out of a condition on the “insured location” or the ways immediately adjoining;
 - b. is caused by the activities of an “insured” at the “insured location;”
 - c. is caused by an animal owned by or in the care of an “insured” at the “insured location.”

Additional Coverages

We cover the following in addition to the limits of liability:

1. Claim Expenses. We pay:
 - a. expenses we incur and costs taxed against an “insured” in any suit we defend;
 - b. premiums on bonds required in a suit we defend, but not for bond amounts more than the limit or liability for Coverage L. We need not apply for or furnish any bond;
 - c. reasonable expenses incurred by an “insured” at our request, including actual loss of earnings (but not loss of other income) up to \$35 per day, for assisting us in the investigation or defense of a claim or suit;
 - d. interest on the entire judgement which accrues after entry of the judgement and before we pay or tender, or deposit in court that part of the judgement which does not exceed the limit of liability that applies.

2. First Aid Expenses. We will pay expenses for first aid to others incurred by an "insured" for "bodily injury" covered under this policy. We will not pay for first aid to you or any other "insured."
3. Damage to Property of Others. We will pay, at replacement cost, up to \$500 per "occurrence" for "property damage" to property of others caused by an "insured."

We will not pay for "property damage:"

- a. caused intentionally by "insured" who is 13 years of age or older;
- b. to property owned by an "insured;"
- c. to property owned by or rented to a tenant of an "insured" or a resident in your household; or
- d. arising out of:
 - (1) a "business" engaged in by an "insured;"
 - (2) any act or omission in connection with a premises owned, rented or controlled by an "insured," other than the "insured location;" or
 - (3) the ownership, maintenance or use of aircraft, watercraft or motor vehicles or all other motorized land conveyances.

- (2) the entrustment by an "insured" of a motor vehicle or any other motorized land conveyance to any person; or;
- (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above;

e. arising out of:

- (1) the ownership, maintenance, use, loading or unloading of a watercraft;
- (2) the entrustment by an "insured" of a watercraft described below to any person; or
- (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a watercraft.

f. arising out of:

- (1) the ownership, maintenance, use loading of an aircraft;
- (2) the entrustment by an "insured" of an aircraft to any person; or
- (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

An aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo.

g. arising out of:

- (1) the ownership, maintenance, use loading or unloading of recreational vehicles and all other recreational land or conveyances, including trailers owned, operated, rented or loaned to an "insured;"
- (2) the use of a recreational motor vehicle in, or in the practice or the preparation for, racing, speed, pulling or pushing, demolition or stunt activities or contests; or
- (3) the entrustment to "insured" of any motorized recreational vehicle, or any other motorized recreational land conveyance to any person; or
- (4) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a recreational vehicle or conveyance excluded in paragraphs 1 and 2.

h. caused directly or indirectly by war, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure of use for a military purpose, and including any consequence of any of these. Discharge of a nuclear

EXCLUSIONS

1. Coverage L – Personal Liability, and Coverage M – Medical Payments to Others, do not apply to "bodily injury" or "property damage:"
 - a. which is expected by, directed by, intended by or arises out of an act of force by an "insured." An act of force does not include the use of reasonable force to protect persons or property from an act of crime.
 - b. arising out of or in connection with a "business" engaged in by an "insured" as defined in the definitions. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed or implied to be provided because of the nature of the "business;"
 - c. arising out of the rendering of or failure to render professional services;
 - d. arising out of a premises:
 - (1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an "insured;"

