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 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' RULE 56(d) REQUEST TO TAKE DISCOVERY

Comes now American National Property and Casualty Company ("ANPAC"), by and through counsel, pursuant to Federal Rule of Civil Procedure 56 and in reply to the *Memorandum in Opposition to ANPAC's Motion for Partial Summary Judgment on the Stuttes' Counterclaims for Bad Faith and Violation of the Tennessee Consumer Protection Act* and in opposition to the Stuttes' request to conduct discovery before the motion is ruled upon, states as follows:

INTRODUCTION

It is important for the Court to understand that ANPAC's motion only seeks to eliminate the extra-contractual claims of bad faith and violation of the Tennessee Consumer Protection Act from this lawsuit. The motion does not seek summary judgment on the breach of insurance contract claim or whether the Stuttes are allowed to recover on their fire loss claim. ANPAC agrees that this is a matter that is not appropriate for summary disposition. However, as pointed out below, other Courts have looked at far less compelling evidence and concluded, both as a matter of fairness and judicial economy, that the insurance carrier, as a matter of law, was acting in good faith leaving only the merits of the claim decision to be litigated, as should be the case here. In essence, the Stuttes are asking this Court to allow discovery to see if they can find a basis for extra-contractual allegations already made as opposed to fleshing out through discovery allegations of such conduct for which a reasonable factual basis existed at the time the allegations were made. Respectfully, this Court should grant ANPAC's motion and allow the litigation to proceed on the real question which is, fundamentally, whether the Stuttes caused or procured the loss in question in violation of both the insurance policy provisions and public policy.

LAW AND ARGUMENT

In response to ANPAC's motion, the Stuttes ask to conduct discovery before the Court rules on the motion. In this case, however, the Stuttes' Counterclaim states no plausible claims for bad faith or violation of The Tennessee Consumer Protection Act. *Patterson v. Novartis*

Pharmaceuticals Corp., 10-5886, 2011 WL 3701884 (6th Cir. Aug. 23, 2011)(discussing requirement of plaintiff to state a plausible --not possible-- claim for relief). Rather, the counterclaim essentially alleges the Stuttes provided their version of the loss and certain information to ANPAC but since ANPAC conducted further investigation and eventually denied the claim, this must mean that ANPAC relied on information it knew to be false and acted unfairly, deceptively and in bad faith. This is not a plausible claim for relief; it is a "chance" claim for relief. Merely pleading facts that are consistent with a defendant's liability or that permit the court to infer misconduct is insufficient. *Patterson*, 2011 WL 3701884 at *1. Additionally, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* If a complaint only allows a Court to infer that something is possible, then it fails to satisfy pleading requirements. *Id.* at *2. When a party can not state a plausible claim for relief, the party is not entitled to go conduct discovery in an effort to find facts to plead. *Id.* This very same principle can be applied in the instant case, even though the present motion is one for summary judgment. [1]

Plain and simple, the Stuttes have put the cart before the horse and now wish to mine for a basis for including these allegations and want to engage in a fishing expedition. While the Stuttes are free to conduct discovery to defend ANPAC's affirmative defenses to their breach of contract claim, they should not be permitted to make baseless allegations and then ask to conduct discovery when those allegations are challenged.

As a basis for their request to conduct discovery, the Stuttes complain that the denial letter sent to them only contained policy provisions and did not contain any factual basis for the

[1] ANPAC did file a motion to dismiss for failure to state claim on the Stuttes' Tennessee Consumer Protection

denial of the claim. However, the Stuttes have failed to cite to any statute, case law, or policy provision which would require ANPAC to specifically set forth in detail all of its various reasons for denying their insurance claim. The Stuttes also complain that ANPAC did not provide them with all of the information it had compiled in investigation of the claim. Again, the Stuttes have failed to cite to any statute, case law, or policy provision which would require ANPAC to provide the Stuttes with its investigative files, its work product, or other materials prepared in anticipation of potential litigation.

