02802-71561 (RER)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,	)	
Plaintiff, Counterclaim-Defendant,	)	CIVIL ACTION
V.	)	NO. 3:11-CV-219
CAROL ANN STUTTE; LAURA JEAN STUTTE,	)	JURY TRIAL DEMANDED
Defendants, Counterclaim-Plaintiffs,	)	
and	)	
CHASE HOME FINANCE, LLC,	)	
Defendant.	)	

ANPAC'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PLAINTIFFS' CLAIMS OF BAD FAITH AND VIOLATION OF THE TENNESSEE CONSUMER PROTECTION ACT

Comes now American National Property and Casualty Company ("ANPAC"), by and through counsel, pursuant to Federal Rule of Civil Procedure 56 and in support of its Motion for Partial Summary Judgment regarding Carol Ann Stutte and Laura Jean Stutte's claims for the statutory bad-faith penalty and violation of the Tennessee Consumer Protection Act, would state and show unto this Court as follows.

I. BACKGROUND AND FACTS

This is an insurance case. On September 4, 2010, the insured premises located at 2715 Highway 360, Vonore, Tennessee 37885 and owned by Carol Anne Stutte and Laura

Jean Stutte was destroyed by fire. *Monroe County Sheriff's Office Incident Report*, attached as **Exhibit 1**. The Citico Volunteer Fire Department responded to the fire, receiving notification of the fire at 8:27 p.m. *Young Report*, p. 11, attached as **Exhibit 2**. According to responding fire personnel, the fire was intense and involved multiple explosions. *Id*. Someone had spray painted the word "QUEERS" on the garage. *Carol Stutte EUO*, p. 45, attached as **Exhibit 3**.; *Laura Stutte EUO*, p. 90, attached as **Exhibit 4**. The Stuttes claim this was a "hate crime" directed against them and in their initial report to ANPAC, the loss was described in this general manner.[1] As a result of the fire, the Stuttes submitted a fire insurance claim to ANPAC requesting $206,000.00 for the dwelling, $69,133.31 for destroyed personal property, and $1,142.15 for damage to other structures. *Sworn Statement in Proof of Loss,* attached as **Exhibit 5**. In addition, the Stuttes have claimed additional living expenses under the policy. *Answer and Counterclaim,* filed by the Stuttes, Document 20.

The Stuttes blame neighbor Janice Millsaps for the fire and have filed suit against her. *Carol Stutte EUO*, p. 22, 35-36, 39; *Laura Stutte EUO*, p. 63-64; *Complaint and Answer in Stutte v. Millsaps case,* attached as collective **Exhibit 6**. The Stuttes claim that before the fire, Millsaps refused to return a mis-delivered UPS package to them, bragged about poisoning their dog, often entered their property uninvited, and even recently in August of 2010, threatened to burn the Stuttes' house down. *Carol Stutte EUO*, p. 29-33, 36, 78-79; *Laura Stutte EUO*, p. 73-80.

Upon being notified of the fire, ANPAC launched an extensive and thorough investigation and began to handle the insurance claim. *Affidavit of Stacey Jennings;*

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1 http://www.metropulse.com/news/2010/sep/22/lesbian-couple-plans-life-after-losing-vonore-home/

Affidavit of Gary Noland. Within two days of being notified of the fire, ANPAC had explained to the Stuttes the loss process, had mailed them claim reporting forms, had engaged an independent adjuster to scope the loss, had engaged a company called Bright Claims to help the Stuttes prepare their personal property inventory forms, and begun the process of obtaining temporary housing for the Stuttes. *Affidavit of Stacey Jennings, ¶6*; *Laura Stutte EUO,* p. 83. ANPAC located and paid for temporary housing for the Stuttes. *Laura Stutte EUO*, p. 13.

ANPAC also made the decision to hire and did hire an origin and cause expert, Gary Young with EFI Global, to conduct an origin and cause investigation. *Young Report*. As part of this investigation, Mr. Young examined the fire scene. *Id.* at p. 3-4. Mr. Young noted evidence of an explosion at the residence and determined that the fire originated in the left rear quadrant of the basement. *Id.* at p. 4-6. Mr. Young also observed signs that someone had trailed an accelerant into the residence. *Id.* at p. 6-8.

While performing his debris examination and removal process, Mr. Young observed faint odors of gasoline. *Id.* at p. 6-7. He also collected debris samples and sent the samples to a laboratory, AK Analytical Services, Inc., for analysis by Dennis Akin. *Id.* at p. 8. A report was sent to ANPAC from AK Analytical Services, Inc., indicating the presence of ignitable liquids. *AK Lab Report*, attached as **Exhibit 7;** *Young Report, p. 6, 8*. As shown in AK Analytical's lab report, two of the debris samples contained evaporated gasoline. *Id.* After ruling out other possible causes, Mr. Young opined that the fire was incendiary, caused by the intentional application of a large amount of gasoline which was then ignited. *Id.* at p. 7-8,11. The fire was also classified as incendiary by the Tennessee Bomb and Arson Investigation Section, according to Special Agent Gary Elliott. *Id.* at p. 10. To learn more about the facts and circumstances surrounding the loss, ANPAC requested that

