IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY,

Plaintiff/Counter-Defendant/Appellant,

v.

No. 30,164

TINA CLEVELAND and ADAM HUDSON,

Defendants/Counter-Plaintiffs/Appellees,

Appeal from the Second Judicial District, County of Bernalillo
The Honorable Beatrice J. Brickhouse
D-202-CV-2008-10671

AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word 2003, and that the body of the brief contains 4,397 words. This Reply Brief therefore complies with the word-limitation provision in Rule 12-213(F)(3) NMRA.

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I. ARGUMENT

Plaintiff/Counter-Defendant/Appellant American National Property and Casualty Company ("ANPAC") submits this Reply Brief in support of its appeal from the judgment entered in favor of Defendants/Counter-Plaintiffs/Appellees Tina Cleveland and Adam Hudson (collectively "Counter-Plaintiffs). As argued in ANPAC's Brief-in-Chief and further demonstrated below, the bad faith and punitive damages judgment against ANPAC should be reversed. Alternatively, the prejudicial testimony of Counter-Plaintiffs' expert, Garth Allen, mandates a new trial. The arguments raised by Counter-Plaintiffs in their Answer Brief in support of the judgment will be addressed in detail below.

A. Counter-Plaintiffs failed to prove their bad faith claim at trial.

i. Counter-Plaintiffs' argument that the jury's verdict can be affirmed on a "fair investigation" theory of bad faith is contrary to the law of the case.

In their answer brief, Counter-Plaintiffs assert that the bad-faith judgment below should be affirmed because there is evidence to support a second theory of recovery, i.e., that ANPAC failed to conduct a fair investigation into Counter-Plaintiff's claims. This new theory, however, was not properly presented to the jury below and is contrary to the jury's express findings on the special verdict form. Counter-Plaintiffs' assertions that the jury's verdict can be sustained based

> denying a claim for reasons which are reasonable under the terms of the policy.
>
> In deciding whether to pay a claim, the insurance company must act reasonably under the circumstances to conduct a timely and fair investigation and evaluation of the claim.

[RP 310] Counter-Plaintiffs maintain that this instruction as given provided two possible bases for bad-faith liability: (1) refusal to pay a claim for frivolous or unfounded reasons; or (2) failure to act reasonably in conducting a timely and fair investigation of the claim. [AB 10-12] Counter-Plaintiffs assert that their position is supported by *Sloan v. State Farm Mutual Automobile Insurance Co.*, 2004-NMSC-004, 135 N.M. 106, 85 P.3d 230.

While *Sloan* arguably appears to support an assertion that an insurer can be held liable for bad faith even if its conduct is not "frivolous or unfounded," such an argument is not properly before this Court. Although the jury instructions below did include a version of UJI 13-1702, the other instructions and special verdict form make it clear that the jury was only asked to render a verdict on one of the theories of liability in that instruction, i.e., whether ANPAC's conduct was "frivolous or unfounded."

For example, in describing Counter-Plaintiffs' burden at trial with respect to their bad-faith claim, the jury was instructed as follows:

> To establish Tina Cleveland and Adam Hudson's claim of Bad Faith Failure to Pay a First Party Claim, Tina Cleveland and Adam Hudson have the burden of proving that ANPAC refused to pay Tina Cleveland and Adam Hudson's first-party claim for the property

damage to the vehicle operated by Adam Hudson in the October 13, 2007 collision for reasons which were *frivolous or unfounded.*

[RP 302 (emphasis added)] The jury was not instructed as to any burden regarding whether ANPAC acted reasonably in conducting a timely and fair investigation of Counter-Plaintiffs' claim.

Even more significantly, the special verdict form demonstrates that the jury's bad-faith verdict was based solely on its determination that ANPAC's denial of Counter-Plaintiffs' claim was "frivolous or unfounded":

> **Question No. 6:** Did ANPAC refuse to pay Tina Cleveland and Adam Hudson's claim relating to the October 13, 2007 collision for reasons which were *frivolous or unfounded*?
>
> **Answer:** Yes (Yes or No)

[RP 334 (emphasis added)] "The purpose of a special verdict form is to allow juries to specifically identify the predicates for the general verdict." *United States v. González*, 466 F.3d 27, 36 (1st Cir. 2006) (internal quotation marks and citation omitted). In this case, the jury was not asked whether ANPAC acted reasonably in conducting a timely and fair investigation of Counter-Plaintiffs' claim and therefore made no finding regarding same.

