

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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ELEIWA & SONS, INC. d/b/a                    )  
K&F BEAUTY SUPPLY, and                    )  
KHALED ELEIWA, Individually                )  
                                                  )  
                  Plaintiffs,                    )  
                                                  )  
v.                                                )        No. 07-2461-V  
                                                  )  
                                                  )  
THE TRAVELERS INDEMNITY                    )  
COMPANY OF AMERICA,                        )  
                                                  )  
                  Defendant.                    )

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ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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This lawsuit, filed on June 6, 2007, arises out of a claim for damages from a fire to the business of the plaintiffs, Eleiwa & Sons, Inc. d/b/a K&F Beauty Supply, and Khaled Eleiwa, individually (collectively the "Plaintiffs"), pursuant to an insurance policy (the "Policy") provided through the defendant, the Travelers Indemnity Company of America ("Travelers"), which was in effect when the fire occurred and had a provision providing coverage for such damages. The Plaintiffs' amended complaint alleges breach of contract, statutory bad faith refusal to pay their insurance claim in violation of Tenn. Code Ann. § 56-7-105, violation of the Tennessee Consumer Protection Act ("TCPA"), Tenn. Code Ann. § 47-18-104 *et seq.*, and detrimental reliance, and seeks punitive damages.

Specifically, the Plaintiffs claim Travelers failed to indemnify them for the full amount of their loss in the fire under the terms of the Policy. Further, the Plaintiffs assert that in failing to fully pay the Plaintiffs for this loss, Travelers acted in bad faith, used unfair and/or deceptive trade practices, and unjustly caused the Plaintiffs to expend money in reliance upon the Policy to their detriment. The Plaintiffs also seek punitive damages based on Travelers' acts and omissions which the Plaintiffs allege to be willful, wanton, malicious, reckless, outrageous, and without justification. Now before the court is Travelers' motion for partial summary judgment as to the Plaintiffs' claims for detrimental reliance, bad faith, violation of the TCPA, and punitive damages. The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge. For the following reasons, Travelers' motion for partial summary judgment is granted.

#### STATEMENT OF UNDISPUTED FACTS

For the purposes of this motion and in addition to the facts stated above, the court finds that the following facts are undisputed:<sup>1</sup>

1. The Plaintiffs obtained a policy of insurance from

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<sup>1</sup> The undisputed facts are based on Defendant's Statement of Undisputed Facts (Doc. No. 17), and the facts admitted by the Plaintiffs in Plaintiffs' Response to Defendant's Statement of Undisputed Facts (Doc. No. 23-2).

Travelers covering their business located at 1323 E. Broadway, West Memphis, Arkansas.

2. The Policy provides that Travelers will not pay "more than your financial interest in the covered property."

3. The Policy has a \$5000.00 deductible requirement.

4. The Plaintiffs' business on Broadway is called K&F Beauty Supply and primarily sells beauty supplies.

5. In addition to the store on Broadway, Eleiwa has other stores.

6. On August 18, 2006, the Plaintiffs' beauty supply store on Broadway was damaged by fire.

7. The Policy was in effect on August 18, 2006.

8. On August 23, 2006, a representative of Travelers met with Eleiwa to discuss the Plaintiffs' loss in that fire and investigation of that loss.

9. Travelers hired an outside consultant, Cornerstone Consulting Group, LLC ("Cornerstone") to assist with the calculation of the Plaintiffs' loss.

10. On October 24, 2006, there was another meeting between Eleiwa and Travelers.

11. On October 26, 2006, Plaintiffs' counsel sent a letter to Travelers demanding Travelers pay the Plaintiffs the full amount of the Plaintiffs' claimed loss and threatening to file a claim for bad faith refusal to pay under Tenn. Code Ann. § 56-7-105 if

Travelers did not fully pay the Plaintiffs' demand.

12. Also on October 26, 2006, Travelers sent a letter to Plaintiffs' counsel explaining that it was unwilling to comply with the Plaintiffs' demand at that time. Further, this letter noted that Eleiwa had made statements representing that both his income statements and profit and loss statements relevant to the Plaintiffs' loss were inaccurate in the meeting on October 24, 2006. As such, Travelers requested Eleiwa fill out the proof of loss form and supply documents supporting his loss within sixty days. Additionally, this letter stated that Travelers had issued payment to Eleiwa for the amount both parties agreed was due and payable for the Plaintiffs' loss under the policy at that point.

