

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WAYNE L. SIMMS and
TRACEY SIMMS

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Plaintiffs

*

vs.

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CIVIL NO. H-02-1261

MUTUAL BENEFIT INSURANCE CO.

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Defendant

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MEMORANDUM AND ORDER

On November 5, 2001, plaintiff Wayne L. Simms, his wife Tracey, and their young son Robby resided at 2624 Winters Run Road in Harford County, Maryland. That day, when the Simms were shopping at a mall and Robby was at school, their home and its contents were destroyed by a fire of undetermined origin. Previously, defendant Mutual Benefit Insurance Co. ("Mutual Benefit") had issued policies to the Simms providing coverage for loss or damage sustained by them as a result of a fire at their home.

When Mutual Benefit denied their claims for reimbursement for their losses, Wayne L. Simms ("Wayne") and Tracey Simms ("Tracey") filed a complaint in the Circuit Court for Harford County seeking a recovery from Mutual Benefit in the amount of \$1,500,000, plus interest and costs. Defendant Mutual Benefit subsequently removed

the case to this Court pursuant to 28 U.S.C. § 1441, et seq., on the ground that diversity jurisdiction exists under 28 U.S.C. § 1332(a).

Pursuant to Scheduling Orders entered by the Court, the parties have engaged in extensive discovery over a period of some twelve months. Discovery in this case has been extremely contentious, and there have been rancorous exchanges between counsel. It has been necessary for the Court to rule on numerous discovery disputes, and a number of conferences have been held in chambers during which the Court has discussed with counsel discovery and other continuing disputes. Because of the ongoing discovery disputes, the Court has been required to enter revised Scheduling Orders which continually extended the cut-off date for the completion of discovery. Finally, following a conference with counsel, the Court entered an Order on February 27, 2003 directing, inter alia, that depositions and all other discovery should be completed by April 2, 2003 and that motions for summary judgment or other substantive motions should be filed by April 16, 2003.

Plaintiffs have now timely filed the following motions: (1) motion for partial summary judgment; (2) motion to strike untimely defenses, contentions and witness designations; and (3) motion to strike expert witness designation of John Ellis.¹ Defendant in turn has filed a motion for summary judgment which includes the

¹In support of its motions, plaintiffs have filed a pleading entitled "Notice of Defendant's Factual Admissions." By way of this Notice, plaintiffs undertake to advise the Court of certain admissions to which defendant has agreed in the course of a recent conference among counsel.

alternative request that the testimony of certain experts named by plaintiffs be excluded if the case proceeds to trial. The parties' motions address substantive, procedural and evidentiary issues. Memoranda and voluminous exhibits have been submitted by the parties in support of and in opposition to the pending motions.² A hearing has been held in open court.

For the reasons stated herein, plaintiffs' motion for partial summary judgment will be denied, plaintiffs' motion to strike untimely defenses, contentions and witness designations will be granted in part and denied in part, and plaintiffs' motion to strike expert witness designation of John Ellis will be denied. Defendant's motion for summary judgment will be denied, as will defendant's requests that certain experts of plaintiffs be precluded from testifying at the trial. The issues which remain in this case will now be scheduled for a pretrial conference and a jury trial.

I

Facts

During 1998 and 1999, Wayne and Tracey built a new home on a tract of land located at 2624 Winters Run Road in Harford County, Maryland. Robert Spamer, Tracey's father, supervised the construction work. At the time, the underlying land was owned by Bobbie Spamer, Tracey's sister.

²The exhibits include the insurance policies themselves, deposition excerpts, affidavits, income tax returns, personal property inventories, valuation estimates and other pertinent documents.

On March 12, 1999, plaintiffs applied to Mutual Benefit for homeowners' insurance covering their new home. At that time, insurance agent Susan Hannah ("Hannah") completed a Property Supplement Form which was attached to the insurance application. One of the questions on the form asked whether the land was owned by the insureds. After being told by Tracey that plaintiffs were buying the land from her sister, Bobbie Spamer, Hannah wrote "yes" next to the question. Bobbie Spamer transferred ownership of the land to the Simms by deed dated June 27, 2000.

After reviewing plaintiffs' application, a homeowners policy was issued by Mutual Benefit and thereafter annually renewed. Among others, Mutual Benefit issued to the Simms a policy of homeowners' insurance designated as Policy No. H000266395 covering the period from April 30, 2001 through April 30, 2002. Wayne was self-employed and operated from his home a trucking business known as RBS Trucking.³ Mutual Benefit also issued to the Simms a policy of commercial insurance designated as Policy No. CF00207905 covering the period commencing March 5, 2001 through March 5, 2002. The two policies provided coverage to the Simms for losses or damages sustained by them as a result of a fire in accordance with the policy terms, conditions and endorsements. A fire to the dwelling is a covered peril under the policies.

Mutual Benefit's homeowners' insurance policy had the following policy limits:

³Tracey at the time worked for State Farm Fire & Casualty Company in Bel Air, Maryland as a claims assistant.

- A. Repair or replacement of the dwelling - \$434,000.00;
- B. Other structures - \$43,400.00;
- C. Personal property, repair or replacement - \$303,800.00;
- D. Loss of use - \$86,800.00;
- E. Scheduled Personal Property replacement - \$7,700.00;
- F. Debris removal - an additional 5% of policy if the cost and replacement exceeds the limit of the dwelling;
- G. Trees and shrubbery - \$21,700.00;
- H. Contents of the refrigerated units - \$500.00;
- I. Death of birds or animals - \$100.00 per animal.

The policy limit of the commercial policy is \$100,000.

On the morning of November 5, 2001, Wayne and Tracey left their home at 2624 Winters Run Road in Wayne's pick-up truck and drove their son Robby to pre-school.⁴ It was Tracey's 32nd birthday, and after dropping Robby off at pre-school, Wayne and Tracey went to the Harford Mall where they shopped. After eating at the Mall, Wayne and Tracey returned to Wayne's pick-up truck shortly after noon and discovered several messages on Wayne's cell phone which had been left in the truck. One of the messages advised Wayne that the Simms' home had burned to the ground. When they arrived at the scene of the fire, they confirmed that their home and its contents had been completely destroyed.

Notice of the fire was then given to Mutual Benefit which retained Pat Bonnani ("Bonnani"), a claims adjuster employed by an independent adjusting firm known as GAB Robbins. Bonnani met with the Simms at the nearby home of Tracey's parents, and discussed with them what they would need to do in order to proceed with submitting claims to Mutual Benefit under their insurance policies.

Immediately after the fire, Mutual Benefit retained arson

⁴At the time, Robby was five years old.

investigator Lee McAdams ("McAdams") in an effort to determine the cause and origin of the fire. Following an investigation, McAdams concluded that the devastation was too great and that the cause of the fire was undetermined.

