UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

LEROY CROOM and wife, JOYCE CROOM,

Plaintiffs,

vs.

No. 06-CV-1238

GUIDEONE AMERICA INSURANCE CO.,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court are the motions of Defendant, Guideone America Insurance Company, for summary judgment (Doc. 24) and partial summary judgment (Doc. 48) ("Motions"). Defendant renewed these Motions after they were denied without prejudice based on the reopening of discovery. This Court heard oral arguments on March 11, 2009, and after consideration of the pleadings, arguments of the parties and the record as a whole, Defendant's Motions are DENIED.

STANDARD OF REVIEW

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of

evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but must, "by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. *Anderson*, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" *Street*, 886 F.2d at 1479 (quoting *Anderson*, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

BACKGROUND

This is an action to recover proceeds under an insurance contract.[1] On the morning of April 24, 2005, while Plaintiffs were delivering newspapers, a fire completely destroyed Plaintiffs' home. After the fire, Defendant conducted an investigation into the loss. As part of its investigation, Defendant's in-house adjuster, John Lively, talked with Mrs. Croom. Mr. Lively found her to be honest and cooperative. He believed Mrs. Croom's statement that at the

[1] The facts are stated for the purpose of deciding these Motions only.

time of the fire Plaintiffs were delivering newspapers. Mr. Lively never believed there was foul play involved in Plaintiffs' claim.

Defendant's investigation also included hiring an independent adjuster, David Ellington. Mr. Ellington contacted the Madison County Fire Chief, who stated he had no concerns about the cause of the fire. Mr. Ellington also spoke with Mrs. Croom. He received no information that made him suspicious other than the amount of insurance on the home. Plaintiffs, however, had not requested this amount of insurance; rather, the amount had increased automatically over time.

Based on the amount of insurance for the home, Mr. Ellington recommended hiring an origin and cause expert, Rick Eley, who conducted a fire scene analysis on April 29, 2005. On May 11, 2005, Mr. Eley issued a report that concluded, "a definitive determination of origin and cause can not [sic] be made." Mr. Eley's report noted that, while he had observed an unusual burn pattern on the floor, "all laboratory analysis was negative for the presence of accelerants." Mr. Eley finished his report by stating that "[t]he origin and cause portion of my investigation is complete."

Mr. Eley's report also included an Order from the United States Bankruptcy Court dismissing Plaintiffs' Chapter 13 bankruptcy case, which they had filed in 2004. In the bankruptcy case, Plaintiffs were required to submit a sworn schedule of assets. The assets they listed in bankruptcy differed from the assets that they claimed nine months later as part of the loss at issue. For example, while Plaintiffs claimed guns and antiques as part of their insurance claim, they failed to list these items in the bankruptcy proceeding. In addition, many of the values of the items they listed in bankruptcy were lower than the values Plaintiffs submitted to Defendant as part of their personal property claim.

As an additional part of the investigation Defendant conducted examinations under oath ("EUOs") of Plaintiffs, during which it noted various inconsistencies between the statements of Mr. Croom and Mrs. Croom. At the time of the EUOs, Mrs. Croom advised counsel for Defendant that Mr. Croom suffered from dementia and was not competent to handle Plaintiffs' personal affairs. Shortly thereafter, Plaintiffs provided Defendant with additional information regarding Mr. Croom's mental state, including a letter from Mr. Croom's doctor confirming Mrs. Croom's statements that Mr. Croom had dementia and providing Mr. Croom's prescription history. Plaintiffs later provided a second letter to Defendant from Mr. Croom's doctor, which discussed Mr. Croom's history of forgetfulness, low Mini-Mental status and observed that "[Mr. Croom's] recent memory status has been impaired probably for a number of years. His recollection of recent events is unreliable."

On November 30, 2005, Defendant sent Plaintiffs a letter denying their claim. The letter included four statements as to why Defendant denied the claim: "knowing and willful misrepresentations . . . as to the amount and the extent of personal property," violation of the Concealment and Fraud section of Plaintiffs' insurance policy; that "the fire loss in question was incendiary in origin, or intentionally set, and we believe was caused by you or at your direction;" and violation of the Exclusions section of the policy regarding intentional loss. After Defendant denied the claim, Plaintiffs filed their Complaint on September 28, 2006. Then, on July 1, 2007, Mr. Eley issued a supplemental report, which indicated that the fire was not accidental. Having removed this action to federal court, Defendant now seeks dismissal of Plaintiffs' claims with prejudice through the instant Motions.