the Stuttes and Kimberly Holloway, also a resident of the insured premises, submit to Examinations Under Oath, and they did so on December 21, 2010. The Stuttes reported that at the time of the fire, they were in Nashville with Kimberly Holloway, and Lora Black celebrating the fact that the Stuttes had been in the subject home for five years and had completed remodeling it. C*arol Stutte EUO*, p. 6; *Laura Stutte EUO*, p. 94. While at the Wildhorse Saloon in Nashville, Lora Black's daughter called and told them that the house was on fire. *Carol Stutte EUO*, p. 11; *Laura Stutte EUO*, p. 99-100. The group stayed at the bar for a while, returned to the hotel, and then Carol Stutte decided to drive home later that night. *Carol Stutte EUO*, p. 13-14. During her Examination Under Oath, Carol Stutte described the problems she had encountered with Janice Millsaps, who she suspects of setting the fire. *Carol Stutte EUO*, 29-33, 36.

The house was listed for sale at the time of the fire because the Stuttes allegedly wanted to get away from Janice Millsaps. *Carol Stutte EUO*, p. 40-41. Witness Lora Black, who allegedly accompanied the Stuttes to Nashville, stated that the Stutte house was going to be shown by a realtor two or three times that weekend while the group was away in Nashville. *Affidavit of Gary Noland*, ¶26. For this reason, they allegedly moved the vehicles away from the house for aesthetics, reasoning that the house would look better to potential buyers if the cars were parked away from the house. *Id.*

The Stuttes had moved belongings out of the house before the fire, including books, tools, landscaping supplies, office supplies, family photos, and furniture. *Carol Stutte EUO*, p. 51-53, 63. The removed items were taken to another house owned by the Stuttes, located at 216 Depot Street, and to a storage unit. *Id.* at p. 53-55. Carol Stutte stated that any gasoline containers on the property were empty before the fire and that there were no other flammable liquids around. *Carol Stutte EUO*, p. 75-78.

Kimberly Holloway is the adult daughter of Carol Stutte and was living with the Stuttes at the time of the fire. Holloway was never involved with and never had any trouble with neighbor Janice Millsaps, nor did she observe any threats being made against the Stuttes by Janie Millsaps. *Holloway EUO*, p. 9-10, attached as **Exhibit 8**. Holloway reported she went to Nashville with Laura and Carol Stutte and Lora Black. *Id.* at p. 16. While at the Wildhorse Saloon, she received a call from one of Lora Black's children who had called to tell them about the fire. *Id.* The group stayed at the bar for approximately an hour and a half and then went back to their hotel. *Id.* at p. 22. The group then remained at the hotel for another two hours when Carol Stutte decided to drive home alone. *Id.* at 22-23. The next day, Holloway, Laura Stutte, and Lora Black got a rental car, continued to explore Nashville, and eventually drove home. *Id.* at 24-25.

ANPAC also interviewed several witnesses, including Eddie Hammondtree, Larry Bookout, Carl Self, Pam Self, Catherine Daughtery, Gerald Daughtery, Jack Welch, Jade Black, Lora Black, Jade Black, Kimberly Holloway, Janice Millsaps, Realtor Dan Watson, Agent Eric Kurtz, Special Agent Gary Elliott with the Tennessee Bomb and Arson Investigation Section, and Postmaster Mark Smith. *Affidavit of Gary Noland, ¶ 9, 11, 14, 18, 20, 25, 29, 40, 44, 53, 61.*

Witnesses Larry Bookout and Eddie Hammondtree had been fishing near the Stutte house on the day of the fire. Their attention was drawn to the house when they heard a large explosion, so they went to the house to make sure no one was inside or injured. *Affidavit of Gary Noland*, ¶10. Larry Bookout stated that after he heard the explosion, he smelled what appeared to be an odor of kerosene. *Affidavit of Gary Noland*, ¶12. Neither man recalls anyone coming or going from the Stutte driveway on the day of the fire. *Affidavit of Gary Noland*, ¶13. Witness Carl Self said that after he heard an explosion, he

went to the house to make sure no one was inside. *Affidavit of Gary Noland*, ¶15. Carl Self was able to see into the house due to the light provided by the flames. *Affidavit of Gary Noland*, ¶17. He stated that he could see into the kitchen, sunroom, front bedroom, and back bedroom, and that he did not see any furniture or pictures on the wall. *Affidavit of Gary Noland*, ¶17.

Janice Millsaps has denied the Stuttes' accusations. *Affidavit of Gary Noland*, ¶30.After being accused of starting the fire, Janice Millsaps voluntarily underwent and passed a polygraph test. *Affidavit of Gary Noland*, ¶31. In addition, Monroe County Detective Travis Jones examined Janice Millsaps' fingers after the fire and found no evidence of paint as would have been present if she had spray painted the word "QUEERS" on the Stuttes' garage on the night of the fire. *Affidavit of Gary Noland*, ¶47, 65. Notably, other neighbors do not support the Stuttes' characterization of Janice Millsaps. *Affidavit of Gary Noland*, ¶48-55. After interviewing Janice Millsaps, Special Agent Elliott with the Tennessee Bomb and Arson Department did not think that Ms. Millsaps had anything to do with the fire. *Affidavit of Gary Noland*, ¶45.

