IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

MICHIGAN MILLERS MUTUAL INSURANCE COMPANY, Plaintiff, vs. ASOYIA, INC., UNITED FIRE & CASUALTY COMPANY and VIVAN JENNINGS, Defendants.	No: 3:11-cv-00006-CRW-CFB **ORDER ON POST-TRIAL MOTIONS**

This matter comes before the Court on Plaintiff Michigan Millers Mutual Insurance Company's (Michigan Millers) Post-Trial Motion (ECF No. 176) and Conditional Motion to Stay Effect of Declaratory Judgment (ECF No. 187) (Motion to Stay). Defendants Vivan Jennings and United Fire & Casualty Company (United Fire) resist Michigan Millers' Post-Trial Motion (ECF Nos. 181, 183). United Fire also resists Michigan Millers' Motion to Stay (ECF No. 190). The Court held hearing on Michigan Millers' Post-Trial Motion on February 12, 2014, at which Michael Duffy and Ben Patterson appeared for Michigan Millers, and Sean O'Brien and Thomas Boes appeared for United Fire.[1]

Michigan Millers, United Fire, and Jennings have all consented to the entry of final judgment by a United States Magistrate Judge under 28 U.S.C. § 636(c). This matter is fully submitted.

[1] United Fire was the only Defendant that participated at trial or the post-trial hearing in this matter. Asoyia, Inc., has been in default since March 28, 2011, for failure to plead or otherwise defend. *See* ECF No. 19, Clerk's Entry of Default. A Report and Recommendation (ECF No. 195) was filed on April 9, 2014, recommending that the Court enter default judgment against Asoyia. Michigan Millers, United Fire, and Jennings stipulated that Jennings would be bound by any trial verdict reached with regard to United Fire. *See* ECF No. 105.

I. FACTS AND PROCEDURAL HISTORY

Michigan Millers brought this diversity action seeking declaratory relief under 28 U.S.C. § 2201. Michigan Millers alleges that it has no duty to defend or indemnify Defendant Asoyia, Inc. (Asoyia), for a fire allegedly caused by soybean oil manufactured by Asoyia. Asoyia purchased liability insurance coverage from Michigan Millers—primary coverage under a Commercial Agribusiness Policy and excess coverage under a Commercial Umbrella Liability Policy—effective October 28, 2006, to October 28, 2007. Michigan Millers asserts that Asoyia failed to satisfy a condition precedent to Michigan Millers' performance under the policies by failing to notify Michigan Millers of the fire, and Asoyia's possible liability therefrom, until nearly two years after the fire.

Jury trial was conducted from December 17 to 20, 2013, at the U.S. Courthouse in Davenport, Iowa. The parties stipulated to the following facts:

> On June 18, 2007, a fire occurred at the Sunnyside Country Club in Waterloo, Iowa. United Fire provided property insurance to the country club. As the club's property insurer, United Fire conducted a preliminary investigation of the fire, determined that the fire loss was covered by its insurance agreement with the club, and paid the club's damage claim. The fire was also investigated by Dave Boesen, the Waterloo Fire Marshal.
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> Shortly after the fire, in the course of its investigation, United Fire sent a . . . subrogation notice [to a number of parties] . . . on June 28, 2007. United Fire's subrogation notice stated that an investigation at the fire scene would take place starting on July 10, 2007, and that others could participate in the ongoing investigation.
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> One of the subrogation notices was sent to Asoyia . . . . Although Asoyia received the subrogation notice from United Fire, no one at Asoyia gave the subrogation notice to Michigan Millers. No one from, or on behalf of, Asoyia participated in the fire investigation. Sunnyside Country Club was entirely repaired in the summer of 2008.
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> On May 19, 2009, United Fire sued Asoyia in state court, alleging that the fire at the country club started due to spontaneous

> combustion of recently laundered kitchen rags, and that the rags had been used to clean a fryer that had contained Asoyia's soybean oil. United Fire alleged that Asoyia is liable to pay the damages caused by the fire because it did not warn customers about the hazard of spontaneous combustion after laundering oil-soaked rags.
>
> Once it was sued in state court in 2009, Asoyia promptly sent notice of the suit to Michigan Millers. Vivan Jennings was Asoyia's Chief Executive Officer in 2005 and 2006. His duties included marketing the oil, and approving product warnings and labels. Jennings was added to the state court lawsuit in 2012. Jennings promptly sent notice to Michigan Millers when he was sued. Michigan Millers' insurance contract with Asoyia was in force at the time of the fire. Jennings is insured under Michigan Millers' insurance contract with Asoyia, and thus is bound by findings about Asoyia's coverage. Asoyia went out of business in December of 2009. . . .
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> Michigan Millers claims it was prejudiced by the delay (between June 2007 and May 2009) in receiving notice of the fire, and that because it did not receive notice of the possible claim when Asoyia first learned of the fire, the insurance contract does not provide coverage, and it does not have to defend or pay in the pending state court action United Fire has against Asoyia and Jennings.
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> United Fire claims that the investigations carried out in 2007 by the Waterloo Fire Marshal and United Fire's experts were thorough and based upon well-preserved evidence, and that Michigan Millers was not prejudiced by the delayed notice. . . .

