

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WAYNE SIMMS, *et ux.*

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Plaintiffs

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v.

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Civil Action No. H 02-1261

MUTUAL BENEFIT INS. CO.

*

Defendant

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**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW**

Plaintiffs Wayne and Tracey Simms, by undersigned counsel, respectfully submit this Memorandum In Support of Plaintiffs' Motion For Judgment As A Matter of Law.

INTRODUCTION

Though Mutual Benefit must provide clear and convincing evidence in order to maintain its fraud defenses, this carrier has failed to produce legally sufficient evidence of fraud and should not be permitted to overcome this burden of proof by muddying the waters to confuse the jury. When stripped of arguments that one federal court characterized as “recklessly misleading¹,” Mutual Benefit has failed to demonstrate a deliberate scheme to falsify information with an intent to deceive and defraud this carrier. Instead, the undisputed evidence fails to support any cognizable claim of fraud on the part of either Tracey or Wayne Simms. After two years of shifting positions and unwarranted accusations, this Court should put an end to two weeks of undue confusion, clarify issues which defense counsel seeks to distort, and enter judgment in favor of both plaintiffs.

FACTS

¹*Zaitchick v. American Motorists Inc. Co.*, 554 F. Supp. 209 (1982)

On Monday, November 5, 2001, fire destroyed the home of Plaintiffs Wayne and Tracey Simms and their young son, Robbie. At the time of this fire, the Simms were covered under insurance policies issued by Defendant Mutual Benefit Insurance Company (“Mutual Benefit” or the “Insurance Company”). As this Court has previously ruled in response to Mutual Benefit’s previous motion for judgment, the undisputed facts of this case confirm the existence of a guaranteed replacement cost policy issued to the Simms, and the failure of the insurance carrier to fund the replacement of their home and its contents, and their failure to pay other claims arising from an admittedly covered peril.² Under these circumstances, this Court correctly observed that the only way for Mutual Benefit to escape its contractual obligations would be to produce clear and convincing evidence of fraud on the part of Tracey and Wayne Simms.

Beyond these policy limits, the Insurance Company provided the Simms with “guaranteed replacement cost” coverage on their dwelling. As Mutual Benefit’s agent and independent adjuster testified, and as was established by formal admissions which were read to the jury, this requires that the Insurance Company pay the full cost of replacing this home even if that ultimate cost were to exceed \$434,000.00. Should the actual replacement cost exceed this figure, Mutual Benefit provided

² Indeed, as recounted in this Court’s Joint Pretrial Order, the terms of this guaranteed replacement cost coverage have been established in this case. While there was once an issue pertaining to the distinction between business and personal property, the parties have entered into a stipulation in which this distinction has been eliminated. Specifically, the parties have agreed that, in determining the amount of replacement costs to award to the Simms, the jury shall only consider the total cost of repurchasing *all* items of property contained on their inventory, regardless of the manner in which these items were used. Thus, the \$2,500 limitation on business personal property would not be considered by the jury in awarding damages and the jury will not be required to determine which category the contents fall into. Instead, the parties have agreed to deduct the sum of \$17,500.00 from the award for personal property replacement after the jury verdict, and this Court would enter a judgment on the lesser amount. The jury would not be advised of this monetary adjustment.

these policy holders with a special “Home Advantage Endorsement” which requires this carrier to increase by the same proportion the limits of coverage for other structures, personal property, and loss of use. *See* Joint Pretrial Order.

Acknowledging that the November 5, 2001 fire would ordinarily be covered under this policy, Mutual Benefit’s corporate designee, Mark Russell, agreed that the Simms sustained “a very substantial property loss” as a result of this devastation.³ At the bench, defense counsel expressly decided against questioning Mr. Russell at that time because his decision to deny the claim was primarily based upon concerns regarding the Simms’ financial condition. Although the Insurance Company has maintained that “[t]here is generally circumstantial evidence of the financial instability of the Plaintiffs at the time immediately prior to the fire,” and has used this as a basis for accusations of arson, inventory padding, and fraud, this Court has granted the Simms’ motion to exclude this evidence and any arguments based upon such irrelevant and prejudicial financial information.

Having been precluded from inflaming the jury with accusations of financial instability, Mutual Benefit now has no evidence on which to retract its stipulation of the ownership of all items contained on the Simms’ inventory. Nor does the defense have any basis for arguing that the Simms lacked the financial means with which to acquire these items. While defense counsel has spent the entire trial trying to confuse the jury and this Court by blending the distinction between retail replacement costs and original purchase prices, Mutual Benefit’s attempt to cast doubt upon the

³ Considering the monumental nature of this loss, Mutual Benefit established monetary reserves at the initial monetary limits of the applicable insurance policies, totaling \$760,300. Mr. Russell admitted on the first day of trial that his superior strongly questioned whether such a reserve was appropriate and discussed the possibility of taking these reserves down. Ultimately, Mr. Russell returned to his boss to advise him of his decision to do so by denying the entire claim.

Simms' financial ability to buy certain items in certain years lacks any evidentiary basis and invites speculation on the very financial condition which this Court excluded pursuant to Rule 403 of the Federal Rules of Evidence.

