

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)	JURY TRIAL DEMANDED
STUTTE,)	
)	
Defendants, Counterclaim- Plaintiffs,)	
)	
and)	
)	
CHASE HOME FINANCE, LLC,)	
)	
Defendant.)	

RESPONSE TO COUNTER-PLAINTIFFS’
MOTION FOR LEAVE TO FILE
SECOND AMENDED COUNTERCLAIM

Comes now American National Property And Casualty Company, by and through counsel and responds to *The Stuttes’ Motion for Leave to File Second Amended Counterclaim* (Document 37) as follows:

The Stuttes’ Motion for Leave to File Second Amended Counterclaim should be denied because it fails to state a plausible claim and is futile. The district court can deny a motion to amend under Rule 15 of the Federal Rules of Civil Procedure as futile if the proposed amendment would not survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To overcome a Rule 12(b)(6) dismissal the proposed amended counterclaim’s factual allegations must be enough to raise a right to relief above the speculative level and state a claim to relief that is plausible on its face. *Campbell v. BNSF Railway Company* 600 F.3d 667

(6th Cir. Tenn. 2010). Here, the allegations of the proposed Second Amended Counterclaim do not state a cause of action under Tennessee law.

Both counter-plaintiffs seek to amend their counterclaim to add causes of action for negligent infliction of emotional distress and intentional infliction of emotional distress and seek the recovery of punitive damages and compensatory damages for alleged mental and physical injuries. Counter-plaintiffs contend that ANPAC's decision to deny their claim because of intentional burning was based on "shoddy investigation" and that ANPAC showed "a lack of diligence and care in conducting its investigation, which ultimately concluded that the Stuttes had committed arson and insurance fraud." (Document 37-1, page 7, paragraph 26). In essence, Counter-plaintiffs are asking the Court to allow them to amend their counterclaim to seek to recover personal injury damages allegedly resulting from negligent and intentional infliction of emotional distress arising from ANPAC's decision to deny their claim.

Tennessee law is clear that extra contractual damages are not available in a breach of contract action regardless of whether the contract was breached unintentionally, intentionally, willfully or wantonly. *Crocker v Aero Mayflower Transit Co. Inc.* (1992 WL 232149 Tenn. App.) (Copy Attached) and *Mid-South Milling Co., Inc. v. Loret Farms, Inc.* 521 S.W. 2d 586 (Tenn. 1975). "Tennessee does not recognize a general common law tort of bad faith by an insurer against an insured; the exclusive remedy for such conduct is statutory, provided by Tennessee Code Annotated 56-7-105," *Cracker Barrel Old Country Store, Inc. v. Cincinnati Insurance Co.* 590 F. Supp. 970 (M.D. Tenn. 2008). The bad faith statute, T.C.A. § 56-7-105 provides the exclusive remedy for extra-contractual damages resulting from an insurer's bad faith processing of a claim. *Persian Galleries, Inc. v. Transcontinental Insurance Company* 38 F. 3d 253 (6th Cir. Tenn. 1994).

Whether the counter-plaintiffs caused this fire may be a question of fact for the jury to decide; however, it is undeniable that ANPAC had a reasonable basis for its decision to deny the claim and did not act in bad faith. The reasonable basis for ANPAC's decision to deny this claim is set forth in great detail in its Motion for Partial Summary Judgment and the supporting documents (Docs. 27, 28, 29 and 33). Counter-plaintiffs base their motion to amend on alleged "new developments" consisting of unexplained notations contained in their cellular telephone billing records and alibi testimony in the form of an affidavit (Doc 36, Exhibit 2) from their friend, Lora Lee Black. Counter-plaintiffs attempt to challenge the findings of Kevin R. Levy, Special Agent Ret. (USSS) HCR Expert – Lead Litigation Consultant & Investigator, TKR Technologies, Inc. described in his report (Document 28-10) concerning the location of the counter-plaintiffs' cell phones at the time of the fire by using notations in their billing records. There is no evidence or testimony to explain the meaning of these notations relied upon by the counter-plaintiffs. On the other hand, Mr. Levy's report describes the process he used to reach his conclusion that there is no conclusive evidence supported by Network Connectivity Records to demonstrate that either Carol Ann Stutte or Laura Stutte ever travelled to Nashville, TN on 09/04/10 or returned from Nashville, TN on 09/05/10 as follows:

Historical Cellular Reconstruction (HCR) is a forensic discipline involving technical data and information relating to a particular cellular telephone or device which may be in question; and is analyzed to construct a brief history or summary of the phone's probable location during a specific time period often referred to as the Relevant Period Tested (RPT). Typically, true HCR analysis is not based upon GPS data but rather based upon the technical and radio-frequency (RF) data and information maintained by the cellular provider related to a particular cellular device's connection to cell towers and the service provider's network at a specific point in time. As such, HCR analysis is often summarized in one of two primary geographic/topographic location techniques for reporting: (a) Isolation or (b) Elimination. In either event, the data reviewed is generally compiled with field surveys, technical analysis, and forensic study. A Preliminary Report of Findings and/or Final Report of Findings can then be generated contingent upon the level of study and analysis employed at the particular time in which the report is authored. In most cases, the data is confirmed to a level of conclusion synonymous with what could

actually occur in a cellular network under the analyzed conditions as provided; thus, eliminating speculative opinions and relying on technical feasibility and forensic conclusion. HCR evidence has been used by law enforcement agencies, prosecutors, defense attorneys, and civil litigation attorneys to name a few, for many years as a tool to aid in the investigation and resolution of criminal and civil cases. Additionally, this type of technology has been and will continue to be a vital component in many missing persons investigations and search and rescue operations as well.

It is submitted that counter-plaintiffs' reliance on their cellular telephone billing records is misplaced. They are comparing apples to oranges. If the reader understands the meaning of Mr. Levy's report as well as the other evidence submitted by ANPAC with its Motion For Partial Summary Judgment (Doc. 27), then it becomes clear why the affidavit testimony of the counter-plaintiffs' friend, Lora Lee Black is suspect. While Black's testimony may create an issue of fact as to whether the counter-plaintiffs caused the fire, it does not demonstrate bad faith on the part of ANPAC.

In conclusion, it is respectfully submitted that Counter-plaintiffs motion to amend their counter-claim should be denied because it is futile and would not survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Counter-plaintiffs' motion is futile because Tennessee does not recognize the cause of action they attempt to assert.

Wherefore, Plaintiff/Counter-defendant requests that *The Stuttes' Motion for Leave to File Second Amended Counterclaim* be denied.

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 21st day of February, 2012.

s/ N. Mark Kinsman