UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy Somnis,

Plaintiff,

v.

Civ. No. 11-324 (RHK/LIB)
MEMORANDUM OPINION AND ORDER

Country Mutual Insurance Company,

Defendant.

Harold A. Frederick, Matthew H. Hanka, Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for Plaintiff.

Leatha G. Wolter, Meagher & Geer, PLLP, Minneapolis, Minnesota, for Defendant.

On July 2, 2009, a fire damaged the home of Plaintiff Jeremy Somnis. He filed a claim with his homeowners insurer, Defendant Country Mutual Insurance Company ("Country Mutual"), which was denied. He then commenced the instant action, seeking to recover the policy proceeds. Presently before the Court is Somnis's Motion to Exclude the Expert Opinion of Gregory St. Onge (Doc. No. 13), an investigator hired by Country Mutual, who opined that the fire was intentionally set. For the reasons that follow, the Court will grant in part and deny in part Somnis's Motion.

BACKGROUND

The relevant facts are undisputed. Somnis owns a home near Grand Marais, Minnesota, that was damaged by fire on July 2, 2009. (Somnis Aff. ¶ 4.) Responding firefighters observed flames coming out of the basement's south wall and found a fire in

the basement ceiling. (St. Onge Aff. Ex. B at 2.) Although the fire was quickly extinguished, it caused significant damage to the basement and lesser damage (from smoke and heat) to other rooms in the house. (Id. App'x B.)

At the time of the fire, Somnis's home was insured under a policy issued by Country Mutual, and he submitted a claim seeking to recover over $200,000 in losses. (Somnis Aff. ¶ 5.) Country Mutual commenced an investigation; it retained St. Onge, a certified fire investigator with nearly fifteen years' experience in fire cause and origin analysis. (St. Onge Aff. ¶ 16 & Ex. A.) St. Onge has worked as a firefighter since 1974, is a licensed law-enforcement officer in Wisconsin, and has served as an instructor for various fire-investigation courses. (Id. Ex. A.)

St. Onge examined Somnis's home, following a "systematic protocol" starting at the exterior, moving onto the home's main floor, and finally proceeding to the basement. (Id. ¶¶ 18-19.) He analyzed burn patterns, smoke damage, and debris, and he evaluated possible ignition sources, including several space heaters in the basement. (Id. ¶ 20.) In addition, several electrical items were removed from the basement and sent to an engineering company for testing. (Id.) No evidence of a short or arcing was found in those items. (Id. ¶ 20 & Ex. B at 4-7.) A space heater near a couch/hide-a-bed, which appeared to be the location of the fire's origin, also was tested and found to have sensors that would disable the heater in the event it became too hot. The sensors were in excellent condition and fully operational. (Id. Ex. B at 8.)

As part of his investigation, St. Onge also conducted a recorded interview of Somnis. (Id. ¶ 17 & Ex. B.) He asked about Somnis's whereabouts on the date of the

fire, the items in the basement, and the home's occupants. (Id.) He learned that Somnis was the only person living in the home on the date in question and had not been in the basement that day. He also learned that other than a space heater and some bedding items, nothing was in the vicinity of the couch/hide-a-bed immediately before the fire. (Id.)

Based on his investigation, St. Onge concluded that "the fire started on the couch [and] not from the space heater or overhead lighting. There was nothing on the couch to start a fire. The space heater was attacked by the fire. It was not the source of the fire." (Id. Ex. A at 8.) He then offered the following opinion: "After systematically examining the fire scene, no accidental fire cause has been found that explains the cause of this fire. *In my opinion, this fire is an incendiary fire started by some person on the couch in the basement family room of the house*." (Id. (emphasis added).)[1] St. Onge apparently reached this opinion solely because he was unable to identify an accidental cause for the fire. (See also St. Onge Aff. ¶ 22.)

By letter dated June 3, 2010, County Mutual denied Somnis's claim based on (1) the policy's "intentional loss" exclusion and (2) the policy's "concealment or fraud" exclusion. (Somnis Aff. Ex. A.) While not expressly accusing Somnis of arson, the letter asserted that he had made "misrepresentations" regarding his claim, "including misrepresentations regarding the cause of the fire." (Id.)

In January 2011, Somnis commenced the instant breach-of-contract action in the Cook County, Minnesota, District Court, seeking to recover for the losses he sustained in

[1] The word "incendiary" means "relating to or involving a deliberate burning of property." Webster's Third New International Dictionary 1141 (1986 ed.).

the fire; Country Mutual timely removed the action to this Court. With discovery complete, Somnis has now moved, pursuant to Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), to exclude St. Onge from testifying at trial. The Court held a hearing on the Motion on December 19, 2011, and it is now ripe for disposition.

STANDARD OF REVIEW

Rule 702, which governs the admission of expert testimony, provides:

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

The Court, acting as a "gatekeeper," must evaluate whether proffered expert testimony passes muster under this Rule, bearing in mind that the touchstone for admitting such testimony is assistance to the trier of fact. See, e.g., Lee v. Andersen, 616 F.3d 803, 808 (8th Cir. 2010); Larson v. Kempker, 414 F.3d 936, 941 (8th Cir. 2005). "The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence." Lauzon v. Senco Prods., Inc., 270 F.3d 681, 686 (8th Cir. 2001) (citing Daubert, 509 U.S. at 592). The Court enjoys "broad discretion" in determining whether an expert's testimony is admissible. Weisgram v. Marley Co., 169 F.3d 514, 518 (8th Cir. 1999).

Rule 702 "reflects an attempt to liberalize . . . the admission" of expert testimony and "clearly is one of admissibility rather than exclusion." Polski v. Quigley Corp., 538 F.3d 836, 838-39 (8th Cir. 2008). Hence, "the rejection of expert testimony is the

exception rather than the rule." Robinson v. GEICO Gen. Ins. Co., 447 F.3d 1096, 1100 (8th Cir. 2006). An expert's testimony should be admitted if it "advances the trier of fact's understanding to any degree." Id. (internal quotation marks and citations omitted). But when the testimony "can offer no assistance to the jury," it should be excluded. United States v. Finch, 630 F.3d 1057, 1062 (8th Cir. 2011) (citations omitted).

ANALYSIS

At first blush, it appeared to the Court that Somnis was seeking *only* to preclude St. Onge from testifying at trial that the fire was incendiary. For example, in his Memorandum he argued that St. Onge's "opinion *regarding the alleged incendiary nature of the fire* fails to pass scrutiny under Rule 702 . . . and Daubert." (Def. Mem. at 2; accord, e.g., id. at 6 (arguing that St. Onge's "opinion regarding the alleged incendiary nature of the fire fails to meet the federal standard for admissibility"); id. at 8 (arguing that Country Mutual "cannot show that Mr. St. Onge's opinion regarding the alleged incendiary nature of the fire is admissible").) He concluded his Memorandum by "urg[ing] the court to exclude . . . St. Onge's opinion *that the fire at the Somnis house was an incendiary fire*." (Id. at 14 (emphasis added).)

At oral argument, however, it became clear that Somnis was seeking to exclude more than just St. Onge's opinion that the fire was incendiary. Rather, he suggested that the Court should preclude St. Onge from testifying at trial at all, including discussing his examination of the fire scene and the reasons why he excluded accidental causes for the fire. Putting aside whether it was appropriate for Somnis to expand the scope of his

Motion at oral argument, there is no principled basis to preclude St. Onge from testifying on such topics.

Notably, Somnis has nowhere argued that St. Onge is unqualified to render opinions regarding accidental causes (or the lack thereof) based on his knowledge, training, or experience, nor could the Court so conclude from the current record. Furthermore, courts repeatedly have found it appropriate for a fire investigator to (1) describe the manner in which he examined a fire scene, (2) explain why he excluded accidental causes for a fire, and (3) offer opinions regarding the location of a fire's origin. See, e.g., Hickerson v. Pride Mobility Prods. Corp., 470 F.3d 1252, 1257-58 (8th Cir. 2006); Weisgram, 169 F.3d at 519 ("[A]s a qualified expert in fire investigation, Freeman was free to testify – as he did – that the burn and smoke patterns and other physical evidence indicated that, in his opinion, the fire started in the entryway and radiated to the sofa.").

Nevertheless, Somnis contended at oral argument that St. Onge must not testify at trial because, in his view, permitting the jury to learn he did not find an accidental cause would lead it to *speculate* the fire was incendiary. Yet, the Court does not believe such a conclusion would be speculative; rather, it would be a reasonable *inference*. Indeed, the absence of an accidental explanation for a fire frequently has been cited as a sufficient basis for a finding of arson. See, e.g., Fitzgerald v. Great Cent. Ins. Co., 842 F.2d 157, 158 (6th Cir. 1988) (jury's finding of arson supported by testimony of expert who "eliminated all other natural or accidental causes in the area where the fire originated"); Weber v. Travelers Home & Marine Ins. Co., __ F. Supp. 2d __, 2011 WL 2728303, at *8 (D. Minn. July 13, 2011) (Kyle, J.) (noting that arson is "one permissible inference" from "the

absence of evidence suggesting an accidental cause"); Reitzner v. Am. Family Mut. Ins. Co., No. A08-0747, 2009 WL 910998, at *5 (Minn. Ct. App. Apr. 7, 2009) (insurer made "strong showing that the fire was incendiary" by "eliminating all accidental causes"). Under Somnis's logic, no jury could find arson unless an investigator actually located physical evidence (such as an accelerant) indicating a fire was intentionally set. Such a requirement has no foundation in the law and would not make intuitive sense, as physical evidence of arson often is consumed by the fire itself. Hence, courts repeatedly have held that "[i]n establishing . . . [a] fire was of incendiary origin, . . . it is not essential to show that some highly combustible material was employed. *Incendiarism may be shown by . . . demonstrating the improbability that the fire had resulted from accidental or natural causes*." Hughes v. State, 251 A.2d 373, 376 (Md. Ct. Spec. App. 1969) (emphasis added); accord, e.g., Riner v. Commonwealth, 601 S.E.2d 555, 575 (Va. 2004) ("When a fact-finder has accepted the testimony of a qualified expert witness, which negates every reasonable possibility that a fire was of accidental origin, we cannot hold the evidence insufficient, as a matter of law, to support a finding that the fire was of incendiary origin."); State v. Blocker, 31 S.E.2d 908, 910 (S.C. 1944) ("While there is usually little difficulty in proving a burning, it is frequently exceedingly difficult to prove the criminal agency of some person in causing the burning. . . . [T]he criminal agency is shown by the absence of circumstances, conditions, and surroundings indicating that the fire resulted from an accidental cause.").

Furthermore, the jury will be able to base its arson determination (or lack thereof) on far more than just St. Onge's testimony. Notably, Country Mutual also intends to

proffer evidence indicating that Somnis (1) was experiencing financial difficulty around the time of the fire and (2) had an opportunity to set it. The company learned during discovery that Somnis had tried to sell his house in 2008 and 2009 and was experiencing financial problems around the time of the fire. It also learned that he was the only person living in the house on the fateful day and was not home when the fire occurred. Courts have repeatedly recognized the importance of such evidence in arson cases, see, e.g., Thomure v. Truck Ins. Exch., 781 F.2d 141, 142-43 (8th Cir. 1986) (*per curiam*); Weber, 2011 WL 2728303, at *8-9; Simons v. State, No. C9-95-2561, 1996 WL 469364, at *3 (Minn. Ct. App. Aug. 20, 1996), which – when combined with evidence indicating an incendiary origin – provides a sufficient basis to conclude that arson was a fire's likely cause. See, e.g., Quast v. Prudential Prop. & Cas. Co., 267 N.W.2d 493, 495 (Minn. 1978) ("[M]otive . . . , together with the fire's incendiary origin, is enough to defeat [a] claim for payment under [an] insurance policy."); Reitzner, 2009 WL 910998, at *4; Summit Fid. & Sur. Co. v. Don Stern Enters., Inc., No. C3-95-2099, 1996 WL 266419, at *3 (Minn. Ct. App. May 21, 1996); Montgomery v. N. Star Mut. Ins. Co., No. C2-93-64, 1993 WL 430347, at *1 (Minn. Ct. App. Oct. 26, 1993); DeMarais v. N. Star Mut. Ins. Co., 405 N.W.2d 507, 509 (Minn. Ct. App. 1987).

For these reasons, the Court rejects Somnis's "new" argument that St. Onge should be precluded from testifying at trial regarding the absence of accidental causes for the fire. However, this leaves unresolved the question originally posed by Somnis's Motion: may St. Onge opine that the fire was, in fact, *incendiary*? In the Court's view, this question must be answered in the negative.

The parties have expended significant portions of their briefs arguing whether St. Onge's opinion is sufficiently "reliable" to be admissible under Daubert. (See Pl. Mem. at 8-13; Mem. in Opp'n at 10-15; Reply at 2-11.) But assuming *arguendo* the "reasoning or methodology underlying [the opinion] is scientifically valid," Daubert, 509 U.S. at 592-93 – a proposition not entirely free from doubt – it is nevertheless excludable because it would not help the jury.[2] Stated differently, the opinion would not "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

As discussed above, an (unstated) inference undergirds St. Onge's opinion: the absence of an accidental explanation suggests the fire was incendiary. Yet, the Court perceives no reason why an expert is necessary to draw that inference for the jury. Indeed, once St. Onge testifies that he could not identify an accidental cause for the fire, the jury

[2] The process employed by St. Onge – deeming a fire intentional after systematically ruling out all accidental causes – is known in the fire-investigation community as "negative corpus." 5 Faigman, Kaye, Saks & Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony § 39:65 (2011-12 ed.) ("Modern Scientific Evidence"). In 1992, negative corpus was first accepted as valid by the National Fire Protection Association and incorporated into Section 921 of its "Guide for Fire and Explosion Investigations," a leading treatise on fire investigation techniques. See http://www.nafi921.com/about.htm (last visited December 29, 2011). This was controversial, as the conclusion that a fire was intentional due to the *lack* of evidence of an accidental cause is an untestable hypothesis and, hence, inconsistent with the scientific method. See, e.g., Daubert, 509 U.S. at 590 ("[I]n order to qualify as 'scientific knowledge' [under Rule 702,] an inference or assertion must be derived by the scientific method."); Caraker v. Sandoz Pharms. Corp., 188 F. Supp. 2d 1026, 1030 (S.D. Ill. 2001) (noting the "hallmark" for reliability of an expert's opinion is "the scientific method, *i.e.*, the generation of testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication"). Accordingly, some courts have rejected negative corpus as a basis for finding arson, see, e.g., Mich. Millers Mut. Ins. Corp. v. Benfield, 140 F.3d 915, 920-21 (11th Cir. 1998); Commonwealth v. Moyer, 419 A.2d 717, 719-20 (Pa. Super. Ct. 1980), and even Section 921 previously noted that negative corpus was appropriate only "in limited circumstances." Modern Scientific Evidence § 39:65. In 2011, after much deliberation, the NFPA rejected negative corpus and revised Section 921 to provide that the "process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited." Id.

will be capable of concluding on its own whether the fire was intentional. His opinion is excludable, therefore, because an expert who simply "draws inferences or reaches conclusions within the jury's competence" does not provide "helpful" testimony under Rule 702. Nichols v. Am. Nat'l Ins. Co., 154 F.3d 875, 883 (8th Cir. 1998); accord, e.g., Williams v. Pro-Tec, Inc., 908 F.2d 345, 348-49 (8th Cir. 1990) (expert's opinion properly excluded where jury was "apprised of all the relevant facts" and "equally able to draw the asserted conclusion"); United States v. Arenal, 768 F.2d 263, 269-70 (8th Cir. 1985) (district court abused its discretion in permitting police officer to testify about inference to be drawn from evidence because, once the evidence was in the record, "the jury was competent to draw its own conclusion"). Simply put, "expert testimony may be admitted [only] where the inferences that are sought to be drawn are inferences that a jury could not draw on its own." United States v. Hines, 55 F. Supp. 2d 62, 64 (D. Mass. 1999).