ECF No. 153, Prelim. Jury Instr. at 5–6.

At trial, Michigan Millers introduced testimony from Brad Bush, its corporate representative. Bush testified that Michigan Millers was unable to investigate the fire scene because the site was repaired one year before Michigan Millers received notice of the fire from Asoyia. Bush testified that because Michigan Millers was unable to investigate the scene, it was unaware of what additional evidence it may have been able to obtain, and whether all potential witnesses were identified and interviewed. According to Bush, Michigan Millers was only able to utilize materials preserved from a one-sided investigation led by United Fire.

Michigan Millers also introduced testimony from fire investigation expert Scott Dillon. Dillon opined that the 2007 fire investigation was insufficient in the following ways: witnesses were not asked about alternative competent ignition sources; witness interviews in total were insufficient or undocumented; debris removed from the area of origin by the Waterloo Fire Department was not sufficiently examined, preserved, or reconstructed during the later phases of the investigation; contents of the country club parking lot's dumpster adjacent to removed debris were not investigated or documented; the structure and nature of the rag pile that other investigators determined spontaneously combusted was not documented as found before being moved to the parking lot on the day of the fire, and was not properly repositioned during the July 2007 fire scene investigation; and insufficient samples of the rags were retained. Dillon concluded from all of these shortcomings that the ignition source of the fire could not be determined based on evidence preserved from the 2007 fire investigation.

United Fire introduced testimony from Waterloo Fire Marshal Dave Boesen, who authenticated his photographs of the fire scene, and testified that he was able to confidently determine the origin and cause of the fire. United Fire then introduced testimony from its own fire investigation expert, Lonn Abeltins, who investigated the Sunnyside fire in 2007 on United Fire's behalf. During his testimony, Abeltins authenticated a number of photographs covering the exterior and interior of Sunnyside's clubhouse upon his first arrival to the scene on June 20, 2007. Abeltins also testified that a number of artifacts from the scene were preserved and are still in the possession of his business, Independent Forensic Investigations Company (IFIC). These artifacts include: Sunnyside's washer and dryer, a container of Asoyia oil, and samples from a pile of laundered rags that he determined was the cause of the fire. Abeltins further testified that notes remain available from interviews with Waterloo Fire Department Captain Mike Jenn, and a

number of Sunnyside employees, including Juanita Jaquith, who discovered the fire. Abeltins ultimately opined that the scene was sufficiently well-preserved to enable a later, independent investigation into the origin and cause of the fire.

United Fire also introduced testimony from Todd Hartzler, an electrical engineer affiliated with IFIC, and Kelly LaFollete, who was a follow-up investigator for IFIC. Hartzler opined that, based on the materials preserved from his investigation in 2007, including arc maps, wiring, and other electrical artifacts, an investigator could independently determine whether the Sunnyside fire had an electrical cause. LaFollette testified that he obtained recorded statements in his follow-up investigation from the Sunnyside employees interviewed as part of the on-scene investigation. LaFollette also testified that he logged twenty artifacts from the fire scene that were preserved and remain housed at IFIC.

In rebuttal, Michigan Millers re-called Dillon, who testified that, in his opinion, Boesen and Abeltins grossly under-photographed the fire scene, and criticized their photographs for not documenting the actual investigation in progress. Dillon also testified that a white object shown in the photographs near the area of origin was possibly a floor fan, as described by Boesen during United Fire's case-in-chief, and that this object presented another potential alternative ignition source that was not investigated during the 2007 fire scene investigations; Abeltins described this object as a chair.

After United Fire's case-in-chief, Michigan Millers moved for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50. The Court took Michigan Millers' motion under advisement and submitted the case to the jury. The jury returned a special verdict, finding that United Fire proved facts which showed that Michigan Millers was not prejudiced by Asoyia's delayed notice, and that Michigan Millers did not prove facts which showed that it actually was

prejudiced by Asoyia's delayed notice. On January 17, 2014, Michigan Millers renewed its motion for judgment as a matter of law in its Post-Trial Motion, alternatively seeking a new trial under Fed. R. Civ. P. 59.