Despite the jury's express findings regarding the basis for its verdict on Counter-Plaintiffs' bad-faith claim, Counter-Plaintiffs now urge this Court to affirm the bad-faith judgment below on a theory that was never properly presented

to the jury. Such an argument is contrary to New Mexico law and therefore fails to provide a basis for this Court to affirm on the issue of bad faith.

The New Mexico Supreme Court's decision in *Fleetwood Retail Corp. of New Mexico v. LeDoux*, 2007-NMSC-047, 142 N.M. 150, 164 P.3d 31 is instructive and controlling on this issue. In that case, LeDoux filed a counterclaim for malicious abuse of process. *Id.* ¶ 11. The jury awarded a judgment in favor of LeDoux on that claim and Fleetwood appealed. *Id.* On certification from this Court, the Supreme Court observed that malicious abuse of process claims can be established by demonstrating either (1) lack of probable cause; or (2) procedural impropriety. *Id.* ¶ 16.

In evaluating LeDoux's claim, the court held that LeDoux's lack of probable cause theory failed as a matter of law and could not therefore provide the basis for her malicious abuse of process claim. *Id.* ¶ 24. The court then considered whether the jury's verdict could be sustained based on the second theory, procedural impropriety. *Id.* ¶ 31. The court observed that although LeDoux initially based her malicious abuse of process claim on both theories, she failed to request "jury instructions on procedural impropriety as an alternative theory." *Id.* ¶ 33. Thus, according to the court, the verdict could not be affirmed on the procedural impropriety theory of liability because it had not been properly presented to the jury. *Id.*

Counter-Plaintiffs' have similarly waived their argument that the alleged failure of ANPAC to act reasonably in conducting a fair investigation of their first-party insurance claim can be relied on by this Court in order to affirm the jury's bad-faith verdict. Such a theory was not properly presented to the jury and cannot therefore form the basis for an affirmance in this case. *See id.*; *see also Haaland*, 110 N.M. at 588, 798 P.2d at 189; *State v. Hurst*, 34 N.M. 447, 449, 283 P. 904, 904 (1929). Accordingly, Counter-Plaintiffs' bad faith claim hinges on whether they demonstrated that ANPAC's denial of their claim was frivolous or unfounded. As discussed below, and in ANPAC's Brief-in-Chief, Counter-Plaintiffs did not meet their burden in this case.

ii. The racing exclusion in ANPAC's insurance policy is not ambiguous.

Positing that one could be "racing" to the airport, or as argued by Garth Allen, "racing" to a pie "contest," and somehow fall under the racing exclusion in ANPAC's insurance policy, Counter-Plaintiffs urge this Court to agree with their contention that the racing exclusion is ambiguous. Putting aside Counter-Plaintiffs' hyperboles, the plain meaning of the language in ANPAC's racing exclusion unambiguously bars coverage for the type of conduct that Hudson was believed to have engaged in.

The policy provision at issue in this case reads as follows:

There is no coverage under PART I – LIABILITY:

. . .

> (18) for **bodily injury** or **property damage** resulting from the use of **your insured car** in or in preparation for, any race, speed contest, hill climbing exhibition, or any other contest or demonstration.

[1 RP 24] As argued in ANPAC's Brief-in-Chief, the issue of whether the above-policy exclusion is ambiguous depends on whether the terms in the exclusion can be interpreted in their "usual, ordinary, and popular sense." *Battishill v. Farmers Alliance Ins. Co.*, 2006-NMSC-004, ¶ 8, 139 N.M. 24, 127 P.3d 1111 (internal quotation marks and citation omitted).

In support of their argument that the above-policy exclusion is ambiguous, Counter-Plaintiffs point out that the ISO policy described by Allen at trial only covers pre-arranged or organized racing. [AB 17] Notably, however, the ISO racing exclusion is materially different than ANPAC's:

> We do not provide liability coverage for the ownership, maintenance or use of: 4. Any vehicle located *inside a facility designed for racing* for the purpose of: a. Competing in; or b. Practicing or preparing for, a *prearranged organized* racing or speed contest.