During its investigation, ANPAC discovered what it reasonably perceived to be inconsistencies in the Stuttes' description of where they were and what they were doing on the night of the fire. For example, although there were allegedly only four people celebrating in Nashville that night, the receipt provided from the Wildhorse Saloon shows that there were five (5) guests and that the ticket for (2) two sandwiches was paid for with Lora Black's credit card. *Holloway EUO*, p. 21; *Carol Stutte EUO*, p. 9; *Laura Stutte EUO*, p. 103-104; *Wildhorse Saloon Receipt,* attached as **Exhibit 9**. While Carol Stutte later decided to drive back to Vonore, it is puzzling why, upon learning that their home was on fire, the Stuttes continued drinking at the Wildhorse Saloon and then later continued

drinking at their hotel room in Nashville rather than return to Vonore immediately. *Laura Stutte EUO*, p. 106. Lora Black, who accompanied the Stuttes to Nashville, reported that the rental car company did not open the next day until the afternoon, so the remainder of the group could not return home any sooner than they did. *Affidavit of Gary Noland*, ¶28. However, National Car Rental represented that it opened for business at 6:00 a.m. the day after the fire September 5, 2010. *Affidavit of Gary Noland*, ¶63. Also, while Lora Black stated that the vehicles remaining at the Stutte property were moved for aesthetic purposes since the house was going to be shown by a realtor two or three times the weekend of the fire, Realtor Dan Watson told ANPAC that the house was not, in fact, scheduled to be shown on the weekend of the fire. *Affidavit of Gary Noland*, ¶62.

Cell phone records from the Stuttes were also examined by a forensic expert, Kevin Levy with TKR Technologies. *Levy Forensic Report, dated May 3, 2011,* attached as **Exhibit 10**. Mr. Levy's analysis of the cell tower records indicated that Carol Stutte was in an area northeast of Vonore, towards Knoxville, Tennessee during the time period of midnight to 2:00 a.m. on September 5, 2010. *Id.* In addition, Mr. Levy's analysis of the cell tower records indicated that Laura Stutte was in the Vonore area at approximately 3:00 a.m. on September 5, 2010, even though Laura Stutte claimed that she stayed in Nashville and did not return to Vonore until the afternoon of September 5, 2010. *Levy Forensic Report; Laura Stutte EUO*, p. 113. Further, Mr. Levy's analysis indicated that there was no conclusive evidence of travel to Nashville by either of the Stuttes and that the records indicated northerly or northeast travel away from the direction of reported travel to Nashville. *Levy Forensic Report.*

After performing its investigation, ANPAC made the decision to deny the fire loss claim. The Stuttes' insurance claim was denied by letter dated May 12, 2011. *Denial Letter,*

attached as **Exhibit 11**. Before the insurance claim was denied, ANPAC paid $2,847.00 on or about September 20, 2010 for temporary housing from September 15, 2010 through October 15, 2010. *Affidavit of Stacey Jennings*, ¶7. ANPAC further paid $610.17 directly to the Stuttes on February 11, 2011 for gas, water and sewer for the time period of October 19, 2010 through January 26, 2011. *Affidavit of Stacey Jennings*, ¶8. ANPAC further paid $3,500.00 directly to the Stuttes on April 15, 2011 for a pet deposit, security deposit and rent from November 1, 2010 through January 19, 2011. *Affidavit of Stacey Jennings*, ¶9.

The present lawsuit originated on May 13, 2011 when American National Property and Casualty Company filed a Complaint for Declaratory Judgment against Carol Anne Stutte, Laura Jean Stutte, and Chase Home Finance, LLC, seeking a judgment that the policy is void and does not provide coverage for the September 4, 2010 fire loss. In its Complaint, ANPAC asserted the defense or arson as well as the intentional act exclusion and the concealment of fraud provision contained in the policy. In response to the Complaint for Declaratory Judgment, the Stuttes counterclaimed against ANPAC, alleging breach of contract, violation of the Tennessee Consumer Protection Act, and statutory bad faith.

II. LAW AND ARGUMENT

A. The Stuttes' Claim for Statutory Bad Faith Fails as a Matter of Law.

Before an insured can recover under the bad faith penalty statute, "(1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit . . . and, (4) the refusal to pay must not have been in good faith." *Palmer v. Nationwide Mutual Fire Insurance Company*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). The Tennessee Supreme Court has stated that delay in settling a claim "does

not constitute bad faith when there is a genuine dispute as to value, no conscious indifference to the claim, and no proof that the insurer acted from 'any improper motive.'" *Id.* (citing *Johnson v. Tennessee Farmers Mutual Ins. Co.,* 556 S.W.2d 750, 752 (Tenn. 1977).

An insurer has the right to assert the defenses available to it if made in good faith. *Id*. **"If an insurance company unsuccessfully asserts a defense and the defense was made in good faith, the statute does not permit the imposing of the bad faith penalty."** *Id.* (quoting *Nelms v. Tennessee Farmers Mut. Ins. Co*., 613 S.W.2d 481, 484 (Tenn. Ct. App. 1978) (Emphasis added).