ANALYSIS

Plaintiffs' Complaint, as amended, sets forth three causes of action: Breach of Contract, Bad Faith, and violation of the Tennessee Consumer Protection Act. There are genuine issues of material fact as to each of these causes of action, mandating denial of Defendant's Motions.

Judicial Estoppel

Defendant first argues that the Court must dismiss Plaintiffs' Complaint in its entirety based on the equitable doctrine of judicial estoppel. The basis of Defendant's argument is the substantial discrepancy in both the contents listed and their valuation by Plaintiffs in the prior bankruptcy proceeding and their insurance claim. Judicial estoppel "prevents [a] party from asserting a legal position contrary with one successfully and unequivocally asserted by the same party in a prior proceeding." *In re Am. HomePatient, Inc.*, 301 B.R. 713, 717 (M.D. Tenn. 2003). The Sixth Circuit has warned that the doctrine must be applied with caution. *See Eubanks*, 385 F.3d 894, 897 (citing *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990) (Judicial estoppel "should be applied with caution to 'avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.'") As one court has explained:

> Designed to prevent a party from gaining an unfair advantage, the indoctrination of judicial estoppel by Tennessee courts has been cogently explained by this court in *Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 266 S.W. 313 (1924): The distinctive feature of the Tennessee law of judicial estoppel (or estoppel by oath) is the expressed purpose of the court, on broad grounds of public policy, to uphold the sanctity of an oath. The sworn statement is not merely evidence against the litigant, but (unless explained) precludes him from denying its truth. It is not merely an admission, but an absolute bar.

Marcus v. Marcus, 993 S.W.2d 596, 602 (Tenn. 1999) (internal citations and quotation marks omitted). Tennessee courts have cautioned, however, that "[a] necessary component of [the rule

concerning judicial estoppel] is that anything short of a willfully false statement of fact, in the sense of conscious and deliberate perjury, is insufficient to give rise to an estoppel and that the party is entitled to explain that the statement was inadvertent or inconsiderate or represents a mistake of law." *State v. Brown*, 937 S.W.2d 934, 936 (Tenn. Ct. App. 1996); *see also Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002). Courts must decide whether to apply the doctrine based on the particular facts and circumstances of each case. *Brown* at 936.

In reviewing the submissions of the parties and the relevant case law, the Court finds that summary judgment is not appropriate on the grounds of judicial estoppel, as the inconsistencies at issue do not rise to the level of willfully false statements as a matter of law.[2] In her sworn affidavit, attached as Exhibit A to Plaintiffs' Response to Defendant's Motion for Summary Judgment, Mrs. Croom explains the discrepancies between the assets listed in Plaintiffs' bankruptcy proceeding and the assets Plaintiffs submitted to Defendant, and likewise explains the discrepancies in their listed values. Mrs. Croom states that the majority of her interactions with her bankruptcy attorney were through his staff. She states that she answered all of their questions completely and honestly, that they never asked Plaintiffs if they owned certain items, such as antiques and guns, and never asked about what certain items were worth. She states that had she been asked about these items, she would have answered truthfully and honestly, and she did not make any false statements to her attorney or his office and did not attempt to mislead anyone. With regard to her insurance claim, Mrs. Croom states that she followed the instructions of Defendant's agents and adjusters, that she told them on several occasions that it was impossible to accurately record every single item in a home Plaintiffs had lived in for thirty

[2] Because this Court has found that summary judgment is not appropriate given the genuine issues of material fact that exist with regard to Plaintiffs' claims, the Court declines to rule on the issue of whether judicial estoppel can act to bar Plaintiffs' claims when the first action, the bankruptcy proceeding, was dismissed rather than adjudicated on the merits.

years, and that Defendant's agent told her to estimate purchase prices and to determine the replacement cost of the items by going to stores in the area. She states that she did not willfully make any false statements in her insurance claim and followed Defendant's instructions to the best of her ability. Mrs. Croom further states that Mr. Croom has dementia and is easily confused, therefore she handles all of Plaintiffs' personal business affairs, and that several of his statements in his EUO were wrong as a result of his mental state.

