

FIRE INSURANCE--INTENTIONAL BURNING BY INSURED.

The (*state number*) issue reads:

"Did the [plaintiff(s)] [defendant(s)]<sup>1</sup> intentionally participate in the burning of *his* property?"

The policy of insurance in this case contains the following provision: "[t]his Company shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured."<sup>2</sup> A person who has intentionally participated, directly or indirectly, in the burning of property may not collect insurance for the loss of or damage to that property.<sup>3</sup>

On this issue the burden of proof is on the [plaintiff] [defendant] insurance company.<sup>4</sup> This means that the [plaintiff]

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<sup>1</sup>The part (y) (ies) referenced here (is) (are) the insured, whether in the capacity of plaintiff(s) or defendant(s).

<sup>2</sup>See G.S. §58-44-15(c) (the standard fire insurance form approved by the General Assembly).

<sup>3</sup>*Shelby Mut. Ins. Co. v. Dual State Constr. Co.*, 75 N.C. App. 330, 332, 330 S.E.2d 508, 510 (1985) ("To establish an intentional burning by an insured as a defense to recovery on a fire insurance policy, the insurer must prove that the property was intentionally burned and that the insured participated directly or indirectly in its burning.") Denial of recovery is based upon policy provisions relieving the insurer of liability where insured neglects to use all reasonable means to save and preserve his property or while the hazard is increased by means within the control of the insured. *Fowler-Barnham Ford v. Insurance Co.*, 45 N.C. App. 625, 626, 631 263 S.E.2d 825 (1980). Recovery would be denied even in the absence of such provisions (and is denied separate and apart from them) as being contrary to the policy of the state. See *Sullivan v. American Motors Ins. Co.*, 605 F.2d 169, 170 (5th Cir. 1979); cf. G.S. § 31A-11. As to the right of another insured, innocent of the arson, to recover, see *Lovell v. Insurance Co.*, 302 N.C. 150, 155, 274 S.E.2d 170, 173 (1981).

<sup>4</sup>In this context, the burden of proof will always be on the insurer, whether in the capacity of plaintiff or defendant.

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[defendant] insurance company must prove, by the greater weight of the evidence, the following [two] [three] things:

First, that the (*specify property*) was intentionally<sup>5</sup> burned. Property is intentionally burned when it is burned on purpose.

(And) Second, that the [plaintiff(s)] [defendant(s)] participated, either directly or indirectly, in the burning.

I instruct you that mere proof that the insured property was intentionally burned does not relieve the [plaintiff] [defendant] insurance company from its obligation to pay under the policy. A person may properly insure himself against a fire set by others without his knowledge or consent. The [plaintiff] [defendant] must prove that, if the property was intentionally burned, the [plaintiff(s)] [defendant(s)] participated, directly or indirectly, in that burning. A person participates in a burning if he (*choose all that apply*):

- a. [burns the property himself (or)]
- b. [helps another burn the property (or)]
- c. [procures, or arranges for, someone else to do the burning, (or)]
- d. [agrees with the person who ultimately sets the fire that the property shall be burned].<sup>6</sup>

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<sup>5</sup>For an instruction on intent, see N.C.P.I.--Civil 101.46.

<sup>6</sup>See *State v. Millican*, 158 N.C. 617, 620, 624, 74 S.E. 107, 109, 110 (1912) (evidence that three defendants, "without previous conference with [witness], told him at once, upon his approaching them, of their purpose to burn the town, and [witness], without motive, agreed to watch, and all of them went immediately . . . and set fire to a warehouse . . ." sufficient to sustain charge to the jury that defendants "agreed with [witness] to burn the

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(And Third, that (*name agent*) was acting as (*specify position, e.g., president*) of the [plaintiff] [defendant] and on its behalf in such participation.)<sup>7</sup>

In arriving at an answer to this issue, you may consider whether or not the [plaintiff(s)] [defendant(s)] had a motive to participate in the burning of *his* property. A motive is that which prompts a person to do a particular act. Motive is not an element of an intentional burning, and therefore the [plaintiff] [defendant] is not required to prove motive. However, the existence of a motive would be a circumstance properly considered by you in determining whether the [plaintiff(s)] [defendant(s)] participated in the burning of *his* property.<sup>8</sup> Motive may be proved by declarations and other conduct of the person himself or by evidence of facts which would naturally give rise to a relevant motive and from which such motive may, therefore, reasonably be inferred.<sup>9</sup>

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warehouse, and that they at once carried out the agreement, and deliberately set the building on fire . . . ."

<sup>7</sup>Read this element only when the [plaintiff] [defendant] is a corporation and the person who allegedly caused the burning was an officer or owner of the corporation.

<sup>8</sup>*Freeman v. St. Paul Fire and Marine Ins. Co.*, 72 N.C. App. 292, 299, 324 S.E.2d 307, 311 (1985) (To establish the defense of an intentional burning by an insured, "the defendant must prove that the property was intentionally burned and that the insured participated either directly or indirectly in its burning. Plaintiff's motive and opportunity are merely circumstances to be considered in determining whether there has been an intentional burning by the insured or someone procured by him.")

<sup>9</sup>*Durham v. Quincy Mut. Fire Ins. Co.*, 63 N.C.App. 700, 701-02, 306 S.E.2d 499, 500, *rev'd on other grounds*, 311 N.C. 361, 317 S.E.2d 372 (1984).

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So, if the [plaintiff] [defendant] has satisfied you by the greater weight of the evidence that the [plaintiff(s)] [defendant(s)] had a motive for participating in the burning of *his* property, you may consider that motive in deciding this issue, together with all the other facts and circumstances in evidence.<sup>10</sup> Likewise, if you find that the [plaintiff(s)] [defendant(s)] did not have a motive for participating in the burning of *his* property, you may consider that in deciding this issue.

*(If a charge on circumstantial evidence is desired, use N.C.P.I.--Civil 101.45.)*

Finally, as to this (*state number*) issue on which the [plaintiff] [defendant] insurance company has the burden of proof, if you find, by the greater weight of the evidence, that the [plaintiff(s)] [defendant(s)] intentionally participated in the burning of his [specify property], then it would be your duty to answer this issue "Yes" in favor of the [plaintiff] [defendant] insurance company. If, on the other hand, you fail to so find, then it would be your duty to answer this issue, "No," in favor of the [plaintiff(s)] [defendant(s)].

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<sup>10</sup>*Id.*