[1 RP 203 (emphasis added)] When an insurance company wants to limit a racing exclusion to only those races that are prearranged or officially sanctioned, it can certainly do so. The ISO policy quoted above is an example of that type of exclusion. *See also County Mut. Ins. Co. v. Bergman*, 185 N.E.2d 513, 517 (Ill. Ct. App. 1962); *Detroit Automobile Inter-Insurance Exchange v. Bishop*, 180 N.W.2d 35, 37 (Mich. Ct. App. 1970). Unlike the ISO sample racing exclusion, ANPAC's

racing exclusion is not limited to vehicles housed in specific locations (e.g., a "facility designed for racing") nor does it contain language limiting coverage for specific types of racing or speed contests (e.g., "prearranged organized"). In that sense, the language in the ISO policy is of little help to this Court in its analysis. *Cf.* UJI 13-1705 NMRA (providing that, in bad faith cases, industry standards are not conclusive).

Counter-Plaintiffs next urge this Court to adopt the reasoning of the Georgia Supreme Court in *Anderson v. Southeastern Fidelity Insurance Co.*, 307 S.E.2d 499 (Ga. 1983). While Counter-Plaintiffs maintain that the racing exclusion in that case is analogous to the one in the ANPAC policy, such a contention is without merit. The policy at issue in *Anderson* provided that

> This policy does not apply: (a) Under any of the coverages to any automobile (1) while rented or leased to others by the Insured; (2) while used as a public livery conveyance, unless such use is specifically declared and described in this policy; or (3) while used or operated in any racing event, speed contest or exhibition.

Id. at 499-500. In holding that the above exclusion did not bar coverage for impromptu drag racing on a public roadway, the court observed that the racing exclusion was grouped in a larger provision barring coverage for other activities—i.e., renting or leasing the vehicle or using a vehicle as a taxicab—that were necessarily prearranged in nature. *Id.* at 500. There is no such grouping of activities in the ANPAC policy. [1 RP 23-24] *See Alabama Farm Bureau Mut.*

Cas. Ins. Co. v. Goodman, 188 So.2d 268, 270 (Ala. 1966) (distinguishing similar racing exclusion in an Illinois case on grounds that the exclusion before the court was not grouped with other classifications as in the Illinois case).

Further, the court in *Anderson* observed that the "critical phrase" in the racing exclusion was "any racing event." *Id.* The court observed that when coupled with the word "event" and followed by the terms "speed contest or exhibition," the word "race" appeared to be limited to prearranged races only. *Id.* In the ANPAC policy, however, the "critical phrase" is not "any racing event," but "any race," a necessarily broader term. In that sense, the racing exclusion at issue is more closely analogous to the exclusion in *Continental Insurance Company v. Collingsworth*, 898 So.2d 1085, 1086 (Fla. Dist. Ct. App. 2005), which excluded coverage for "any speed race or test." Significantly, the court in *Continental Insurance Company* held that the racing exclusion was unambiguous and included all races, whether "sanction or unsanctioned, official or unofficial." *Id.* at 1087.

Counter-Plaintiffs further urge this Court to wholly reject the definition of "race" in NMSA 1978, § 66-8-115 (1978). The authority cited by Counter-Plaintiffs in support of this argument, however, suggests that statutory definitions of racing may be "used as a guide toward ascertaining the common meaning of the term." [AB 23 (citing Steven Pitt, *The Claim Adjuster's Automobile Liability Handbook* § 4:30).] While this Court is not bound by the definition in Section 66-

8-115, it provides yet "another extrinsic source" to be considered by this Court in construing the meaning of the policy exclusion at issue. *See Simpson v. State Mut. Life. Assur. Co. of Am.*, 382 A.2d 198, 200 (Vt. 1977).

As discussed above, and in ANPAC's Brief-in-Chief, the racing exclusion at issue is not ambiguous, and, in this case, properly excluded coverage for the conduct that Hudson was alleged and reasonably believed to have been engaged in, at the time of his collision with Officer McElroy.

iii. There was conflicting evidence as to whether Hudson was drag racing at the time of the collision.