13. On November 3, 2006, Plaintiffs' counsel sent a letter to Travelers stating that Eleiwa disputed Travelers' allegations in its October 26, 2006 letter regarding the October 24, 2006 meeting and stating that he would soon provide Travelers with the proof of loss form.

14. On November 6, 2006, Travelers sent Plaintiffs' counsel a letter apologizing if it had incorrectly recalled the meeting on October 24, 2006. This letter further stated that, in accordance with the Plaintiffs' current assertion that Travelers had misunderstood Eleiwa's statements in that meeting, Travelers now intended to assume that the financial statements Eleiwa had presented were accurate in calculating the Plaintiffs' loss.

15. On November 16, 2006, the Plaintiffs sent Travelers a proof of loss form.

16. On November 16, 2006, Travelers' counsel sent Plaintiffs' counsel a letter stating that Travelers had retained him to assist with the Plaintiffs' claim. This letter also requested Eleiwa to provide Travelers with the documentation that he had brought to the October 24, 2006 meeting which had been retained by Eleiwa's accountants. This letter also explained that more documentation to support the Plaintiffs' proof of loss would be requested soon.

17. On January 23, 2008, Plaintiffs' counsel sent a letter to Travelers rejecting an apparent settlement offer in the amount of \$152,017.09.

18. On February 20, 2007, Plaintiffs' counsel sent a letter to Travelers enclosing copies of financial documents to illustrate that certain deposits to Eleiwa's business account did not represent sales but rather represented Eleiwa's transfer of personal money into that account. This letter further asserted that the individual making calculations of the Plaintiffs' loss was biased against Eleiwa and had expressed racial and other insults to him. Also, the letter stated that the Plaintiffs would agree to Travelers issuing payment to them for the \$152,000.00 Travelers was currently offering while specifically reserving the right to arbitrate the Plaintiffs' claim for the additional amount the Plaintiffs claimed as a loss.

19. On March 8, 2007, Plaintiffs' counsel sent Travelers a letter advising that if the matter was not settled within the next week or so, the Plaintiffs would file suit on the claim.

20. On March 16, 2007, Plaintiffs' counsel sent Travelers' counsel a letter stating that he had not received a response to his last two letters and that a third party had informed Eleiwa that Travelers had made a thirty percent downward adjustment in its last settlement offer. Based on this allegation, Plaintiffs' counsel stated that he believed the Plaintiffs had a very valid argument for bad faith denial of insurance payment. Lastly, the letter stated that unless Plaintiffs' counsel's office heard from Travelers before the close of business on Monday, March 19, 2007, the Plaintiffs would file suit.

21. In a letter to Plaintiffs' counsel dated March 15, 2007, but apparently not received by Plaintiffs' counsel until after he sent his letter dated March 16, 2007, Travelers' counsel stated that Travelers still needed additional information from the Plaintiffs in accordance with an attached letter from an accountant working on the claim before any final determination could be made regarding the claim and declined to issue payment for \$152,000.00 with the Plaintiffs reserving the right to arbitrate the remaining amount. Also, the letter requested specific information regarding any insults or racial epithets used by a Travelers representative and denied that Travelers' actions were motivated by anything other

than a desire to accurately determine the Plaintiffs' loss.

22. On March 27, 2007, Plaintiffs' counsel sent Travelers' counsel a letter requesting specific itemization of the supporting documentation Travelers needed. Also, the letter expressed the Plaintiffs' intent to file suit unless the matter was settled by April 2, 2007, and further implied that, should Travelers pay the Plaintiffs some additional money towards the claim, litigation could be avoided at that time. The letter also declined to provide further information regarding the alleged insults to Eleiwa based on a fear of retaliation from those continuing to work on the claim and because of the small number of persons involved.

23. On March 30, 2007, Travelers sent Plaintiffs' counsel a letter again requesting that the Plaintiffs provide Travelers with documentation in support of their claim based upon the detailed request for additional information previously provided on March 5, 2007, and advising that the claim could not be resolved without the Plaintiffs providing this information. The letter further indicated that without specific information Travelers could not respond to Eleiwa's allegations of racial comments or insults.