A party opposing a motion for summary judgment possesses no absolute right to additional time for discovery under Rule 56. *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989). Rule 56(d) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. *Emmons*, 874 F.2d at 356. While it is true that in many cases, discovery should usually be allowed before a summary judgment motion is considered, Sixth Circuit courts have upheld the denial of Rule 56(d) motions on vagueness grounds even when the parties were given no opportunity for discovery. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420 (6th Cir. 2008) *Cunningham v. Osram Sylvania, Inc.*, 221 F. App'x 420, 422-23 (6th Cir. 2007). Similarly, Sixth Circuit Courts have affirmed the denial of Rule 56(d) motions if further discovery would not have changed the legal and factual deficiencies. *Id.*

To prevail under Rule 56(d), a party opposing a motion for summary judgment must make (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists. *Miskam*

Act claim. The Court has not yet issued a ruling.

v. McAllister, CIV. 2:08-02229 JMS, 2010 WL 4942628 (E.D. Cal. Nov. 30, 2010). *See also Tatum v. City & County of S.F.,* 441 F.3d 1090, 1100 (9th Cir.2006) (party requesting continuance must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment); *Garrett v. City & County of S .F.,* 818 F.2d 1515, 1518 (9th Cir.1987) (opposing party must make clear what information is sought and how it would preclude summary judgment). Failure to comply with the requirements of Rule 56 is a proper ground for denying discovery and proceeding to summary judgment. *Brae Transp., Inc. v. Coopers & Lybrand,* 790 F.2d 1439, 1443 (9th Cir.1986); *In re Silicon Graphics Inc. Sec. Litig.,* 183 F.3d 970, 989 (9th Cir.1999), *superseded by statute on other grounds* (failing to file the required Rule 56 affidavit detailing with particularity the information sought was fatal to request for further discovery); *Tatum,* 441 F.3d at 1100 (finding that an attorney declaration was insufficient to support a continuance where declaration failed to specify specific facts to be discovered or explain how a continuance would allow the party to produce evidence precluding summary judgment).

Rule 56 requires affidavits setting forth the **particular facts** expected from the movant's discovery. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 489 (6th Cir. 2000)(Emphasis added); *Ironside v. Simi Valley Hosp.,* 188 F.3d 350, 354 (6th Cir. 1999)(plaintiff's affidavit made only general and conclusory statements regarding the need for more discovery and did not show how discovery would have allowed information related to the truth or falsity of the letter to be discovered); *Evans v. Technologies Applications & Serv. Co.,* 80 F.3d 954, 961 & n. 4 (4th Cir.1996) (rejecting plaintiff's memorandum

opposing summary judgment because it simply stated that she could not adequately oppose the motion “at this early stage in the litigation-especially when plaintiff has not yet been afforded the opportunity to conduct discovery”).

In *Emmons*, the only affidavit filed that might have satisfied the requirements of Rule 56 was the appellant’s but it clearly failed to indicate why he could not “present by affidavit facts essential to justify [his] opposition” to the motion for summary judgment. *Emmons*, 874 F.2d at 357. The fundamental failure in the affidavit was its **inability to substantiate appellant's allegations with any details**. *Id.* (Emphasis added). The Sixth Circuit Court of Appeals held that the lack of specificity, without any apparent justification on the face of appellant's affidavit, gave the district court ample reason to deny appellant's request for additional discovery. *Id.* Like the Stuttes in this case, the appellant in *Emmons* argued that relevant facts were solely in the other side’s possession. *Emmons,* 874 F.2d at 357. However, the Court of Appeals found that given the nature of appellant's allegations, his right to further discovery hinged not upon information in the other side’s control, but instead upon **facts that, if they existed, should have been within appellant's personal knowledge**. *Id.* (Emphasis added). The Court of Appeals found that appellant’s refusal to divulge his knowledge to the court justified the early entry of summary judgment. *Id.*

In *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995), in response to a summary judgment, the plaintiff requested more time to learn the details of a local GM affirmative action plan and to obtain a list of the names of those securing apprenticeships. As pointed in *Plott*, an important consideration in a case where the party opposing summary judgment requests discovery is **whether the desired**

discovery would have changed the ruling on summary judgment. *Plott*, 71 F.3d at 1196 (Emphasis added). In affirming the district court's grant of summary judgment and denial of discovery to the plaintiff, the Sixth Circuit Court of Appeals found that even if the plaintiff had received the materials he wanted, the case's outcome would have been the same. *Id.* at 1197. In that particular case, a code section granted the defendant immunity for the employment decisions at the core of the litigation and the additional information the plaintiff sought was irrelevant to the code section's application. *Id.* The Court of Appeals found even the most forthcoming discovery responses by defendant would not have changed the ultimate result of the case. *Id.*