In order to demonstrate that ANPAC's denial of their claim was frivolous or unfounded, Counter-Plaintiffs had to establish that ANPAC's denial lacked "any arguable support in the wording of the insurance policy or the circumstances surrounding the claim." *Jackson Nat'l Life Ins. Co. v. Receconi*, 113 N.M. 403, 419, 827 P.2d 118, 134 (1992) (internal quotation marks and citation omitted). Contrary to Counter-Plaintiffs' assertions, this standard is also described as a "fairly debatable" standard—meaning, in other words, "[w]here a claim is fairly debatable, the insurer is entitled to debate it, whether the issue concerns a question of law or fact." *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 492, 709 P.2d 649, 661 (1985) (Bivens, J., specially concurring); *see also Burge v. Mid-Continent Cas. Co.*, 1997-NMSC-009, ¶ 20, 123 N.M. 1, 933 P.2d 210 (relying on *United Nuclear Corp.* for the proposition that there is no bad faith

where "legitimate questions of law or fact exist"); Douglas G. Houser, *Good Faith as a Matter of Law: The Insurance Company's Right to Be Wrong*, 27 Tort & Ins. L.J. 665, 667 (1992) (equating the "fairly debatable" standard with the "frivolous or unfounded" standard).[1]

While Counter-Plaintiffs may not agree with ANPAC's decision to deny their claim, it cannot be disputed that ANPAC's decision was based on a particular set of facts and circumstances that raised a legitimate question as to whether Hudson was drag racing at the time of the collision:

- Evidence indicated that, after the collision, Hudson admitted to drag racing, and that he later denied that he was drag racing after ANPAC informed him that there may be no coverage for the collision; [Exs. F, J; 1 Tr. 73, 79, 175]

- The investigating officer, Officer Compton, told ANPAC that the officer involved in the accident, Officer McElroy, saw two sets of headlights in his rearview mirror, heard engines revving and tires squealing, and two cars appearing to race down the road behind where he was parked; [Ex. J, p. 8; Ex. 5, p. 2; 2 Tr. 46-47][2]

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[1] Indeed, Counter-Plaintiffs' own expert identified the standard as "reasonably debatable." [2 Tr. 173]

[2] Exhibit J was misidentified as Exhibit H in ANPAC's Brief-in-Chief. Contrary to Counter-Plaintiffs' arguments, ANPAC did have evidence at the time of its investigation as to Officer McElroy's observations. These observations were described by the investigating officer, Officer Compton, during a recorded interview that is transcribed in Exhibit J. These observations were also summarized in the police report that ANPAC obtained a copy of during its investigation. [1 Tr. 166-69]

- The police report obtained by ANPAC indicated that Hudson admitted to drag racing, that there had been citizen complaints relating to drag racing in the area, and also summarized Officer McElroy's observations of circumstances leading up to the collision. [Ex. 5, p. 3; 1 Tr. 166-69]

It was these facts, known to ANPAC at the time of its investigation, that led it to deny Counter-Plaintiffs' claim. Thus, contrary to Counter-Plaintiffs' representations in their Answer Brief, ANPAC did not rely solely on Officer Compton in denying Counter-Plaintiffs' claim, but instead made a decision based on conflicting evidence before it. Under such circumstances, ANPAC's conduct cannot be characterized as "frivolous or unfounded." *See Jackson Nat'l Life Ins. Co.*, 113 N.M. at 419, 827 P.2d at 134; *United Nuclear Corp.*, 103 N.M. at 485, 492, 709 P.2d at 654, 661; *see also Suggs v. State Farm Fire & Cas. Co.*, 833 F.2d 883, 891 (10th Cir. 1987).

These same facts demonstrate that ANPAC conducted a fair investigation of the claim. While Counter-Plaintiffs fault ANPAC's investigator for not asking Hudson directly whether he was drag racing, any additional denial by Hudson would have no real bearing on the evidence before ANPAC, as Hudson denied drag racing in a sworn statement. [Ex. F] Aside from Officer McElroy, who "did not wish to speak about [the collision]," ANPAC interviewed Officer Compton and Hudson, obtained a copy of the police report, and also received a sworn statement from Hudson regarding the collision. [1 TR. 166-69, 176; Ex. J]

In their brief, Counter-Plaintiffs state that, with respect to Officer McElroy's decision not to speak to ANPAC's investigators, "[w]hen the only police officer at the scene declined to give a statement that someone was drag racing, that should have been a huge red flag for the insurer." [AB 2] Counter-Plaintiffs misrepresent the record. Officer McElroy did not decline to state that Hudson was drag racing; rather, he simply declined to be interviewed at all. [1 Tr. 176; 2 Tr. 30] No one at trial testified that this should have raised a "red flag." Indeed, it appeared that one possible reason why Officer McElroy did not respond to ANPAC's attempts to contact him was not because he had something to hide, but instead because he had been injured and was possibly represented by an attorney. [2 TR. 30] Counter-Plaintiffs' attempt to create a negative inference from these facts should be rejected by this Court.