II. MICHIGAN MILLERS' POST-TRIAL MOTION

A. Judgment as a Matter of Law

"Judgment as a matter of law is only appropriate when no reasonable jury could have found for the nonmoving party." *S. Wine & Spirits of Nev. v. Mountain Valley Spring Co.*, 646 F.3d 526, 533 (8th Cir.2011) (citing *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 860 (8th Cir. 2002)). The Court "may not weigh the credibility of evidence, and conflicts in the evidence must be resolved in favor of the verdict." *Id.* (citing *Schooley v. Orkin Extermination Co.*, 502 F.3d 759, 764 (8th Cir. 2007)). "[J]udgment as a matter of law is appropriate 'when the record contains no proof beyond speculation to support [the] verdict.'" *Arabian Ag. Servs. Co. v. Chief Indus., Inc.*, 309 F.3d 479, 482 (8th Cir. 2002) (quoting *Sip-Top, Inc. v. Ekco Group, Inc.*, 86 F.3d 827, 830 (8th Cir. 1996)).

On all parties' Cross Motions for Summary Judgment, the Court held that Asoyia's notice of the fire to Michigan Millers was late as a matter of law. ECF No. 103, Order on Mots. for Summ. J. at 11–12. Under Iowa law, when an insured cannot show substantial compliance with a notice of occurrence provision, or that late notice was waived or excused, prejudice to the insurer is presumed. *Henderson v. Hawkeye-Security Ins. Co.*, 106 N.W.2d 86, 92 (Iowa 1960). The insured may rebut this presumption "by a satisfactory showing of lack of prejudice." *Id.* "The question of prejudice is usually for the jury, but if the facts are undisputed and the only question concerns the breach of the policy, it may become a question of law for the court." *Fireman's Fund Ins. Co. v. ACC Chem. Co.*, 538 N.W.2d 259, 265 (Iowa 1995).

1. United Fire's Standing

Michigan Millers first argues that it is entitled to judgment as a matter of law because Asoyia, its insured, never appeared in this action to rebut the presumption of prejudice. The Court ruled on summary judgment that United Fire has a present "case or controversy" with Michigan Millers, separate from Asoyia's. ECF No. 103, Order on Mots. for Summ. J. at 4–6. This ruling was premised on a conclusion that United Fire would have a right of action, independent of Asoyia, under Iowa law and Asoyia's policies with Michigan Millers, if United Fire prevails in the Underlying Lawsuit. *Id.* at 5 (citing IOWA CODE § 516.1; *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 274 (1941); and *Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335, 337 (Iowa 1975)). The undersigned also recommended that default judgment be entered against Asoyia, but that such default judgment would have no effect on United Fire's independent defense in this declaratory judgment action. ECF No. 195, Report and Recommendation at 4–5. United Fire, in its independent controversy with Michigan Millers, presented evidence at trial to rebut the presumption of prejudice from Asoyia's delay. The parties stipulated that Jennings would be bound by whatever result United Fire obtained at trial. Michigan Millers is not entitled to judgment as a matter of law on this ground.

2. Sufficiency of United Fire's Evidence to Rebut the Presumption of Prejudice

Michigan Millers also argues that United Fire did not introduce sufficient evidence at trial to rebut the presumption of prejudice. Michigan Millers relies on three Iowa Supreme Court decisions, and a summary judgment ruling by a District Judge of this Court filed one week after the Court's Order on Cross Motions for Summary Judgment in this matter. *See generally Simpson v. U.S. Fid. & Guar. Co.*, 562 N.W.2d 627 (Iowa 1997); *Fireman's Fund Ins. Co.*, 538 N.W.2d 259 (Iowa 1995); *Bruns v. Hartford Accident & Indem. Co.*, 407 N.W.2d 576 (Iowa

1987); *Weitz Co. v. Lexington Ins. Co.*, No. 4:10-cv-00254, 2013 WL 5998243 (S.D. Iowa Nov. 13, 2013).

In *Weitz Co. v. Lexington Ins. Co.*, a general contractor (Weitz) sued the property insurers of its customer (Hyatt), after it had settled claims against it by Hyatt for allegedly defective construction work at a resort facility owned by Hyatt. Hyatt contracted with Weitz in 2001 to build the resort. *Weitz Co.*, 2013 WL 5998243 at *1. In 2004 and 2005, respectively, Hyatt reported to its insurers that two components of the resort, the care center and towers, had been damaged. *Id.* at *2. Hyatt settled the care center damage claim with its insurers for $750,000. *Id.* In 2006, Hyatt sued Weitz and others in the Southern District of Florida, alleging $102 million in damages from a breach of the building contract and breaches of guaranties and building codes. *Id.* In May 2008, while the Hyatt-Weitz lawsuit was pending, damage was discovered to the resort's plaza deck. *Id.* at *21 (date assumed for summary judgment purposes). In 2010, Weitz and Hyatt entered into a $53 million settlement agreement. *Id.* at *2. Later in 2010, Weitz sued Hyatt's insurers in this District, alleging a right of subrogation to Hyatt, and entitlement to receive payment under Hyatt's policies for all damage to the resort, including damage to the plaza deck, which was never reported to Hyatt's insurers. *See id.*