- weapon will be deemed a warlike act even if accidental;
- i. which arises out of the transmission of a communicable disease by an "insured;"
 - j. arising out of an "insured" who inflicts, or directs another person to inflict, upon any person, corporal punishment or sexual abuse which results in "bodily injury" or "property damage." Sexual abuse includes physical or mental harassment or assault of a sexual nature;
 - k. arising out of the use, sale, manufacture, delivery, transfer or possession by any person of a Controlled Substance(s) as defined by the Federal Food and Drug Law at 21 U.S.C.A. Sections 811 and 812. Controlled Substances include but are not limited to, cocaine, LSD, marijuana and all narcotic drugs. However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the orders of a licensed physician;
 - l. arising out of the conduct of a partnership or a joint venture that is not shown on the declarations;
 - m. arising out of work being performed by the "insured" or on the "insured's" behalf to change the use of the "insured location" to other than that of a residence;
 - n. we do not pay for:
 - (1) "bodily injury" to an employee of an "insured" if it occurs in the course of employment;
 - (2) consequential injuries to a spouse, child, parent, brother or sister or such injured employee.
 - (3) which is assumed under a contract or an agreement. This exclusion does not apply to an incidental contract.
 - o. arising out of "bodily injury" to a person caused by lead poisoning.
2. Coverage L – Personal Liability, does not apply to:
- a. liability:
 - (1) for any loss assessment charged against you as a member of an association, corporation or community of property owners;
 - b. "property damage" to property owned by the "insured;"
 - c. "property damage" to property rented to, occupied or used by or in the care of the "insured;"
 - d. "bodily injury" to any person eligible to receive any benefits:
 - (1) voluntarily provided; or
 - (2) required to be provided; or
 - (3) occupational disease law.
 - e. "bodily injury" or "property damage" for which an "insured" under this policy:
 - (1) is also an insured under a nuclear energy liability policy; or
 - (2) would be an insured under that policy but for the exhaustion of its limit of liability.

A nuclear energy liability policy is one issued by:

 - (1) American Nuclear Insurers;
 - (2) Mutual Atomic Energy Liability Underwriters;
 - (3) Nuclear Insurance Assn. Of Canada; or any of their successors.
 - f. "bodily injury" to you or an "insured" within the meaning of part a. or b. of "insured" as defined.
3. Coverage M – Medical Payments to Others, does not apply to "bodily injury:"
- a. to a "residence employee;"
 - b. to any person eligible to receive benefits:
 - (1) voluntarily provided; or
 - (2) required to be provided: under any:
 - (1) worker's compensation law;
 - (2) non-occupational disability law; or
 - (3) occupational disease law.
 - c. from any:
 - (1) nuclear reaction;
 - (2) nuclear radiation; or
 - (3) radioactive contamination; all whether controlled or uncontrolled or however caused by; or
 - (4) any consequence of any of these.
 - d. to any person, other than a "residence employee" of an "insured," regularly residing on any part of the "insured location."

CONDITIONS

1. Limit of Liability. Out total liability under Coverage L for all damages resulting from any one "occurrence" will not be more than the limit of liability for Coverage L as shown in the Declarations. This limit is the same regardless of the number of "insured's," claims made or persons injured. All "bodily injury" and "property damage" resulting from any one accident or from continuous or repeated exposure to substantially the same general

harmful conditions shall be considered to be the result of one "occurrence."

Our total liability under Coverage M for all medical expense payable for "bodily injury" to one person as the result of one accident will not be more than the limit of liability for Coverage M as shown in the Declarations.

2. Severability of Insurance. This insurance applies separately to each "insured." This condition will not increase our limit of liability for any one "occurrence."
3. Duties After Loss. In case of an accident or "occurrence," the "insured" will perform the following duties that apply. You will help us by seeing that these duties are performed:
 - a. give written notice to us or our agent as soon as is practical, which sets forth:
 - (1) the identity of the policy and "insured;"
 - (2) reasonably available information on the time, place and circumstances of the accident or "occurrence;" and
 - (3) names and addresses of any claimants and witnesses;One means you may use to give written notice is mailing the notice to us, postage prepaid, through first class mail deposited in the United States Post Office.
 - b. promptly forward to us every notice, demand, summons or other process relating to the accident or "occurrence;"
 - c. at our request, help us;
 - (1) to make settlement;
 - (2) to enforce any right or contribution or indemnity against any person or organization who may be liable to an "insured;"
 - (3) with the conduct of suits and attend hearings and trials;
 - (4) to secure and give evidence and obtain the attendance of witnesses.
 - d. under the coverage – Damage to Property of Others – submit to us within 60 days after the loss, a sworn statement of loss and show the damaged property, if in the "insured's" control. One means you may use to send the statement of loss is mailing it to us, postage prepaid, through first class mail deposited in the United States Post Office. Failure to submit the statement of loss within 60 days does not invalidate your claim, if you show that it was not reasonably possible to do so and also show that you submitted the

statement to us as soon as reasonably possible;

e. the "insured" will not, except at the "insured's" own cost, voluntarily make payment, assume obligation or incur expense other than for first aid to others at the time of the "bodily injury."