Lacking such inflammatory tactics, Mutual Benefit's entire case boils down to several strained arguments which hardly provide clear and convincing evidence of a deliberate effort to falsify and an intent to deceive and defraud the carrier. Nonetheless, the defense seeks to prolong the Simms' agony by taking this dubious case to the jury with the following contentions:

- ▶ Tracey Simms fraudulently inflated the replacement cost of her home by misrepresenting the square footage of the destroyed dwelling as 5,400 square feet. Ironically, measurements conducted by three agents of Mutual Benefit, namely, Mutual Benefit's agent, Susan Hannah, the Mutual Inspection Bureau, the company that was retained by Mutual Benefit to appraise the home prior to the implementation of the Home Endorsement Policy, and their independent adjuster, Patrick Bonanni, all exceeded the figure that Tracey provided to the carrier;

- ▶ Relying on a battle of the experts more befitting a damages trial, Mutual Benefit questions Robert Spamer's proposal to rebuild the home by claiming that his \$120.00 per square foot price is too high. Although the undisputed evidence showed that Tracey's father build the home far below retail pricing, the key question is whether the *replacement cost* in today's residential construction market is reasonable. While opinions may differ on the reasonable cost of construction, this hardly forms the basis of a fraud case;

- ▶ Mutual Benefit does not want to pay for the cost of demolition and debris removal which was authorized by its independent adjuster following the fire. Although Mr. Bonanni said that he verified the reasonableness of the equipment charges contained on the Spamer General Construction invoice, he was removed from the case before he could investigate other issues. While both Robert Spamer and John Spencer, Jr. have provided opinions confirming the reasonableness of these costs, Mutual Benefit has not produced any evidence to the contrary. Even if it had, differences of opinion on the reasonableness of such charges do not provide legally sufficient evidence of fraud;⁴

⁴ Prior to trial, and even at the trial itself, defense counsel attempted to argue that Robert Spamer misrepresented "public dumping charges" and that he dumped debris illegally. Because there was no evidence of any such misrepresentation, this Court excluded such arguments. Unable to attack the estimates in this manner, Mutual Benefit has nothing left in this category of fraud contentions.

▶ Mutual Benefit claims that Tracey Simms and her sister Bobbie Spamer somehow defrauded the carrier out of additional living expenses. However, the carrier has not presented any evidence of a fraudulent misrepresentation. Instead, the defense wants to present the jury with such ludicrous questions as whether this dwelling should be called a “house” or an “apartment.” While Mutual Benefit’s agent, Susan Hannah, testified that she even procured a Mutual Benefit insurance policy covering Robert Spamer’s ownership of the building, and that she went to this dwelling to bring an advance benefits check on the very day following the fire, this carrier somehow maintains that Tracey concealed the true nature of this dwelling from a carrier that knew all about it.

▶ While defense counsel has spent the better part of this trial accusing Tracey Simms of fraud in reporting non-discounted prices on furniture, and claims that this is part of a fraudulent effort to inflate replacement costs, he ignores the fact that Tracey fully disclosed far more than the full retail price. Following Mr. Bonanni’s express instructions, Tracey’s inventory provided non-discount, retail prices from reputable dealers. Where she received information pertaining to discounts, or had information relating to original purchase prices, she provided them despite Mr. Bonanni’s instructions to the contrary. In fact, when Tracey expressed confusion over this process and was unable to obtain guidance from Mr. Bonanni, Mutual Benefit’s insurance agent told her to list the full retail prices and assured her that the carrier will adjust them as appropriate. Having followed Mutual Benefit’s own instructions, and having disclosed everything to her carrier, there is no evidence, clear, convincing or otherwise, that Tracey Simms concealed material information from her carrier.

Prior to trial, while Mutual Benefit constantly changed its theories of the case, one thing has remained constant – the carrier has relied heavily upon inflammatory accusations of financial instability to accuse their policyholders of arson, underwriting fraud, inventory padding, misrepresenting the dwelling, inflating inventory, demolition costs, and rental costs. Lacking such “evidence,” and absent clear and convincing evidence of fraudulent misrepresentations on the part of Tracey Simms, this Court should enter judgment in her favor on the affirmative defense of fraud.⁵

The lack of evidence of fraud did not prevent Mutual Benefit from sending the Simms a

⁵ While the Insurance Company has subjected his wife to baseless accusations of fraud, it has not produced any evidence of any misrepresentation on the part of Wayne Simms. Indeed, beyond an initial meeting with the independent adjuster in which Mr. Bonanni did most of the talking to these fire victims, there has been no evidence that Mr. Simms had any communications with the carrier. Under these circumstances, there can be no evidence of any fraudulent misrepresentations on his part.

March 12, 2002 letter, stating that their “entire policy must be considered void for misrepresentations, false statements, and fraudulent conduct you have engaged in with regard to the fire, and your subsequent claim.” March 12, 2002 Letter from William C. Parler, Jr., Esquire to Tracey and Wayne Simms at 1-2 (Plaintiffs’ Exhibit 3). While Mark Russell admitted that his company did not have a set standard for determining when to deny a claim on the basis of fraud, Maryland law establishes such a standard and forces the carrier to produce clear and convincing evidence before upholding such forfeitures. Having failed to produce such evidence, this carrier should not be permitted to rest on the unwarranted suspicions of claims executives who were swayed by the very inflammatory evidence that this Court has already excluded.