Federal Rule of Evidence 403 also counsels against permitting St. Onge to testify that the fire was intentional.[3] Given that "[e]xpert evidence can be both powerful and quite misleading," Daubert, 509 U.S. at 595, the Court must be particularly careful to exclude such testimony if it might lead the jury to simply rely on the expert's opinion and "surrender[] [its] own common sense." Westcott v. Crinklaw, 68 F.3d 1073, 1076 (8th Cir. 1995) (citations omitted). Permitting St. Onge to draw an inference that the jury can reach on its own would do "little more than put[] his imprimatur on the defendant's case,"

[3] Although Somnis did not invoke Rule 403 in his Motion, "Daubert makes it clear that when assessing the admissibility of proffered scientific expert testimony under Rule 702, the trial court must also take into account the interplay of other relevant rules of evidence, such as Rule 403." United States v. Kime, 99 F.3d 870, 884 (8th Cir. 1996) (citation omitted).

Tuli v. Brigham & Women's Hosp., Inc., 592 F. Supp. 2d 208, 212 (D. Mass. 2009), and, in essence, simply "tell the jury what result to reach." Lee, 616 F.3d at 809 (quoting Fed. R. Evid. 704 advisory committee's note). As succinctly stated in Hines, it is for "[t]he jury . . . to draw reasonable inferences from the firsthand data. When an expert witness is called upon to draw those inferences, several concerns are raised. . . . [A] certain patina attaches to an expert's testimony unlike any other witness; this is 'science,' a professional's judgment, the jury may think, and give more credence to the testimony than it may deserve." 55 F. Supp. 2d at 64. These concerns are manifest here.

CONCLUSION

For the reasons set forth above, St. Onge may testify at trial that his examination of the fire scene failed to reveal an accidental cause for the fire. However, his opinion that the fire was incendiary "would not be helpful because it would not tell the jury anything that lay persons could not logically deduce on their own; []he would be drawing h[is] conclusion in the same manner as lay persons, i.e., by exercising simple logic." Ruminer v. Gen. Motors Corp., No. 4:03-CV-00349, 2006 WL 287945, at *13 (E.D. Ark. Feb. 6, 2006). To the extent County Mutual believes the jury should reach that conclusion, it may press that point in its closing argument. See In re Zyprexa Prods. Liab. Litig., 489 F. Supp. 2d 230, 283 (E.D.N.Y. 2007) (Weinstein, J.) ("Expert testimony should not merely reiterate arguments based on inferences that can be drawn by laypersons; those can properly be advanced by the parties in their summations.").

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Somnis's Motion (Doc. No. 13) is **GRANTED IN PART** and **DENIED**

IN PART. The Motion is **GRANTED** to the extent it seeks to preclude St. Onge from testifying at trial (orally or otherwise) that the fire was incendiary. In all other respects, the Motion is **DENIED**.

Dated: January 3, 2012

s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy Somnis, Court File No. 11 -CV-00324 (RHK/LIB)

Plaintiff,

vs.

Country Mutual Insurance Company,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO EXCLUDE THE EXPERT OPINION OF GREGORY ST. ONGE

INTRODUCTION

This matter stems from a fire that occurred at the home of Jeremy Somnis ("Plaintiff" or "Mr. Somnis") in early July of 2009. The fire caused extensive damage to the home. The fire also caused extensive damage to personal property located in the home.

Following the fire, Mr. Somnis made a claim to his homeowner's insurer, Country Mutual Insurance Company ("Country Mutual" or "Defendant"). Country Mutual commenced an investigation that lasted for nearly a full year. Finally, in June of 2010, Country Mutual sent a letter to Mr. Somnis stating that the claim had been denied. Country Mutual bases its denial on an opinion that the fire was "incendiary," meaning that Mr. Somnis had a part in starting the fire. Mr. Somnis had no part in starting the fire at his home.

Country Mutual bases its denial on an expert opinion from Gregory St. Onge ("Mr. St. Onge") of Ember Investigations. Mr. St. Onge alleges that the fire was incendiary because he could not find a cause for the fire. Fire investigators call this technique "Negative Corpus."[1] Negative Corpus is an investigative method that has been repudiated by the fire investigation community as shown in the 2011 Edition of NFPA® 921. Mr. St. Onge's opinion regarding the alleged incendiary nature of the fire fails to pass scrutiny under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As such, the Court should employ its gatekeeper role to exclude Mr. St. Onge's opinion.

FACTS

1. Mr. Somnis is the owner of a home at 934 Cutoff Road near Grand Marais, Minnesota ("Somnis Home") and was the owner of that home on July 2, 2009. Jeremy T. Somnis Affidavit ("Somnis Aff'd") ¶4.

[1] *See* NFPA 921 Section 18.6.5: Inappropriate Use of the Process of Elimination. The process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no evidence of its existence, is referred to by some investigators as "negative corpus." Negative corpus has typically been used in classifying fires as incendiary, although the process has also been used to characterize fires classified as accidental. This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited. Any hypothesis formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.

2. Mr. Somnis purchased a policy of insurance on the Somnis Home from Country Mutual. Plaintiff's Complaint at paragraph 4 and Answer of Defendant ("Def's Ans.") at paragraph 4.

3. On July 2, 2009, a fire occurred at the Somnis Home and both the home and personal property in the Somnis Home were damaged. Somnis Aff'd ¶6.

4. Country Mutual admits that a fire occurred at the Somnis Home on or about July 2, 2009. Def's Ans. ¶5.

5. Mr. Somnis submitted a claim to Country Mutual for damages or loss caused by the fire. Somnis Aff'd ¶7; Def's Ans. ¶7.

6. Country Mutual has specifically denied that Mr. Somnis is entitled to coverage under the policy of insurance which it issued. Def's Ans. ¶16.

7. On June 3, 2010, Country Mutual sent Mr. Somnis a letter denying his claim for payment under the policy. A copy of the letter is appended as Attachment A to the Somnis Aff'd.

8. In connection with discovery in this proceeding, counsel for Country Mutual provided counsel for plaintiff with an expert disclosure disclosing Gregory St. Onge of Ember Investigations as an expert witness. Appended to the disclosure is a report by Mr. St. Onge titled "Jeremy Somnis House Fire, July 2, 2009" ("St. Onge Report"). A copy of the disclosure and the St. Onge report is appended to the Affidavit of Harold A. Frederick (Frederick Aff'd) as Attachment D.

9. The National Fire Protective Association (NFPA) is a non-profit organization founded in 1896, which among other activities, advocates for consensus

codes and standards, research, training and education. To that end, NFPA has in place a committee known as the Technical Committee on Fire Investigation. The committee prepares, and NFPA periodically releases, NFPA 921 *Guide for Fire and Explosion Investigations*. Frederick Aff'd ¶¶3-6.

10. The methodology and procedures set out in NFPA 921 are utilized by fire investigators in their work. In the year 2000, the United States Department of Justice released a research report which identified NFPA 921 as a benchmark for the training and expertise of those who purport to be experts in origin and cause determination of fire. Frederick Aff'd ¶6.

11. The current edition of NFPA 921 is the 2011 Edition. Relevant provisions of the 2011 Edition are set out at Frederick Aff'd pp. 8, 9 and 10.

12. The 2011 Edition of NFPA 921 was approved as an American National Standard on January 3, 2011. Frederick Aff'd ¶5. The American National Standards Institute ("ANSI") is a private non-profit organization that administers and coordinates the U.S. Voluntary Standardization and Conformity Assessment System. *See* ANSI website at ansi.org. A copy of material from that website which provides information about the organization is appended as Attachment A to the Frederick Affidavit. ANSI operates an online Standards Store. A copy of the page from the ANSI Standards Store that describes the 2011 Edition of NFPA 921 is Attachment B to the Fredrick Affidavit.

Here are excerpts from the ANSI description of the 2011 edition of NFPA 921 as posted at the ANSI Standards Store.

NFPA 921: Guide for Fire and Explosion Investigations, 2011 Edition

> New coverage in the 2011 *NFPA 921* guides first investigators through a complex process.
>
> Updated based on recent court cases, scientific data, and trends, the 2011 edition of *NFPA 921: Guide for Fire & Explosion Investigations* presents the information you need for reliable field work and conclusions that hold up in a court of law. Major revisions give fire investigators, litigators, and insurance professionals more comprehensive and effective guidance for today's world.
>
> Major revisions in *NFPA 921* help you render opinions that stand up to scrutiny:
>
> > An all-new section on Report Review Procedure in Chapter 4 outlines the review process in fire investigation and discusses peer vs. technical review.
> >
> > Rewritten Chapter 18, Cause helps ensure fire investigators use scientific methodology when developing hypotheses, to avoid *Daubert* challenges resulting from the absence of supportive evidence commonly known as "negative corpus."
>
> . . .
>
> Use the 2011 *NFPA 921*'s total system for safe and accurate fire investigations.

ARGUMENT

1. **Legal Standard.**

Mr. Somnis brought a suit against Country Mutual in state court in Cook County, where his home is located. However, Country Mutual removed the case to the Federal Court on diversity grounds. Admissibility of expert opinion in diversity cases is governed by federal law, *Clark v. Heidrick*, 150 F.3d 912, 914 (8th Cir. 1998).

Country Mutual retained fire investigator Gregory St. Onge of Ember Investigations. Mr. St. Onge purports to be an expert in cause and origin fire

investigations. However, Mr. St. Onge's opinion regarding the alleged incendiary nature of the fire fails to meet the federal standard for admissibility. As such, his opinion should be excluded.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert opinions. Rule 702 states:

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

Fed. R. Evid. 702.

Expert testimony must meet three prerequisites in order to be admitted under Rule 702. First, evidence based on scientific, technical, or other specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. Second, the proposed witness must be qualified to assist the finder of fact. Third, the proposed evidence must be reliable or trustworthy in an evidentiary sense, so that, if the finder of fact accepts it as true, it provides the assistance that the finder of fact requires. *Id.*; *see also Daubert*, 509 U.S. 579 at 591 (1993). The basis for the third prerequisite lies in the 2000 amendment to Rule 702 that added the following language to the former rule: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the

facts of the case." The language of the amendment codifies *Daubert* and its progeny. *See* Rule 702 Comm. Note.

In *Daubert*, the U.S. Supreme Court emphasized the district court's gatekeeper role when screening expert testimony for relevance and reliability. *Daubert*, 509 U.S. at 591-93; *see also Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1040 (8th Cir. 1999) (during the evaluation "of expert testimony under Federal Rule of Evidence 702, the district court must look to both the relevancy and the reliability of the testimony"). In *Kumho*, the U.S. Supreme Court clarified that the district court's gatekeeper role extends to all expert testimony, not just testimony based on science. *Kumho Tire Co., v. Carmichael*, 526 U.S. 137 (1999).

Daubert provides a number of nonexclusive factors that a court can apply in performing its gatekeeper role: "(1) whether the theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted." *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (*citing Daubert*, 509 U.S. at 593-94). *Daubert's* progeny provides additional factors such as: whether the expertise was developed for litigation or naturally flowed from the expert's research, and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case. *See Bogosian v. Mercedes-Benz of N. Am., Inc.*, 104 F.3d 472, 479 (1st Cir. 1997).

Of great importance in this case is the fact that "… nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is

connected to existing data only by the *ipse dixit* of the expert. That is, a court may conclude that there is simply too great an analytical gap between the data and the opinion offered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 at 146 (1997). To be reliable, and therefore admissible, the opinion must be proven, not simply asserted. And, the proponent of the expert testimony must prove that it is admissible. *Daubert*, 509 U.S. at 592.

In this case, Country Mutual cannot show that Mr. St. Onge's opinion regarding the alleged incendiary nature of the fire is admissible. As detailed below, Mr. St. Onge's opinion should be excluded because it is (1) based on an absence of evidence, and not sufficient facts or data, (2) it cannot be tested, and (3) it is based on a methodology that has been specifically rejected by Mr. St. Onge's peers as shown in the guidance provided by NFPA 921.[2]

2. Mr. St. Onge's peers have flatly repudiated Negative Corpus as an investigative methodology.

A determination that a fire is incendiary because no evidence of an accidental cause was found is known among fire investigators as Negative Corpus. On page one of his report, Mr. St. Onge included a Summary of the results of his investigation of the Somnis house fire. The summary states as follows:

> **Summary**
>
> No evidence of an accidental fire cause was found in this examination of the Somnis house. This fire is an incendiary fire.

[2] *See* Rule 702 Comm. Note: "[T]he court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community…"

For his conclusion at page 8 of the same report, investigator St. Onge, states:

> **Conclusion**
>
> After systematically examining the fire scene, no accidental fire cause has been found that explains the cause of this fire. In my opinion, this fire is incendiary fire started by some person on the couch in the basement family room of the house.

Negative Corpus as a method for determining that a fire is incendiary was questioned in a 2006 paper by Dennis W. Smith presented to the International Symposium on Fire Investigation Science and Technology. The paper was published as a part of the proceedings at pages 313-325.[3] Mr. Smith observed that one of the big problems with Negative Corpus is the inherent conflict with the Scientific Method and the process of hypothesis development. Page 316.

The National Fire Protective Association ("NFPA") is an international non-profit organization that was founded in 1896. The NFPA publishes codes and standards dealing with fires and fire safety. Affidavit of Harold A. Frederick paragraph 3 ("Frederick Aff'd at ¶3"). Among the standards established by NFPA is NFPA 921 A Guide for Fire and Explosion Investigations. The 2011 Edition of NFPA 921 is the Seventh Edition, the First Edition having been published in 1992. Frederick Aff'd ¶7. In the year 2000, the United States Department of Justice identified NFPA 921 as a "benchmark for the training and expertise of everyone who purports to be an expert in the origin and cause

[3] Mr. Smith is associated with Kodiak Fire & Safety Consulting, a part of Kodiak Enterprises, Inc., located at Fort Wayne, Indiana. A copy of the reference paper is available online at kodiakconsulting.com by clicking on the published articles tab. The article is a part of the list of articles there shown. A copy of Mr. Smith's CV also appears online at the same website.

determination of fires." Frederick Aff'd ¶9. Further, the 1995 edition of NFPA 921 was referenced and relied upon by the Court in *American Family Insurance Group v. JVC American Corp.*, 2011 WL 1618454 (D.Minn.).

The 2011 Edition of NFPA 921 repudiates Negative Corpus stating that "the process is not consistent with the Scientific Method. Sections 18.6.5 and 18.6.5.1 provide:

> **18.6.5 Inappropriate Use of the Process of Elimination**. The process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin, and then claiming such methodology is proof of an ignition source for which there is no evidence of its existence, is referred to by some investigators as "negative corpus." Negative corpus has typically been used in classifying fires as incendiary, although the process has also been used to characterize fires classified as accidental. **This process is not consistent with the Scientific Method, is inappropriate, and should not be used because it generates un-testable hypotheses, and may result in incorrect determinations of the ignition source and first fuel ignited.** Any hypothesis formulated for the causal factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts. Those facts are derived from evidence, observations, calculations, experiments, and the laws of science. Speculative information cannot be included in the analysis.