On November 13, 2013, the District Court granted summary judgment against Weitz on all of its claims. *Id.* at *28. The Court held that the 2005 settlement between Hyatt and its insurers released the insurers from liability for damage to the care center. *Id.* at *17. The Court also held that the two-year contractual suit limitations period in the insurers' policies barred Weitz's claims relating to damage to the care center and the towers. *Id.* at *20. Regarding the plaza deck damage, the Court held:

> Weitz failed to show a lack of prejudice as a matter of law, and thus, did not meet its burden. . . .

> In this case, evidence of prejudice includes the fact that because Hyatt never gave the required notice of any plaza deck damage, Lexington was denied the chance to respond. As a consequence, Lexington did not have the opportunity to negotiate with Hyatt regarding the damage to the plaza deck. Hyatt is barred from suing Lexington/Allied for the alleged damage, and thus, it is prejudicial to allow Weitz, as Hyatt's subrogee, to sue Lexington/Allied at this late date. . . . Moreover, two years and one month passed after the damage to the plaza deck allegedly occurred and Weitz filed suit. It has now been five years and five months since the damage to the plaza deck occurred. The fact that Lexington monitored the litigation between Hyatt and Weitz cannot rise to the level of notice that Lexington received direct notice, or that Lexington conducted an extensive investigation of the damage to the plaza deck. Hence, the presumption of prejudice to Lexington was not overcome. Thus, Weitz is barred from suing the Defendants for the alleged damage to the plaza deck in 2008.

Id. at *23.

The parties in this matter stipulated that Asoyia notified Michigan Millers of the Sunnyside fire in May 2009, approximately two years after the fire, and "promptly" after United Fire sued Asoyia in state court. Prelim. Jury. Instr. at 5–6. This is distinct from *Weitz*, where Hyatt never notified its insurers of the plaza deck damage. *See Weitz Co.*, 2013 WL 5998243 at *22. After the plaza deck damage, two years of further litigation ensued between Hyatt and Weitz, ending in a $53 million settlement, all before the insurers learned of the plaza deck damage when Weitz later sued them. *See id.* at *2, 22–23. Asoyia's notice to Michigan Millers immediately after being sued presents a materially different situation. There was no evidence offered in the trial record that Asoyia settled with United Fire or otherwise fixed its liability, or that Michigan Millers' opportunities to settle after receiving notice were negatively impacted by Asoyia's delay, or that any such settlement opportunities ever existed.

Michigan Millers cites to the fact that Sunnyside was completely repaired by the summer of 2008 for the proposition that it was denied the opportunity to settle or challenge costs assigned to the fire damage repairs. In *Weitz*, the settlement that preceded the insurers' notice was

between the insured (Hyatt) and an allegedly liable party (Weitz). Asoyia, Michigan Millers' insured, was not involved in—and would have no standing to insert itself into—United Fire's resolution of Sunnyside's property insurance claim. United Fire, the subrogee seeking relief, has bound itself to Sunnsyide in a similar manner to the alleged subrogee in *Weitz*, but without Asoyia's involvement in that claims adjustment, Michigan Millers' liability is still contingent and open to negotiation, or resolution at trial in the underlying liability lawsuit.

Weitz is also distinguishable due to the amount of evidence United Fire offered regarding fire scene investigations at Sunnyside. In both cases, approximately two years passed between the respective occurrences (the Sunnyside fire and *Weitz*'s plaza deck damage) and the insurers learning of the occurrences. In *Weitz*, there is no indication that the plaza deck damage was ever investigated or preserved in any manner. *See Weitz Co.*, 2013 WL 5998243 at *22–23. In this matter, the Court has consistently held that the preservation of materials from the scene and photographs of investigations at Sunnyside are directly relevant to whether Asoyia's late notice prejudiced Michigan Millers. *See* ECF No. 103, Order on Mots. for Summ. J. at 12–14; ECF No. 40, Order on Mot. to Bar Expert Test. at 4–5.

For these reasons, the Court finds that *Weitz* is materially distinguishable, and not persuasive of whether Michigan Millers is entitled to judgment as a matter of law.

