

STATE OF MINNESOTA
COUNTY OF HENNEPIN

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DISTRICT COURT

FOURTH JUDICIAL DISTRICT

BY _____ DEPUTY

Diane Saarela,

HENNY CO. DISTRICT
COURT ADMINISTRATOR

Plaintiff,
vs.

**ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

Minnesota FAIR Plan,
Defendant.

Court File No. 27-CV 06-8852

The above-entitled matter came before the undersigned Judge of District Court on March 23, 2007 on the parties' cross-motions for summary judgment.

Plaintiff is represented by Eric J. Strobel, Esq. and Holly J. Tchida, Esq., Hinshaw & Culbertson, LLP, 333 South Seventh Street, Suite 2000, Minneapolis, MN 55402.

Defendant is represented by Bradley J. Ayers, Esq. and Robert W. Vaccaro, Esq., Flynn, Gaskins & Bennett, L.L.P., 333 South Seventh Street, Suite 2900, Minneapolis, MN 55402.

Based on the file, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. In this lawsuit, Plaintiff has brought:
 - A. An action for damages alleging: Count I-Breach of Contract; Count II-Bad Faith; Count III-Misrepresentation; Count IV-Fair Claims Practices Act;
 - B. Declaratory relief seeking declarations that:
 - a. the FAIR Plan policy provides coverage to Plaintiff and her family for the property damage, repairs, damage to personal property, and alternative living expenses, on a per covered loss basis and that:
 - 1) Plaintiff is entitled to recover up to the limits of \$156,000 for property damage to the residence for damage resulting from each of the seven covered causes of loss;

2) Plaintiff is entitled to recover up to the limits of \$15,000 for property damage to the appurtenant structures for damage resulting from each of the seven covered causes of loss;

3) Plaintiff is entitled to recover up to the limits of \$78,000 for property damage to her personal property for damage resulting from each of the seven covered causes of loss;

4) Plaintiff is entitled to recover up to the limits of \$15,000 for additional living expenses necessitated by each of the seven covered causes of loss. Pltf Complaint, p. 17.

2. Defendant has filed cross-claims against the Plaintiff alleging Count I—Intentional Act; Count II—Misrepresentation; Count III—Vacancy/Increase of Hazard.

3. In the motions before the Court, both Plaintiff and Defendant have made cross-motions for summary judgment as to their respective claims and counter-claims.

4. Plaintiff Saarela owned a home located at 3219 Lyndale Avenue North, Minneapolis, Minnesota. Saarela purchased the home in 1999. There is no indication that the property was in a condemned status at the time of purchase. The property experienced two fires—one on May 16, 2004 and the other on June 10, 2004. Defendant has presented evidence that the fires were the result of arson and this is not disputed by the Plaintiff. The property was demolished by the City in September 2005.

5. Prior to the fires, the following persons were residing in the premises:

- a. Plaintiff
- b. Marjorie Dawson (Plaintiff's mother)
- c. Cassandra, Marissa and Matthew Saarela (Plaintiff's children)
- d. Wayne Dawson (Plaintiff's brother)
- e. Catrina LaFrance (Matthew Saarela's girlfriend)
- f. Tiara and Martina LaFrance (children of Matthew and Catrina)
- g. Daniel (Saarela ?) (Plaintiff's son) (resided there until Oct. or Dec. 2003)

See, Vaccaro Aff., 2/23/07, Ex. 2 (Saarela depo.) pp. 25-26.

6. In addition, three other persons, Michael, Patsy and their daughter, Tiffany (all unrelated to Plaintiff), lived on the third floor in the few months preceding the condemnation. Plaintiff is unsure if their last name is Green or Smith, so she used both names during her examination under oath of August 16, 2004. Tchida Aff., 3/14/07, Ex. 25, p. 93. (The Court will

refer to them as “the Greens”). During the time that Michael, Patsy and Tiffany “Green” resided on the premises, an incident occurred involving Tiffany, Daniel Saarela, Daniel’s friend (Brett), Plaintiff’s daughters and the police (allegations of rape). *Id.* at 67-69. However, Michael, Patsy and Tiffany “Green” remained on the premises until everyone was evicted when the premises were condemned. *Id.* at 136. There is no indication that the three unrelated parties paid any rent to Plaintiff.

7. According to Plaintiff, she and her mother owned the premises at Lyndale with a mortgage of about \$1,400 per month. *Id.* at 114. Plaintiff states her mother paid \$500 and Plaintiff paid the rest. *Id.* Plaintiff’s brother, Wayne Dawson, helped with the utilities and groceries *Id.* at 115. Wayne Dawson is on disability. *Id.* Plaintiff did not charge her family rent. Tchida Aff., 3/14/07, Ex. 25, p. 93.

8. On March 15, 2004 the City, through its inspector, Wayne Murphy, went to the premises for the inspection at the request of the Minneapolis police who were going to conduct a search warrant. Vaccaro Aff., Ex. N, Murphy depo., p. 25. After the police executed the warrant, Murphy went through the property with Sergeant Peter Ritschel. *Id.* Murphy observed:

...What I found was clutter, unsanitary conditions, open electrical boxes, hazard electrical box.

There was a sleeping unit, an apartment put in the basement with no second means of egress [where Plaintiff’s mother slept]. There were stacks of papers and clothing piled next to the furnace.

The garage was cluttered with car parts, tools. Part of the garage roof was propped up with two by fours because it was starting to cave in.

...rodent droppings throughout the kitchen cabinets...

...There was a back stairwell from the third floor apartment down to the garage roof which was, in my opinion, unsafe to walk on. I would not walk down it...

Id. at 25-26. During that inspection, Murphy noted the red-tagged furnace in the top floor. *Id.* at

30.

9. On March 17, 2004, the City issued two Letters of Intent to Condemn for 3219 Lyndale Avenue North: one for lack of maintenance¹ and one for unsanitary conditions.² Vaccaro Aff., 2/23/07, Exs. O and P. On March 15, 2004, a Placard of Unlawful Occupancy was posted on the premises (Inspector's Comments: "Property is shown to be a duplex but grandmother has apartment in basement and attic is being rented"). The required correction was to "revert this dwelling to its authorized construction and occupancy as shown in the Inspections Division records. Our records show the dwelling being used in some other manner than what is allowed...." Vaccaro Aff., Ex. J.

10. Murphy returned to the premises on April 12, 2004 with Sergeant Ritschel and observed, "There was not a lot of work done. The property still scored very high." *Id.* at 27.

11. For "lack of maintenance", the repairs were to be done by May 1, 2004; for "unsanitary conditions", the repairs originally was to be done by March 28, 2004, but the "work done" date on unsanitary conditions was extended to May 1, 2004. *Id.* The Letters state, "If the above corrections have not been made, the building may be condemned and the occupants will be notified that they have to move immediately." *Id.* By March 28, 2004 Saarela was to discontinue the unlawful occupancy of the attic, as well as the unlawful occupancy of the

¹ The following items were listed as violations of the Minneapolis Housing Maintenance Code, for lack of maintenance: the garage roof (permit required to repair), rear retaining wall, the fence along the property, the chimney, exterior steps to 3rd floor rear patio door, the front and rear 1st floor doors; the 2nd and 3rd floor rear doors; the 2nd floor exterior guard rail; the exterior handrails; the interior handrails; hazardous wiring in garage, 1st floor and furnace (permit required); 3rd floor entry door, basement closet door, laundry door; exterminate mice; deteriorated walls (various locations); deteriorated ceilings (various locations); remove and replace peeling paint (possibly lead-based, depending upon date structure was built); exterior ground cover throughout the yard. Vaccaro Aff., 2/23/07, Ex. O.

² The following items were listed as violations of the Minneapolis Housing Maintenance Code, for unsanitary conditions/clutter/hazardous electrical: remove combustible materials and rodent harborages from basement; discontinue storage of combustible materials within 10 feet of heating facility; remove illegal extension cord wiring; repair/replace defective electrical hanging fixtures; clean the dwelling. Vaccaro Aff., 2/23/07, Ex. P.

nonhabitable basement space as a habitable room or dwelling unit. Failure to cure the defect of unlawful occupancy could result in a \$100 re-inspection fee and “possible legal action.”

12. Saarela refers to a repair or replacement of a hot water heater “per the City’s requirements” (Pltf. Supp. p. 3; Tchida Aff., Ex. 2, p. 32), but the Court does not find any mention of the water heater in any of the City’s documents.