(emphasis added)

> **18.6.5.1 Cause Undetermined**. In the circumstance where all hypothesized fire causes have been eliminated and the investigator is left with no hypothesis that is evidenced by the facts of the investigation, the only choice for the investigator is to opine that the fire cause, or specific causal factors, remains undetermined. It is improper to base hypotheses on the absence of any supportive evidence (*see 11.5.2, Types of Evidence*). That is, it is improper to opine a specific ignition source that has no evidence to support it even though all other hypothesized sources were eliminated.

(Frederick Aff'd ¶9)

There is a corollary rejection of Negative Corpus in Section 4.3.6.1 of the 2011 Edition of NFPA 921, which provides:

> **4.3.6.1** Any hypothesis that is incapable of being tested is an invalid hypothesis. **A hypothesis developed based on the absence of data is an example of a hypothesis that is incapable of being tested.** The inability to refute a hypothesis does not mean that the hypothesis is true.

(emphasis added) (Frederick Aff'd ¶10).

3. Mr. St. Onge's report fails to pass scrutiny under Rule 702 and Daubert-Kumho.

Whether the opinion of investigator St. Onge is analyzed pursuant *Daubert*, 509 U.S. 579 (1993) or *Kumho Tire Co.*, 526 U.S. 137 (1999), or both, it should not be allowed. Under *Daubert* a significant part of the threshold test is "whether the reasoning or methodology underlying the testing is scientifically valid." *Daubert* at 592, 593. In *Daubert*, the court said "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., 'good grounds,' based on what is known." *Id.* at 590. Further, the court said "[o]rdinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Id.* at 593. The court said "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication." *Id*. NFPA 921, Section 18.6.5 declares that the method employed by investigator St. Onge "is not consistent with the Scientific Method." Further, 18.6.5 states that it generates "un-testable hypothesis". Chapter 4 states at Section 4.3.6.1 that "[a]ny hypothesis that is incapable of being tested is an invalid

hypothesis." The hypothesis advanced by investigator St. Onge cannot be tested because it is based on the absence of data. In *Daubert*, the court quoted "C. Hempel, *Philosophy of Natural Science*, 49 (1966), "statements constituting a scientific explanation must be capable of empirical test." *Daubert* at 593.[4]

The National Fire Protective Association has in place a Technical Committee on Fire Investigation (the "NFPA Technical Committee") which considers debates and updates the NFPA 921 *Guide for Fire and Explosive Investigations*. In the fire investigation field, NFPA 921 is a peer established document. The 2011 Edition has been approved as an American National Standard by ANSI. The NFPA Technical Committee has determined that the "reasoning [and] methodology underlying" Negative Corpus is not "scientifically valid."

Under *Kumho*, the testimony of an experienced based expert is subject to the trial court's gatekeeper role to "ensure the reliability and relevance of the proposed expert testimony." *Kumho* at 152. A key phrase in *Kumho* is "intellectual rigor". *Id.* at 152. In 2010, the NFPA Technical Committee considered Negative Corpus in preparing the 2011 Edition of NFPA 921. Section 4.3.6.1 lays out why Negative Corpus does not pass the *Kumho* intellectual rigor test. Negative Corpus is based on a hypothesis that is incapable of being tested and as applied to the instant case, relies on the inability of the plaintiff to refute a hypothesis that is not capable of being tested. Section 4.3.6.1 states that the inability to refute a hypothesis does not mean the hypothesis is true. It is no accident that

[4] "Empirical" means "capable of being verified or disproved by observation or experiment." *Webster's New Collegiate Dictionary*.

the Explanatory Material in Annex A to the 2011 Edition to of NFPA 921 with regard to Section 4.3.6.1 refers to textbooks on critical thinking, logic and faulty reasoning. Through intellectual rigor, the NFPA 921 Technical Committee determined that a hypothetical that is developed based on absence of data cannot be tested. Therefore, it is invalid and the inability to refute such a hypothesis does not make that which is invalid to begin with true.

The analysis of the court in *Daubert* and *Kumho* reflects a keen interest by the Court in the Scientific Method and intellectual rigor. That interest has carried over to other decisions of the court and outside activity on the subject by some members of the court. Justice Steven Briar wrote the introduction to the Second Edition of the Reference Manual on Scientific Evidence published by the Federal Judicial Center.[5] The Preface to the Second Edition of the Reference Manual on Scientific Evidence states that the First Edition of the Reference Manual was republished by numerous private publishers and used in a variety of educational programs for judge's, attorneys, and law students. Plaintiff suggests that the decisions of the court in *Daubert* and *Kumho* and related cases coupled with the wide distribution of the Reference Manual on Scientific Evidence prepared by the Federal Judicial Center inspired fire cause and origin investigators including the NFPA Technical Committee to analyze Negative Corpus. That analysis led to a total rejection of Negative Corpus.

[5] An electronic version of the Reference Manual on Scientific Evidence, Second Edition can be downloaded from the Federal Judicial Center's site on the world wide web at http://air.fjc.gov/public/fjcweb.nsf/pages/16.

CONCLUSION

What is striking about the repudiation of Negative Corpus by the NFPA Technical Committee on Fire Investigations is its straightforward declarative form coupled with expressed reasoning as shown in Section 4.3.6.1 and Section 18.6.5. The repudiation is clear and complete. Although, NFPA 921 is a Guide for Fire Investigators, those investigators who recognize NFPA 921 are left with no more wiggle room on Negative Corpus. The process of elimination employed by investigator St. Onge "should not be used because it generates un-tested hypotheses." Section 18.6.5. "Any hypothesis that is incapable of being tested is an invalid hypothesis." Section 4.3.6.1. The "process is not consistent with the Scientific Method." Section 18.6.5. The court stated in *American Family Insurance Group v. JVC Americus Corp.* that NFPA 921 "emphasizes that the use of the Scientific Method is appropriate in reaching conclusions as to fire cause and origin." *American Family Insurance Group* at 3. The same endorsement of the Scientific Method is contained in Section 4.2 of the 2011 Edition of NFPA 921. The NFPA Technical Committee has effectively declared that Negative Corpus is inherently inconsistent with the Scientific Method that is the foundation of NFPA 921, and therefore has closed the gate on it.

In exercising its gatekeeper role as established in *Daubert* and *Kumho,* plaintiff urges the court to exclude investigator St. Onge's opinion that the fire at the Somnis Home was an incendiary fire. Mr. St. Onge's opinion, and the basis for it fails to be meet the requirements of *Daubert* and *Kumho*.

Dated: November 1, 2011

FRYBERGER, BUCHANAN, SMITH & FREDERICK, P.A.

By:/s/ Harold A. Frederick
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy Somnis,

Plaintiff,

v.

Country Mutual Insurance Company,

Defendant.

Court File No. 11-cv-00324 (RHK/LIB)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE THE EXPERT OPINION OF GREGORY ST. ONGE

INTRODUCTION

Plaintiff Jeremy Somnis' motion to exclude the expert opinion of Defendant COUNTRY Mutual Insurance Company's expert Gregory St. Onge is skewed from the outset. Somnis bases his motion on language contained within the 2011 Edition of NFPA 921, one of several guides or treatises referenced by fire investigators. The 2011 Edition of NFPA 921 did not go into effect until January 3, 2011. The Somnis fire and related investigation occurred in 2009. At the time of the investigation, the 2008 Edition of NFPA 921 was in effect. The sole basis for Somnis' motion is his reliance upon one set of suggested guidelines that was not in effect during the relevant time period.

In addition, Somnis misconstrues the 2011 Edition of NFPA 921's commentary on "negative corpus" to mean that a qualified fire investigator may not opine that all accidental causes of fire have been examined and excluded. In making this argument, Somnis relies heavily on the supporting Affidavit of his attorney – who is not a certified fire investigator – opining despite an utter lack of foundation on the methodologies set

forth in NFPA 921 and on the function of the American National Standards Institute. (*See* Affidavit of Harold A. Frederick [Docket No. 16] at ¶ ¶ 3-4, 8-9). Moreover, Somnis inappropriately views the protocols outlined in NFPA 921 as being synonymous with the standards required under Fed. R. Evid. 702.

Somnis' motion lacks merit and should be denied. St. Onge's expert report documents the reliable methods used in pinpointing where the fire started and in ruling out all possible accidental causes of ignition.

BACKGROUND

Somnis submitted a claim to Defendant COUNTRY Mutual for a July 2, 2009 fire that occurred at his residence. He sought payment for structural damage and for personal property loss. As part of its investigation of Somnis' claim, Defendant COUNTRY Mutual retained fire investigator Greg St. Onge to conduct a fire origin and cause investigation. (Decl. of St. Onge, ¶ 16). Anderson Engineering was also retained to examine the residence's electrical system and appliances to determine what role, if any, they played in the cause and/or spread of the fire. (Declaration of Tamara L. Rollins, Ex. 1). An inspection of the residence was completed on August 24, 2009. *Id*. At that time, Somnis was also interviewed. *Id.* On October 31, 2009, St. Onge issued his report detailing his findings, opinions, and conclusions. (Decl. of St. Onge, Ex. B).

The fire at issue originated from a hide-a-bed/couch in the basement of the Somnis' residence. (Decl. of St. Onge, Ex. B). In his report, St. Onge notes that Somnis advised that he was the only person staying at the residence at the time of the fire. *Id.* St. Onge also states that Somnis' whereabouts at the time of the fire have not been verified.

Id. Further, St. Onge's examination of the fire scene showed that there was no electrical source for the fire and that there was nothing on the couch to start the fire. *Id.*

Somnis was interviewed by St. Onge. *Id.* Somnis also appeared for an examination under oath. (Declaration of Tamara L. Rollins, Ex. 3). Somnis represented to COUNTRY that his dog caused damage in the family room – tossing about blankets, stuffed animals, and papers. *Id.* Somnis claimed that his dog's actions caused something to fall on the space heater and start the fire. *Id.* Somnis, however, did not provide a consistent story regarding the damage allegedly caused by his dog. His story changed between his interview with St. Onge and his examination under oath.

Somnis' testimony establishes that he modified his work day on the day of the fire. (Declaration of Tamara L. Rollins, Ex. 3). His whereabouts at the time of the fire have not been confirmed. (Decl. of St. Onge, Ex. B).

When asked by COUNTRY, Somnis denied any attempts to sell his home in 2009. (Declaration of Tamara L. Rollins, Ex. 3). Yet, Somnis' real estate agent confirmed that Somnis attempted to sell his home in 2008 and 2009. (Declaration of Tamara L. Rollins, Ex. 4). No offers were received. (Declaration of Tamara L. Rollins, Ex. 4). At the time of the July 2, 2009 fire, Somnis was behind in his mortgage payments. (Declaration of Tamara L. Rollins, Ex. 3). Somnis' claimed income was not sufficient to meet his monthly expenses. (Declaration of Tamara L. Rollins, Ex. 3).

Somnis' claim was ultimately denied because COUNTRY's investigation established that the claim was the result of an intentional loss. (Declaration of Tamara L. Rollins, Ex. 5). Additionally, the claim was denied because Somnis made material

misrepresentations to COUNTRY in violation of the policy's Concealment or Fraud provision. (Declaration of Tamara L. Rollins, Ex. 5).

Somnis commenced litigation seeking payment of insurance benefits. As part of discovery, COUNTRY served expert disclosures for Greg St. Onge and Andrew Paris of Anderson Engineering. (Declaration of Tamara L. Rollins, ¶ 7). Somnis did not identify any experts. (Declaration of Tamara L. Rollins, ¶ 8). He did not depose St. Onge or Anderson Engineering. (Declaration of Tamara L. Rollins, ¶ 9). Somnis offers no opinions to counter the conclusions reached by St. Onge and Anderson Engineering. (Declaration of Tamara L. Rollins, ¶ 8).

ARGUMENT

I. Standards for Excluding Evidence.

"**The exclusion of an expert's opinion is proper only if it is so fundamentally unsupported that it can offer no assistance to the jury**." *Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997) (internal quotations and citation omitted); *see also* Advisory Committee Notes to 2000 Amendments to Fed. R. Evid. 702 ("the rejection of expert testimony is the exception and not the rule"). Although courts serve a "gatekeeping" function when determining whether expert testimony is admissible under Fed. R. Evid. 702, doubts about the usefulness of an expert's testimony should be resolved in favor of admissibility. *U.S. v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011).

As this Court recently noted the threshold for the admission of expert testimony is low – expert testimony should be admitted if it "advances the trier of fact's understanding *to any degree*." *Cannon Technologies, Inc., v. Sensus Metering Systems, Inc.*, 2011 WL

221826, at *1 (D. Minn. Jan. 21, 2011) (quoting *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006)). The proffered expert testimony should only be excluded if it is "so fundamentally unsupported that it can offer no assistance to the jury." *Cannon Technologies, Inc.*, 2011 WL 221826, at *1 (quoting *United States v. Finch*, __ F.3d ___, 2011 WL 31517, at *3 (8th Cir. Jan. 6, 2011) (citations omitted)).

Indeed, any "gaps" in an expert's qualifications "go to the weight of the witness's testimony, not its admissibility." *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006) (citing 29 Charles Alan Wright & Victor James Gold, *Fed. Practice & Procedure: Evidence* § 6265 (1997)). Generally, "[t]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *United States v. Rodriguez*, 581 F.3d 775, 795 (8th Cir. 2009) (quoting *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997)), *cert. denied*, 131 S. Ct. 413 2010).

Under *Daubert*, courts may only allow expert testimony that is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597-98 (1993). Nonetheless, Rule 702 "reflects an attempt to liberalize" the rules governing admissibility of expert testimony and favors admissibility over exclusion. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) (citations omitted). Experts are permitted wide latitude in their opinions, including those not based on firsthand knowledge, so long as "the expert's opinion [has] a reliable basis in the knowledge and experience of the discipline. *Jahn v. Equine Services, PSC*, 233 F.3d 382, 388 (6th Cir. 2000).

Pursuant to Rule 702, district courts apply the following three-part test: (1) the scientific, technical, or specialized knowledge must be useful to the factfinder; (2) the witness must be "qualified to assist the finder of fact"; and (3) the evidence must be "reliable or trustworthy in an evidentiary sense." *Lauzon*, 270 F.3d at 686. Courts should analyze reliability "from a flexible, case-specific standpoint." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50 (1999). In *Kumho*, the supreme court set forth the following factors for evaluating reliability:

- whether the theory/technique can be or has been tested;
- whether it has been or is subject to peer review; and
- whether it is generally accepted within the relevant scientific community.

Id. (citing *Daubert*, 509 U.S. at 592–94). The inquiry into an expert's qualification to testify is to be a flexible one, with a focus on principles and methodology, not on the conclusions they generate. *Daubert*, 509 U.S. 579, 594 – 595. St. Onge's expected testimony satisfies the relevant standards and, therefore, Somnis' motion should be denied.