In *Cunningham v. Osram Sylvania, Inc.*, 221 F. App'x 420, 422-23 (6th Cir. 2007), the Sixth Circuit Court of Appeals examined the nature of discovery sought by the plaintiffs and found it to be immaterial to the issues before the Court on summary judgment. The Court of Appeals concluded that discovery would not have produced evidence sufficient to create a *material* dispute of fact in the case and that summary judgment was therefore properly entered in favor of the defendant. *Id.* (Emphasis in original).

I. The Stuttes' request for discovery before the Court rules on the instant motion should be denied.

In this case, the Stuttes' request for discovery should be denied for two reasons. First, the Stuttes wholly fail to explain why they need discovery of ANPAC's "complete investigation file," what they reasonably believe they will find there, and why it is "indispensable" to the Stuttes' opposition to ANPAC's motion. Rather, the Stuttes want to conduct a fishing expedition and hope they find something that might support their conclusory extra-contractual claims. In this case, the Stuttes' attorney filed his own

Affidavit. There is no Affidavit submitted by the Stuttes, who are the policyholder Plaintiffs. In the Affidavit, the Stuttes' attorney merely says that he asked for a complete copy of ANPAC's investigation file, that ANPAC did not provide it, and that the Stuttes dispute the allegations made in the Affidavits submitted by ANPAC. The Stuttes' attorney further states that the Stuttes need to depose the affiants, the authors of the reports, and the ANPAC employees and investigators who were involved in the case to discover the basis for the assertions made in the Affidavits and Reports. Respectfully, the bases for the assertions is stated in the reports and affidavits themselves. The Stuttes' attorney further states, **without any basis or support whatsoever**, that ANPAC has submitted an incomplete picture of its investigation of the insurance claim. Why are the Stuttes and their attorney not able to articulate any basis for this assertion in their request to conduct discovery? At least in *Emmons*, the attorney who submitted an affidavit claimed that he interviewed individuals who had relevant information but refused to provide affidavits for fear of retaliation. *Emmons,* 874 F.2d at 358. Although counsel in *Emmons* suggested that he interviewed numerous witnesses, his affidavit gave only two examples of persons who refused to cooperate. *Id.* Even with that Affidavit, the Sixth Circuit Court of Appeals was not persuaded to overturn the district court. *Id.* It is not unfair to require the Stuttes and their attorney to show some factual basis for their claims of bad faith and violation of the Tennessee Consumer Protection Act before being permitted to conduct extensive discovery. *Emmons*, 874 F.2d at 357. This they have not done.

The failure of the Stuttes to plead any facts whatsoever supporting their bad faith and Tennessee Consumer Protection Act claims is the first indication that the Stuttes want

to conduct a fishing expedition. To this end, ANPAC has filed a motion to dismiss the Tennessee Consumer Protection Act claim which this Court has not yet ruled upon. In response, the Stuttes claim only that their claim is based on their allegation that "ANPAC knew its accusations were false, because ANPAC had clear evidence proving that the Stuttes did not cause the fire that destroyed their home." *See Memorandum in Opposition to ANPAC's Motion to Dismiss Count Three of the Stuttes' Counterclaim*, Document 13, p. 1, 3. All of the information used by ANPAC to support the instant summary judgment motion is certainly not in the exclusive possession of ANPAC. For example, the Stuttes lay out their "clear evidence" in their response to ANPAC's motion to dismiss the Tennessee Consumer Protection Act claims, stating that they provided ANPAC with receipts and witnesses backing up their claims. *Id.* at p. 2. Notably, this is all information within the Stuttes' possession and has even been presented to the Court as part of ANPAC's motion for summary judgment. Therefore, it is unclear what additional discovery needs to be done in this regard.

Moreover, the Stuttes and their attorneys are perfectly capable of speaking with the fact witnesses mentioned and of obtaining affidavits. For example, if the Stuttes claim that these witnesses, such as Eddie Hammondtree, Larry Bookout, Carl and Pam Self, Gary Elliott, Gerald and Catherine Daughtery, Lora Black, Janice Millsaps, Mark Smith, Eric Kurtz, Jack Welch, etc., did not tell ANPAC what is sworn to in the filed Affidavits, then the Stuttes can certainly present competing affidavits without the need for conducting wholesale discovery in this case.

