

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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**REPLY TO DEFENDANT’S RESPONSE TO
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs Wayne and Tracey Simms (“the Simms”), by undersigned counsel, respectfully submit this Reply To Defendant’s Response To Motion For Partial Summary Judgment.

ARGUMENT

Apparently recognizing the shortcomings of its fraud defense, Defendant Mutual Benefit Insurance Company (“the Insurance Company” or “Mutual Benefit”) has engaged in a last-ditch effort to avoid summary judgment by ignoring the undisputed facts of this case and concocting theories and contentions that it has never previously raised. Accusing the Simms of “blatant destruction of evidence” designed to prevent the Insurance Company from conducting an arson investigation, this carrier now claims that its policy holders “quickly act[ed] to destroy this evidence” to prevent the discovery of accelerants left in the wake of arson. *See* Response to Plaintiffs’ Motion for Partial Summary Judgment at 7.

In reviewing the evidence produced by the Insurance Company in discovery, 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, and even regarded this as “obvious.” *Id.* Indeed, claims supervisor Michael Snare conceded in a February 12, 2003 deposition that this carrier had no evidence of such misconduct. Admitting that “[n]obody knows for sure exactly how this fire was set,” Exhibit E at 93 (appended to Plaintiffs’ Memorandum in Support of Motion for Summary Judgment), Mr. Snare confirmed that Mutual Benefit did not deny this claim based upon the possibility that the fire resulted from arson. *Id.* at 94.

Contrary to the blatant misrepresentations of defense counsel, the Insurance Company completed its arson investigation weeks before any demolition or debris removal was conducted. In fact, on the very day of the fire, arson investigator Lee McAdams was assigned to conduct a cause and origin investigation. *See* Invoice of Lee McAdams, describing his activity in conducting arson investigation (Exhibit 1). The next day, Mr. McAdams went to the scene, met with a team of fire marshalls, interviewed the Simms, and “[c]onducted fire scene exam w/ photos, diagram, & etc.” *Id.* After completing his investigation, this investigator gave a “verbal report” of his findings to Michael Snare on November 8, 2001. *Id.* According to Mr. Snare, three days after the fire, Mr. McAdams “said, you know, based on the devastation of the loss, it cannot be determined, the cause and origin, the fire is undeterminable.” Deposition of Michael Snare at 89 (Exhibit 2). Rather than request any additional investigation, Mr. Snare told Mr. McAdams that he need not prepare a report. *Id.* Explaining his decision to terminate this investigation, Mr. Snare explained, “Why would I want a written report that says nothing. I mean, that says that he cannot determine the cause of this fire.” *Id.*

While claiming that “no thorough [arson] investigation was possible as Plaintiffs ... removed the basement slab immediately following the fire,” Defendant’s Response at 7, defense

counsel ignores the undisputed fact that no one touched this slab until after Patrick Bonanni authorized demolition and debris removal on November 20, 2001 – more than fifteen days after the fire and more than two full weeks after Lee McAdams completed his “fire scene exam.” Deposition of Patrick Bonanni at 137 (Exhibit 3). To ensure that the building and its contents remained “untouched until McAdams was done with his investigation and the local fire authorities were done,” Mr. Bonanni did not authorize any demolition or debris removal until November 20, 2001. *Id.* Rather than accuse the Simms of acting immediately to destroy evidence and obstruct these investigations, Mutual Benefit’s own field adjuster agreed that, “prior to giving the Simmses approval for demolition and debris removal on November 20, 2001, none of that work had been done.” *Id.* Thus, there is absolutely no truth to defense counsel’s claims that the Simms destroyed critical evidence before the carrier completed its arson investigation. The undisputed facts confirm, beyond the shadow of any doubt, that this investigation was completed long before the Simms did anything.¹

¹ Contrary to defense counsel’s misleading suggestion that Patrick Bonanni somehow missed his chance to supplement Lee McAdams’ arson investigation, this field adjuster was never retained to or qualified to conduct such an examination. Far from checking for traces of accelerants, Mr. Bonanni’s only interest in the basement slab was to see “if it needed to be torn out.” Exhibit 3 at 138. Although he had ample opportunities to inspect this slab prior to his authorization of demolition and debris removal, *id.* at 137-38 (“the opportunity was there before November 20”), Mr. Bonanni was only concerned with “whether the slab was going to be salvageable and [to] get the ... basic footprint of dimensions off of the slab.” *Id.* at 135. Furthermore, while defense counsel complains that “foundation walls were removed to prevent such an investigation and to destroy evidence of arson,” Defendant’s Response at 7, prior to any demolition and debris removal, the carrier “determined that the foundation walls were not sound and that they would, that they would have to be removed.” *Id.* at 136. Thus, the testimony of the carrier’s own field adjuster soundly refutes the baseless accusations of its attorney.