In *Palmer*, the court of appeals reversed a jury's imposition of the bad faith penalty. *Id.* In that case, the plaintiffs suffered a fire loss to their home. The proof showed that on the night of the fire, two separate fires occurred. *Id.* The fire chief testified that the second fire had up to 14 separate points of origin. *Id.* at 127. The State Deputy Fire Marshall testified that he investigated the premises and determined arson as the cause of the second fire. *Id*. Based upon this information, the insurer denied the claim. *Id.* Based upon this proof, the court of appeals stated that "[t]he record is devoid of any proof which would warrant a bad faith penalty, and the court was in error in affirming the jury award of the penalty." *Id.*

In *Williamson v. Aetna Life Insurance Company*, the District Court for the Western District of Tennessee faced a similar issue on a defendant's motion for summary judgment. *Williamson v. Aetna Life Insurance Company*, 2005 WL 3087861 (W.D. Tenn. Nov. 17, 2005). In that case, as here, the plaintiff sought damages under both the Tennessee Consumer Protection Act and the Bad Faith Penalty Statute. *Id.* at *1. Plaintiff claimed that the defendant insurer acted in bad faith in requiring her to submit proof of her disability and

thereafter terminating her benefits. *Id.* The plaintiffs provided the court a laundry list of more than 180 claims alleged to have been filed over a five year period that were allegedly wrongfully denied by the insurer. *Id.* at 5. The plaintiff additionally argued that the insurer unreasonably requested proof of her disability on numerous occasions even after she had previously provided the requested information. *Id.*

In granting the summary judgment motion as to the TCPA claim, the court noted that **"[e]rroneous denial of a claim…unaccompanied by deceit or other misleading conduct, does not constitute deception or unfairness**." *Id*. at *6 (quoting, *Hamer v. Harris*, 2002 WL 31469213, *1 (Tenn. Ct. App. Feb. 18, 2002)**(**Emphasis added)). The court noted that the insurance plan at issue allowed the request of proof of disability status on a reasonable basis. *Id*. The court granted the motion for summary judgment on the basis that the plaintiffs could offer no evidence that the insurer acted in any deceptive or unfair manner. *Id*.

Likewise, the court granted the insurer's motion for summary judgment on Plaintiffs' bad-faith statutory claim. *Id*. at *8. After noting the proof required to make out a claim under the statute, the court stated that the insured bears the burden of proof with regard to the four requirements. *Id*. at *7. The court additionally stated that **"[a] penalty is not appropriate when the insurer's refusal to pay rests on legitimate and substantial legal grounds."** *Id.* (quoting, *Tyber v. Great Central Ins. Co.,* 572 F.2d 562, 564 (6th Cir. 1978) (Emphasis added).

In *Williamson*, the defendant insurer specifically based its summary judgment motion on the fourth prong of required proof that states that the insurer's "refusal to pay was not in good faith." *Id.* As with the plaintiffs' TCPA claim, the court reviewed the applicable facts of the case and noted that the plaintiffs were unable to offer evidence that the insurer acted

in any manner which could be considered bad faith. *Id*. at *8. Specifically, the court noted that the insurer acted reasonably in requesting proof of disability status as the plaintiff's living arrangements, school status and location of residence changed from the first of such requests to the request complained of by plaintiffs. *Id*. The court found that the insurer's reliance on those facts provided a reasonable basis for requesting proof of her status as fully disabled. *Id.* Further, the court noted that the plaintiffs provided no basis for the assertion that the insurer denied various claims in bad faith. *Id.* at *7. In fact, the court noted that the insurer provided evidence of its various bases for denial of those claims. *Id.* Based upon these findings, the **court held as a matter of law that the defendant insurer did not act in bad faith under the statute, and therefore granted the defendant's motion for summary judgment** *Id.* at *8 (Emphasis added). *See also Order Granting Defendant's Motion for Partial Summary Judgment in Thompson v. State Farm Fire & Casualty Company*, 2:05-cv-02368-BBD-sta, W.D. Tenn, 9-17-2007), attached as **Exhibit 14**.

Likewise, in a fact set similar to the present case, in *Zientek v. State Farm International Services, Inc.*, the District Court for the Eastern District of Tennessee granted a defendant insurer's motion for summary judgment as to the plaintiff insured's claim for statutory bad-faith. *Zientek v. State Farm International Services, Inc.*, 2006 WL 925063, *4 (E.D. Tenn. April 10, 2006). In making its determination, the court focused on the facts presented. *Id.* at *2. Those facts revealed that the plaintiff was home alone at the time of the fire, multiple points of origin were found, and the fire chief noted the ignition factor was suspicious. *Id.* Further, the insurer hired a cause and origin expert to investigate the fire. *Id.* The expert determined that the fire was likely caused by an accelerant and ignited by a "human hand." *Id.* at *3. The court first quoted the above mentioned law related to the

required elements to prove entitlement to the statutory bad faith penalty. *Id*. The court then stated that **"[t]he bad faith penalty is not recoverable in every refusal of an insurance company to pay a loss**. . . . *Id.* at *4 (citation omitted) (Emphasis added). Further, the court noted that an **insurer has the right to rely upon available defenses** (emphasis added) and refuse payment of a claim if such is based upon substantial legal grounds. *Id.*