Second, the generalized discovery requested by the Stuttes can have no effect on the outcome of ANPAC's current motion. As in *Cunningham*, the discovery sought here would not produce evidence sufficient to create a *material* dispute of fact with respect to the extra-contractual claims in the case. ANPAC will not restate the law cited in its opening Memorandum, but would instead refer the Court back to those arguments and legal authority and incorporate them by reference as if fully restated here. Conducting discovery on the extra-contractual claims is not necessary at this point in the litigation because of the nature of ANPAC's motion and the basis upon which it is filed. ANPAC's motion is based on other federal cases in Tennessee in which judges have, as a matter of law, eliminated extra-contractual claims in arson cases just like the current one so that the issues are properly narrowed to the real dispute: are the plaintiffs responsible for the fire or are they not? Respectfully, the Stuttes lose focus on the basis for ANPAC's motion. If the court considers the testimony and materials submitted by ANPAC, and even that identified by the Stuttes as their "clear evidence" that ANPAC relied on information it knew to be false, ANPAC could not, as a matter of law, be found to have acted in bad faith or violated the Tennessee Consumer Protection Act. Distinguish this from the following scenarios. Suppose the Stuttes conduct discovery and learn that ANPAC or one of its experts made an error which would change a conclusion with respect to some piece of evidence. Or suppose that the Stuttes, after deposing a witness, conclude that that witness is not credible. Or suppose the Stuttes hire their own handwriting expert, origin and cause expert, and cell phone tower expert who disagree with the conclusions drawn by ANPAC's experts. Or suppose the Stuttes discover that an investigator misconstrued a witness's statement. All of these

things are proper for the Stuttes to present to a jury on their breach of contract claim, i.e., in trying to show that ANPAC's affirmative defenses should not be accepted and that they did not commit fraud or arson. However, these types of discoveries do nothing to change what information was conveyed to ANPAC by its investigators, the witnesses, or its experts during the investigation of the claim and they do nothing to change what information contributed to the decision to deny the claim at that time. While discoveries such as those suggested above could theoretically be made (as anything can theoretically be discovered in any case), no amount of discovery, and certainly none the Stuttes have reasonably articulated, can create a dispute of material fact with respect to what appears in black and white before the Court in ANPAC's motion and supporting documents. In light of the law in Tennessee regarding bad faith and the Tennessee Consumer Protection Act and in light of the basis upon which federal courts in our state have granted similar motions, the Stuttes wholly fail to explain what exactly it is they think they will discover to challenge the assertions made by ANPAC or to create a dispute of material fact on the issues of bad faith and violation of the Tennessee Consumer Protection Act if discovery is allowed before the Court rules. There is no question that the Stuttes will be allowed to conduct discovery on their breach of insurance claim. But, the wrongful denial of an insurance claim is not bad faith and it does not constitute a violation of the Tennessee Consumer Protection Act.

The authority cited by the Stuttes can be distinguished. *CenTra, Inc. v. Estrin*, 538 F.3d 402, 408 (6th Cir. 2008) was a case involving breach of contract, breach of fiduciary duties, and legal malpractice, all stemming from an alleged conflict of interest and a law firm's simultaneous and adverse representation of two competing clients. The *CenTra*

court first found that CenTra had established genuine issues of material fact in response to the summary judgment motion. The *CenTra* court later specifically found that the exceptions to Rule 56 relief, such as failure to identify what discovery is needed and why, and the information's likelihood of changing a summary judgment outcome, did not apply there. *CenTra,* 538 F.3d at 421. In so finding, the court noted that CenTra filed an affidavit outlining the evidence it needed and why and the Court specifically found in the context of that case that the affidavit was not too vague and that it sufficiently identified information sought. *Id.* at 421. The affidavit described specific items it wished to discover, including the law firm's conflict check procedures and how these procedures were or were not applied and the law firm's use of confidential information, all of which were central to the issues involved in that case and which were reasonably certain to exist. *Id.*

White's Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 232 (6th Cir. 1994) was a fishing regulations case and involved a group of commercial fishermen who wanted to challenge the regulations. There, the Court wholly failed to address what discovery was requested and for what purpose. Therefore, it would be difficult if not impossible for this Court to find *White's Landing* persuasive in this case. As pointed out in the dissent in *White's Landing*, "[t]hough discovery might provide competing versions or interpretations of the facts, it is not possible for it to debunk this "belief" altogether. Because it cannot alter the outcome of the case, discovery on this point is a waste of time." *Id*. at 232.