It is this Court's opinion that the inconsistencies relied on by Defendant go to the weight of the evidence rather than to mandating a finding of judgment. There is a genuine issue of material fact in dispute as to whether Plaintiffs willfully made false statements. Plaintiffs provide an explanation for the discrepancies and deny that they made willfully false statements. *See Prince v. Allstate Ins. Co.*, 2002 U.S. Dist. LEXIS 26889 at *16 ("issues of fraud and willfully false statements raised by [an insurer] involve the element of [the insured's] intent which, in light of [the insured's] affidavit, cannot be determined by the Court on summary judgment"). Quite simply, Defendant may test Plaintiffs' credibility at trial, and may seek to use the bankruptcy schedules for impeachment purposes. It is the province of the trier of fact to make a factual determination as to Plaintiffs' credibility and whether their inconsistencies were due to mistake or inadvertence, or were intentional. Accordingly, Defendant has not met its burden of showing that Plaintiffs' conduct constitutes fraud or the making of willfully false statements and the Motions for Summary Judgment and Partial Summary Judgment on the grounds of judicial estoppel are DENIED.

Bad Faith Claim

Defendant also argues that Plaintiff's Bad Faith claim must be dismissed because there are no genuine issues of material fact with regard to this claim. Tennessee's bad faith statute is

codified at Tennessee Code Annotated § 56-7-105. Before an insured can recover under the bad faith penalty statute, "(1) the policy of insurance must, by its terms, have become due and payable, (2) a formal demand for payment must have been made, (3) the insured must have waited 60 days after making his demand before filing suit . . . and, (4) the refusal to pay must not have been in good faith." *Palmer v. Nationwide Mutual Fire Insurance Company*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986). The statute is "penal in nature and must be strictly construed." *Stooksbury v. American Nat'l Prop. and Cas. Co.*, 126 S.W.3d 505, 519 (Tenn. Ct. App. 2003). Bad faith "means a lack of good or moral intent as the motive for the refusal to pay a loss." *Grinder v. Peninsula Ins. Co.*, 1985 Tenn. App. LEXIS 3183, *4 (Tenn. Ct. App. Sept. 16, 1985) (citing *Silliman v. Int'l. Life Ins. Co.*, 188 S.W. 273 (Tenn. 1915). While a refusal to pay based on substantial legal grounds is not bad faith, (*see, e.g., Columbian Nat'l. Life Ins. Co. v. Harrison*, 12 F.2d 986 (6th Cir. 1926)), raising a defense for which there is no proof is an element of bad faith. *Agricultural Ins. Co. v. Holter*, 318 S.W.2d 433 (Tenn. Ct. App. 1958). The question of whether an insurance company should pay the statutory penalty for bad faith is ordinarily a question of fact for the jury. *See, e.g., Doochin v. U.S. Fidelity & Guar. Co.*, 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993); *Pemberton v. Amoco Life Ins. Co.*, 2002 U.S. Dist. LEXIS 26338 (E.D. Tenn. Feb. 15, 2002).

Here, Defendant states that no genuine issue of material fact exists regarding the fourth factor, that the refusal to pay must not have been in good faith. Defendant argues that its refusal to pay the claim was based on substantial legal grounds. Defendant claims that its denial of the claim was in good faith reliance on the substantial discrepancies between the schedule of assets in the Bankruptcy proceeding and the insurance claim and between Mr. and Mrs. Croom's

statements in their EUOs, and was also based on the investigation of its origin and cause expert, Rick Eley.

Here, there is a genuine issue of material fact as to whether Defendant's decision to deny Plaintiffs' claim was made in bad faith. Plaintiffs have shown that Defendant's in-house adjuster never believed there was foul play and that Defendant's independent adjuster had no concerns other than the amount of the insurance on the house, which Plaintiffs had not requested. Additionally, at the time their claim was denied, Defendant's origin and cause expert found no accelerants indicating that the fire was intentionally set, and he could not determine cause and origin.[3] The trier of fact may conclude based on this information that Defendant did not have grounds for denying Plaintiff's claim on the basis that "the fire loss in question was incendiary in origin, or intentionally set, and we believe was caused by you or at your direction," when two adjusters had not indicated this, the report issued by its origin and cause expert did not support this conclusion, and when Plaintiffs were delivering newspapers on the morning of the fire. A genuine issue of material fact exists as to whether, based on the information Defendant had at the time of denying Plaintiffs' claim, it was bad faith to accuse Plaintiffs of burning the home they had lived in for thirty years. *See McColgan v. Auto-Owners Ins. Co.*, 2002 Tenn.App. LEXIS 720, *13 (Tenn.Ct.App. Oct. 11, 2002) (bad faith finding upheld where the insured complied with policy requirements, had a verifiable explanation for his whereabouts on the morning of the fire, and demonstrated that the record contained no evidence connecting him to the fire or its cause).