During their meeting with claims adjuster Bonnani on the evening of the fire, Bonnani explained to the Simms the procedures to be followed in submitting to Mutual Benefit a claim for their losses and damages. One of the matters discussed related to plaintiffs' claim for living expenses. Tracey told Bonnani that her sister, Bobbie Spamer, owned a furnished house which was vacant. Bonnani authorized the Simms to rent this dwelling located at 2620 Winters Run Road for \$1,700 per month. A lease was executed, and for a period of time Mutual Benefit paid the Simms \$1,700 per month. It was later determined during discovery that the premises occupied by plaintiffs was a loft apartment attached to a shed owned by Tracey's father, Robert Spamer.

During the month of November, Tracey submitted a personal property inventory to Bonnani, together with invoices from Spamer General Contracting for demolition and emergency work performed at 2624 Winters Road and also an estimate of the cost of rebuilding the destroyed home. The following documents were submitted to Bonnani: (1) invoices for demolition and debris removal at 2624 Winters Run Road totaling \$24,810; (2) a personal property inventory listing 1,689 destroyed items with a total replacement cost of \$446,794.88; and (3) an estimate to rebuild their house for \$648,000. Bonnani forwarded these documents to Mutual Benefit for its review.

Questioning the amounts claimed by plaintiffs, William C. Parler, Jr., Esq., Mutual Benefit's attorney, scheduled, pursuant to provisions of the policies, Examinations Under Oath of both Tracey and Wayne. Both Tracey and Wayne were examined by Mr. Parler at length on January 17, 2002. On that occasion, additional documents were produced by them, including a revised personal property inventory and their 1999 and 2000 tax returns. Mr. Parler questioned plaintiffs about numerous discrepancies between the replacement costs listed by them and information obtained by Mutual Benefit as a result of its own investigation. The Examination of Tracey was continued on January 21, 2001, at which time Tracey produced a third revised personal property inventory which indicated a lower total replacement cost of \$390,290.73.⁵ The reduction in the total replacement cost was due primarily to changes in the costs of replacing items of furniture.

During her examination, Tracey was also questioned about the original cost of plaintiffs' house and its replacement cost. Mutual Benefit learned that the original construction cost of the house was \$286,000 and that Tracey's father, Robert Spamer, had supervised much of the construction. The \$648,000 estimate to rebuild the house was prepared by Robert Spamer and was based on plans for a 5,500 square foot house costing \$120 per square foot. When Robert Spamer was told by Tracey that plaintiffs' house was

⁵Defendant lists the total of the third revised inventory as \$388,978.23, but a review of that inventory, attached as Exhibit W to defendant's summary judgment brief, indicates that the total is \$390,290.73.

only 4,900 square feet, he prepared an amended estimate for a 4,900 square foot house. The amended estimate listed the replacement cost as \$588,000.

Mutual Benefit also investigated the demolition and debris removal costs submitted by plaintiffs. Spamer General Contracting, Inc., a company owned and operated by Robert Spamer, performed both the emergency demolition work and the debris removal work at 2624 Winters Run Road. The invoices submitted to Mutual Benefit were prepared by Robert Spamer and indicated that the total cost for the emergency work was \$5,600 and that the total cost for the debris removal and demolition work was \$19,210. Mutual Benefit learned that the debris removal and demolition work had been performed late in November over Thanksgiving weekend and that although the invoice for that work was dated November 6, 2001, it was in fact prepared at a later date after completion of the work.

On March 12, 2002, counsel for Mutual Benefit advised the Simms that their claim for benefits under their homeowners' policy for the fire of November 5, 2001 was being denied. Plaintiffs were told that their policy would be considered void because of plaintiffs' misrepresentations and false statements made in support of their claim for their losses and damages. Shortly thereafter, the Simms filed a complaint against Mutual Benefit in the Circuit Court for Harford County seeking a recovery of \$1,500,000, plus interest and costs from defendant Mutual Benefit. Later, the case was removed to this Court by defendant.

The Parties' Claims and Defenses

In their one-count amended complaint, plaintiffs seek a recovery for breach of contract. They allege that they were insured against loss or damage caused by a fire under both the homeowners' policy and the commercial policy issued to them by defendant Mutual Benefit. It is further alleged that within the period covered by the policies, they sustained a loss by fire whereby the premises and their personal property were destroyed. Plaintiffs alleged that they made demand of defendant Mutual Benefit for the payment of the sums due under the policy, that defendant refused and still refuses to pay such sums, and that defendant's refusal to honor and pay the sums due was not in good faith.

In its answer to the original complaint, defendant Mutual Benefit denied that it had breached the contract between the parties and in addition alleged numerous affirmative defenses. In particular, defendant asserted in its answer that no coverage was available under the homeowners' policy because plaintiffs intentionally concealed or misrepresented material facts and engaged in fraudulent conduct or made false statements relating to this insurance.

III

The Pending Motions

In their motion for partial summary judgment, plaintiffs contend that they are entitled to judgment as a matter of law on the issue of liability, leaving the question of damages to be determined by the jury at the trial of this case. According to

plaintiffs, defendant Mutual Benefit is obligated to provide coverage for the losses sustained by plaintiffs in the November 5, 2001 fire. They assert that Mutual Benefit has failed to produce legally sufficient evidence indicating that plaintiffs committed any intentional act to defraud the insurance company on claims for losses arising from the fire. In addition, plaintiffs refer to requests for admissions previously submitted by them and ask the Court to determine that certain facts sought to be admitted by them must be deemed at the trial to be conclusively established.

Plaintiffs have also filed two other motions. In their motion to strike untimely defenses, contentions and witness designations, they ask the Court to enter an Order precluding defendant from maintaining its newly asserted defense of underwriting fraud and striking as an expert witness Donna Patterson, defendant's recently named underwriting designee. In addition, plaintiffs ask the Court to preclude defendant from maintaining its new contentions as to the accuracy of the Mutual Inspection Bureau calculations and also to strike defendant's untimely designation of Byron Long and Michael Casella as expert witnesses. In a separate motion, plaintiffs have asked the Court to strike the expert witness designation of John E. Ellis, IV whom defendant intends to call to offer testimony with regard to property valuation at the time of the occurrence as well as with regard to repair and/or replacement costs associated with plaintiffs' claim.

By way of its motion for summary judgment, defendant Mutual Benefit seeks the entry of judgment in its favor. Defendant contends that plaintiffs have voided their policies by

intentionally concealing facts material to defendant's investigation of the claims and by making other false statements to Mutual Benefit. In the alternative, defendant contends that if their motion for summary judgment is denied and if this case proceeds to trial, the Court should exclude the testimony of plaintiffs' experts Jeffrey Gould, David Gould, Robert Spamer and Mark Powers. According to defendant, the testimony of these witnesses is inadmissible because they are not qualified to render expert opinions in the area in which they have been identified and because their testimony is speculative.