Vance was a medical malpractice case sounding in tort. *Vance By & Through Hammons v. United States*, 90 F.3d 1145, 1149-50 (6th Cir. 1996). There, while plaintiff's family had obtained his medical records before filing suit, plaintiff had not had an

opportunity to depose the physicians who treated him or to review the x-rays taken at the hospital. *Id.* at 1149. As pointed out in *Vance*, in a medical malpractice case, an expert's opinion frequently is not obtained until after such discovery is conducted. *Id.* Thus, the evidence that defendant faulted plaintiff for not providing (i.e., expert testimony supporting the malpractice claim) is evidence which he was neither required nor likely to have obtained before filing his medical malpractice suit. *Id.* The *Vance* court was also impressed by the fact that plaintiff did not seek reconsideration of the court's decision based only on generalized statements of the need for discovery. *Id.* at 1150. Rather, plaintiff supported his motion with an affidavit of a physician which set forth precisely what discovery was needed and why it was needed, all based on a meticulous review of plaintiff's medical records. *Id.* Thus, the facts and circumstances in the *Vance* case were drastically different than in the present case.

II. ANPAC is entitled to summary judgment on the Stuttes' extra-contractual claims as a matter of law regardless of the status of discovery in this case.

An insurer has the right to assert the defenses available to it if made in good faith. 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. In its motion for summary judgment, ANPAC has provided Affidavits and documents which detail the reasons the Stuttes' fire insurance claim was denied. While the Stuttes are free to try to convince the jury that ANPAC was incorrect, as a matter of law, the reasons advanced by ANPAC for the denial constitute a good faith basis for denying the claim and general discovery conducted by the Stuttes can not change this. *See e.g., Williamson v. Aetna Life*

Insurance Company, 2005 WL 3087861 (W.D. Tenn. Nov. 17, 2005 (granting summary judgment on insured's claims of bad faith and violation of The Tennessee Consumer Protection Act); *Zientek v. State Farm International Services, Inc.*, 2006 WL 925063, *4 (E.D. Tenn. April 10, 2006)(stating that insurer's refusal to pay the claim was in good faith reliance on reports and investigation findings).

The Stuttes have responded to some of ANPAC's proffered material undisputed facts. For example, the Stuttes do not dispute the following facts:

- On September 4, 2010, the insured premises located at 2715 Highway 360, Vonore, Tennessee 37885, owned by Carol Anne Stutte and Laura Jean Stutte was destroyed by fire.

- The word "QUEERS" had been spray painted on the garage and was not present when the Stuttes claim they were last at the property.

- As a result of the fire, the Stuttes submitted a fire insurance claim to ANPAC. ANPAC explained the loss process, emailed claim reporting forms, engaged a company to help prepare personal property inventory forms and initiated the process to obtain temporary housing for the Stuttes.

- 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. Kimberly Holloway is the biological adult daughter of Carol Stutte and was reported as living with the Stuttes at the time of the fire.

- The Stuttes reported to ANPAC that at the time of the fire they were in Nashville partly to celebrate the five year anniversary of being in the subject home.

- The Stuttes reported that while at the Wildhorse Saloon in Nashville, Lora Black's daughter called and said that the Stuttes' house was on fire. The Stuttes reported that the group stayed at the bar for a while, returned to the hotel, and then Carol Stutte decided to drive home alone later that night.

- Carol Stutte reported that any gasoline containers on the property were empty before the fire and that there were no other flammable liquids around.

- On the day after the fire, the Stuttes reported that Laura Stutte Kimberly Holloway,

and Lora Black rented a car and drove from Nashville to Vonore.

- The Stuttes have suspected that their neighbor, Janice Millsaps, was involved with the fire and have filed a civil suit against her. Janice Millsaps has denied the Stuttes' accusations.

- The Stuttes provided their cell phone records to ANPAC or otherwise allowed ANPAC to obtain them.