13. Plaintiff claims that, in April and May of 2004, she was in the process of performing repairs to her home. Saarela Aff. ¶ 3. She states she had finished remodeling the kitchen, replaced six windows and replaced the back door. However, neither the kitchen remodel nor the windows were part of code compliance issues. Plaintiff also states that she had received an estimate from a contractor, Advanced Restoration Services, to perform the various needed repairs on the home. Tchida Aff., Ex. 1. The bid is dated April 23, 2004, lists thirteen items for repair, at a cost of \$30,000, with work to commence on April 24, 2004 and be completed by May 15, 2004. *Id.* The bid is signed by Barry Rohweder of Advanced Restoration Service. *Id.* However, the record does not contain a *signed contract* between Saarela and Advanced Restoration Service. Vaccaro Aff., Ex. BB, Barry Rohweder depo., p. 17. Beyond some boarding up of windows and doors (post-fire), the Rohweders did not do any of the bid work on the Saarela property. *Id.* at 21.

14. Plaintiff also stated that Minnegasco (or “the inspectors”) told her that the furnaces “had to be serviced,” and that Service Plus went to the house on May 3, 2004 at 8:00 a.m. (the day of the eviction). Tchida Aff., 3/14/07, Ex. 25, p. 27. Inspector Murphy states he saw the red tag almost two months earlier, on or about March 15, 2004. Plaintiff claims the furnace was red-tagged on the morning of May 3, 2004; according to Plaintiff, Home Service Plus Repair and Maintenance “blew both furnaces out that morning at 8:00 a.m.”—red-tagging one of the furnaces and repairing the other. *Id.* p. 28. Plaintiff’s explanation about the red-

tagging dates does not correspond with the notation in the City's Letter of Intent to Condemn of a furnace violation having occurred on March 15. If Plaintiff's version of the facts is accurate, Plaintiff nevertheless had *not* corrected the furnace defects by the May 1, 2004 final cure date stated in the City's Letters of Intent to Condemn.

15. It is undisputed that the City, through its inspector, Wayne Murphy, returned to the property on May 3, 2004 along with the police. According to Plaintiff, the City did not reinspect the premises and Plaintiff was told she had five minutes to grab what she could and vacate the property. Tchida Aff., Ex. 2, Examination Under Oath of Saarela, 10/07/04, pp. 205-206. Inspector Murphy, however, states that he walked through the premises with Plaintiff and Sergeant Ritschel, and that he told Plaintiff that not enough work had been done to lift the Letter of Intent to Condemn. Vaccaro Suppl. Aff., Ex. B, Murphy depo. p. 41. Therefore, the property was vacated and boarded.

16. Plaintiff made arrangements to go back into the house to retrieve belongings on May 10, 2004 from 10:00 until 7:00 or from 9:00 to 7:00. Tchida Aff., 3/14/07, Ex. 25, p. 37. What was retrieved is not in the record. Diane Saarela states that her brother, Wayne, went to the property everyday (after the condemnation) in order to retrieve their mail. *Id.* at 214. Saarela states that during that time (between May 3 and 16, 2004), Wayne said the basketball hoop was stolen, the garbage cans were moved, the carport doors were opened and that neighbors had been calling the police because somebody was up on the house's balcony. *Id.* at 214-215.

17. On May 16, 2004, a fire occurred at the premises. Vaccaro Aff., Ex. T (MFD Fire Investigation Report of T. Thomas). Thomas determined the fire was arson and estimated damage to the structure at \$75,000 and damage to contents at \$5,000. *Id.*

18. Investigator James Novak investigated the fire for Defendant on May 18, 2004. Vaccaro Aff., Ex. U (Novak Preliminary Investigation Report). He concluded the fire was of an

incendiary nature. *Id.* The house is in a “bad neighborhood” and directly across the street from a flower shop where a burglary/homicide had occurred on the same day as the fire. *Id.* A neighbor stated that her son and a friend had observed two white males coming out of the garage after the fire. *Id.* Another neighbor saw a white car sitting in the alley while the fire was burning. *Id.*

19. According to Sgt. Sean McKenna of the Minneapolis Police Department Arson Investigation Unit, possible causes for this arson were: for the purpose of defrauding an insurance company; the dwelling’s location in a high-crime area; the fact that the house was vacant, boarded up, and subject to trespassers for the purpose of committing crimes, for drug use and prostitution; plus Saarela “probably through no fault of her own, had children who were criminals, and certainly I would believe that, as a result of their criminal activities, they had plenty of enemies.” Tchida Aff, Ex. 10 at pp. 22-23.

20. On June 10, 2004, a second arson fire occurred at the home. Vaccaro Aff., Ex. V (MFD Fire Investigation Report by T. Thomas). Thomas set the property damage at \$50,000 and stated “the property is a total loss because of it’s [sic] current condition.” *Id.*

21. On June 26, 2004, Diane Saarela filled out a Sworn Statement in Proof of Loss to the Minnesota FAIR Plan which was received by Defendant on June 29, 2004. Vaccaro Aff., Ex. Y. Saarela stated the claimed amount for the loss to the property was \$239,000. This was for the May 16, 2004 fire.

22. On June 26, 2004, Saarela filled out another Sworn Statement in Proof of Loss for the June 26, 2004 fire, claiming the same amount. That was received by the Defendant on July 26, 2004. *Id.*, Ex. Z.

23. For the remaining five (5) losses, Saarela has not completed any Sworn Statements in Proof of Loss.

24. On December 20, 2004 FAIR Plan sent Saarela a letter advising her that FAIR Plan was denying Saarela's claims for the following reasons:

1. The fire(s) were intentionally set by or at the direction of Saarela (citing Section I-Exclusions, Section 8 – Intentional Loss);
2. Saarela increased the risk of hazard (citing Minn.Stat. 65A.01, the Minnesota Standard Fire Insurance Policy);
3. Saarela concealed and misrepresented material facts relating to the insurance (citing the “Concealment or Fraud” provision of the policy);
4. Saarela was not using the dwelling as the “residence premises” at the time of the loss (citing Section 1, Coverage A, Definitions).

The denial letter also contained the following language:

“By specifying the above reasons for denial, the MN FAIR Plan does not intend to waive, but rather specifically reserves all of its rights, including any defense, which it may be entitled to under the law.”

Tchida Aff., Ex. 14 at 14 of 15 and Minnesota endorsement at 6 of 7.

25. Defendant has paid a total of \$156,000 to the mortgagee, Countrywide Home Loans, and the City of Minneapolis. The payment to Countrywide was pursuant to the Mortgage Clause in the Policy which states:

* * *

If a mortgagee is named in this policy:

- a. Loss payable to property insured under Coverage A or, if applicable, Coverage B or by separate endorsement will be paid to the mortgagee and you, as interests appear...

If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

- a. Pays any premium due under this policy on demand if you have neglected to pay the premium; and
- b. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so...

If we pay the mortgagee for any loss and deny payment to you:

- a. We are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. At our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgagee debt...

26. The payment to the City (25% of the \$156,000) was made pursuant to Minn.Stat. § 65A.50, subd. 2 (Trust or escrow accounts; insured real property fire or explosion loss proceeds):

Subd. 2. Partial withholding from settlement payments; notice. Except as otherwise provided in this section, with respect to insured real property located in a municipality which has elected to apply this section as provided in subdivision 12, when a claim is filed for a loss to insured real property due to fire or explosion and a final settlement is reached on the loss to the insured real property, an insurer shall withhold from payment 25 percent of the actual cash value of the insured real property at the time of the loss or 25 percent of the final settlement, whichever is less. At the time that 25 percent of the settlement or judgment is withheld, the insurer shall give notice of the withholding to the treasurer of the municipality in which the insured real property is located, to the insured, and to any mortgagee having an existing lien or liens against the insured real property, if the mortgagee is named on the policy. In the case of a judgment, notice shall also be provided to the court in which judgment was entered.

Minn.Stat. § 65A.50, subd. 2.

27. It is undisputed that Plaintiff was not notified by FAIR Plan when the payments to Countrywide and the City were made. However, Plaintiff has not explained how that lack of notification affects her claims in the present case.

28. From late 1999 through January 2005, FAIR Plan provided Homeowners Insurance coverage of the Saarela property under policy number 24MN0001028. Tchida Aff., Ex. 14. Among the applicable “perils insured against” are “Fire and Lightning,” “Smoke,” “Vandalism or malicious mischief” and “Theft.” Tchida Aff., Ex. 14 at 5 of 15.

29. The “insured” means:

...you and residents of your household who are:

- a. Your relatives; or
- b. Other persons under the age of 21 and in the care of any person named above.

Tchida Aff., Ex. 14 at 1 of 15.