The court stated that "no genuine issue of material fact exists regarding Defendant's refusal to pay . . . . The refusal to pay the claim was in good faith reliance on Chief Rosemond's Fire Report and the findings of Rowland's investigation [sic]. . . . Defendant had the benefit of all this information when it informed Plaintiffs on December 2, 2004 there was a question as to whether Defendant is obligated to pay under the policy." *Id*. Lastly, the court found the record devoid of any inference that the insurer acted in bad faith beyond the mere allegation by the plaintiff that the defendant refused to pay for the loss. *Id.*

In the case presently before the Court, after the loss, ANPAC conducted an extensive and thorough investigation of the Stuttes' insurance claim. ANPAC also made the decision to hire and did hire an origin and cause expert, Gary Young with EFI Global, to conduct an origin and cause investigation. *Young Report.* As part of this investigation, Mr. Young examined the fire scene. *Id.* at p. 3-4. Mr. Young noted evidence of an explosion at the residence and determined that the fire originated in the left rear quadrant of the basement. *Id.* at p. 4-6. Mr. Young also observed signs that someone had trailed an accelerant into the residence. *Id.* at p. 6-8.

While performing his debris examination and removal process, Mr. Young observed faint odors of gasoline. *Id.* at p. 6-7. He also collected debris samples and sent the samples to a laboratory, AK Analytical Services, Inc., for analysis by Dennis Akin. *Id.* at p. 8. A

report was sent to ANPAC from AK Analytical Services, Inc., indicating the presence of ignitable liquids. *AK Lab Report; Young Report, p. 6, 8*. As shown in AK Analytical's lab report, two of the debris samples contained evaporated gasoline. *Id.* After ruling out other possible causes, Mr. Young opined that the fire was incendiary, caused by the intentional application of a large amount of gasoline which was then ignited. *Id.* at p. 7-8, 11. The fire was also classified as incendiary by the Tennessee State Bomb and Arson Investigation Section, according to Special Agent, Gary Elliott. *Id.* at p. 10.

ANPAC also interviewed numerous witnesses (as mentioned above) during its investigation. ANPAC also requested that the Stuttes and Kimberly Holloway submit to Examinations Under Oath, and the Stuttes did so on December 21, 2010. Based on its investigation, ANPAC denied the Stuttes' insurance claim by letter dated May 12, 2011. *Denial Letter.*

At the time of the insurance denial, ANPAC had or knew of *at least* the following information:

(1) An opinion from an experienced and reputable origin and cause expert that the fire was incendiary. *Young Report.*

This is one of the required elements of arson in Tennessee.

(2) An opinion from an experienced and reputable forensic scientist that samples of debris collected from the fire scene contained ignitable liquids, namely gasoline. *AK Lab Report from Dennis Akin.*

This supports the conclusion reached by the origin and cause expert that the fire was incendiary, a required element of arson in Tennessee.

(3) The Stuttes' owned two pieces of real property, with three mortgages and had a monthly car payment. In addition, they had credit cards, one of which had a balance of approximately $7,000.00, another which had a balance of approximately $2,000.00, and they owed Lumber Liquidators approximately $4,000.00. The Stuttes also owed approximately $3,0000.00 to the IRS. *Laura Stutte EUO*, p. 40-48, 51-53, 57.

This is information that could be used to establish motive, one of the required elements of arson in Tennessee.

(4) The Stuttes' home was for sale at the time of the fire. *Laura Stutte EUO*, p. 58; *Affidavit of Gary Noland, ¶32, 61*.

This is information that could be used to establish motive, one of the required elements of arson in Tennessee.

(5) At the time of the fire, the Stuttes wanted to move away from where they lived and had wanted to sell the house for some time. *Holloway EUO*, p. 27-28-29; *Laura Stutte EUO*, p. 62.

This is information that could be used to establish motive, one of the required elements of arson in Tennessee.

(6) A forensic report prepared by Kevin Levy analyzing the cell phone records of the Stuttes did not support the assertions made by the Stuttes with respect to their whereabouts on the day of the fire and the day after the fire. *Levy Forensic Report, dated May 3, 2011*. The analysis did not indicate that the Stuttes were in Nashville, at the time of the fire, as they reported.

This is information that could be used to establish opportunity, one of the required elements of arson in Tennessee.

(7) Only Laura Stutte, Carol Stutte, and Kimberly Holloway had keys to the property. *Laura Stutte EUO*, p. 68.

This is information that could be used to establish opportunity, one of the required elements of arson in Tennessee.

(8) No one reported hearing the Stuttes' dogs barking on the night of the fire, despite the fact that the Stuttes have described the dogs as their "alarm system." *Carol Stutte EUO*, p. 60-61; *Laura Stutte EUO*, p. 108; *Affidavit of Gary Noland, ¶58.*

This is information that could be used to establish opportunity, one of the required elements of arson in Tennessee.