- The Stuttes' house was listed for sale at the time of the fire. Dan Watson was the real estate agent who listed the property on or about August 4, 2010. At the time of the fire, the Stuttes wished to move out of the subject house.

- At the time of the fire, the Stuttes owned another house located at 216 Deport Street in Vonore.

- The Stuttes removed certain items from their home before the fire. Some items were taken to Depot Street house, while others were taken to a storage unit.

- Before the fire, the Stuttes changed their mailing address at the post office and electric company and increased their insurance coverage on the house and the contents.

- Before the insurance claim was denied, ANPAC paid $2,847.00 for temporary housing, paid $610.17 for gas, water and sewer, and paid $3,500.00 for a pet deposit, security deposit and rent.

- At the time of the fire, the Stuttes' owned two pieces of real property, with three mortgages and had a monthly car payment. At the time of the fire, the Stuttes 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 described their dogs as their "alarm system."

- ANPAC denied the Stuttes' insurance claim by letter dated May 12, 2011.

Unreasonably, and without stating anything other than a lack of discovery, the Stuttes claimed they lacked information to admit or deny the following facts:

- Upon being notified of the fire, ANPAC began to handle the insurance claim.

- ANPAC hired a private investigator, Gary Noland, to assist in its investigation of the fire loss. Gary Noland provided regular updates to ANPAC concerning the results of his investigation work and regarding the witness interviews he conducted.[2]

- ANPAC hired an origin and cause expert, Gary Young with EFI Global, to conduct an origin and cause investigation. While performing his debris examination and removal process, Mr. Young observed faint odors of gasoline. As part of this investigation, Mr. Young collected debris samples and sent the samples to a laboratory, AK Analytical Services, Inc., for analysis. 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.[3]

- AK Analytical Services, Inc. determined that there were ignitable liquids, identified as gasoline, in two of the debris samples.[4]

- The fire was also classified as incendiary by the Tennessee State Bomb and Arson Investigator, Gary Elliott.[5]

- Lora Black reported 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. Lora Black reported that this was the reason the vehicles were parked away from the house at the time of the fire. [6]

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[2] What information could the Stuttes find in discovery that would dispute this fact?

[3] Mr. Young's Report speaks for itself. The Report confirms he was hired and it also sets forth the conclusions he drew and reported to ANPAC. The Stuttes' failure to admit that these findings were reported to ANPAC is unreasonable and unjustified and the Court should consider the fact admitted. Are the Stuttes seriously contending that ANPAC did not hire Mr. Young and that his Report is somehow falsified? If so, why have the Stuttes not informed the Court of the reasons they believe this? Challenging an expert opinion, which the Stuttes are free to do, is a completely different inquiry.

[4] The AK Lab Report speaks for itself. The Report confirms the debris samples were and it also sets forth the conclusions drawn and reported to ANPAC. The Stuttes' failure to admit that these findings were reported to ANPAC is unreasonable and unjustified and the Court should consider the fact admitted. Are the Stuttes seriously contending that ANPAC did not hire AK Labs to analyze the debris samples and that this Report is somehow falsified? If so, why have the Stuttes not informed the Court of the reasons they believe this? Challenging an expert opinion, which the Stuttes are free to do, is a completely different inquiry.

[5] Why can't the Stuttes contact Mr. Elliott or the proper official and ask whether the fire was classified as incendiary?

[6] First of all, Lora Black is a friend of the Stuttes and allegedly accompanied them to Nashville on the night of the fire. ANPAC does not control the Stuttes' access to their own friends and neighbors. So, why can't the Stuttes simply ask Ms. Black if she told ANPAC these things, and if not, obtain her Affidavit? Also, the Stuttes themselves should be in possession of information about whether or not their house was scheduled to be shown the weekend of the fire and whether or not the vehicles were moved for this purpose.

- Realtor Dan Watson told ANPAC that the house was not scheduled to be shown on the weekend of the fire. [7]

- The Stuttes had recently removed important papers and belongings from the subject property, including their insurance policy, titles to vehicles, tax returns, real estate contract, living wills, divorce papers, family photos, clothing, guns, books, tools, landscaping supplies, office supplies, furniture and other items.[8]

- 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.[9]

- On the day after the fire, Kimberly Holloway, Laura Stutte, and Lora Black continued to explore Nashville before driving back to Vonore.