Under such circumstances, it is unclear what more ANPAC could have done to investigate the claim.[3] *See Jessen v. Nat'l Excess Ins. Co.*, 108 N.M. 625, 629, 776 P.2d 1244, 1248 (1989) ("The duty of the insurance company includes a duty to the insured to make a reasonably prompt investigation of all relevant facts." (internal quotation marks and citation omitted)), *limited in part on other grounds*

[3] While Counter-Plaintiffs list a number of questions that the investigator should have asked Hudson regarding the drag-racing allegation, the only alleged deficiency with the investigation argued by Counter-Plaintiffs at trial was that the investigator failed to ask Hudson directly if he was racing. [2 Tr. 175] None of these other "missed questions" were presented to the jury below and therefore do not provide a basis for affirmance in this case.

by Sloan, 2004-NMSC-004, ¶ 6; *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 31, 690 P.2d 1022, 1025 (1984) (stating that insurance company must make a "diligent effort to ascertain the facts upon which only an intelligent and good-faith judgment may be predicated"). Thus, to the extent that Counter-Plaintiffs' assertion that they should prevail on their bad-faith claim based on a "fair investigation" theory is considered by this Court, such a theory is nonetheless not supported by substantial evidence.

iv. ANPAC is not advocating for the adoption of a "directed verdict standard" with respect to insurance bad faith claims.

As further evidence of the conflicting nature of the evidence regarding Hudson's conduct, ANPAC pointed out in its Brief-in-Chief that the district court denied both parties' respective motions for directed verdicts because there were disputed facts. [BIC 27; 2 Tr. 213-14] In its Answer Brief, Counter-Plaintiffs accuse ANPAC of advocating for a "directed verdict standard" for bad faith claims. [AB 30-32] ANPAC is doing no such thing; rather, ANPAC merely suggests that the fact that the district court denied both parties' respective motions for directed verdicts lends further support to ANPAC's argument that it was presented with conflicting evidence when deciding whether Counter-Plaintiffs' insurance claim was barred by its racing exclusion. Accordingly, this Court need not consider whether to adopt or reject a "directed verdict standard" with respect to bad faith claims.

v. Counter-Plaintiffs' argument regarding ANPAC not objecting to the admission of evidence regarding the dismissal of the drag racing charges against Hudson is a red herring.

Counter-Plaintiffs' maintain that ANPAC cannot argue that the dismissal of the drag-racing charge is irrelevant to the question of whether ANPAC acted in bad faith because ANPAC did not object to the admission of such evidence at trial. [AB 32-33] ANPAC, however, is not arguing that the court erred in admitting the evidence regarding the dismissal of the drag-racing charge. Instead, ANPAC maintains that the evidence regarding the dismissal of the drag-racing charge simply doesn't lend any support to Counter-Plaintiffs' argument that ANPAC acted in bad faith. [BIC 28-29] Because ANPAC is not challenging the decision to admit such evidence, the fact that ANPAC did not object to its admission is immaterial. *See, e.g., State v. Mitchell*, No. L-92-227, 1995 WL 136820, at *1 n.1 (Ohio Ct. App. Mar. 31, 1995) (rejecting assertion that appellant should have challenged the admissibility of certain evidence where appellant was not challenging the admission of such evidence on appeal, but rather, the legal sufficiency of such evidence to support the verdict); *Dunaway v. Dunaway*, No. 14-06-01042-CV, 2007 WL 3342020, at *9 (Tex. Ct. App. Nov. 13, 2007) (concluding that appellant did not need to object to certain evidence in order to preserve his challenge to the legal sufficiency of the evidence to support the judgment).

