

THE FIRE SPREAD CASE:
RECOGNITION AND INVESTIGATION OF SUBROGATION POTENTIAL

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I. INTRODUCTION

The typical fire subrogation case is one which focuses upon framework in the usual cause and origin investigation are the first few seconds or minutes when a fire starts. the instrumentality, product, or specific negligent act or omission responsible for the start of the fire then becomes the target of further investigation and potential legal action.

By contrast, the fire spread case shifts the focus from the point of time when the fire first starts to a slightly later period during which time the fire grows and spreads to other property.

The fire spread case has two central themes:

- A. Those acts or omissions which directly enhance the intensity, scope or spread of a fire; or
- B. Those act or omissions which delay, hinder or otherwise impedes fire extinguishment activities.

Perhaps the single most distinguishing feature of the fire spread case is that the instrumentality responsible for the fire spread may aver no culpability whatsoever for the initiation or start of the fire. In fact, in many fire spread cases, the cause of a particular fire may be listed as “Unknown,” does not, in any way, impede the development of a fire spread theory of liability.

II. INVESTIGATION

A. Background

The first step in the successful developing of a fire spread case is to identify, to the extent possible, the point of origin. The use of well-developed early investigation techniques is essential in terms of this process. Accordingly, it is critical that an experienced cause and origin expert be retained and that investigation be commenced at the earliest possible time. In most fire spread cases, it is initially thought that cause, as well as point of origin, will be capable of ascertainment. It is only later, when a cause may finally be identified as “Unknown” that focus then moves to fire spread considerations based upon the point of origin.

If it is impossible to identify the location of the fire origin, then it becomes essential to al least identify precisely what was burning when the fire was first observed.

In developing the fire spread case investigation, there are several overriding considerations:

1. Where was the fire when it was first observed, and what was the stage or condition of the fire at this point? Specifically, what were the dimensions of the fire and what property was involved in fire at this point?

2. What was the pace, speed and direction of the fire when first observed? This portion of the analysis focuses heavily upon specifically what material was burning and how was it burning in terms of rapidity, density of smoke, and direction of fire spread.
3. What was the chronology or time line of fire progress? This portion of the investigation attempts to construct a minute by minute diary of fire progress.

B. Witnesses

There are two categories of witnesses available to assist in developing the above three-pronged investigation: lay eye witnesses and professional fire department personnel.

Lay witnesses, more frequently than not, first discover a fire and sound the alarm. In terms of proximity to the fire, a lay witness may be in the immediate area and may even be associated with the structure that is burning such as a watchman or other building inhabitant. Alternatively, lay witnesses may be considerably removed from the fire scene such as a passerby in an automobile. Nevertheless, it is essential that in the development of a fire spread case, considerable attention be paid to the lay witness or witnesses who first observed the fire. Although rare, for instance if an alarm is sounded by some automatic signaling device, the first observer of a fire may in fact be those fire department personnel on the first arriving fire trucks.

Obviously, fire department personnel always play a critical role in the development of a fire spread case as they have first hand knowledge as to the pace or speed of fire spread which is so important in the development of the chronology or time line. Fire department personnel also typically have highly trained senses or powers of observation. Also, their attention is singularly focused upon precisely those factors which give rise to a case based upon fire spread considerations.

A checklist in interviewing both lay and fire department witnesses in a fire spread case would include the following questions:

1. Where were you when you first observed the fire?
2. At the time you first observed the fire, what were the lighting conditions?
3. Did anything impair your observation of the fire, i.e., was your path of vision blocked or otherwise obstructed?
4. At the time you first observed the fire, what were the dimensions of the fire itself, i.e., what would the square foot measurements of the fire be and, and how high were the actual flames?
5. Was there a lot of smoke when you first observed the fire and, if so, what was the color of the smoke?

6. At the time you first observed the fire, could you tell what was burning?
7. How much time did you spend observing the fire before taking some action?
8. During the period of time you spend observing the fire before taking some other action, was the fire becoming larger or smaller?
9. If it was becoming larger, could you tell what additional property was being ignited?
10. During the period you observed the fire, did the flames appear to grow higher or lower?
11. If the fire was in fact spreading or getting larger, was it spreading at ground level or at some other height?
12. If the fire was spreading, was it spreading in all directions evenly, or was it spreading in one direction at a faster or greater rate?
13. If the fire was spreading, was it spreading gradually or rapidly?
14. If the fire was spreading contiguously, i.e., to property immediately adjacent to the fire or, was the fire “jumping” from area to area?
15. What were the dimensions of the fire and other fire conditions that you last observed before leaving the scene?