- ANPAC interviewed several witnesses, including Eddie Hammondtree, Larry Bookout, Carl Self, Pam Self, Catherine Daughtery, Gerald Daughtery, Jack Welch, Jade Black, Lora Black, Kimberly Holloway, Janice Millsaps, Realtor Dan Watson, Fire Marshall Gary Elliott, and Postmaster Mark Smith, Agent Eric Kurtz, Detective Travis Jones, Tommy Self, and Rick Harris.[10]

- Witnesses Larry Bookout and Eddie Hammondtree reported that they 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. Larry Bookout reported that after he heard the explosion, he smelled what appeared to be an odor of kerosene. Neither Bookout nor Hammondtree recalls anyone coming or going from the Stutte driveway on the day of the fire. [11]

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[7] Dan Watson is the Stuttes' own real estate agent. ANPAC does not control the Stuttes' access to their own real estate agent. So, why can't the Stuttes simply ask Mr. Watson if he told ANPAC these things, and if not, obtain his Affidavit?

[8] The Stuttes are in possession of this information and testified about it during their Examinations Under Oath .

[9] The Stuttes are in possession of this information and Kimberly Holloway testified about it during her Examination Under Oath.

[10] Why can't the Stuttes contact these individuals and ask if they spoke to ANPAC or its investigators?

[11] Why can't the Stuttes contact Bookout and Hammondtree and ask them if they reported these facts to ANPAC, and if not, offer opposing Affidavits?

- Carl Self reported that he went to the fire scene and was able to see into the house due to the light provided by the flames. Carl Self reported 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 in those rooms.[12]

- Janice Millsaps voluntarily underwent and passed a polygraph test. Monroe County Detective Travis Jones examined Janice Millsaps' fingers after the fire. Monroe County Detective Travis Jones found no evidence of paint on Janice Millsaps' hands.[13]

- Neighbors gave a different description of Janice Millsaps than did the Stuttes. Neighbors indicated that the Stuttes and their friend, Joe Neubert, had exhibited hostile behavior to neighbors and others who came near their property.[14]

- The receipt provided by the Stuttes from the Wildhorse Saloon states that there were five (5) guests and that the ticket for (2) two sandwiches was paid for with Lora Black's credit card.

- National Car Rental opened for business at 6:00 a.m. the day after the fire.[15]

- ANPAC hired a forensic expert, Kevin Levy with TKR Technologies, to analyze the Stuttes' cell phone records, as well as the corresponding cell tower records. 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. 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. 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. [16]

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[12] Mr. Self is one of the Stuttes' neighbors. Why can't the Stuttes contact Mr. Self and ask him if they reported these facts to ANPAC, and if not, offer an opposing Affidavit?

[13] Why can't the Stuttes contact law enforcement to verify these facts?

[14] Why can't the Stuttes contact their neighbors and ask if they provided this information to ANPAC?

[15] Why can't the Stuttes call National Car Rental to confirm this? ANPAC does not control the Stuttes' access to National Car Rental.

[16] Mr. Levy's Forensic Report speaks for itself. The Report confirms he was hired and it also sets forth the conclusions he drew and reported to ANPAC. The Stuttes' failure to admit that these findings were reported to ANPAC is unreasonable and unjustified and the Court should consider the fact admitted. Are the Stuttes seriously contending that ANPAC did not hire Mr. Levy and that this report is somehow falsified? If so, why have the Stuttes not informed the Court of the reasons they believe this? Challenging an expert opinion, which

- At the time of the fire, the Stuttes owed approximately $3,000.00 to the IRS.[17]
- Only Laura Stutte, Carol Stutte, and Kimberly Holloway had keys to the property.[18]
- Neighbors reported that the Stuttes removed a large amount of furniture from the house during the two weeks before the fire.[19]
- ANPAC retained a handwriting expert, Theresa F. Dean, to analyze and compare the handwriting used to write on the plywood at the Stuttes' 216 Depot Street house with the handwriting used to spray paint the word "QUEERS" on the Stuttes' garage. Ms. Dean opined, 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 spray painted on the plywood at the Stuttes' 216 Depot Street House. [20]

As the Court can see, the Stuttes were certainly able to admit many of the facts stated by ANPAC without conducting discovery. In addition, pursuant to Rule 56(e), the Court should consider the facts that the Stuttes failed to respond to as undisputed. ANPAC does not control the Stuttes' access to their own friends and neighbors or to law enforcement agencies or publicly operating companies and business people. With respect to the experts retained by ANPAC, the reports and letters filed by ANPAC speak for themselves as to what information was considered by those experts and relayed to

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the Stuttes are free to do, is a completely different inquiry.