(9) Recently before the fire, the Stuttes had removed important papers from the property, including their insurance policy, titles to vehicles, tax returns, real estate contract, living wills, divorce papers, family photos, clothing, guns, furniture and other items. *Laura Stutte EUO*, p. 60-61, 85-86, 109-110.

Unusual.

(10) In at least four rooms of the home, there were no wall hangings or furnishings. *Affidavit of Gary Noland, ¶17*.

Unusual.

(11) A large amount of furniture was removed from the house during the two weeks before the fire. *Affidavit of Gary Noland, ¶21-22.*

Unusual.

(12) Before the fire, the Stuttes changed their mailing address at the post office and electric company. *Carol Stutte EUO*, p. 83-84; *Laura Stutte EUO*, p. 88-90; *Affidavit of Gary Noland, ¶40-41.*

Unusual

(13) Shortly before the fire, the Stuttes increased their insurance coverage on the house and the contents. *Laura Stutte EUO, p. 80; Affidavit of Gary Noland, ¶43.*

Unusual

(14) Lora Black, who allegedly accompanied the Stuttes to Nashville, stated that the vehicles remaining at the Stutte property were moved for aesthetic purposes because the house was going to be shown by a realtor two or three times the weekend of the fire. However, Realtor Dan Watson told ANPAC that the house was not, in fact, scheduled to be shown on the weekend of the fire. *Affidavit of Gary Noland, ¶26,62.*

Unusual

(15) Lora Black, who accompanied the Stuttes to Nashville, reported that the rental car company did not open the day after the fire until the afternoon, so the remainder of the group could not return home any sooner than they did. *Affidavit of Gary Noland, ¶28*. However, National Car Rental represented that it opened for business at 6:00 a.m. the day after the fire September 5, 2010. *Affidavit of Gary Noland, ¶63.*

Unusual

(16) There is credible evidence indicating that Janice Millsaps did not set the subject fire. *Affidavit of Gary Noland, ¶48-55.* For example, Millsaps voluntarily underwent and passed a polygraph test. *Affidavit of Gary Noland, ¶31, 46.* In addition, Monroe County Detective Travis Jones examined Millsaps' fingers after the fire and found no evidence of paint as would have been present if she had spray painted the word "QUEERS" on the Stuttes' garage on the night of the fire. *Affidavit of Gary Noland, ¶47, 65.*

> *This is evidence that tends to rule out Janice Millsaps as the potential suspect for setting the subject fire*.

See also Statement of Undisputed Material Facts submitted in support of this motion by ANPAC.

In addition, after the denial, ANPAC obtained additional information supporting its denial of the Stuttes' insurance claim. The handwriting used to paint the word "QUEERS" on the side of the Stuttes' garage and the handwriting painted on plywood and used to label boxes located at their Stuttes' 216 Depot Street house appears to be very similar and appears to have been written by the same person. *Photographs of Handwriting*, attached as Collective **Exhibit 12**. As a result, ANPAC retained a handwriting expert, Theresa F. Dean, to analyze the handwriting used in both places. It is Ms. Dean's opinion, based on a reasonable degree of certainty, that the person who spray painted the word "QUEERS" on the Stuttes' garage was probably the same person who authored the words spray painted on plywood at the Stuttes' 216 Depot Street House. *June 6, 2011 Letter from Theresa F. Dean,* attached as **Exhibit 13**. This opinion suggests that it was one of the Stuttes who wrote the word "QUEERS" on the Stuttes' garage and supports the opportunity element of the arson defense.

ANPAC also conducted follow-up witness interviews after the denial, including interviews Detective Travis Jones, Tommy Self, and Rick Harris. *Affidavit of Gary Noland, ¶64.* The interviews of Tommy Self and Rick Harris indicate that it was the Stuttes, and their friend Joe Neubert, who were aggressive and unfriendly to neighbors, as opposed to the other way around. *Affidavit of Gary Noland, ¶67-71.* For example, Rick Harris and his children, who were attempting to go fishing on public access land, were approached by an angry and aggressive woman, either Carol or Laura Stutte, dressed in camouflage and

carrying some type of assault rifle. *Affidavit of Gary Noland, ¶68.*

In order to prevail on a defense that an insured caused or procured the fire, the insurer must show that (1) the loss was due to a fire of incendiary origin, (2) that the insured had an opportunity to set the fire, and (3) that the insured had a motive to set the fire. *McReynolds v. Cherokee Insurance Co.,* 815 S.W.2d 208,211 (Tenn. Ct. App. 1991)(citing *Harris v. Zurich Insurance Co*., 527 F.2d 528 (8th Cir. 1975); *McIntosh v. Eagle Fire Co. of New York*, 325 F.2d 99 (8th Cir. 1963); *Ralls v. Northwestern National Insurance Co.*, 238 F.Supp. 228 (E.D.Mo. 1965), *see also, EGLI Holdings, Inc. v. Insurance Co. of North America,* 511 F.2d 957 (2d Cir. 1975); *Boone v. Royal Indemnity Co.,* 460 F.2d 26 (10th Cir. 1972); *accord* 21B J. Appleman & J. Appleman, *Insurance Law & Practice*, 12682 (1980) (general rule is that "to establish a prima facie case of incendiarism for the purpose of denying coverage under a fire policy, it is sufficient to show: arson by someone; motive by the suspect; and unexplained circumstantial evidence implicating the suspect.").