Like *Weitz*, two Iowa cases, *Simpson v. U.S. Fid. & Guar. Co.*, and *Fireman's Fund Ins. Co. v. ACC Chem. Co.*, involved claims that the insured had settled without notice to the insurer following substantial proceedings (either judicial or administrative). *See Simpson*, 562 N.W.2d at 632–33; *Fireman's Fund*, 538 N.W.2d at 266; *Weitz*, 2013 WL 5998243 at *2. These cases are also distinguishable.

In *Simpson*, the court concluded that the insured under a workers' compensation and commercial auto policy did not introduce "satisfactory evidence to rebut the evidence of substantial prejudice to [the insurer]." *Simpson*, 562 N.W.2d at 632. The court found that, because of the insured's breach of a cooperation clause, the insurer "had no opportunity to participate in, control, or monitor the litigation between" the insured and the parties allegedly responsible for the insured's injuries. *Id.* at 632. The court also found that the insurer "had no opportunity to investigate the claim or assess its potential liability and damages," and was also excluded from the discussions leading to a $600,000 confessed judgment in favor of the insured. *Id.* at 629, 632–33. Asoyia's notice to Michigan Millers after being sued has enabled Michigan Millers to participate in and control the litigation between United Fire and Asoyia. Asoyia did not bind itself to any finding of liability or judgment amount in the underlying lawsuit.

In *Fireman's Fund*, the insured (Chemplex) entered into a consent decree with the Environmental Protection Agency (EPA) to remedy chemical leaching covered by its liability policies before its insurers were notified of the spills. *Fireman's Fund Ins. Co.*, 538 N.W.2d at 261–62. The court held that the insurers were prejudiced as a matter of law, finding that:

> five years had passed since the occurrence. The appearance of the site had been changed. At least one key witness had died, many had left, and many relevant documents had been destroyed. The witnesses who were available could not reasonably be expected to fully recall the events of five years earlier. These insurers were deprived of any opportunity to negotiate with the EPA or provide any input, except their money, on the consent decree. Chemplex had already spent millions on remediation and had obligated itself to spend millions more before it notified these insurers that they were expected to pay these expenses.

Id. at 266.

The findings in *Fireman's Fund* show prejudice beyond any that could be inferred from the trial record in this matter. The parties stipulated that Asoyia notified Michigan Millers within

two years of the Sunnyside fire, rather than five. There was no evidence in the trial record of any witness actually being unavailable, or unable to remember details of the fire; further, Abeltins' interview notes entered into evidence provided the jury a basis for concluding that any presumed inability of witnesses to remember information about the fire had been mitigated by contemporaneous notes. Further, Asoyia did not bind itself or Michigan Millers to any settlement amount or finding of liability.

A third Iowa case, *Bruns v. Hartford Accident & Indem. Co.* provides the most analogous controlling authority. In *Bruns*, the insurers were notified of the policy occurrence at issue—an auto accident—after twenty-eight months. 407 N.W.2d at 580. The insured and injured party in *Bruns* relied on a police report made at the scene of the accident to show lack of prejudice resulting from the insurers' inability to investigate at the time of the accident. *See id.*

In *Bruns*, the Iowa Supreme Court, conducting a *de novo* review of a bench trial finding that the insurers were prejudiced, concluded that:

> The insurance companies were denied access to potential witnesses. They were deprived of immediate descriptions of the accident scene, the opportunity to photograph the scene as it then existed, and the opportunity to inspect the vehicles involved in the collision. Any descriptions or photographs obtained twenty-eight months after the collision would necessarily be less vivid and of considerably diminished value.

Id. The court further found that the police investigation report compiled near the time of the accident did not establish lack of prejudice, because the object of that investigation (locating a hit-and-run driver) was different from that of the insurers (assessing comparative fault). *Id.* Further, the report contained no record of statements made by two persons identified in the report as having been present at the scene. *Id.*

Unlike *Bruns*, the trial record in this matter does not indicate that relevant witnesses to the fire were never interviewed, or that the accident scene was not photographed. Further,

Abeltins' notes of witness interviews conducted on June 20, 2007, gave the jury a reasonable basis for finding that any presumed fading memory or unavailability of the witnesses that were interviewed was mitigated, in light of the photographs and all of the other preserved evidence of the fire scene. The jury could have reasonably found that any prejudice presumed by Michigan Millers' inability to photograph the scene itself was rebutted by the hundreds of photographs of the fire scene entered into evidence, all of which were taken between June 18, 2007, and July 10, 2007.

The *Bruns* insurers' inability to examine the vehicles involved in the collision is distinct from Michigan Millers' inability to examine objects at the scene of the fire in 2007. IFIC preserved twenty artifacts from the Sunnyside fire. *See* Trial Ex. 28. In *Bruns*, the insured hid, repaired, and sold his vehicle between the accident and notice to the insurers. *Bruns*, 407 N.W.2d at 578.