Obviously, following the questioning of the first eyewitness to the fire, other eyewitnesses need to be interviewed so as to pick up the fire spread time line and develop it through the ensuing stages of the fire. both first arriving and later arriving fire department personnel must be interviewed and the fire progress traced through all subsequent stages of the fire until extinguishment.

C. Photographic Evidence

Another valuable source of factual information concerning the specifics of fire spread are photographs. Fires almost always attract the attention of professional media photographers. Local newspapers and television stations will publish or broadcast, almost as a matter of habit, photographs or film of local fire scenes. It is critical for the investigator or fire adjuster to appreciate that for every fire photograph or film clip published, many more photographs and many more feet of video tape exist back at either the newspaper offices or television station. These unpublished photographs are typically not retained and this again points out the critical importance of early investigation. Even where a newspaper or television station refuses to voluntarily release these materials without a subpoena, notice should be provided to these organizations that they should retain these materials and not destroy or erase them.

D. Search of Relevant Records

The investigation of a fire spread case is frequently aided by a careful search of those official records which bear directly upon conditions in and about the fire location. The municipal, county and state department with relevant records generally include:

1. Fire marshals or fire inspectors office.
2. Building departments or department of licenses and inspections.
3. Safety department.

Civil or unofficial organizations with relevant records include:

4. Insurance company loss control inspection reports prepared in connection with the underwriting of risk locations.
5. In-house corporate safety or fire inspection reports.

These records are typically prepared in connection with routine fire safety inspections conducted pursuant to local fire safety codes or ordinances. Frequently, hazardous or unsafe conditions are cited and appropriate notices or copies of these reports and recommendations are provided to building owners, occupants, or property managers. Included among typical violations which, if incurred might give rise to liability in a fire spread case are:

- a. accumulation of trash, waste paper, debris, etc. (commonly referred to as "creating a fire hazard");
- b. unsafe storage or warehousing practices;
- c. blockage of sprinkler heads;
- d. deficiencies associated with sprinkler systems;
- e. inoperative fire alarms;
- f. insufficient or inappropriate fire extinguisher;
- g. lack of smoke or heat detectors;
- h. lack of watchman protection;
- i. lack of building integrity, locked doors, glazed windows, etc.;
- j. unsafe storage of hazardous materials such as paint thinners, lacquers, gasoline, etc.;
- k. inoperative fire doors;

- I. lack of or inoperative special automatic fire extinguishing devices necessary for particularly hazardous activities or occupancies such as commercial cooking or painting where sophisticated sprinkler systems are appropriate.

E. Codes or Standards

Fire and safety codes exist in virtually every jurisdiction. Regardless of whether there have been specific citations, violation notices, or warnings issued, these codes may prove extremely useful in evaluating a landowner's or occupier's conduct. In addition to officially adopted fire codes, there are also well accepted and recognized national and industry standards such as those published by the National Fire Protection Association. These standards are frequently admitted into evidence for the purpose of demonstrating generally accepted standards of conduct or care.

III. CASE LAW SCENARIOS

A review of case law scenarios should prove instructive in terms of those key considerations which may give rise to a viable subrogation action in a fire spread context.

A. Creation of a Fire Hazard

Over 50 years ago the Supreme Court of Washington recognized and imposed liability for the creation of a fire hazard. In the case of *Prince v. Chehalis Saving & Loan Assn.*, 58 P. 290 (Wash. 1936), plaintiff owned a building several doors away from the defendants' property. The defendants owned a vacant and unoccupied garage building. Prior to becoming vacant, the building had been utilized for the dismantling of used automobiles and the building's wooden floor had oil and grease deposits on it. The building was in a general state of disrepair with windows missing, roof shingles missing, and an accumulation of combustible waste and debris throughout the interior. Neighborhood children played in the vacant garage during the day and vagrants occupied it at night. Cigarette stubs had been observed throughout the structure prior to the fire in question.

A fire of unknown origin originated within the garage and spread throughout adjacent properties eventually spreading to plaintiff's property. The trial judge, sitting without a jury, found that the defendants, by their conduct, had created a fire hazard by allowing the building's condition to exist when, the exercise of reasonable care, would have required that the dangerous conditions be abated. On appeal to the Supreme Court of Washington, the defendants contended that because the cause of the fire remained unknown, they could not be held liable. Defendants argued that plaintiff had a burden to demonstrate the cause of the fire and that the proof of the cause was a necessary element to sustain the cause of action. The Supreme Court disagreed concluding that:

“The courts generally support the rule, in such cases as that now before us, that evidence as to origin of the fire is not a necessary element to entitle a recovery where property causing the fire has gotten into such a condition that it creates a fire hazard, and that, if a fire should occur in it, it is reasonably probable that it would spread to adjacent property.