ARGUMENT

Although Defendant’s denial of coverage may have been based upon its officers’ “suspicion” of fraud by either Tracey or Wayne Simms, the Federal Rules impose a much greater evidentiary burden upon an insurer wishing to maintain such an affirmative defenses to coverage.

I. ABSENT CLEAR AND CONVINCING EVIDENCE OF FRAUD, THE SIMMS ARE ENTITLED TO SUMMARY JUDGMENT ON THE *PRIMA FACIE* ELEMENTS OF BREACH OF CONTRACT AND THE FACTS RELEVANT TO THIS ISSUE

The undisputed facts confirm the existence of insurance policies which provide coverage in the event of a fire. The Insurance Company admits that they provided two such policies to the Simms, both of which were in effect on November 5, 2001. Notice of Defendant’s Factual Admissions at 1-3. In this case, Mutual Benefit does not and cannot dispute the fact that the damages sustained by the Simms were covered under these policies of insurance. *Id.* (“fire to the dwelling is a covered peril”). Indeed, Mutual Benefit’s own corporate designee agrees that “the Simmses sustained very significant monetary losses by virtue of losing all of their property and

belongings.” Exhibit C at 164.

As in any breach of contract action, Plaintiffs must prove the following elements:

1. Contract Formation - this is admitted by Mutual Benefit. There is no dispute that Plaintiffs’ dutifully paid their premiums for this coverage;
2. Contract Terms - these facts are beyond dispute as they are set forth in the written insurance policies themselves;
3. Breach of Contract - despite the fact that the Simms’ sustained losses covered by the insurance provided by Mutual Benefit, Mutual Benefit has refused to compensate them for these losses. *See* Exhibit G.

Under these circumstances, there is no genuine dispute as to any material fact on the issue of whether, in the first instance, Plaintiffs have made a *prima facie* case of breach of contract. Unless Mutual Benefit can sustain its affirmative coverage defense of fraud, Plaintiffs are entitled to compensation under their insurance policies as a matter of law. *Owen*, 211 F.2d 488. While damages issues will still need to be tried, the undisputed facts of this case more than justify partial summary judgment on the threshold issue of coverage and a failure to pay.

To clarify Mutual Benefit’s obligations under their Homeowner’s Policy, the Simms propounded certain requests for admission of facts. Although many of these requests were met with unexplained, terse denials, this Court found “it difficult to believe that [defense counsel], faced with possible sanctions ... would continue ... to deny facts clearly established by the record.” March 24, 2003 Letter from The Honorable Alexander Harvey II to Counsel at 4. Expressing the desire to revisit these denials and “at a later date make determinations of fact based on evidence produced during discovery,” *id.* at 5, this Court invited Plaintiffs to “include in their substantive motion requests that the Court make any such determinations which are necessary.” *Id.* While some of these issues have been resolved in a subsequent conference among counsel, *see* Notice of

Defendant's Factual Admissions, the following facts relevant to the Simms' *prima facie* case are beyond legitimate dispute:⁶

WAYNE'S REQUEST NO. 1: As a result of the Fire, the Simms' home and all of its contents were destroyed.

Deficient Response: Mutual Benefit objects to the term "home". Subject to, and without waiving the above objection, Mutual Benefit states that after reasonable inquiry, the information known or readily obtainable to Mutual Benefit is insufficient to enable Mutual Benefit to admit or deny request number one and, it therefore denies the same.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: In the deposition of Mutual Benefit's corporate designee, Mark Russell, the following admissions were made:

Q Is it your understanding that that home was totally destroyed?

A Yes.

Q Is it your understanding that all of the contents of that home were totally destroyed?

A Yes.

Exhibit C at 163. Although this Court observed "that evidence of record establishes that the Simms' home and all of its contents were destroyed in the fire," March 24, 2003 Letter from The Honorable Alexander Harvey II to Counsel at 4, Mutual Benefit persists in denying what this Court may well regard as an "obvious fact." Nonetheless, as it is important to streamline the trial of this case, eliminate surprise, and establish elements of the case which are not legitimately in dispute, summary judgment is entirely appropriate to establish this fact.

WAYNE'S REQUEST NO. 16: In exchange for additional premiums paid by the Simms, the Insurance Company provided the Simms with a guaranteed replacement cost endorsement, providing the coverage for the full replacement cost of the dwelling even if such replacement cost would exceed the \$434,000.00 limit of liability on repair and replacement of the dwelling.

Deficient Response: Denied. Such coverage is not available in the event of fraud or misrepresentations on the part of the insured.

⁶ For the convenience of this Court, Plaintiffs shall cite to the specific request for admission which was propounded upon Mutual Benefit. These requests and the corresponding responses were appended to the Motion to Determine Sufficiency of Defendant's Responses to Requests for Admissions of Facts.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: While Mutual Benefit ultimately contends that such coverage would not be available in the event of fraud, it cannot legitimately dispute the existence and import of the guaranteed replacement cost endorsement contained within the Simms' insurance policy. Indeed, when asked whether "the Simmses have a guaranteed replacement cost policy," Defendant's own designee responded, "I believe they did." Exhibit C at 145. To prevent needless consumption of time at the trial of this case, and to eliminate the need to prove what is not in dispute, this Court should enter summary judgment on this issue.