Based on the testimony of those at the fire scene and those who contemporaneously investigated the fire, all of the physical evidence preserved from the Sunnyside fire, and witnesses statements and photographs from the fire scene, the jury had a reasonable basis for finding that Michigan Millers was not prejudiced by Asoyia's two-year delay in notifying it of the fire. None of the authorities offered by Michigan Millers are sufficiently analogous to require a holding that United Fire, as a matter of law, did not rebut the presumption of prejudice.

3. Michigan Millers' Evidence of Actual Prejudice

Michigan Millers also argues in its Post-Trial Motion that it entered evidence of actual prejudice into the trial record, which requires judgment in its favor as a matter of law. Michigan Millers asserts that it was actually prejudiced by: insufficient documentation of the pile of laundered rags; insufficient documentation of potential alternative ignition sources; insufficient

documentation of the fire debris and a dumpster located in the Sunnyside parking lot; too few photographs of the fire scene; insufficient documentation of witness interviews; and having no opportunity to settle or negotiate the amount of the claim.

a. Documentation of the Pile of Rags

Samples from the pile of rags that was identified as the fire's origin were preserved as artifacts of the fire, *see* Trial Ex. 28 (item number seventeen), in addition to photographs of the rags at the fire scene and during the investigation. United Fire made this evidence available to Michigan Millers in the underlying lawsuit. Dillon testified that the rags (samples of which were tested in 2007 for oil residue) would likely have decomposed after two years, but Michigan Millers did not offer any evidence that the actual rags in this case did decompose or that any change would impact conclusions about the origin and cause of the fire. There was no indication in the trial record that Michigan Millers ever made any attempt to obtain or sample the rags.

Bush testified that, to avoid a conflict of interest, Michigan Millers bifurcated its handling of Asoyia's claim when it filed this declaratory judgment action; it kept the discussion of the underlying lawsuit separate from personnel handling the declaratory judgment; thus, there was no testimony about any specifics of the evidence Michigan Millers was lacking in the underlying liability case (which has been stayed pending the outcome of the declaratory judgment case). United Fire did not offer evidence disputing Dillon's assertion that the rags likely decomposed after two years, but without testimony from Michigan Millers showing it was actually unable to obtain a useful sample of the pile of rags, or why such testing would be relevant, the jury could have reasonably concluded that Michigan Millers was not actually prejudiced by the manner in which the rags were preserved.

Michigan Millers' argument that there is no photograph of the rags at the time of the fire assumes that such a photograph could have been available if it was given timely notice by Asoyia. Abeltins testified that the Waterloo Fire Department had already removed the rags from the fire scene by the time he arrived on June 20, 2007. The jury therefore could have reasonably concluded that the rags had already been moved from their arrangement at the time of the fire eight days before United Fire mailed its subrogation notice to Asoyia, and thus there was no prejudice to Michigan Millers, because it received all of the evidence available.

b. Documentation of Potential Alternative Ignition Sources

Michigan Millers asserts the following defects in the documentation of alternative ignition sources: a white object seen in photographs of the purported area of origin—identified at trial as a fan by Boesen, and as a chair by Abeltins—was not clearly identified or retained as an artifact; Hartzler failed to account for an attempt to return power to the Sunnyside clubhouse after the fire when he mapped electrical arcing; and Hartzler did not perform a digital multimeter test on a partially burned light switch photographed near the purported area of origin.

Abeltins testified that the white object, regardless of what it was, was merely debris, and not sufficiently burned to be considered an ignition source. On that basis, the jury could have reasonably determined that identifying or cataloging the object was not pertinent to later investigation. Although Dillon testified that, in his opinion, the object should have been logged or preserved to allow a more complete later investigation of the fire, this conflict in the evidence is to be resolved at this stage in favor of the verdict.

Hartzler testified that he mapped the arcing he found in the Sunnyside clubhouse on July 10, 2007, but that he was unaware when the fire department returned power to the clubhouse, which possibly caused some arcing viewed after the fire. The jury could have reasonably

concluded that, by attributing additional post-fire arcing to the fire, Hartzler did not overlook an alternative ignition source, and that his arc map, on the basis of which he concluded the fire did not have an electrical origin, was nonetheless useful to Michigan Millers, and did not prejudice its investigation into the origin and cause of the fire.