IV

Summary Judgment Principles

The principles to be applied by this Court in considering a motion for summary judgment or partial summary judgment under Rule 56, F.R.Civ.P., are well established. A party moving for summary judgment or partial summary judgment bears the burden of showing the absence of any genuine issue of material fact and of showing that the movant is entitled to judgment in whole or in part as a matter of law. Barwick v. Celotex Corp., 736 F.2d 946, 958 (4th Cir. 1984). Where, as here, the nonmoving party will bear the ultimate burden of persuasion at trial, "the burden on the moving party [at the summary judgment stage] may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In Phoenix Sav. & Loan, Inc. v. Aetna Cas. Co., 381 F.2d 244, 249 (4th Cir. 1967), the Fourth Circuit Court of Appeals summarized

the principles applicable under Rule 56 as follows: "It is well settled that summary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances." Id. Hence, the party opposing a motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Cram v. Sun Life Ins. Office, Ltd., 375 F.2d 670, 674 (4th Cir. 1967).

The party moving for summary judgment has the burden of establishing that there is no genuine issue of material fact. Barwick, 736 F.2d at 958. This burden is met by consideration of affidavits exhibits, depositions and other discovery materials. Id. Nevertheless, "[t]he facts, and the inferences to be drawn from the facts, must be viewed in the light most favorable to the party opposing the motion." Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1004-05 (4th Cir. 1987), cert. denied, 484 U.S. 897 (1987) (citing Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985)).

V

Defendant's Motion for Summary Judgment

In support of its motion for summary judgment, defendant Mutual Benefit contends that plaintiffs are not entitled to coverage under the policies because they breached policy provisions

regarding concealment or fraud on the part of the insureds.⁶ The policy provision which relates to concealment or fraud by the insured is as follows:

CONCEALMENT OR FRAUD

- a. Under Section I - Property Coverages, with respect to all "insureds" covered under this policy, we provide no coverage for loss under Section I - Property Coverages if, whether before or after a loss, one or more "insureds" have:
 1. Intentionally concealed or misrepresented any material fact or circumstance;
 2. Engaged in fraudulent conduct; or
 3. Made false statements; relating to this insurance.

"To constitute false swearing within the meaning of the contract of insurance, so as to render the policy void, the statement so made must not only be untrue, but it must be shown that it was knowingly and intentionally stated with knowledge of its untruthfulness, or that it was so stated as a truth when the party did not know it to be true, and had no reasonable grounds for believing it to be true, and was so made with the purpose to defraud." United States Fire Ins. Co. v. Merrick, 171 Md. 476, 491 (1937); see Great Southwest Fire Ins. Co. v. S.M.A., Inc., 59 Md.App. 136, 142 (1984). The burden of proof is upon the insurer

⁶Defendant has also contended that the policies are void ab initio because of underwriting fraud. For the reasons stated hereinafter, the Court has concluded that defendant may not rely on the defense of underwriting fraud which was asserted for the first time late during the discovery period.

to establish intent to defraud, and intent to defraud is never to be presumed. Merrick, 171 Md. at 491; Tru-Fit Clothes v. Underwriters at Lloyd's London, 151 F.Supp. 136, 138-139 (D. Md. 1957).

According to plaintiffs, defendant, to prevail on its defense of intentional misrepresentation, must, under Maryland law, prove fraud by clear and convincing evidence. Defendant in turn argues that its burden would be to prove false statements violative of the insurance contract merely by a preponderance of the evidence. It is well established under Maryland law that a plaintiff asserting a claim of common law fraud must prove each of the elements of such a claim by clear and convincing evidence. Abt Associates, Inc. v. JHIPEGO Corp., 104 F.Supp.2d 523, 537 (D. Md. 2000). The question presented is whether the same standard should be applied when an insurer defendant asserts an affirmative defense of fraud in a case like this one. The parties have referred the Court to no Maryland case which has addressed this issue. In this diversity case, Maryland law is controlling.

Plaintiffs cite Gross v. Sussex, Inc., 332 Md. 247, 258 (1993) and Owen v. Commercial Union Fire Ins. Co. of N.Y., 211 F.2d 488 (4th Cir. 1954) in support of their contention that an insurer must prove fraud by clear and convincing evidence. Neither case so holds. Gross applied a clear and convincing standard in a case in which the insurer was the plaintiff. In Owen, the Fourth Circuit did not discuss either the preponderance of the evidence standard or the clear and convincing evidence standard. In Kerr v. State

Farm Fire & Casualty Co., 731 F.2d 227, 229 (4th Cir. 1984), the Fourth Circuit applied a clear and convincing evidence standard in a case like this one. However, South Carolina law was controlling in that case, and state courts in South Carolina have consistently applied such a standard. See Federal Deposit Ins. Corp. v. American Bank Trust Shares, Inc., 460 F.Supp. 549, 555 (D. S.C.), aff'd, 629 F.2d 951 (4th Cir. 1980). The Court's review of cases from other jurisdictions indicates that there is a split of authority in state courts which have addressed this issue. Compare Rego v. Connecticut Ins. Placement Facility, 593 A.2d 491, 493-95 (Conn. 1991) with Oak Point Indus. Park, Inc. v. Massachusetts Bay Ins. Co., 531 N.Y.S.2d 329 (N.Y. App. Div. 1988).

The Court concludes that it is not necessary to determine at this time the applicable standard of proof which defendant must satisfy to prove fraud. Further briefing by the parties is necessary, including a review of the many cases from jurisdictions which have addressed the question. At a later time, this Court will undertake to decide whether an insurer defendant asserting an affirmative defense of fraud must under Maryland law prove fraud by a preponderance of the evidence or by clear and convincing evidence.

Where an insured person, in making proof of loss by fire, overestimates the value of the property destroyed by mistake or inadvertence, the overvaluation alone does not amount to fraud sufficient to avoid the policy. Tru-Fit Clothes, 151 F.Supp. at 138. The jury should make all reasonable allowance for lack of

knowledge, or sound judgment, or for honest mistake on the part of the insured as well as for the tendency to believe that which is to one's own interest. Id. at 139. If the trier of fact finds that there was a willful misstatement made with the intent to defraud, the insurance policy is void, even if defendants were not prejudiced by relying on the misstatements. Id. at 138. Whether an insured intended to deceive an insurer is a question of fact. 13 Couch on Insurance § 197:12 (3rd ed. 2003). "To constitute false swearing and willful misrepresentation in the proof of loss so as to bar insured's recovery on policy as a matter of law, it must appear undisputed that misstatements were knowingly made with intent to deceive or defraud the insurer." Id.