30. The Policy defines the “insured location” as the “residence premises” located at 3219 Lyndale Avenue North, Minneapolis, Minnesota. Tchida Aff., Ex. 14. The Policy defines “residence premises” as:

- a. The one family dwelling, other structures, and grounds; or
- b. That part of any other building;

where you reside and which is shown as the “residence premises” in the declarations.

“Residence premises” also means a two family dwelling where you reside in at least one of the family units and which is shown as the “residence premises” in the Declarations.

Tchida Aff., Ex. 14.

31. The parties agree that the residence at 3219 Lyndale Avenue North was a duplex.

32. The Policy in effect at the time of the fires had been renewed on December 3, 2003 and was in effect through December 3, 2004. *Id.* at Declarations page.

33. The Policy also contains an “Intentional Loss” provision which states:

We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

8. Intentional Loss, meaning any loss arising out of any act committed:

- a. By or at the direction of an “insured”; and
- b. With the intent to cause a loss.

This exclusion does not apply, with respect to loss to covered property caused by fire, to an “insured” who does not commit, or direct another to commit, any act that results in loss by fire. We cover such “insured” only to the extent of the “insured’s” legal interest, but not exceeding the applicable limit of liability.

Tchida Aff., Ex. 14 at 6 of 15 and Minnesota endorsement at 3 of 7.

34. The Policy contains a “Concealment or Fraud” clause, as follows:

2. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an “insured” has:

- a. Intentionally concealed or misrepresented any material fact or circumstances;

- b. Engaged in fraudulent conduct; or
- c. Made false statements;

relating to this insurance.

35. However, that clause has been “deleted and replaced” by the Minnesota Endorsement which states:

Concealment Or Fraud

a. Under Section 1 – Property Coverages:

(1) With respect to loss caused by fire, we do not provide coverage to the “insured” who has:

- (a) Before a loss, willfully; or
- (b) After a loss, willfully and with intent to defraud;

concealed or misrepresented any material fact or circumstance relating to this insurance.

Tchida Aff., Ex. 14, p. 6 of 7. The same language is used for peril other than fire and for liability coverage.

36. The Minnesota Endorsement to the Policy also contains the following language:

Section I – Conditions

2. Your Duties After Loss, paragraphs **f.** and **g.** are deleted and replaced by the following:

f. As often as we reasonably require:

- (1) Show us the damaged property;
- (2) Provide us with records and documents reasonably related to the loss, or certified copies if the originals are lost, and permit us to make copies; and
- (3) Submit to an examination under oath, while not in the presence of any other “insured”, and sign the same, within a reasonable time of our request, after having been informed:

(a) Of your right to counsel; and

(b) That your answers may be used against you in later civil or criminal proceedings.

g. Send to us, within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

- (1) The time and cause of loss;
- (2) The interest of the “insured” and all others in the property involved and all liens on the property;
- (3) Other insurance which may cover the loss;

(4) Receipts for additional living expenses incurred and records which support the fair rental value loss; and

(5) Evidence or affidavit that supports a claim under the Credit Card, Fund Transfer Card, Forgery and Counterfeit Money Coverage, stating the amount and cause of loss.

.....

37. As stated in Finding of Fact Nos. 20-21 *supra*, Saarela has submitted two (2) Sworn Statements in Proof of Loss. Saarela is making seven (7) claims under the FAIR Plan policy (“seven covered losses”).

38. Plaintiff moves for summary judgment on all of her claims for:

a. Breach of Contract for failure to pay under the Policy for “seven covered losses;”

b. Bad Faith for FAIR Plan’s “refusal” to honor its contractual obligations under the Policy;

c. Misrepresentation – that FAIR Plan misrepresented to Plaintiff that there is no coverage for her losses resulting from numerous covered perils;

d. Violation of Fair Claims Practices Act, Minn.Stat. § 72A.201 et seq. for which Plaintiff seeks to act as a private attorney general; and

e. Declaratory relief that the Policy provides coverage to Plaintiff “and her family” for property damage, personal property damage, alternative living expenses and other consequential damages sustained as a result of Defendant’s conduct.

39. Defendant moves for summary judgment in its counterclaims for:

a. Intentional Act – that Plaintiff or persons under her control set and/or arranged the fires;

b. Misrepresentation – that Plaintiff concealed or misrepresented material facts or circumstances relating to the insurance and that caused the fires to occur; and

c. Vacancy/Increase of Hazard – that Plaintiff neglected the property, allowing it to reach the state where it was condemned so that she had to vacate it, thus increasing the risk of hazard to the property for vandalism, thefts and the fires.

40. Defendant maintains that Plaintiff's conduct caused it to have to pay out a total of \$156,000 and that it should get judgment against Plaintiff in that amount.

CONCLUSIONS OF LAW

1. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits...show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Minn.R.Civ.Proc. 56.03.

2. A non-moving party must submit significant probative evidence tending to support its complaint; it must do more than simply show some metaphysical doubt as to the material facts. Minn.R.Civ.Proc.. 56.05; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.App. 1989) citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The party opposing summary judgment has the burden to "provide the court with specific facts indicating that there is a genuine issue of fact." *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

3. The district court may not decide factual issues; its sole function is to determine whether fact issues exist. *Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Company*, 498 N.W.2d 274, 276 (Minn.App. 1993), *rev. denied*, (Minn. April 6, 1993).

4. All evidence in the record before the Court is to be construed in the light most favorable to the nonmoving party. *See Leonzal v. Grogan*, 516 N.W.2d 210 (Minn.App. 1994); *Rediske v. Johnson*, 415 N.W.2d 692, 693 (Minn.App. 1987), and all justifiable inferences are to be drawn in favor of the nonmoving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981); *accord Liberty Lobby*, 477 U.S. at 255.

Plaintiff's Claim under the Unfair Claims Practices Act, Minn.Stat. § 72A.201 et seq.

5. Subdivision 1 of the statute provides:

Subdivision 1. Administrative enforcement. The commissioner may, in accordance with chapter 14, adopt rules to ensure the prompt, fair, and honest processing of claims and complaints. The commissioner may, in accordance with sections 72A.22 to 72A.25, seek and impose appropriate administrative remedies, including fines, for (1) a violation of this section or the rules adopted pursuant to this section; or (2) a violation of section 72A.20, subdivision 12. The commissioner need not show a general business practice in taking an administrative action for these violations.

No individual violation constitutes an unfair, discriminatory, or unlawful practice in business, commerce, or trade for purposes of section 8.31.

6. Section 8.31 is entitled "Additional duties of attorney general" and the statute includes the "private attorney general" subdivision, subd. 3a:

Subd. 3a. Private remedies. In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

7. While Plaintiff seeks to act as a private attorney general for her UCPA claim, it is well-settled in Minnesota that a private person "does not have a cause of action for a violation of the Unfair Claims Practices Act." *Morris v. American Family Mutual Insurance Co.*, 386 N.W.2d 233, 238 (Minn.1986) ("...a private person does not have a cause of action for a violation of the Unfair Claims Practices Act."); *Glass Service Co., Inc. v. State Farm Mutual Automobile insurance Co.*, 530 N.W.2d 867, 872 (Minn.App.1995) ("...UCPA is inapplicable because it creates no substantive legal rights or private cause of action. See *Morris v. American Family Mut. Ins. Co.*, 386 N.W.2d 233, 238 (Minn.1986) (holding that no private causes of action exist for violations of the UCPA)"); *Schermer v. State Farm and Fire Cas. Co.*, 702 N.W.2d 898, 905 (Minn.App.2005):

The class's claims were predicated on an alleged violation of Minn.Stat. § 72A.20, subd. 13. The class claimed that State Farm's alleged breaches of contract violated this statute. Thus, the class sought to bring a private cause of action under the UCPA, which is barred by *Morris*. Moreover, this court has rejected a plaintiff's attempt to use an alleged violation of the UCPA as an element of the plaintiff's common law claim for tortious interference with prospective relations. See *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867 (Minn.App.1995), *review denied* (Minn. May 2, 1995). Relying on *Morris*, this court in *Glass Serv.* reiterated that the UCPA does not create any "private cause of action," regardless of how the claims are styled. *Id.* at 872; *cf. Olson v. Moorhead Country Club*, 568 N.W.2d 871, 873 (Minn.App.1997) (relying on *Morris* and *Glass Serv.* to hold that an employee did not have a private cause of action for conversion where his only alleged right arose under a statute that did not provide for a private cause of action), *review denied* (Minn. Oct. 31, 1997); see also *Elder v. Allstate Ins. Co.*, 341 F.Supp.2d 1095, 1100-02 (D.Minn.2004) (citing *Morris* and the absence of a private cause of action under the UCPA to hold that a common law claim for negligence per se cannot be based on an insurer's alleged violation of the UCPA). Thus, the law is settled that a litigant cannot directly sue under Minn.Stat. § 72A.20, subd. 13, or use an alleged violation of this statute to prove elements of a common law claim.