II. Qualifications of St. Onge.

St. Onge is a Certified Fire Investigator and a member of the International Association of Arson Investigators. (Decl. of St. Onge, ¶¶ 1 and 8). He is also a certified firefighter and law enforcement officer. (Decl. of St. Onge, ¶¶ 1 - 4). At the time of the Somnis fire investigation, St. Onge had more than 30 years experience with the prevention, detection, suppression, and investigation of fires. (Decl. of St. Onge, Ex. A). Since 1997, St. Onge has specialized in the investigation of fires, including fire

origin and cause, throughout Minnesota and Wisconsin. (Decl. of St. Onge, Ex. A). St. Onge is a qualified and professional investigator who, throughout the course of his career, has personally investigated more than 1,000 fire scenes. (Decl. of St. Onge, ¶ 13). For the past 14 years, on average, St. Onge has examined one new fire each week. (Decl. of St. Onge, ¶ 13). In addition, St. Onge has completed numerous fire investigation training programs and served as an instructor to others in the area of fire investigation. (Decl. of St. Onge, ¶¶ 6 and 11 and Ex. A). St. Onge has been accepted as an expert in state courts in Minnesota and Wisconsin. (Decl. of St. Onge, Ex. A). Based upon his education and extensive experience – qualifications that are not disputed by Somnis – St. Onge has sufficient skill, knowledge, experience, training, and education to qualify as a Rule 702 witness with specialized knowledge and the jury is entitled to hear about his investigation and conclusions.

III. St. Onge Methodically Investigated the Fire Scene.

The evidence, including St. Onge's report and declaration, details St. Onge's systematic approach to fire investigation including his examination of the scene and interviews. St. Onge works a fire from the outside-in to determine the cause and origin of a fire. (Decl. of St. Onge, ¶ 14). When St. Onge investigates a fire, including the Somnis fire, he considers and utilizes a number of resources to formulate his opinions. (Decl. of St. Onge, ¶ 15). The resources St. Onge utilizes include his knowledge, experience, education, training, and fire-investigation-related treatises and guides including, NFPA 921, *Ignition Handbook* by Dr. Vytenis Babrauskas, and *Kirk's Fire Investigation* by John D. DeHaan. (Decl. of St. Onge, ¶ 15).

During his investigation of the Somnis fire, St. Onge interviewed the firefighters who were present at the fire scene. (Decl. of St. Onge, Ex. B). St. Onge's report documents that firefighters arriving at Somnis' smoke-filled house only found flames burning on a wooden ceiling beam in the basement directly above the couch. *Id.* St. Onge's report also details his investigation of all appliances in the partially unfinished basement. *Id.* A fan was plugged into the receptacle behind the couch; Anderson Engineering found that the fan and receptacle showed no arcing in the power cord. Nor did Anderson Engineering find any arcing in the wires in the ceiling light above the hide-a-bed. *Id.*

Fire damage to the couch in the basement family room was heaviest where its back met the flat portion of the hide-a-bed. The fire had "moved laterally across the couch in both directions." St. Onge detected a burn pattern on the southeast basement wall, with fire having climbed up the wall from a woven basket on the east side of the couch. He also found fire had damaged a space heater tightly placed between the west side of the couch and the west wall. The lower part of the wall adjacent to the heater was not damaged, while the part of the wall above the heater – at the level of the couch – was damaged.

The examination of the space heater showed that the power cord – which was plugged into the west wall – had "arced." However, this small arc could not have started the fire as it was placed on concrete flooring. (Decl. of St. Onge, Ex. B). Moreover, as St. Onge explains, had a fire started inside the heater, an arc would have appeared inside the heater and shut the power down before an arc occurred on the power cord. *Id.*

Instead, St. Onge opines, the fire attacked the outside of the space heater, with material (likely, from the hide-a-bed) burned across the top of the heater. *Id.* The screen on top of the heater was oxidized, with the plastic end caps melted away on its north side.

Anderson Engineering performed tests on an exemplar space heater to determine if bedding from the hide-a-bed could have been left on top of the heater and become hot enough to start a fire. (Declaration of Tamara L. Rollins, Ex. 1). When Anderson Engineering wrapped the heater in a blanket, temperatures inside the blanket never exceeded 160 degrees F, which would not be hot enough to cause a fire. *Id.* The actual space heater's sensors – designed to switch off the appliance if it became too hot – were also tested. *Id.* They were in excellent condition and would have shut down the heater before it could have started a fire. *Id.*

After explaining this thorough and pain-staking investigation, St. Onge concluded from the fire scene that the fire started on the couch, not from the space heater, fan, or overhead lighting. (Decl. of St. Onge, Ex. B). Rather than being the source of the fire, the space heater had been attacked by the fire. In St. Onge's words,

> There was nothing on the couch to start a fire. . . .
>
> * * *
>
> After systematically examining the fires scene, no accidental fire cause has been found that explains the cause of this fire. In my opinion, this fire is an incendiary fire started by some person on the couch in the basement family room of the house.

(Decl. of St. Onge, Ex. B). It is this conclusion that Somnis challenges. Somnis, however, offers no expert opinion to counter St. Onge's systematic analysis of the fire scene or the elimination of all accidental causes of the fire. (Declaration of Tamara L.

Rollins, ¶ 8). Somnis' objections lack any credible support and should be rejected by the Court.

III. St. Onge's Expert Opinion Is Relevant and Reliable.

Somnis' sole basis for seeking to exclude St. Onge's opinion is the theory that his report inappropriately engages in "negative corpus" as an investigative method, which Somnis maintains has been recently "repudiated" in the 2011 Edition of NFPA 921. In the first instance, NFPA is nothing more than a guide that may be utilized by fire investigators. (Decl. of St. Onge, ¶ 23). The failure to follow NFPA 921 has been rejected as a basis to exclude expert testimony. *Thompson v. State Farm Fire and Casualty Company*, 548 F.Supp.2d 588 (W.D. Tenn. 2008) (holding that fire investigator's failure to follow standards and protocol's in national fire protection association's guide did not automatically render the principles and methods underlying his investigation and testimony unreliable). NFPA 921 is just one of several accepted resources for fire investigations. (Decl. of St. Onge, ¶¶ 15 and 23). When he investigates a fire, St. Onge uses several guides or treatises, in combination with his training and experience. *Id*.

In addition to being nothing more than a guide, it is important to recognize that the 2011 Edition of NFPA 921 was not in effect at the time of the Somnis fire or the related investigation in 2009. The 2011 Edition of NFPA 921 was not published until January 3, 2011. (Decl. of St. Onge, ¶ 25). No aspect of the 2011 Edition of NFPA 921 is retroactive in its application. As a result, the entirety of Somnis' argument to exclude St. Onge is based upon a guide that was not even in effect during the relevant time period.

The Court should also disregard in its entirety the Affidavit of Harold A. Frederick, which discusses the NFPA, the ANSI, and the 2011 edition of the NFPA 921's treatment of "negative corpus." [Docket No. 16 at ¶ ¶ 3-4, 8-9]. In particular, Attorney Frederick's statement at paragraph 9 of his **Affidavit** -- "I have found in working with fire cause and origin investigators and by reading an authoritative text and literature in the field, that NFPA 921 is held up as reflecting the standard methodology for fire investigations" -- flies in the face of basic foundation standards.

Affiant Frederick is *an attorney, not a certified fire investigator.* He is neither a member of NFPA, nor on staff at ANSI. **Simply put, he lacks foundation to speak to the practices of NFPA and ANSI or to authenticate any documents issued by those agencies**. *See Auto. Ins., Co. of Harford, Conn. v. Abel*, 2010 WL 5014408, at *3 (D. Or. Dec. 3, 2010) (excluding NFPA 921 exhibit where "attorney who identified and offered NFPA 921 through his declaration is not a forensic fire investigator and cannot authenticate NFPA 921 nor establish that it is an industry standard").

Somnis also fails to acknowledge that the 2011 changes to NFPA 921 have been controversial. (Decl. of St. Onge, ¶ 25). In fact, at least one Chapter of the International Association of Arson Investigators has rejected the updates to NFPA 921. (Declaration of Tamara L. Rollins, Ex. 2). At its August 3, 2011 General Meeting, the Georgia Chapter of the IAAI recognized the NFPA 921 "as a resource guide, training manual, and not a standard or required guideline to be complied with in a fire investigation." *Id.* The Georgia IAAI further stated that the alteration of Chapter 18 "Fire Cause Determination" in NFPA 921 (2011), "does not accurately reflect existing evidentiary standards, or

acknowledge and recognized investigative procedures." *Id.* The Georgia Chapter also noted that the revised Chapter 18 "seeks to impose unreasonable and over-reaching standards upon the investigator." *Id.* The Georgia Chapter's rejection of the updated NFPA 921 supports the conclusion that NFPA 921 is not binding upon all investigators. Rather, it merely serves as one of several guides that may be utilized when conducting a fire investigation.

In any event, the relevant standard for the admissibility of St. Onge's expert opinion is set forth in *Daubert* – not in the NFPA.[1] Moreover, Somnis has failed to provide any authority to authenticate his belief that "negative corpus" constitutes an industry standard for forensic fire investigators. Certainly, his attorney's Affidavit does not provide the necessary authentication.

Analyzing St. Onge's opinion "from a flexible, case-specific standpoint," his theory that the fan, overhead light, and space heater were not ignition sources, that the fire started on the couch, and that the fire was an incendiary fire meets the standards of

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[1] Somnis does not allege that St. Onge deviated from the practices recommended in NFPA 921, apart from his purported non-compliance with the prohibition in the 2011 edition of NFPA 921 from engaging in a "negative corpus" determination. Ironically, in his motion papers, Somnis states, "the 1995 edition of NFPA 921 was referenced and relied upon by the Court in *American Family Insurance Group v. JVC American Corp.*, 2011 WL 1618454 (D. Minn.)." (*See* Plaintiff's Memorandum, p. 10). Thus, Somnis has argued that an expert's compliance with the pre-2011 version of NFPA 921 – which allowed "negative corpus" determinations – passed muster with this Court.

Notably, St. Onge's investigation and report were made in 2009, before promulgation of the 2011 edition. Relevant excerpts from prior editions of NFPA 921, none of which prohibited the "negative corpus" methodology, are attached to the Declaration of Greg St. Onge as Exhibits C and D.

Rule 702 and *Daubert.* Mr. Onge – a certified fire investigator – had each of these electrical appliances tested for internal arcing. From skills developed from his many years of experience in the field (August 1997 – to the present), he was able to detect burn patterns on the objects in the basement as well as on the walls and ceiling. Moreover, St. Onge meticulously documented his investigation of the fire scene with photographs that are appended to his report. (Decl. of St. Onge, Ex. B). In fact, this case bears a striking similarity to *Hickerson v. Pride Mobility Prods. Corp.*, 470 F.3d 1252 (8th Cir. 2006). There, the court allowed expert testimony as to the point of origin where that opinion was based upon a careful process of elimination:

> Mr. Schoffstall has extensive experience as a firefighter and fire investigator, and he is a certified fire investigator. This experience demonstrates that he is qualified in the area of expertise for which he has been designated. In fact, Defendants do not seriously contend that Mr. Schoffstall is unqualified to conduct a fire scene investigation and analysis to determine a point of origin. Rather, Defendants contend that his conclusions regarding causation and origin are unsupported by reliable methodology.
>
> We disagree. The methodology he used to generate his opinion is sound. He examined burn patterns, examined heat, fire, and smoke damage, considered this evidence in light of testimony regarding the fire, and identified a point of origin. He then considered as possible causes of the fire those devices that contained or were connected to a power source and that were located at the identified point of origin. He eliminated as possible sources those devices that were not in the area of origin or that were not connected to a power source and contained no internal power source. We can find nothing unreliable in this accepted and tested methodology. *See, e.g., Weisgram v. Marley Co.*, 169 F.3d 514, 519 (8th Cir.1999) ("Now, as a qualified expert in fire investigation, Freeman was free to testify-as he did-that the burn and smoke patterns and other physical evidence indicated that, in his opinion, the fire started in the entryway and radiated to the sofa.").
>
> * * *
>
> Based on the identification of a point of origin and the elimination of other possible causes, it is permissible for Mr. Schoffstall to testify as to the point of

> origin and to explain that he inferred through process of elimination that the PowerChair was the cause of the fire.

Id. at 1256-58 (holding fire expert's method reliable where he examined burn patterns, considered testimony, and identified point of origin).

Similarly, in the instant case, St. Onge was qualified to investigate the fire and reach conclusions, including determining from burn patterns where the fire started and eliminating various electrical devices as causes of the fire. He interviewed Somnis and considered his statements, including statements about the condition of the basement prior to the fire, such as the space heater having run continuously for two weeks. [Docket No. 16-5 at 19]. Furthermore, St. Onge had an exemplar of the space heater tested to see whether it could have served as the source of ignition. *See Presley v. Lakewood Engineering &Mfg. Co.*, 553 F.3d 638, 645 (8th Cir. 2009) (excluding expert's testimony who had not substantiated his theories by testing an exemplar appliance). As noted above, that testing showed that a blanket from the hide-a-bed on top of the space heater would not become hot enough to ignite a fire and that had it done so, the heater's sensors – still intact after the fire – would have automatically switched off that appliance.

Somnis fails to point to any authority for its assertion that St. Onge's testimony is not reliable. Somnis offers no expert opinion or other credible evidence to attack St. Onge's methodology or conclusions. St. Onge's qualifications as an expert are undisputed. St. Onge's report documents his step-by-step investigation and the inherent reliability of the investigation and St. Onge's opinions.

IV. St. Onge's Testimony Will Assist the Factfinder.

St. Onge's testimony regarding his investigation and opinions regarding the origin and cause of the Somnis fire will without question assist the jury. *Pride v. BIC Corporation*, 218 F.3d 566, 578 (6th Cir. 2000). This case hinges, in part, upon whether the jury believes that Somnis caused or arranged for someone to cause the fire in his home. St. Onge will testify that following his systematic investigation and analysis of the fire scene he concluded that there was no accidental cause for the fire. Thus, there exists a direct connection between St. Onge's testimony and the disputed factual issues in this case. St. Onge's testimony satisfies the requirements of Rule 702, *Daubert*, and related case law.

CONCLUSION

Defendant COUNTRY Mutual respectfully requests that the Court deny Plaintiff Somnis' motion to exclude the expert opinion of St. Onge, whose report demonstrates that potential sources of ignition were examined using a reliable methodology. It is undisputed that St. Onge has extensive experience as a fire investigator and origin and cause expert. Plaintiff Somnis lacks any legal basis for excluding St. Onge's expert opinion that none of the potential ignition sources (the fan, overhead light, or space heater) caused the fire and that "some person" started the fire on the couch, the fire's established area of origin. The requested exclusion of St. Onge's expert testimony is not justified and should be denied by the Court.

Respectfully submitted,

DATED: November 28, 2011

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy Somnis, Court File No. 11 -CV-00324 (RHK/LIB)

Plaintiff,

vs.

Country Mutual Insurance Company,

Defendant.

PLAINTIFF'S REPLY MEMORANDUM

PART I

Pursuant to Rule 12(f)(1) of the Rules of Civil Procedure, plaintiff requests that the court on its own strike from the Declaration of Tamara L. Rollins of November 28, 2011 and from Defendant's Memorandum in Opposition to Plaintiff's Motion to Exclude the Expert Opinion of Gregory St. Onge ("Defendant's Memorandum") as immaterial and impertinent or simply disregard the material identified below:

A. From the Declaration of Tamara L. Rollins, that part of the declaration that has been stricken from the copy appended hereto as Part I Attachment A, together with the referenced Exhibits.