24. On April 10, 2007, Plaintiffs' counsel sent Travelers a letter with several financial documents attached to show that Eleiwa had deposited funds in his business bank account from his personal line of credit and requesting correction of an adjuster's classification of Eleiwa's deposit of checks from Travelers as

sales. This letter also demanded an additional advance of the undisputed amount of the Plaintiffs' claim within seven days and stated that, if Travelers wished to resolve the entire claim, it would need to be done within seven days.

25. On April 24, 2007, Travelers' counsel sent Plaintiffs' counsel a letter stating that, while additional questions remained regarding the claim, Travelers was willing to issue payment of the undisputed amount. The letter also stated that Travelers would provide a detailed explanation of what documentation the Plaintiffs would need to provide in order to allow Travelers to evaluate any additional amount of loss the Plaintiffs claimed along with this payment.

26. On April 26, 2007, Plaintiffs' counsel sent Travelers' counsel a letter confirming that Travelers would be paying an amount towards the Plaintiffs' claim and that the Plaintiffs reserved the right to make a claim for any additional amounts owed.

27. On May 1, 2007, Plaintiffs' counsel sent a letter to Travelers' counsel confirming that Travelers had delivered a check for \$165,989.09 to Plaintiffs' counsel's office and requesting further communication to resolve the remaining dispute in the matter.

28. On May 7, 2007, Plaintiffs' counsel sent a letter to Travelers' counsel stating that Eleiwa had supplied Travelers with all the information in his possession regarding the unpaid amount

of the Plaintiffs' claim. As such, this letter advised that the Plaintiffs would file suit within seven days if the matter was not resolved.

29. On May 16, 2007, Travelers' counsel sent a letter to Plaintiffs' counsel explaining that Travelers had issued the Plaintiffs payment in full for their claim based on the documentation the Plaintiffs had supplied. Although the letter acknowledged that Eleiwa had recently provided additional documentation regarding the loss, it stated that Eleiwa had not provided certain requested information to allow Travelers to evaluate whether further payment was warranted.

30. On May 18, 2007, Plaintiffs' counsel sent a letter to Travelers stating that the Plaintiffs had not received detailed requests for further information from Travelers and had not received any explanatory letter along with the settlement check. Further, the letter stated that the Plaintiffs would be filing suit.

31. Travelers states it has made payments to the Plaintiffs on this loss, which the Plaintiffs admit but state that full payment has not been made.

32. Travelers has paid the Plaintiffs a total of \$347,680.36 on this loss.

33. Included in the payments Travelers has made to the Plaintiffs was an advance of \$100,000.00 in September of 2006 for

the loss.

34. Included in the payments Travelers has made to the Plaintiffs was a payment in the amount of \$165,989.09 as payment for the loss of store inventory.

35. The Plaintiffs filed suit in state court on June 6, 2007.

36. Part of the dispute in the present lawsuit is the calculation of the inventory lost in the fire.

#### STATEMENT OF DISPUTED FACTS

The parties dispute the following facts:

1. Travelers states that Eleiwa's other stores also sell beauty supplies, while the Plaintiffs admit only that Eleiwa has other stores.

2. Travelers states that it began an investigation into the Plaintiffs' loss after the fire, and the Plaintiffs admit an investigation was referenced but state that they are without actual knowledge as to whether the investigation actually commenced or was properly completed.

3. Travelers states that it hired an outside consultant, Cornerstone, to assist with the calculation of the Plaintiffs' loss, and the Plaintiffs admit that documents evidence Cornerstone's work but are without actual knowledge as to whether Cornerstone actually commenced or properly completed calculation of the Plaintiffs' loss.

4. Travelers states that its counsel sent Plaintiffs'

counsel a letter on March 15, 2007 which stated that Travelers still needed additional information from the Plaintiffs in accordance with an attached letter from an accountant working on the claim before any final determination could be made regarding the claim and that Travelers declined to issue payment for \$152,000.00 with the Plaintiffs reserving the right to arbitrate the remaining amount. Also, the letter requested specific information regarding any insults or racial epithets used by a Travelers representative and denied that Travelers' actions were motivated by anything other than a desire to accurately determine the Plaintiffs' loss. The Plaintiffs, however, state that they are without sufficient knowledge to admit or deny this allegation as they did not receive this letter.