B. Garth Allen's trial testimony was prejudicial and should have been excluded by the court.

Below, ANPAC argued that Counter-Plaintiffs' proffered expert, Garth Allen,[4] should not be permitted to testify because Counter-Plaintiffs failed to comply with the district court's scheduling order and because Allen's affidavit, which was eventually produced by Counter-Plaintiffs in lieu of an expert report, was deficient in that it was based on erroneous assumptions and failed to explain the bases for his opinions. [1 RP 216-18] In allowing Allen to testify at trial, the district court abused its discretion. *See State v. Torrez*, 2009-NMSC-029, ¶ 9, 146 N.M. 331, 210 P.3d 228.

Contrary to Counter-Plaintiffs' assertions in their Answer Brief, ANPAC was prejudiced by Allen's trial testimony. As ANPAC pointed out in its Brief-in-Chief, Allen claimed in his affidavit that ANPAC failed to adopt and implement reasonable standards for the prompt investigation and processing of insurance claims. [*See* 1 RP 235] Below, ANPAC alerted the district court to the fact that

[4] In their Answer Brief, Counter-Plaintiffs attempt to avoid Allen's own testimony that ANPAC did not act arbitrarily or frivolous until after Hudson's drag-racing charged as dismissed by asserting that expert testimony is not needed in bad-faith cases. [AB 36] However, having relied extensively on Allen's testimony below and in its Answer Brief, Counter-Plaintiffs' latest argument that Allen's testimony was unnecessary is disingenuous and should be rejected by this Court. *See First Fin. Bank v. CS Assets, LLC*, 678 F. Supp. 2d 1216, 1242 (S.D. Ala. 2010) ("Plaintiff will not be permitted to pick and choose the parts of its own expert's testimony it wants to implement, asking the Court to accept some of it and reject other portions of it, all to maximize plaintiff's advantage.").

Allen's affidavit failed to describe what ANPAC's standards for prompt investigation or processing of claims are, what claim information ANPAC failed to obtain, or what his basis was for asserting what such standards are. [1 RP 217-18] Despite this, Allen was allowed to testify at trial that ANPAC did not have reasonable standards for the investigation of insurance claims and that ANPAC's conduct otherwise violated industry standards. [2 Tr. 177-78] Moreover, although ANPAC argued pre-trial that Allen's affidavit failed to identify a basis for his assertion that ANPAC favored its own interests to the detriment of its insured, Allen was nonetheless permitted to testify as to that statement at trial. [2 Tr. 183, 190] Such unsupported testimony is inherently prejudicial and mandates reversal of the judgment against ANPAC.

C. Should this Court affirm the judgment below, it should nonetheless exercise its discretion to deny attorney's fees and costs for the appeal.

If this Court decides to affirm the judgment below, this Court should still exercise its discretion to deny an award of attorney's fees and costs for the appeal in this case. As evidenced by the fact that this Court initially recommended summary reversal and subsequently assigned the case to the general calendar, the issues on appeal are open to legitimate debate. Moreover, this case presents issues of first impression not yet addressed by New Mexico courts. For these reasons, this Court should deny Counter-Plaintiffs' request for attorney's fees and costs for the appeal. *See Jessen*, 108 N.M. at 631, 776 P.2d at 1250 ("In the *appropriate*

case, a first party insured who prevails on appeal *may* be awarded reasonable attorney fees and costs for the appeal." (emphasis added)); *Padilla v. State Farm Mut. Auto. Ins. Co.*, 2002-NMCA-001, ¶ 24, 131 N.M. 419, 38 P.3d 187 (denying request for attorney's fees on appeal under Section 39-2-1 despite fact that insured prevailed on appeal).

II. CONCLUSION

For the foregoing reasons, and those addressed in ANPAC's Brief-in-Chief, ANPAC respectfully requests that this Court reverse the bad-faith judgment below, and remand this matter with directions to enter judgment on the breach of contract claims only and vacate all damages awarded to Counter-Plaintiffs predicated on the finding of bad faith, including the bad-faith compensatory damages, punitive damages, the award of attorneys' fees and costs, and the award of all pre- and post-judgment interest predicated on the award of damages for bad faith. In the alternative, ANPAC respectfully requests that this matter be remanded for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2010, I caused a true and correct of ANPAC's Reply Brief to be served via U.S. Mail, postage prepaid, to:

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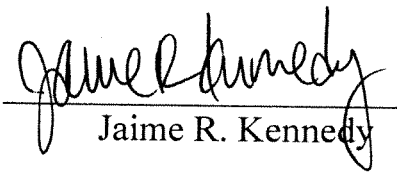

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