WAYNE'S REQUEST NO. 17: Under the terms of the Homeowner's Insurance Policy, if the replacement cost of the dwelling exceeded the \$434,000.00 limit of liability on repair and replacement cost of the dwelling, the Insurance Company must increase by the same percentage applied to the dwelling the limits of coverage for other structures, personal property, and loss of use.

Deficient Response: Denied.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: There is no basis for the denial of a provision of the applicable insurance policy, which is itself undisputed. *See* Exhibit A; Exhibit C at 145.

WAYNE'S REQUEST NO. 19: There is no insurance policy provision which would base the Insurance Company's obligations to the Simms on the original cost of construction of their dwelling.

Deficient Response: Denied. In assessing the reasonable cost to rebuild, the Simms' original cost of construction in 1998 were a pertinent consideration.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: Despite Mutual Benefit's denial, this carrier has never produced any policy provision that would base the carrier's obligations on the cost of construction. Absent evidence to the contrary, there is no dispute on this fact and this matter should be deemed admitted.

TRACEY'S REQUEST NO. 1: Prior to its denial of the Simms' claims, the Insurance Company did not communicate or otherwise negotiate with these homeowners to reach agreement on the actual cash value and/or replacement cost of their dwelling and lost contents.

Deficient Response: Denied.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: When Defendant's own designee was asked whether the carrier "ever tr[ie]d to work with the Simmses to negotiate a more, what you regarded as a more reasonable agreement to rebuild their

house,” Mark Russell testified, “No, I don't believe at that point we did.” Exhibit C at 130. He also admitted that the carrier never negotiated with these homeowners regarding their lost contents. *Id.* at 165. Mr. Snare also confirmed that there were no such communications. Exhibit E at 105. Having admitted that it typically tries to negotiate “agreed figures” with its policy holders when adjusting such insurance claims, Exhibit D at 26, this carrier’s admitted failure to engage in this process with the Simms is a material fact relating to its performance under the insurance contract. Because there is no genuine dispute as to this fact, summary judgment is appropriate.

TRACEY’S REQUEST NO. 2: Prior to its denial of the Simms’ claims, the Insurance Company did not provide information or documentation to the Simms to express disagreement on the accuracy of figures obtained by the Simms in connection with their claims.

Deficient Response: Denied.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: Having failed to produce any such documentation, Defendant lacks a factual basis for this denial. Without ever giving the Simms an opportunity to respond to the carrier’s position, the carrier summarily denied the claim. Lacking any genuine dispute as to a fact which is material to the carrier’s performance under the insurance contract, summary judgment is entirely appropriate.

TRACEY’S REQUEST NO. 3: At all relevant times, Pat Bonanni was retained by the Insurance Company to act as its agent to investigate the Fire and the claims arising from it and to communicate with the Simms on these claims.

Deficient Response: Denied. Pat Bonanni’s involvement in the claim was reduced in December of 2001 after the fraud of the Simms became apparent.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: Although defense counsel was unable to deny the accuracy of this request, he insisted on tweaking the language and would only admit that “Pat Bonanni of GAB Robins was retained by the Insurance Company to act on its behalf to investigate the Fire and the claims arising from it and to communicate with the Simms on these claims.” As this would undoubtedly render Mr. Bonanni the agent of Mutual Benefit for purposes of Rules 801(d)(2)(C) and 801(d)(2)(D) of the Federal Rules of Evidence, the undisputed fact of agency should be established on summary judgment.

TRACEY’S REQUEST NO. 13: Prior to its denial of claims arising from the Fire, the Insurance Company 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.

Deficient Response: Denied.

GROUNDS FOR SUMMARY JUDGMENT ON ISSUE: When asked whether he had any evidence to the contrary, Mark Russell admitted that “I have no direct evidence that any items of inventory wasn't in the home.” Exhibit C at 180-81. Absent any evidence that these items were not physically present in the home, Mutual Benefit cannot legitimately maintain this denial and summary judgment is entirely appropriate.

TRACEY’S REQUEST NO. 27: The Simms never terminated the Homeowner’s Insurance Policy prior to the Fire.

Deficient Response: Denied.

GROUNDS FOR SUMMARY JUDGMENT ON ISSUE: Unless Mutual Benefit can produce evidence to the contrary, it cannot legitimately dispute this fact. Summary judgment is appropriate.⁷

TRACEY’S REQUEST NO. 28: The Simms never rejected a policy rate increase on any homeowner’s insurance policy issued by the Insurance Company to cover their dwelling and its contents.

Deficient Response: Denied.

GROUNDS FOR SUMMARY JUDGMENT ON ISSUE: As with the previous request, unless Mutual Benefit can produce evidence to the contrary, it cannot legitimately dispute this fact. Summary judgment is appropriate.

Because there is no factual dispute as to any of the facts relevant to Plaintiffs’ *prima facie* case establishing the existence of coverage and the obligations of their insurer, summary judgment is appropriate to establish all of these facts and eliminate the need to litigate over issues that are already well-established by the record.