B. From Defendant's Memorandum, that part of pages 2 and 3 that has been stricken from the copy thereof that is appended as Part I Attachment B.

RATIONALE FOR THE REQUEST

Plaintiff brought a motion to exclude the expert opinion of Investigator Gregory St. Onge of Ember Investigations. Investigator St. Onge prepared a report of his findings and conclusions, which is Exhibit B to his declaration as submitted by defendant herein. The report deals only

with the interviews of Jeremy Somnis and two volunteer fire firefighters, Bruce Olsen and Betsy Zavoral to the limited extent shown in the report; examination and photographs of the fire scene; the report of Anderson Engineering; and a limited commentary and conclusion reached.

Plaintiff has not made a motion for summary judgment in whole or in part. The matter before the court deals only with the report of Investigator St. Onge and his opinion as expressed in the report. However, plaintiff's lawyers have submitted information unrelated to the report of Investigator St. Onge as shown in Part I Attachments A and B. Significantly, none of the information in Attachments A and B is referenced in the argument section of Defendant's Memorandum, a self acknowledgment that it is immaterial. Plaintiff is prepared to litigate all of the matters referred to in Part I Attachments A and B, but not as a part of this limited proceeding.

PART II
REVIEW AND ADDITIONAL BACKGROUND
IN LIGHT OF DEFENDANT'S MEMORANDUM
AND RELATED DECLARATIONS

There was a fire at the home of Jeremy Somnis located near Grand Marais, Minnesota in July of 2009. The home was insured by Country Mutual Insurance Company ("Country"). Country hired Gregory St. Onge ("Investigator St. Onge") to investigate the fire. Investigator St. Onge prepared a report of his findings and conclusion. That report is appended to the Declaration of Greg St. Onge ("St. Onge Declaration") as Exhibit B ("St. Onge Report"). The St. Onge Report demonstrates that Investigator St. Onge found no evidence of an accelerant at the fire scene nor did he find any other positive evidence of the cause and origin of the fire.

The National Fire Protection Association ("NFPA") periodically prepares what it describes as a Guide for Fire and Explosion Investigation known as *NFPA 921*. At the time of the fire, the 2008 edition of *NFPA 921* was in effect. The 2011 edition of *NFPA 921* is a peer reviewed source of information utilized by fire investigators in connection with their work.

Affidavit of Harold A. Frederick dated December 2, 2011 ("Frederick Aff'd December 2, 2011") ¶4. In the St. Onge Declaration, Investigator St. Onge references *NFPA 921*, a textbook titled *Kirk's Fire Investigation* by John D. DeHaan and *Ignition Handbook* by Vytenis Babrauskas as resources he utilizes in formation of opinions in connection with his fire investigation work. The 2008 edition of *NFPA 921* includes Section 18.2 titled Process of Elimination. A photocopy of that section is Exhibit C to the St. Onge Declaration. The gist of the process of elimination method (described by some investigators as negative corpus) is contained in the first sentence of Section 18.2.1:

> Any determination of fire cause should be based on evidence rather than on absence of evidence; however, when the origin of the fire is clearly defined, it may be possible to make a credible determination regarding the cause of the fire even when there is no physical evidence of the ignition source identified after the fire.

However, a cautionary admonition regarding the process of elimination is set forth in Section 18.2.5, which provides in part:

> The "elimination of all accidental causes" to reach a conclusion that a fire was incendiary is a finding that can rarely be justified scientifically, using only physical data; however, the "elimination of all causes other than the application of an open flame" is a finding that may be justified in limited circumstances. . .

Several developments took place regarding the Process of Elimination as contained in Section 18 of the 2008 edition of *NFPA 921* both before and after July of 2009. In 2006, Dennis W. Smith, a fire investigator, delivered a paper at the International Symposium on Fire Investigation and Technology titled "Pitfalls, Perils and Reasoning Fallacies of Determining the Fire Cause in the Absence of Proof: The Negative Corpus Methodology." Frederick Aff'd December 2, 2011 ¶5(e). In his paper, Mr. Smith condemns the process of elimination as not scientific and illogical. Mr. Smith was an alternate member of the *NFPA 921* technical

committee for the 2008 and 2011 editions of *NFPA 921*. Frederick Aff'd December 2, 2011 ¶5(e).

Prior to 2011, as noted by Investigator St. Onge, the sole author of *Kirk's Fire Investigation* was John D. DeHaan. Mr. DeHaan had been a member of the *NFPA 921* technical committee from 1991 to 1999. Frederick Aff'd December 2, 2011 ¶3. Mr. DeHaan took on a co-author for the Seventh Edition of *Kirk's Fire Investigation*, which was published some time in 2011. Frederick Aff'd December 2, 2011 ¶2. The co-author is David J. Icove. Frederick Aff'd December 2, 2011 ¶5(c). Members of the 921 technical committee for the 2011 edition of *NFPA 921* included David J. Icove and Vytenis Babrauskas with, as noted above, Dennis Smith as an alternate. Frederick Aff'd December 2, 2011 ¶5. *Kirk's Fire Investigation* is a comprehensive textbook on fire investigation. The seventh edition contains more than 750 pages with 17 chapters. Frederick Aff'd December 2, 2011 ¶2.

Interestingly, the technical committee on fire investigation for the 2011 edition of *NFPA 921* included representatives of all of the sources which Investigator St. Onge referred to in the St. Onge Declaration. Included on the committee were Vytenis Babrauskas, David J. Icove the co-author of the Seventh Edition of *Kirk's Fire Investigation*, plus the established negative corpus protagonist Dennis Smith. All members of the committees had the opportunity to present their point of view. Frederick Aff'd December 2, 2011 ¶5(a). The outcome of the work of the technical committee was a consensus repudiation [Frederick Aff'd of December 2, 2011 ¶5(a)] of the Process of Elimination or negative corpus in clear and certain terms. Old Section 18 was completely rewritten in furtherance of the Scientific Method.

DECLARATION OF GREG ST. ONGE

The St. Onge Declaration is revealing both for the specific declarations made and the things not said. Investigator St. Onge states that *NFPA 921* is one of the sources he relies on as a

fire investigator (¶15). He states that the 2008 edition of *NFPA 921* was in effect in July 2009 when he made his investigation of the fire at the home of Jeremy Somnis. There is appended to the St. Onge Declaration Section 18 of the 2008 edition, and in paragraph 24, he specifically refers to Section 18.2.5. It is clear that Investigator St. Onge relied specifically on Section 18 of the 2008 edition of *NFPA 921* to reach his conclusion that the fire at the Somnis home was incendiary. He states in paragraph 25 that *NFPA 921* was not amended until after his investigation of the fire at the Somnis home, and that the change has been controversial within the fire investigation community. He was not specific. The seventh edition of *Kirk's Fire Investigation* states that the 2011 edition of *NFPA 921* "supersedes all previous issues and is considered by practitioners and judicial authorities the standard of care for conducting fire investigations." Frederick Aff'd December 2, 2011 ¶4. It further states that *NFPA 921* is a peer reviewed source of information for fire investigators. Frederick Aff'd December 2, 2011 ¶4. There is no suggestion by Investigator St. Onge that his peers are wrong, or that he has continued to apply old Section 18.2 during 2011 in defiance of what practitioners consider to be the standard of care for conducting fire investigations. Rather, it seems that the fire at the Somnis home with regard to the lack of scientific basis for the process of elimination from the viewpoint of Investigator St. Onge, simply took place on the wrong side of January 3, 2011.

AGREED UPON PRINCIPLES AND THEIR APPLICATION TO THE ADMISSIBILITY OF DEFENDANT'S EXPERT

Based upon a review of Defendant's Memorandum in opposition to Plaintiff's Motion to Exclude the Expert Opinion of Gregory St. Onge ("Defendant's Memorandum"), there are a number of principles upon which the parties agree, including the following:

1. Pursuant to *Daubert* the court may only allow expert testimony that is both relevant and reliable. Defendant's Memorandum p. 5.

2. To be admissible, the evidence must be "reliable or trustworthy in an evidentiary sense." Defendant's Memorandum p. 6.

3. The expert's opinion should have a reliable basis in the knowledge and experience of the discipline. Defendant's Memorandum p. 5.

4. The inquiry to be carried out by the court is to focus on principles and methodology, not on the conclusions they generate. Defendant's Memorandum p. 6.

5. Whether the theory/technique can be or has been tested. Defendant's Memorandum p. 6.

6. Whether the theory/technique has been or is subject to peer review. Defendant's Memorandum p. 6.

7. Whether the theory/technique is generally accepted within the relevant scientific community. Defendant's Memorandum p. 6.

Because there is agreement on the applicable principles, the task is to apply them to the opinion of investigator St. Onge.

2011 EDITION OF *NFPA 921: GUIDE FOR FIRE AND EXPLOSIONS INVESTIGATIONS*

Defendant does not dispute the fact that the 2011 Edition of *NFPA 921* addresses the methodology employed by defendant's expert. Rather, defendant contends that the court should ignore the repudiation of the methodology employed by its expert so clearly set out in the 2011 Edition of *NFPA 921* because the new edition has an effective date of January 3, 2011. Defendant ignores the specific statement in *NFPA 921* that states that it "supersedes all previous editions." The fact that the 2011 edition has an effective date of January 3, 2011 would be relevant if the issue before the court was whether or not investigator St. Onge was negligent or guilty of malpractice in employing the now repudiated methodology in 2009, but this is not the

issue at hand. Here, the issue is whether that methodology passes muster in light of the principles listed above about which there is no dispute. Those principles should be applied by the court based on today's state of the art. Defendant would have the court blind itself to that which is now known.

APPLICATION OF AGREED UPON PRINCIPLES

The first three agreed upon principles set out above all focus on reliability. Is the expert's testimony both relevant and reliable?; is it reliable or trustworthy in an evidentiary sense?; and does it have a reliable basis in the knowledge and experience of the discipline? There is no doubt that the Court in *Daubert* became a disciple and evangelist of the Scientific Method and demonstrated no diminished zeal for that method in *Kumho Tire*. Section 18.6.5 and 18.6.5.1 of the 2011 edition of *NFPA 921* declare flatly that the method employed by defendant's expert is not reliable. "The process is not consistent with the Scientific Method, is inappropriate and should not be used. . . ." Section 18.6.5 goes on to explain why it should not be used, "because it generates un-testable hypothesis." "Any hypothesis formulated for the casual factors (e.g., first fuel, ignition source, and ignition sequence), must be based on facts."

The fourth principle upon which the parties agree is that the inquiry should focus on principles and methodology. Sections 18.6.5 and 18.6.5.1 reject the St. Onge methodology. Section 18.6.5.1 states in part "it is improper to base hypothesis on the absence of any supportive evidence (*See* 11.5.2, Types of Evidence). That is, it is improper to opine a specific ignition source that has no evidence to support it even though all other hypothesized sources were eliminated."

The fifth principle upon which the parties agree is whether the theory/technique can be or has been tested. Section 4.3.6.1 of the 2011 edition provides:

> 4.3.6.1* Any hypothesis that is incapable of being tested is an invalid hypothesis. **A hypothesis developed based on the absence of data is an example of a hypothesis that is incapable of being tested.** The inability to refute a hypothesis does not mean that the hypothesis is true.

(emphasis added)

The sixth principle upon which the parties agree is to determine whether the theory/technique has been or is subject to peer review. St. Onge's peers have made a careful study of the theory/technique which he employed and concluded that the "process is not consistent with the Scientific Method, is inappropriate, and should not be used. . . ." The seventh edition of *Kirk's Fire Investigation*, which is the latest edition, states that the National Fire Protective Association's 2011 edition of *NFPA 921* is a peer reviewed source. Frederick Aff'd December 2, 2011 ¶ 4. The authors go on to say that "[t]he 2011 edition of *NFPA 921* supersedes all previous issues and is considered by practitioners and judicial authorities the standard of care for conducting fire and explosion investigations." Both of the co-authors of *Kirk's Fire Investigation* have served as technical consultant members in the development of *NFPA 921* and David Icove was a member of the technical committee, which approved the 2011 edition of *NFPA 921*. Frederick Aff'd December 2, 2011 ¶3 and 5(c).

There is attached to the Affidavit of Tamara L. Rollins submitted on behalf of the defendant, a resolution of the Georgia Fire Investigators Association, which in part notes that the 2011 edition of *NFPA 921* seeks to impose unreasonable and over-reaching standards upon the investigator often in conflict with a existing judicial, legislative and executive standards as set forth in the State of Georgia. There is no indication that the

Georgia Fire Investigators Association is a "peer reviewed source" as is the 2011 edition of *NFPA 921*. Further, the resolution speaks to judicial, legislative and executive standards as set forth in the State of Georgia.

The seventh principle upon which the parties agree is to determine whether the theory/technique is generally accepted within the relevant scientific community. At the present time, as this case makes its way to trial, it can no longer be stated that the theory/technique employed by investigator St. Onge is generally accepted within the relevant scientific community. It may be accepted by some, but given the stature of *NFPA 921*, it no longer finds general acceptance.

CONTENTION OF DEFENDANT THAT THE 2011 EDITION OF *NFPA 921* IS "ONLY" A GUIDE

Defendant argues that the 2011 edition of *NFPA 921* is "only" a Guide, and therefore should not be used in testing the opinion of Investigator St. Onge against the seven agreed upon principles set out above. In response, it is worthwhile to point out that the 2011 edition of *NFPA 921* was approved as an American National Standard by the American National Standard Institute ("ANSI") on January 3, 2011. Frederick Affidavit dated November 1, 2011 ¶8. What is significant regarding this designation is that ANSI had to be satisfied that the 2011 edition is a "peer reviewed" document. See Frederick Affidavit dated November 1, 2011 ¶8 and the reference to the ANSI website there contained.

As noted above, the leading textbook in the field of fire investigation, *Kirk's Fire Investigation*, Seventh Edition, states that the 2011 edition of *NFPA 921* is the standard of care for fire investigation.

However, it makes no difference in applying the agreed upon principles listed above as to whether *NFPA 921* is a guide or a standard. What is important is that the 2011 edition of *NFPS 921* is a peer reviewed document, which as declared in the Seventh Edition of *Kirk's Fire Investigation*, prescribes the standard of care for fire investigation. It reflects the most up-to-date thinking about the methodology used by Investigator St. Onge. New Sections 18.6.5, 18.6.5.1, and 4.3.6.1 provide a logical and thought out method of testing Investigator St. Onge's opinion against the requirements of *Daubert* and *Kumho Tire.*

TESTIMONY THAT ALL CAUSES OF FIRE HAVE BEEN EXAMINED AND EXCLUDED

At page one of defendant's memorandum, defendant contends, without support, that the 2011 edition of *NFPA 921* allows a qualified investigator to opine that all accidental causes of the fire have been examined and excluded. Section 18.6.5.1 provides in part:

> Cause undetermined. In the circumstance where all hypothesized fire causes have been eliminated and the investigator is left with no hypothesis that is evidenced by the facts of the investigation, the only choice for the investigator is to opine that the fire cause, or specific causal factors, remains undetermined. It is improper to base hypothesis on absence of any supporting evidence (See 11.5.2 Types of Evidence). That is, it is improper to opine a specific ignition source that has no evidence to support it even though all other hypothetical sources were eliminated.