[17] The Stuttes are in possession of this information.

[18] The Stuttes are in possession of this information and testified about it during their Examinations Under Oath.

[19] Again, why can't the Stuttes simply ask their neighbors if they reported this to ANPAC?

[20] Ms. Dean's Letter speaks for itself. The Letter confirms she was hired and it also sets forth the conclusions she drew and reported to ANPAC. The Stuttes' failure to admit that these findings were reported to ANPAC is unreasonable and unjustified and the Court should consider the fact admitted. Are the Stuttes seriously contending that ANPAC did not hire Ms. Dean and that this Letter is somehow false? If so, why have the Stuttes not informed the Court of the reasons they believe this? Challenging an expert opinion, which the Stuttes are free to do, is a completely different inquiry.

ANPAC. The reports confirm these experts were hired and set forth the various conclusions drawn. The Stuttes' failure to admit that these findings were reported to ANPAC is unreasonable and unjustified. Are the Stuttes seriously contending that ANPAC did not hire these experts or that the reports filed by ANPAC with the Court are somehow falsified? If so, why have the Stuttes not informed the Court of the reasons they believe this? Challenging an expert opinion, or providing a contrary expert opinion, which the Stuttes are free to do in this case, is a completely different issue. Assuming that the Stuttes go out and hire their own experts who reach different conclusions, this does not change the fact that ANPAC hired these experts and these experts formed these opinions and provided them to ANPAC which ANPAC then considered in the context of the Stuttes' fire insurance claim. The inquiry before the Court now is ANPAC's good faith and conduct, not whether or not the Stuttes burned or procured the burning of their home.

In its opening Memorandum, ANPAC discussed in detail not only the law on bad faith and Tennessee Consumer Protection Act, but the law on the arson and fraud defense. ANPAC discussed how information it learned during its investigation is relevant to its arson defense in this case. As shown by ANPAC in its motion, 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. 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 or unfair or deceptive conduct by ANPAC.

With respect to the Tennessee Consumer Protection Act claim, the Stuttes fail to address the authority cited by ANPAC. *See e.g., Fulton Bellows, LLC v. Federal Insurance Company,* 662 F. Supp 2d 976 (E.D. Tenn. 2009)21. 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. As discussed above, the Stuttes have not alleged any plausible unfair or deceptive conduct on the part of ANPAC. Rather, their complaint is that when they provided

[21] 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).

certain information to ANPAC, ANPAC didn't take the Stuttes' word for it and instead investigated further and came to the decision to deny the claim. Without adding any factual support whatsoever, the Stuttes accuse ANPAC of relying on information which ANPAC knew to be false. If the Stuttes know that ANPAC relied on information which ANPAC knew to be false, then why can't the Stuttes point out what information ANPAC knew to be false? If the Stuttes are talking about the receipts they provided from their alleged Nashville trip, then those facts are properly before the Court now and do not need further discovery. Why would the Stuttes need to conduct discovery to find out what they already allegedly know and what Rule 11 would require that their attorneys have evidentiary support to plead? The answer is that the Stuttes do not have this information and they hope to conduct a fishing expedition in discovery to cobble together something.

Conducting an investigation into an insurance claim and reaching a decision contrary to that which an insured would like is not unfair or deceptive conduct. If it was, then every time an insurance company denied an insurance claim or did not simply "take the insured's word for it," a claim under this Act would stand. For the same reasons as stated above, as a matter of law, the Stuttes cannot present facts 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

The Stuttes' request to conduct discovery before this motion is ruled upon should be denied because the Stuttes have failed to particularly identify what they hope to discover, why they reasonably believe it to exist, and how it applies to the present motion. In addition, any discovery conducted by the Stuttes would not change the outcome of the proper ruling on this motion.

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 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 23rd day of November, 2011.

___s/ Russell E. Reviere_____