Following its review of the facts developed by discovery in this case, this Court concludes that genuine issues of material fact exist as to whether plaintiffs knowingly made false statements with an intent to defraud defendant Mutual Benefit. Whether under Maryland law defendant must prove fraud by a preponderance of the evidence or by clear and convincing evidence, there is sufficient evidence in this record to permit defendant to present its affirmative defense to the jury. Under all the circumstances here, the issue of whether or not defendant acted with the requisite scienter must be left for determination by the jury at the trial. The Fourth Circuit has emphasized that summary judgment is seldom appropriate in cases in which particular states of mind are decisive as elements of a claim or defense. Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (citing Charbonnages de France v. Smith, 597 F.2d 406, 414

(4th Cir. 1979)). Cases like this one which turn on a finding of intent are not ordinarily appropriate for disposition by way of a motion for summary judgment since resolution of such an issue depends on the credibility of the witnesses which can best be determined by the trier of fact after observation of the demeanor of the witnesses during direct and cross-examination. Morrison v. Nissan, Ltd., 601 F.2d 139, 141 (4th Cir. 1979).

(a)

Demolition and Rebuilding Costs

In arguing that plaintiffs breached the "Concealment or Fraud" provisions of the Policy, defendant first contends that plaintiffs knowingly made false statements in the presentation of their claims for demolition and rebuilding. Defendant contends that the invoices prepared by Robert Spamer for the demolition work were based on inflated hourly labor rates and contained charges for dumping fees which were never incurred. But the figures were those of Robert Spamer, and plaintiffs have presented evidence disputing defendant's assertion that they participated in the preparation of Spamer's figures with the intent to deceive Mutual Benefit. Moreover, John Spencer, plaintiffs' expert, reviewed the demolition charges in question and concluded that they were fair and reasonable.

Defendant also contends that the estimate of Robert Spamer for rebuilding the house was based on an inflated square footage figure and amounted to \$350,000 more than the cost of the Simms' original house. In response, plaintiffs argue that the differences of

opinion as to construction costs shown by the evidence do not amount to fraud. As plaintiffs note, far from inflating the living space of the Simms' original house, Robert Spamer based his estimate on a smaller square footage figure than that earlier calculated by Mutual Inspection Bureau on May 12, 1999.

On the record here, this Court concludes that it will be for the jury in this case to determine whether the demolition invoices and the rebuilding estimate prepared by Robert Spamer contained false statements or material misrepresentations. Even if defendant were able to prove that Robert Spamer made false statements, disputed issues of material fact exist as to whether plaintiffs knew about and participated in the false statements and whether they thereby intended to defraud Mutual Benefit.

(b)

Personal Property Replacement Costs

Defendant next contends that plaintiffs knowingly made false statements in the presentation of their personal property inventory claim. According to defendant, plaintiffs substantially misrepresented the value of the personal property destroyed in the fire by providing inflated replacement costs for certain items. Defendant further contends that the Simms included in their personal property inventory items that never existed in the house. This contention is based primarily on defendant's belief that the Simms were in severe financial difficulty during the years immediately preceding the fire and that they therefore could not have purchased all of the items listed in their personal property

inventory. In response, plaintiffs maintain that in preparing their personal property inventory, they followed Bonnani's instructions and listed the full retail price for each lost item. That the items listed on plaintiffs' personal property inventory were in the house when it was destroyed is supported by plaintiffs' testimony. As plaintiffs note, defendant has presented no direct evidence to the contrary.

After reviewing evidence of record here, this Court concludes that plaintiffs did overestimate the replacement costs of at least some of the more than 1,600 items listed in their personal property inventory. However, the mere fact that plaintiffs overestimated certain replacement costs does not constitute false swearing so as to void coverage unless they intended to defraud Mutual Benefit. Merrick, 171 Md. at 491; 13 Couch on Insurance § 197:12 (3rd ed. 2003). Plaintiffs have presented evidence that any overestimating of the retail price of lost items was not intentional.⁷ Indeed, higher replacement costs for a particular item of furniture lost in the fire would provide monetary benefit not to the plaintiffs but to the retailer which made the sale. Whether plaintiffs intended to defraud Mutual Benefit by knowingly and intentionally overestimating replacement costs and whether the Simms included in their personal property inventory items of furniture that did not exist are questions of fact to be decided by the jury.

(c)

⁷Bonnani told plaintiffs to put down in their personal property inventory their "best guess" as to when particular items were purchased.

Living Expenses Claim

Finally, defendant contends that plaintiffs knowingly made false statements in the presentation of facts relating to the cost of their living expenses after the fire. According to defendant, plaintiffs falsely informed Mutual Benefit that the property rented by plaintiffs following the fire was a furnished house and that the property was owned by Bobbie Spamer. Defendant also contends that plaintiffs knew that the fair rental value of the property was much less than the \$1,700 per month which they agreed to pay Bobbie Spamer. In response, plaintiffs contend that claims adjuster Bonnani approved the proposed \$1,700 per month rental figure and encouraged the Simms to rent the nearby property. According to plaintiffs, Bonanni was not concerned with the rental amount and viewed the lease as a benefit to the insurer because the cost of having the Simms' live in a motel would have been much more than \$1,700 per month. Plaintiffs further assert that any debate concerning the fair rental value of the property constitutes a dispute as to the amount of damages and is not evidence of fraud.

It is apparent on the record here that plaintiffs did make false statements in support of their living expenses claim. After the fire, plaintiffs resided in an apartment owned by Robert Spamer. Plaintiffs falsely informed Bonnani that the rented facility was a furnished house and also falsely informed him that the property was owned by Bobbie Spamer. The Rental Agreement of November 6, 2001 executed by plaintiffs and Bobbie Spamer so provided. Nevertheless, a disputed question of fact exists

concerning whether plaintiffs knowingly made these false statements with the intent to defraud Mutual Benefit or whether an inadvertent mistake was made.

(d)

Summary - Defendant's Motion

For the reasons stated herein, this Court concludes that genuine issues of material fact are presented in this case concerning whether or not plaintiffs knowingly made false statements in support of their claim for benefits with the intent to defraud defendant Mutual Benefit. Under these circumstances, the issue of whether or not defendants acted with the requisite scienter must be left for determination by the jury at the trial. It is well established that the facts and all reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing a motion for summary judgment. Ross, 759 F.2d at 364. The Fourth Circuit has indicated that summary judgment should not be granted if inquiry into the facts is desirable to clarify the application of the law. See Podberesky v. Kirwan, 38 F.3d 147, 156 (4th Cir. 1994) (quoting Stevens v. Howard D. Johnson Co., 181 F.2d 390, 394 (4th Cir. 1950)); see also Kirkpatrick v. Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955). In this particular case, defendant Mutual Benefit has not met its burden of showing the complete absence of any genuine issue of material fact.

Accordingly, defendant's motion for summary judgment will be denied.

(e)

Plaintiffs' Expert Witnesses

Besides seeking summary judgment, defendant contends in its motion that the testimony to be presented at the trial by plaintiffs' experts Jeffrey Gould, David Gould, Robert Spamer and Mark Powers should be deemed inadmissible because these witnesses are not qualified to render expert opinions and because their testimony is speculative. In response, plaintiffs assert that each of these witnesses possesses the requisite type of knowledge, skill, experience, training or education to qualify as an expert.