Therefore, under the circumstances suggested by defendant, a qualified fire expert would be required to state that the cause of the fire remains undetermined.

FEDERAL RULE OF EVIDENCE 702

Defendants discuss Fed.R.Evid. 702 at page 4 of defendant's memorandum. The relevant part of that rule states that the expert testimony must be "the product of reliable principles and methods. . . ." The very first principle listed above upon which the parties agree is that the method employed by Investigator St. Onge must be reliable. As noted above, Investigator St. Onge's peers have concluded through the adoption of Sections 18.6.5, 18.6.5.1 and 4.5.6.1 of the 2011 edition of *NFPA 921* that his opinion regarding the incendiary nature of the fire is not reliable.

CONCLUSION

Defendant's position is that the provisions of 18.6.5, 18.6.5.1 and Section 4.3.6.1 of the 2011 edition of *NFPA 921* should be ignored. Defendant does not challenge the reasoning or logic of the changes that were made, nor does defendant suggest that the changes do not have a scientific basis. In the notes to new Section 4.3.6.1, there is a reference to three textbooks on logic, critical thinking and faulty reasoning. Frederick Affidavit of November 1, 2011 ¶12. Defendant does not suggest that negative corpus is logical, consistent with critical thinking and is not the product of faulty reasoning. Rather defendant would have the court grandfather in faulty reasoning and bad science.

The members of the 2011 *NFPA 921* technical committee are presumptively selected because they have familiarity with the work of fire investigators. Plaintiff asks the court to respect the judgment of the technical committee made up of Investigator St.

Onge's peers. There is every reason to believe that the technical committee is knowledgeable on the subject, operated in good faith and carefully debated the changes before coming to the consensus decision to make the change.[1]

The *NFPA 921* technical committee was aware of the Supreme Court's decision in *Daubert*. The committee appears to have been concerned about what their secretary Russell K. Chandler described in his 2009 Book *Fire Investigation* as junk science. Frederick Aff'd December 2, 2011 ¶5(a). The committee was influenced by the paper presented at the 2006 International Symposium on Fire Investigation, Science and Technology by Dennis W. Smith, a technical committee alternate in which Smith made the case for the proposition that negative corpus or the process of elimination is not grounded in science or logic. *See* Frederick Aff'd December 2, 2011 ¶5(e) and the Smith article there referenced. The committee reached consensus to throw out the method which Investigator St. Onge used to find that the fire in the present case was incendiary. What is interesting about what occurred and how it occurred is that the Supreme Court's decision in *Daubert* and the Court's announced interest in Science has had a teaching effect. It took years, but the NFPA technical committee woke up to the fact that it had been a party to bad science and lazy thinking. The fact that this revelation did not occur until the work and interaction of the members of the technical committee in 2010 does not mean that the methodology used by Investigator St. Onge in July of 2009 was based

[1] The secretary of the technical committee, Russell K. Chandler describes how the committee operates. "Everyone is involved in composing, debating, recomposing and putting forth proposed text for a consensus vote." Frederick Aff'd December 2, 2011 ¶5(a).

on good science and critical thinking. In the paper that Dennis W. Smith presented to the 2006 International Symposium on Fire Investigation Science and Technology, Mr. Smith included in his conclusion in the context of the then continuing acceptance of negative corpus by the fire investigation community, the following quotation:

> *One of the saddest lessons in history is this: if we have been bamboozled long enough, we tend to reject any evidence of the bamboozle. We are no longer interested in finding out the truth. The bamboozle has captured us. It is simply too painful to acknowledge even to ourselves, that we have been taken.*

Frederick Aff'd December 2, 2011 ¶5(e).

On appeal, deference to the rulings of the trial judge is appropriate and recognized. Here, plaintiff submits that this court should give deference to the work of the 2011 NFPA 921 technical committee.

Dated: December 2, 2011

FRYBERGER, BUCHANAN, SMITH & FREDERICK, P.A.

By: /s/ Harold A. Frederick
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jeremy Weber,

Plaintiff,

v.

Civ. No. 10-2142 (RHK/LIB)
MEMORANDUM OPINION AND ORDER

The Travelers Home and Marine Insurance Co.,

Defendants.

John E. Mack, Mack & Daby, P.A., New London, Minnesota, for Plaintiff.

Stacy E. Ertz, Daniel A. Haws, Kari L. Gunderman, Murnane Brandt, PA, St. Paul, Minnesota, for Defendant.

INTRODUCTION

This action arises out of a fire at Plaintiff Jeremy Weber's home on September 14, 2009. Weber filed a claim with his insurance company, Defendant Travelers Home and Marine Insurance Company ("Travelers"), which was denied.[1] Weber then commenced this action, seeking to recover the policy proceeds. Presently pending before the Court are (i) Weber's Motion for Partial Summary Judgment and to Amend the Complaint and (ii) Travelers' Motion for Summary Judgment. For the reasons that follow, both Motions will be denied.

[1] Travelers did not expressly deny the claim but rather "reject[ed]" it on several grounds. As discussed in more detail below, however, the Court finds this "rejection" functionally equivalent to a denial.

BACKGROUND

The events leading up to the fire are not well explicated in the parties' briefs, even though they are critical to a full understanding of the parties' arguments. Many of the facts set forth below, therefore, are taken from the October 15, 2009 Investigation Report of Deputy State Fire Marshal John Steinbach, who investigated the fire's cause. (See 4/4/11 Mack Aff. Ex. E.)[2]

Through a contract for deed, Weber purchased a house in Sauk Centre, Minnesota, in October 2008. The purchase agreement required him to make $700 monthly payments to the house's previous owners. He obtained a policy from Travelers insuring the house and its contents. Among other things, the policy excluded coverage for any loss "arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss."

The policy imposed certain duties on Weber in the event of a loss, including cooperating with any investigation undertaken by Travelers, submitting a sworn proof of loss containing an inventory of damaged property, and sitting for an examination under oath. The policy also provided that "[n]o action can be brought against" Travelers if there were anything less than "full compliance with all of the terms" thereof.

[2] The report contains Steinbach's findings regarding the fire's origin, as well as statements and other information provided to him during his investigation. While the report itself appears to fall within a hearsay exception, see Fed. R. Evid. 803(8), statements made to Steinbach contained *within* the report would seem to be hearsay. Nevertheless, the Court may consider the entirety of the report because neither party has objected to it (save for Weber's objection to Steinbach's conclusions, which is addressed in more detail below). See Walker v. Wayne Cnty., Ia., 850 F.2d 433, 435 (8th Cir. 1988).

In March 2009, Weber was laid off from his job, and he was unable to find other employment. Two months later, a fire in the house's kitchen, which Weber attributed to "bump[ing] a knob on the stove," caused significant damage. He submitted a claim to Travelers, which paid him more than $52,000. He then set about repairing the damage. The interior of the house was largely gutted; most of the electrical supply was disconnected, and the house was stripped to the frame and contained no working appliances. During remodeling, Weber lived in a travel trailer parked in his backyard. The house was otherwise unoccupied.

According to Weber, on September 13, 2009, he was at his house until approximately 12:00 p.m. After boarding up some windows and locking the doors, he drove, with his traveler trailer in tow, to Mabel Murphy's, a restaurant and bar in Fergus Falls, Minnesota, approximately 65 miles away along Interstate 94. There, he watched a Vikings football game, after which he visited his brother and sister-in-law, who live near Fergus Falls. He then returned to Mabel Murphy's, where he drank heavily and sang karaoke. At approximately midnight he took his van to get gas and then returned to Mabel Murphy's' parking lot. He went into his trailer, "got sick," and fell asleep.

Joanne McQuisten Moe, co-owner of Mabel Murphy's, recalls the events somewhat differently. She told Steinbach that she had known Weber for 12 years and, although she was working the bar during the Vikings game, she did not see him there. She recalled seeing him enter the bar at approximately 8:00 p.m., after which he drank and sang karaoke. He left at approximately 12:30 a.m. on September 14, 2009; when she closed Mabel Murphy's at 2:00 a.m. and left the premises, she saw Weber's travel trailer

but did not see his van attached to it. She acknowledged, however, that she did not search for the van, which may have been parked in a nearby lot where patrons often parked on weekends.

At approximately 4:00 a.m. on September 14, 2009, neighbors reported a fire at Weber's house. Despite the efforts of the Sauk Centre Fire Department, the house was largely destroyed. The walls on its west side collapsed and its northwest quadrant was reduced to several feet of ash. The house's remaining sides were heavily damaged and in danger of collapsing. Simply put, the house was a total loss.

Weber, who learned of the fire via a call on his cell phone at approximately 5:00 a.m., submitted a claim to Travelers for the damage. The company, in turn, hired an independent investigator to analyze the origin and cause of the fire.[3] It also asked Weber to submit within 60 days a form entitled "Sworn Statement in Proof of Loss," listing all damages he claimed, all property destroyed, and similar information. It is clear from the record that Weber filled out and returned the form to Travelers, although neither party has submitted it to the Court.

Deputy State Fire Marshal Steinbach also undertook an investigation at the request of the Sauk Centre Fire Department. That investigation included an examination of the scene, interviews with neighbors, and a review of Weber's financial records. Those records revealed that Weber had maintained two checking accounts in 2009. The first account had been charged overdraft fees on several occasions and had monthly ending balances between five and ten dollars; it was closed in May 2009. The second account

[3] There is no evidence in the record regarding the outcome of this investigation.

was opened in January 2009 and had a beginning balance of 11 cents; the balance fell to zero in March. In June, approximately $46,000 was deposited into the account, likely the proceeds of Travelers' payment for the first fire. Several large withdrawals followed, and by September 15, 2009, the day after the fire, the account's balance had dropped to just under $600.

Steinbach also interviewed Weber at the Sauk Centre Police Department; there, he denied having set the fire. He also denied having any financial problems and indicated that he was current on his bills.[4] When Steinbach asked if he would be willing to take a polygraph examination, Weber refused. He then asked Steinbach whether he (Steinbach) was accusing him of having set the fire, and Steinbach answered in the affirmative. Weber then terminated the interview and said he wanted to consult an attorney.

Steinbach also conducted a criminal background check on Weber, which revealed a "lengthy criminal history," including "felony level burglary and theft convictions" and an "extensive criminal driving record." The nature and number of his prior convictions are not specified in the record.

Ultimately, Steinbach was unable to determine the fire's cause from the physical evidence. Nevertheless, he concluded in his October 15, 2009 report:

> Based on my training and experience and the scene examination, it is my opinion the fire in this residential house, which was damaged by a previous fire, originated in the northwest quadrant of the residence's basement. Due to severe fire damage and building collapse, I was unable to determine an exact area of origin and/or definitive cause for the fire. However, it is my

[4] Weber also stated that he had "no lawsuits or liens against him," although a background check revealed that he had two outstanding judgments against him in Otter Tail County, Minnesota, totaling approximately $1,900.

> opinion this unoccupied residence damaged by a previous fire and undergoing extensive remodeling, including significant foundation work, was in all probability intentionally set on fire to destroy property and collect insurance monies. The property owner, who has owned the residence on a contract for deed for less than a year, has experienced two fires at the residence I consider to be in extremely poor condition, including a crumbling foundation. The unemployed property owner, who has felony level burglary convictions, maintains he's not involved with setting his house on fire and refuses to take a polygraph exam. I am closing this case and reserve the right to re-open it should newer information become available.

On November 10, 2009, Travelers wrote Weber and informed him that it would take his examination under oath regarding the fire on November 24, 2009, as permitted under the policy. Weber appeared with counsel and testified as requested; due to scheduling conflicts, however, the examination could not be completed on November 24. The parties agreed to continue it on January 18, 2010. In the interim, however, on January 7, 2010, Travelers wrote to Weber's counsel, advising him that it was

> [r]ejecting the Sworn Statement [in] Proof of Loss as submitted by . . . Weber on the following grounds: The proof of loss includes amounts for additional living expenses which have not been established as actually incurred; the amounts of personal property and the value of that property ha[ve] not been proven nor ha[ve] [they] been established as accurate; the amount claimed for the structure has not been proven or established; and Travelers' investigation into this loss and claim will not be complete until such time as Mr. Weber's examination under oath is completed and the investigation by the fire marshal for the State of Minnesota is also completed.

The letter further advised that Weber could "submit a revised Sworn Statement [in] Proof of Loss . . . following the completion of [his] examination under oath."

Weber's examination under oath was completed on January 18, 2010. At the conclusion, he indicated that he wanted to read and sign the transcript of the examination,

but according to Travelers he never did so. There also exists no evidence that he submitted a revised Sworn Statement in Proof of Loss following the completion of his examination.

On April 24, 2010, Weber commenced the instant action in the Stearns County, Minnesota District Court, alleging that Travelers' failure to pay his claim constituted breach of contract. (Compl. ¶ VI.) He further alleged that Travelers "has claimed, and continues to claim, that it does not have an obligation to pay . . . because [he] either burned the said residence by arson or caused another to burn [it]." (Id. ¶ IX.) He asserted that this arson defense was "made in bad faith and in conscious violation of [his] known rights." (Id.)

Invoking diversity jurisdiction, Travelers timely removed the action to this Court.[5] It then answered the Complaint and asserted, *inter alia*, that Weber failed to comply with conditions precedent to suit and that his claims "may be barred by the [policy's] exclusion for intentional loss." (Answer ¶¶ 18-21.) The Magistrate Judge later issued a

[5] As the Court noted at oral argument, Travelers has taken inconsistent positions with regard to the amount in controversy. In its Notice of Removal, it alleged that "the matter in controversy exceeds the sum or value of $75,000." (Notice of Removal ¶ 3.) Yet, in its Statement of the Case it averred that "as alleged by Plaintiff, *but not admitted by Travelers*, the matter in controversy exceeds the sum or value of $75,000." (Doc. No. 7 at 1 (emphasis added).) Travelers cannot have it both ways. Regardless, there is no question that the amount in controversy exceeded $75,000 at the time of removal, insofar as Weber's house was a total loss and the policy's limit for dwelling coverage was $166,000. (See 4/11/11 Gunderman Aff. Ex. 1.) And although Weber's counsel suggested at the hearing that the amount-in-controversy requirement might no longer be satisfied due to payments Travelers made, following removal, to the contract-for-deed seller of Weber's home, it is well settled that "events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court's [diversity] jurisdiction once it has attached." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293 (1938).

Pretrial Scheduling Order setting October 1, 2010, as the deadline for amending the pleadings, and April 1, 2011, as the discovery cut-off. (See Doc. No. 11.)

On January 20, 2011, Weber moved for partial summary judgment, seeking a determination that Travelers "has not established the affirmative defense of arson." (Doc. No. 36.) He noticed his Motion for a hearing on March 11, 2011 – before the close of discovery. On February 4, 2011, Travelers cross-moved for summary judgment (Doc. No. 41), noticing its Motion for a hearing on May 23, 2011. By Order dated March 1, 2011 (Doc. No. 45), the Court concluded to hear these Motions together, once discovery had closed. Accordingly, it denied Weber's Motion without prejudice.