4. Duties of an Injured Person – Coverage M – Medical Payments to Others. The injured person or someone acting for the injured person will:
 - a. give us written proof of claim, under oath if required, as soon as is practical; and
 - b. authorize us to obtain copies of medical reports and records.The injured person will submit to physical examination by a doctor of our choice when and as often as we reasonably require.
5. Payment of Claim – Coverage M – Medical Payments to Others. Payment under this coverage is not an admission of liability by an "insured" or us.
6. Suit Against Us. No action can be brought unless the policy provisions have been compiled with and the action is started within three years after the date of the loss.

No one will have the right to join us as a party to any action against an "insured." Also, no action with respect to Coverage L can be brought against us until the obligation of "insured" has been determined by final judgement or agreement signed by us.
7. Bankruptcy of an "Insured". Bankruptcy or insolvency of an "insured" will not relieve us of our obligations under this policy.
8. Other Insurance – Coverage L – Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.
9. Policy Period. This policy applies only to "bodily injury" or "property damage" which occurs during the policy period.
10. Subrogation. An "insured" may waive in writing before a loss all rights of recovery against any person, if not waived, we may require an assignment of rights of recovery for

a loss to the extent that payment is made by us.

If an assignment is sought, an "insured" must sign and deliver all related papers and cooperate with us.

Subrogation does not apply to Medical Payments to Others or Damage to Property of Others.

11. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an "insured" has:

- a. intentionally concealed or misrepresented any material fact or circumstance;
- b. engaged in fraudulent conduct; or
- c. made false statements; relating to this insurance.

12. Liberalization Clause. If we make a change which broadens coverage under this edition of our policy without additional premium charge, that change will automatically apply to your insurance as of the date we implement the change in your state, provided that this implementation date falls within 60 days prior to or during the policy period stated in the Declarations.

13. Waiver or Change of Policy Provisions. A waiver or change of a provision of this policy must be in writing by us to be valid. Our request for an appraisal or examination will not waive any of our rights.

14. Assignment. Assignment of this policy will not be valid unless we give our written consent.

15. Death. If any person named in the Declarations or the spouse, if a resident of the same household, dies:

- a. we insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;
- b. "insured" includes:
 - (1) any member of your household who is an "insured" at the time of your death, but only while a resident of the "residence premises;" and
 - (2) with respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

16. Cancellation.

- a. You may cancel this policy at any time by returning it to or by letting us know in writing of the date cancellation is to take effect;
- b. we may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. The cancellation notice may be delivered to you or mailed through first class mail to your last address known to us. Proof of mailing will be sufficient proof of notice;
 - (1) when you have not paid the premium, we may cancel at any time by letting you know at least 10 days before the date cancellation takes effect;
 - (2) when this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by letting you know at least 10 days before the date cancellation takes effect;
 - (3) when this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel if:
 - (a) there has been a material misrepresentation; or
 - (b) the risk has changed substantially since the policy was issued, unless we could have reasonably foreseen the change or contemplated the risk in writing the policy; or
 - (c) there has been a substantial breach of a contractual duty, condition or warranty.
 - (4) when this policy is written for a period of more than one year or for an indefinite term, we may cancel for any reason at anniversary by letting you know at least 30 days before the date cancellation takes effect.
- c. when this policy is cancelled, the premium for the period from the date of cancellation to the expiration date will be refunded pro-rata;
- d. if the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

17. Non-Renewal. We may elect not to renew this policy. If we elect not to renew, we will let you know in writing at least 30 days before the expiration date of this policy. The non-renewal

notice may be delivered to you or mailed through first class mail to your last address known to us. Proof of mailing will be sufficient proof of notice.

18. Non-duplication of Benefits, Limit of Liability and Conditions of Other Insurance.

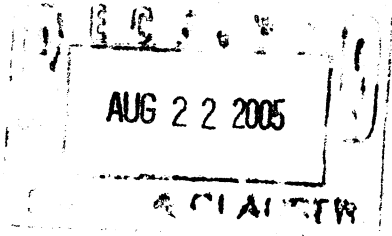
- a. No "insured", or other person, can recover benefits from the same elements of loss under this, or any other insurance, for an occurrence.
- b. Policies Issued by us to you:
 - (1) if two or more insurance policies issued by us to you apply to the same

occurrence, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability.

c. Other Liability Coverage Available from Other Sources:

- (1) if other liability coverage applies, we are liable only for our share of the damages. Our share is the percent that the limit of liability of this policy bears to the total of all liability coverage applicable to the occurrence.