8. Therefore, Plaintiff's UCPA claim will be dismissed.

Plaintiff's Claim for Bad Faith

9. Plaintiff alleges that Defendant acted in bad faith by improperly refusing to honor its contractual obligations under the Policy "in an effort to defraud Plaintiff from her contractual rights thereunder." Complaint ¶ 65.

10. In *Haagenson v. National Farmers Union Prop.*, 277 N.W.2d 648, 652 (Minn.1979), the court held that bad faith refusal to pay a first-party insurance claim is not actionable absent an independent tort ("We have consistently held, in the absence of specific statutory provision therefor, that extra-contract damages are not recoverable for breach of contract except in exceptional cases where the breach is accompanied by an independent tort.").

The *Haagenson* court stated:

Plaintiffs contend that defendant committed an independent tort because refusal to pay their claim under the insurance contracts was intentional, malicious, and in bad faith. Notwithstanding the jury's finding that such was defendant's conduct, it does not appear from the circumstances of the accident that the responsible officials of defendant insurance company had no reason whatever to contest plaintiffs' claim under the insurance contracts. Even assuming the contrary, however, our recent decisions in Moore

v. John E. Blomquist Inc., supra, and Wild v. Rarig, supra, hold that such damages are not recoverable for bad-faith breach of contract. As expressed in the Wild case (302 Minn. 442, 234 N.W.2d 790): “A malicious or bad-faith motive in breaching a contract does not convert a contract action into a tort action.” *Haagenson* at 652.

11. The *Haagenson* holding is reiterated in *Saltou v. Dependable Ins. Co., Inc.*, 394 N.W.2d 629, 633 (Minn.App.1986):

The tortious acts appellants allege, however, are all connected with Dependable's failure to pay appellants' insurance claim in the manner appellants felt it should have been paid. **The failure to pay an insurance claim in itself, no matter how malicious, does not constitute a tort; it constitutes a breach of an insurance contract.** *Haagenson v. National Farmers Union Property & Casualty Company*, 277 N.W.2d 648, 652 (Minn.1979). “When the insurer refuses to pay or unreasonably delays payment of an undisputed amount, it breaches the contract and is liable for the loss that naturally and proximately flows from the breach.” *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn.1979). Punitive damages are not recoverable for breach of contract unless the breach was accompanied by an independent tort. *Id.* at 388. [Emphasis added]

12. Plaintiff has offered no caselaw to the contrary (*See* Pltf. Memo in Supp. at pp. 32-33 and Pltf. Memo in Opp. at pp. 12-13); therefore, Plaintiff's claim for Bad Faith will be dismissed.

Plaintiff's Claim for Misrepresentation

13. Plaintiff claims that Defendant misrepresented to Plaintiff that there is no coverage for her loss from the numerous covered perils and that FAIR Plan intentionally made those misrepresentations for the purpose of wrongfully avoiding its obligations under the Policy. Complaint ¶¶ 70-71.

14. Defendant argues that the misrepresentation claim is a breach of contract claim impermissibly disguised as a tort and, therefore, the claim should be dismissed for the same reasons as the dismissal of the bad faith claim. Deft. Memo in Supp. p. 19. The Court agrees and the claim will be dismissed.

Plaintiff's Claims for Breach of Contract and Declaratory Judgment; Defendant's Counterclaims Alleging Intentional Act and Vacancy/Increase of Hazard

15. Defendant argues that Plaintiff's claims should be dismissed because they are barred by the holding in *Quam v. Gen. Accident Ins. Co. of North America*, 411 N.W.2d 270 (Minn.App.1987) and "uncontradicted evidence that Plaintiff failed to comply with orders of the City of Minneapolis Inspections Division concerning her property." Deft. Memo in Supp., p. 1.

16. Defendant argues that, under the *Quam* case, "the undisputed evidence in [the present] case showing an increase in the risk of hazard is so conclusive that judgment can appropriately be entered on summary judgment." *Id.* at 5. The facts in *Quam* are:

Appellant Hazel Quam was the owner of a duplex at 2728 Bloomington Avenue, as well as several other rental properties. The property was destroyed by fire on September 10, 1983, one day after the house had been condemned by the Minneapolis Health Department for unsanitary living conditions in the first floor apartment. The two-story house was insured for fire loss with respondent General Accident Insurance (GAI) for \$65,000. GAI denied Quam's claim for this amount, on grounds of arson by the insured and increase of hazard by the insured. It is undisputed the fire was deliberately set, with the use of gasoline as an accelerant.

GAI stipulated that Quam owned the property, was insured under the policy for the loss, and that the loss exceeded the policy limits. The only issues at trial were whether Quam arranged for the burning of the house and whether the conditions leading to the condemnation increased the hazard of loss by fire. *Id.* at 270.

17. The judge in *Quam* submitted the arson and "increase of hazard" issues to the jury by special verdict.³ As to whether the conditions leading to the condemnation increased the hazard of loss by fire, *Quam* determined that the "increase of hazard" by the insured need not *cause* the actual loss. *Quam* states:

The court instructed the jury that the insured's "increase of hazard" may defeat recovery although the increased hazard did not cause the actual loss. Since the fire was of incendiary origin, the conditions in the building did not cause the loss. However, Quam's argument that causation is required is without merit.

Our supreme court has stated that "[w]here the risk is in fact increased, it is immaterial that the loss was not caused by it." *Taylor v. Security Mutual Fire Insurance Co.*, 88

³ The court in *Quam* itself answered the first verdict question, finding the fire was of incendiary origin. *Id.* Similarly, in the present case, Plaintiff is not disputing the incendiary origin of either 2004 fire.

Minn. 231, 235, 92 N.W. 952, 954 (1903); *see also* Note, *The Increase of Hazard Clause in The Standard Fire Insurance Policy*, 76 Harv.L.Rev. 1472, 1474 (1963), *quoted in Hawkeye Chemical Co. v. St. Paul Fire & Marine Insurance Co.*, 510 F.2d 322, 328 (7th Cir.) (Pell, J., dissenting), *cert. denied*, 421 U.S. 965, 95 S.Ct. 1955, 44 L.Ed.2d 452 (1975).

Id. at 273.

18. The present case is strikingly similar to *Quam*. Nevertheless, the Court disagrees with Defendant's assertion that the facts are so "conclusive" that reasonable minds cannot differ on whether Plaintiff increased the risk of hazard to the premises. While the evidence contrary to Plaintiff's position is weighty (namely, that Plaintiff allowed the property to deteriorate into a condemned state, that the subsequent fires were of incendiary origin [although the person/persons responsible have yet to be determined], that Sgt. McKenna has testified that the arson here may have been as a result of defrauding an insurance company; the dwelling's location in a high-crime area; the fact that the house was vacant, boarded up, and subject to trespassers for the purpose of committing crimes, for drug use and prostitution; plus Saarela "probably through no fault of her own, had children who were criminals, and certainly, I would believe that, as a result of their criminal activities, they had plenty of enemies"), other facts do show that the neighborhood was a "distressed" neighborhood, a high-crime area, a neighborhood where other arson fires had occurred in the weeks prior to the arson fires at Plaintiff's property, a neighborhood where a burglary and murder occurred directly across the street on the same day as one of the fires, a neighborhood that may have required Plaintiff to seek insurance through FAIR Plan, rather than an "industry" insurer. There are also disputed facts whether or not Plaintiff was in the midst of trying to make the required repairs for the specific defective conditions outlined by the City in the notices to condemn at the time Plaintiff was told to vacate the property. These are all genuine issues of material fact for the trier of fact to consider. Concomitantly, there are

genuine issues of material fact on Defendant's counterclaim alleging Vacancy/Increase of Hazard.⁴

19. Further, genuine issues of material fact exist on Defendant's counterclaim on the issue of the Intentional Act exclusion in the Policy. "[A]n insurer has the burden of proving that a policy exclusion applies" and courts read such exclusions "narrowly against the insurer." *Auto-Owners Ins. Co. v. Newmech Cos., Inc.*, 678 N.w.2d 477, 483 (Minn.App.2004). Plaintiff argues that Defendant has no evidence showing who started the fires, "let alone any evidence pointing to Saarela or her family." Pltf. Memo Supp., p. 24.