Following the close of discovery, Weber re-filed his partial-summary-judgment Motion (Doc. No. 46).[6] However, he also added a request that the Court grant him leave to amend the Complaint "to include a count against [Travelers] of bad faith pursuant to Minn. Stat. § 604.18." (Id. at 1-2.) The Motion was set to be heard together with Travelers' Motion on May 23, 2011, but the hearing was continued to June 27, 2011. The Motions have been fully briefed and are now ripe for decision.

STANDARD OF DECISION

Summary judgment is proper if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of showing that the

[6] A subsequent entry in the docket (Doc. No. 54) also is styled as a "Motion for Partial Summary Judgment," but that document actually is Weber's Memorandum in support of his Motion.

material facts in the case are undisputed. Id. at 322; Whisenhunt v. Sw. Bell Tel., 573 F.3d 565, 568 (8th Cir. 2009). The Court must view the evidence, and the inferences that may be reasonably drawn from it, in the light most favorable to the nonmoving party. Weitz Co., LLC v. Lloyd's of London, 574 F.3d 885, 892 (8th Cir. 2009); Carraher v. Target Corp., 503 F.3d 714, 716 (8th Cir. 2007). The nonmoving party may not rest on mere allegations or denials, but must show through the presentation of admissible evidence that specific facts exist creating a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); Wingate v. Gage Cnty. Sch. Dist., No. 34, 528 F.3d 1074, 1078-79 (8th Cir. 2008).

Where, as here, the Court confronts cross-motions for summary judgment, this approach is only slightly modified. When considering Travelers' Motion, the Court views the record in the light most favorable to Weber, and when considering Weber's Motion, the Court views the record in the light most favorable to Travelers. "Either way, summary judgment is proper if the record demonstrates that there is no genuine issue as to any material fact." Seaworth v. Messerli, Civ. No. 09-3437, 2010 WL 3613821, at *3 (D. Minn. Sept. 7, 2010) (Kyle, J.), aff'd, No. 10-3532, 2011 WL 873121 (8th Cir. Mar. 15, 2011).

ANALYSIS

I. Weber's Motion will be denied

A. The arson defense

1. Quast

In his Motion, Weber mounts a frontal assault on the seminal case of Quast v. Prudential Property & Casualty Co., 267 N.W.2d 493 (Minn. 1978), a case his counsel labels "obnoxious." (Doc. No. 38 at 1.) Because that case is key to the Court's analysis, it is discussed in some detail below.

In Quast, the plaintiff had purchased a home with the intention of residing there until he remodeled and resold it, but financial difficulties caused him to list it for sale sooner than expected. 267 N.W.2d at 493-94. The house languished on the market for several months and was still for sale when it was destroyed by an explosion and fire that occurred at approximately 10 p.m. on the night in question. Id. at 494. At the time the fire broke out the plaintiff "was at a bar where he claimed to have been since approximately 7 p.m., when he left his home after locking all the doors." Id.

After the plaintiff's insurance company denied his claim, he sued for payment of the policy proceeds. At trial, the insurer offered evidence that an accelerant had been used to start the fire, and there was no other evidence indicating an accidental cause. The plaintiff, however, testified that he did not set the fire. Id. The jury returned a special verdict finding that the fire was incendiary in origin and that the plaintiff had participated in setting it. The plaintiff then moved for judgment notwithstanding the verdict, which

the trial court denied. An appeal followed, with the plaintiff challenging the sufficiency of the evidence to support the verdict. Id. at 494-95.

The Minnesota Supreme Court affirmed. It noted that while the evidence introduced by the insurer was "largely circumstantial," courts routinely permitted such evidence "to support the inference that the insured set the fire or arranged to have it set":

> In Elgi Holding, Inc. v. Insurance Co. of North America, 511 F.2d 957 (2d Cir. 1975), for example, the court held that proof of the fire's incendiary origin plus evidence of the insured's financial difficulties which suggested a motive were sufficient to support a jury verdict for the insurance company. Similarly, in Fenton Country House v. Auto-Owners Ins. Co., 63 Mich. App. 445, 450, 234 N.W.2d 559, 561 (1975), the court stated that "[a]rson [could] be proven through evidence tending to show motive and opportunity, together with evidence negating accidental cause."
>
> The evidence introduced in this case, although largely circumstantial, was clearly sufficient to support the jury's verdict. Appellant was deeply in debt and had tried unsuccessfully more than once to sell his house. This information alone would permit the jury to infer motive which, together with the fire's incendiary origin, is enough to defeat appellant's claim for payment under the insurance policy. Because this is a civil case and not a criminal one, arson must be shown only by a preponderance of the evidence rather than beyond a reasonable doubt. Thus, respondent's failure to demonstrate that appellant knew of or participated in the crime does not defeat the jury's decision in its favor as long as credible evidence of motive is introduced.

Id. at 495-96 (citations omitted). Following Quast, Minnesota courts have repeatedly held that "[e]vidence of [a] fire's incendiary nature, combined with evidence of motive, is sufficient to support a finding of arson." Reitzner v. Am. Family Mut. Ins. Co., No. A08-0747, 2009 WL 910998, at *4 (Minn. Ct. App. Apr. 7, 2009) (internal quotation marks and citation omitted); accord, e.g., Summit Fid. & Sur. Co. v. Don Stern Enters., Inc., No. CE-95-2099, 1996 WL 266419, at *3 (Minn. Ct. App. May 21, 1996); Montgomery v. N. Star Mut. Ins. Co., No. C2-93-64, 1993 WL 430347, at *1 (Minn. Ct. App. Oct. 26,

1993); DeMarais v. N. Star Mut. Ins. Co., 405 N.W.2d 507, 509 (Minn. Ct. App. 1987); see also Minn. Fair Plan v. Neumann (In re Neumann), 374 B.R. 688, 694-95 (Bankr. D. Minn. 2007).

Although Quast was the Minnesota Supreme Court's first decision on this issue, it was hardly novel. Indeed, courts had recognized for years that financial motive combined with incendiary origin were sufficient to create a jury question on arson. See, e.g., Raphtis v. St. Paul Fire & Marine Ins. Co., 198 N.W.2d 505, 509-10 (S.D. 1972) (collecting cases). That is largely borne of necessity: because "[o]ne could scarcely be expected to set fire to his property in the presence of others," proof in arson cases "consists almost wholly of circumstantial evidence." Klein v. Auto Owners Ins. Co., 39 F.R.D. 24, 26 (D. Minn. 1965) (Devitt, J.) (citations omitted).

2. The so-called Erie problem

Recognizing that Quast provides a serious hurdle for his claim, Weber has put forward a creative argument in an unsuccessful attempt to avoid it. He asserts that Quast created a procedural rule that must be rejected by the Court, pursuant to Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), because there is a "direct collision" between it and Federal Rule of Civil Procedure 56. (Pl. Mem. in Supp. at 14.) This is so, according to Weber, because evidence of motive plus an incendiary origin fails to create a triable issue under the "federal rule" – rather, an insurer must also proffer evidence indicating the insured had the "opportunity" to set the fire in order to survive summary judgment. (See Pl. Mem. in Supp. at 11, 15.)

Under Erie, "in a suit based on diversity of citizenship jurisdiction[,] the federal courts apply federal law as to matters of procedure but the substantive law of the relevant state." In re Baycol Prods. Litig., 616 F.3d 778, 785 (8th Cir. 2010) (citations omitted). Where a federal procedural rule "control[s] [an] issue" and "leav[es] no room for the operation" of conflicting state law, the state law must yield. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987). But when there is no such collision, the state rule should be applied to accomplish Erie's "twin aims" of discouraging forum shopping and promoting equitable administration of the laws. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

Here, the Court concludes that there is no "direct collision" between Quast and Rule 56, because Quast is a substantive rule, not a procedural one.[7] Quast simply sets forth the way in which an insurer may defend a claim on the basis of supposed arson, namely, by proffering evidence of motive and incendiary origin; it sets forth the *elements* of an insurer's arson defense. Accordingly, it is substantive for Erie purposes. See, e.g., Marshall v. Marshall, 547 U.S. 293, 313 (2006) ("It is clear, under Erie, that Texas law governs the substantive elements of [a] tortious interference claim."); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 13–14 (1983) (state law determined elements of tax levy cause of action). Rule 56, by contrast, defines the quantum of evidence necessary to support that defense: sufficient evidence to create a "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). In other words, Quast

[7] Under Erie, it makes no difference that Quast is a judge-made rule rather than a legislative one. See Erie, 304 U.S. at 78 ("[W]hether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

defines *which* facts are material, while Rule 56 sets forth the *way to determine* whether those facts are genuinely in dispute.

Accordingly, there is no support for Weber's contention that Rule 56 requires the displacement of Quast. Rather, the two are easily harmonized: an insurer can defend with evidence of motive and incendiary origin (Quast) but will survive summary judgment only if it proffers sufficient evidence to put them genuinely into dispute (Rule 56). It is for this reason that federal courts routinely look to state law when determining how an insurer may prove arson, whether at the summary-judgment stage or otherwise. See, e.g., Ciao Giuseppe, Inc. v. Reliance Ins. Co., 74 F.3d 1245 (Table), 1996 WL 21644, at *1-2 (9th Cir. Jan. 19, 1996) (unpublished) (review of summary judgment); State Auto Prop. & Cas. Ins. Co. v. Hargis, Civ. A. No. 4:09CV-15-M, 2010 WL 1662179, at *2 (W.D. Ky. Apr. 23, 2010) (summary judgment); St. Paul Fire & Marine Ins. Co. v. Salvador Beauty Coll., Inc., 731 F. Supp. 348, 350 (S.D. Iowa 1990) (judgment notwithstanding verdict); Demyan's Hofbrau, Inc. v. INA Underwriters Ins. Co., 542 F. Supp. 1385, 1386 (S.D.N.Y. 1982) (fact finding following bench trial).

Based on the foregoing, the Court is obligated to apply Quast here.[8]

[8] To be precise, the Erie inquiry does not end upon the determination that there is no collision between state and federal law. Rather, the Court must also determine whether applying state law would disserve Erie's goals of avoiding forum shopping and equitably administering the law. Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980). That is not the case here. Indeed, if this Court were to apply a more-stringent standard for insurers claiming arson than Minnesota state courts, insureds would have a "dramatic incentive to forum shop." Burke v. Air Serv Int'l, Inc., __ F. Supp. 2d __, 2011 WL 1237625, at *4 (D.D.C. Mar. 30, 2011) (state evidentiary rule "imposing a significant hurdle that plaintiffs would plainly rather avoid" was substantive for purposes of Erie).

3. There is sufficient evidence to support Travelers' arson defense

That Quast controls the Court's analysis does not end the inquiry; the Court must apply that case to the facts and determine whether Travelers has proffered sufficient evidence of the fire's incendiary origin and a financial motive for Weber to set the fire. Weber acknowledges that evidence of his poor financial state at the time of the fire is sufficient to satisfy Quast's motive prong. (Pl. Mem. in Supp. at 4.) He argues, however, that Travelers lacks sufficient evidence of the fire's incendiary origin. The Court does not agree.

The crux of Weber's argument concerns the conclusions in Steinbach's October 15, 2009 Investigation Report. He contends that Steinbach's opinion was flawed because it (i) was based on inadmissible evidence (stale criminal convictions), (ii) was not given to a "reasonable degree of professional certainty," and (iii) improperly relied on evidence of Weber's financial condition – the *other* prong of Quast – to establish incendiary origin. (Id. at 5-9.) He therefore urges the Court to ignore the report's conclusion that he started the fire. And according to Weber, "[i]n the absence of [Steinbach's] opinion, there is insufficient circumstantial evidence" of an incendiary origin because "[t]here is no evidence of where the fire originated," "no evidence of how the fire started," and "no evidence that accelerants, timing devices, fuses, or other material often associated with arson fires, was involved in this" case. (Id. at 9-10.)

It is true that Steinbach could not offer an opinion, based on the *physical evidence* at the scene, whether the fire was intentionally set. He gave only generalities about where the fire originated. He could not identify accelerants or other flammable chemicals

often found in arson cases. His opinion was largely based on Weber's poor financial condition, which the Eighth Circuit has indicated is not relevant to a finding of incendiary origin (only motive). See St. Paul Fire & Marine Ins. Co. v. Salvador Beauty Coll., Inc., 930 F.2d 1329, 1332 (8th Cir. 1991). And his opinion that the fire resulted from arson was, indeed, somewhat equivocal.

Nevertheless, Weber's argument founders because even if the Court were to ignore Steinbach's opinions, there exists other circumstantial evidence in the record creating a genuine issue for trial. First, Weber submitted a claim for fire damage barely four months before the fire in question here. Courts have noted that several fires in short succession suggest arson. See, e.g., Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1249 (6th Cir. 1984); Cora Pub, Inc. v. Cont'l Cas. Co., 619 F.2d 482, 484 (5th Cir. 1980). Second, Steinbach indicated in an Affidavit that he "attempted, but was unable to identify, an accidental cause for the subject fire." (Steinbach Aff. ¶ 6.) Weber takes issue with that assertion, claiming that Steinbach "was unable to identify an intentional cause of the . . . fire either." (Pl. Reply at 3 n.1.) That is true, but also of no moment. The question is: what reasonable *inference* can be drawn from the absence of evidence suggesting an accidental cause? Clearly, one permissible inference is arson. See, e.g., Fitzgerald v. Great Cent. Ins. Co., 842 F.2d 157, 158 (6th Cir. 1988) (expert's opinion appropriately suggested arson where expert "eliminated all other natural or accidental causes in the area where the fire originated"); Cora Pub, 619 F.2d at 485 (same); Reitzner, 2009 WL 910998, at *5 (insurer made "strong showing that the fire was incendiary" by "eliminating all accidental causes"); U.S. Fire Ins. Co. v. Dace, 305

N.W.2d 50, 54 (S.D. 1981) (deputy fire marshal's inability to find evidence of accidental cause "important" evidence of arson). And notably, Weber has offered no evidence – expert or otherwise – indicating that the cause of the fire was accidental. See Quast, 267 N.W.2d at 494 (pointing out that "no explanation of [the fire's] origin other than an incendiary one was offered by any witness called by either party").

There also exists other circumstantial evidence suggesting an incendiary origin. For instance, Weber was not home at the time the fire broke out. See DeMarais, 405 N.W.2d at 511. By his own admission, he was the last person in his (otherwise unoccupied) house before the fire began, and he locked the doors and secured the windows before leaving. Furthermore, there is no evidence that anyone other than Weber had the keys to the premises. These are often found to be telltale signs in arson cases. See, e.g., Fitzgerald, 842 F.2d at 159; Ins. Co. of N. Am. v. Musa, 785 F.2d 370, 373 (1st Cir. 1986); Hargis, 2010 WL 1662179, at *2; Raphtis, 198 N.W.2d at 509 ("The last person to leave a building before a fire creates a circumstance which courts have deemed important in arson cases.").

When viewed in the light most favorable to Travelers, the record contains sufficient evidence from which a jury could find both incendiary origin and financial motive. Weber's Motion, therefore, must be denied.

4. The result would be the same without Quast

Notably, the Court would reach the same conclusion even if Quast were not controlling. As discussed above, Weber argues that an insurer cannot survive summary judgment under the "federal rule" without evidence showing, in addition to motive and

incendiary origin, that the insured had an "opportunity" to set the fire. (See Pl. Mem. in Supp. at 11, 15.)[9] He claims that the record lacks evidence showing such an "opportunity" here because he has proffered an alibi: he was passed out in his trailer in Mabel Murphy's' parking lot when the fire started. (See Pl. Mem. in Supp. at 17-20.) And he argues that in order to overcome this alibi, Travelers must "offer direct evidence tending to show he was in Sauk Centre at the time of the fire." (Id. at 20.)