An insurer does not have to prove that an insured was present at the time of the ignition of the fire in order to prevail on the arson defense. Rather, an insurer may prove arson by either direct or circumstantial evidence:

> Arson cases typically are difficult to prove. It has been stated that it is rarely "possible to prove the actual lighting of the match." . . . Therefore, "courts have long recognized that [arson] can be established in civil cases by circumstantial evidence." . . .

Arms v. State Farm Fire & Casualty Ins. Co., 731 F.2d 1245, 1249 (6th Cir. 1984) (applying Tennessee law).

The defense of policy exclusion based on arson is an affirmative defense in Tennessee as to which the insurer has the burden of proof. *Herren v. Old Republic*

Insurance Co., 802 S.W.2d 628 (Tenn.Ct.App. 1990). The standard of review for the arson defense is **by a preponderance of the evidence**, not beyond a reasonable doubt. *Groves v. Auto Owners Insurance Co.,* 459 F. Supp. 490 (E.D. Tenn. 1978); *Hendrix v. Insurance Co. of North America*, 675 S.W2d 476 (Tenn. Ct. App. 1984); *Livingston v. United States Fire Insurance Co.*, 7 Tenn. App. 230 (1928)(Emphasis added).

In this case, ANPAC obviously would not be liable on a contract of insurance if the Stuttes participated in or procured the burning of their house. Additionally, ANPAC is obviously an insurance company who has an interest in deterring arson. ANPAC believed at the time of denial that the subject fire was arson and had information indicating (1) incendiary nature of the fire, (2) motive of the Stuttes to cause or procure the fire, and (3) opportunity of the Stuttes to cause or procure the fire. Based on established principles of law in Tennessee on arson, ANPAC's beliefs at the time of denial were not only reasonable, they were based on substantial legal grounds. *See Zientek*, 2006 WL 925063 at *4.

Nitpicking ANPAC's investigation, creating immaterial disputes of fact and offering explanations and arguments for the information considered by ANPAC at the time of denial are not enough to avoid summary judgment on these particular issues. The only issue before the Court presently is ANPAC's good faith, not ANPAC's perfection; and, for that matter, the issue is not whether ANPAC was correct in its determination that the Stuttes intentionally caused or procured the fire loss in question. The Stuttes are free to challenge ANPAC's evidence and argue at trial that ANPAC was ultimately wrong in its decision to deny the claim. Likewise, the Stuttes are also free to argue at trial that the various expert opinions rendered to ANPAC were erroneous or faulty. If a jury ultimately determines that ANPAC has failed to prove one of the required elements of the defense of arson set forth

above, it is in their exclusive province to do so and force ANPAC pay the Stuttes' insurance claim. However, the fact that a jury may ultimately disagree with ANPAC on any of the elements of arson does not equate to bad faith conduct by ANPAC.

Being wrong in the end does not equate to bad faith. Hindsight is always 20/20. An insurer has the right to assert the defenses available to it if made in good faith. *Palmer v. Nationwide Mutual Fire Insurance Company*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). **"If an insurance company unsuccessfully asserts a defense and the defense was made in good faith, the statute does not permit the imposing of the bad faith penalty."** *Id.* (quoting *Nelms v. Tennessee Farmers Mut. Ins. Co.*, 613 S.W.2d 481, 484 (Tenn. Ct. App. 1978) (Emphasis added). Based on the established law in Tennessee, the arson defense, as well as the fraud and misrepresentation policy defense, is available to ANPAC. The record and the undisputed facts establish that ANPAC has asserted the arson defense and the subject policy provisions prohibiting recovery in good faith. Therefore, the Stuttes' claim for the bad faith penalty contained in Tennessee Code Annotated § 56-7-105 should be denied because it fails *as a matter of law* and ANPAC should be granted summary judgment on this claim.

B. The Stuttes' Claim for Violation of the Tennessee Consumer Protection Act Fails as a Matter of Law

As previously stated in ANPAC's *Memorandum of Law in Support of Motion to Dismiss TCPA Allegations of Counterclaim*, it is well settled in Tennessee that the mere denial of an insurance claim, absent any deceptive, misleading, or unfair act, does not violate the TCPA. In *Fulton Bellows, LLC v. Federal Insurance Company,* 662 F. Supp 2d 976 (E.D. Tenn. 2009), Judge R. Allan Edgar addressed this issue. In that case, the insured sued Federal Insurance Company for breach of a Directors' and Officers' Liability

insurance policy. At issue was whether the alleged wrongful discriminatory acts arose prior to the inception date of the policy. Federal Insurance Company denied coverage and refused to provide a defense for the insured in the underlying lawsuit because the evidence indicated that the discriminatory acts arose prior to the inception date of the policy.