20. Defendant argues, however, that under the holding in *Quast v. Prudential Property and Cas. Co.*, 267 N.W.2d 493 (Minn.1978), it is allowed to present circumstantial evidence tending to show that the fires were intentionally set and that Plaintiff had the motive to set them. Deft. Opp. p. 10. Since Plaintiff does not dispute the incendiary origin of the fires, the relevant inquiry, for purposes of summary judgment, is whether FAIR Plan has produced evidence of motive to create a genuine issue of material fact that the fires were intentionally set.

21. Defendant claims that it has done so, including:

a. That Plaintiff's expenses exceeded her documented income at the time she was evicted. *Id.* However, Plaintiff counters that Defendant failed to include money she was receiving on a monthly basis from her brother and son, and that if Defendant had included those amounts, Saarela's total monthly income would have exceeded the monthly average expenses. Pltf. Reply p. 6.

⁴ The Court notes that Defendant, in its arguments relative to "increase in hazard" included the statement that, "Moreover, both before and after plaintiff purchased the property, it also had been the subject of literally dozens of housing violations. (Ex. M (Listing of Housing Violations).)" Deft. Memo in Supp., p. 10. Exhibit M is attached to the Vaccaro Affidavit. While housing violations *after* purchase of the property may be relevant evidence at trial, Defendant cannot use housing violations *prior to Saarela's purchase* to demonstrate that *Saarela* increased the hazard.

b. That following the latest refinancing of her residence, in the amount of \$186,000, Plaintiff did not make a complete payment on her mortgage, allegedly suggesting “that plaintiff was experiencing financial difficulties with her current obligations.” Def. Opp. p. 10. In response, Plaintiff states that she made a payment of \$1410.45 to her mortgage company after the first fire, albeit with a balance still outstanding of \$257.67. Pltf. Reply p. 6. Plaintiff argues this small remaining balance is *not* evidence that she was ignoring her mortgage. According to Saarela, she continued to make mortgage payments after the fires because she intended to move her family back into the home once it was renovated. *Id.*

c. Finally, Defendant contends that, as in *Quast*, Plaintiff Saarela “offered to sell her property before the fires.” Def. Opp., p. 11, citing *Novak Aff.* at ¶ V. Jamie Novak was hired by Defendant to investigate the origin and cause of the fires at Plaintiff’s property. In his March 14, 2007 Affidavit, Novak states, relative to this issue:

During the course of my investigation, I learned that Saarela had talked to two individuals about selling the home prior to the fires.

For purposes of Summary Judgment, this statement is unreliable to create a genuine issue of material fact regarding an “intentional act” on Saarela’s part 1) as hearsay, 2) because the “individuals” are not identified (which brings into question their actual existence, their relationship, if any, to Saarela and their motives), and 3) the context (time, place, reason for conversation, etc.) of any alleged discussions about “selling the home” is not revealed. Saarela has testified, that she never listed her property for sale prior to the May 16, 2004 fire and while she received many offers to buy the home, she never seriously considered selling and never took any action to list or sell the property. Pltf. Reply p. 7; 8/16/04 statement Under Oath at pp.62-63.

22. Therefore, disregarding Novak’s statement, FAIR Plan is left with two pieces of circumstantial evidence (other than the incendiary origin of the fires) supporting application of

the Intentional Act exclusion: That Plaintiff's expenses allegedly exceeded her income and that she was supposedly not making her mortgage payments.

23. In *Quast*, the court found that "Because direct proof of arson is seldom available, courts have permitted the insurer to use circumstantial evidence to support the inference that the insured set the fire or arranged to have it set. *Quast* at 495, citing:

In *Elgi Holding, Inc. v. Insurance Co. of North America*, 511 F.2d 957 (2 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." See, also, *Gregory's Continental Coiffures & Boutique v. St. Paul Fire & Marine Ins. Co.*, 536 F.2d 1187 (7 Cir. 1976); *Vadnais v. American Family Mut. Ins. Co.*, 309 Minn. 97, 243 N.W.2d 45 (1976); *Nathan v. St. Paul Mut. Ins. Co.*, 251 Minn. 74, 86 N.W.2d 503 (1957); *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 235 A.2d 576 (1967).

See, also, *DeMarais v. North Star Mutual Insurance Company*, 405 N.W.2d 507 (Minn.App.1987).

24. In *Quast*, the jury had to decide whether or not the fire was arson and also had evidence before it that "Quast was deeply in debt and had tried unsuccessfully more than once to sell his house." *Quast* at 495. The court found that "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." *Id.*

25. In *DeMarais*, the jury also had to decide whether the fire was intentionally set. The jury had conflicting evidence before it regarding whether DeMarais caused the fire to be set: Appellant's evidence that all the family's belongings were destroyed (including family photos, awards, etc.) versus that the fact that all family members were away when the fire occurred and their prolonged absence that evening was "without sufficient explanation." *DeMarais* at 511. As for motive, the insurance company presented evidence that appellants had "ongoing

dissatisfaction with their home,” suing the builder for erosion on the property caused by drainage from the sewage system, that the floorboard materials were inadequate, the house was known locally as a “lemon,” the home was up for sale in the five months preceding the fire, two foreclosure proceedings, a failure to make any mortgage payments for 6 months, and the fire occurring three days before the second foreclosure period expired.

26. Comparing *Quast* and *DeMarais* to the present case, while Plaintiff’s property was condemned, while the list of needed repairs was going to cost Saarela approximately \$30,000, while Saarela and her family were evicted, while one fire occurred 11 days after the eviction, while the second fire occurred 25 days later, fact issues nevertheless exist regarding Plaintiff’s income versus her expenses and whether the mortgage payments were kept up-to-date. Based on *Quast* and *DeMarais*, the Court finds that Defendant has presented sufficient circumstantial information to raise a genuine issue of material fact whether Saarela caused one or both of the arson fires at the property.

27. In a side issue, Plaintiff argues that the Intentional Act exclusion does not apply to an “innocent insured” and, should FAIR Plan prove that Plaintiff set the fire, the exclusion would still not apply to the property damage claims of *other insureds*. Pltf. Memo in Supp. p. 24, fn. 5. Defendant responds that Plaintiff’s argument “would be worthy of consideration had plaintiff not expressly withdrawn the claims of these individuals at the outset of this litigation.” Deft. Opp. p. 8; Vaccaro Supp. Aff., Exs. E and F (e-mails between Attorneys Strobel and Ayers). According to Attorney Strobel’s e-mail, Exhibit E, “As no other resident relatives are currently making claims for damage to their property, I presume that Ms. Saarela is the only one who will be required to provide a sworn statement.” Attorney Ayers replies, in Exhibit F, “Since, per your e-mail, no other relatives are making claims for their own property, I will instruct Gary Rupp to

disregard those items and we won't need to take euo's [examinations under oath] of anyone else."

28. In the Complaint, wherein Diane Saarela is the only named Plaintiff, the Breach of Contract claim is pled out as to Diane Saarela; however, in the Declaratory Relief claim Plaintiff asks for a declaration that:

Saarela is entitled to a declaration that the FAIR Plan policy provides coverage to Saarela and her family for the property damage sustained by them as a result of numerous covered perils, for the property damage sustained by them to their personal property as a result of numerous covered perils, for the alternative living expenses incurred by them as a result of numerous covered perils...[Emphasis added]

29. In the Policy in effect at the time of the fires, Diane Saarela and William Saarela are listed as "Named Insured" on the Declarations page, while Marjorie Dawson, Plaintiff's mother, is listed as "Additional Insured" on page 2 of the Declarations. Although the parties have not made this clear, the Court believes William Saarela was/is Diane Saarela's husband, but he was not living in the property at the time of the fires.

30. Plaintiff's counsel in no way refuted Attorney Ayers' e-mail that the only claimant is Diane Saarela. Further, Plaintiff, in her Reply did not dispute Defendant's argument that the only claims presented in this case are those of Diane Saarela. The Court finds, that despite the plural language in the claim for Declaratory Relief, the only claims in this case are those of Diane Saarela and, therefore, Plaintiff's argument that the Intentional Act exclusion does not apply to the claims of innocent insureds is moot.

31. Plaintiff's claim for seven covered losses which are:

- 1). Vandalism to personal property after May 3, 2004.
- 2). Home and personal property damage for May 16, 2004 fire.
- 3). Smoke damage to home and personal property for May 16, 2004 fire.
- 4). Home and personal property damage for June 10, 2004 fire.
- 5). Smoke damage to home and personal property for June 10, 2004 fire.
- 6). Theft of house components and personal property after June 10, 2004 fire.