Hartzler testified that the light switch photographed near the break room was retained as an artifact, and could still be examined at the time of trial. The jury could therefore have reasonably found that Michigan Millers' investigation was not prejudiced by Hartzler not performing a digital multimeter test on the light switch in 2007.

c. Documentation of Fire Debris

Abeltins testified that he and Ken Ward, a third-party investigator present at the July 10, 2007 fire scene investigation, troweled through debris at the fire scene. United Fire offered a number of close-up photos of debris in the Sunnyside employee break room (where the fire occurred). *See* Trial Ex. 130 (photographs SCC003812–SCC003821). Abeltins testified that the items in those photographs were representative of the debris that he encountered. The jury could have reasonably inferred from these photographs and this testimony that Michigan Millers was not prejudiced by the lack of further documentation of the debris remaining in the Sunnyside parking lot or dumpster that had been removed from the break room by firefighters on June 18, 2007.

d. Number of Photographs Available to Michigan Millers

Dillon testified that he would have taken 600 to 800 photographs of the fire scene. Abeltins and Boesen both testified that they took a number of photographs they believed appropriate for the Sunnyside fire scene, and that the preserved evidence—artifacts and photographs—was sufficient to enable later investigation by any other party. Resolving this

conflict in the evidence in favor of the verdict, the jury could reasonably have found that the number and type of photographs submitted to them were sufficient to allow Michigan Millers to later investigate the Sunnyside fire scene.

e. Insufficient Record of Witness Interviews

Michigan Millers asserts it was prejudiced by the fact that Boesen did not document any of his witness interviews. Any failure of Boesen's investigation happened before United Fire and IFIC were involved, and would have been no different even if Michigan Millers had received immediate notice of the fire from Asoyia when Asoyia received the subrogation notice.

Abeltins' witness interview notes are still available and were submitted to the jury. *See* Trial Ex. 22. Michigan Millers did not introduce evidence that its defense of Asoyia required any information or line of questioning not recorded in Abeltins' notes. Michigan Millers also did not introduce any evidence that actual witnesses involved were unavailable, or unable to recall any information asked of them subsequent to Michigan Millers' notice of the claim. Abeltins' notes are not complete transcripts or recordings of his witness interviews, but in light of the entire trial record, the jury could have reasonably found that Michigan Millers was not prejudiced by the manner in which the interviews were recorded.

f. Settlement Opportunities

Michigan Millers again relies on *Weitz Co. v. Lexington Ins. Co.*, No. 4:10-cv-00254, 2013 WL 5998243 (S.D. Iowa Nov. 13, 2013), to support its assertion that it was prejudiced by not being able to settle with United Fire before Sunnyside was repaired. Asoyia, Michigan Millers' insured, never bound itself to pay for any damage to Sunnyside. Asoyia's liability, and the amount of damages attributable to Asoyia, if any, are still undetermined in the underlying lawsuit. The jury could have reasonably concluded that Michigan Millers had the same ability to

settle with United Fire after receiving notice in 2009 as it would have at any point before then, and that Michigan Millers was not prejudiced with respect to settlement from Asoyia's late notice. There also was no evidence that United Fire was interested in, or sought assistance from, Asoyia or any other third party in resolving the damage claim made by Sunnyside, or that it would have allowed a third party to inject itself into the claims adjustment process.

g. Conclusion

Because the jury had a reasonable basis on evidence in the trial record for finding that United Fire rebutted the presumption of prejudice to Michigan Millers, and that Michigan Millers was not actually prejudiced in any of the specific ways it asserts it was, Michigan Millers' motion for judgment as a matter of law is denied.

B. New Trial

The court may grant a new trial after a jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). A verdict against the greater weight of the evidence is among the grounds on which a new trial may be granted. *See Frumkin v. Mayo Clinic*, 965 F.2d 620, 624 (8th Cir. 1992). "A new trial should be granted only if the evidence weighs heavily against the verdict." *Maxfield v. Cintas Corp., No. 2*, 563 F.3d 691, 694 (8th Cir. 2009). "The key question in determining whether a new trial is warranted is whether it is necessary to prevent a miscarriage of justice." *Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 471 (8th Cir. 2011). The court exercises "sound discretion" in deciding whether to grant a new trial. *Id.* (quoting *Howard v. Mo. Bone & Joint Ctr., Inc.*, 615 F.3d 991, 995 (8th Cir. 2010)).

Michigan Millers moves for a new trial only on the ground that the verdict was against the greater weight of the evidence. The Court finds, for the same reasons as discussed above, that

the evidence does not weigh heavily against the jury's verdict, and that the verdict does not constitute a miscarriage of justice. Michigan Millers' motion for a new trial is denied.