II. WHILE THE INSURANCE COMPANY REFUSES TO ADMIT IT,

⁷ While this may also seem to this Court to be a request to admit an “obvious fact,” this request was propounded upon Mutual Benefit because its counsel has occasionally suggested in deposition questions that he may somehow raise an issue in this regard. As Plaintiffs’ counsel has never received any evidence to this effect, they thought it prudent to prevent undue surprise through a request for admission.

THERE IS ABSOLUTELY NO EVIDENCE OF ARSON OR ANY OTHER ACT ON THE PART OF THE SIMMS TO CAUSE THE NOVEMBER 5, 2001 FIRE

Although this Court observed “that defendant has no evidence that the Simms committed arson or any other intentional act to cause the fire,” March 24, 2003 Letter from The Honorable Alexander Harvey II to Counsel at 4, the Insurance Company persists in its refusal to admit that it “has no evidence that the Simms committed arson or any other intentional act to cause the Fire.” Wayne Simms’ Request for Admission of Fact No. 2. Although Mutual Benefit responded to this request with the magic word “Denied,” *see* Motion to Determine Sufficiency of Defendant’s Responses to Requests for Admissions of Facts at 3, it has failed to produce any evidence of arson or other intentional act on the part of the Simms to cause the fire. Over defense counsel’s vigorous objections, Mutual Benefit’s claims supervisor Michael Snare reluctantly admitted that this insurance carrier has no evidence of such misconduct. Admitting that “[n]obody knows for sure exactly how this fire was set,” Exhibit E at 93, Mr. Snare conceded that Mutual Benefit did not deny this claim based upon the possibility that the fire resulted from arson. *Id.* at 94. Acknowledging the lack of such evidence, Mutual Benefit reluctantly admitted that it “does not have specific evidence of arson,” Defendant’s Supplemental Answer to Interrogatory No. 21, dated October 24, 2002 (Exhibit F), but nonetheless maintained that “[t]here is generally circumstantial evidence of the financial instability of the Plaintiffs at the time immediately prior to the fire.” *Id.* Absent competent evidence that the Simms committed arson or some other intentional act to cause this fire, it would be highly improper and unduly prejudicial for the Insurance Company to use such innuendo or suspicion to speculate before a jury on whether its policy holders may have been prompted to set their own home ablaze. Because no such evidence exists, this Court should put an end to the issue once and for all by

entering summary judgment in favor of the Simms.⁸

III. THE INSURANCE COMPANY CANNOT MAINTAIN AN AFFIRMATIVE DEFENSE OF FRAUD ON THE BASIS OF SUSPICION, INNUENDO AND UNSUBSTANTIATED BELIEFS

Unable to pin the charge of arson upon the Simms, Mutual Benefit struggles to maintain its denial based on a multitude of fraud accusations – accusations which the Insurance Company frequently modifies and expands as discovery reveals their dubious grounds for denial. One reason for Mutual Benefit’s improvisational approach to its fraud denial may stem from the fact that this carrier has never established any policies, procedures or standards for determining whether there is sufficient evidence of fraud to justify a denial of a policy holder’s claims.

Admitting that “there's no specific policy for determining how to exercise the judgment that fraud has been committed,” Defendant’s corporate designee and Vice President of Claims testified that “I'm not aware of any policy in the industry that would be able to assist us in that.” Exhibit C at 110. Lacking such guidance, the Insurance Company has strained to claim that the Simms committed fraud in overstating the square footage of their dwelling, in submitting proposals to rebuild, in submitting estimates for the replacement of contents, in renting temporary living quarters, and even in removing the debris left in the wake of the fire itself.

⁸ Immediately after the fire, Mutual Benefit retained arson investigator Lee McAdams to determine the cause and origin of the fire, but he was unable to find any evidence of arson or other fraudulent conduct on the part of the Simms. Defendant’s corporate designee admitted that, as a result of Mr. McAdams’ investigation, he learned that “the devastation was too great, that he had to call the fire undetermined.” Exhibit C at 188. Defendant has never produced any evidence to the contrary or indicated that Mr. McAdams found any evidence of arson or other fraudulent conduct on the part of the Simms. Yet, the Insurance Company has improperly denied Wayne Simms Request No. 4 that “Lee McAdams was unable to find any evidence of arson or other fraudulent conduct on the part of the Simms in connection with the Fire.” Given the undisputed facts of this case, this matter should be deemed admitted.

Although Mutual Benefit may not employ standards for determining fraud, state and federal courts apply stringent evidentiary requirements. In *Gross v. Sussex, Inc.*, 332 Md. 247, the Court of Appeals of Maryland enumerated the elements of fraud under Maryland law, as follows:

- (1) that a false representation of a material fact was made by defendant;
- (2) that the falsity of the statement was known to the defendant, or that the misrepresentation was made with such reckless indifference to the truth as to impute knowledge of its falsity to the defendant;
- (3) that the misrepresentation was made for the purpose of defrauding plaintiffs;
- (4) that plaintiffs not only acted in reliance on the misrepresentation but had a right to rely upon it with full belief in its truth, and that plaintiffs would not have acted in the same way if the misrepresentation had not been made; and
- (5) that plaintiffs suffered some harm as a direct result of the misrepresentation.