Complaint, ¶¶ 17-40. For those losses, Plaintiff seeks “coverage for property damage, repairs, damage to personal property and alternative living expenses on a per covered loss basis” as follows:

- a. Up to the limits of \$156,000 for property damage to the residence for damage resulting from each of the seven covered causes of loss;
- b. Up to the limits of \$15,000 for property damage to the appurtenant structures for damage resulting from each of the seven covered causes of loss;
- c. Up to the limits of \$78,000 for property damage to Plaintiff’s personal property for damage resulting from each of the seven covered causes of loss;
- d. Up to the limits of \$15,000 for additional living expenses necessitated by each of the seven covered causes of loss.

Id. at Prayer for Relief, ¶ 4.

32. Plaintiff has submitted only two Sworn Statements in Proof of Loss in this case—one for the May 16, 2004 fire and one for the June 10, 2004 fire. Says Plaintiff:

The basis for Saarela’s breach of contract claim is simple: Beginning in 1999 Saarela paid insurance premiums for homeowners insurance coverage to Fair Plan. In return for those premiums, Fair Plan issued Saarela a homeowners policy providing coverage for the following perils: fire, smoke, vandalism, and personal property loss. Saarela’s home sustained fire and smoke damage, as well as personal property loss and vandalism, in May and June 2004. Under her contract of insurance, Saarela was also entitled to “alternative living expenses: while she was displaced from her home, which would assist Saarela in obtaining housing, food and other basic necessities for her family while she was displaced from the home. Pursuant to her insurance contract, Saarela timely tendered these claims to Fair Plan Fair Plan breached its contract with Saarela. Pltf. Memo In Opp. to Def.’s Motion for S.J., pp. 16-17 (Court emphasis).

33. In Plaintiff’s Supplemental Memorandum addressing the procedure regarding the “seven covered losses,” Plaintiff argues that

In the Conditions section [of the policy], the Fair Plan requires Ms. Saarela to perform five affirmative acts only. She must give prompt notice (paragraph a), she must notify the police of loss by theft (paragraph b), she must notify the credit card company

(paragraph c), she must protect the property from further damage (paragraph d), and she must 'prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. All of this she has done. Pltf. Supp. Memo, p. 7. [Court emphasis]

34. Plaintiff argues that she described instances of vandalism and smoke damage, as well as a theft incident, during her three Examinations Under Oath. Saarela further argues that she described the smoke damage sustained by the home as well as some vandalism. Pltf. Reply, p. 3. Plaintiff continues:

Although it received this information during the statements under oath, Fair[sic] Plan did not provide Saarela with any additional paperwork, including Sworn Statements in Proof of Loss, regarding these claims. Fair Plan provided Saarela, an unsophisticated insured, with no opportunity to submit a "formal" tender of her claims – which it now claims nearly three years later than [sic] it requires – even though it had knowledge and information relating to the claims from Saarela's three statements under oath.

Id. at 4.

35. Saarela agrees that she "described" the five additional covered losses in her two Examinations Under Oath and, thus, that it was *FAIR Plan* that failed to provide Saarela with the Sworn Proof of Loss forms; FAIR Plan having failed to give Saarela the Sworn Proof of Loss Statements, the argument is made, FAIR Plan cannot complain about Saarela's claims for seven covered losses ("The Policy expressly requires Ms. Saarela to respond only in the event that Fair Plan has made such a request" (emphasis in original)).

36. In its Opposition Memorandum, in the Introduction, Defendant states:

As a preliminary matter, although plaintiff argues that there are "seven covered causes of loss," only two losses were brought to the attention of Fair [sic] Plan through Sworn Statements in Proof of Loss – the fires on May 16 and June 10, 2004. Plaintiff's attempt to claim seven independent losses – two of which in any case constitute "smoke damage" that inextricably relate to the fires – reflects unreasonable overreaching. Plaintiff has never identified what damages she suffered from the five alleged causes of loss that were not reported to Fair Plan. And, irrespective of this deficiency, Fair Plan's obligation to make payment under the Policy (if any) would be discharged by payment of the policy limits. Plaintiff is not entitled to seven independent "bites" at the apple.

Id. at 1-2.

37. FAIR Plan appears to be arguing that five of Plaintiff's seven claimed losses should be dismissed, although FAIR Plan has not made a motion in that regard. However, by specific language from the Policy (Minnesota endorsement at 4 of 7, Vaccaro Aff., Ex. J) it appears the burden is on FAIR Plan to request a proof of loss from its insureds and not the obligation of an insured to submit it. Stated another way, once Saarela submitted to an Examination Under Oath, FAIR Plan was on notice of Saarela's claims. None of Plaintiff's seven claimed losses will be dismissed on that basis.

38. Regarding the *extent* of insurance coverage available to Plaintiff, in her Prayer for Relief, Plaintiff uses the language "up to the limits." In the Sworn Statements in Proof of Loss (Vaccaro Aff., Exs. Y and Z), Plaintiff acknowledges that the total amount of insurance upon the property (the house) at the time of the losses was \$156,000. However, in her Memorandum in Support at pages 9 and 10, Plaintiff argues that the Coverages in Section I of the Declarations page (Residence at \$156,000 limit; Appurtenant Structures at \$15,600 limit, Personal Property at \$78,000 limit, Additional Living Expenses at \$15,600 limit) are "not limited by a total policy aggregate," but rather the limit is the \$156,000/\$15,600/\$78,000/\$15,600 "per covered loss.

39. As stated by Defendant, "Plaintiff appears to be claiming entitlement up to the full policy limits (*e.g.*, Coverage A (Residence) limit of \$156,000, Coverage B (Appurtenant Structures) limit of \$15,600, Coverage C (Personal Property) limit of \$78,000, and Coverage D (Additional Living Expenses) limit of \$15,600, or a total of up to \$265,200 in coverage for each of her seven claimed losses." Deft. Supp. Memo, p. 1 (emphasis in original).

40. Saarela argues that the FAIR Plan policy is an "all-risk" policy that provides coverage for loss up to the relevant policy limits for loss caused by "any covered peril." According to the Plaintiff, while the coverage is limited on a per loss basis, the FAIR Plan policy did not provide for any "total aggregate" in the Policy. Without an applicable aggregate, argues

Plaintiff, for each loss, the policy provides coverage available up to \$266,100 [should read \$262,200] for covered damages with respect to each of the seven losses. Pltf. Supp. Memo, pp. 9-10.

41. Defendant counters that Plaintiff is isolating the term “any one loss” in the insurance policy (Policy, Section I—Conditions (Page 7 of 15)) and that following Plaintiff’s approach would mean that the FAIR Plan Policy has no limits at all, since the amount of available coverage would be determined solely by reference to how many separate losses a plaintiff claims occurred. For a very modest premium, according to Defendant, a homeowner could obtain “virtually unlimited” coverage, provided the homeowner experienced and reported enough “losses.” Deft. Supp. Memo, p. 2. Defendant argues that Plaintiff’s position is not reasonable under a full view of the Policy, nor is it consistent with the caselaw that exists on this question, or the dictates of common sense. Deft. Supp. Memo, p. 2.

42. According to *Soo Line R. Co. v. Brown's Crew Car of Wyoming*, 694 N.W.2d 109, 113 (Minn.App.2005):

If [an insurance] policy is unambiguous, the court must give the language its ordinary and usual meaning and not redraft the contract. *Simon v. Milwaukee Auto. Mut. Ins. Co.*, 262 Minn. 378, 385, 115 N.W.2d 40, 45 (1962). If the court concludes the policy language is ambiguous, the ambiguity must be resolved in the insured’s favor. *Columbia Heights Motors, Inc. v. Allstate Ins. Co.*, 275 N.W.2d 32, 36 (Minn.1979). The policy should be interpreted “according to what a reasonable person in the position of the insured would have understood.” *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn.1977). Exclusions are narrowly interpreted against the insurer. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 314 (Minn.1995). But, if the insurer demonstrates the applicability of an exclusion, then the insured bears the burden of proving an exception to the exclusion. *Id.*

43. The Policy section at issue (“any one loss”) is at Section I – Conditions (p. 7 of 15), which provides:

Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in **any one loss**: [Court emphasis]

- a. To the “insured” for more than the amount of the “insured’s” interest at the time of loss; or
- b. For more than the applicable limit of liability.