* * *

The negligence in the case now before us consisted in two things, first, the condition of the building, and, second, the purposes for which it was permitted to be used.

58 P. at 292.

In the Prince case, the court sets up the critical “foreseeability” test. It concluded that given the juxtaposition of the defendants’ property and the adjacent properties, it was foreseeable that a fire started in defendants’ vacant garage would grow in intensity and spread to plaintiff’s property several doors away.

When this element of foreseeability is missing, judgment will be entered in favor of the defendant. In the Oregon case of *Aune v. Oregon Trunk Railway*, 151 OR. 622, 51 P. 2d 633 (1935), defendant railway company left its empty boxcars unlocked and unguarded by any watchman. Hobos entered the cars and caused a fire which spread to plaintiff’s adjacent building. The court, ruling in favor of the defendant, concluded that the destruction of plaintiff’s building was not a natural and probable consequence of leaving the cars where they were, unlocked and unguarded and that the destruction of plaintiff’s property could not have foreseen by a person exercising ordinary care. Moreover, the defendant was able to demonstrate that its policy of leaving its railroad cars unlocked and unguarded was consistent with industry practice and did not deviate from generally accepted standards of conduct recognized by railway companies.

B. Code Violations

In a 1973 Oregon case, the plaintiff property owner based his claim for fire damage upon defendant’s violation of a city fire code which violation permitted a fire to spread from defendant’s property.

Defendant, a wooden home manufacturer, placed sawdust containing linseed oil, refuse and wood trimmings into a wooden trash box kept inside its building. This practice contrasted sharply with the requirement of the applicable city fire code that dealt with the handling of readily combustible materials. Code required the removal of these materials at the end of each day’s work and storage, outside the premises, in suitable metal containers. A fire, of unknown origin started within the wooden storage box and spread from defendant’s property to plaintiff’s. Defendant was held liable for its violation of the statute. See *Pac. N.W. Bell v. Century Homes*, 267 OR. 46, 514 P.2d 874 (1973).

C. Fire Spread Due to Delay in Reporting the Fire

In an Eighth Circuit case, defendant wrecking company neglected to post a watchman at a demolition site. A fire of unknown origin began at the site and burn undetected and unreported for nearly one hour before it was reported to authorities by a night watchman located some three blocks away at another property. by that time, the fire was a raging blaze which soon spread out of control to plaintiff and its verdict was upheld on appeal. While it was of course impossible for the plaintiff to prove that had a watchman been employed, he would

have promptly discovered and reported the fire, the court concluded that the jury could draw reasonable inferences as to causation based upon facts and circumstances in evidence.

“There are many instances in tort litigation where precise causation becomes difficult to prove. There is not an exact way to prove that the harm might have been avoided, because the harm did in fact take place ... A plaintiff does not have the negative burden to show that the harm could not have possibly occurred if the defendant had performed the duty breached. It would be absurd to say that a defendant could hide behind such absence of proof where his own conduct had created the fertile ground for harm and the harm did occur.”

Fireman’s Fund Ins. Co. v. AALCO Wrecking Co., Inc., 466 F.2d 179, 185 (8th Cir. 1972).

D. Product Liability

There are many products in the market place which, although not responsible for the initiation of a fire, give rise to causes of liability due to fire spread. Typically, these include building and decorating products such as certain wall finishes, insulating materials, carpeting, etc. Frequently, a fire of unknown origin will begin in a structure and, for reasons not initially apparent, will suddenly grow in intensity. Upon closer investigation, an analysis of available fuel gives rise to a fact pattern sufficient to support a cause of action for fire spread. There is a large body of law and scientific data associated with certain particular products including cellular plastics foam insulation which, in the early generations of the product, created an enormous risk of fire spread as the insulation melted, pooled and burned in a fashion not unlike gasoline.

Accordingly, where there exists an unexplained intensity in an otherwise normally combustible fire load situation, the investigators and adjusters should inquire as to the nature of materials located within the structure and within the building walls and upon the floor, wall and roof surfaces that might have contributed to the fire’s intensity.

IV. CONCLUSIONS

In each of the cases cited above, the cause of the fire was unknown. Yet each case went to verdict and all but one resulted in an award for the plaintiff. Each case involved some act or omission of the defendant ---completely unrelated to the start of the fire --- yet, which gave rise to potential liability.

The lesson to be gleaned, then, is that subrogation efforts should be directed at those files where the preliminary or final evaluation lists the cause of fire as “unknown”.