Under Rule 702 of the Federal Rules of Evidence, if:

specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Accordingly, the Court must here determine (1) whether each challenged witness is qualified and (2) if qualified, whether the opinion of each challenged witness is reliable. Berlyn, Inc. v. Gazette Newspapers, Inc., 214 F.Supp.2d 530, 534 (D. Md. 2002). The Fourth Circuit has stated that "[t]he witness' qualifications to render an expert opinion are ... liberally judged by Rule 702." Kopf v. Skyrn, 993 F.2d 374, 377 (4th Cir. 1993). In determining reliability, the Court acts as a gatekeeper to "ensure that any and all scientific testimony ... is not only relevant, but reliable."

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); see Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) (extending Daubert's analysis of expert testimony based on "scientific" knowledge to expert testimony based on "technical" and "other specialized" knowledge). Even if a witness is qualified as an expert, the witness' opinion can be excluded if it is based on inadequate facts or flawed methodology. Berlyn, 214 F.Supp.2d at 536.

Defendant first contends that the testimony of David and Jeffery Gould should be deemed inadmissible because these witnesses are not qualified to render expert opinions in the area of accounting. Defendant further contends that the testimony of these witnesses is speculative.

Plaintiffs designated David and Jeffery Gould to render expert opinions in the areas of insurance adjustment, fraud claims and the Simms' financial ability to acquire the items contained on their personal property inventory. David Gould is the founder and President of American Claims Management Services and a founder and Secretary/Treasurer of the Adjusters Group. He became a Certified Public Adjuster in Maryland in 1964 and a Certified Public Accountant in 1966. He has prepared and defended insurance claims for close to 40 years, and he has taught numerous seminars relating to the analysis of insurance claims. Jeffery Gould is David Gould's son and became a Certified Public Accountant in 1991 and a Certified Public Adjuster in Maryland in 1994. He serves as the Vice President of American Claims Management Services, where he is

responsible for the adjustment and analysis of claims involving homeowner's and property insurance. Both David and Jeffrey Gould maintain active memberships in a variety of industry organizations.

On the record here, the Court finds and concludes that both David and Jeffrey Gould are qualified to give expert opinions in this case and that the opinions to be given by them are reliable. Both men have significant experience in the areas of accounting, insurance adjustment and claims processing. That these witnesses are no longer certified public accountants does not render them unqualified to offer expert opinions in this case. Counsel for defendant may cross examine them at the trial as to their background and experience and as to the documents reviewed by them in this case. The arguments advanced by defendant in seeking to exclude the testimony of these experts go to their credibility and the weight to be given to their testimony. It will be for the jury to determine questions of weight and credibility.

Defendant next contends that the testimony of Robert Spamer should be deemed inadmissible because he is not qualified to render an expert opinion in the area of home construction and because his testimony is unreliable. Robert Spamer, Tracey's father, is the President of Spamer General Contracting and has thirty-four years of experience in the construction industry. He has supervised the construction of several residential and commercial structures, including the Simms' house which was destroyed by the fire. In addition to his construction experience, Robert Spamer has conducted significant excavation, demolition and debris removal

work on numerous projects.

Robert Spamer will be called by plaintiffs to testify at the trial concerning various pertinent matters. He is a member of plaintiffs' family and not an outside expert. Whether or not Robert Spamer can properly be termed to be an expert, the Court will permit him to render opinions in this case as a lay witness pursuant to Rule 701, F.R.E., provided that he has been properly qualified at the trial to give the opinions sought. Robert Spamer personally supervised the original construction of the Simms' house and is therefore familiar with its construction and cost. He also personally conducted the demolition and the debris removal at 2624 Winters Run Road. Whether or not his trial testimony is based on his specialized knowledge, the opinions to be given by Robert Spamer are rationally based on his perception and would be helpful to the determination by the jury of facts in issue. See Rule 701(a) and (b), F.R.E. Defendant's request that he be excluded will therefore be denied.

Finally, defendant contends that the testimony of Mark Powers ("Powers") should be deemed inadmissible because he is not qualified to render an expert opinion in the area of home construction. Powers is the Vice President of Powers Homes. He has extensive experience in estimating the costs of home construction throughout Maryland, including Harford County, and the factors and variables which must be considered in assessing such costs. Powers worked for several other real estate developers before forming his own custom home company 13 years ago. He has

substantial expertise in the preparation of residential building estimates.

The Court is satisfied that Powers is qualified to testify at the trial with regard to construction estimates in view of his extensive background in preparing such estimates. Once again, the arguments advanced by defendant in seeking to preclude the testimony of this expert witness go not to the admissibility of this evidence but rather to its weight and to the witness' credibility. Defendant's arguments advanced in its motion do not convince the Court that Powers is not qualified to testify as an expert at the trial.

For these reasons, David Gould, Jeffery Gould and Mark Powers may be called by plaintiffs to testify as experts at the trial. Robert Spamer may also testify, and any objections to particular opinions given by him will be addressed at the trial.

VI

Plaintiffs' Motion for Partial Summary Judgment

(a)

Liability

Plaintiffs' motion seeks summary judgment on the issue of liability, with only the amount of damages being left for determination by the jury at the trial. Relying on provisions of the two fire insurance policies at issue, plaintiffs assert that defendant Mutual Benefit breached its contractual obligations when it denied plaintiffs' claim for benefits under these policies.

As the Court has determined in Part V hereinabove, disputed issues of material fact exist concerning whether plaintiffs intentionally concealed or misrepresented any material fact after their loss and thereby voided the policies. In considering plaintiffs' motion for partial summary judgment, the Court must draw all favorable inferences from the evidence in favor of defendant Mutual Benefit. There is circumstantial and other evidence in the record here which would permit the jury to find that plaintiffs engaged in fraudulent conduct after the loss occurred. On the other hand, there is also evidence in the record which would permit the jury to find that defendant had not met its burden of proving that plaintiffs engaged in fraud in seeking reimbursement for their losses. It will be for the jury at the trial to decide these disputed questions of fact after hearing all the evidence in open court.

For these reasons, plaintiffs' motion for partial summary judgment will be denied.

(b)

Requests for Admissions of Facts

During discovery, each plaintiff served on defendant requests for admissions of facts. Dissatisfied with defendant's responses to those requests, plaintiffs filed a motion asking the Court to determine the sufficiency of those responses. In its Letter Opinion of March 24, 2003, the Court denied that motion because, inter alia, plaintiffs had not complied with Rule 37(a)(2)(A), F.R.Civ.P. Plaintiffs' motion was denied without prejudice to the

right of plaintiffs to request that the Court at a later date make determinations of fact based on the evidence produced during discovery.