Id. at 257, quoted in *Doe v. Prudential Ins. Co. Of America*, 860 F. Supp. 243, 250 (D. Md. 1993) (Harvey, J.). “To be sufficient, the evidence must be such as to constitute proof by clear and convincing evidence.” *Id.* at 258. As this Court has observed, while negligent mistakes or errors in representations would not qualify, legally sufficient evidence of fraud requires ‘scienter on the part of the defendant – intent to deceive the other party.’” *Prudential Ins. Co. Of America*, 860 F. Supp. at 250, quoting *Martens Chevrolet v. Seney*, 292 Md. 328, 333, 439 A.2d 534 (1982). Here, Mutual Benefit has failed to produce any evidence of a deliberate, malevolent scheme to deceive this carrier. Far from exhibiting any hint of scienter, Tracey and Wayne Simms bent over backwards to cooperate with their insurer in producing the information sought, sitting for multiple examinations under oath, submitting additional information and documentation requested by the Insurance Company, and providing this carrier with updates as new information became available. Asked whether he had any complaints about the Simms level of cooperation with their investigation and adjustment of this claim, Mutual Benefit’s Vice President of Claims confirmed the full cooperation of these policy holders:

- Q Well, you are not denying this claim based on noncooperation of your policyholders?
A I am not.
Q And as you understand the requirement to cooperate, it is your understanding that the Simmses have fully cooperated with their carrier; is that correct?
A That's correct.

Exhibit C at 216. In sharp contrast with the “suspicions” of Mutual Benefit claims executives, the undisputed facts of this case confirm the legitimacy and severity of the each and every aspect of claims arising out of an admittedly devastating fire.

A. *Dwelling Claim*

As this Court has readily observed from reviewing the undisputed facts of this case, “defendant can hardly deny that evidence of record establishes that the Simms’ home and all of its contents were destroyed in the fire.” March 24, 2003 Letter from The Honorable Alexander Harvey II to Counsel at 4. While this has not stopped the Insurance Company from denying a request to admit this fact, Mutual Benefit has no evidence to dispute the total destruction of the Simms’ dwelling. Nor can this carrier legitimately dispute coverage for the replacement cost of this dwelling. Notice of Defendant’s Factual Admissions at 2-3; *see also* Exhibit A; Exhibit C at 145 (admitting that “the Simmses have a guaranteed replacement cost policy”). Lacking a genuine dispute as to the legitimacy of the Simms’ claim for replacement of their totally destroyed dwelling, Mutual Benefit should hardly be permitted to advance baseless accusations of fraud as a smokescreen to avoid its undisputed obligations under this insurance policy.⁹

⁹ Although Mutual Benefit cursorily denied that “Prior to the Insurance Company’s issuance of insurance policies to the Simms to cover their dwelling at 2624 Winters Run Road, Joppa, Maryland, the Mutual Inspection Bureau, Inc. determined that the living area within the Simms’ home was 5,692 square feet,” *see* Tracey Simms’ Request No. 9, this report was marked as Exhibit 4 to Mr. Russell’s deposition and is attached as an exhibit to this Motion as Exhibit H. This document plainly states that the living area within the Simms’ home was 5,692 square feet. Although Mutual Benefit now wishes to depart from this document by designating a new expert

B. *Contents Claim*

Admitting that he had “no direct evidence” that the Simms’ inventory of lost contents contained items that were not physically present in their home at the time of the fire, Exhibit C at 179, Mutual Benefit’s designee conceded that this carrier never performed any calculation which would dispute the figures submitted by its policy holders. Asked whether “Mutual Benefit ever perform[ed] any calculation of the correct amount of the claim for lost contents,” Exhibit C at 214, Vice President of Claims Mark Russell replied, “No.” *Id.* Lacking any evidence to dispute the inventory submitted, Mr. Russell expressed suspicion that “the Simmses were living above their financial means at the time of the fire.” *Id.* at 215. While this suspicion, combined with his unsubstantiated “belief” that the inventory was “grossly exaggerated,” *id.*, prompted Mr. Russell to deny the Simms’ claims, mere suspicion and beliefs hardly qualify as the type of clear and convincing evidence that would permit this carrier to maintain a claim of fraud. Lacking sufficient evidence to prove that the Simms’ submitted fraudulent inventories of non-existent contents, Mutual Benefit may not rest on such speculation to avoid summary judgment.¹⁰

after the close of discovery, *see* Memorandum In Support of Motion To Strike Untimely Defenses and Designation Of Witnesses, there is no basis for denying the contents of a document that is admittedly authentic and fully admissible into evidence. As such, this undisputed fact should also be deemed admitted on summary judgment.

¹⁰ Although defense counsel promised to reconsider his denials of Tracey Simms’ Request for Admission of Fact Nos. 14 and 15 in light of Mr. Russell’s admissions that his carrier failed to perform such calculations, this attorney failed to communicate with Plaintiffs’ counsel as promised. *See* April 14, 2003 Email from Irwin R. Kramer to William C. Parler, Jr. (Exhibit I). Because these facts are not in dispute, this Court should enter summary judgment to confirm the following:

1. “Prior to its denial of claims arising from the Fire, the Insurance Company did not make any independent calculation of the actual cash value or replacement cost of the contents or personal property listed on the inventories compiled by the