5. Travelers states that Cornerstone sent Travelers' counsel a letter commenting upon information Cornerstone had requested from Plaintiffs' counsel on March 5, 2007 and commenting upon Plaintiffs' counsel's April 10, 2007 letter with financial documents attached, which the Plaintiffs are without sufficient knowledge to admit or deny.

6. Travelers alleges that it sent another May 16, 2007 letter to Plaintiff's counsel containing a letter from Cornerstone dated April 24, 2007 and a letter from Travelers dated April 25, 2007, which the Plaintiffs state they are without sufficient information to admit or deny but believe is correct.

7. Travelers states that Eleiwa does not keep inventory lists for his fire-damaged store, which the Plaintiffs deny as written.

8. Travelers states that Eleiwa has or has had multiple bank accounts for himself personally and for his stores, which the Plaintiffs deny as written.

9. Travelers states that Eleiwa has or has had multiple credit accounts for himself personally and for his stores, which the Plaintiffs deny as written.

10. Travelers states that Eleiwa did not keep business transactions separate from personal transactions at all times, which the Plaintiffs deny.

11. Travelers states that Eleiwa did not keep business records separate from personal records at all times, which the Plaintiffs deny.

12. Travelers states it has paid the Plaintiffs a total of \$347,680.36 for the loss that is the subject of the lawsuit, which the Plaintiffs admit but the Plaintiffs allege this amount equals seventy percent of the Plaintiffs' calculated loss due to a thirty percent unilateral downward adjustment.

13. Travelers states that it paid the Plaintiffs \$71,691.27 in October of 2006 in payment for the loss of the Plaintiffs' business personal property and stock. Further, Travelers states that the total amount of the lost property under this coverage was

\$171,691.27 after subtracting the \$5000.00 policy deductible. Also, Travelers states that after subtracting the \$100,000.00 advance that had been already made, the remainder due on that portion of the loss was \$71,691.27. The Plaintiffs state they do not have sufficient information to admit or deny these statements and therefore dispute these facts.

14. Travelers states that it paid the Plaintiffs the policy limits of \$5000.00 in October 2006 under the Inland Marine coverage for damage to the Plaintiffs' sign. The Plaintiffs state they do not have sufficient information to admit or deny this statement and therefore dispute this fact.

15. Travelers states the dispute in the present lawsuit is the calculation of the loss of the Plaintiffs' inventory at the damaged store. The Plaintiffs admit that part of the dispute is based on this calculation, but add that the claims of bad faith, detrimental reliance, violation of the TCPA, and breach of contract, along with any other disputes arising from the facts and complaint, are also disputed.

#### ANALYSIS

The critical issue before the court is whether the Plaintiffs have presented sufficient evidence to support each of their non-contractual claims. Travelers argues that the Plaintiffs' detrimental reliance claim is nothing more than a breach of contract claim with a different name, that its conduct does not

amount to bad faith as defined in the statute, that it cannot be found liable for a violation of the TCPA, and that any claim for punitive damages fails as a matter of law. In opposition, the Plaintiffs aver that there is sufficient evidence to establish that genuine issues of material fact exist that would enable a finder of fact to find in favor of them on these claims.

A. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see also *LaPointe v. United Autoworkers Local 600*, 8 F.3d 376, 378 (6th Cir. 1993); *Osborn v. Ashland County Bd. of Alcohol, Drug Addiction & Mental Health Servs.*, 979 F.2d 1131, 1133 (6th Cir. 1992) (per curiam). The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case. *LaPointe*, 8 F.3d at 378. This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

In response, the nonmoving party must go beyond the pleadings

and present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993); see also *LaPointe*, 8 F.3d at 378. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *LaPointe*, 8 F.3d at 378.

In deciding a motion for summary judgment, "this [c]ourt must determine whether 'the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir. 1993) (quoting *Anderson*, 477 U.S. at 251-52). The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Patton*, 8 F.3d at 346; *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). However, to defeat a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 252;

*LaPointe*, 8 F.3d at 378. Finally, a district court considering a motion for summary judgment may not weigh evidence or make credibility determinations. *Anderson*, 477 U.S. at 255; *Adams v. Metiva*, 31 F.3d 375, 379 (6th Cir. 1994).