44. Defendant refers the Court to the case of *Coats v. Farmers Ins. Exchange*, ___ S.W.3d ___, 2006 WL 1765925 (Tex.App. June 29, 2006)⁵ In *Coats*, the court was faced with an insurance policy similar to the one between Saarela and FAIR Plan, including the phrase “any one loss.” The *Coats* court found that the term “any one loss” is not ambiguous and that the term “refers to a scenario where two or more insured persons...are disputing allocation of loss payments.” *Coats* at *3. “In other words, [the insurance company] will be required to pay an amount not to exceed the applicable limit of liability to be allocated between the insureds as their interests appear.” *Id.*

45. The court in *Coats* concluded that “[t]he general rule relative to payment of the limit of liability is that policy proceeds should be applied to indemnify the insured up to the amount of the policy, fulfilling the objective that the insured should neither reap economic gain, nor incur a loss, if adequately insured.” *Id.*

46. In the present case, FAIR Plan’s Policy has a stated “LIMIT” for each of the Section I and Section II coverages provided, which are set forth on the Declarations page. The FAIR Plan Policy also has a “Loss Settlement” provision that is similar to the provision examined in *Coats*:

3. **Loss Settlement.** Covered property losses are settled as follows:
* * *
- b. Buildings under Coverage A or B:

⁵ The WestLaw cite to the *Coats* case contains this language: “NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.” Therefore, although recognizing *Coats* has not been released for publication, this Court finds the reasoning germane to the present situation, especially when no Minnesota case has been found that is on point.

(1) If you repair or replace the loss or damage to restore the building structure for the same occupancy and use at the same site within 180 days of the date of loss or damage, **we will pay the lesser of the following amounts:**

(a) **The limit of liability that applies to the damaged or destroyed building structure;** or [Court emphasis]

(b) The necessary amount actually spent to repair or replace the loss or damage to the building structure...

47. Comparing the similarity of policy language in *Coats* with the policy language in the present case, this Court agrees with the *Coats* court that the “any one loss” language, read in the context of the entire FAIR Plan policy, is not ambiguous. While no case similar to *Coats* has been located in Minnesota (analysis of an “any one loss” provision where *multiple losses* are claimed), the unpublished opinion of *Nygaard v. Western National Insurance Company*, 1998 WL 8490 (Minn.App., Jan. 13, 1998), provides some useful insight on the “any one loss” provision.

48. In *Nygaard*, the construction insurance policy provided a “provisional” limit of \$200,000.00 wherein the actual amount of insurance on any given date while the policy was in force would be a percentage of the provisional amount. When the house was 95% complete, it was destroyed by fire. The homeowners claimed they had spent \$350,000 on the home by that time. The insurance company paid the policy limit of \$200,000 and the homeowners sued for the entire loss. The court concluded the term “provisional” was not ambiguous and the insurance company was only obligated to the limit of \$200,000. The homeowners then argued that even if the policy was unambiguous, the policy “must be construed in favor of the insured to permit liability of over \$200,000, citing the ‘reasonable expectations’ doctrine set out in *Atwater Creamery Co. v. Western National Mutual Ins. Co.*, 366 N.W.2d 271 (Minn.1985).” *Id.* at *2. The reasonable expectations doctrine provides, in summary that:

It does place a burden on insurance companies to communicate coverage and exclusions of policies accurately and clearly. It does require that expectations of coverage by the insured be reasonable under the circumstances.

Atwater at 278.

49. Therefore, the question here is whether Saarela's expectation of over \$1 million in coverage, given the facts and circumstances, is reasonable. Saarela has come forward with nothing other than the "any one loss" provision to support such an expectation. The house was purchased for \$113,000 in 1999, there is agreement the house is located in a high-crime neighborhood, Plaintiff had to obtain insurance through FAIR Plan as "standard" insurance plans were apparently not a viable option, and the property was condemned at the time of the fires. Under those circumstances, no reasonable person would expect or find that the FAIR Plan Policy would provide virtually unlimited coverage instead of the clear liability limits stated.

50. In summary, based on *Coats* and *Nygaard*, the Court finds there is no ambiguity in the FAIR Plan Policy regarding the meaning of "any one loss," and that FAIR Plan is only obligated, if at all, to the Policy limits as stated on the Declarations page, i.e., \$156,000 / \$15,600 / \$78,000 / \$15,600, as, among other things, it would not be reasonable to expect otherwise. See *Atwater Creamery*.

Defendant's Counterclaim Alleging Misrepresentation

51. Defendant alleges that Plaintiff willfully and with intent to defraud, concealed or misrepresented facts or circumstances relating to the insurance and that as a direct result of her representations, "fires occurred at Plaintiff's property" causing FAIR Plan to pay \$156,000 to Countrywide Home Loans and the City of Minneapolis. Counterclaim ¶¶ 8-9.

52. Specifically, Defendant argues that when Saarela applied for the Policy in 1999, 1) she misrepresented the number of insurance claims she had made in the five previous years, 2) she did not accurately characterize the property as a "One (1) Family" residence, and, 3) that she

misrepresented the facts concerning the repairs she had or was making at the time of eviction. Deft. Memo in Supp. pp. 6-8; Deft. Opp. p. 15.

Repairs/Remediation

53. The Court's analysis regarding the Intentional Act / Increase of Hazard exclusions of the Policy, *supra*, bear on the issue of whether Saarela misrepresented the facts concerning the repairs she had made or was making at the time of the eviction. As the Court stated in Conclusion of Law No. 18, *supra*, disputed facts exist whether or not Plaintiff was in the midst of trying to make the required repairs for the specific defective conditions outlined by the City in the Letters of Intent to Condemn. Further, a genuine issue of material fact exists whether Saarela caused one or both of the arson fires at the property.⁶

One Family Residence

54. Defendant agrees that Saarela's residence was a duplex or "two family" residence, but contends that the actual use was as a "multifamily residence in violation of the Minneapolis Code of Ordinances." Deft. Supp. Response, p. 1. Defendant refers the Court to Minneapolis Code of Ordinances, §§ 546.20 and 546.50 (the Saarela property being designated as in Zone R2B).

55. Minneapolis Code of Ordinances § 546.50 provides:

546.50. Maximum occupancy.(a) *Dwelling units.* The maximum occupancy of a dwelling unit located in the R1 through R3 Districts shall not exceed one (1) family plus up to two (2) unrelated persons living together as a permanent household, provided that

⁶ In its Counterclaim, Defendant alleges that Plaintiff's misrepresentations directly resulted in the fires. One of those "misrepresentations," according to Defendant, is that Plaintiff falsely testified in her Examinations Under Oath that repairs outlined by the City had or were being made, but actually were not. However, whether or not Plaintiff lied in her EUOs about the particulars of any repairs, those alleged lies could not have *caused* the fires. In other words, any alleged falsehoods about the repairs "in an effort to suggest that there was a 'rush to judgment' by the City with respect to the condemnation and that plaintiff was prematurely evicted" (Defendant's theory at page 15 of its Opposition) could not be a "proximate result" of the fires themselves. The fires were set by arsonists. Arsonists may have had a greater opportunity because Plaintiff did not make the repairs, thus resulting in her eviction and thus resulting in an unoccupied dwelling, but it cannot be said that any *post-fire misrepresentations* caused the fires themselves as that would be a physical impossibility.

the family plus the unrelated persons shall not exceed a total of five (5) persons. The maximum occupancy of a dwelling unit located in the R4 through R6 Districts shall not exceed one (1) family plus four (4) unrelated persons living together as a permanent household, provided that the family plus the unrelated persons shall not exceed a total of five (5) persons.

56. FAIR Plan, at pages 1 and 2 of their response dated May 5, 2007, mistakenly interprets § 546.50 to mean that no more than five persons can dwell in any housing in the R1-R3 Zones---*ever*. That cannot be the correct interpretation as it would mean *no* single-family or two-family home in Minneapolis could ever be occupied by more than five people.

57. What FAIR Plan failed to do was include the definition of “Family” encoded in Minneapolis Code of Ordinances § 520.160 which provides:

Family. An individual or two (2) or more persons related by blood, marriage, domestic partnership as defined in Chapter 142 of the Minneapolis Code of Ordinances, or adoption, including foster children and domestic staff employed on a full-time basis, living together as a permanent household. This definition of family is established for the purpose of preserving the character of residential neighborhoods by controlling population density, noise, disturbance and traffic congestion, and shall not be applied so as to prevent the city from making reasonable accommodation where the city determines it necessary to afford handicapped persons living together in a permanent household equal access to housing pursuant to the Federal Fair Housing Amendments Act of 1988.

58. Therefore, the correct reading of § 546.50 is that, *if* there are “unrelated persons” occupants of an R1-R3 dwelling then the *total* number of Family + Unrelated Persons cannot exceed five (and only two of the five may be “unrelated”).