C. *Claim for Additional Living Expenses*

In approving the Simms' \$1,700.00 per month rental of Bobbie Spamer's apartment, Mutual Benefit's own field adjuster, Patrick Bonanni, boasted that this rental actually saved the insurer far more than it would have paid if the insured went into a hotel. Reasoning that these policy holders were entitled to far more expensive hotel accommodations, Mr. Bonanni viewed the rental of Bobbie Spamer's furnished apartment as a genuine "win-win" situation. According to this veteran claims adjuster, "[c]ompared to the cost of living in a motel with a man, a woman, and I don't remember how old, how old Robby was, but the son, plus the meals, it's going to be substantially, substantially less to rent it to a month." Exhibit D at 57-58. Far from concerned with the expense of these accommodations, Mr. Bonanni concluded that "exposure for the insurance company" and "the comfort for the insureds" were both "well-served." *Id.* Having fully approved of this rental on behalf of Mutual Benefit, the Insurance Company can hardly dispute the legitimacy of living expenses which were expressly covered by the Simms' homeowner's policy. *See* Notice of Defendant's Factual Admissions at 2-3 (admitting coverage for "loss of use" of \$86,800.00); *see also* Exhibit A.¹¹

Simms."

2. "Prior to its denial of claims arising from the Fire, the Insurance Company had not determined the dollar amount by which the Simms' claims for loss of personal property arising from the Fire exceeded either the actual cash value or replacement costs of these items."

See Motion to Determine Sufficiency of Defendant's Responses to Requests for Admissions of Facts.

¹¹ Straining to make a case for fraud on this issue, Defendant waited until the eve of this Court's discovery deadline, and many months after the deadline for designating expert witnesses, to designate real estate appraiser Michael Casella to express an opinion regarding the reasonable

D. *Demolition and Debris Removal*

Considering “a very substantial property loss” in which the Simms’ entire “home was totally destroyed” and “all of the contents of that home were totally destroyed,” Exhibit C at 163-64, no one disputes the need to incur significant expense for demolition and debris removal. Exhibit D at 65 (Mutual Benefit’s field adjuster confirmed that the fire created a “smoldering pile of debris”). Because the homeowner’s insurance policy expressly covers demolition and debris removal, *see* Notice of Defendant’s Factual Admissions at 2-3; Exhibit A, Patrick Bonanni authorized the demolition, debris removal and cleanup on November 20, 2001. Exhibit D at 175. After this work was completed, the Simms’ submitted bills which expert witness John Spencer found “fair, reasonable and in accordance with what we would charge for similar work.” August 30, 2002 Report of John Spencer (Exhibit J). Absent any evidence of fraud on the part of Wayne or Tracey Simms in connection with this essential work, the Insurance Company has no basis for denying reimbursement of these expenses.

E. *The Insurance Company Cannot Legitimately Deny the Simms’ Claims Based Upon Unfounded Suggestions of a “Conspiracy” to Defraud or Upon Unintentional Errors Contained Within a Claim*

Throughout the course of discovery, Mutual Benefit and its counsel have speculated that the Simms somehow conspired with other vendors and relatives to defraud this carrier. Lacking any

rental value of these temporary accommodations. March 26, 2003 Letter from William C. Parler, Jr., Esquire to Irwin R. Kramer, Esquire and Lawrence S. Greenberg, Esquire (appended to Memorandum In Support of Motion To Strike Untimely Defenses and Designation Of Witnesses). Beyond an untimely designation which warrants the preclusion of Mr. Casella’s testimony, *see* Memorandum In Support of Motion To Strike Untimely Defenses and Designation Of Witnesses, the mere fact that defense counsel has retained an expert whose assessment on rental values may differ from Mutual Benefit’s field adjuster hardly provides any evidence of fraud on the part of the Simms.

evidence of an actual conspiracy to commit fraud, or some concerted, intentional effort to deceive this insurer, Mutual Benefit has been fond of questioning every possible error or inaccuracy contained within complex claims which its own designee admits involve “very significant monetary losses.” Exhibit C at 163-64.

As Mutual Benefit has yet to produce any evidence of a conspiracy to defraud which was supposedly masterminded by Tracey Simms and her husband, Wayne, Plaintiffs propounded requests for admissions of fact designed to put this speculation and suspicion to an end. Unfortunately, although the Insurance Company lacked any evidence to dispute these requests, its counsel nonetheless used the magic word “Denied” as a substitute for evidence which would create a genuine dispute as to the following facts:

WAYNE’S REQUEST NO. 24: Prior to the Insurance Company’s denial of claims arising out of the Fire, the Insurance Company did not have evidence that the Simms conspired or otherwise acted in concert with other individuals or entities to commit any type of fraudulent act or omission relating to the Fire or the claims arising from it.

Deficient Response: Denied.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: If Defendant has evidence of such a conspiracy, it had every obligation to produce it during the discovery process. Lacking any such evidence, and having failed to produce evidence of a conspiracy to defraud on the part of Plaintiffs, Defendant cannot simply deny this request and attempt to build a conspiracy case later on.

WAYNE’S REQUEST NO. 25: In determining whether to pay the Simms’ claims arising from the Fire, the Insurance Company was not permitted to deny these claims based upon unintentional errors, mistakes or inaccuracies contained in statements or documents provided to the Insurance Company.