B. Detrimental Reliance

Travelers seeks summary judgment as to the Plaintiffs' claim for detrimental reliance on the grounds that the facts of this case do not support such a claim under Tennessee law<sup>2</sup> as a matter of law. Detrimental reliance is another term for the doctrine of promissory estoppel in Tennessee. *Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007). As such, Tennessee courts apply the definition of promissory estoppel found in the Restatement (Second) of Contracts to detrimental reliance claims, to-wit:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

*Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982) (quoting Restatement (Second) of Contracts § 90 (1981)). Promissory estoppel is an equitable doctrine, and its limits are defined by equity and reason. *Chavez*, 245 S.W.3d at 404 (citing *Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982)). Although the language

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<sup>2</sup> Under 28 U.S.C. § 1652, this court applies the law of Tennessee to these claims.

of the Restatement section does not expressly limit its application to gratuitous promises, it is telling that the section falls under the topic of "Informal Contracts Without Assent or Consideration." (Restatement (Second) of Contracts § 90 (1981)). Accordingly, courts apply promissory estoppel to allow a party who has justifiably relied on a *gratuitous* promise to enforce that promise despite the lack of consideration. *Alden*, 637 S.W.2d at 864 (emphasis added) (quoting L. Simpson, *Law of Contracts* § 61 (2d ed. 1965)). If the promise is not gratuitous and consideration has been paid in exchange for the promise, it is not necessary to resort to the equitable doctrine of promissory estoppel because the promise would be binding under the law of contracts. Tennessee courts do not favor the application of promissory estoppel in contract cases because it creates an exception to the statute of frauds and, if applied too liberally, could "swallow the rule." *Johnson v. Allison*, 2004 WL 2266796 at \*8 (Tenn. Ct. App. 2004). The Tennessee Supreme Court has limited the application of promissory estoppel to "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud." *Shedd v. Gaylord Entm't Co.*, 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003) (quoting *Baliles v. Cities Serv.*, 578 S.W.2d 621 (Tenn. 1979)).

The Plaintiffs' claim for detrimental reliance in this case fails to meet the requirements for application of promissory

estoppel in Tennessee. It is undisputed that the Plaintiffs paid premiums to Travelers pursuant to the terms of the written insurance policy in return for Travelers' promise to indemnify them for losses under the Policy. (Am. Compl. ¶¶29-30; Pls.' Resp. 5.)

The Plaintiffs' claim for promissory estoppel relies exclusively on Travelers' alleged failure to comply with the terms of the Policy and cites no extra-contractual promise by Travelers. (Am. Compl. ¶¶29-30; Pls.' Resp. 5.) No genuine issue of material fact exists regarding the validity of the Policy and its inclusion of a promise from Travelers to indemnify the Plaintiffs for any losses covered under the terms of the Policy. However, this promise cannot be considered informal or gratuitous, as it was memorialized in writing and based upon the Plaintiffs' payment of premiums under the Policy. Therefore, this promise does not fall within the equitable doctrine of promissory estoppel, but rather under the laws of contract. There are no allegations in the amended complaint of any conduct on the part of Travelers that verges on actual fraud, and therefore the court finds there is no facts to support a finding that this is an "an exceptional case" where promissory estoppel should be applied. As such, the Plaintiffs' claim for detrimental reliance fails as a matter of law, and Traveler's motion for partial summary judgment is granted as to the Plaintiffs' claim for promissory estoppel.

C. Statutory Bad Faith

The Plaintiffs have also alleged that Travelers acted in "bad faith in denying and/or refusing and/or failing to pay [their insurance] claim for fire loss" in violation of Tenn. Code Ann. § 56-7-105, the "bad faith" penalty statute. (Am. Compl. ¶ 23.)

The bad faith penalty statute provides that:

The insurance companies of this state . . . in all cases where a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy . . . on which the loss occurred, shall be liable to pay the holder of the policy . . . in addition to the loss and interest thereon, a sum not exceeding twenty five percent (25%) on the liability of the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury including attorney fees upon the holder of the policy.