59. There is *no* maximum occupancy stated for *family* members in R1-R-3 dwellings. Further, the U.S. Supreme Court, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 504-05, 97 S.Ct. 1932, 1938-39 (1977), defines “family” broadly:

Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the

centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing, which Yoder, Meyer, Pierce and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

60. Therefore, at the time Saarela filled out the insurance application in 1999, there is no evidence that Saarela misrepresented the occupancy of the house as other than “one family,” that family being those listed in Finding of Fact number 5.

Number of previous insurance claims

61. On Saarela’s Insurance Application, Exhibit G to the Vaccaro Affidavit, page S1100, she and William Saarela were asked:

C. Has insurance coverage on this property been cancelled (or non-renewed) within the past 12 months.

Answer: Yes

Provide company name, date and reasons: “State Farm” “Breed of Dogs”

D. Have there been any insurance claims in the past 5 years?

Answer: Yes

Give date, type of loss and amount: “Theft 2-28-99”

62. Defendant disputes the accuracy of Plaintiff’s answer to Question C, for Plaintiff’s failure to identify, in the FAIR Plan insurance application, the specific breed of dog causing cancellation of Plaintiff’s insurance—a pit bull. Deft. Memo in Supp. pp. 6-7. The Court does not find this to be a compelling argument, since Plaintiff’s disclosure on the application put Defendant was on notice regarding the dogs and Defendant could have made further inquiries on this point.

63. Regarding prior insurance claims made by Plaintiff within the 5 years before the FAIR Plan application, on the FAIR Plan application Plaintiff stated she had only made one such claim—for a theft occurring in 1999. Discovery in this case demonstrates otherwise: Plaintiff actually made numerous insurance claims related to various circumstances through the five-year period from 1994-1999: Fire claims in 1996 and 1997 relative to property at 2910 Lyndale Avenue North, a robbery claim for 1344 Thomas Avenue North sometime prior to 1995, and a claim for a garage roof collapse in July 1999 to American Family. *Id.* at 7.

64. In response, Plaintiff states that at the time she applied for FAIR Plan’s insurance in 1999, she “does not even recall filling out the insurance application and, instead, believes that an agent completed the form.” Pltf. Reply p. 9; Tchida Aff., Ex. 26 (10/18/04 Examination Under Oath), pp. 171-172. When asked why the other claims were not disclosed, Saarela responded:

A. No. I think he just asked if we were canceled. I don’t remember – I don’t remember even writing this, but yeah...

* * *

Q. Okay. And my only question is, you know, why these other claims were not listed on there. Do you know?

A. I don’t know. I don’t know if they asked me for any of it or – [Answer either ends or is cut-off by counsel’s next question. The transcript is unclear.]

Id.

65. Plaintiff’s answers at her Examination Under Oath do not raise a genuine issue of material fact to present to the jury that it was Plaintiff’s agent who filled out the form or that Plaintiff did *not* make 4 other insurance claims within 5 years preceding the FAIR Plan application. However, on the other side, Defendant has come forth with no genuine issue of material fact that Plaintiff’s failure to list the other four insurance claims was done “willfully and

with intent to defraud,” as required by the Minnesota Endorsement. According to the “Conditions” section of the FAIR Plan Policy, “Concealment Or Fraud” (cf. Tchida Aff., Ex. 14 at p. 14 of 15, which language is replaced by the Minnesota Endorsement at p. 6 of 7), there is “no coverage” if, before a loss, the “insured...willfully and with intent to defraud; concealed or misrepresented any material fact or circumstance relating to this insurance.”

66. In summary, Defendant’s misrepresentation claim can go forward on the issue of repairs/remediation, but not on the issues of “one family,” number of previous insurance claims not revealed, or alleged *post-fire* misrepresentations.

Whether the Property was Plaintiff’s “Residence Premises” at the time of the Loss

67. The next issue is whether the Court should decide, as a matter of law, that Plaintiff was not using the property as the “residence premises” at the time of the loss. In his deposition, FAIR Plan’s claims manager, Gary Rupp, testified that “[s]ince they weren’t residing there at the time of the loss, the property no longer was considered to be the residence premises under the policy.” Rupp depo., p. 48. “Residence premises” is defined as:

- a. The one family dwelling, other structures, and grounds; or
- b. That part of any other building;

where you reside and which is shown as the “residence premises” in the declarations.

68. The parties agree that Minnesota courts have not decided the precise question of how to determine whether an insured is using his/her property as the “residence premises.” Pltf. Memo in Supp. p. 30; Def’t. Opp. p. 13. However, the Court finds the following definitions and caselaw instructive on the issue.

69. Black’s Law Dictionary, 7th edition, provides, *inter alia*, the following definition: “*Residence* usu. just means bodily presence as an inhabitant in a given place...a house or other fixed abode.”

70. In *Illinois Farmers Ins. Co. v. Neumann*, 596 N.W.2d 685, 686 (Minn.App.1999), review denied (Sept. 14, 1999):

Neumann rented one-half of a duplex at 577 Brunson in St. Paul and sublet a room to Brenny for an unspecified term. The two shared the costs of rent and utilities equally.

In September 1995, Neumann's dog bit Brenny. As a result, Brenny required medical treatment and she lost wages. Brenny sued Neumann for compensatory damages, and Neumann submitted a claim under her renter's insurance policy written by Illinois Farmers. Illinois Farmers commenced a declaratory judgment action, seeking a determination that the policy provided no coverage for the September 1995 incident. Brenny intervened in the action.

ISSUE

Did the district court err in determining that Brenny was a "resident of residence premises" as that term is used in a bodily injury exclusion in Neumann's renter's insurance policy?

71. The appellate court determined that the district court did not err in its determination and held, "We conclude that intent to live in a residence and physical presence there are of primary importance in determining whether a person is a resident of a residence premises." *Id.* at 687. The court also concluded "that leaving home for a few days each week does not change a person's residence." *Id.*

72. In *Nancarrow v. Aetna Cas. & Sur. Co.*, 932 F.2d 742 (8th Cir.1991), the court affirmed a trial court's decision upholding an insurer's defense of nonoccupancy where the insured married and moved out of a house and into an apartment. In that case, Nancarrow, the insured, planned to renovate the property and move back when the renovations were completed. He left some furniture and other personal belongings at the property. The property and its contents were subsequently destroyed by a fire, however, that was *four* years after Nancarrow had moved out. At the time of the fire, water and telephone service had been disconnected, but the electricity and gas utilities were still connected. The court affirmed the trial court's decision on a directed verdict that, at the time of the fire, the insured no longer occupied the property as

his “residence premises” as defined in the policy basing its decision on the facts that: the insured had not lived in the home for the prior four years, he only visited the home “occasionally;” the house was in an obvious state of disrepair; the water and telephone service had been disconnected. *Id.* at 744. The appellate court agreed with the district court that no reasonable jury could have found that Nancarrow resided in the house at the time of the fire, i.e., that the house was not his “residence premises.” *Id.*

73. Applying this caselaw to the present situation, the Court finds, as a matter of law, that the property at 3219 Lyndale Avenue North, Minneapolis, Minnesota was Plaintiff’s “residence premises” at the time of the fires. At the time of the first fire, Plaintiff had only been out of the house for 13 days; at the time of the second fire only 39 days had elapsed. The family was living in temporary locations at those times. All the utilities in the property remained connected. The family’s furniture and the majority of their personal belongings were in the house. Plaintiff’s brother went to the property every day to get the mail and to check on the property. Plaintiff expressed her intent to fix the property and return to the home. She was continuing to pay her mortgage at the time of the first fire.

74. Finally, in her Memorandum in Support at page 38, Plaintiff asks the Court to issue a “summary declaration that the Fair Plan has failed to follow Minnesota law in adjusting this loss [and, in addition requests] an immediate injunction preventing the Fair Plan from continuing to deny insurance claims based upon the economic status of its insureds.” These requests come at the end of Plaintiff’s argument that FAIR Plan violated the Fair Claims Practices Act.

75. The Court will not entertain these requests because 1) no injunctive relief was sought in the Complaint, 2) the Court has already found that Plaintiff’s claim under the Act must be dismissed, and 3) Plaintiff has provided no caselaw in support of these unusual requests.

ORDER

1. Plaintiff's motion for summary judgment on Defendant's counterclaims is DENIED.

2. Defendant's motion for summary judgment on Plaintiff's claims for Bad Faith (Count Two), Misrepresentation (Count Three) and Violation of Fair Claims Practices Act (Count Four) are GRANTED and those claims are dismissed with prejudice.

3. Defendant's motion for summary judgment on Plaintiff's claims for Breach of Contract (Count One) and Declaratory Relief (Count Five) are DENIED.

BY THE COURT:

Date: June 14, 2007



Marilyn J. Kaman
Judge of District Court