[3] Mr. Eley also stated in his original report that the cause and origin portion of his investigation was complete, though he issued a supplement to the report after the claim was denied, and after Plaintiffs filed this lawsuit, ruling out that the fire was accidental. As stated in this Court's Order Denying Plaintiffs' Motion to Exclude Defendant's Expert Witness Rick Eley and to Strike His Opinions from the Record, it is for the trier of fact to determine Mr. Eley's credibility and the weight to give his second report.

Plaintiffs also informed Defendant of Mr. Croom's dementia and forgetfulness, submitting statements from Mr. Croom's doctor confirming his mental state. In fact, Mr. Croom's EUO contains internal consistencies, such as his age and date of birth, which may indicate to the trier of fact that Defendant should have known that Mr. Croom's memory was not reliable. Indeed, Defendant's own in-house nurse wrote that "[a]s I read the EUO, it is my gut that this man does have some dementia." A trier of fact could conclude that Defendant's reliance on the fact that Mr. Croom's statements contradicted Mrs. Croom's EUO and the bankruptcy documents in denying Plaintiffs' claim, though apprised by Plaintiffs of Mr. Croom's dementia, amounted to bad faith. In sum, there are genuine issues of material fact with regard to Plaintiffs' Bad Faith claim such that summary judgment is inappropriate.

Tennessee Consumer Protection Act ("TCPA") Claim

The TCPA states that, "[a]ny person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." T.C.A. § 47-18-109(a)(1). Subsection (b) of the statute sets forth a number of specific "unfair or deceptive acts or practices," which includes the "catch-all" provision that states "[e]ngaging in any other act or practice which is deceptive to the consumer or to any other person." T.C.A. § 47-18-104(b)(27). The Supreme Court of Tennessee has found that the TCPA applies to acts and practices of insurance companies. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920 (Tenn. 1998). In that case, the court found that the insurance company's denial of a claim, which was based on the suspicious nature of the fires, did not violate the TCPA, where the parties stipulated that the two fires at issue were intentionally set. The court explained:

> While the sale of a policy of insurance easily falls [within the TCPA], we conclude that Allstate's conduct in handling the Myints' insurance policy was neither unfair nor deceptive. The record reveals no evidence of an attempt by Allstate to violate the terms of the policy, deceive the Myints about the terms of the policy, or otherwise act unfairly."

Id. at 926. This Court has found that claims based on insurance claims handling procedures come within the ambit of the TCPA. *Sparks v. Allstate Ins. Co.*, 98 F.Supp.2d 933, 937 (W.D. Tenn. 2000). However, mere denial of an insurance claim, absent any deceptive, misleading or unfair act does not violate the TCPA. *See, e.g., Williamson v. Aetna Life Ins. Co.*, 481 F.3d 369, 378 (6th Cir. 2007) (affirming award of summary judgment for insurer on plaintiff's TCPA claim where at worst insurer's conduct amounted to an "erroneous denial" of a claim); *Stooksbury v. American Nat. Property and Cas. Co.*, 126 S.W.3d 505, 520 (Tenn.Ct.App. 2003) (reversing trial court award of damages pursuant to the TCPA where "no material evidence" existed "to support the jury's conclusion that Defendant engaged in deceptive or unfair acts").

In this case, Plaintiffs have presented evidence sufficient for the trier of fact to find that Defendant's insurance claim handling procedures were deceptive or unfair. As discussed above with regard to their Bad Faith claim, Plaintiffs have demonstrated that Defendant's conclusion that the fire was intentional and set by them or at their direction was based, in part, on an expert report that was inconclusive and found no presence of accelerants. Plaintiffs have also presented evidence that they were at work on the morning of the fire. Defendant's own adjuster found Plaintiffs to be honest and cooperative, and has never suspected foul play.

Plaintiffs have likewise presented evidence sufficient for the trier of fact to conclude that Defendant acted unfairly or deceptively by relying on Mr. Croom's EUO in denying the claim, in the face of medical information indicating that Mr. Croom suffered from dementia. The trier of fact could find that Defendant did not adequately investigate whether Mr. Croom had a mental

condition such that his EUO could not be relied on, especially where its own in-house nurse suspected Mr. Croom might suffer from dementia based on the internal inconsistencies of his EUO. Quite simply, there are genuine issues of material fact as to whether Defendant's handling procedures and denial of Plaintiffs' claim were deceptive or unfair such that they constitute a violation of the TCPA.

For the above reasons, Defendant's Motions for summary judgment and partial summary judgment are DENIED.

IT IS SO ORDERED.

s/ Edward G. Bryant
EDWARD G. BRYANT
UNITED STATES MAGISTRATE JUDGE

Date: March 23, 2009