Tenn. Code Ann. § 56-7-105 (2000). Under Tennessee law, "this statute is penal in nature and must be strictly construed." *Minton v. Tennessee Farmers Mut. Ins. Co.*, 832 S.W.2d 35, 38 (Tenn. Ct. App. 1992). Thus, before an insured can recover under the statute, (1) the policy must be due and payable under its terms, (2) the insured must have demanded payment, (3) sixty days must have passed from the date of making the demand, unless the insurer refused to pay the claim prior to the passage of sixty days, and (4) the refusal to pay must be in bad faith. *Id.* However, the statutory penalty should not be imposed where an insurer fails to pay a claim if there is an actual dispute over the value of the claim, the

insurer has not acted in an intentionally indifferent manner towards the claim, and there is no proof that the insurer acted with improper motive. *Palmer v. Nationwide Mut. Fire Ins. Co.*, 723 S.W.2d 124, 126 (Tenn. Ct. App. 1986) (citing *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 556 S.W.2d 750 (Tenn. 1977)). "Erroneous denial of a claim . . . unaccompanied by deceit or other misleading conduct, does not constitute deception or unfairness." *Williamson v. Aetna Life Ins. Co.*, 2005 WL 3087861 (W.D. Tenn. 2005).

As grounds for its motion for partial summary judgment on the Plaintiffs' "bad faith" statutory penalty claim, Travelers argues that the Plaintiffs have failed to produce sufficient evidence to support a finding that Travelers acted with bad faith or sufficient evidence to support a finding that sixty days passed after the Plaintiffs' demand for payment before Plaintiffs filed suit. The court first considers whether the evidence is sufficient to create a genuine issue of material fact as to whether Travelers acted in bad faith as the statute requires before turning to the procedural issue of the timeliness of the Plaintiffs' notice to Travelers regarding their intent to file a "bad faith" claim and the actual filing of the lawsuit.

The Plaintiffs assert that there is sufficient evidence from which a jury could find that Travelers' conduct in the following particulars constituted bad faith: (1) waiting over seven months to deny a portion of the Plaintiffs' claim while paying the

undisputed amounts of the Plaintiffs' claim; (2) waiting sixty days to give the Plaintiffs a proof of loss form; (3) undervaluing the Plaintiffs' claim by an arbitrary 30%; (4) unreasonably repeatedly requesting additional documentation; and (5) acting with improper motive, bias, and prejudice in dealing with Eleiwa, an insured of Middle Eastern descent.

It is undisputed that on August 23, 2006, within five days after the fire loss, and then again on October 24, 2006, Travelers met with the Plaintiffs to discuss the loss. (Undisputed Facts, ¶¶ 8 and 10.) It is further undisputed that by letter dated October 26, 2006, Travelers requested the Plaintiffs to fill out a proof of loss form and supply documents supporting the fire loss within sixty days because the Plaintiffs had made statements representing that their income statements and profit and loss statements presented in the October 24, 2006 meeting were inaccurate, and that on November 16, 2006 the Plaintiffs provided a proof of loss form. (Undisputed Facts, ¶¶ 12, 13, and 15.) It is further undisputed that Travelers has paid the Plaintiffs a significant amount of money totaling \$347,608.36 for all undisputed portions of their claim in several payments over the period that the Plaintiffs' claim has been pending with the first payment on this loss being in September of 2006. (Undisputed Facts, ¶¶ 31, 32, and 33.)

In response to the motion for summary judgment, the Plaintiffs

have failed to present any evidence<sup>3</sup> that any delay in making these payments was based on anything other than attempting to calculate the actual value of the Plaintiffs' loss. Under the terms of the Policy, the Plaintiffs are required to allow Travelers to inspect their books and records as often as may be reasonably required and to submit a signed, sworn proof of loss. (Def.'s Mot. for Part. Summ. J., Ex. A. Policy Excerpts, 28.) Moreover, as to the portion of the Plaintiffs' insurance claim which is still outstanding, it is stipulated that the parties still dispute the calculation of at least part of the claim, and there is no evidence that this dispute is not genuine. Further, it is worth noting that, at all times relevant to this cause of action, Travelers expressed a willingness to review any documents supporting the Plaintiffs' claim that their loss had been undervalued under the terms of the Policy. Finally, the Plaintiffs have failed to present any specific evidence of any discrimination against the Plaintiffs, racial or otherwise, by Travelers, or of an arbitrary thirty percent downward adjustment of the Plaintiffs' claim by Travelers. Indeed, the deposition testimony of Floyd Ramage, the Plaintiffs' own expert witness, offered by Travelers, indicates that he was of the opinion that the

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<sup>3</sup> In response to Travelers' motion for summary judgment, the Plaintiffs failed to present any evidence - by affidavit or otherwise - in support of their position that there are genuine issues or material fact but instead relied solely on their response to Traveler's statement of undisputed facts and Travelers' exhibits.