In its complaint, the insured alleged that Federal Insurance Company's denial of coverage constituted a violation of the TCPA. Judge Edgar dismissed the insured's TCPA claim because the insured could not demonstrate that Federal Insurance Company's mere denial of the claim was deceptive or unfair. In so ruling, Judge Edgar stated as follows:

> Other state and federal court decisions have made clear that for the TCPA to apply to the denial of insurance claims, the insured must allege that the insurer violated the terms of the policy or acted unfairly in some other way. *See, e.g., Nautilus Ins. Co. v. In Crowd, Inc. No. 3:04-0083, 2005 U.S. Dist. LEXIS 24567, 2005 WL 2671252 (M.D. Tenn. Oct. 19, 2005); Parkway Assocs., LLC v. Harleysville Mut. Ins. Co., 129 Fed. Appx. 955, 960-61 (6th Cir. 2005*) (affirming district court's award of summary judgment where plaintiff failed to allege that defendant insurer misled or deceived it). Further, a mere denial of an insurance claim, absent any deceptive, misleading of [*sic.*] unfair act does [**56] not violate the TCPA. *See e.g., Williamson v. Aetna Life Ins. Co.., 481 F.3d 369, 378 (6th Cir. 2007)* (affirming award of summary judgment for insurer on plaintiff's TCPA claim where at worse insurer's conduct amounted to an "erroneous denial" of a claim); *Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 520 (Tenn. Ct. App, 2003)* (reversing trial court award of damages pursuant to the TCPA where "no material evidence" existed "to support the jury's conclusion that Defendant engaged in deceptive or unfair acts"); *Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 445-46 (Tenn. Ct. App. 2004) (*reversing jury verdict on plaintiff's TCPA claim where insurer simply maintained good faith, although mistaken, belief that plaintiff materially misrepresented her husband's health).

Judge Edgar's opinion, as well as the cases cited by Judge Edgar, stand for the proposition that the mere denial of an insurance claim does not constitute a violation of the TCPA absent evidence that the insurer deceived the insured about the terms of the policy of acted unfairly in some other way.

The Stuttes' counterclaim alleges that ANPAC violated the TCPA by denying their

insurance claim and specifically makes the following allegations:

> 35. ANPAC has engaged in unfair or deceptive acts or practices by denying coverage for the Stuttes' claim, cancelling the policy, and filing this coverage action based on allegations ANPAC knows, or should know, to be false, in an effort to avoid its obligation under the Policy.
>
> 36. Specifically, ANPAC accused the Stuttes of destroying their home and contents, and of committing concealment or fraud relating to their claim, even though ANPAC knew, or should have known, that these allegations were false based on evidence in its possession concerning the Stuttes whereabouts at the time of the fire.
>
> 37. As a direct result of these unfair or deceptive acts or practices, the Stuttes had suffered and continue to suffer the ascertainable loss of money, property, and/or other things of value, including, without limitation, insurance proceeds for loss to their home and contents and additional living expenses, attorney's fees and other expenses in defending this litigation and attempting to obtain coverage under the policy, lost earnings on the amounts wrongfully withheld by ANPAC, and damage to their credit. In addition, the Stuttes are entitled to recover treble damages, up to three times the actual damages they have sustained, pursuant to Tenn. Code Ann. §47-18-109(a)(3).

Thus, the only basis of the counterclaim for damages under the TCPA is the denial of the Stututes' insurance claim. That alone is insufficient to state a cause of action under the TCPA.

In addition, the "fact set" that would constitute a claim for violation of the Tennessee Consumer Protection Act (TCPA) would be the same "fact set" necessary to substantively prove a claim for statutory bad faith under Tennessee Code Annotated § 56-7-105. In the present case, for the same reasons as stated above, as a matter of law, the Stuttes cannot present facts at trial sufficient to establish that ANPAC acted unfairly or deceptively to support a claim for violation of the TCPA. *See e.g., Williamson v. Aetna Life Ins. Co.*, 2005 WL 3087861 (W.D. Tenn. Nov. 17, 2005); *Zientek v. State Farm International Services, Inc.*, 2006 WL 925063, *4 (E.D. Tenn. April 10, 2006); *Stooksbury v. American National Property and Casualty Company*, 126 S.W.3d 505 (Tenn. 2004); *Order Granting*

Defendant's Motion for Partial Summary Judgment in Thompson v. State Farm Fire & Casualty Company, 2:05-cv-02368-BBD-sta, W.D. Tenn, 9-17-2007). Therefore, the Stuttes' claim for violation of the TCPA should be denied because it ***fails as a matter of law*** and ANPAC should be granted summary judgment on this claim.

Conclusion

ANPAC relies upon the entire record in this cause, including, but not limited to, the pleadings, the Examinations Under Oath of the Stuttes and Kimberly Howell, the reports provided to ANPAC by the experts in this case, the witness interviews, its Statement of Undisputed Facts, the Affidavit of Gary Noland, the Affidavit of Stacey Jennings, and this Memorandum. ANPAC should be granted summary judgment on the Stuttes' statutory bad faith and Tennessee Consumer Protection Act claims because there can be no genuine dispute of material fact that ANPAC acted in good faith in denying the Stuttes' fire insurance claim and did not otherwise act unfairly or deceptively.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this pleading or document was served via the Court's ECF filing system upon:

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This the 25th day of October, 2011.

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