Considering Mr. Bonanni’s deposition testimony, it is hard to understand how defense counsel could suggest that there was any impairment of evidence or that Mr. Bonanni was to play some role in an ongoing arson investigation:

Lacking any evidence of arson, or fraud of any kind, defense counsel's ever-growing and baseless accusations are more inflammatory than the fire itself. 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 innuendo and suspicion to speculate before a jury on whether its policy holders may have been prompted to set their own home ablaze. This is particularly true where, as here, there is absolutely no evidence whatsoever of an incendiary cause or of the Simms' participation in a criminal act to cause the fire. Although the Insurance Company acknowledges that it must produce clear and convincing evidence that the fire was incendiary in origin and that the policy holders committed a criminal act to start the fire, *Carpenter v. Union Insurance Society of Canton*, 284 F.2d 155,159, 162 (4th Cir. 1987), citing *Ziegler v. Hustisford Farmers Mut. Ins. Co.*, 1941, 238 Wis. 238, 298 N.W. 610; 7 Wigmore, *Evidence* §§ 2498(3) (3d ed. 1940), it cannot satisfy this burden merely by

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- Q. You didn't want debris removed prior to the completion of Mr. McAdams's investigation, correct?
- A. Right.
- Q. And I assume the reason for that is because that might in some respect impair the evidence?
- A. Well, yeah, that's just a common practice.
- Q. And when you spoke with *Mr. McAdams*, what did he tell you?
- A. That his *investigation was complete*.
- * * *
- Q. Is there any particular reason why you did not ask him about the findings of his investigation?
- A. That's -- the origin and cause is a separate issue from the loss adjustment. My job's to adjust and handle the loss based on the coverage. The *origin and cause is a separate matter and is handled totally separate from, at least, what I do*.

Id. at 120-21 (emphasis added). In summary, the undisputed facts confirm that the arson investigation was completed long before any demolition work was commenced, that Mr. Bonanni waited until this investigation was over before proceeding with such demolition, and that the Simms never did anything to obstruct an arson investigation.

calling an accountant to highlight its policy holders' debts.

Straining to preserve its brand new arson defense, the Insurance Company cites *Carpenter v. Union Insurance Society of Canton*, 284 F.2d 155 (4th Cir. 1987), while ignoring the overwhelming evidence of arson presented in that case. Unlike Mutual Benefit in the case at bar, the carrier in *Carpenter* presented substantial forensic evidence to satisfy what the Fourth Circuit described as the “crucial inquiry involving the evidence relating to the act of incendiarism itself.” *Id.* at 161.

Armed with expert and eyewitness testimony confirming “a violent explosion” in an area of the insured textile plant which contained slow burning bales, *id.*, the carrier in *Carpenter* established that “spot fires” were burning from beneath fire-resistant material, that the fire had multiple points of origin, and that the nature of the fire and resulting debris “negated the presence of faulty electrical or gas fixtures, paint or rags, or other conditions that would produce “spontaneous combustion.” *Id.* Even the firemen, who were overcome by “unusual fumes,” were permitted to present expert testimony on the incendiary nature of this fire. *Id.* at 158, 162. Unlike the Simms, the plant owners in *Carpenter* had just paid for and substantially increased their insurance coverage prior to the fire, were on the verge of bankruptcy at the time of the fire, and even filed to bankruptcy shortly after the fire. *Id.* at 158. In fact, there was even evidence that the fire occurred just after the premises were surveyed for the installation of a sprinkler system and just before fire prevention equipment was to be installed. *Id.* at 160.

In sharp contrast with the evidence in *Carpenter*, Mutual Benefit has not produced any evidence of an incendiary cause, but nonetheless wishes to draw creative inferences by asserting that its policy holders were in debt at the time of the fire. While the Simms, like millions of

Americans, had debts to pay, this hardly constitutes legally sufficient evidence of arson. Absent any evidence of an incendiary cause or the insureds' engaging in criminal activity to set their home ablaze, the Insurance Company should not be permitted to maintain inflammatory accusations of arson and of evidence destruction which fly in the face of undisputed evidence.

CONCLUSION

Acting through its own defense counsel, the Insurance Company denied the Simms' claims long ago. Yet, its efforts to justify this dubious action continue to change and grow with its attorney's own imagination. Lacking evidence of arson or fraud on the part of Tracey and Wayne Simms, their carrier continues to engage in a desperate and dishonest effort to distort the undisputed facts of this case while concocting new theories and contentions long after the close of discovery. Although this Court may easily understand this carrier's motives for avoiding hefty contractual obligations, it should not permit the Insurance Company or its counsel to spew accusations of arson and fraud that lack legitimate evidentiary foundations.

When reviewing the testimony of the Insurance Company's own claims personnel, it is painfully obvious that this carrier has exceeded the bounds of propriety in accusing its own policy holders of an immediate and "blatant destruction of evidence." Although this carrier has never required a factual basis for such brutal accusations, this Court should not ignore the undisputed fact that this arson investigation had been completed weeks before its field adjuster authorized the Simms to commence demolition work. While its investigation failed to reveal any evidence of arson on the part of the Simms or anyone else, this has hardly deterred defense counsel from fanning the flames of speculation by accusing them of a deliberate plot to set their home ablaze, to destroy evidence designed to reveal their criminal conspiracy, and to

fraudulently inflate the resulting claim. Nor has the lack of evidence prevented the Insurance Company from asserting novel theories of underwriting fraud and advancing a host of other opinions and contentions that were never disclosed during the course of discovery. *See* Memorandum In Support of Motion To Strike Untimely Defenses and Designation Of Witnesses. Far from setting forth the type of clear and convincing evidence on which to maintain its dubious fraud claims, the ever-evolving theories of an insurance carrier straining to justify its denial of claims only serve to confirm its own liability. No matter how creatively the defense seeks to spin this case, this is a dispute over the amount of damages to which homeowners are entitled in the wake of a devastating fire. Absent any evidence that they caused this catastrophe, the issue of damages is the only legitimate question remaining for trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2003, a copy of the foregoing sent via this Court's electronic filing procedure to:

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