Such a request has now been made by plaintiffs. In their motion for partial summary judgment, plaintiffs have asked the Court to determine certain facts as a matter of law. Rule 56(d), F.R.Civ.P., provides in pertinent part as follows:

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

From its review of the record here, the Court has concluded that some of the material facts set forth in plaintiffs' requests for admissions "exist without substantial controversy. . ." and should be "deemed established" at the trial. Id. Other facts listed in plaintiffs' requests "are actually in good faith controverted" or for other reasons are not determinable pursuant to Rule 56(d). Id. They will therefore be left for determination by the jury at the trial.

The material facts which exist without substantial controversy

are as follows:

Wayne's Request No. 1. As a result of the fire, the Simms home and all of its contents were destroyed.

Wayne's Request No. 16. In exchange for additional premiums paid by the Simms, Mutual Benefit provided them with a guaranteed replacement cost endorsement, providing coverage for the full replacement cost of the dwelling even if such replacement cost would exceed the \$434,000 limit of liability on repair and replacement of the dwelling.

Wayne's Request No. 17. Under the terms of the homeowners' insurance policy, if the replacement cost of the dwelling exceeded the \$434,000 limit of liability on repair and replacement cost of the dwelling, Mutual Benefit must increase by the same percentage applied to the dwelling the limits of coverage for other structures, personal property and loss of use.

Tracey's Request No. 3. At all relevant times, Pat Bonnani was retained by Mutual Benefit to act as its agent to investigate the fire and the claims arising from it and to communicate with the Simms on these claims.

Tracey's Request No. 13. Prior to its denial of claims arising from the fire, Mutual Benefit had no evidence that the items contained on the Simms' inventories of contents were not physically present in their home at the time of the fire.

Tracey's Request No. 27. The Simms never terminated the homeowners' insurance policy prior to the fire.

Other facts set forth in plaintiffs' Requests and listed in plaintiffs' memorandum are controverted, are not material, or constitute conclusions of law. No determinations of these matters will therefore be made by the Court at this time pursuant to Rule 56(d). Included are Wayne's Requests Nos. 19, 24, 25 and 27 and Tracey's Requests Nos. 1, 2, 24 and 28. It will remain for the jury to make determinations as to the facts set forth in those Requests.

VII

Plaintiffs' Motion to Strike Untimely Defenses,

Contentions and Witness Designations

In its motion to strike untimely defenses, contentions and witness designations, plaintiffs challenge certain defenses and witness designations of the defendant. Specifically, plaintiffs ask this Court: (1) to preclude defendant from maintaining its new defense of underwriting fraud; (2) to strike as a witness Donna Patterson, defendant's "underwriting designee"; (3) to preclude defendant from maintaining its new contentions as to the accuracy of Mutual Inspection Bureau's calculations; (4) to strike defendant's designation of Byron Long as a witness to testify as to the accuracy of the Mutual Inspection Bureau calculations; and (5) to strike defendant's designation of Michael Casella as a witness to testify as to the reasonable rental value of the premises occupied by plaintiffs following the fire. At the hearing on pending motions, plaintiffs also requested that defendant be precluded from maintaining an arson defense. In responding to

plaintiffs' motion to strike, defendant contends that any delay in making contentions and in identifying witnesses was caused by false testimony given by plaintiffs and that plaintiffs' motion should therefore be denied in its entirety.

(a)

Underwriting Fraud Contention

Plaintiffs contend that defendant failed to timely assert the defense of underwriting fraud and that defendant should therefore not be permitted to rely on that defense at the trial. Defendant does not deny that this contention was raised late during the course of the pretrial proceedings but argues that it did not discover facts to support this defense until shortly before the end of the discovery period. There is no merit to this argument.

On May 1, 2002, plaintiffs served interrogatories and a request for the production of documents on defendant. Interrogatory No. 18 sought information relating to defendant's underwriting guidelines. Interrogatory No. 19 was a so-called "contention interrogatory" and asked defendant to disclose whether it was in this case asserting a defense of underwriting fraud. Interrogatory No. 21 was also a "contention interrogatory," and asked defendant to disclose whether it was in this case contending that the fire was caused by any person inside or outside of plaintiffs' residence at the time of the occurrence. After defendant failed to properly respond to these and other interrogatories, plaintiffs filed with the Court a motion to compel.

In its Memorandum and Order of October 18, 2002, the Court, inter alia, denied plaintiffs' motion to compel as to Interrogatory No. 18, but granted plaintiffs' motion as to Interrogatories Nos. 19 and 21. The Order entered on October 18, 2002, required defendant to respond to plaintiffs' Interrogatories Nos. 19 and 21 within 15 days. On October 24, 2002, defendant complied with the Court's Order and mailed a copy of Supplemental Answers to Interrogatories Nos. 19 and 21 to counsel for plaintiffs. Defendant did not in those Supplemental Answers state that it was contending that plaintiffs had committed underwriting fraud or arson. It was not until more than three and a half months later on February 11, 2003 that defendant added the defense of underwriting fraud in its Second Supplement to Answers to Interrogatories.

Following defendant's contention that it would present at the trial a defense of underwriting fraud, plaintiffs filed a renewed motion to compel discovery of defendant's underwriting files. In its Letter Opinion of March 24, 2003, the Court, inter alia, once again denied plaintiffs' request that the underwriting files be produced by defendant. In denying plaintiffs' renewed motion to compel, the Court questioned whether defendant would be permitted so late during the period of discovery to assert a defense of underwriting fraud:

Were defendant now permitted to go forward with its new claim of underwriting fraud, additional discovery would be necessary in the case, including perhaps the production by defendant of its underwriting files and the taking of depositions required by such production. However, if no such claim can be

maintained by defendant because it did not comply with the Court's earlier ruling, plaintiffs would not as a result of the Court's prior ruling be entitled to underwriting files of defendant.

The Court will not at this time rule on the question whether defendant will be permitted to assert in this case the defense of underwriting fraud which it has so recently sought to add. The parties have not briefed that question, and until the issue is decided, grounds do not exist for giving plaintiffs access to defendant's underwriting files. Accordingly, the Court will deny plaintiffs' renewed motion to compel without prejudice. When they file a substantive motion, plaintiffs may challenge defendant's right to rely on the claim of underwriting fraud made for the first time on February 11, 2002.⁸

(Letter Op. at 3).

In their pending motion to strike, plaintiffs have challenged defendant's right to rely on the defense of underwriting fraud. The issue has now been fully briefed, and plaintiffs' challenge will be upheld. Defendant failed to comply with the Court's Order of October 18, 2002.