Deficient Response: Denied to the extent that the inaccuracies were fraudulent or constituted misrepresentations.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: As there is no basis for the Insurance Company to deny a claim due to “unintentional errors, mistakes or

inaccuracies,” there is no basis to deny this request for admission. Yet, because Mutual Benefit wishes to exploit any discrepancy, no matter how slight or seemingly innocuous, it has even resisted admitting this undisputed fact.

WAYNE’S REQUEST NO. 27: In determining whether to pay the Simms’ claims arising from the Fire, the Insurance Company was not permitted to deny these claims based upon fraudulent acts, omissions or false statements made by other persons without the Simms’ knowledge of any falsehood.

Deficient Response: Denied.

GROUND FOR SUMMARY JUDGMENT ON ISSUE: Because the Insurance Company has no basis for denying claims due to the misconduct of others without the Simms’ knowledge of falsehoods, there is no basis to deny this undisputed fact.

TRACEY’S REQUEST NO. 24: Prior to its denial of the Simms’ claims, the Insurance Company had no evidence that the Simms instructed any person or entity to prepare false, inflated or inaccurate estimates on the cost of replacing personal property lost in the Fire.

Deficient Response: Mutual Benefit objects to request twenty four, and therefore denies same. Counsel for Plaintiff never forwarded a page five which would appear to contain the remainder of request twenty-four. In an abundance of caution, Mutual Benefit denies any and all requests contained on page five of the Request for Admissions of Tracey Simms.

GROUND FOR COMPELLING SUFFICIENT ANSWER: As the Insurance Company has failed to produce any evidence to dispute this fact, it cannot legitimately base a fraud defense on speculation or innuendo to the contrary. Consequently, summary judgment on this undisputed fact is entirely appropriate.

While Mutual Benefit may have used the “sixth sense” of its claims officials to deny the Simms claims, such conspiracy theories, speculation and dissection of minute discrepancies hardly amount to legally sufficient evidence of fraud. Perhaps recognizing the lack of evidence of fraud in the submission of these wholly legitimate and serious claims, the Insurance Company waited until the eve of this Court’s discovery deadline to shift gears and spring new theories of “underwriting fraud” upon Plaintiffs at the last minute. Beyond the fact that such untimely theories should be

stricken from the record, *see* Memorandum In Support of Motion To Strike Untimely Defenses and Designation Of Witnesses, Mutual Benefit's strained efforts to find a theory of fraud that may somehow pass muster provide a stark illustration of the lengths to which this carrier will go to avoid its coverage obligations. Considering the undisputed facts of this case, Mutual Benefit's obligation to provide its policy holders with the coverage that they contracted for is beyond question. The only question to be decided at trial is the dollar value of the claims at issue.

CONCLUSION

While Plaintiffs have suffered devastating losses as a result of the November 5, 2001 fire, the undisputed facts of this case demonstrate that they have been burned once again by their own insurance carrier. Lacking legally sufficient evidence of fraud and conspiracy, the Insurance Company has created a smokescreen designed to cloud the issues and avoid its contractual obligations. Despite Mutual Benefit's strained efforts to fan the flames of fraud, this Court has observed that "the function of a motion for summary judgment is to smoke out if there is any case." *Doe v. Prudential Ins. Co. Of America*, 860 F. Supp. 243, 249 (D. Md. 1993) (Harvey, J.), *quoting Bland v. Norfolk and Southern Railroad Company*, 406 F.2d 863, 866 (4th Cir. 1969). As the United States Court of Appeals for the Fourth Circuit observed in *Felty v. Graves Humphrey Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987), trial judges have "an affirmative obligation ... to prevent 'factually unsupported claims and defenses' from proceeding to trial."

Though Mutual Benefit has denied the Simms' claim on the basis of unspecified accusations and suspicions of "misrepresentations, false statements, and fraudulent conduct," Exhibit G, it is much easier to issue a terse denial letter than it is to produce clear and convincing evidence of fraud. Although the Insurance Company may prefer to rest on suspicion, innuendo and the unsubstantiated

beliefs of its claims counsel and executives, it has failed to produce legally sufficient evidence that Tracey or Wayne Simms committed any intentional act to cause the fire or to deceive their carrier in the submission of claims arising out of this catastrophe.

In light to the destruction caused by the fire, one can understand an insurance carrier's desire to reduce its exposure. But, in this case, the carrier's contractual obligations are beyond dispute. The only legitimate question to be decided at trial centers on the nature and extent of the damages sustained as a result of a devastating fire that left Tracey, Wayne and their son, Robbie, out of house and home. Considering the undisputed facts of this case, this Court should enter partial summary judgment in favor of the Simms, establishing that:

- A. The Insurance Company is obligated to provide coverage for the losses sustained in the November 5, 2001 fire;
- B. The Insurance Company has failed to produce legally sufficient evidence that the Simms committed any intentional act to cause the fire or to defraud their carrier on claims arising from it;
- C. The items set forth in the requests for admissions referred to in this Memorandum are supported by the undisputed facts of this case and shall be deemed conclusively established at trial; and
- D. The Simms are entitled to judgment as a matter of law on the issue of liability, leaving the question of damages to be determined by the fact finder at the trial of this case.

_____/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 16, 2003, a copy of the foregoing sent via this Court's electronic filing procedure to:

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_____/s/_____
Irwin R. Kramer

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