But Weber offers no support for this "direct evidence" argument, which is inimical to the legion of cases discussed above holding that arson may be proved by circumstantial evidence. Moreover, contrary to his assertion, there *does* exist circumstantial evidence of "opportunity" here. Weber acknowledges that he was the last person in his (otherwise unoccupied) house before the fire began, and he locked the doors and secured the windows before leaving. These facts suffice to show "opportunity." See, e.g., Fitzgerald, 842 F.2d at 159 ("[A]ccess to the building is a sufficient showing of opportunity."); Musa, 785 F.2d at 373 (insurer "presented evidence showing that [the insured] had an almost unique opportunity to set (or to arrange the setting of) the fire" when it proffered testimony that insured was "the last person to leave the store before the fire occurred" and had "the only known set of keys"); Hargis, 2010 WL 1662179, at *2 (opportunity to set fire shown by, *inter alia*, evidence that insured "was the only person who had a key"

[9] Weber argues that "Minnesota [courts] ha[ve] never been confronted with a case which involves . . . ***three*** factors in a circumstantial evidence/arson case, viz: motive, incendiary origin, and ***opportunity***." (Pl. Mem. in Supp. at 17 (emphases in original).) He is mistaken. See Montgomery, 1993 WL 430347, at *1 ("Appellant also argues the evidence is insufficient to sustain a finding that she . . . caused the fire since North Star presented no evidence placing her . . . in the vicinity of the house within several hours of the fire. *It is not necessary, however, for North Star to present such evidence as long as there was evidence of the fire's incendiary nature combined with evidence of motive.*") (emphasis added).

and "was the last person in the house before the fire started"); 10A Lee R. Russ & Thomas F. Segalia, Couch on Insurance § 149:59 (3rd ed. 2010) ("[O]pportunity to set [a fire] may be shown by . . . access to the building."). Indeed, Weber appears to recognize that evidence of access alone will suffice. (See Pl. Mem. in Supp. at 11 (arguing he is entitled to summary judgment because Travelers "cannot produce evidence that [he] had opportunity *or access to the house in question near the time the fire started*") (emphasis added).)

That Weber denies being in the area at the time of the fire cannot be dispositive because a jury is free to disbelieve him. His assertion that he "was not in the vicinity of [his] home at the time of the fire merely creates a jury question." Hargis, 2010 WL 1662179, at *2 n.4; see also Zane v. Home Ins. Co. of N.Y., 254 N.W. 453, 454 (Minn. 1934) (fact that plaintiff was in out-of-town hospital for six days before fire not dispositive, as "his participation could be proved by circumstantial evidence").

At bottom, the Court concludes that the record contains sufficient evidence to create a jury question on Travelers' arson defense.

B. Leave to amend

In his Motion, Weber also seeks leave to amend his Complaint to add a cause of action for bad-faith denial of his claim, pursuant to Minnesota Statutes Section 604.18. In pertinent part, that statute provides that an insured may recover costs, attorneys' fees, and similar damages if he can show that his insurer "lacked a reasonable basis for denying the benefits of the insurance policy" and "knew" or acted in "reckless disregard" thereof. Minn. Stat. § 604.18, subd. 2(a). An insured may not allege such a claim in his

complaint, but rather must "make a motion to amend the pleadings to claim [such] recovery." Id. subd. 4(a).

Here, Travelers argues that amendment should be denied because it is (1) futile and (2) untimely. (Def. Mem. in Opp'n at 15-20.) The Court agrees with the latter argument and, accordingly, it need not consider the former.

Although leave to amend typically is granted liberally under Federal Rule of Civil Procedure 15, different considerations apply when a party seeks amendment beyond the deadline set in a scheduling order. See, e.g., Morrison Enters., LLC v. Dravo Corp., 638 F.3d 594, 610 (8th Cir. 2011) ("When a party moves for leave to amend outside the district court's scheduling order, Fed. R. Civ. P. 16(b), not the more liberal standard of [Rule 15], governs."). Under Rule 16(b), a plaintiff seeking an untimely amendment is required to show "good cause to modify the schedule." Id. (internal quotation marks and citation omitted). "The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." Id. (citations omitted).

The Pretrial Scheduling Order in this case set October 1, 2010, as the deadline for amendment. Weber's Motion is therefore untimely, and he must make a sufficient showing of good cause to be permitted to amend. The Court determines that he has failed to do so.

Notably, Weber has been alleging from the outset that Travelers' handling of his claim evidenced bad faith. Paragraph 9 of the Complaint – which was filed on April 24, 2010, more than five months before the amendment deadline – alleges that Travelers "has claimed, and continues to claim, that it does not have an obligation to pay . . . because

plaintiff either burned [his] residence by arson or caused another to burn [it]. *This claim is made in bad faith and in conscious violation of plaintiff's known rights*." (emphasis added).[10] He makes the same allegation now in support of his request to amend. Hence, there is simply no reason Weber could not have sought amendment long ago, well before the deadline set in the Pretrial Scheduling Order.

Weber argues that a motion for leave to assert a bad-faith claim requires a plaintiff to await the close of discovery because it must be supported by sufficient evidence, "which is obviously going to be strongest only after all the evidence produced in discovery is 'in.'" (Pl. Reply at 7-8.) But nothing requires a plaintiff seeking such an amendment to await receipt of the "strongest" or "best" evidence to support his motion. Rather, a plaintiff must make only a *prima facie* showing of bad faith, based on "one or more affidavits showing the factual basis" for the claim. Minn. Stat. § 604.18, subd. 4(a). Discovery need not have closed before a plaintiff can make such a showing. Weber also argues that a "prudent attorney will ordinarily not make a motion to include either punitive damages or bad faith insurance practice until he knows everything that the defendant has to offer." (Pl. Reply at 8.) But the *defendant's* evidence is irrelevant to the determination. This is made clear by the analogous procedure for amending a complaint to add a claim for punitive damages – when reviewing such a motion, courts look only at

[10] Although Weber included allegations regarding Travelers' so-called "bad faith" in his Complaint, he did not plead a separate bad-faith *claim*. Travelers nevertheless has cross-moved for summary judgment on that "claim." (See Def. Mem. in Supp. at 16-20.) If such a claim were in the Complaint, however, Weber would not need leave to add it.

the *plaintiff's* evidence. See, e.g., Harris v. Wal-Mart Stores, Inc., Civ. No. 07-1191, 2007 WL 4284854, at *2 (D. Minn. Nov. 30, 2007) (Kyle, J.) (collecting cases).

Weber has simply failed to point to any evidence he needed to uncover in discovery before bringing his Motion. Under these circumstances, he has not demonstrated "good cause" for failing to seek amendment before the deadline, and his request will be denied.[11]

II. Travelers' Motion will be denied

Travelers argues it is entitled to dismissal of Weber's Complaint for two reasons. First, it argues that this action was prematurely filed because it was still investigating Weber's claim when he commenced suit in April 2010. It next argues that Weber failed to comply with several conditions precedent in his policy. Neither contention has merit.

A. The alleged prematurity

Travelers asserts that it "was in the middle of conducting its claim investigation and had not made a decision with respect to Weber's claim at the time th[is] suit was commenced." (Def. Mem. in Supp. at 13.) Without having actually denied Weber's claim, it argues, he cannot show a breach of the policy. The Court does not agree.

On January 7, 2010, long before Weber filed suit, Travelers sent him a letter advising that it was "rejecting" his Sworn Statement in Proof of Loss. While this letter did not use the magic words "deny" or "denial," the Court fails to see a practical

[11] Weber also argues that Travelers will not be prejudiced by a belated amendment because it has known since the Complaint was filed that he was alleging bad faith. (Pl. Reply at 8.) In the absence of "good cause," however, a court generally should not reach the question of prejudice. See, e.g., Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 717 (8th Cir. 2008).

difference. Travelers is attempting to hide behind semantics – its "rejection" was, in the Court's view, the functional equivalent of a denial. Were it otherwise, insurers could "reject" claims without actually "denying" them, thereby avoiding the various statutory protections afforded to Minnesota insureds. See, e.g., Minn. Stat. § 72A.20, subd. 12(5) (unlawful for insurer to "fail[] to affirm or *deny* coverage within a reasonable time") (emphasis added); Minn. Stat. § 72A.201, subd. 4(3)(i) (providing 30 days for insurer to "inform the insured . . . of [its] acceptance or *denial* of a claim . . . unless the investigation cannot reasonably be completed within that time") (emphasis added).

Moreover, the letter provided that Travelers' investigation would not be finished until "Weber's examination under oath is completed and the investigation by the fire marshal for the State of Minnesota is also completed." Yet, Steinbach's investigation was complete on October 15, 2009, three months *before* the letter was sent, and Weber's examination under oath was completed on January 18, 2010. In other words, by Travelers' own acknowledgement, it possessed the information necessary to decide Weber's claim several months before he filed suit. There is no indication in the record, however, that Travelers took any steps during those months to do so.

In these circumstances, the Court believes that Travelers, at a minimum, *constructively* denied Weber's claim. Notably, Minnesota courts have recognized that an insurer can constructively deny a claim through its conduct. See, e.g., Perry v. State Farm Mut. Auto. Ins. Co., 506 F. Supp. 130, 134 (D. Minn. 1980) (MacLaughlin, J.); In re Claims for No-Fault Benefits Against Progressive Ins. Co., 720 N.W.2d 865, 871 n.2

(Minn. Ct. App. 2006).[12] Travelers, too, recognizes the concept of constructive denial. (See Def. Reply at 8 (arguing that there was no constructive denial in this case).) And where, as here, an insurer possesses the information necessary to decide an insured's claim but fails to act on that information, the claim is constructively denied. See Durkin v. Allstate Ins. Co., Civ. A. No. 90-346, 1991 WL 42562, at *1 n.3 (E.D. La. Mar. 21, 1991) (noting that "when an insurer [fails] to respond to a timely filed notice of loss, . . . that insurer has constructively refused to participate in an ascertainment of the loss and has effectively denied the claim").

Accordingly, the Court rejects Travelers' argument that this action should be dismissed as prematurely filed.[13]

B. The alleged failure to cooperate

Travelers next argues that Weber failed to cooperate with its investigation because he did not sign the transcript of his examination under oath, failed to re-submit a Sworn Statement in Proof of Loss, and failed to provide authorizations for his cell phone records. (Def. Mem. in Supp. at 16.) As a result, it contends that this action must be dismissed because Weber transgressed the policy's "suit against us" clause, which provides that "[n]o action can be brought against us unless there has been full compliance with all of the terms . . . of this policy." This argument fails.

[12] Minnesota courts are not unique in this regard. See, e.g., Jones v. Gen. Ins. Co. of Am., Civ. A. No. 07-0855, 2009 WL 1537866, at *11 (S.D. Ala. May 29, 2009); Durkin v. Allstate Ins. Co., Civ. A. No. 90-346, 1991 WL 42562, at *1 n.3 (E.D. La. Mar. 21, 1991).

[13] Moreover, even if the claim could not be considered "denied" at the time Weber filed suit, surely it has been constructively denied by now, nearly two years after the fire occurred, essentially rendering this argument moot.

The Court has recently been down this road. In Martin v. State Farm Fire & Casualty Co., __ F. Supp. 2d __, 2011 WL 2437060 (D. Minn. June 16, 2011) (Kyle, J.), a case with remarkably similar facts to the instant action, the plaintiff Martin's home suffered fire damage; State Farm denied his claim on several grounds and, when he sued, it moved for summary judgment, arguing that the action was barred because Martin had failed to (i) timely submit a Sworn Statement in Proof of Loss and (ii) sit for an examination under oath, thereby violating several cooperation clauses in his policy. The Court rejected this argument because "[i]t has long been recognized in Minnesota" that a timely proof of loss and an examination under oath are not "condition[s] precedent to *suit*," but rather "condition[s] precedent to *recovery*." Id. at *4 (emphases in original) (collecting cases). The Court perceives no reason to deviate from Martin or repeat herein the analysis in that case. For the reasons stated in Martin, the Court rejects Travelers' argument that Weber's "failure to fulfill [his] duties of cooperation under the [p]olicy *precludes him from bringing this action* against Travelers." (Def. Mem. in Supp. at 16 (emphasis added).) And it makes no difference that Weber's policy expressly provided that cooperation was a condition precedent to *suit* – as noted in Martin, such a provision cannot be enforced. See 2011 WL 2437060, at *5 (citing Greene v. W. Bend Mut. Ins. Co., No. A10-1031, 2011 WL 292151, at *2-3 (Minn. Ct. App. Feb. 1, 2011)).[14]

[14] At oral argument, Travelers seized on Martin's distinction between the right to sue and the right to recovery, which emanated from several Minnesota Supreme Court decisions, including Nathe Bros., Inc. v. American National Fire Insurance Co., 615 N.W.2d 341 (Minn. 2000). It argued that even if Weber enjoys the right to *sue*, it cannot have breached the policy by failing to pay him because he has no right to *recovery*, due to his alleged failure to cooperate. In the absence of any breach, Travelers argues that Weber's claim must be dismissed. The Court

The undersigned also noted in Martin that an "insured's failure to timely submit a proof of loss is not fatal to his claim unless the insurer can 'show it was prejudiced' as a result." 2011 WL 2437060, at *6 (quoting Nathe Bros., Inc. v. Am. Nat'l Fire Ins. Co., 615 N.W.2d 341, 347 (Minn. 2000)). Travelers has nowhere argued that Weber's ostensible "lack of cooperation" was prejudicial, and there is no prejudice evident to the Court. Notably, Weber *has* submitted to an examination under oath; he simply has not signed the transcript of that examination. It would be difficult for Travelers to argue, therefore, that it lacks the information necessary to adjudicate his claim. Nor can it credibly claim that it could not marshal such information *by now*, given the panoply of discovery devices available to it in this litigation. For instance, Travelers assails Weber's failure to provide authorizations for his cell-phone records, and yet it acknowledges that it subpoenaed those records. (Def. Reply at 5.) Simply put, the Court perceives no prejudice here.[15]

CONCLUSION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Weber's Motion for Partial Summary Judgment and Amendment of

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cannot agree with this circular argument. Indeed, if Travelers' argument were correct, there would have been no need for Nathe Bros. (and the other cases discussed in Martin) to distinguish between the right to sue and the right to recovery – they would have simply held that there had been no breach and affirmed the dismissal of the insureds' claims.

[15] It is possible that Weber's failure to submit a revised Sworn Statement in Proof of Loss was prejudicial, but it is impossible for the Court to make that determination on the current record. Notably, Weber's original Sworn Statement in Proof of Loss has not been submitted with the parties' Motion papers, and hence the Court cannot discern whether it was so lacking in detail that Travelers reasonably required a revised one.

Complaint (Doc. No. 46) and Travelers' Motion for Summary Judgment (Doc. No. 41) are **DENIED**.[16]

Date: July 13, 2011

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

[16] The Court reminds the parties that this case is on its September 2011 trial calendar. The parties should be fully prepared to try this matter in September 2011 (although trial will not be scheduled during defense counsel's previously indicated family vacation).