After defendant had initially failed to properly respond to Interrogatory No. 19, the Court, in its ruling of October 18, 2002, ordered defendant to respond to that Interrogatory within 15 days. In its response of October 24, 2002, defendant did not indicate that it would be contending in this case that plaintiffs had

⁸As a result of a typographical error, this date in the Letter Opinion was stated to be "February 11, 2002." The actual date of the service on plaintiffs of defendant's Second Supplement to Answers to Interrogatories was February 11, 2003.

committed underwriting fraud. Then suddenly, some 3-1/2 months later, defendant amended its earlier response and added a claim of underwriting fraud. Had defendant complied with the Court's Order of October 18, 2002, plaintiffs would have had adequate time to conduct necessary discovery related to this claim before discovery closed. Moreover, the Court has twice denied plaintiffs' request for the discovery of defendant's underwriting files. If defendant were now permitted to raise the defense of underwriting fraud, additional discovery including production of the underwriting files would be necessary on a date after discovery has closed and after dispositive motions have been filed.

Defendant argues that the reason it raised the claim of underwriting fraud late during the discovery period was because plaintiffs failed to disclose that they did not purchase the land located at 2624 Winters Run Road until June 27, 2000. The record does not support this argument. During her Examination Under Oath, Tracey testified that her house had been built before the land was acquired by the Simms and that her sister later deeded the property to the plaintiffs. Mr. Parler therefore knew in January, 2002 that plaintiffs owned the house but not the land when Mutual Benefit issued the original insurance policies. Defendant's attorney must be charged with knowledge of the underwriting guidelines of Mutual Benefit, including whether they prohibited issuance of a homeowners' insurance policy in the event that the insured did not own both the land and the house when the application for insurance was submitted. It is apparent from the record here that Mr. Parler

had knowledge of the critical facts more than a year before he raised the defense of underwriting fraud.

In any event, the defense of underwriting fraud would not be maintainable. Tracey informed defendant's agent Hannah at the time of plaintiffs' application for insurance coverage that the Simms did not then own the land but that it was being bought from Tracey's sister. The fact that plaintiffs did not own the land at the time of the application was therefore known by defendant when it issued the policies. Furthermore, when the policies in effect on November 5, 2001 were issued, plaintiffs then owned not only the house and contents but also the land.

For these reasons, defendant may not at the trial rely on the defense of underwriting fraud. Moreover, defendant will not be permitted to call Donna Patterson as a witness. She has been termed an "underwriting designee," and her proposed testimony would therefore not be relevant to any of the issues in the case.

(b)

Arson Defense

In its response to plaintiffs' motion for partial summary judgment, defendant asserts for the first time in this case that there is sufficient evidence in the record that plaintiffs committed arson to submit that issue to the jury at the trial. During the period of discovery, defendant did not at any time indicate that it would rely in this case on the affirmative defense of arson. At the hearing held on pending motions, plaintiffs orally moved to strike defendant's affirmative defense of arson.

In its answer to the original complaint,⁹ defendant listed thirteen affirmative defenses. Arson was not included as one of these defenses. In its supplemental answer to plaintiffs' Interrogatory No. 21 served on October 24, 2002, defendant stated that, although there was "generally circumstantial evidence" of plaintiffs' financial instability, it nevertheless had at the time no "specific evidence of arson." Defendant did not in responding to this "contention" Interrogatory state then or later than it was contending that plaintiffs caused or contributed to the occurrence of the fire. Neither in its Second Supplement to Answers to Interrogatories nor in its Third Supplemental Answers to Interrogatories did defendant claim that discovery had revealed evidence of arson and that it was raising the affirmative defense of arson. In its Letter Opinion of March 24, 2003, the Court concluded, after reviewing pending motions, that defendant can hardly deny that it "has no evidence that the Simms committed arson or any other intentional act to cause the fire. . ." Defendant's own investigator, Lee McAdams, determined after an inspection of the premises that the cause of the fire was undetermined. There is no merit to defendant's contention that no thorough investigation of the fire was possible because the basement slab was removed immediately following the fire. The arson investigation undertaken by McAdams was completed before there was any demolition or debris removal.

⁹No answer to the amended complaint was ever filed by defendant.

For these reasons, plaintiffs' oral motion to strike defendant's arson defense will be granted. Even were the Court to permit such a defense to be asserted, it would be subject to dismissal as a matter of law. Defendant has not produced legally sufficient evidence which is clear and convincing and which would permit a defense of arson to be considered by the jury.¹⁰ That plaintiffs were experiencing financial difficulties at the time of the fire amounts to no more than a mere "scintilla of evidence" which is not sufficient to create a fact issue for trial, particularly since defendant at the trial would have to prove arson by clear and convincing evidence. Barwick, 736 F.2d at 958-59 (quoting Seago v. North Carolina Theatres, Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd. 388 F.2d 987 (4th Cir. 1967)).

(c)

Square Footage Dispute

The parties vigorously dispute the size of plaintiffs' house. Discovery in this case has revealed many differing opinions as to the exact square footage of the house occupied by plaintiffs at the time of the fire. In a report dated May 12, 1999, Mutual Inspection Bureau, a firm retained by defendant to conduct measurements of plaintiffs' house before there was insurance coverage, concluded that plaintiffs' dwelling contained 5,692 square feet of living space. Insurance agent Hannah believed that

¹⁰Defendant concedes that it would have the burden at the trial of proving arson by clear and convincing evidence. See Carpenter v. Union Ins. Society, 284 F.2d 155, 162 (4th Cir. 1960).

the house occupied 6,366 square feet. Robert Spamer originally concluded that the house contained 5,400 square feet, but subsequently changed his estimate after being informed by Tracey that the house contained only 4,900 square feet. Plaintiffs have designated Mark Powers as an expert and has indicated that he would testify that the size of plaintiffs' house was approximately 5,400 square feet. On April 3, 2003, after the close of discovery, defendant designated Byron Long ("Long"), President of Mutual Inspection Bureau, as an expert. Defendant indicated that Long would testify that the diagram used by Mutual Inspection Bureau in calculating its figure of 5,692 square feet actually shows that the proper square footage for plaintiffs' house is 4,640 square feet.

Plaintiffs here seek to preclude defendant from maintaining its new contentions as to the accuracy of Mutual Inspection Bureau's calculations. Plaintiffs also seek to strike defendant's designation of Long as untimely. In response, defendant asserts that Long was designated as an expert only after plaintiffs' counsel stated during the Ellis deposition that the square footage of the house was actually 5,692, not 4,900 square feet as Tracey had testified. Defendant explains that Long will testify that the 5,692 figure listed on the Mutual Inspection Bureau report is incorrect because of a mathematical error.

On the record here, the Court concludes that defendant's designation of Long as an expert witness was made much too late. Defendant named Long as an expert on April 3, 2003, which was a day after the close of discovery and months after the deadline for

designating experts. Under the discovery schedule set by the Court, plaintiffs have not been afforded an opportunity to depose Long or to consider the retention of rebuttal experts. Accordingly, because defendant failed to comply with the Court's Scheduling Orders, Long will not be permitted to testify as an expert at the trial of this case.