Tab C



SHAWN D. TURNER (5813)
LARSON, TURNER, FAIRBANKS & DALBY
1218 West South Jordan Parkway, Suite B
South Jordan, UT 84095
(801) 446-6464

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

<p>BEAR RIVER MUTUAL INSURANCE COMPANY</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DAVID WILLIAMS AND DEANNA WILLIAMS</p> <p style="text-align: center;">Defendant</p>	<p style="text-align: center;">DOCKETING STATEMENT</p> <p style="text-align: center;">Court of Appeals No. 20050618-CA</p>
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1. This Appeal is from a final Order and Judgment of the Third Judicial District Court, Salt Lake City Department Hon. Lee Dever entered June 13, 2005.
2. Appeal was taken to the Utah Supreme Court Pursuant to Rule 3 of the Utah Rules of Appellate Procedure and pursuant to that Court's jurisdiction under UCA §78-2-2. The case was poured over to the Utah Court of Appeals pursuant to UCA §78-2-2(4).
3. (a) Date of Entry of Final Order Appealed From: 6/13/05
(b) Date Notice of Appeal was filed: 7/13/05
(c) Dates of Post Judgment Motions: N/A
4. Issues on Appeal

Whether the trial court erred in expanding an exclusion from coverage for losses caused by vandalism or malicious

mischief to include losses from arson contrary to established case law requiring exclusions in coverage contained in insurance contracts to be read narrowly.

A. Relevant Case Authority

American States Ins. Co. v. Rancho San Marcos Properties, LLC, 97 P.3d 775 (Wash App. 2004).

Battishill v. Farmers Alliance Insurance Co., 97 P.3d 620 (NM App. 2004).

Draughon v. CUNA Mutual Ins. Society, 771 P.2d 1105 (Utah App. 1989).

Farmers Insurance Exchange v. Versaw, 99 P.3d 796 (Utah 2004)

Holbrook Company v. Adams, 542 P.2d 191 (1975)

United States Fidelity & Guaranty Co., v. Sandt, 854 p.2d 519 (Utah 1993).

B. Applicable Standard of Appellate Review:

In considering an appeal from a grant of summary judgment, the appellate court views the facts in a light most favorable to the losing party below. And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court gives no deference to the trial court's conclusions of law, which are reviewed for correctness.

Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

5. Summary of Relevant Facts

The Williams are the owners of a small rental home located in Salt Lake City, Utah. In the summer of 2002, their last set

of tenants damaged the interior of the home and moved out. The damage was to an extent that made it impracticable for the Williams to rent the property to someone else until substantial repairs were made to the property. Unfortunately at this time Mr. Williams was in Bankruptcy and there was no cash readily available to make the repairs. The property has been unoccupied since these last tenants moved out.

During all of this time the Williams had the property covered with insurance purchased from Bear River Mutual. The Williams faithfully paid their premiums for what they were informed and perceived was fire insurance on the property.

On July 3, 2003 a fire started in some debris located outside the back door to the property. The Salt Lake County fire inspector and the hired fire inspector for the Plaintiff have stated their opinion that the fire began in that location and that the cause of the fire was probably a hand held flame.

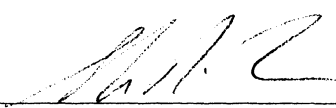
The Williams asked Bear River to provide the fire insurance which they had purchased. Bear River has refused to provide the insurance and has instead claimed it owes the Williams nothing. The basis for this denial is the two pronged argument made in Bear River's Memorandum in support of its motion for summary judgement namely 1.) the policies stated exclusion for losses caused by vandalism or malicious mischief encompass claims for arson and/or 2.) that the structure was

not used primarily for dwelling purposes. The parties filed cross motions for summary judgment on these issues. The Trial Court granted Bear River's summary judgment as to the first reason only and denied Defendants motions.

6. Prior Appeals N/A

DATED this 18th day of August, 2005

LARSON, TURNER, FAIRBANKS & DALBY L.C.



Shawn D. Turner