III. MICHIGAN MILLERS' MOTION FOR STAY OF JUDGMENT PENDING APPEAL

In its Motion to Stay (ECF No. 187), Michigan Millers requests that the Court stay the declaratory judgment entered against it, pending appeal. Michigan Millers requested oral argument on its Motion to Stay, but the Court finds no good cause for argument, and will decide the motion on the parties' filings. *See* LR 7(c).

When deciding whether to stay a judgment pending appeal, the court considers four factors:

> (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Iowa Utils. Bd. v. Fed. Commc'ns Comm'n, 109 F.3d 418, 423 (8th Cir. 1996) (citations omitted). The court must balance all four factors. *See Brady v. Nat'l Football League*, 640 F.3d 785, 789 (8th Cir. 2011).

Michigan Millers contends that it has two strong arguments on appeal: (1) the weight of the evidence in the trial record, and (2) the persuasiveness of *Weitz Co. v. Lexington Ins. Co.*, No. 4:10-cv-00254, 2013 WL 5998243 (S.D. Iowa Nov. 13, 2013). The Court finds *Weitz* distinguishable, and not persuasive of Michigan Millers' claim that it was prejudiced as a matter of law, or that United Fire failed as a matter of law to rebut the presumption of prejudice. For its weight of the evidence argument to prevail, Michigan Millers must conclusively show that the jury had no "legally sufficient evidentiary basis to find for" United Fire, or that this Court has abused its discretion in not granting Michigan Millers a new trial. Fed. R. Civ. P. 50(a)(1); *see Two Rivers Bank & Trust v. Atanasova*, 686 F.3d 554, 563 (8th Cir. 2012) ("When the basis of

the motion for a new trial is that the jury's verdict is against the weight of the evidence, the district court's denial of the motion is virtually unassailable on appeal." (quoting *Jones v. Swanson*, 341 F.3d 723, 732 (8th Cir. 2003))). The Court finds that the factor of likelihood of success on the merits weighs against granting Michigan Millers a stay of judgment pending appeal.

On March 13, 2014, Michigan Millers supplemented its Motion to Stay by filing in this action an Order entered by the Iowa District Court in the underlying lawsuit. This Order, dated March 6, 2014, held:

> [O]n the 28th day of February, 2014, this matter came before the court . . . regarding [United Fire]'s request to lift the stay and for a trial scheduling conference. . . .
>
> A review of the file shows that proceedings in this matter have been stayed pending a determination of federal court issues. The court has now been advised that a decision has been reached in the federal court; however, post-trial motions have been filed and the parties expect that an appeal of the final decision in federal court will be taken. . . .
>
> The court determines that the stay should remain in effect at this time. A review hearing should be set in approximately 60 days to keep the court apprised of proceedings in the federal matter.

ECF No. 194-1, Ex. to Supplemental Filing at 1. Michigan Millers argues that it will be irreparably harmed by having to defend and possibly indemnify Asoyia in the underlying lawsuit while appeal in this matter is pending. The Court finds, as Michigan Millers asserts in its Supplemental Filing (ECF No. 194), that the underlying lawsuit is stayed entirely, and that the Iowa District Court is mindful of an impending appeal in this matter. Accordingly, the Court finds that Michigan Millers will not be irreparably harmed absent a stay pending appeal in the instant case. If the state court lifts the stay in the underlying lawsuit, United Fire could be harmed by moving forward with judgment in this matter stayed, as much as Michigan Millers could be harmed moving forward in the underlying lawsuit with this judgment in effect. The

Court therefore finds that the second and third factors, taken together, do not favor granting Michigan Millers a stay of judgment pending appeal.

The Court notes that nearly seven years have now elapsed since the Sunnyside fire, and nearly five years have elapsed since United Fire commenced the underlying lawsuit. The Court finds that it is in the public interest that judgment on the jury's verdict be effectuated immediately, and that the balance of the four factors weighs against staying the judgment pending appeal. Michigan Millers' Motion to Stay is denied.

CONCLUSION

Based on the evidence introduced at trial, including evidence of the photographs, interview notes, and artifacts preserved from investigations conducted near the time of the Sunnyside fire, the jury had a reasonable, and legally sufficient, basis for finding that Michigan Millers was not prejudiced by Asoyia's delay in notifying Michigan Millers of the Sunnyside fire. Michigan Millers' Post-Trial Motion (ECF No. 176) is **denied**, with respect to both judgment as a matter of law and a new trial. Michigan Millers has not demonstrated a sufficient likelihood of success on appeal or irreparable harm to stay judgment on the jury's verdict pending appeal. Michigan Millers' Motion to Stay (ECF No. 187) is **denied**.

IT IS SO ORDERED

Dated this 23rd day of April, 2014.

Celeste F Bremer

CELESTE F. BREMER
CHIEF UNITED STATES MAGISTRATE JUDGE