The Mutual Inspection Bureau report of May 12, 1999 may be entered in evidence as an exhibit at the trial. Both parties have relied throughout discovery on the figures contained in that report. Defendant will not be permitted to introduce new evidence which was not developed during discovery and which challenges the figures contained in that report. If, as defendant contends, a mathematical error was made in the calculation of the total square footage in the Mutual Inspection Bureau report, that can presumably be shown by an examination of the report itself. The issue can be addressed by the parties without the necessity of permitting defendant to call a new expert witness to explain the figures. The parties may, of course, continue to challenge other views as to the actual square footage of the house destroyed in the fire. Various witnesses have expressed different views concerning the exact size of the house, and their testimony may be presented at the trial. It will then be for the jury to determine the square footage of the house from all the evidence presented.

(d)

Additional Living Expenses

On March 26, 2003, defendant designated as an expert witness

real estate appraiser, Michael Casella ("Casella"). Defendant indicated that Casella would be called to testify as to the fair rental value of the apartment where plaintiffs resided following the fire. Plaintiffs here seek to strike the designation of Casella as untimely. In response, defendant maintains that the delay in designating Casella as an expert was the result of the false information supplied by plaintiffs to Bonnani with respect to the property that they rented after the fire.

Following the fire, plaintiffs and Bobbie Spamer entered into a written agreement for the rental of the "furnished house" located at 2620 Winters Run Road for \$1,700 per month. Plaintiffs represented that the property was a "house" and that it was owned by Bobbie Spamer. In January 2003, defendant learned that the property rented by plaintiffs was owned by Robert Spamer and then sought leave of Court to enter the land and take measurements and photographs. On February 28, 2003, the Court granted defendant's request, and defendant subsequently inspected the apartment on March 23, 2003. After inspecting the apartment, defendant retained Casella to testify to the fair rental value of that dwelling. On March 26, 2003, defendant designated Casella as an expert and provided plaintiffs with a copy of a report which Casella had prepared.

Under the circumstances, the Court concludes that any delay on the part of defendant in designating Casella as an expert witness was due to false information earlier provided by plaintiffs. Although Tracey, during her examination under oath on January 27,

2002, testified that she had resided after the fire in her sister's "apartment" connected to her father's shop, she had earlier described it to Bonnani as a furnished house owned by her sister. It was only when defendant took the deposition of Robert Spamer on April 2, 2003 that the actual facts were finally determined. Robert Spamer testified that Bobbie Spamer never owned the dwelling at 2620 Winters Run Road, that the building was a "pull shed, tractor shed" with a "little apartment" on the back of it, that he had never charged rent for the apartment and that he had no involvement in setting the \$1,700 rental figure. Soon after inspecting the apartment, defendant designated Casella as an expert on a date before the close of discovery. The Court accordingly concludes that Casella will be permitted to testify as an expert in this case.

Plaintiffs contend that if Casella is permitted to testify, it will be necessary for them to take the depositions of Casella and defendant's corporate designee Mark Russell, and to possibly schedule a second deposition of insurance agent Hannah. Plaintiffs further contend that they will have to retain additional experts if Casella is permitted to testify. The Court will permit the plaintiffs to now depose Casella even though discovery has closed. However, it is questionable whether there is any need for plaintiffs to undertake any further discovery after the taking of Casella's deposition. The matter will hereafter be discussed with counsel at or before the pretrial conference.

VIII

Plaintiffs' Motion to Strike Expert

Witness Designation of John E. Ellis, IV

On September 13, 2002, defendant Mutual Benefit designated John E. Ellis, IV ("Ellis") as an expert witness. In their Amended Rule 26(b)(4) Designation of Experts, defendant indicated that Ellis "may be called to offer testimony with regard to property valuation at the time of the occurrence and any repair and/or replacement costs associated with the claimed property loss made by Plaintiffs." Ellis was deposed by plaintiffs' counsel on March 29, 2003. Plaintiffs here seek to strike the designation of Ellis on the ground that defense counsel acted improperly during Ellis' deposition, thereby obstructing plaintiffs' effort to pursue the substance of his testimony.

What occurred during Ellis' deposition, which was a typically contentious one, is yet another example of the uncooperative conduct of counsel during the discovery phase of this case. Discourteous conduct on one side has led to retaliatory action by the other, leading to acrimonious discovery disputes. Counsel for defendant must be faulted for stopping the deposition on several occasions, for conferring with the witness Ellis outside the room where the deposition was being held and for making speaking objections. Counsel for plaintiffs in turn must be faulted for participating in rancorous colloquies with Mr. Parler, leading to confusion on the part of Ellis in understanding some of the questions asked. During the course of the deposition, one of plaintiffs' attorneys threw an exhibit at Mr. Parler striking him

in the neck and chest.

Although defense counsel acted improperly at times during the deposition of Ellis, a review of the transcript indicates that the actions of plaintiffs' attorneys are likewise subject to reproach. The Court is satisfied that Mr. Parler's conduct was not so egregious as to warrant the exclusion of Ellis' testimony. Plaintiffs have not convinced the Court that the improper conduct in question precluded their attorneys from conducting a full and complete examination of Ellis and from being prepared to challenge his testimony at the trial. The expert testimony of Ellis will therefore not be stricken. In cross-examining Ellis at the trial, counsel for plaintiffs would be entitled to ask him whether he was coached in any way by Mr. Parler during the course of the deposition and when the two left the room together before the deposition was completed.

For these reasons, plaintiffs' motion to strike the expert witness designation of John Ellis will be denied.

IX

Conclusion

For all the reasons stated, this Court concludes that the parties' motions for partial summary judgment or summary judgment must be denied, and that this case should proceed to trial before a jury. The other pending motions will be granted in part and denied in part.

Accordingly, it is this 3rd day of June, 2003 by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion for summary judgment is hereby denied;
2. That defendant's request that the testimony of plaintiffs' witnesses Jeffrey Gould, David Gould, Robert Spamer and Mark Powers be precluded is hereby denied;
3. That plaintiffs' motion for partial summary judgment is hereby denied;
4. That plaintiffs' request that the Court make determinations of fact is hereby granted in part and denied in part;
5. That plaintiffs' motion to strike untimely defenses, contentions and witness designations is hereby granted in part and denied in part;
6. That defendant is hereby precluded from maintaining its proposed defense of underwriting fraud;
7. That defendant is hereby precluded from maintaining its proposed defense of arson;
8. That defendant is hereby precluded from presenting evidence in support of its new contentions as to the accuracy of calculations made in the Mutual Inspection Bureau's report;

9. That plaintiffs' motion to strike Donna Patterson and Byron Long as witnesses for defendant is hereby granted;
10. That plaintiffs' motion to strike Michael Casella as a witness for defendant is hereby denied; and
11. That plaintiffs' motion to strike defendant's expert witness designation of John E. Ellis, IV is hereby denied.

/s/

Alexander Harvey, II
Senior United States District Judge