Plaintiffs had undervalued their sales by 30% thus making it difficult, if not impossible, to calculate the value of the Plaintiffs' inventory on the premises at the time of the fire without reviewing other documents such as bank statements which Travelers requested. The deposition testimony of Eleiwa concerning alleged disparaging racial remarks on one occasion by a David Wilson, who was not employed by Travelers, does not present sufficient evidence from which a jury could reasonably find improper motive or indifference on the part of Travelers in handling the Plaintiffs' claim.

After considering the arguments of the parties, the undisputed facts,<sup>4</sup> and the exhibits submitted by Travelers in connection with its summary judgment motion, the court finds that the Plaintiffs have not presented sufficient evidence from which a jury could reasonably find that Travelers' actions amounted to bad faith under Tenn. Code Ann. § 56-7-105. Because the court has found that the evidence is insufficient as a matter of law to show that Travelers acted in bad faith, it is unnecessary for the court to consider the procedural issue of timeliness of the notice and filing of the lawsuit. Accordingly, Travelers' motion for partial summary judgment on the Plaintiffs' claim of bad faith is granted.

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<sup>4</sup> None of the disputed facts are material to the court's ruling on the motion for partial summary judgment.

D. Violations of the TCPA

Travelers also seeks summary judgment on the Plaintiffs' claims under the TCPA. The TCPA prohibits any "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104 (2008). The purpose of the TCPA is "to protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts and practices." *Stooksbury v. American Nat'l Prop. and Cas. Co.*, 126 S.W.3d 505, 520 (Tenn. Ct. App. 2003). Tennessee courts have held that the TCPA applies to the acts and practices of insurance companies. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 925-26 (Tenn. 1998); *Newman v. Allstate Ins. Co.*, 42 S.W.3d 920, 924 (Tenn. Ct. App. 2000).

In their amended complaint, the Plaintiffs allege that Travelers violated the TCPA by failing to fully compensate the Plaintiffs' fire loss despite representing that the Policy fully insured such losses. (Am. Compl. ¶¶ 25-27.) The Plaintiffs insist that Travelers' "unreasonable delay and unreasonable requests," "improper motive," and undervaluation of the Plaintiffs' claim were deceptive and unfair. (Pls. Resp. 11-14.) Travelers, however, asserts that the Plaintiffs have failed to present any specific evidence that Travelers employed any unfair or deceptive business practices in evaluating the Plaintiffs' claim. Rather, Travelers states that the Plaintiffs merely disagree with Travelers as to the

value of the claim.

For the same reasons the court has concluded that the Plaintiffs have failed to present sufficient evidence from which a reasonable jury could find bad faith on the part of Travelers, the court concludes that there is insufficient evidence from which a jury could conclude that Travelers engaged in deceptive or unfair acts. As such, the Plaintiffs' claim under the TCPA fails as a matter of law, and Travelers' motion for partial summary judgment on the Plaintiffs' claims under the TCPA is granted.

E. Punitive Damages

Finally, Travelers seeks partial summary judgment on the Plaintiffs' claim for punitive damages in this case. (Am. Compl. ¶ 16.) Under Tennessee law, punitive damages are available in cases where clear and convincing evidence shows the defendant acted in an intentional, fraudulent, malicious or reckless manner. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992). As a general rule, punitive damages are not recoverable in a contract cause of action. *Bland v. Smith*, 277 S.W.2d 377, 379 (Tenn. 1955); *Johnson v. Woman's Hosp.*, 527 S.W.2d 133, 141 (Tenn. Ct. App. 1975). Based on the court's rulings herein, the Plaintiffs' only remaining claim against Travelers is for breach of contract. As such, no grounds for an award of punitive damages remain in this lawsuit. Accordingly, Travelers' motion for partial summary judgment on the Plaintiffs' claim for punitive damages is granted.

CONCLUSION

For the reasons stated above, Travelers' motion for partial summary judgment is granted in full on the Plaintiffs' claims for statutory bad faith refusal to pay claim, violation of the Tennessee Consumer Protection Act ("TCPA"), detrimental reliance, and punitive damages.

IT IS SO ORDERED this 18th day of September, 2008.

s/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE