Commonwealth of Kentucky
Court of Appeals
No. 2017-CA-001252

CRYSTAL LEE MOSLEY, individually and as Administratrix of the Estate of Rhett Lee Mosley, deceased and RHETT MOSLEY, JR., a minor, by and through his Mother and Next Friend, Crystal Lee Mosley, **APPELLANTS,**

v. **APPEAL FROM HARLAN CIRCUIT COURT**
CIVIL ACTION NO. 11-CI-00349

ARCH SPECIALTY FIRE INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY, **APPELLEES.**

BRIEF FOR APPELLEE
NATIONAL UNION FIRE INSURANCE COMPANY

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CERTIFICATE OF SERVICE

On this 26th day of January, 2018, this Brief for Appellee was mailed via First Class Mail to: J. Dale Golden, Kellie Marie Collins, Golden Law Office, PLLC, 771 Corporate Dr., Suite 750, Lexington, KY 40503; Jeffrey Morgan, Jeffrey R. Morgan & Associates PLLC, 850 Morton Blvd, Hazard, KY 41702; Mindy G. Barfield, Dinsmore & Shohl LLP, Lexington Financial Center, 250 West Main St., Suite 1400, Lexington, KY 40507; Kenneth R. Friedman, 1126 Highland Ave., Bremerton, WA 98337; Harlan Circuit Court Clerk, Harlan County Justice Center, 129 S. First Street, Harlan, KY 40831; and Hon. Jeffrey Thomas Burdette, Chief Regional Circuit Judge, Pulaski County Judicial Center, 50 Public Square, Somerset, KY 42501. It is also certified that the record on appeal was not withdrawn from the Harlan Circuit Court.

Counsel for Appellee,
National Union Fire Insurance Company

INTRODUCTION

This appeal arises from claims that two insurers acted in bad faith by defending their respective insureds against an underlying wrongful death claim where

- the insureds asserted liability defenses based on workers compensation immunity, causation, the law of bailment, and comparative fault;
- after more than 4 years to take discovery in the tort action, the Plaintiffs/Appellants were not able to establish that the insureds' liability was beyond dispute;
- the trial court held that there were valid defenses for a jury to consider;
- Plaintiffs' counsel's testimony in the bad faith action revealed that Plaintiffs knew that liability was never beyond dispute; and
- the Plaintiffs/Appellants eventually accepted a settlement for a fraction of their prior policy limits demands.

Following an additional 16 months of discovery on the bad faith claims, the circuit court properly held that the further discovery sought by Appellants could not raise a genuine issue of material fact (1) that the insureds' liability was never "beyond dispute," and (2) that the insurers' litigation conduct during a confidential court-ordered mediation did not establish bad faith under Kentucky law. That judgment should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

This case can easily be affirmed without oral argument on the basis of the undisputed record and clear Kentucky law.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

May it please the Court:

COUNTERSTATEMENT OF THE CASE

This appeal challenges the dismissal of third-party bad faith claims arising from two insurers' defense of their insureds in wrongful death litigation. A record developed over 5 years of litigation, circuit court decisions about issues to be determined by a jury, and even testimony from the plaintiffs' trial counsel all confirm that the insureds' liability in that underlying case was never beyond dispute. The insurers' efforts to protect their insureds and avoid any potential excess judgment against one of them were not only lawful, but also necessary. And the request for additional bad faith discovery could not change the undisputed facts or Kentucky law to make liability beyond dispute in the tort case. Accordingly, the judgment in favor of the insurers should be affirmed.[1]

Appellants Crystal Mosley, individually and as administratrix of her husband's estate, and Rhett Mosley Jr. brought bad faith claims against two insurers: Appellee National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") and Appellee Arch Specialty Insurance Company ("Arch"). Appellants claim that National Union acted in bad faith by defending its insureds, Rex Coal Company, Inc. and Dixie Fuel Company, LLC, where the insureds asserted liability defenses of immunity, causation, the law of bailment, and comparative fault. That disputed liability precludes the bad faith claim. And because the bad faith claims are based on alleged conduct during a court-ordered mediation, controlling precedent holds that there can be no bad faith.

The underlying wrongful death claim.

These third-party bad faith claims arise out of a fatal accident at a surface coal

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[1] RA 7857-7874: Order, 7/11/17, attached as Apx. A.

mine near Harlan, Kentucky.[2] Rhett Mosley was killed when he lost control of the service truck he was driving in the course of his employment with Regional Contracting.[3]

Appellants initially sued Dixie Fuel, the owner of the truck Mr. Mosley was operating at the time of the accident.[4] Appellants later added claims against Rex Coal, the owner of the surface mine.[5] Both Dixie Fuel and Rex Coal were insured by National Union, and National Union assumed their defense.[6] Appellants also added claims against other parties not insured by National Union: Jean Coal Co., LLC, the actual surface mine operator and the bailee responsible for operation and maintenance of the Dixie Fuel truck; Regional Contracting, Mr. Mosley's employer; and Terry Loving, the sole managing member of Jean Coal and Regional Contracting.[7]

After four years of litigation, Rex Coal's and Dixie Fuel's liability for the death of Rhett Mosley remained in dispute.

The alleged liability of Rex Coal and Dixie Fuel (and the other defendants) was disputed over more than four years of litigation. Under Kentucky law, neither Rex Coal nor Dixie Fuel could be held legally responsible for Mr. Mosley's death. Rex Coal asserted it was entitled to "up the ladder" immunity under the Workers' Compensation Act as a "contractor" of Mr. Mosley's employer and Mr. Mosley's statutory employer.[8]

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[2] RA 6733-6742: Second Am. Compl. at ¶¶ 1-35, attached as Ex. 2 to Pls. Resp. Mot. J. Pleadings. This brief uses "RA" to refer to pages in the consecutively numbered indices from the 2015 interlocutory appeal and the original certification in this appeal and "SRA" to refer to the separately numbered pages in the Supplemental Record certified in this appeal on September 29, 2017.

[3] RA 1-7: Compl. at ¶ 5.

[4] RA 1-7: Compl. at ¶¶ 1-29.

[5] RA 41-46: First Am. Compl. at ¶¶ 7, 11-14.

[6] *See, e.g.*, RA 6394-6559: National Union's Mot. to Dismiss at 3.

[7] RA 41-46: First Am. Compl. at ¶¶ 5-6, 9-15.

[8] *See* KRS 342.610; KRS 342.690; *Gen. Elec. Co. v. Cain,* 236 S.W.3d 579 (Ky. 2007); *see also* SRA 339-407: Rex Coal's Mot. Summ. J. at 1-17. In fact, the issue of up the ladder immunity was first raised by Appellants: in March 2013, Appellants filed a Motion for Declaratory Judgment requesting

Dixie Fuel, as bailor of the truck operated by Mr. Mosley, argued it was not legally responsible for the bailee's (Jean Coal's) alleged negligent use or maintenance of a truck that it did not control or have any right to control.[9] Dixie Fuel also argued that events after the truck left its control more than a year before the accident – specifically, repairs by numerous mechanics and other individuals – severed any chain of causation with respect to Dixie Fuel's alleged negligence.[10] The assertion that Dixie Fuel's liability was clear – or that Dixie Fuel made "admissions" of liability after it stipulated ownership of the truck and that it was not entitled to up-the-ladder immunity – therefore misrepresents the record and ignores Dixie Fuel's other legal and factual defenses.[11]

While both sides' dispositive motions were pending, Appellants also filed a separate motion asking the court to "enter a judgment as a matter of law regarding both [Rex Coal's and Dixie Fuel's] culpability for negligence."[12] The circuit court summarily denied all pending dispositive motions, including Appellants' motion requesting a liability determination, thus recognizing that liability was not beyond dispute.[13]

Apportionment to other entities and individuals was likely.

Even if Kentucky law did not preclude liability for both Rex Coal and Dixie Fuel

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that the circuit court determine that none of the underlying defendants were entitled to "up the ladder" immunity under the Kentucky Workers' Compensation Act. RA 1722-1840: Pls. Mot. Dec. J. at 1-20.

[9] *See Am. Fid. & Cas. Co. v. Pa. Cas. Co.*, 258 S.W.2d 5, 7 (Ky. 1953); *see also* RA 2102-2120: Dixie Fuel's Mot. Summ. J. at 9-11.

[10] *See Bruck v. Thompson,* 131 S.W.3d 764, 767-68 (Ky. App. 2004); *see also* RA 2102-2120: Dixie Fuel's Mot. Summ. J. at 11-13.

[11] *Cf.* Appellants' Br. at 15, 22.

[12] RA 2945-3083: Pls. Mot. Summ. J. at 1. Appellants postured their dispositive motion as "a comprehensive statement of the Plaintiffs' position on the issues of immunity and liability based upon the present constellation of facts and law." *Id.* at 3.

[13] RA 4326: Order, 10/21/14. Rex Coal appealed the denial of immunity and the underlying claims were settled during the appeal. *See Rex Coal Co. v. Mosley,* No. 2014-CA-001873 (Ky. App. Feb. 24, 2015)(order passing appeal to merits panel).

on the legal issues of "up the ladder" immunity and bailment, liability for these parties was never "beyond dispute" because a jury would have been able to apportion fault to other current and former parties, as well as to Mr. Mosley himself. For example, Jean Coal and Regional Contracting were exclusively responsible for maintaining the truck Mr. Mosley was driving.[14] Another liability dispute involved third-party mechanics who were hired to adjust the truck's brakes after the Mine Safety and Health Administration (MSHA) found problems with the brakes the year before the accident.[15]

A liability dispute also existed about Rhett Mosley's comparative fault: (1) Mr. Mosley was not wearing a seatbelt at the time of the accident, which Plaintiffs' expert admitted would have prevented him from being thrown from the truck;[16] (2) MSHA investigators confirmed that Mr. Mosley was operating the truck in neutral, instead of in gear, and that he therefore did not have the benefit of the Jacobs engine brake, an operational choice that Plaintiffs' expert described as "unsafe, period";[17] and (3) Mr. Mosley and others (including those in the preceding shift who operated the truck without any problem) had performed numerous pre-shift inspections on the truck in the days and

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[14] RA 2102-2120: Dixie Fuel's Mot. Summ. J. at 5-7, 9-11.

[15] RA -- : Deposition of J. Morgan ("Morgan Dep."), 12/15/16, at 29-30 (in separate envelopes in record); SRA 56-109: Defs. Mot. Leave to File Third-Party Compl. at 1-5; SRA 56-109: Third-Party Compl. at ¶ 15.

[16] RA 4685-4707: Deposition of T. Eaton ("Eaton Dep."), 12/12/14, at 73, attached as Ex. 2 to Dixie Fuel's Mot. Partial Summ. J. Comparative Fault; *see also* RA 4685-4707: Dixie Fuel's Mot. Partial Summ. J. Comparative Fault at 4.

[17] RA 4685-4707: Eaton Dep. at 42-43, attached as Ex. 2 to Dixie Fuel's Mot. Partial Summ. J. Comparative Fault; RA 4685-4707: Deposition of T. Marshall, attached as Ex. 1 to Dixie Fuel's Mot. Partial Summ. J. Comparative Fault. Had the truck been in gear and the Jake brake applied, Plaintiffs' expert believed the truck would have descended the hill in a safe manner. RA 4685-4707: Eaton Dep. at 45, attached as Ex. 2 to Dixie Fuel's Mot. Partial Summ. J. Comparative Fault; *see also* RA 4685-4707: Dixie Fuel's Mot. Partial Summ. J. Comparative Fault at 3-4.

weeks leading up to the accident, but never reported any issues with the brakes.[18] Based on this evidence, the circuit court judge "[felt] confident … the record [would] support a comparative negligence instruction."[19] And as the circuit court judge later stated: "How can liability be reasonably clear when the court is ordering an apportionment jury instruction and then denying summary judgment on both accounts, on both sides?"[20]

Appellants' bad faith and concert of action claims against National Union.

While the various dispositive motions were pending, two court-ordered mediations were held in June 2013 and in September 2013. After the second mediation, in an apparent attempt to force a settlement,[21] Appellants added bad faith and concert of action claims against National Union, the insurer of Rex Coal and Dixie Fuel, and Arch, the insurer of Jean Coal and Terry Loving.[22]

The bad faith allegations relate to the insurers' alleged conduct at the confidential mediation in September 2013.[23] Appellants complain that a single attorney and a single adjuster attended the mediation and made "global" settlement offers on behalf of all defendants (Jean Coal and Terry Loving, insured by Arch, and Rex Coal and Dixie Fuel).[24] But as Appellants knew, both Rex Coal and Dixie Fuel were indemnitees under Arch's policy and entitled to a defense from Arch, which provided that defense up until

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[18] RA 4685-4707: Pre-Shift Checklists, attached as Ex. 3 to Dixie Fuel's Mot. Partial Summ. J. Comparative Fault; RA 4685-4707: Eaton Depo. at 47-55, attached as Ex. 2 to Dixie Fuel's Mot. Partial Summ. J.; *see also* RA --: Morgan Dep., 12/15/16, at 94.

[19] Hearing, VR 1/5/15: 11:03:02-11:03:09. Plaintiffs' counsel agreed that the evidence would warrant a jury instruction on Mr. Mosley's comparative fault. RA --: Morgan Dep., 12/28/16 at 96-98 ("Well, we're a comparative fault state. There would be some kind of instruction on it, I imagine.").

[20] Hearing, VR 2/3/16: 11:03:30-11:03:39.

[21] Hearing, VR 9/26/13: 10:16:27-10:16:33.

[22] RA 6733-6742: Second Am. Compl. at ¶¶ 1-35, attached as Ex. 2 to Pls. Resp. Mot. J. Pleadings.

[23] *Id.* at ¶¶ 4-12.

[24] *Id.* at ¶¶ 9-12.

the point it tendered its $1 million policy limits.

Through both of these mediations (and a subsequent one in 2014), Appellants never lowered their collective demand to Rex Coal and Dixie Fuel below National Union's policy limits of $6 million.[25] And Appellants never made a separate demand to either Rex Coal or Dixie Fuel.[26] Settlement negotiations thus consisted of Rex Coal and Dixie Fuel "bidding against themselves" by increasing their collective settlement offer without receiving a corresponding counter-demand. Although the parties had exchanged global settlement demands/offers without objection from Appellants, and although Appellants never issued separate demands to Rex Coal and Dixie Fuel, Appellants nonetheless now claim that National Union and Arch somehow conspired to commit bad faith by "forcing" global negotiations and refusing to delineate how a proposed settlement would be allocated among the defendants.[27] Appellants claim that these global offers by Arch and National Union violate Kentucky law.[28]

After these mediations, Arch reached a settlement on behalf of Terry Loving and Jean Coal. That settlement would have created an empty chair at trial for apportionment of fault to Jean Coal – the actual operator of the mine and bailee of the truck.

Appellants agreed to settle their claims against Rex Coal and Dixie Fuel for a fraction of their prior demands.

Throughout four years of litigation and multiple court-ordered mediations, Appellants repeatedly demanded National Union's $6 million policy limits to settle

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[25] RA --: Morgan Dep., 12/28/16, at 95-96.

[26] *See, e.g.*, RA 7557-7591: Mem. Supp. Mot. Summ. J. at 9; RA: 6364-6389: Mot. J. Pleadings at 3.

[27] RA 6733-6742: Second Am. Compl. at ¶¶ 10, 11, attached as Ex. 2 to Pls. Resp. Mot. J. Pleadings.

[28] *Id.* at ¶ 19.

claims against Rex Coal and Dixie Fuel.[29] Finally, in July 2015, during the interlocutory appeal of Rex Coal's immunity claim, the claims against Rex Coal and Dixie Fuel were settled for a fraction of the National Union policy's limits.[30]

The bad faith litigation.

Appellants now assert that the circuit court prevented them from obtaining evidence they needed to prove their bad faith claim.[31] However, Appellants had four years of time and meaningful opportunities to take relevant discovery to try to establish that Rex Coal's and Dixie Fuel's liability in the underlying claim was beyond dispute, and an additional sixteen months after that to take even more discovery to attempt to gather evidence in support of its claims.

After National Union's initial motion to dismiss the bad faith claims was denied without prejudice,[32] National Union timely responded to voluminous discovery requests: along with interrogatory responses, National Union produced over 4,300 pages of responsive documents, including portions of its claims file.[33] Because many of the requested documents, including the complete files of counsel for Rex Coal and Dixie Fuel, were protected by the attorney-client privilege and the work product doctrine, National Union also produced an appropriate privilege log describing the privileged

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[29] *See, e.g.*, RA --: Morgan Dep., 12/14/16, at 131-32; RA 7166-7556: Mot. Summ. J. at Ex. W; RA --: Morgan Dep., 12/14/16, at Exs. 31, 33, 41 and 47.

[30] RA --: Morgan Dep., 12/15/16, at 65.

[31] *See* Appellants' Br. at 10.

[32] RA 6870-6872: Order, 3/28/16. The circuit court granted Arch's Motion for Judgment on the Pleadings. RA 6873-6874: Order, 3/28/16.

[33] RA 7021-7165: Resp. Pls. Mot. Compel at 3. When National Union filed the initial Motion to Dismiss, it also moved for entry of a protective order preserving the stay on bad faith discovery until the circuit court had ruled on National Union's motion to dismiss. RA 6560-6618: Mot. Protective Order at 2. When National Union's motion to dismiss was denied without prejudice, the circuit court granted National Union 30 days to respond to the pending discovery requests. RA: 6870-6872: Order, 3/28/16. National Union did so.

documents withheld.[34] For almost a year, Appellants chose not to pursue a motion challenging any alleged deficiencies in National Union's discovery responses.

During that period of inaction by Appellants, National Union deposed Jeffrey Morgan, Appellants' primary counsel in the underlying case. Mr. Morgan's three days of deposition testimony confirmed that Appellants were fully aware of the weaknesses in the claims against Rex Coal and Dixie Fuel. Mr. Morgan acknowledged that fault could have been apportioned to other defendants and/or to Mr. Mosley himself and that Appellants faced legal barriers to the claims due to workers' compensation immunity.[35]

After Mr. Morgan's deposition testimony, Appellants tried another avenue to obtain privileged documents by seeking them from defense counsel for Rex Coal and Dixie Fuel.[36] Defense counsel for those insureds – not National Union – objected because the insureds had not waived their attorney-client privilege.[37] Appellants did not challenge those objections or seek to enforce their subpoena.

Finally, nearly a year after receiving National Union's discovery responses and document production, Appellants filed a motion to compel "all claim file documents withheld on National Union's privilege log."[38] National Union responded and also renewed its dispositive motion based on Mr. Morgan's concessions and the Kentucky

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[34] RA 7021-7165: Resp. Pls. Mot. Compel at 4, Ex. B.

[35] *See, e.g.*, RA --: Morgan Dep., 12/14/16, at 40 (acknowledging difficulties with workers' compensation defenses); *id.*, 12/15/16, at 29-30 (acknowledging discovery showed that a mechanic had adjusted the brakes in October 2010); *id.*, 12/14/16, at 70 (acknowledging that the circuit court's denial of plaintiffs' summary judgment motion meant that "a reasonable jury could find for Defendants"). Mr. Morgan further acknowledged that Dixie Fuel was Appellants' counsel's "main target" in the underlying litigation, joking that the reason was that it had higher insurance coverage limits than the other defendants. *Id.*, 12/14/16, at 108-09.

[36] RA 6896-6902: Pls. Notice of Intent to Serve Subpoena Duces Tecum.

[37] RA 6903-6911: Obj. Subpoena Duces Tecum. The objections were expressly made on behalf of the insureds' privilege. Thus, Appellants' statement that "National Union objected" is demonstrably false. *Cf.* Appellants' Br. at 10.

[38] RA 6912-7018: Pls. Mot. Compel at 1.

Supreme Court's decision in the *Holloway* case.[39]

The circuit court properly granted summary judgment in favor of National Union.

The circuit court granted National Union's motion for summary judgment, finding that Appellants were unable to satisfy the elements of bad faith under Kentucky law and that the claims were premised on litigation conduct.[40] The court also expressly addressed Appellants' request for additional discovery, noting that the issues raised were "immaterial to the facts supporting National Union's Motion for Summary Judgment":

> The factual allegations set forth in Plaintiffs' response are not material because they do not impact the key summary judgment issues: specifically, whether Plaintiffs' bad faith claim is based on litigation conduct and whether liability in the underlying case was beyond dispute.[41]

Appellants' allegations over citation of an unpublished case.

Appellants complain that National Union's Reply in support of its motion for summary judgment included a citation to an unpublished opinion from this Court that had been modified and reissued.[42] But the record shows that the circuit court did not consider National Union's Reply – much less the mistakenly cited opinion. National Union's Reply was filed on July 11, 2017 – the same day the circuit court entered its order in National Union's favor.[43] The circuit court's order was entered before – or contemporaneous with – the filing of National Union's Reply. The circuit court's order

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[39] RA 7557-7591: Mem. Supp. Mot. Summ. J. at 1-35. National Union also responded to Appellants' motion to compel additional discovery. RA 7021-7165: Resp. Pls. Mot. Compel at 1-13.

[40] RA 7857-7874: Order, 7/11/17. While the circuit court's order is similar to the order tendered by National Union, the court did not adopt National Union's tendered order "wholesale" and deleted portions of the order tendered by National Union. *Cf.* Appellants' Br. at 13.

[41] RA 7857-7874: Order, 7/11/17, at 14-15. *Cf.* Appellants' Br. at 5, 8-12.

[42] *See* Appellants' Br. at 24-25.

[43] RA 7875-7961: Reply Supp. Mot. Summ. J.; RA 7857-7874: Order, 7/11/17.

does not mention the unpublished decision about which Appellants complain.[44]

In its Reply, National Union cited an unpublished opinion by this Court in *Cincinnati Insurance Co. v. Hofmeister* upholding summary judgment in another bad faith case involving similar allegations of "leveraging" by Appellants' counsel, Dale Golden.[45] The first version of the opinion contained criticism of Mr. Golden's litigation tactics, and was modified to remove that criticism but otherwise remained substantively unchanged. The withdrawal of the first opinion was not immediately evident from Westlaw, and counsel unintentionally cited the prior version of the opinion.

Even though the circuit court had already ruled in favor of National Union, Appellants then filed a Surreply, arguing that National Union cited to the *Hofmeister* to prejudice the circuit court's opinion of Mr. Golden and seeking to have the Reply brief stricken from the record.[46] This appeal followed.

ARGUMENT

I. The circuit court did not abuse its discretion to terminate discovery where Appellants' proposed discovery had no prospect of producing evidence sufficient to rebut National Union's motion for summary judgment.

"The civil rules afford a trial court broad power to control discovery and prevent its abuse." *Ray v. Stone*, 952 S.W.2d 220, 223 (Ky. App. 1997). A decision "that a sufficient amount of time has passed and that it can properly take up the summary judgment motion" is therefore within the trial court's discretion. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010). Here, the court exercised its broad discretion to grant summary judgment after Appellants had ample opportunity to conduct discovery because

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[44] *See* RA 7857-7874: Order, 7/11/17.

[45] RA 7875-7961: Reply Supp. Mot. Summ. J. at 1-3 (citing earlier opinion in *Hofmeister,* 2004-CA-002296-MR (Ky. App. Oct 17, 2008)).

[46] RA 7962-7988: Pls. Surreply Mot. Summ. J. at 2.

additional discovery would not create a genuine issue of material fact under Kentucky's standard for bad faith liability. *See Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993).

Where a party challenges summary judgment as premature, an appellate court considers "whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery ...." *Blankenship*, 302 S.W.3d at 668. Here, Appellants had 16 months to gather evidence of alleged bad faith conduct, which is more than "ample opportunity to respond and complete discovery." *Id.*

This Court has repeatedly rejected claims of premature summary judgments by parties with far less time to complete discovery. *See e.g. Tucker v. Bluegrass Reg'l Mental Health Mental Retardation Bd.*, 2017 WL 242705, at *4 (Ky. App. Jan. 20, 2017)(unpub. op., copy attached as Apx. B)(1 year of discovery not premature); *Hamilton v. Kent D. Thacker Ins. Co.*, 2017 WL 2609125, at *4 (Ky. App. June 16, 2017)(unpub. op., copy attached as Apx. C)(10 months of discovery not premature); *Hartford Ins. Grp. v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979)(6 months of discovery not premature).

Appellants' statement that they were "thwarted in their efforts to conduct the discovery" is false.[47] In its Order granting National Union's motion for summary judgment, the circuit court specifically found that "Plaintiffs have had ample opportunity to conduct discovery" during the four-plus years that the underlying case was pending and during sixteen months of bad faith discovery.[48] Indeed, National Union produced more than 4,000 pages of documents in response to Appellants' written discovery requests related to the bad faith claims alone, including portions of its claim file related to

[47] *Cf.* Appellants' Br. at 8.

[48] RA 7857-7874: Order, 7/11/17, at 13-14.

the underlying dispute.[49] However, many of the written discovery requests sought materials from National Union's claim file protected by the attorney-client privilege and/or the work product doctrine,[50] and National Union accordingly objected and provided an appropriate privilege log.[51] For almost a year, Appellants did not seek additional discovery or challenge National Union's objections – or the later objections of the insureds. After that delay, Appellants filed a motion to compel production of the privileged portions of National Union's claims file.[52] National Union responded to that motion and concurrently moved for summary judgment on the grounds that Appellants' request for additional discovery was futile due to other deficiencies in their case.[53]

The circuit court correctly recognized that the issues raised in Appellants' motion to compel – namely, their "attempts to pierce the attorney-client privilege and obtain portions of National Union's claim file materials developed during National Union's defense of its insureds [did] not preclude summary judgment."[54] The circuit court also found that the factual allegations Appellants raised in response to National Union's motion for summary judgment (and which were the subject of the underlying discovery dispute) did not "impact the key summary judgment issues: specifically, whether Plaintiffs' bad faith claim is based on litigation conduct and whether liability in the underlying case was beyond dispute."[55] Thus, Appellants' assertion that a failure to separately deny the motion to compel warrants reversal is unavailing. The circuit court

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[49] RA 7021-7165: Resp. Pls. Mot. Compel at 3.

[50] *Id.* at 3-12.

[51] *Id.* at Ex. B.

[52] RA 6912-7018: Pls. Mot. Compel at 1-10.

[53] RA 7021-7165: Resp. Pls. Mot. Compel at 1-9; RA 7557-7591: Mem. Supp. Mot. Summ. J. at 1-35.

[54] RA 7857-7874: Order, 7/11/17, at 14.

[55] *Id.* at 15.

appropriately exercised its discretion when it concluded that the discovery sought by Appellants could not overcome the deficiencies in their claims under Kentucky law.

The circuit court's express findings that the requested discovery could not overcome deficiencies in the bad faith claims distinguishes this case from the *Nelson* decision cited by Appellants. Unlike the circuit court here, that court failed to "at least consider" the plaintiff's pending motion to compel before taking up the defendants' summary judgment motion. *Cf. Nelson v. Jefferson Cnty. Bd. of Educ.*, 2017 WL 464797, at *1 (Ky. App. Feb. 3, 2017)(unpub. op., copy attached as Apx. 2 to Appellants' Br.).

And the additional discovery sought by Appellants – related to National Union's internal claims handling procedures and "state of mind"[56] – could not overcome the fact that liability in the underlying case was never "reasonably clear," the standard that must be shown for a finding of bad faith for a failure to settle. KRS 304.12-230; *Coomer v. Phelps*, 172 S.W.3d 389 (Ky. 2005). Appellants' reliance on *Grange Mutual Insurance Company v. Trude*, 151 S.W.3d 803 (Ky. 2004), which delineates, in part, the scope of discovery for KUCSPA claims, is misplaced.[57] This Court has recognized that "[w]hile *Grange Mutual Insurance Company* ... does hold that the type of discovery [Appellants were] seeking ... is generally relevant and discoverable in a bad faith case, the totality of the record does not support the conclusion that such discovery had any prospect of producing evidence sufficient to rebut [the Appellee's] summary judgment motion in this case." *Griffin v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 79175, at *2 (Ky. App. Jan.

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[56] *See* Appellants' Br. at 11.

[57] Appellants also point to their attorney's declaration, setting forth broad discovery categories supposedly required to respond to the summary judgment motion, including "[t]he claim file," and "[d]epositions of key individuals who adjusted the claim." Underscoring the boilerplate nature of these bad faith discovery requests, the declaration seeks "discovery into the board of director meeting minutes for ***Chubb*** concerning claims handling," an error repeated in Appellants' response to the summary judgment motion as well. RA 7615-7640: Pls. Resp. Mot. Summ. J. at 3 (emphasis added).

12, 2007) (unpub. op., copy attached as Apx. D).

Here, as in *Griffin,* undisputed facts prove that National Union did not act in bad faith in litigating the debatable issue of liability in the underlying case, including the complexity of the underlying claims and significant issues regarding allocation of fault to Mr. Mosley himself and other entities and individuals. Nothing in the file of underlying counsel[58] (or any other item Appellants sought to discover) could overcome the finding that liability was not "reasonably clear" in the tort case. *Id.* at *3. Nor could additional discovery overcome the fact that the bad faith claims were premised on litigation conduct, including conduct during court-ordered, confidential mediations, none of which is admissible to prove bad faith. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006).[59]

In sum, Appellants cannot demonstrate that additional discovery would have affected the outcome of this case. Absent proof that National Union was obligated to pay Appellants' claim because its insureds' liability was reasonably clear (the first prong of the *Wittmer* test), the circuit court was correct to curtail further discovery related to the latter two *Wittmer* elements, *i.e.* related to National Union's state of mind while litigating the underlying claim. *See Wittmer*, 864 S.W.2d at 889. The circuit court was well within its discretion in determining that no additional discovery would have raised an issue of fact on National Union's alleged bad faith misconduct. *See, e.g., Price v. AgriLogic Ins. Servs., LLC*, 37 F. Supp. 3d 885, 891-92 (E.D. Ky. 2014).

II. Summary judgment in favor of National Union should be affirmed because there is no genuine issue of material fact.

The circuit court's summary judgment order should be affirmed because

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[58] Appellants have not disputed that neither of National Union's insureds waived the attorney-client privilege to permit discovery of their attorneys' files. *See* RA 7857-7874: Order, 7/11/17, at 14 (citing *Shaheen v. Progressive Cas. Ins. Co.*, 2012 WL 692668 (W.D. Ky. Mar. 2, 2002)).

[59] *Id.* at 10.

Appellants cannot satisfy the elements of their bad faith claim under Kentucky law.[60] First, Rex Coal's and Dixie Fuel's liability was never reasonably clear, and therefore National Union had no obligation to pay Appellants' claims under the KUCSPA. To the contrary, National Union had both a right and a duty to defend its insureds against an excess judgment exactly as it did. Second, the circuit court properly held that Appellants improperly based their bad faith claims on litigation conduct at a confidential mediation, which cannot form the basis of a bad faith claim under Kentucky law.

A. Appellants failed to make a colorable third-party bad faith claim under Kentucky law.

Appellants, as the parties opposing summary judgment, bore the burden of presenting "at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *James v. Wilson*, 95 S.W.3d 875, 883 (Ky. App. 2002). Here, Appellants cannot surmount the genuine liability dispute in the underlying tort case, which precludes a claim of bad faith against National Union as a matter of law.

Appellants cannot satisfy any of the required elements of a bad faith claim under Kentucky law:

> (1) The insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and, (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky. 1993)(quoting *Fed. Kemper Ins. Co. v. Hornback*, 711 S.W.2d 844, 846-47 (Ky. 1986) (Liebson, J., dissenting)); *Hollaway v. Direct Gen. Ins. Co. of Miss., Inc.*, 497 S.W.3d 733 (Ky. 2016). The failure to show any one of these elements eliminates a bad faith claim as a matter of law. The insurer has tort

[60] A summary judgment ruling is reviewed *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001).

liability for bad faith if, and only if, its liability for paying the claim in question is "beyond dispute." *See, e.g., Hollaway,* 497 S.W.3d at 736; *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005).

1. To sustain a bad faith claim, Appellants must present evidence that Rex Coal's and Dixie Fuel's liability was beyond dispute.

The circuit court correctly found that Appellants cannot satisfy even the first element of *Wittmer* because of the "genuine dispute ... regarding Rex's and Dixie's liability for the death of Rhett Mosley . . . . ."[61] The KUCSPA imposes liability for failing to make good faith efforts to effectuate a fair, prompt and equitable settlement only in those cases in which an insured's liability has become "reasonably clear." KRS 304.12-230(6).[62] Within that context, the Kentucky Supreme Court has held that for liability to be "reasonably clear" it must be "beyond dispute." *Coomer*, 172 S.W.3d at 395 ("The statute only requires that an insurer make a good faith attempt to settle any claim, for which liability is beyond dispute for a reasonable amount."). Accordingly, whenever liability is not "beyond dispute," a "defendant ha[s] a right to litigate its case" and is under "no duty to make an offer" unless and until it becomes "beyond dispute." *Lee v. Medical Protective Co.*, 904 F. Supp. 2d 648, 656 (E.D. Ky. 2012).

Appellants mistakenly equate *Wittmer*'s "obligation to pay" element with a question of insurance coverage, arguing that, where no exclusion to coverage applies, an insurer is "obligated to pay" under *Wittmer* and can be subject to bad faith liability for

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[61] RA 7857-7874: Order, 7/11/17, at 6.

[62] KRS 304.12-230(13), on which Appellants base their leveraging claims, similarly precludes an insurance company's failure to promptly settle claims "under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage" only "where liability has become reasonably clear."

"seeking to avoid coverage" through litigation.[63] Here, National Union never disputed that Rex Coal and Dixie Fuel were entitled to coverage under its policy. But as is typical with insurance policies, National Union's indemnity obligations are not triggered unless and until its insureds become legally obligated to pay damages. Thus, the "obligation to pay" goes directly to Rex Coal's and Dixie Fuel's liability for Rhett Mosley's death – not whether an exclusion to coverage existed under National Union's policy.[64]

Appellants cite the *Farmland* and *Phelps* cases for the proposition that a bad faith claim can proceed even where liability on the underlying claim was fairly debatable.[65] But that is not the holding of those cases. Instead, the holdings in *Farmland* and *Phelps* arose from situations where "liability was clear and the conduct of the insurance company was oppressive." *Lee*, 904 F. Supp. 2d at 652. Thus, in *Farmland*, there was no liability dispute, the insurance company misrepresented the terms of the policy to its insured and proceeded to negotiate using the erroneous basis and using other "oppressive tactics" toward its insured. *Farmland*, 36 S.W.3d 368. *Phelps* also involved a case where liability was undisputed, where the insurer refused to reveal its policy limits, and where the insurer attributed delays in the claims processing to its lack of information that it never requested from the claimant. *Phelps*, 736 F.3d at 698-700.

The situations presented in *Farmland* and *Phelps* do not exist here. Liability was clearly disputed – as recognized by the circuit court and admitted by Appellants' counsel

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[63] *See* Appellants' Br. at 14-15.

[64] *Cf.* Appellants' Br. at 15. As the Kentucky Supreme Court recently explained in *Hollaway*, an insurer's "duty to compensate" encompasses various distinct questions of law, including the relatedness of the claimant's injuries to the accident at issue and "liability for the accident itself." 497 S.W.3d at 738.

[65] Appellants' Br. at 16-17 (citing *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 375 (Ky. 2000) and *Phelps v. State Farm Mut. Auto Ins. Co.*, 736 F.3d 697 (6th Cir. 2012)).

– and National Union never misrepresented or refused to disclose available coverage. Appellants do not identify when – or how or even if – the obligation to pay on behalf of Rex Coal arose. And, the suggestion that National Union's "obligation to pay" on behalf of Dixie Fuel arose when Dixie Fuel stipulated that it owned the truck at issue and that it was not entitled to up-the-ladder immunity[66] ignores Dixie Fuel's other defenses based on the law of bailment, no control over the truck and the comparative fault of Mr. Mosley and others, including mechanics who had serviced the brakes.[67]

"The greater number of the Kentucky bad faith cases are governed by the standards set forth in the landmark case, *Wittmer v. Jones*," which "establish[ed] criteria for bad faith actions," including that "an insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or facts." *Lee*, 904 F.Supp.2d at 653-54 (citing *Wittmer*, 864 S.W.2d at 890); *see also Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Serv., Inc.*, 880 S.W.2d 886, 890 (Ky. App. 1994) ("[A]n insurer is entitled to challenge a claim which is fairly debatable on the law or the facts.").

Indeed, in the years since *Farmland* was decided, the Kentucky Supreme Court has reinforced the *Wittmer* standard and the "tall burden of proof on plaintiffs seeking to recover on a theory of bad faith." *Hollaway*, 497 S.W.3d at 737. As the Supreme Court recently held, a "genuine dispute as to liability" renders a "bad faith claim a de facto nullity." *Id.* at 738. Even the *Demetre* case cited by the Appellants found that bad faith liability is predicated on whether there was a "genuine dispute" as to the pertinent facts or law. *Ind. Ins. Co. v. Demetre*, 527 S.W.3d 12, 31 (Ky. 2017) ("[A] bad faith claim is precluded as a matter of law as long as there is room for reasonable disagreement as to

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[66] Appellants' Br. at 15.

[67] RA 7857-7874: Order, 7/11/17, at 7-8.

the proper outcome of a contested legal issue[.]") (quoting *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 650 (6th Cir. 2013)).

The *Wittmer* standard controls here and the genuine liability issues in the underlying case mean that National Union had no obligation to pay Appellants' claims. Even if the more expansive *Phelps/Farmland* standard applies, Appellants still cannot establish National Union's obligation to pay in light of Dixie Fuel's lack of contact with the truck in the year preceding the accident, based on evidence of the comparative fault of Jean Coal (as bailee of the truck), mechanics who performed repairs on the truck, and Mr. Mosley himself, who did not report any problems with the truck in the days and weeks before the accident.[68] Rex Coal's liability was equally debatable in light of the substantial probability that it was entitled to up-the-ladder immunity as a "contractor" of Mr. Mosley's employer.[69] Appellants cannot therefore establish a threshold element of their bad faith claims. The circuit court's ruling should be affirmed.

2. Appellants cannot establish the type of wrongful conduct necessary to sustain their bad faith claims under the third prong of *Wittmer*.

The genuine liability dispute in the underlying case also precludes any finding that National Union "knew there was no reasonable basis for denying [Appellants'] claim or acted with reckless disregard for whether such a basis existed" under *Wittmer*'s third requirement. 864 S.W.2d at 890. As the circuit court found, no additional discovery could create a genuine issue of material fact concerning Rex Coal's and Dixie Fuel's disputed liability for the death of Rhett Mosley.[70] Because of the strong defenses to Rex Coal's and Dixie Fuel's liability, National Union had a reasonable basis for litigating the

[68] *See supra* nn. 16-18, 39; *see also* RA 7857-7874: Order, 7/11/17, at 7-10.

[69] *Id.* at 7; *Rex Coal Co. v. Mosley,* No. 2014-CA-001873 (Ky. App. Feb. 24. 2015)(order passing appeal to merits panel).

[70] RA 7857-7874: Order, 7/11/17, at 13-14. *See supra* pp. 10-14.

underlying claims and, as a matter of law, did not engage in the type of malicious, intentional, or reckless conduct necessary to support a bad faith claim. *See id.* ("[T]here must be sufficient evidence of intentional misconduct or reckless disregard of the rights of an insured or a claimant to warrant submitting the right to award punitive damages to the jury."). The circuit court's ruling should be affirmed.

B. Conduct at a confidential, court-ordered mediation is inadmissible to prove bad faith and cannot support a conspiracy claim.

Even if Appellants could raise a material issue of fact as to whether Rex Coal's and Dixie Fuel's liability was "reasonably clear," summary judgment in favor of National Union was still required under Kentucky law. Under controlling Kentucky precedent, National Union cannot be liable for bad faith based on its litigation conduct, including alleged conduct during court-ordered, confidential mediations.

The Kentucky Supreme Court has expressly rejected Appellants' argument that an insurer's litigation conduct can establish bad faith. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006). In *Knotts,* the Supreme Court considered what role litigation conduct should play in a bad faith action and squarely held that it should play no role. *Id.* at 517. Indeed, evidence of litigation conduct should not even be admissible in a bad faith action because permitting evidence of an insurer's litigation strategies would "impede insurers' access to the courts and right to defend, because it makes them reluctant to contest coverage of questionable claims." *Id.* at 521. Under *Knotts*, any alleged improper mediation conduct should be addressed under the civil rules, because "the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct." *Id.* at 522. The Supreme Court further cautioned of "the chilling effect that

allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights," finding that "any exception [making litigation conduct admissible] threatens to turn our adversarial system on its head." *Id.*

Moreover, even if an insurer's litigation conduct could be considered, confidential mediation activity cannot. Appellants' bad faith and civil conspiracy claims are premised on National Union and Arch's conduct at a confidential mediation in September 2013.[71] KRE 408 explicitly provides that settlement offers, settlement conduct, and settlement statements are inadmissible to prove liability or invalidity of a disputed claim or its amount. The reason for the rule is to encourage "voluntary dispute resolution by protecting against the possibility that a compromise or offer of compromise might be used to the disadvantage of a party in subsequent litigation." *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643, 646 (Ky. App. 1995). Consistent with this rule, Appellants agreed that they would keep all mediation discussions strictly confidential.[72]

Thus, even if National Union and Arch's "global offers" on behalf of their insureds were somehow inappropriate, Appellants' claims still fail because evidence of National Union's mediation strategy is inadmissible under KRE 408 and because a bad faith action is not the proper vehicle to seek recovery for alleged misconduct during a mediation. If Appellants believed that Arch was withholding its policy limits despite a previous agreement to pay them,[73] they could have sought redress through a motion with the trial court to enforce the putative settlement agreement. They did not do so. Similarly, if Appellants felt that separate counsel should be required to attend mediation

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[71] RA 6733-6742: Second Am. Compl. at ¶¶ 4-12, attached as Ex. 2 to Pls. Resp. Mot. J. Pleadings.

[72] RA 7166-7556: Mot. Summ. J. at Ex. DD.

[73] *See* Appellants' Br. at 4.

on behalf of each party,[74] this, too, could have been taken up with the court. It was not.[75]

Here, Appellants' bad faith claims emanate not from the settlement offer *amounts* (which might be admissible "settlement conduct" probative of bad faith),[76] but from the fact that "National Union and Arch refused to negotiate the respective claims against their insureds separately."[77] But both National Union and Arch had a legal obligation to obtain a release for all their insureds to avoid subjecting one to an excess verdict:

> If we read [the KUCSPA] as requiring payment of the policy limit without a settlement of claims against the insured, then an insurance company would be forced to watch both flanks. On one side, the company may be sued for their unfair settlement practices by a claimant disgruntled by the company's failure to pay, and, on the other side, the company may be sued by an insured disgruntled by the company's payment of the policy limit without obtaining a release.

Shaheen v. Progressive Cas. Ins. Co., 114 F. Supp. 3d 444, 449-450 (W.D. Ky. 2015), *aff'd*, 673 Fed. Appx. 481 (6th Cir. 2016). Here, attempting to force one of the insureds into an excess verdict was admittedly part of Appellants' litigation strategy, as their counsel, Jeffery Morgan, acknowledged at his deposition.[78]

Even if admissible, relevant, and construed in a light most favorable to Appellants, the global offers on behalf of multiple insureds are in no way prohibited by the KUCSPA or Kentucky law. The KUCSPA's prohibition on "leveraging" applies only to attempts to condition settlement under one portion of an insurance policy on settlement

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[74] *See id.* at 3-4.

[75] This case shows why an insurer's mediation strategy cannot be the subject of a bad faith claim. Bad faith claims cannot be permitted whenever plaintiffs disagree with an insured party's settlement position. *See Hollaway*, 497 S.W.3d at 739 ("[The KUCSPA] only requires insurers to negotiate reasonably with respect to claims; it does not require them to acquiesce to a third party's demands.").

[76] *See* Appellants' Br. at 21 (citing *Hale Gen. Contracting, Inc. v. Motorist Mut. Ins. Co.*, 2016 WL 1068997, at *2-3 (Ky. App. Mar. 18, 2016) (unpub. op., copy attached as Apx. E)).

[77] Appellants' Br. at 22.

[78] RA 7557-7591: Mem. Supp. Mot. Summ. J. at 27; RA --: Morgan Dep., 12/15/16, at 49, 108; *id.*, 12/28/16, at 72-74.

of another portion of an insurance policy on claims where liability has become reasonably clear, which it was not in this case. *See* KRS 304.12-230(13). Here, the insurers' efforts to protect each of their insureds were appropriate – and necessary.

Appellants' reliance on *Ridley v. Guaranty National Insurance Co.* is therefore misplaced. 951 P.2d 987 (Mont. 1997).[79] In *Ridley*, liability was "reasonably clear," as the insurer conceded that its insured bore 90% fault for an auto accident yet declined to pay the claimant's medical expenses before a full and final settlement of the entire claim. *Id.* at 988-89. *Ridley*, which interpreted a Montana statute[80] as applying to "an insurer's failure to pay one type of damages for which liability has become reasonably clear in order to influence settlement of claims for other types of damages made pursuant to the same policy." *Id.* at 994. That was not the situation here. Thus, under both Kentucky law and Montana law, making global settlement offers is not improper. Nor are efforts to require a release of both insureds. *See Shaheen*, 114 F. Supp. 3d at 449-450.

III. Appellants' conspiracy and concert of action claims are derivative of the bad faith claims and must fail.

A claim for civil conspiracy/concert of action cannot exist on its own under Kentucky law. *James v. Wilson*, 95 S.W.3d 875, 897 (Ky. App. 2002).[81] Rather, two or more parties must commit or assist in committing an underlying crime or tort. "[T]he law in Kentucky requires the actual commission of the tortious act or a concert of action where substantial assistance has been provided in order for liability to attach based on a civil conspiracy theory." *Id.* at 897-898. To assert a claim that National Union somehow conspired with Arch to violate the KUCSPA, Appellants must first prove that National

[79] *Cf.* Appellants' Br. at 22.

[80] § 33-18-201(13), MCA. The language of this statute is substantially similar to KRS 304.12-230(13).

[81] The terms civil conspiracy and concert of action are used interchangeably in Kentucky law. *See James*, 95 S.W.3d at 897 (*citing Farmer v. City of Newport*, 748 S.W.2d 162 (Ky. App. 1988)).

Union and Arch violated the KUCSPA or otherwise committed bad faith.[82] Here, Appellants cannot show that National Union acted in bad faith, much less that it conspired with Arch to do so. The conspiracy/concert of action claims premised on those bad faith claims therefore also fail and the circuit court's judgment should be affirmed.

IV. The mistaken citation of an unpublished decision – in a pleading not relied on by the circuit court – is not grounds for reversal.

Finally, Appellants again contend that National Union's reply brief in support of its summary judgment motion should be stricken from the record due to the mistaken citation to an earlier version of an unpublished opinion in *Cincinnati Insurance Co. v. Hofmeister.* But the circuit court did not rely on National Union's Reply – much less the *Hofmeister* case – in reaching its decision. National Union's Reply was filed at the same time as – or after – the entry of the circuit court's decision.[83] The decision does not reference the *Hofmeister* case or Mr. Golden's litigation tactics.[84] Thus, even if there is somehow an error by the circuit court in failing to strike the Reply, any such error would be harmless and not grounds for reversal here.[85]

As stated in its pleadings, National Union referred to the *Hofmeister* opinion not as "binding precedent" but because "it is instructive of how this case has/will be litigated by Plaintiffs' counsel." *Cf.* CR 76.28(4)(c).[86] National Union's counsel mistakenly cited to a prior version of the *Hofmeister* opinion, due to a mistake in not recognizing on

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[82] *Cf.* Appellants' Br. at 23.

[83] RA 7875-7961: Reply Supp. Mot. Summ. J.; RA 7857-7874: Order, 7/11/17.

[84] RA 7857-7874: Order, 7/11/17.

[85] Moreover, Appellants Brief acknowledges that National Union mistakenly cited *Hofmeister* in both its Memorandum in Support of Summary Judgment and its Reply. *See* Appellants' Br. at 24-25. But Appellants did not challenge the filing of the motion, only the reply filed after the entry of judgment. Any complaint about the citation to *Hofmeister* should therefore be waived.

[86] *See* RA 7557-7591: Mem. Supp. Mot. Summ. J.; RA 7875-7961: Reply Supp. Mot. Summ. J. at 1, n.3.

Westlaw that the opinion had been modified. The decision was not cited for the language subsequently removed. In *Hofmeister*, this Court rejected attempts by Appellants' counsel, Dale Golden, to make a "leveraging claim" against an insurer who rejected what the Court described as Mr. Golden's "peculiar letter to Murner ostensibly attempting to settle one portion only of his clients' claims." *Hofmeister,* 2008 Ky. App. LEXIS 313, at *24 (Ky. App. Oct. 17, 2008)(unpub. op., copy attached as Apx. F). The opinion was subsequently modified to omit criticism of Mr. Golden, but not the similarity of circumstances that made the decision relevant. National Union, without realizing the opinion had been modified, cited the opinion to show that Mr. Golden used the same litigation tactics here: purporting to accept only one portion of a global offer extended by the parties.[87] Indeed, Mr. Golden's co-counsel, Jeffery Morgan, admitted that he partnered with Mr. Golden on this case so that he could engage in a "letter war."[88]

Counsel's unintentional citation error was not a ground to strike the Reply. *See, e.g., Watts v. Laboratory Corp. of America*, 139 S.W.3d 534, 536 (Ky. App. 2004) ("[T]his Court will not strike a portion of a brief simply because a legal argument might be faulty."). It certainly is not a ground on which to reverse the circuit court's judgment.

CONCLUSION

For these reasons, the circuit court's judgment should be affirmed.

Respectfully submitted,

Counsel for Appellee
National Union Fire Insurance Company

[87] RA 7875-7961: Reply Supp. Mot. Summ. J. at 1-3.

[88] RA --: Morgan Dep., 12/28/17, at 60-61.

INDEX TO APPENDIX

COMMONWEALTH OF KENTUCKY
26th JUDICIAL DISTRICT
HARLAN CIRCUIT COURT
CIVIL ACTION NO. 11-CI-00349

CRYSTAL LEE MOSLEY, *et. al.* **PLAINTIFFS**

v.

NATIONAL UNION FIRE INSURANCE COMPANY **DEFENDANT**

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on the Defendant's April 20th, 2017 Motion for Summary Judgment in regards to the Plaintiffs' third-party bad faith claims. In response, Plaintiff requested the Court to defer ruling on the matter until there is an opportunity for more complete discovery. After hearing arguments of counsel on June 16th, 2017, reviewing relevant motions and memoranda, and being otherwise sufficiently advised, the Defendant's Motion for Summary Judgment is **GRANTED.** The Defendant, National Union Fire Insurance Company of Pittsburgh, PA (hereinafter, "National Union"), is entitled to summary judgment as a matter of law.

Background

Plaintiffs do not deny the scores of undisputed facts proffered by National Union in its Motion for Summary Judgment.[1] By way of summary, Plaintiffs' third-party bad

[1] In addition to referencing such facts, and incorporating them by reference, this Court also relies upon pleadings and factual evidence contained in its record of the underlying case. "[I]t is a well-established principle that a trial court may take judicial notice of its own records and rulings, and of all matters patent on the face of such records, including all prior proceedings in the same case." *M.A.B. v. Commonwealth Cabinet for Health and Family Services*, 456 S.W.3d 407, 412 (Ky. App. 2015) (citing *Adkins v. Adkins*, 574 S.W.2d 898, 899 (Ky. App. 1978). To the extent relied upon

faith claims against National Union arise out of the death of Rhett Mosley on November 23, 2010. Mr. Mosley was killed in an accident while driving a truck in the scope of his employment at a surface mine near Harlan, Kentucky. In 2011, Plaintiffs filed claims against National Union's insureds: Dixie, which owned the truck that Mr. Mosley was operating, and Rex, the owner of the mine. Plaintiffs also sued several others who were not insured by National Union, including, (a) Jean Coal Co., LLC, which operated the mine where the accident took place; (b) Regional Contracting, Mr. Mosley's employer; (c) Terry Loving, the sole managing member of Jean Coal and Regional Contracting; and (d) Cardinal Mining LLC. Both Rex and Dixie defended against Plaintiffs' underlying allegations for more than four years, making various reasonable arguments throughout that period.

Plaintiffs received a $1 million policy limits settlement from the insurer of Jean Coal and Terry Loving in 2014, and also received a large workers' compensation settlement from Regional Contractors' insurance carrier for an undisclosed amount. Plaintiffs' counsel, Jeffrey Morgan, acknowledged that, because of these settlements, Mrs. Mosley was not under financial pressure to resolve her case when later negotiating with counsel for Rex and Dixie. Counsel for Rex and Dixie continued to defend the case and assert legitimate defenses related to duty, breach and damages. Counsel and National Union also reasonably refused to settle claims separately against Dixie and Rex to prevent each from being targeted for an excess judgment. On April 15, 2013, the Court ordered the parties to mediation. Pursuant to this order, the parties mediated on June 19, 2013, and September 12, 2013, but did not settle.

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herein, the facts contained in the record of this Court are supported by deposition testimony or other admissible evidence.

For years, including throughout both mediations, Plaintiffs' counsel repeatedly and persistently demanded policy limits of $6 million to settle their tort claims against Rex and Dixie. In the meantime, the parties prepared the case for trial and engaged in an interlocutory appeal. Finally, in July 2015, Plaintiffs' demands began to drop. In August 2015, the parties settled Plaintiffs' claims against Rex and Dixie for $2 million, a third of the amount they had previously demanded. There lacks any credible evidence that National Union ever denied coverage to its insureds, or misrepresented its available coverage.

Summary Judgment Standard

Summary judgment procedure is employed to avoid unnecessary trials. *Transportation Cabinet, Bureau of Highways v. Leneave*, 751 S.W.2d 36, 38 (Ky. App. 1988). CR 56.03 authorizes summary judgment if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. All doubts of an issue considered for summary judgment are to be resolved in favor of the party opposing the motion. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citations omitted). Once the moving party has met the initial burden of showing that no genuine issue of a material fact exists, the other party must refute the contentions of the moving party with at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Davis v. Devers*, 617 S.W.2d 56, 57 (Ky. App. 1981), (citing *Roberts v. Davis*, 422 S.W.2d 890 (Ky. App. 1968).

In applying this standard, the Court must view all materials offered in support of a motion for summary judgment in the light most favorable to the non-moving party.

Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001) (citing *Steelvest,* 807 S.W.2d at 480-482). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists and then the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial. *Hubble v. Johnson,* 841 S.W.2d 169 (Ky. 1992); *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.,* 814 S.W.2d 273 (Ky. 1991); *Steelvest,* 807 S.W.2d 476; *Paintsville Hospital Co. v. Rose,* 683 S.W.2d 255 (Ky. 1985). A trial court's function in considering a motion for summary judgment is to determine whether there are issues of fact to be tried. *Mitchell v. Jones,* 283 S.W.2d 716 (Ky. 1955). The inquiry should be whether, from the evidence of record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial. *Welch v. Am. Publ'g Co. of Kentucky,* 3 S.W.3d 724, 730 (Ky. 1999). Here, the facts must be viewed in the light most favorable to Plaintiffs, giving them the benefit of all favorable inferences that may be reasonably drawn from the evidence and resolving all doubts against the moving party. *Hines v. Louisville Figure Skating Club, Inc.,* 342 S.W.2d 395 (Ky. 1961). This Court having examined the evidence in light of that standard agrees there are no genuine issues of material fact.

Analysis

Plaintiffs claim that National Union was in some fashion responsible for the case against its insureds not being settled fast enough, despite substantial issues regarding the liability of those insureds; the overall complexity of the underlying dispute; Plaintiffs' previous settlement with other parties for a seven-figure sum; National Union's obligation to protect and defend its insureds under Kentucky law; Plaintiffs' decision not to decrease

their demand below $6 million until shortly before the claims against Rex and Dixie settled; the fact that seven Circuit Court Judges have presided over this case causing unavoidable delays; and significant issues regarding allocation of fault to various entities and individuals, including Mr. Mosley himself. Further, Plaintiffs claim National Union acted in bad faith because it required that the claims against both of its insureds be released as a condition of settlement. It did so after consideration of Kentucky law, and to guard against the possibility of Plaintiffs settling with one insured, then seeking an excess verdict against the other with diminished policy limits. Under Kentucky law, National Union is entitled to Summary Judgment because liability was not reasonably clear, because Plaintiffs' bad faith claims are premised on litigation conduct, and because Plaintiffs have not produced evidence of a material issue of fact despite having ample time to conduct discovery.

As one of the only states that permits a private cause of action for third-party bad faith, Kentucky imposes a very high threshold for bad faith claims to be presented to a jury, and asks trial courts to act as gatekeepers to dispose of unmeritorious claims. *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993); *United Servs. Auto. Ass'n v. Bult*, 183 S.W.3d 181, 186 (Ky. App. 2003); *Motorists Mut. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1997). Plaintiffs have not cleared that threshold in this case.

A. Because Plaintiffs cannot satisfy the elements of bad faith under Kentucky law, their bad faith claims must be dismissed.

Wittmer v. Jones holds that a plaintiff must provide evidence of the following three elements to sustain any bad faith claim: "(1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such

a basis existed...." 864 S.W.2d at 890 (internal citation omitted). "[T]he common thread running through each of the three *Wittmer* elements is that the insurer has tort liability for bad faith if, and only if, its liability for paying the claim in question was 'beyond dispute.' Absent that, an insurer has a right to defend the case, without making any settlement offer at all, until appellate review is final." *Hollaway v. Direct General Ins. Co. of Mississippi, Inc.*, 2014 WL 5064649, (Ky. App., Oct. 10, 2014) (aff'd in relevant part by *Hollaway v. Direct Gen. Ins. Co. of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016)); *see also Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005). "[A]ll elements of the test must be established to prevail on a third-party claim for bad faith under the KUCSPA." *Hollaway*, 497 S.W.3d at 738.

KRS 304.12-230(6), the provision of Kentucky's Unfair Claims Settlement Practice Act upon which Plaintiffs base their delay claims, imposes liability for failing to make good faith efforts to effectuate a fair, prompt and equitable settlement only in those cases in which an insured's liability has become "reasonably clear." Similarly, KRS 304.12-230(13), upon which Plaintiffs base their "leveraging" claims, also applies only "where liability has become reasonably clear." Kentucky's Supreme Court has held that for liability to be "reasonably clear," it must be "beyond dispute." *Coomer*, 172 S.W.3d at 395 ("[the] statute only requires that an insurer make a good faith attempt to settle any claim, for which liability is beyond dispute, for a reasonable amount."). A "defendant ha[s] a right to litigate its case as long as liability [i]s not 'beyond dispute'" *Lee v. Medical Protective Co.*, 904 F. Supp. 2d 648, 656 (E.D. Ky. 2012).

Because a genuine dispute exists regarding Rex's and Dixie's liability for the death of Rhett Mosley, National Union's duty to pay Plaintiffs' claims was in dispute and Plaintiffs cannot satisfy even the first element of *Wittmer*. As the Kentucky Supreme

Court recently reiterated in *Hollaway*, the UCSPA "only requires insurers to negotiate reasonably with respect to claims; it does not require them to acquiesce to a third party's demands." *Hollaway*, 497 S.W.3d at 739. Simply put, a "genuine dispute as to liability" renders a "bad faith claim a de facto nullity." *Id.* at 738.

1. Rex reasonably argued it owed no duty to Plaintiffs because it was entitled to "up the ladder" Workers' Compensation immunity.

"Up-the-ladder" immunity posed a significant legal barrier to any recovery against Rex from the outset of the case because Rex consistently argued it was Mr. Mosley's statutory employer and was entitled to dismissal as a matter of law. In its pleadings before this Court, Rex reasonably relied on the plain language of KRS 342.610(2), as well as cases such as *Beaver v. Oakley*, 279 S.W.3d 527 (Ky. 2009), *Ramler v. Spartan Const. Inc.* 2003 WL 22064334 (Ky. App. Sept. 5, 2003) and *Hensley v. First Healthcare Corp.*, 2003 WL 22149385, (Ky. App. Sept. 19, 2003). Although this Court denied Rex's Motion for Summary Judgment on this point, the Kentucky Court of Appeals recognized that, because of potential workers' compensation immunity, this was a rare case that fit an exception to the final judgment rule and passed it to the panel for an interlocutory ruling on the merits. Rex's worker compensation immunity argument was, therefore, reasonably made in good faith; it was not "wrongful."

2. Dixie disputed that it owed any duty as the bailor of the vehicle involved in the accident.

Plaintiffs argue that Dixie's ownership of the truck, plus the fact that the truck had bad brakes, means Dixie's underlying liability was beyond dispute, and that National Union should have settled this case sooner. Plaintiffs' conclusion is not supported by the law or the facts of this case.

In its filings with this Court, Dixie reasonably argued it did not owe any duty to Mr. Mosley as the bailor of the truck at issue. Because it had not had control over the truck for over a year prior to the accident, and because it had no right or duty to exercise control over the truck, Dixie maintained it was not responsible for Jean Coal's (the bailee's) negligent use or maintenance of the truck. Dixie also argued events occurring after the truck left its control--namely, repairs by a mechanic, Burnett Combs, and other individuals--severed the chain of causation with respect to Dixie's alleged negligence, relieving Dixie of any liability. While this Court eventually denied Dixie's Motion for Summary Judgment, it was clear that Dixie had a good faith basis to make those arguments. *See American Fid. & Cas. Co. v. Pennsylvania Cas. Co.*, 258 S.W.2d 5, 7 (Ky. 1953) ("[i]t is generally established that a bailor who does not retain control of the article bailed is not responsible to others for its negligent use by the bailee.").[2] Also, an underlying jury could have determined that Mr. Combs and other individuals--rather than Dixie—were liable for Mr. Mosley's death.[3] For these reasons, liability against Dixie was never beyond dispute during the relevant time period.

3. Apportionment of liability to other entities and individuals was likely.

Further, the undisputed factual record shows that the liability of Rex and Dixie was never "beyond dispute" because the jury would have been able to apportion fault to Jean Coal or Regional Contracting, the entities who were actually responsible for maintaining the truck Mr. Mosley was driving and who, themselves, settled. Dixie did not have control

[2] Further, *S. Ry. Co. v. Kelly Const. Co.*, 406 S.W.2d 305, 308 (Ky. 1966) provides, "[a]s a general rule, in the absence of statute, the negligence of the bailee is not imputed to the bailor where the latter does not have control, or the right and duty to exercise control, of the conduct of the bailee with respect to the acts or omissions which caused the injury to the thing bailed".

[3] Kentucky law allows argument that non-defendant individuals or entities were responsible for damages severing the chain of causation and defeating a plaintiffs' negligence claims. *Bruck v. Thompson*, 131 S.W.3d 764, 769 (Ky. App. 2004),

over the truck at any time during the year prior to the accident, and a jury could reasonably conclude it was not responsible for maintenance. Plaintiffs' Amended Complaint alleged that Regional Contracting and Jean Coal were negligent.

A genuine dispute also existed as to the liability of third-party mechanics who were hired to adjust the brakes on the truck after the Mine Safety and Health Administration ("MSHA") found that the brakes were defective the year before the accident. Any improper or incomplete repairs by those mechanics were an intervening or superseding cause of Plaintiffs' injuries. None of these parties were insured by National Union.

4. A question existed as to whether Rex or Dixie knew about any issues with the truck's brakes, creating another major liability issue.

Plaintiffs were also unable to provide any evidence that Jean Coal or Regional Contracting were aware of the alleged issues with the truck's brakes at the time of the accident, or that Dixie or Rex (who were not responsible for the maintenance of the truck) were on notice of such issues. While MSHA had previously identified issues with the truck's brakes, a subsequent MSHA remediation document shows that the brakes had been repaired. Mr. Mosley expressed no concerns about the truck in the days leading up to the accident, and he did not report any problems with the truck's brakes. The day-shift driver, Matthew Blanton, testified that he drove the truck on the day of the accident, performed a pre-shift check, and drove the same stretch of road that Mr. Mosley traveled, but had no problems with the vehicle. Mr. Blanton further testified that the truck's brakes were working when he left his shift that day. These facts lend themselves to the proposition that liability was not beyond dispute.

5. Fault could have been apportioned to Mr. Mosely in the underlying case.

During the underlying pretrial conference on January 5, 2015, this Court indicated it felt confident the record would support a comparative negligence instruction, which would allow the jury to consider apportioning fault to Mr. Mosley. This Court also ruled Plaintiffs would not be entitled to pain and suffering damages.

B. Plaintiffs' allegations are based on litigation conduct and settlement communications during a confidential mediation and cannot form a basis for their bad faith claims.

Plaintiffs' bad faith claims also fail as a matter of law because they seek recovery related to National Union's litigation conduct, including alleged conduct during court-ordered, confidential mediations. The introduction of evidence of an insurance company's litigation conduct, strategies, and techniques in an underlying suit is prohibited in a subsequent bad faith action. *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006). The Kentucky Supreme Court's decision in *Knotts* adopted "an absolute prohibition on the introduction" of evidence of litigation conduct as proof of an insurer's bad faith. absolute prohibition on the introduction. Id. at 522. In issuing that prohibition, the Court explained that the distinguishing feature between "litigation conduct" and "settlement conduct" is whether the Rules of Civil Procedure provide a remedy for the alleged misconduct. If they do, the conduct is "litigation conduct" and is not actionable as bad faith. *See generally, id.* Further refining that distinction, the Court noted that, "[w]here improper litigation conduct is at issue, generally the ... Rules of Civil Procedure provide adequate means of redress, such as motions to strike, compel discovery, secure protective orders, or impose sanctions." *Id.* (internal citations omitted). In fact, "given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head." *Id.* at 522.

To the extent Plaintiffs believed Rex or Dixie engaged in improper conduct at the court-ordered mediation or caused unnecessary delays during the underlying litigation, Plaintiffs could have addressed these issues through a motion with the Court, but did not.[4] Plaintiffs, however, never sought relief from the Court related to National Union's alleged mediation and litigation conduct. Regardless, a careful examination of the underlying record shows any delays are attributable to normal litigation conduct and also the fact that seven Circuit Court Judges have presided over this case, causing delays associated with several case transfers.

Moreover, as a matter of law, attorneys hired by National Union had the right, and even the duty, defend their clients. *See Shaheen v. Progressive Cas. Ins. Co.*, 114 F. Supp. 3d 444, 449 (W.D. Ky. 2015) (aff'd 6th Cir. Dec. 15, 2016) (discussing the problems created by an insurer's dual, conflicting roles in third-party cases and noting that an insurer's primary obligation is to the defense of its insured). Kentucky's Supreme Court also explained, "[i]n addition to the duties owed to [the plaintiff], both insurers owed a duty to their liability insured ... to protect him from a potential excess judgment...."[5] *Glass*, 996 S.W.2d at 454.

Although Plaintiffs now allege that National Union's attempt to obtain a global settlement on behalf of both of its insureds is somehow evidence of improper "leveraging," in his deposition, Mr. Morgan admitted he was trying to force settlement on behalf of one of National Union's insureds so that he could litigate--and seek an excess verdict--against

[4] The civil rules give courts the inherent authority to enforce its own orders and to correct counsel's conduct; where they apply, Plaintiffs must seek a remedy under those rules rather than create a separate bad faith lawsuit. *Knotts*, 197 S.W.3d 512.

[5] The Kentucky Supreme Court has recognized that some attorneys exhibit a "personal bias against insurance companies and in favor of using bad faith and UCSPA allegations to extort payment of underlying claims from insurers." *Glass*, 996 S.W.2d at 447. If counsel was so concerned about settling the case for Ms. Mosley, they should have brought the alleged bad conduct to the attention of the Judge charged with overseeing litigation conduct, and who ordered the mediation in the first instance.

the other. This is precisely the type of conduct that National Union had a duty to protect both of its insureds against. *Shaheen,* 114 F. Supp. 3d at 449; *Glass*, 996 S.W.2d at 454.[6]

Further, there is no evidence that the underlying confidential mediations that would support bad faith claims. After agreeing to keep all mediation conduct confidential, A bad faith claim was filed based almost entirely on alleged mediation conduct. This conduct is inadmissible under KRE 408. Also, courts routinely hold confidential mediation conduct to be inadmissible because, "[t]he integrity of the mediation process depends on the confidentiality of discussions and offers made therein." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979 (6th Cir. 2003). "There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations." But "[i]n order for settlement talks to be effective, parties must feel uninhibited in their communications." *Id.* at 980.[7]

Even if mediation conduct were admissible, Plaintiffs have presented no evidence that National Union acted in bad faith during the underlying mediations, violative of KRS 304.12-230(13).[8] There is no evidence that National Union failed to settle claims "under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage." And KRS 304.12-230(13) applies only "where liability has become reasonably clear" which is not the case here.

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[6] When refusing to settle without releases for both insureds, counsel for Rex and Dixie properly explained they had a duty to both of their clients to not "diminish the available coverage limits by resolving claims against one insured to the detriment of another." Their position was more than reasonable, and was not taken in bad faith. Moreover, these global settlements, concluding litigation against all defendants, are common practice and should be encouraged.

[7] Mediation has proven to be a very effective mechanism whereby civil parties in Kentucky can resolve cases without substantial Court involvement. But lack of confidentially during mediations could cause parties to "more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost." *Goodyear Tire,* 332 F.3d at 980.

[8] Two mediations were held in this case: one on June 19, 2013, and the other on September 12, 2013. The parties did not settle at either mediation. Throughout both mediations, Plaintiffs never lowered their collective demand to National Unions' insureds, Dixie and Rex, below the full policy limits of $6 million, even though National Union's insureds increased their offers.

A good faith dispute existed as to the liability of National Union's insureds. Both sides litigated. Both sides conducted intense discovery and thoroughly briefed numerous, complex issues in preparation for trial. The Court conducted a final pretrial conference and made significant rulings.

C. Plaintiffs have had ample opportunity to conduct discovery.

Both parties agree that this Court has the discretion to rule upon whether they have had a sufficient opportunity to conduct discovery. CR 56.02 provides that the defending party may move for summary judgment at any time. In *Garland*, Kentucky's Court of Appeals granted summary judgment after the Plaintiffs "had nearly a year and had not yet developed any evidence" to defeat summary judgment. *Garland v. Certainteed Corp.*, 2003 WL 1240465, at *1 (Ky. App. Feb. 7, 2003) (citing *Hasty v. Shephard*, Ky.App., 620 S.W .2d 325 (1981) (affirming summary judgment just six months after the complaint had been filed) and *Hartford Ins. Grp. v. Citizens Fid. Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (similarly affirming summary judgment after a discovery period of roughly six months). Significantly, "[t]here is no requirement that discovery be completed, only that the non-moving party have 'had an *opportunity* to do so.'" *Carberry v. Golden Hawk Transp. Co.*, 402 S.W.3d 556 (Ky. App. 2013) (*quoting Hartford*, at 630.)

Plaintiffs' opportunity to conduct discovery regarding liability in the underlying case began on June 7, 2011, when they filed their initial Complaint. In the six years this case has been pending, Plaintiffs have had ample opportunity to conduct far-reaching discovery, and have done so extensively with respect to the key liability questions at issue in National Union's Motion for Summary Judgment. More than two-dozen depositions were taken, including six expert depositions. The parties have made numerous filings, encompassing varied and complex liability issues. Since this Court ruled bad faith

discovery could commence on February 3, 2016, Plaintiffs had over sixteen months to conduct any additional discovery that might be relevant to their bad faith claim. Plaintiffs' arguments that they need more time to complete additional discovery fail to persuade this Court. For the sake of judicial efficiency, the time to conduct discovery cannot be indefinite. The evidence is clear on the relevant issues before this Court.

Further, Plaintiffs' attempts to pierce the attorney-client privilege and obtain portions of National Union's claim file materials developed during National Union's defense of its insureds does not preclude summary judgment. Kentucky courts have explicitly refused to create an exception to the attorney-client privilege in the bad faith context. *See Shaheen*, 2012 WL 692668, (citing *Guaranty Nat'l Ins. Co. v. George*, 953 S.W.2d 946, 948 (Ky. 1997)). In this third-party case, the privilege at issue belongs not to National Union, but to its insureds, Rex and Dixie. Neither of these insureds has waived the privilege.

D. Plaintiffs have failed to produce evidence, as required by CR 56, to show that a material issue of facts exists.

After National Union provided evidence that no genuine issue of material fact exists, Plaintiffs failed to meet their burden under CR 56 to offer evidence of a genuine issue of material fact. *Neal v. Welker*, 426 S.W.2d 476, 479 (Ky. 1968) ("[w]hen the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact."). Instead, Plaintiffs rely on unsubstantiated allegations and arguments that--even if they had been supported--are immaterial to the facts supporting National Union's Motion for Summary Judgment. Plaintiffs did not provide any evidence to support their claim that liability was beyond

dispute and that their claims were based on more than litigation conduct.[9] For purposes of this Motion, the Court accepts the argument that Dixie owned the truck and that the brakes caused the accident. This does not mean, as Plaintiffs' argue, that Dixie and Rex's, liability was beyond dispute. Moreover, Rex legitimately filed an appeal, which the appellate court sent to a merits panel for resolution, to address workers' compensation immunity issues.

The factual allegations set forth in Plaintiffs' response are not material because they do not impact the key summary judgment issues: specifically, whether Plaintiffs' bad faith claim is based on litigation conduct and whether liability in the underlying case was beyond dispute. Although Plaintiffs allege certain unsupported facts, doing so merely highlights the parties' legitimate dispute regarding underlying liability, evidencing a situation where, as in *Hollaway*, "both parties rely on their own accounts of the series of events [surrounding] the accident." *Hollaway*, 497 S.W.3d at 734.

Counsel for Plaintiffs have argued--and Mr. Morgan testified at his deposition--that they believe underlying liability was reasonably clear. It comes as no surprise that Plaintiffs' attorneys, who are acting as zealous advocates for their clients, opine they are entitled to prevail on the ultimate issue at the summary judgment stage. Yet Plaintiff Counsels' opinions on this issue does not overcome the substantial evidence that the underlying liability of Rex and Dixie was in question, for which this Court has become very familiar.

[9] While genuine disputes of material fact preclude summary judgment, a respondent's bare allegations, devoid of evidentiary support, are not enough to create such a dispute. *De Jong v. Leitchfield Deposit Bank*, 254 S.W.3d 817 (Ky. Ct. App. 2007), (ruling summary judgment was ripe, the Court explained, although "the appellants [had] stated potentially valid causes of action...they [had] failed to produce any evidence, in the record, to support such legal theories" and "unsupported allegations are insufficient to create a genuine issue of material fact[.]")

For example, on May 23, 2014, Plaintiffs filed an all-inclusive Motion for Summary Judgment, asking the Court to "enter a judgment as a matter of law regarding both [Rex's and Dixie's] culpability for negligence." Plaintiffs indicated, "[u]ltimately, this Motion is designed to be a comprehensive statement of the Plaintiffs' position on the issues of immunity and liability based upon the present constellation of facts and law." This Court eventually denied Plaintiffs' Motion for Summary Judgment because a reasonable jury could find for Defendants on liability. In arguing its bad faith claims should go forward, Plaintiffs are essentially arguing that this Court was incorrect in denying summary judgment to Plaintiffs. But their remedy was to address these issues in the underlying lawsuit, not a new lawsuit.

Plaintiffs also argue that *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000) and *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287, 290 (Ky. App. 2007) compels a general ruling that "whether an insurance company acts in bad faith is a question of fact for the jury." But Plaintiffs' reading of these cases is overly broad. Kentucky Courts routinely, and properly, grant summary judgment in bad faith cases; not every allegation of bad faith presents a material issue of fact. *Hollaway v. Direct General Ins. Co. of Mississippi*, 497 S.W.3d 733 (Ky. 2016); *United Services Auto. Ass'n v. Bult*, 183 S.W. 3d 181 (Ky. App. 2003); *Guar. Nat. Ins. Co. v. George,* 953 S.W.2d 946 (Ky. 1997); *Pryor v. Colony Ins.*, 414 S.W. 3d 424, (Ky. App. 2013). Moreover, both *Farmland* and *Buttery* were first-party cases in which the claimants presented evidence that their insurance companies sought to misrepresent or hide coverage from their insureds. No such evidence exists here.

CONCLUSION

In the underlying case, National Union's insureds, Dixie Fuel Company ("Dixie") and Rex Coal Company, Inc. ("Rex"), presented more than sufficient evidence that would have permitted a jury attribute liability to others. In fact, they fairly contested all three elements of negligence: duty, breach, and consequent damages. Thus, National Union had no obligation to pay Plaintiffs' claims under the Unfair Claims Settlement Practices Act. It had a duty and right under Kentucky law to defend its insureds against excess judgment until it ultimately settled the claims filed against them for $2 million, which occurred soon after Plaintiffs belatedly reduced their previous $6 million policy limit demand. "Because [National Union's] absolute duty to pay [Plaintiffs'] claim is not clearly established, this alone [is] enough to deny [Plaintiffs'] bad-faith claim under *Wittmer*." *Hollaway v. Direct Gen. Ins. Co. of Mississippi, Inc.*, 497 S.W.3d 733, 739 (Ky. 2016).

Kentucky Courts have long recognized the "important public policy of encouraging settlements." *See Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 689 (Ky. 2012). In taking judicial notice of the records and rulings in the underlying case, and after careful consideration of the case law cited by both parties, this Court finds there was clearly a good-faith, underlying dispute regarding whether Dixie and Rex were liable to Plaintiffs. Simply put, liability in the underlying case was never beyond dispute.

National Union's Motion for Summary Judgment is **HEREBY GRANTED**; all claims against National Union are **DISMISSED WITH PREJDUICE**. This is a final and appealable Order, there is no just cause for delay.[10]

[10] Plaintiffs also asserted "concert of action/civil conspiracy" claims against Arch and National Union. However, those claims are conditioned on Plaintiffs' ability to properly assert bad faith claims, which Plaintiffs cannot do. *See James v. Wilson*, 95 S.W.3d 875, 896-902 (Ky. Ct. App. 2002). Further, the claims against Arch have been

So Ordered this 07 day of July, 2017.

Hon. Jeffrey T. Burdette, Judge

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dismissed, vitiating Plaintiffs concert of action/civil conspiracy claims against National Union. Finally, Plaintiffs have presented no genuine issue of material fact with respect to these claims. *Id.*

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Court of Appeals of Kentucky.

Angela TUCKER, Appellant
v.
BLUEGRASS REGIONAL MENTAL HEALTH MENTAL RETARDATION BOARD d/b/a Bluegrass.org, Appellee

NO. 2015–CA–001229–MR
|
JANUARY 20, 2017; 10:00 A.M.
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|
Opinion Designated Not for Publication December 7, 2017

Synopsis
Background: Female former employee filed suit against employer for gender discrimination and retaliation. The Fayette Circuit Court, Thomas L. Clark, J., entered summary judgment for employer, and employee appealed.

Holdings: The Court of Appeals, Lambert, J., held that:

[1] employee failed to make prima facie case of gender discrimination, and

[2] employee did not make prima facie case for retaliation.

Affirmed.

APPEAL FROM FAYETTE CIRCUIT COURT, HONORABLE THOMAS L. CLARK, JUDGE, ACTION NO. 14–CI–03185

Attorneys and Law Firms

BRIEF FOR APPELLANT: Angela Tucker, pro se, Versailles, Kentucky

BRIEF FOR APPELLEE: Leslie Patterson Vose, Erin C. Sammons, Gregory A. Jackson, Lexington, Kentucky

BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

OPINION

LAMBERT, J., JUDGE:

***1** Angela Tucker appeals *pro se* from a Fayette Circuit Court order granting summary judgment to Bluegrass Regional Mental Health Mental Retardation Board d/b/a Bluegrass.org ("Bluegrass"). Finding no error, we affirm.

Tucker is a licensed clinical social worker. In 2003, she began working for Bluegrass in the Forensics unit. In 2005, she accepted an offer to work as a clinical coordinator at another Bluegrass location in Mercer County. Her job duties included managing other staff and providing counseling for patients. She assessed patients for suicidal ideation and performed mental health triages at detention centers. Her job performance was adequate and she received all "satisfactory" or higher ratings in her July 2008 competency evaluation. She requested a raise at that time, but budgeting constraints prevented Bluegrass from providing any employee with a salary increase. Tucker requested a salary increase again in June 2010, but was refused for the same reason. In June 2012, she received an incremental wage increase following her competency evaluation. At that time, she requested a thirty percent pay increase, stating that she believed that her pay was lower than that of other employees with less experience and responsibility.

In a meeting with the human resources director of Bluegrass, Tucker alleged for the first time that male staff members were being given larger raises, and she gave several examples of male employees she believed were being paid more than females. The director reviewed the salaries of these individuals and found no disproportionately large raises for the male staff. The director did, however, discover a discrepancy between Tucker's salary and that of another clinical coordinator

who had recently been hired. The director adjusted Tucker's salary by giving her a raise of nearly fifteen percent, thereby increasing her salary to $55,000.00, effective July 2012.

At this point, according to Tucker, she began to be harassed, was given oral warnings, and had her work scrutinized without justification. In June 2013, she received an evaluation that contained some negative comments. She refused to sign the evaluation and filed an EEOC Charge of Discrimination. In the Charge, she alleged that she had received the poor evaluation in retaliation for complaining about gender-related wage discrimination.

Bluegrass received notice of the Charge in August 2013, and it responded by denying any adverse employment action and providing employee salary information demonstrating the absence of any gender-based disparities. The EEOC dismissed Tucker's Charge and provided her with a "right to sue" letter. The letter indicates that it was mailed on April 25, 2014; according to Bluegrass, it received the letter on May 6, 2014.

Meanwhile, on April 15, 2014, Tucker filed a 202A [1] petition for the involuntary hospitalization of a client. Upon review, Bluegrass determined that Tucker had inappropriately filed the petition in violation of Bluegrass's Client Rights Policy, which provides clients with the right to individualized treatment in the least restrictive environment possible. After meeting with the director, Tucker was suspended without pay on April 24, 2014. Following an investigation that, according to Bluegrass, substantiated the events leading to the suspension, Tucker was offered a three-month correction plan, with her continued employment dependent upon her agreement to comply with the plan. Tucker refused to sign the agreement, and her employment was terminated in a letter dated May 7, 2014, and mailed the following day.

1 The 202A petition refers to Form AOC–710, which is a Verified Petition for Involuntary Hospitalization or Involuntary Admission, pursuant to Kentucky Revised Statutes (KRS) Chapter 202A Hospitalization of the Mentally Ill.

***2** On August 21, 2014, Tucker filed a complaint in Fayette Circuit Court against Bluegrass, alleging gender discrimination pursuant to KRS 344.040 of the Kentucky Civil Rights Act and retaliation pursuant to KRS 344.280. Bluegrass filed an answer denying the allegations. Tucker's deposition was taken on November 6 and December 8, 2014.

On May 13, 2015, Tucker's counsel was permitted to withdraw from his representation on the grounds that a disagreement had arisen with Tucker concerning how to proceed with the case. The trial court allowed Tucker thirty days to retain new counsel or proceed *pro se*. On May 22, 2015, Tucker notified the court of her intent to proceed *pro se* while continuing to try to find counsel. On June 12, 2015, after the thirty days had expired, Bluegrass filed a motion for summary judgment, noticing the motion to be heard on June 26, 2105. Tucker did not respond to the motion or appear at the hearing. The trial court granted the motion for summary judgment. On June 30, 2015, Tucker filed a motion to amend her complaint to include any aliases of the defendant and requesting the court to permit more time to find another attorney.

On July 9, 2015, Tucker filed an objection to the summary judgment, requesting reconsideration and ninety days in which to find an attorney. She noticed the motion to be heard on July 17, 2015. At the hearing, she told the court that Bluegrass had been served with the motion that morning. The trial court denied the motion due to insufficient notice but told Tucker she could refile the motion with proper notice. Tucker accordingly refiled the motion objecting to the summary judgment. Bluegrass received the motion and filed a response. Following a brief hearing, at which Tucker informed the court that she was trying to find an attorney and wanted ninety days to do so, the trial court denied the motion to reconsider as untimely. This appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact

for trial." *Id.* at 482. "An appellate court need not defer to the trial court's decision on summary judgment and will review the issue *de novo* because only legal questions and no factual findings are involved." *Hallahan v. The Courier–Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004).

[1] **[2]** **[3]** To defeat a motion for summary judgment on a gender discrimination claim, the plaintiff must establish a *prima facie* case comprised of four elements. *Murray v. E. Kentucky Univ.*, 328 S.W.3d 679, 681–82 (Ky. App. 2009). The plaintiff must show "(1) she was a member of a protected group; (2) she was subjected to an adverse employment action; (3) she was qualified for the position; and (4) similarly situated males were treated more favorably." *Bd. of Regents of N. Kentucky Univ. v. Weickgenannt*, 485 S.W.3d 299, 306 (Ky. 2016). If Tucker can establish such a claim, the burden then shifts to Bluegrass to offer a "legitimate, nondiscriminatory reason" for paying her less than her male colleagues. *Id.* The burden then shifts one more time, when Tucker must be afforded a "fair opportunity" to show that Bluegrass's stated reason for allegedly paying her less was "in fact pretext" for discrimination. *Id.*

***3** Tucker did not establish a *prima facie* case of gender discrimination because she failed to show that she was subjected to an adverse employment action. Although she claimed that she was paid less than her male colleagues, Bluegrass provided data, which Tucker was unable to refute, to show that this was not the case. Thus, as a matter of law, summary judgment was appropriate on her claim of discrimination.

[4] **[5]** In order to make a *prima facie* case of retaliation, a plaintiff must demonstrate "(1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of [her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Brooks v. Lexington–Fayette Urban Cty. Hous. Auth.*, 132 S.W.3d 790, 803 (Ky. 2004), *as modified on denial of reh'g* (May 20, 2004) (quoting *Christopher v. Stouder Mem'l Hosp.*, 936 F.2d 870, 877 (6th Cir. 1991), *cert. denied*, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991)).

Tucker established the first three elements of the *prima facie* case: first, "[f]iling an EEO complaint is a protected activity." *Kentucky Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003), *as modified on denial of reh'g* (Jan. 22, 2004) (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509, 515 (2001)). Second, Bluegrass was aware that Tucker had filed the EEOC complaint, and, third, it thereafter did take an adverse action in ultimately terminating her employment after she refused to participate in the three-month correction plan. Tucker has failed, however, to offer evidence of the fourth element: that there was a causal connection between the protected activity (filing the EEOC complaint) and the termination.

[6] **[7]** When, as in this case, there is no direct evidence of a causal connection,

> the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence. *Nguyen v. City of Cleveland,* 229 F.3d 559, 566 (6th Cir. 2000). Circumstantial evidence of a causal connection is "evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." *Id.* at 566. In most cases, this requires proof that (1) the decision maker responsible for making the adverse decision was aware of the protected activity at the time that the adverse decision was made, and (2) there is a close temporal relationship between the protected activity and the adverse action. *See, e.g., Clark County School District v. Breeden,* 532 U.S. 268, 273, 121 S.Ct. 1508, 1511, 149 L.Ed.2d 509, 515 (2001).

Brooks, 132 S.W.3d at 804.

In this case, Bluegrass received notice in August 2013 that Tucker had filed the EEOC Charge. Its proceedings against Tucker concerning the allegedly inappropriate filing of the 202A petition commenced in April 2014, eight months later. Without any additional evidence of retaliatory conduct, there is an insufficient temporal relationship to meet the standard for showing causation.

[8] "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest, Inc.*, 807 S.W.2d at 482. "[T]he hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact." *Benningfield v. Pettit Envtl., Inc.*, 183 S.W.3d 567, 573 (Ky. App. 2005).

*4 [9] Tucker filed her complaint against Bluegrass in August 2014. Summary judgment was not granted to Bluegrass until almost one year later. Although Tucker's attorney withdrew representation in May 2015, she was provided additional time by the court to procure new counsel and to provide some evidentiary support to defeat the summary judgment motion. We recognize that "[*p*]*ro se* pleadings are not required to meet the standard of those applied to legal counsel[,]" *Beecham v. Commonwealth*, 657 S.W.2d 234, 236 (Ky. 1983), but "[a] party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007).

> The curtain must fall at some time upon the right of a litigant to make a showing that a genuine issue as to a material fact does exist. If this were not so, there could never be a summary judgment since "hope springs eternal in the human breast." The hope or bare belief, like Mr. Micawber's, that something will "turn up," cannot be made basis for showing that a genuine issue as to a material fact exists.

Neal v. Welker, 426 S.W.2d 476, 479–80 (Ky. 1968) (internal citation omitted).

The Fayette Circuit Court order granting summary judgment to Bluegrass is affirmed.

ALL CONCUR.

All Citations

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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

James L. HAMILTON, Appellant
v.
KENT D. THACKER INSURANCE COMPANY & Kent D. Thacker, Individually, Appellees

NO. 2015–CA–001490–MR
|
JUNE 16, 2017; 10:00 A.M.

APPEAL FROM PIKE CIRCUIT COURT, HONORABLE JOHNNY RAY HARRIS, SPECIAL JUDGE, ACTION NO. 14–CI–01254

Attorneys and Law Firms

BRIEF FOR APPELLANT: Jonah L. Stevens, Pikeville, Kentucky

BRIEF FOR APPELLEE: William J. Baird, IV, Pikeville, Kentucky

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

OPINION

JONES, JUDGE:

***1** Appellant, James L. Hamilton, appeals the September 21, 2015, order of the Pike Circuit Court granting summary judgment in favor of the Appellees. After careful review of the record and applicable law, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kent D. Thacker is a Pike County insurance agent who sells insurance for Kentucky Farm Bureau Mutual Insurance ("KFB") through the Kent D. Thacker Insurance Company, Inc.[1] This dispute arose in 2014 when James Hamilton contacted Thacker to obtain a quote for a homeowner's insurance policy for the property located at 190 East Chloe Ridge Drive, Pikeville, Kentucky (the "Property").

1 We refer to Mr. Thacker and his insurance company collectively as "Thacker".

The Property had previously been owned by Hamilton from 2002–2009 and was insured by KFB under a policy issued by another independent agent. That policy was cancelled in 2009 for nonpayment. In 2010, the Property came under the ownership of Hamilton's father and, following an inspection of the Property, Hamilton's father acquired a homeowner's insurance policy on the Property through KFB (the "2010 Policy"). Hamilton's father continued owning the Property through September 2013, at which time the Property was sold back to Hamilton. It does not appear that KFB was notified of this change in ownership. However, the 2010 Policy on the Property continued through late 2014.

According to Hamilton, in September 2014, he contacted Thacker and requested that the 2010 Policy on the Property be "re-issued" in his name. Hamilton indicated that Thacker advised him that in order to "re-issue" the policy, Hamilton's father would have to first cancel the 2010 Policy. Hamilton then contacted his father, who contacted Thacker's office and cancelled the 2010 Policy on the Property effective October 10, 2014. On that same day Hamilton, in person at Thacker's office, requested an inspection of the Property immediately so as to avoid any "gap" in coverage. No inspection was made that day. Hamilton then returned to Thacker's office on October 13, 2014, and requested to speak with Thacker. Eventually, Thacker notified Hamilton that his office would not be providing a quote for a homeowner's policy on the Property.

Afterwards, Hamilton requested Thacker provide him a letter authorizing another KFB agent to write him a policy on the Property. Thacker declined to do so and indicated that if another KFB agent were interested in writing a policy, that agent could contact him directly. According to Hamilton, he then contacted two other KFB agents who initially were interested in doing business with him, but then later refused. Hamilton was unable to obtain a homeowner's insurance policy with KFB; he ultimately obtained a policy though another carrier at an alleged higher rate.

Hamilton filed a complaint with the Pike Circuit Court alleging fraud, twisting/churning, slander, and intentional interference with a contract. Hamilton later amended his complaint to include the claims of breach of express and implied contract, and breach of contractual obligation of good faith and fair dealing. Thacker then filed a motion to dismiss with the trial court. Before Thacker's motion to dismiss was ruled on, the case was assigned to a special judge. Thacker then re-filed his motion to dismiss. A hearing was held on the motion. At that hearing, the trial court dismissed Hamilton's claim for twisting/churning. The trial court then stated that depositions should be re-noticed.

***2** From there, several discovery disputes arose. Eventually, Hamilton and Thacker were scheduled to be deposed on August 18, 2015. Prior to their scheduled depositions, Thacker filed a motion for summary judgment. In his response, Hamilton argued that "it was premature to move for summary judgement at that time as the parties had not yet appeared for their depositions, and Hamilton had not yet been afforded the opportunity to depose Thacker's witnesses regarding their affidavits upon which Thacker was relying in the motion for summary judgment." Hamilton also voluntarily withdrew his claim for slander in his response.

Subsequently, Thacker's counsel sent a letter to Hamilton's counsel. According to Hamilton, this letter advised his counsel that Hamilton's deposition was cancelled and, should Hamilton's claims survive summary judgment, the depositions could be rescheduled. A hearing on the motion for summary judgment was held on August 21, 2015. By order rendered September 21, 2015, the trial court entered summary judgment in favor of Thacker. Specifically, the trial court found:

> [T]he Court can find no statute or case in which a [sic] insurance agent is required to write a policy of insurance to a particular party and it appearing to the Court that membership in Kentucky Farm Bureau entitles members to access to an insurance agent, but the Court can find no document which would entitle that person to a quote. In the present case there was no quote ever issued to Mr. James L. Hamilton and thereby no meeting of the minds and therefore no contract of insurance. The Plaintiff was free to obtain different quotes from different insurance agents and did in fact obtain insurance through American National.

The court concluded that it could find no legal grounds supporting Hamilton's claims and suggested that his concerns may best be addressed by complaint to the Kentucky Department of Insurance.

It is from the order granting summary judgment in favor of Thacker that Hamilton now appeals to this Court.

II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgment involves only questions of law and not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Our review is *de novo*. *Cumberland Valley Contrs., Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

III. ANALYSIS

On appeal, Hamilton maintains that the trial court erred as a matter of law when it dismissed his claims finding no genuine issue of material fact existed. Specifically, Hamilton raises three arguments. First, he argues that there is a genuine issue of material fact as to whether an "oral agreement/contract" was created between Hamilton and Thacker. Hamilton argues this is a question for a jury to decide. Second, Hamilton argues the trial court erred in granting summary judgement, as he alleged additional causes of action other that the breach of contract claim dismissed by the trial court. And, finally, Hamilton maintains that the trial court's grant of summary judgment was premature as the parties had yet to complete sufficient discovery.

a. "Oral agreement/Contract"

***3** Hamilton maintains that he presented evidence to the trial court that was sufficient to create a genuine issue of material fact as to whether an oral agreement was created between him and Thacker, and therefore allow his claims to survive summary judgment. In the record, Hamilton points to his request to Thacker that the 2010 Policy be re-issued in his name; Thacker's directive that in order to re-issue the 2010 Policy, Hamilton's father would have to first cancel the it; Hamilton and his father both acting as instructed by Thacker; and Hamilton's detrimental reliance on statements made by Thacker and Thacker's office staff.

Hamilton points to various conversations and acts involving Thacker; however, he points to nothing in the record to support his actual contention that the parties created an "oral agreement/contract" for a homeowner's insurance policy.

> It has never been held by this court that an oral contract of insurance may be enforced, unless it contains all of the essential elements necessary to constitute a valid contract. The general rule is that the person claiming under such a contract must prove an oral contract possessing all of the essentials of a written contract of insurance. The subject-matter must be agreed upon, and also the risk insured against, the rate of premium, the duration of the risk, the amount of insurance, and the identity of the parties. The minds of the parties must meet touching these matters.

Kitchen v. Yorkshire Ins. Co., 10 S.W.2d 1074, 1075 (Ky. 1928).

Here, with the exception of the parties' identifying the Property as the subject matter to be insured, nothing exists showing that the parties had come to an agreement sufficient to create an oral agreement or contract for insurance. The record lacks any evidence that the parties had come to an agreement on many essential elements required to create a contract for insurance, including the risk to be insured against, the rate of the premiums to be paid, the duration of the risk, or the amount of insurance to be available. Hamilton's allegations are proof positive that the essential terms had not been reached, as he recounts that he requested Thacker inspect the property so that Thacker could give him a quote. The request for a quote shows that the parties had not come to an agreement on the essential terms, primarily the premium that Hamilton would have to pay for a policy. Thus, we agree with the trial court no oral contract or agreement for insurance was created between Hamilton and Thacker. As a result, we find no error on this issue.

b. Additional Causes of Action

Next, Hamilton argues that the trial court erred by granting summary judgment based only on its finding that no contract existed between the parties, as his claim against Thacker was not limited to breach of contract. Hamilton maintains that he alleged additional causes of action, including fraud, intentional interference with his attempts to obtain insurance from other KFB agents, and breach of good faith and fair dealing practices.

Specifically, Hamilton argues that sufficient evidence existed to support his claim "that the parties had an oral agreement that Thacker would reissue a homeowner's insurance policy to Hamilton which had previously been in his father's name ...." Hamilton maintains that Thacker made material representations, which were relied on and acted on by Hamilton, and in turn caused Hamilton's father to cancel the 2010 Policy. Hamilton believes this to be sufficient evidence rising to the level "fraud, trickery and deceit," which should have been addressed by the trial court.

KRS [2] 304.14–060, entitled "Insurable interest, property," states as follows:

> ***4** (1) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.
>
> (2) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.
>
> (3) When the name of a person intended to be insured is specified in the policy, such insurance can be applied only to his own proper interest. This section shall not apply to life, health or title insurance.

2 Kentucky Revised Statutes.

In Kentucky, it is well settled that the law requires a person to have an insurable interest in the insured property "both at the time of the making of the contract and at the time of the loss[.]" *Crabb v. Calvert Fire Ins. Co.*, 255 S.W.2d 990, 991 (Ky. 1953). "A person is usually regarded as having an insurable interest in the subject matter insured when he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction or injury by the happening of the event insured against." *Id.*

Here, Hamilton's father acquired the Property in 2010, at which time he also acquired the 2010 Policy. The 2010 Policy was maintained and continued until September 2013, at which time Hamilton's father sold the Property back to Hamilton. When Hamilton's father no longer owned the Property, he no longer had any "insurable interest" in the Property as defined by KRS 304.14–060(2).

Consequently, when Hamilton contacted Thacker in October 2014, the 2010 Policy was no longer in effect and, therefore, Thacker's alleged direction and/or advice to Hamilton could not have caused him or his father to cancel the 2010 Policy. Thus, Thacker's alleged conduct or statements could not have possibly caused Hamilton or his father to cancel the 2010 Policy and given rise to any of Hamilton's alleged claims. Given the undisputed evidence of record, we find no error in the trial court's dismissal of Hamilton's legal claims. Accordingly, we find no error.

c. Discovery Opportunities

Finally, we turn to the argument that the trial court erred by prematurely granting summary judgment in favor of Thacker, and effectively prevented Hamilton from conducting discovery. However, our review of the record reveals sufficient discovery opportunities were afforded to Hamilton.

Under Kentucky law, "[i]t is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Grp. v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (six months between filing of complaint and granting motion for summary judgment was sufficient opportunity to complete discovery). Moreover, "[a] party responding to a motion for summary judgment cannot complain of the lack of a complete factual record when it can be shown that the respondent has had an adequate opportunity to undertake discovery." *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 69 (Ky. App. 2006).

In this case, the span of time from the date Hamilton filed his initial complaint (November 19, 2014) and the date the trial court granted summary judgment (September 21, 2015) was approximately ten months. Certainly, this was a sufficient amount of time for the parties to complete discovery. Moreover, in his appeal, Hamilton's focuses on his lack of opportunity to depose Thacker and Thacker's employees, and Thacker's subsequent "unilateral" cancellation of the depositions scheduled for August 18, 2015. But, what Hamilton fails to acknowledge is the approximate ten-month period prior the granting of summary judgment, which was available to him to undertake discovery. During that time, Hamilton could have obtained Thacker's deposition and any other discovery materials he so desired. In the record, Hamilton relies only on the canceled August 18, 2015, depositions, but given the approximate ten months prior that Hamilton had available to him to depose Thacker, we cannot say he was prevented from conducting discovery. Most importantly, the facts upon which the trial court predicated its order granting summary judgment are based on Hamilton's allegations. Nothing Thacker could have testified to would have changed the fact that no oral agreement existed, where Hamilton was only able to prove

that he requested that Thacker give him a quote. Nothing Thacker could have testified to would have changed the fact that Hamilton's father did not have an insurable interest in the Property when he cancelled the 2010 Policy in 2014. Therefore, we find no error regarding this issue.

IV. CONCLUSION

*5 For the foregoing reasons, we affirm the order of the Pike Circuit Court granting summary judgment in favor of the Appellees.

D. LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS.

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Court of Appeals of Kentucky.

Bruce GRIFFIN and Kelly Thompson, Appellants
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
and James Smiley, Appellees.

No. 2006–CA–000621–MR.
|
Jan. 12, 2007.

Appeal from Warren Circuit Court, Action No. 05–CI–00207; Carl Hurst, Special Judge.

Attorneys and Law Firms

Matthew Baker, Bowling Green, KY, for appellant.

Rebecca K. Bethard, Louisville, KY, for appellee.

Before ABRAMSON, DIXON, and HOWARD,[1] Judges.

1 Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

OPINION

HOWARD, Judge.

*1 Bruce Griffin ("Griffin") and Kelly Thompson[2] appeal from a Summary Judgment of the Warren Circuit Court, dismissing their complaint against State Farm Mutual Automobile Insurance Company ("State Farm") alleging that State Farm breached both common law and statutory duties by failing to deal in good faith with Griffin as a third party beneficiary under an insurance policy issued by State Farm to its insured, Joyce Parker. Appellants argue that summary judgment was not supported by the facts and the law, and specifically maintain the trial court improperly failed to compel adequate discovery. For the reasons stated below, we affirm.

2 Thompson is designated as an Appellant, but his claims were dismissed by the circuit court by separate order. He does not appeal from that order, nor make any argument that he was improperly dismissed. Therefore, we will refer only to Griffin.

The facts, as they are relevant to this appeal, are not in controversy. On August 14, 2000, State Farm's insured, Joyce Parker, operated a vehicle which was involved in a minor accident with a vehicle owned by Griffin and operated by his daughter. After negotiating with Griffin, and apparently believing that the matter was settled by agreement of the parties, State Farm tendered to Griffin a check representing one half of the $1,572.29 property damage to Griffin's automobile. The settlement offer reflected State Farm's assessment, based in part on the report of its insured, that each party was 50% at fault.

Griffin subsequently retained counsel and filed suit against Joyce Parker in the Warren District Court. On December 19, 2000, Griffin's attorney wrote State Farm, rejecting the settlement, claiming that its insured was 100% liable for the accident, and requesting that State Farm, "please retain a lawyer, and lets proceed to a jury trial." State Farm did employ an attorney, but also wrote Griffin's counsel, suggesting further negotiations. It received no response. The matter ultimately did go to trial, whereupon Parker was found to be 100% liable and Griffin was awarded $1,572.29 in damages.

That judgment, however, was reversed on appeal to the Warren Circuit Court and the matter was remanded for a new trial. A second trial was conducted, resulting in an award of $786.12 based on a finding of 50/50 liability, in line with State Farm's evaluation of the case. That judgment, however, was also reversed on appeal to the circuit court.[3] The case was again remanded. On May 25, 2004, a third trial was conducted and the jury returned a verdict identical to the first trial, finding Parker 100% at fault and awarding Griffin $1,572.29. No appeal was taken from this third and final judgment.

3 Both parties have indicated in their briefs why one or the other of these first two verdicts were reversed. However, since none of the record of the district court case, or its appeals, were included in the record in this

case, we will not consider those matters, but only note that the case was tried three times.

On February 8, 2005, Griffin filed the instant action in Warren Circuit Court alleging that State Farm failed to exercise good faith in its administration of Griffin's property damage claim against Parker.[4] State Farm answered and filed a motion to dismiss. Griffin served written discovery on State Farm and, being unsatisfied with the responses he received, subsequently moved to compel discovery. That motion was granted. Meanwhile, on August 23, 2005, Griffin served on State Farm additional interrogatories and requests for production of documents. Again, State Farm responded and apparently produced some—but not all—of the items requested.

4 Ms. Parker's counsel, Harlan Judd and State Farm's claims adjuster, John Smiley, were also made party defendants, but were later dismissed from the action. There is a "James Smiley" listed as an Appellee on this appeal. This is apparently an erroneous reference to John Smiley, but no argument is made that either he or Mr. Judd were improperly dismissed, and Mr. Judd is not listed as an Appellee. We will therefore refer only to State Farm.

***2** Being dissatisfied with State Farm's compliance, Griffin filed an additional motion to compel discovery on November 14, 2005. On December 9, 2005, a hearing was conducted on this motion, whereupon the circuit court entered an order directing Griffin to file a third request for discovery encompassing all discovery previously sought but not yet obtained. That was done and further information was provided.

On February 8, 2006, State Farm moved for summary judgment and Griffin responded by again moving to compel additional discovery. A hearing on both the summary judgment and discovery motions was conducted on February 27, 2006, after which the circuit court entered an order on March 9, 2006, granting State Farm's motion for summary judgment. As a basis for the judgment, the court found in relevant part that, "beyond mere conclusory statements in their pleadings, Plaintiffs have not offered any factual information or legal argument to suggest how Defendants acted in 'bad faith' toward Plaintiffs." This appeal followed.

Griffin now argues that the trial court committed reversible error in granting State Farm's motion for summary judgment. Specifically, he maintains that summary judgment was premature because he was denied sufficient discovery. In support of this contention, he directs our attention to *Grange Mutual Insurance Company v. Trude,* 151 S.W.3d 803 (Ky.2005). He seeks an order reversing the summary judgment and remanding the matter for further proceedings. We have closely examined the written arguments, the record and the law, and find no basis for reversing the summary judgment.

We note first that we agree with the Appellant that the duty of good faith on the part of an insurance company extends to third party claims such as that in this case and continues throughout the litigation process. *Knotts v. Zurich Insurance Co.,* 197 S.W.3d 512 (Ky.2006). However, the essence of Griffin's claim of error centers not on these general propositions of law, but on his contention that additional discovery would have produced sufficient evidence, in this case, to overcome State Farm's motion for summary judgment. While *Grange Mutual Insurance Company, supra,* does hold that the type of discovery he was seeking, regarding other claims handled by the defendant insurance company, is generally relevant and discoverable in a bad faith case, the totality of the record does not support the conclusion that such discovery had any prospect of producing evidence sufficient to rebut State Farm's summary judgment motion in this case.

As the parties are well aware, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky.1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact ." *Steelvest,* 807 S.W.2d at 480. "The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App.1996). However, a party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required

to present "some affirmative evidence showing that there is a genuine issue of material fact for trial." *Hallahan v. The Courier Journal,* 138 S.W.3d 699, 704 (Ky.App.2004).

*3 In the matter at bar, the circuit court thoroughly summarized the record and properly characterized it as being void of any "factual information or legal argument" which would support the claim that State Farm acted in bad faith as to Mr. Griffin. In fact, Griffin made no response to the motion for summary judgment except to ask for additional discovery. The trial court questioned Griffin's counsel at length about any factual basis he might have for the allegation of bad faith. Counsel advised that he had interviewed Griffin and the attorney who represented him in the district court, but no deposition, affidavit nor evidence in any form was provided from Griffin, from that attorney or from any other witness that would tend to show any bad faith. Counsel could not even identify to the court what acts of bad faith he alleged had occurred in this case. He only referred to a statement allegedly made in the district court by the attorney employed by State Farm to defend its insured, Ms. Parker, which statement was never filed in the circuit court record; [5] and to information he had found "on the internet" which alleged that State Farm adjusters were "beating people down" to obtain settlements in some other cases. Even this was not produced for the court to consider. The trial judge indicated that if Griffin could have presented even a "miniscule factual defense," he would have overruled the motion for summary judgment. Not even that was presented.

5 It is alleged that counsel stated, "It's never been about the money. We are going to send a message to Mr. Thompson that we aren't going to back down, and we are going to try every one of these if we have to." However, this statement appears of record in this case only in a request for admission served upon State Farm, to which State Farm properly responded that it could neither admit nor deny that the statement was made, as it was not a party in the district court action and was not present on the day in question.

The circuit court further noted that the record did contain "uncontradicted factual representations [which] prove Defendants did not act in 'bad faith' in litigating the debatable issue of liability in the underlying accident case." The court specifically noted that State Farm had attempted early settlement negotiations, but was "rebuffed" by the attorney representing Griffin at that time and that one of the district court trials produced a verdict of 50/50 on liability, supporting State Farm's position. The circuit court, in a lengthy, well-reasoned opinion, found that liability in the underlying case was not "reasonably clear," nor did State Farm's position lack a "reasonable basis." These are the very standards which must be shown for a finding of bad faith for a failure to settle. KRS 304.12–230; *Coomer v. Phelps,* 172 S.W.3d 375 (Ky.2005). The record supports this finding and contains nothing which would suggest otherwise—no testimony, affidavits or even any substantive argument. Based on the record, the circuit court correctly found that there was no genuine issue of material fact and that summary judgment was appropriate.

Turning to the claim that the circuit court failed to compel proper discovery, we note first that a trial judge has broad discretion to regulate discovery. *Bratcher v. Commonwealth,* 151 S.W.3d 332 (Ky.2004). We will not reverse the trial court on such matters in the absence of clear abuse. The test for abuse of such discretion is whether the trial judge's ruling was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 581 (Ky.2000). In this case, we cannot find that the trial court abused its discretion in refusing to order the further discovery sought by the Appellant.

*4 Contrary to Griffin's assertion that summary judgment was granted "without providing any meaningful discovery," the record reflects that Griffin sent State Farm three different sets of written discovery, and State Farm responded to each one, although its response to some individual requests was to object to those requests. The circuit court specifically found that Griffin had been provided with "voluminous amounts of information, ... including the Defendant's entire claims file." This case was litigated for more than a year (February 8, 2005 to February 27, 2006) before summary judgment was granted. Griffin had ample opportunity to take any depositions or conduct any other form of discovery he might have wished, so that he could have responded substantively to the motion for summary judgment. The record does not reflect any such attempt, beyond the written discovery set out above.

Griffin makes no claim that any discoverable matter, directly relating to this case, was requested and not provided. His complaint is simply that he did not get all of

the information he was seeking concerning State Farm's handling of other claims. The trial judge determined that such discovery, while generally relevant in bad faith cases, was not going to be relevant or change the fact that there was no bad faith in this case. Given the affirmative evidence in the record to support the trial judge's finding that liability in the underlying case was "debatable" and not "reasonably clear" and that State Farm had a "reasonable basis" for its position, as well as the absence of anything in the record to suggest otherwise, we cannot say that the judge abused his discretion in not compelling further discovery.

For the foregoing reasons, we believe the circuit court properly concluded that there was no genuine issue as to any material fact and that State Farm was entitled to judgment as a matter of law. The summary judgment entered by the Warren Circuit Court is affirmed.

ALL CONCUR.

All Citations

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Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Hale General Contracting, Inc.; Terry Hale; and Brenda Hale, Appellants
v.
Motorist Mutual Insurance Company, Appellee

NO. 2015–CA–000396–MR
|
MARCH 18, 2016; 10:00 A.M.
|
Discretionary Review Denied by Supreme Court September 15, 2016

APPEAL FROM WARREN CIRCUIT COURT, HONORABLE STEVE ALAN WILSON, JUDGE, ACTION NO. 09–CI–00864

Attorneys and Law Firms

BRIEF FOR APPELLANT: Matthew J. Baker, Bowling Green, Kentucky

BRIEF FOR APPELLEE: Kim F. Quick, Elizabethtown, Kentucky

BEFORE: COMBS, KRAMER, AND NICKELL, JUDGES.

OPINION

KRAMER, JUDGE:

*1 The Warren Circuit Court entered judgment in conformity with a jury verdict dismissing, with prejudice, Terry Hale's claim of bad faith against the appellee, Motorist Mutual Insurance Company ("Motorist"). Hale now appeals, [1] arguing the circuit court committed error in admitting certain evidence during trial. Finding no error, we affirm.

1 Hale General Contracting, Inc., and Brenda Hale were listed as parties below and were likewise added as appellants. However, both of these parties were dismissed as plaintiffs prior to the trial of Hale's bad faith claim, and neither has any legal interest in the outcome of this appeal.

On May 24, 2008, Hale was operating a motor vehicle owned by Hale General Contracting, Inc., on a public road in Warren County, Kentucky, when he was involved in a motor vehicle accident with another vehicle driven by Joyce Button. At the time, Hale had a policy of insurance with Motorist Mutual Insurance Company which provided uninsured and underinsured (UM/UIM) coverage. He initiated an action in Warren Circuit Court on May 20, 2009, against Motorist for UM/UIM coverage because the cost of treating his injuries resulting from the accident exceeded the $25,000 limit of Button's auto insurance policy.

Discovery commenced, and Hale first itemized the extent of his damages on January 12, 2010—an amount he alleged was $1,394,656.84. The circuit court directed the parties to mediation, and mediation was held on January 10, 2012. In his brief, Hale describes what happened next as follows: "At this mediation, Motorist failed and refused to mediate and negotiate in good faith; therefore, at the conclusion of the mediation, the Hales immediately prepared and filed a motion to amend their complaint, asserting a first party bad faith claim against Motorist."

Shortly thereafter, the circuit court bifurcated Hale's action and a jury trial was set for the month of September, 2012, for the sole purpose of resolving Hale's UM/UIM claim. One month prior to the trial date, Motorist offered Hale $50,000 to settle. Hale refused. The trial proceeded with Hale and his spouse (who claimed loss of consortium due to the accident) collectively asking for a maximum amount of $856,905 in damages. A jury ultimately rejected the loss of consortium claim and awarded Hale $300,000 for past and future pain and suffering; $33,750 in medical expenses; and $45,000 in past and future economic loss. Hale's total recovery was reduced, however, by 15% for his comparative negligence in failing to wear a seatbelt, and was further reduced by $35,000 to reflect his receipt of $10,000 in no-fault benefits and Button's $25,000 policy limits. Accordingly, the net sum of his recovery was $286,838. Motorist filed no appeal.

In January of 2015, Hale's bad faith claim against Motorist proceeded to trial. The circuit court ultimately dismissed this claim with prejudice after a jury made the following findings: (1) Motorist had not failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (2) Motorist had not refused to pay Hale's claims without conducting a reasonable investigation based upon all available information; (3) Motorist had not violated its duty to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability had become reasonably clear; and (4) Motorist had not compelled Hale to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amount Hale ultimately recovered in his lawsuit.

***2** Hale's arguments on appeal are two-fold. First, he contends the circuit court committed reversible error by allowing Motorist to introduce evidence regarding its negotiations with Hale and the parties' settlement positions during and after the January 10, 2012 mediation. This, he asserts, is because Kentucky Rule of Evidence (KRE) 408[2] provides that settlement negotiations are *always* inadmissible. Second, Hale argues the circuit court committed reversible error by also allowing Motorist to introduce expert opinion evidence that tended to prove he had exaggerated his estimate of economic damages resulting from the May 24, 2008 accident, and that he had also been comparatively negligent in causing the accident and a large extent of his own injuries by failing to avoid or lessen the severity of the accident by keeping a proper lookout, and by admittedly failing to wear a seatbelt. Hale asserts this expert evidence became irrelevant for all purposes after the jury in the September, 2012 trial found in his favor.

2 KRE Rule 408 provides:

> Evidence of:
>
> (1) Furnishing or offering or promising to furnish; or
>
> (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Both of Hale's arguments have no merit because they are predicated upon a misapprehension of the issues presented in the January 2015 trial. To reemphasize, the overarching issue was whether Motorist committed the tort of bad faith by denying coverage and otherwise failing to offer Hale an adequate settlement prior to the September 2012 trial date. The essential elements of such an action—elements which are not referenced or discussed in Hale's brief—were explained in *Wittmer v. Jones,* 864 S.W.2d 885 (Ky.1993) as follows:

> [A]n insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed ... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or facts.

Id. at 890 (quoting *Federal Kemper Ins. Co. v. Hornback,* 711 S.W.2d 844, 846–47 (Ky.1986) (Leibson, J., dissenting)).

As to Hale's first argument, Motorist did not introduce evidence of its settlement negotiations with Hale to prove either its liability for or the invalidity of Hale's UM/UIM claim or its amount. KRE 408 prohibits such a use for this type of evidence. Moreover, doing so would have been pointless because the prior jury verdict following the September 2012 trial (which Motorist never appealed) had already resolved the matter of Motorist's liability.

Instead, it is readily apparent from the record that Motorist introduced this evidence for "another purpose" that the language of KRE 408 does not prohibit. Specifically, Motorist used this evidence to establish that any failure on its part to offer a settlement with Hale between the January 10, 2012 mediation and September, 2012 trial did not injure Hale in any cognizable way. It demonstrated (1) all of Hale's multiple settlement demands, which ranged between $1.3 million and $400,000, were well in excess of what he eventually recovered in his UM/UIM judgment; and (2) Hale admitted, over the course of his deposition testimony, that he never would have settled for the amount he was awarded in his UM/UIM judgment.

*3 Motorists also points out in its brief that the tort of bad faith can warrant punitive damages and requires proof that an insurer engaged in outrageous conduct due to an evil motive or reckless indifference. How a jury can be expected to determine whether the insurer's settlement conduct was outrageous without knowing something of its negotiations with the insured is, as Motorists notes, a mystery. The circuit court accordingly did not violate KRE 408 by admitting this evidence, and Hale cites no rule of law that otherwise would have excluded it.

Hale's second argument similarly misses the mark. To begin, Hale cites no rule of law standing for the proposition that evidence, once disbelieved by a jury at some point in time, ceases to be evidence for any and all purposes thereafter. This is because no such rule of law exists. Furthermore, by reintroducing the expert evidence it had previously introduced in the September, 2015 UM/UIM trial, Motorist was not attempting, as Hale repeatedly insists throughout his brief, to retry the UM/UIM action.

Instead, Motorist introduced this evidence because it was relevant to the second element of the tort of bad faith, which requires an insurer to "lack a reasonable basis in law or fact for denying the claim." *Wittmer,* 864 S.W.2d at 890. A central issue in the January 2015 trial was whether it was reasonable for Motorist to rely upon its own experts' assessments of the facts and circumstances of the accident, Hale's injuries, and Hale's estimates of economic loss as a basis for refusing to settle with Hale prior to the September, 2012 trial date.

At or about the time of the January 12, 2010 mediation, these experts had opined to Motorist that Hale had overestimated the economic damages component of his various settlement demands, and that Hale had been comparatively negligent in causing the May 24, 2008 accident and most of his resulting injuries. Hale does not question these experts' respective qualifications or the methodologies underpinning their conclusions; Hale does not argue it was unreasonable for Motorist to have relied upon these experts' conclusions as a basis for determining, under the facts, that it had a legitimate comparative negligence defense; and, as noted in *Curry v. Fireman's Fund Ins. Co.,* 784 S.W.2d 176, 178 (Ky.1989), an insurance carrier has no duty to settle if doing so would force it to "abandon legitimate defenses."

We have addressed the breadth of Hale's appellate arguments and have determined they are without merit. The Warrant Circuit Court is therefore AFFIRMED.

NICKELL, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

All Citations

Not Reported in S.W.3d, 2016 WL 1068997

End of Document

Cincinnati Ins. Co. v. Hofmeister

Court of Appeals of Kentucky

October 17, 2008, Rendered

NO. 2004-CA-002296-MR AND NO. 2004-CA-002362-MR

Reporter
2008 Ky. App. LEXIS 313 *

CINCINNATI INSURANCE COMPANY, APPELLANT/CROSS-APPELLEE v. GEORGE HOFMEISTER AND KAY HOFMEISTER, APPELLEES/CROSS-APPELLANTS

Notice: TO BE PUBLISHED. [UNLESS OTHERWISE ORDERED BY THE KENTUCKY SUPREME COURT, OPINIONS DESIGNATED "TO BE PUBLISHED" BY THE COURT OF APPEALS ARE NOT TO BE PUBLISHED IF DISCRETIONARY REVIEW IS PENDING, IF DISCRETIONARY REVIEW IS GRANTED, OR IF ORDERED NOT TO BE PUBLISHED BY THE COURT WHEN DENYING THE MOTION FOR DISCRETIONARY REVIEW OR GRANTING WITHDRAWAL OF THE MOTION.]

Subsequent History: **[*1]** OPINION OF SEPTEMBER 26, 2008 WITHDRAWN.

Review denied by *Hofmeister v. Cincinnati Ins. Co., 2009 Ky. LEXIS 264 (Ky., May 13, 2009)*

Prior History: APPEAL AND CROSS-APPEAL FROM SCOTT CIRCUIT COURT. HONORABLE PAUL F. ISAACS, JUDGE. ACTION NO. 00-CI-00030.

Cincinnati Ins. Co. v. Hofmeister, 2008 Ky. App. LEXIS 302 (Ky. Ct. App., Sept. 26, 2008)

Core Terms

insurer, trial court, settlement, coverage, bad faith, independent contractor, documentation, attorney's, insurance company, fraudulent misrepresentation, policy limit, keys, amended complaint, discovery, damages, issues, settle, businesses, parties, supplied, rights, excess policy, claimant, common law, deposition, adjuster, motions, hired, vicarious liability, insurance contract

Case Summary

Procedural Posture

A jury found appellant insurer liable to appellees, a driver and his wife, for fraudulent misrepresentation and violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), *Ky. Rev. Stat. Ann. § 304.12-230*. The insurer appealed a decision of the Scoot Circuit Court (Kentucky) denying its motions for summary judgment, directed verdict and judgment notwithstanding the verdict, and entering judgment in favor of appellees.

Overview

The driver suffered injuries in an accident when another vehicle crossed the centerline. The other driver, who worked for a company insured by the insurer, was driving from his home back to work after a more than 10-hour shift to return company keys he had mistakenly taken home. In reversing the trial court's judgment, the appellate court first concluded that the insurer was entitled to a directed verdict that the attorney hired by the insurer to defend the its insured was not the insurer's agent. Among to other things, the record was devoid of any evidence that the insurer exercised any actual control over the means by which the attorney accomplished his representation of the company, including his efforts toward settlement of the tort claim. The appellate court also agreed that the insurer was entitled to a directed verdict on appellees' claim of fraudulent misrepresentation as, inter alia, there was no evidence that the insurer made a fraudulent misrepresentation as to the amount of coverage the insured had. The appellate court also held that the trial court committed reversible error when it failed to direct a verdict in favor of the insurer on the claim it violated the UCSPA.

Outcome

The judgment of the trial court was reversed and appellees' cross-appeal was reversed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Standards of Review, Clearly Erroneous Review**

A directed verdict or judgment notwithstanding the verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice.

Insurance Law > ... > Motor Vehicle Insurance > Obligations > Duty to Defend

Legal Ethics > Client Relations > General Overview

HN2[] **Obligations, Duty to Defend**

The relationship of an attorney hired to defend an insured relative to the insurer that hired him, at least initially, is that of independent contractor.

Torts > Vicarious Liability > Independent Contractors > General Overview

HN3[] **Vicarious Liability, Independent Contractors**

An employer is not liable for the torts of an independent contractor in the performance of his job.

Business & Corporate Law > Agency Relationships > Establishment > General Overview

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > Employment Relationships > Independent Contractors

HN4[] **Agency Relationships, Establishment**

If a principal lacking the right of control nevertheless personally interferes with, undertakes to do, manages or controls the work of an independent contractor, he thereby destroys the relationship of independent contractor. The independent contractor would thus convert to an employee or agent.

Legal Ethics > Client Relations > Duties to Client > Effective Representation

HN5[] **Duties to Client, Effective Representation**

An attorney who relinquishes the right to control will perforce violate his duty under the Ky. Sup. Ct. R. 3.130-1.8(f)(2), and clearly subject himself to severe discipline.

Insurance Law > ... > Motor Vehicle Insurance > Obligations > Duty to Defend

Legal Ethics > Client Relations > Conflicts of Interest

HN6[] **Obligations, Duty to Defend**

In determining whether an insurer has exercised actual control of an attorney hired to represent an insured despite lacking the right to do so, courts consider that such control must be invidious in that it affects the attorney's independent professional judgment, interferes

with the attorney's unqualified duty of loyalty to the insured, or presents a reasonable possibility of advancing an interest that would differ from that of the insured.

Business & Corporate Law > ... > Establishment > Elements > Right to Control by Principal

Labor & Employment Law > Employment Relationships > Independent Contractors

HN7 **Elements, Right to Control by Principal**

Whereas independent contractor status is shown by the absence of a principal's control over the work to be performed, agency is shown by its presence. Just as with the independent contractor analysis, the right to control is considered the most critical element in determining whether an agency relationship exists.

Business & Corporate Law > Agency Relationships > Types > Attorney & Client

HN8 **Types, Attorney & Client**

An attorney is an agent of his client.

Business & Corporate Law > Agency Relationships > Types > Attorney & Client

HN9 **Types, Attorney & Client**

While the attorney-client relationship is generally that of principal and agent, the attorney owes the client a higher duty than any ordinary agent owes his principal.

Insurance Law > ... > Motor Vehicle Insurance > Obligations > Duty to Defend

Legal Ethics > Client Relations > General Overview

HN10 **Obligations, Duty to Defend**

Where there is no evidence other than the fulfillment of those duties existing between the lawyer and the insured as his client, and the fulfillment of those duties existing between the insured and the insurer, there can be no finding of an agency relationship between the insurer and the attorney it hires to defend its insured.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Judicial Estoppel

HN11 **Estoppel, Judicial Estoppel**

The judicial estoppel doctrine prevents a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.

Insurance Law > Claim, Contract & Practice Issues > General Overview

HN12 **Insurance Law, Claim, Contract & Practice Issues**

An accident victim has no right, prior to obtaining a judgment against the tortfeasor, to assert a direct claim to insurance policy proceeds.

Evidence > Burdens of Proof > Clear & Convincing Proof

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN13 **Burdens of Proof, Clear & Convincing Proof**

Common law fraudulent misrepresentation requires proof of six elements: (1) that the declarant made a material misrepresentation to a plaintiff; (2) that this misrepresentation was false; (3) that the declarant knew it was false or made it recklessly; (4) that the declarant induced the plaintiff to act upon the misrepresentation; (5) that the plaintiff relied upon the misrepresentation; and (6) that the misrepresentation caused injury to the plaintiff. There must be clear and convincing proof of each of these elements.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Remedies > Damages > General Overview

HN14[] **Business Torts, Fraud & Misrepresentation**

If a truth or falsehood of a representation might have been tested by ordinary vigilance and attention, it is a party's own folly if he neglected to do so, and he is remediless.

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Elements of Bad Faith

HN15[] **Bad Faith & Extracontractual Liability, Elements of Bad Faith**

An insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. An insurer is entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Torts > ... > Employers > Scope of Employment > Personal Activities

HN16[] **Scope of Employment, Personal Activities**

To remain in the scope of employment, an employee must not have deviated from its pursuit.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > ... > Employers > Scope of Employment > Personal Activities

HN17[] **Jury Trials, Province of Court & Jury**

Where deviation from the course of his employment by a servant is slight and not unusual, a court may, as a matter of law, find that the servant was still executing his master's business. On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own. Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > ... > Damages > Punitive Damages > General Overview

HN18[] **Jury Trials, Province of Court & Jury**

Whether a tort has occurred under *Ky. Rev. Stat. Ann. § 304.12-230* is what a trial court, not a jury, is required to decide. The "threshold problem" is to determine whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages. To do that, a trial court must weigh in on the question of punitive damages by answering whether the proof is sufficient for the jury to conclude that there was conduct that is outrageous, because of a defendant's evil motive or his reckless indifference to the rights of others.

Evidence > Burdens of Proof > General Overview

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > General Overview

HN19[] **Evidence, Burdens of Proof**

The evidentiary threshold for a claim of bad faith insurance claims settlement is high indeed. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an indifference to its insureds' rights. Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Insurance Law > Liability & Performance

Standards > Bad Faith & Extracontractual Liability > General Overview

HN20[] **Jury Trials, Province of Court & Jury**

The issue of "bad faith" in action for a claim of bad faith insurance claims settlement should be decided by a trial court.

Insurance Law > Liability & Performance Standards > Settlements > General Overview

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

HN21[] **Liability & Performance Standards, Settlements**

Ky. Rev. Stat. Ann. § 304.12-230(1) prohibits an insurer from misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue. In addition, *§ 304.12-230(1)* addresses "coverages" - a term used through the Insurance Code, Ky. Rev. Stat. Ann. ch. 304. Though not defined by statute or Kentucky caselaw, "coverages" is a term that identifies the amount and extent of risk contractually assumed by an insurer. It is an abbreviated means by which we define what the insured has contracted for in exchange for his premium. "Coverages at issue" therefore refers to an insured's contractual dispute with his insurer, and not an accident victim's tort dispute with the insured-tortfeasor, or an accident victim's dispute with the insurer (unless as the assignee of the insured's rights under the contract he stood in the insured's shoes).

Insurance Law > Liability & Performance Standards > Settlements > Good Faith & Fair Dealing

HN22[] **Settlements, Good Faith & Fair Dealing**

Under *Ky. Rev. Stat. Ann. § 304.12-230(6)*, an insurer violates the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, by not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

Insurance Law > Liability & Performance Standards > Settlements > General Overview

Insurance Law > Liability & Performance Standards > Bad Faith & Extracontractual Liability > Payment Delays & Denials

HN23[] **Liability & Performance Standards, Settlements**

Although an insurer is under a duty to promptly investigate and pay claims where it has no reasonable grounds to resist in good faith, neither this duty nor any provision of the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, requires the insurer to assume responsibility to investigate the amount of the claimant's loss for the claimant. The insurer's legal responsibility is limited to payment upon proof of loss.

Insurance Law > Liability & Performance Standards > Settlements > General Overview

Insurance Law > Liability & Performance Standards > Settlements > Third Party Claims

HN24[] **Liability & Performance Standards, Settlements**

Ky. Rev. Stat. Ann. § 304.12-230(13) of the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, allows a private right of action against an insurer for failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. The class of persons protected by this section are first-party insureds and third-party assignees of the first-party's rights.

Insurance Law > Liability & Performance Standards > Settlements > General Overview

HN25[] **Liability & Performance Standards, Settlements**

Ky. Rev. Stat. Ann. § 304.12-230(14) makes an insurer liable for failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a

claim or for the offer of a compromise settlement.

Business & Corporate Compliance > ... > Industry Practices > Unfair Business Practices > Claims Investigations & Practices

HN26[] **Unfair Business Practices, Claims Investigations & Practices**

There is an absolute prohibition on the introduction of evidence of an insurer's litigation conduct in actions brought under *Ky. Rev. Stat. Ann. § 304.12-230*.

Insurance Law > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN27[] **Insurance Law, Remedies**

The test of whether there can be a recovery for loss of anticipated revenues or profits is whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.

Counsel: ORAL ARGUMENT AND BRIEFS FOR APPELLANT AND CROSS-APPELLEE: John T. Ballantine, Louisville, Kentucky; Ronald L. Green, Lexington, Kentucky.

BRIEFS FOR APPELLANT AND CROSS-APPELLEE: Michael D. Risley, Louisville, Kentucky.

ORAL ARGUMENT AND BRIEFS FOR APPELLEES AND CROSS-APPELLANTS: J. Dale Golden, Lexington, Kentucky.

AMICUS CURIAE BRIEF FOR THE KENTUCKY DEFENSE COUNSEL: Gregg E. Thornton, Luke A. Wingfield, Lexington, Kentucky.

Judges: BEFORE: ACREE AND KELLER, JUDGES; KNOPF, [1] SENIOR JUDGE. KNOPF, JUDGE, CONCURS. KELLER, JUDGE, CONCURS IN RESULT ONLY.

Opinion by: ACREE

Opinion

REVERSING APPEAL NO. 2004-CA-002296-MR AND DISMISSING AS MOOT APPEAL NO. 2004-CA-002362-MR

ACREE, JUDGE: This is the appeal and cross-appeal of a judgment entered in Scott Circuit Court after a jury found Cincinnati Insurance Company (CIC) liable to George and Kay Hofmeister for fraudulent misrepresentation and **[*2]** for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), *Kentucky Revised Statutes (KRS) 304.12-230*. CIC appeals the trial court's denial of its motions for summary judgment, motions for directed verdict and judgment notwithstanding the verdict, and entry of judgment awarding the Hofmeisters $ 10,000,000 in compensatory damages and $ 18,405,500 in punitive damages following a jury verdict. Prior to appeal, the trial court amended the judgment by reducing the punitive damages award to $ 10,000,000. The Hofmeisters filed a cross-appeal, challenging the reduction of the punitive damages award. We reverse the judgment and dismiss the Hofmeisters' cross-appeal as moot.

This case requires examination of a myriad of relationships and duties, some created by contract, others by statute, and still others by common law. It requires examination of settlement negotiations and litigation strategy and tactics, nearly all of which was placed in the hands of a jury to assess. Understanding this case necessitates a detailed examination of a voluminous record which we will abbreviate wherever possible.

I. Facts and Procedure

The facts of the underlying automobile claim, which the jury **[*3]** found CIC settled unfairly, began at 10:00 a.m. on November 3, 1998. Eugene "Gene" Clark, a delivery driver for Dasher Express, Inc., had finished a workshift that exceeded ten hours. He returned his employer's vehicle to Dasher's offices in Lexington, Kentucky. He then drove home to Frankfort in his personal vehicle.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Clark was fatigued when he arrived home and discovered that he still had in his possession the company's credit card and the keys to his company's vehicle. He called Dasher's offices, informed the dispatcher of his mistake, and "indicated he was going to return the keys to Dasher." (Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee). Clark took a shower and changed clothes. Then he got back in his personal vehicle and left his Frankfort home. Ostensibly, his sole purpose was to return the Dasher vehicle keys and credit card.

George Hofmeister was driving his own vehicle and talking to his wife on a cell phone when he first saw Clark's vehicle approaching him from about a quarter-mile away. Clark's driving was erratic. In fact, Clark had fallen asleep despite having gone to a McDonald's restaurant for coffee. As the vehicles approached **[*4]** one another, Clark's vehicle crossed the centerline. Hofmeister slammed on his brakes but did not avoid the collision. Whether it was possible to have done so was never determined in the record. [2]

When Clark did not arrive at Dasher's offices after indicating he was going to return the keys, a Dasher employee called his telephone number and

> le[ft] a message for Gene, indicating whether or not he was returning the keys and when they or whomever [sic] was returning the keys would have them to Dasher. After that, we received a call that Gene had been in an accident and basically were waiting to see how he was and, you know, what the situation was.

(Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee).

The accident did not occur on the most direct route between Clark's home and Dasher's offices. Clark said the direct route he regularly took would have placed him on Interstate Highway 64 (I-64) all the way from Frankfort until he exited the highway southbound at the Newtown Pike exit in Lexington. But the accident **[*5]** site was on US 62 in Georgetown, Kentucky. This location necessarily required Clark to exit I-64 about halfway between his home and Dasher's offices, and to head away from his business destination. Clark was rendered unconscious by the accident, and said he did not recall exiting I-64 onto US 62 or why he did so.

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[2] Mr. Hofmeister testified in the bad faith trial, however, that there was no place for him to exit the road on which the accident occurred.

Hofmeister's injuries were significant. He convalesced for a total of eight months, confined to a wheelchair for five of those months. During that time, Hofmeister engaged attorney Dale Golden to assist in recovering his damages.

Golden concentrated his settlement efforts on Clark and Clark's insurer, the Travelers Insurance Group. Travelers offered to pay Hofmeister its policy limits of $ 100,000. Pursuant to *KRS 304.39-320(3)*, Golden sent notice of Travelers' offer to Hofmeister's underinsured motorist (UIM) coverage insurer, Kentucky Farm Bureau Mutual Insurance Company, whose policy limits were also $ 100,000. Farm Bureau elected to preserve its subrogation rights against Clark and substituted its own payment of $ 100,000 to Hofmeister under the procedure outlined in *Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1983)*. Additionally, Farm Bureau paid $ 50,000 in personal **[*6]** injury protection (PIP) benefits to Hofmeister's medical providers. Hofmeister did not waive his right to file a civil action against Farm Bureau, and he subsequently did so.

The complaint first named Clark as a defendant. The second defendant identified was Farm Bureau. The claim against Farm Bureau sought to collect an additional $ 100,000 in UIM benefits available under any and all of the Hofmeisters' policies. Finally, the complaint named Dasher, asserting that Clark was acting within the scope of his employment at the time of the accident and, therefore, Dasher was vicariously liable.

Service of the complaint was Dasher's first notice that the Hofmeisters were asserting any claim against the company. Consistent with duties created by its contract of insurance, Dasher notified CIC of the claim. CIC's duty under the same contract was to provide a defense at its cost. To satisfy that duty, CIC made financial arrangements with attorney Dan Murner to answer and defend Dasher against the Hofmeisters' claims.

Murner drafted and served Dasher's answer to the complaint on November 4, 1999, asserting, among other defenses, that Clark was not acting within the scope of his employment at the **[*7]** time of the accident, and that Hofmeister was comparatively negligent. Murner simultaneously served discovery requests upon Hofmeister seeking information substantiating the damages claimed and the basis of Dasher's alleged liability.

The Hofmeisters responded to Dasher's discovery requests four months later, on March 3, 2000. The

responses provided scant information upon which Dasher could assess its exposure to liability. On the contrary, they show the Hofmeisters: (1) had not yet compiled a list of medical expenses; (2) had not yet decided what witnesses to call at trial; (3) did not know what documents they intended to introduce at trial; and (4) were not prepared to identify any expert, including one who would testify regarding Mr. Hofmeister's claim for economic losses, or otherwise. Furthermore, in response to Dasher's request pursuant to *Kentucky Rules of Civil Procedure (CR) 8.01(2)* that damages be specified, the Hofmeisters replied that "[a] total has not been calculated at this time."

The Hofmeisters, too, engaged in discovery. On February 1, 2000, they submitted interrogatories and requests for production of documents to Dasher. Consistent with a pattern repeated throughout **[*8]** this litigation, the Hofmeisters did not ask Dasher to produce insurance information in accordance with *CR 26.02(2)*. [3]

In the meantime, Dasher noticed Hofmeister's deposition to be taken on May 12, 2000. Mr. Hofmeister's deposition testimony was the first indication Dasher had that Hofmeister was claiming a loss of income equaling or exceeding $ 5 million. When questioned about substantiation for this loss, Hofmeister explained that the primary entity through which he conducted his business, American Commercial Holdings, Inc. (ACH), had paid him a $ 5-million bonus for the year of the accident, but did not pay him any bonus the next year. [4]

Hofmeister's deposition testimony showed that while he did receive a Form W-2, he was not a typical employee. He was a self-made **[*10]** entrepreneur. Through various business entities he had created, including ACH, Hofmeister made a career of purchasing troubled businesses, obtaining financing to keep the businesses afloat, and then reselling the businesses for a profit. Between 1995 and 1999, Hofmeister and ACH acquired approximately sixty (60) businesses. Hofmeister stated that he accomplished these acquisitions after obtaining bank financing to do so. At deposition, he testified that he had been turned down for a $ 25-million loan as a direct result of the accident and his injuries. Consequently, so he testified, he was unable to purchase more distressed businesses for resale. He had no documentation with him at the deposition that would have substantiated any of his prior acquisitions or sales, or any of his business activity at all. Nor could he document the denial of his $ 25-million loan application or the potential business acquisitions the loan would have facilitated. However, he agreed to later provide Dasher with that documentation through his own attorney.

Hofmeister's attorney, Golden, took the face-to-face opportunity immediately following Hofmeister's deposition to propose settlement. After the Hofmeisters **[*11]** departed, Golden sat down with Murner and Dasher's owners and verbally demanded $ 1,500,000 on behalf of his clients. [5] According to Murner's uncontradicted testimony, Golden said "[Y]ou don't want an excess verdict, you'd better settle this case." Once Golden had departed, Murner's clients asked him what was meant by an "excess verdict" and Murner explained it to them. What followed this meeting was a series of extrajudicial correspondence upon which much of the Hofmeisters' claim of fraud and bad faith rests.

On May 18, 2000, Murner wrote to Golden requesting

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[3] *CR 26.02(2)* states:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[4] As the CEO of ACH, Mr. Hofmeister largely controlled his own income. He testified that his salary the year after the accident actually increased from $ 577,402 in 1998 (10 months of which preceded the accident) to $ 624,135 in 1999. **[*9]** The Hofmeisters' tax returns show that 1998 was a good year for Mr. Hofmeister to take a $ 5-million bonus because his capital losses and Schedule E losses (from other partnerships and subchapter S corporations including ACH) exceeded $ 8 million. When those losses were deducted from his total income, including the $ 5-million bonus, the Hofmeisters' adjusted gross income (AGI) was less than zero (-$ 443,102). Consequently, the Hofmeisters paid no taxes in 1998. In 1999, the year after the accident, the Hofmeisters' businesses netted substantial capital gains resulting in an AGI of more than $ 9.5 million, and a tax liability of more than $ 1.8 million. Awarding himself any bonus in 1999 would have yielded an even higher tax burden. In 2000, Mr. Hofmeister's salary was again above $ 500,000. Also in 2000, and in 2001 and 2002 as well, the Hofmeisters continued to earn substantial capital gains. Those gains, however, were offset by greater Schedule E losses from other partnerships and S corporations, including the Hofmeisters' interest in equine partnerships.

[5] Though Golden informally stated he could establish damages of $ 20,000,000, no demand higher than $ 1,500,000 was ever made.

further substantiation of Hofmeister's claim that his business losses were attributable to the accident and stating that such information was essential to a proper assessment of Golden's settlement demand. Murner also noted that the demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" He never stated what those policy limits were except to say that $ 1,500,000 exceeded them.

On May 22, 2000, Golden wrote to Murner "a little surprised that $ 1,500,000 is in excess of the policy **[*12]** limits of Dasher's insurance carrier." He declined Murner's request for additional support for Hofmeister's losses, stating, "The tax returns I have provided to you contain more than adequate information to show" Hofmeister's loss. He expressed his opinion that a "claim for punitive damages against Dasher alone could exceed $ 1,000,000." Nevertheless, based upon Murner's representation that $ 1,500,000 exceeded Dasher's liability policy limits, Golden agreed to recommend to Hofmeister "that he accept the amount of $ 1,000,000, *which I assume* from your correspondence is the policy limit." (Emphasis supplied).

Because Golden was unable to contact Mr. Hofmeister until early the next month, Golden agreed to extend the offer until June 9. Golden stated that if settlement was not accomplished by then, he would recommend that his client not accept less than $ 1,500,000. "In other words," Golden said, "assuming that Dasher has $ 1,000,000 in coverage, this is your one opportunity to resolve this matter within the limits of coverage."

The next day, May 23, 2000, Golden and Murner spoke by telephone. Based on that conversation, Golden wrote Murner again, agreeing to a short extension of the deadline **[*13]** for Dasher's response to his settlement demand. Golden also asked Murner to let him know "what additional information you will need and I will try to provide" it. He then reiterated that if Dasher did not agree to settle the claim for $ 1 million, "our demand will increase beyond the limits of Dasher's liability policy[.]"

One day later, May 24, 2000, Murner provided a list of information he needed to assess the claim and settlement demand, limiting the list to information Hofmeister already agreed in his deposition to provide through Golden. Among other things, this included: a list of Hofmeister's companies identifying those he purchased and sold in the previous five years, with the cost of acquisition and profit realized on resale; documentation relating to the denial of his $ 25-million loan application; quarterly earnings reports for three of Hofmeister's corporations; and an accounting of Hofmeister's 1999 income.

On May 26, 2000, while waiting for Golden's response, Murner sought to file a protective cross-claim against Clark. On behalf of Dasher, Murner continued to assert that Clark was not acting within the scope of his employment at the time of the accident, but claimed the **[*14]** right of indemnification from Clark should that issue be determined otherwise. The Hofmeisters initially objected to Dasher's motion to file the cross-claim, but soon after withdrew the objection.

On May 31, 2000, the Hofmeisters served upon Dasher a second set of interrogatories and requests for production of documents. Despite Golden's being "a little surprised" that the initial demand exceeded policy limits, the discovery still did not include a request to provide insurance information.

Also on May 31, 2000, Golden wrote to Murner again. He enclosed a copy of an amended complaint alleging that Dasher had violated federal Department of Transportation regulations prohibiting drivers to spend more than ten consecutive hours on the road without an eight-hour break. Based on that alleged violation, the proposed amended complaint demanded punitive damages be assessed against Dasher. Golden stated he would file the amended complaint if the case was not settled by June 22 for $ 1,000,000.

Golden's correspondence did not provide the documentation Murner requested, but did say that he had sought it from "Mr. Hofmeister and he will be providing that information to my office within the next few **[*15]** days." Golden also confirmed for Murner that Mr. Hofmeister agreed "to lower his demand to $ 1,000,000, which, according to you, is the policy limit of Dasher's insurance." Nothing in the record supports Golden's assertion that Murner had confirmed what Golden had previously assumed - that the limit of Dasher's automobile liability insurance policy was $ 1,000,000.

On the contrary, according to Murner's testimony, a telephone conversation took place around this time during which he conveyed to Golden the information regarding Dasher's policy of excess insurance coverage. Murner initially told Golden, as he had been told by Dasher, that those policy limits were $ 3 million. Later, Murner learned that the policy limits were not $ 3 million, but $ 5 million. Following a hearing on a procedural motion in Scott Circuit Court, Murner conveyed that corrected information to Golden. There is

no evidence in the record that impugns Murner's testimony.

Back at CIC's offices, senior claims examiner Julie Sullivan was developing a sense of the claim against CIC's insured, Dasher. Her role was to evaluate the claim based on information provided by Dasher's counsel. On June 9, 2000, she created a "Reserve **[*16]** Increase Memorandum," introduced at trial as Plaintiffs' Exhibit 5, stating:

> Information is sketchy at this time. . . . The claimant, George Hofmeister, DOB unknown, was in a wheel chair for five months and he had physical therapy. He was unable to conduct his business [but] is back to work now. His attorneys say he will likely need to have a joint replacement of his knee and hip. . . . His meds total around $ 100,000.

Hofmeister's economic circumstances, as well as a settlement demand in excess of Dasher's insurance coverage through CIC, also concerned Sullivan.

> Mr. Hofmeister is literally "worth millions." We have his tax returns [showing he did not receive a $ 5M bonus] which plaintiff may attribute to this accident. Dan [Murner] will meet with an accountant to review all this documentation. . . .
>
> In mid May a settlement demand of $ 1.5 million was initially proposed in the presence of Dasher officials. They immediately became very concerned due to personal exposure. . . . At that time, the issue of accepting the demand and tendering our limit of $ 1M, limiting the personal exposure of the insured to half a million versus potentially exposing them to millions was problematic due to **[*17]** coverage issues involved.

The coverage issues to which she referred included the fact that "Clark's personal carrier, KY Farm Bureau, tendered their $ 100,000 limits [and] some question regarding KY Farm Bureau stacking their coverage up to $ 600,000." Sullivan noted that "while the insured [Dasher] has an umbrella policy, it is not through CIC." This is the earliest indication in the record that a policy of excess insurance coverage existed. Still, neither the carrier nor the policy limits was identified.

On the other hand, Sullivan noted that there was still a question of Dasher's liability. The case had not developed far enough to know "whether Mr. Clark was on or off the clock." At that time, legal focus was on whether the "actions of Mr. Clark occurred outside the time restrictions of his employment."

As it turned out, Hofmeister's representations of his impaired physical condition were overstated. According to his pretrial disclosures in the spring of 2004, Hofmeister's medical expenses never totaled more than $ 50,037.92, far from the $ 100,000 to which he had testified. Also, Hofmeister never needed subsequent surgery or any other substantial medical treatment for his injuries. **[*18]** His pretrial disclosures placed a zero-dollar value on future medical costs. Nevertheless, for a time at least, the parties proceeded on Hofmeister's erroneous representations.

Meanwhile, the Hofmeisters, through Golden, had provided to Murner some documentation of Hofmeister's finances. However, according to a June 16, 2000, letter from Murner to Golden, there was still much requested documentation that had yet to be provided. Notably, there was no documentation of the $ 25-million loan application or its denial. An accounting expert hired on behalf of Dasher reported to Murner that the information Hofmeister had thus far provided only supported the conclusion that his businesses were losing money even before the accident. From 1995 to 1999, the cost of acquiring the businesses exceeded the cash generated by all of Hofmeister's businesses by $ 150 million. Dasher's expert could not reconcile Hofmeister's claim that his economic loss was attributable to the accident without additional documentation. He specifically requested documentation to support Hofmeister's income calculations, as well as records of intercompany loans and other subsidization of the losses shown to have been sustained **[*19]** by Hofmeister's equine-related and other businesses. Murner explained to Golden the reason such detailed information was necessary:

> As you know, this is not a W2 economic loss case. Your client derives his income from a myriad of sources, which we need to explore. If this cannot be accomplished by June 22 [Golden's settlement demand deadline], so be it. However, my client will not act on blind faith as you suggest. . . . [I]f you take out the economic claims and simply size this case up on medical expenses (past and future) and pain and suffering (past and future) the numbers do not come close to the limits of my client's insurance policy. For example, everything you have provided to us show [sic] medical expenses of approximately $ 50,000 rather than the $ 100,000 claimed by your client during deposition. . . . Your client is asking . . . me to assume without documentation that his economic losses make up the difference and exceed the policy limits . . . .
>
> I, of course, will put all of this in a formal request for

production of documents. However, the deadline for your response [to that discovery request] will fall after the deadline your client has arbitrarily imposed [to respond to **[*20]** the settlement offer].

Golden responded to Murner on June 20, 2000, that "Cincinnati Insurance Company has known about the claim since October 1999. . . . A cursory review of any of Mr. Hofmeister's tax returns for the past five years would reveal to the layman that he has a solid basis for his economic damages claim." Golden declined to send Murner any further medical records to support a claim for future medical costs stating simply that "Cincinnati Insurance Company is creating additional requests for information to serve as the basis for its refusal to settle this claim." [6] Furthermore, Golden charged CIC with failing to timely investigate and pay the claim, and with asking "for more information than the court would ever require Mr. Hofmeister to produce and that would take us several months to acquire." He then stated his intention "to hold Cincinnati Insurance Company responsible."

On June 21, 2000, Murner spoke by telephone with Golden and invited him to his office to discuss settlement. Golden declined the invitation. Murner therefore had a settlement proposal hand-delivered to Golden's **[*21]** office on June 22, 2000. There were several aspects to the settlement proposal.

First, because the issue of whether Clark was acting within the scope of his employment at the time of the accident had not been resolved, Murner pointed out the possibility that Dasher would have no liability whatsoever. Additionally, Murner's interpretation of the discovery produced thus far suggested some comparative liability on Mr. Hofmeister's part.

Second, because Hofmeister still had not provided the documentation Murner requested, both informally and through discovery, Hofmeister's claim for lost business earnings could not be properly assessed. Therefore, the settlement offer specifically reserved Hofmeister's right to pursue "any claim the Hofmeisters may have against Dasher for damages due to lost wages, or lost profits due to lost business opportunities[.]"

Third, Murner totaled "all of Mr. Hofmeister's medical expenses provided to Dasher by Plaintiffs' counsel to date," then subtracted "expenses previously paid for PIP [personal injury protection of $ 50,000]" by Hofmeister's own insurance. The balance was $ 9,275. [7] Dasher agreed to pay that sum and further agreed, having obtained CIC's consent, **[*22]** that CIC would "be responsible for negotiating any settlement for PIP, for expenses incurred as of the date of this settlement."

Fourth, Dasher agreed to pay Hofmeister $ 25,000 for future medical treatment despite the fact that "no medical evidence has been presented by the Hofmeisters' counsel regarding Mr. Hofmeister's need for future medical treatment[.]"

Fifth, recognizing Mrs. Hofmeister's "role in caring for Mr. Hofmeister[,]" Dasher agreed to pay her $ 25,000 on her loss of consortium claim.

Sixth, for Hofmeister's claim of past and future pain and suffering, Dasher agreed to add $ 50,000 to the $ 100,000 previously received from Clark's carrier making his pain and suffering claim about three times his medical expenses.

In effect, Dasher's total offer was $ 109,275, plus indemnification for the $ 150,000 previously paid by other insurers for a total of $ 259,275, plus the important reservation of Hofmeister's right to pursue his claim for lost income.

Before the workday ended, Golden, **[*23]** on behalf of the Hofmeisters, wrote to Murner stating that the "proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $ 1 million." Golden gave no credence to Murner's asserted defense that Clark was not acting in the scope of employment for Dasher, stating, "I have already presented to your office the applicable case law that clearly indicates Mr. Clark was acting within the scope of his employment[,]" and insisting that taking a contrary position "is a clear violation of the Unfair Claims Settlement Practices Act because liability has become clear." Similarly, according to Golden, Murner's position that Hofmeister might bear some percentage of fault "constitutes a violation of the Unfair Claims Settlement Practices Act." Finally, and contrary to the offer to reserve the claim for lost profits, Golden claimed that while Murner acknowledged a "viable claim for lost wages, lost profits, and lost business opportunities, [he]

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[6] The record reflects that no such medical records existed and, therefore, none could be sent.

[7] These figures indicate that Murner continued to err in favor of Hofmeister regarding calculation of medical expenses since his estimate exceeds Hofmeister's pretrial disclosure by more than $ 9,200.

did not offer a dime to settle that portion of our claim. This, too, is in violation of the Unfair Claims Settlement Practices Act."

Settlement negotiations were thus suspended. Negotiations would **[*24]** not resume in earnest until the issue of Dasher's vicarious liability was determined by the trial court. This did not occur until shortly before the final date set for the trial, October 14, 2002.

Between these two periods of settlement negotiation - the summer of 2000 and autumn of 2002 - substantial discovery took place as well as a variety of procedural and other motions. The following events, including extrajudicial events subsequently memorialized as part of the record, are relevant to our review.

On February 9, 2001, Golden wrote a peculiar letter [8] to Murner ostensibly attempting to settle one portion only of his clients' claims. The letter did not present any *offer* to settle. On the contrary, Golden was attempting to resurrect and accept one portion of Dasher's June 22, 2000, offer that Hofmeister rejected *in toto* eight months earlier. With still no proof of future medical expenses, Golden, on behalf of the Hofmeisters, wanted now to accept that portion of Dasher's previous offer. He wanted Murner to explain the "decision to withdraw the offer of settlement of $ 25,000[.]" He also wanted to know why Hofmeister could not accept one portion of the offer without accepting the other **[*25]** portions. In Golden's opinion, this violated Kentucky's UCSPA. Using the same wording as KRS 304.12-230(13), Golden claimed this amounted to "failing to promptly settle a claim where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under another portion of the coverage afforded by [CIC]."

Murner replied on February 15, 2001, documenting the history of Dasher's offer and Hofmeisters' rejection, and quoting Golden's June 2000 pronouncement that "[w]e will now proceed to trial and have the jury decide the issue of damages." Again, Murner insisted that liability was not as clear as Golden asserted and reminded Golden of the difficulty Dasher had in obtaining from Hofmeister sufficient information to assess his claim of lost profits. Finally, Murner stated, "I believe your allegations of bad faith that you have thrown about throughout this litigation are frivolous."

More than three years later, when Golden interrogated **[*26]** Murner at trial regarding this episode, Golden revealed that his February 9, 2001, letter was a calculated attempt to put Murner "on the spot." [9]

> Golden: You admitted you shouldn't have made that offer. You admitted it was a sham. . . . I put you on the spot on the $ 25,000 you offered in future medicals, to show that that was just a sham.
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> Murner: I did not admit it was a sham. . . . You rejected the whole $ 109,000 . . . . And then six [sic] months later you said, oh well, I'll take the $ 25,000 that you were offering for medicals, and I said you already rejected the offer and you hadn't proved anything regarding future medicals, so why would I go there?

The Hofmeisters continued to engage in discovery between the summer of 2000 and autumn of 2002. They served additional requests for production of documents and a third and fourth set of interrogatories on Dasher in September 2000 and May 2001, respectively. Again, the Hofmeisters never took advantage of the discovery process to obtain information regarding Dasher's insurance coverage.

Dasher, too, continued efforts through discovery to obtain Hofmeister's financial records so it could assess whether there was a causal relationship between the accident and Hofmeister's business failures. The trial court permitted such **[*28]** discovery even over Golden's motion for a protective order. Even then, Dasher subsequently found it necessary to obtain the

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[8] The oddity of Golden's letter surpasses the "curious letter" described in Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493, 495 (Ky. 1976), which is similar to some of Golden's other correspondence.

[9] On this point, Golden interrogated Murner, CIC representative Dan Walsh, and CIC's bad faith expert Carl Sumner. The essence of Golden's interrogation and argument is that: (1) the June 22, 2000, offer included $ 25,000 for future medical expenses; (2) there was no change in the medical proof between June 22, 2000, and February 9, 2001, when Golden "accepted" the offer, so the offer could not have become less justifiable; (3) despite this, CIC refused to pay over the $ 25,000; (4) Murner admitted that the $ 25,000-offer should not have **[*27]** been made; and (5) Murner's admission supported Golden's claim that it was a sham offer all along and, therefore, made in bad faith. This argument fails fundamentally since there was never any evidence of the need for future medical care. Murner's settlement recommendation to Dasher, and CIC's approval of the settlement offer for future medicals, was based on Golden's representation that he would eventually present such evidence. Golden attempts to make Murner and CIC the culprits because they relied on his representations in making the offer. The argument defies logic.

trial court's order compelling production of this documentation before Hofmeister would produce it.

On July 19, 2001, through Golden, the Hofmeisters moved to amend their complaint for a second time. They did not attach a copy of the proposed amended complaint to the motion, but stated their intent to assert a claim against CIC for violation of the UCSPA. Through Murner, Dasher moved the trial court pursuant to CR 11 to strike the motion as frivolous, having been filed for the improper purpose of attempting to force settlement of the underlying claim. Primarily, Dasher noted that its liability was still fairly debatable since no decision had yet addressed the scope-of-employment issue. Dasher also asserted that the Hofmeisters had continuously thwarted its efforts to substantiate their economic losses. The trial court granted the Hofmeisters' motion to amend the complaint and deferred a ruling on Dasher's CR 11 motion.

The second amended complaint listed a variety of grievances against CIC, each of which the Hofmeisters contended constituted a violation of the UCSPA. **[*29]** Shortly thereafter, the Hofmeisters amended the complaint again, adding an additional UCSPA claim against CIC. Now itself a defendant, CIC answered the two amended complaints and denied each of the substantive allegations in both.

In September 2001, the trial court agreed with CIC that the case against it for bad faith should be bifurcated from the underlying tort claim and entered an order to that effect. Attorney Michael Risley entered his appearance on behalf of CIC. The underlying tort claim went forward.

On March 15, 2002, Dasher took the deposition of a representative of the bank where Hofmeister had applied for and had been denied the $ 25-million loan. The bank representative acknowledged that he recommended Hofmeister's loan application to his superiors, but stated they ultimately denied the loan. He said that Hofmeister's medical condition following the accident did not affect either his recommendation or his superiors' denial of the application for credit. He testified, "I don't recall it being woven into the credit presentation as an issue we had to deal with[.]" Instead, "the final decision" to reject was based on "economic issues with his businesses, his horse business **[*30]** and other businesses, that he had that brought in risk factors that the bank [was] not willing to accept[.]" Nothing in the record indicates that the accident had any effect on the bank's denial of Hofmeister's application for a $ 25-million loan.

Trial was scheduled for the spring of 2002. Both the Hofmeisters and Dasher submitted proposed jury instructions that left the issues of Dasher's vicarious liability and Hofmeister's comparative negligence for resolution by the jury. For reasons which the Hofmeisters opposed but are not otherwise pertinent here, the trial was continued and eventually rescheduled for October 14, 2002.

The critical issue of whether Clark was acting in the scope of his employment was still not resolved when, between August 30 and September 4, 2002, the Hofmeisters, Clark and Dasher each filed motions on this issue. On September 13, 2002, the trial court entered an order finding that Clark was acting in the scope of his employment with Dasher.

There was conflicting evidence as to whether Dasher's dispatcher *ordered* Clark to return the keys and credit card himself that morning, or whether Clark, knowing the keys had to be returned, felt compelled to voluntarily undertake **[*31]** the task. The Hofmeisters argued that this specific question is irrelevant. The trial court seemed to agree, focusing instead on the facts that: (1) Dasher "indicated the keys had to be returned;" (2) return of the keys was for Dasher's benefit; (3) Dasher's dispatcher authorized the return of the keys; and (4) returning the keys was "incidental" to Clark's employment. The trial court noted and discounted the fact that Clark made two separate stops for coffee and fuel, stating those stops were "not evidence of any independent pursuit or deviation [but] merely in furtherance of Clark's primary mission[.]" The trial court did not address the facts that: (1) Clark was not on a direct route between his home and Dasher's offices when the accident occurred; (2) Clark did not recall why he deviated from the direct route to Dasher's offices; (3) Clark himself had created the circumstances necessitating a return of the keys and credit card; or (4) when asked in a pre-litigation interview whether he was on company or personal business, Clark himself responded, "[T]hat's debatable."

On October 3, 2002, rather than challenging the trial court's ruling, Dasher stipulated liability [10] and

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[10] Murner testified this was a tactical decision "to refocus the issues to the damages, which is what we always wanted to address in this case." On cross-examination, Golden attempted unsuccessfully to have Murner admit the stipulation indicated CIC knew Dasher was liable all along "because

simultaneously **[*32]** presented the Hofmeisters with an offer of judgment, pursuant to *CR 68*, in the amount of $ 175,000. [11] Eight days later, on October 11, the offer increased to $ 300,000. On the day of trial, October 14, Dasher offered $ 500,000. Before trial started, Dasher offered the $ 1,000,000-limits of its policy of automobile liability insurance. On behalf of the Hofmeisters, Golden accepted, but conditioned that acceptance upon certain concessions from some of the other defendants.

Because this occurred on the day trial was to commence, **[*33]** and because terms of the settlement were unclear, the parties agreed to go on the record with the trial court, as "the way to consummate this settlement[,]" to use Golden's words. Golden and Murner were present on behalf of their respective clients. Also present, either in person or by telephone conferencing, were representatives of Clark's personal insurer and the attorney for Farm Bureau Insurance. As the case against CIC for statutory bad faith had been bifurcated and all such claims were to be addressed later, attorney Risley was not present on behalf of CIC.

Golden initiated the discussion by representing he could "blackboard over $ 20 million in damages and that will expose Eugene Clark to that excess judgment[.]" Only moments into the hearing, a reference was made to the "excess policy with Dasher of $ 10 million[.]" Murner corrected the speaker and clarified that Dasher's excess policy was only $ 5 million. Owing to telecommunications glitches, Murner had to repeat three times that the amount of Dasher's excess insurance coverage was $ 5 million.

Before the negotiations ended, eleven separate references were made to the existence of Dasher's policy of excess insurance. In addition, **[*34]** the excess insurer was identified as Fireman's Fund three separate times. And the excess policy limits of $ 5 million were stated a total of four times. Nothing in the transcript indicates that anyone, including Golden, was surprised by or unaware of the existence of Dasher's policy of excess insurance.

The sticking point in settlement, however, was the relatively smaller amount of $ 100,000. This is one of the sums of insurance Golden collected for the Hofmeisters before initiating litigation. Before the parties could reach a settlement, one question had to be resolved: which party or insurance company would ultimately be responsible for that amount? The attorneys for the Hofmeisters and Dasher and Clark were attempting to convince the representatives of the insurance companies to waive the right to recover the sum from any of them.

Golden pointed out that he could easily prove more than $ 100,000 in damages and, if the trial went forward, the obstinacy of Clark's personal liability insurer "will expose Eugene Clark to that excess judgment." This prompted Clark's insurer to ask, "Isn't Mr. Clark an insured under the excess policy, also?" To this, Murner responded that he "had no authority **[*35]** from the excess carrier. A million dollars is what we're offering here." Golden proposed a simple solution: "[I]f [Clark's personal liability insurer] pays the hundred [thousand dollars] that it already committed to pay earlier, then we're all done and it's over with, we can all go home."

Clark's insurer balked. So, Golden announced he was prepared "to proceed against Eugene Clark, and if we ring him up, then we're going to take his personal assets . . . and our position is going to be that [Clark's personal liability insurer] has acted unreasonably and violated the Unfair Claims Settlement Practices Act[.]" Eventually, the representatives of the affected insurers agreed to brief and argue this particular issue among themselves, leaving the remaining parties out of that particular fray and free to settle their claims.

On the points of settlement, Murner was very clear that the settlement for the limits of Dasher's automobile liability policy embraced a universal release of liability relative to the underlying tort claim.

> Mr. **[*36]** Murner: Okay, Your Honor, my position is--and if I'm wrong, somebody tell me now. Cincinnati, excess carrier, Dasher and Clark are protected, and free and clear from--
> The Court: I don't know what anybody else thinks, but I am clear on that, for whatever it is worth.
> . . . .
> Mr. Murner: What I want to make sure is that this is a complete release. I mean, this is the standard complete release with the exception of [the remaining issues among the insurers regarding subrogation issues apart from the parties].
> Mr. Golden: I agree.

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nothing had changed in the case" from the date of Dasher's original offer, June 22, 2000, until liability was conceded.

[11] The Hofmeisters have argued throughout the litigation, and now in this appeal, that the net value of this $ 175,000-offer was $ 25,000 because of "liens" in favor of Travelers and Farm Bureau. There is nothing in the record supporting the existence of such liens.

In accordance with this agreement, Murner drafted a settlement agreement and release. [12] The Hofmeisters' right was reserved to continue pursuing the bad faith and UCSPA claims against CIC and Fireman's Fund. Otherwise, the Hofmeisters released Dasher, Clark, CIC and Fireman's Fund for all claims arising directly from the automobile accident only.

There was a delay in obtaining **[*37]** approval from the Hofmeisters' insurer and Clark's personal insurer relative to the subrogation issue. This delayed execution of settlement documents and disbursement of proceeds. Attempting to encourage movement on the issue, Golden filed a motion to enforce the settlement on behalf of the Hofmeisters, followed by a motion on his own behalf, based on his own lien, for immediate disbursement of his attorney fees and costs expended.

In his motions, Golden claimed that he never agreed to include CIC and Fireman's Fund in the release of the underlying tort action. Blaming Murner, Golden insisted that the trial court "stop the wrongful conduct of withholding the settlement proceeds in exchange for additional releases that were never bargained for[.]" Golden insisted the delay was to pressure the Hofmeisters into dismissing their bad faith claims.

> On behalf of Dasher and Clark, Murner responded that he had never included a provision in any proposed settlement agreement providing for protection against allegations of violation of the Unfair Claims Settlement Practices Act [or] in any correspondence that any release must contain protection from any potential bad faith allegations[.] Thus, any **[*38]** claim by Plaintiffs' counsel that settlement proceeds are being withheld to solicit a release of bad faith claims on behalf of Cincinnati Insurance and/or Fireman's Fund Insurance Company are simply unsupported by the correspondence between counsel and the proposed settlement release.

Murner's position is easily verified by the language of the settlement agreement itself. Furthermore, nothing in the record contradicts Murner's position on this issue, nor does the record support Golden's suggestion otherwise.

Eventually, all of the issues were resolved by the attorneys without the need for the trial court to rule. However, the delay was long enough that it allowed Allied Capital Corporation, one of George Hofmeister's judgment creditors, to intervene in this action and garnish the settlement proceeds before the Hofmeisters received them.

In May 2003, the Hofmeisters sought leave to file another amended complaint. In essence, this amendment added two counts. First, the Hofmeisters alleged that CIC's rapid increase in offers between October 3 and October 14, 2002, from $ 175,000 to $ 1,000,000, violated Kentucky's UCSPA. Second, they alleged that CIC intentionally prolonged settlement to **[*39]** purposefully take advantage of the Hofmeisters' worsening financial circumstances. The motion was granted and the amended complaint ordered filed on June 5, 2003.

In August 2003, ten months after the settlement negotiations were recorded before the trial court, it occurred to the Hofmeisters that they had an opportunity to file yet another amended complaint. Here, they alleged that CIC "misrepresented pertinent facts regarding the amount of insurance that was available" and "failed to disclose the existence of an excess insurance policy." The motion was granted and the amended complaint ordered filed on September 15, 2003.

In February 2004, the Hofmeisters sought leave to file what became their final amended complaint. Seemingly aware of this Court's nonfinal opinion in *Knotts v. Zurich Ins. Co., 2002-CA-001846, 2004 Ky. App. LEXIS 22 (Feb. 6, 2004)* that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim, the Hofmeisters' "Fifth Amended Complaint" [13] alleged that all of CIC's actions also supported a claim for common law fraud and intentional infliction of emotional distress. It appears from the record that this tactical decision was intended to avoid the potential that *Knotts,* **[*40]** once final, would totally defeat the Hofmeisters' claims under the UCSPA. The motion was granted and the amended complaint ordered filed on May 17, 2004, three days before trial.

Before trial commenced on May 20, 2004, CIC moved for a continuance because the amended complaint had

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[12] Golden actually made the first attempt at drafting the agreement. However, that draft was incomplete in that it did not include the release of CIC and Fireman's Fund as to the underlying tort claim and it left unresolved the subrogation dispute between the Hofmeisters' insurer and Clark's insurer.

[13] While this was the fifth amendment of the complaint after CIC was named as a defendant, it was the sixth time the original complaint was amended.

been filed so close in time to the commencement of trial. The motion was denied because there were no additional factual allegations, only additional legal theories. The trial judge also addressed numerous procedural and evidentiary motions, filed by both sides. Over CIC's objection, the trial court ruled that Murner was CIC's agent for purposes of settlement negotiation. *See, infra,* Section II.C.

Both sides tendered proposed jury instructions. The parties announced ready and the trial proceeded. At the close of evidence, each party moved for directed verdicts. As to the issues now before this Court, those motions were denied. The jury was instructed in preparation for its deliberations.

The trial court took the parties' respective proposed jury instructions into consideration **[*41]** but crafted its own. The court incorporated its previous holding that Murner was CIC's agent into Instruction No. 2, addressing violations of the UCSPA, and Instruction No. 3, addressing fraudulent misrepresentation. Therefore, the jury was entitled to attribute Murner's conduct to CIC for liability purposes. The jury received no instruction regarding fraud by omission, *i.e.,* the Hofmeisters' allegation that CIC failed to disclose the existence of the policy of excess insurance coverage. Further details of the jury instructions will be discussed as necessary in the context of the parties' various arguments. The case was turned over to the jury which found for the Hofmeisters on both Instruction No. 2 and Instruction No. 3, though not unanimously on either.

CIC filed motions for judgment notwithstanding the verdict; for a new trial; and to alter, amend or vacate the judgment. To the extent the bases for these motions are relevant to this appeal, they will be discussed *infra.* It is sufficient now to note only that all post-judgment motions were denied with the exception of the motion to reduce the punitive damages award. These appeals followed.

II. *Cincinnati Insurance Company v. Hofmeister,* [*42] 2004-CA-002296

CIC presents a plethora of arguments on appeal. Many of these arguments center on one central question: What legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to resolution of this case. After addressing this question generally, we will apply the law to the facts of this case, and then address CIC's additional arguments *seriatim.*

We further preface our discussion by noting two factors that will distinguish this case from many others. First, the underlying litigation was a negligence action brought by a claimant seeking restitution from a tortfeasor. It was not a contract action brought either by the first-party insured, by a third-party beneficiary of an insurance contract, or a third party who stood in the shoes of the insured as a result of an assignment. Second, the Hofmeisters made no attempt to settle the case with Dasher prior to the filing of the complaint. Consequently, whether the concepts discussed here have equal application to pre-litigation conduct will depend on circumstances not present in this case.

A. Standard of Review

Many **[*43]** of the issues addressed here were preserved in more ways than one. The issues which are dispositive of this case involve the denial of CIC's motions for directed verdict and for judgment notwithstanding the verdict. The same standard applies to both. *Prichard v. Bank Josephine, 723 S.W.2d 883, 885 (Ky.App. 1987).* ***HN1***[↑] A directed verdict or judgment notwithstanding the verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buchholtz v. Dugan, 977 S.W.2d 24, 26, 45 11 Ky. L. Summary 7 (Ky.App. 1998); see also, Bierman v. Klapheke, 967 S.W.2d 16, 18, 45 5 Ky. L. Summary 18 (Ky. 1998).* A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. *Bierman at 18.* The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id. at 18-19.*

B. Relationship of Attorney Defending Insured and Insurer - Generally

In Kentucky, the relationship of the insurer to the attorney **[*44]** hired to defend the insured has been discussed primarily in caselaw interpreting the Rules of Professional Conduct, Supreme Court Rule (SCR) 3.130. While the trial court was not inclined to consider these cases because Murner's professional responsibility was not directly in issue, we believe they are illuminating.

In American Ins. Ass'n v. Kentucky Bar Ass'n, 917 S.W.2d 568 (Ky. 1996), the insurance industry sought permission for its insurer members to use in-house lawyers to defend their insureds, or at least to engage outside counsel on a "set fee" or retainer basis to handle all litigation. Both requests were denied.

Reaffirming the sanctity of the relationship between the insured and the attorney hired to defend him, our Supreme Court reemphasized that "[n]o man can serve two masters[.]" American Ins. Ass'n at 571, *quoting* Kentucky State Fair Bd. v. Fowler, 310 Ky. 607, 615, 221 S.W.2d 435, 439 (1949). It is axiomatic that a lawyer must serve his client dutifully and loyally. Building upon that axiom, the Supreme Court recognized that granting the industry's request would move the attorney closer to certain "inherent pitfalls and conflicts" that would interfere with his duty and **[*45]** loyalty to the client. Id. at 571.

> Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is *controlling* the legal representation.

American Ins. Ass'n at 573 (emphasis supplied). To quell that "fear," "[w]e continue to adhere to the view that it would be contrary to public policy to allow the insurer to control the litigation[.]" Wheeler v. Creekmore, 469 S.W.2d 559, 563 (Ky. 1971).

American Ins. Ass'n was not the first time we rejected a "rule [that] would be inimical to the preservation of traditional and longstanding concepts associated with attorney-client relationship, as recognized by Kentucky law." American Continental Ins. Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12, 13, 45 13 Ky. L. Summary 18 (Ky.App. 1998) (rejecting excess insurer's claim of right to sue its insured's attorney for malpractice). Our courts simply cannot ignore Kentucky's consistent refusal to allow the insurer any right to control the attorney's independent manner of representing its insured. That independence has a long history.

In New Independent Tobacco Warehouse, No. 3 v. Latham, 282 S.W.2d 846 (Ky. 1955), **[*46]** our highest court said that the "general rule is the services of a professional man, such as a lawyer . . . are rendered under an independent contract[.]" Id. at 848. That is, a lawyer is one "who follows [his] employer's desires only as to results of work, and not as to means whereby it is to be accomplished." Romero v. Administrative Office of Courts, 157 S.W.3d 638, 642 (Ky. 2005), *quoting* BLACK'S LAW DICTIONARY 770 (6th ed.1990). These same rules apply when an insurer selects and pays an attorney to represent its insured. The Tennessee Supreme Court accurately described the relationship:

> In the typical situation in which an insurer hires an attorney to defend an insured, the relationship of the insurer and its attorney is precisely that of principal to independent contractor. [T]he attorney is engaged in the distinct occupation of practicing law . . . one in which the attorney possesses special skill and expertise. [T]he attorney generally supplies his or her place of work and tools; the attorney is employed and paid only for the cases of individual insureds; and he or she alone, consistent with ethical obligations to ensure competence and diligence in the representation, determines **[*47]** the time to be devoted to each case. Finally, and obviously, the practice of law is not, nor could it be, part of the regular business of an insurer.

Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 393-94 (Tenn. 2002); *see also,* Sam Horne Motor & Implement Co. v. Gregg, 279 S.W.2d 755, 756-57 (Ky. 1955)(factors for determining independent contractor status); *see also,* Vires v. Dawkins Log & Mill Co., 240 Ky. 550, 42 S.W.2d 721, 722 (Ky. 1931)("independent contractor is . . . independent of his employer in the execution of his work, and may labor at the times and in the manner he prefers.").

Clearly, the factor most critical to the attorney's retention of his status as an independent contractor, *vis-a-vis* the insurer, is the attorney's retention of control over the means by which he accomplishes the insurer's desired result - defense of its insured. Home Ins. Co. v. Henderson Lodge, No. 732, Loyal Order of Moose, 201 Ky. 522, 257 S.W. 422, 423 (Ky. 1923)("If [one] is merely subject to the control or direction of the [employer] as to the result to be obtained, he is [still] an independent contractor. If [one] is subject to the control of the employer as to the means, he **[*48]** is not an independent contractor.")(quotation marks and citation omitted). We conclude that HN2[↑] the relationship of an attorney hired to defend an insured relative to the insurer that hired him, at least initially, is that of independent contractor. [14]

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[14] This same conclusion has been reached by many of our sister states. *See,* ***Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 788 N.E.2d 522, 539-41 (Mass. 2003)***(Where lawyer "controls the strategy, conduct, and daily

As a general rule, HN3[↑] an employer is not liable for the torts of an independent contractor in the performance of his job. Miles Farm Supply v. Ellis, 878 S.W.2d 803, 804 (Ky.App. 1994). While general rules often have philosophical or logical origins, their exceptions typically are **[*49]** born of practical realities. Therefore, we cannot ignore the practical reality that an insurer may seek to exercise actual control of an attorney's work, even though lacking the right to do so. Our common law embraces that possibility.

Long ago, Kentucky recognized that HN4[↑] if a principal lacking the right of control nevertheless "personally interferes with, undertakes to do, manage or control the work of the independent contractor, he thereby destroys the relationship of independent contractor." Madisonville, H. & E.R. Co. v. Owen, 147 Ky. 1, 143 S.W. 421, 424 (Ky. 1912). The independent contractor would thus convert to an employee or agent. Our review of authority reveals that Kentucky independent contractors, once possessed of the right to control their own work, are not inclined to relinquish that right to the employer. In fact, we failed to discover any case in which that has occurred. [15]

However low the rate at which typical independent contractors relinquish the *right* to control their own work, logic compels the conclusion that the rate would be even lower when that right is coupled with a *duty.* Unlike other independent contractors, the HN5[↑] attorney who relinquishes the right to control will perforce violate his duty under the Rules of Professional Conduct, Rule 1.8(f)(2), and "clearly subject himself to severe discipline." Summit v. Mudd, 679 S.W.2d 225, 226 (Ky. 1984). An attorney's maintenance and protection of his independent contractor status is thus additionally reinforced. We therefore agree with our sister court that "cases in which an insurer may be held liable under an agency theory will be rare indeed." Givens at 395.

We also believe Givens indicates the proper standard for HN6[↑] determining whether the insurer has exercised actual control of the attorney despite lacking the right to do so. Such control must be invidious in that it "affect[s] the attorney's independent professional judgment . . . interfere[s] with the attorney's unqualified **[*51]** duty of loyalty to the insured, or . . . present[s] a reasonable possibility of advancing an interest that would differ from that of the insured." Givens at 395.

We now apply these criteria to the facts of this case.

C. Whether the Trial Court Erred in Failing to Direct a Verdict That Murner Was Not CIC's Agent

The trial court concluded that Murner was CIC's agent for purposes of settlement negotiations. CIC claims that ruling was error. We agree.

The trial court did not engage in the analysis indicated above, but instead applied the reciprocal analysis of whether Murner was CIC's agent. HN7[↑] Whereas independent contractor status is shown by the *absence* of the principal's control over the work to be performed, agency is shown by its *presence.* Just as with the independent contractor analysis, "the right to control is considered the most critical element in determining whether an agency relationship exists." Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003)(citation and quotation marks omitted). Therefore, the trial court's analytical approach was effectively the same as ours.

During oral argument of the issue, the trial court stated, "[i]t's pretty clear to me that Mr. Murner was *controlled* **[*52]** *and guided* by Cincinnati Insurance Company in terms of settling this case." (Emphasis supplied). The trial court determined that CIC exercised sufficient control over Murner to make him CIC's agent based on the following three facts alone:

(1) "Murner was hired by Defendant [CIC] to represent Dasher;"

(2) "Murner was required to report to [CIC];" and

(3) CIC "would have to approve any settlement offers [recommended by Murner]."

Having examined the record and finding no additional facts that would reinforce this list, we conclude that CIC was entitled to a directed verdict that Murner was not

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details of the defense . . . an insurer cannot be vicariously liable for the lawyer's negligence."), *and cases cited therein, and,* Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co., 963 F.Supp. 452, 454-55 (M.D.Pa. 1997)("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"), *and cases cited therein.*

[15] Several cases, notably United Engineers & Constructors, Inc. v. Branham, 550 S.W.2d 540 (Ky. 1977), reaffirm the longstanding rule that "the main dispositive criterion is whether it is understood that the alleged principal or master has the *right* to control the details of the work." Id. at 543 (emphasis **[*50]** supplied). Here we are speaking of a different concept - the principal's exercise of control despite having no right to do so.

CIC's agent.

Respectfully, we believe the learned trial judge erred by not considering closely enough just what caused these three facts to occur. The trial court concluded they occurred because an agency relationship existed between Murner and CIC. But the record reveals that none of these three facts was intended as a means by which CIC would exercise control over Murner as its agent. Instead, each fact relates directly to a specific duty created by the insurance contract between CIC and Dasher. The contract and these duties existed well before CIC engaged Murner as Dasher's legal counsel.

The insurance **[*53]** contract created specific reciprocal duties that CIC and Dasher were required to satisfy when certain claims of Dasher's liability were asserted. CIC's duty was to defend such claims and to satisfy the legitimate ones. These duties were conditioned upon Dasher's satisfaction of its own duty to cooperate with CIC "in the investigation, settlement or defense of the claim[.]" To be entitled to the benefits of its bargain with CIC, Dasher had to obtain CIC's approval of any settlement it expected CIC to pay. At the same time, however, the contract did not prohibit Dasher from paying a claim without CIC's approval and outside the contract - that is, by utilizing any other Dasher asset to settle the Hofmeisters' demands - but such a payment would be, according to the insurance contract, "at the 'insured's' own cost." [16]

CIC performed its duty to defend Dasher by selecting and agreeing to pay Murner to serve as Dasher's legal counsel. Experience tells us that an insurer is better able than its insured to select legal counsel to represent that insured. *State Farm Mut. Auto. Ins. Co. v. Marcum, 420 S.W.2d 113, 120 (Ky. 1967)*(insurer is "a professional defender of law suits[.]"), *overruled on other grounds, Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493 (Ky. 1975)*. Our courts will not penalize a party because he prudently authorized his experienced insurer to select the right attorney to defend him. *Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979)*(An insured who "has paid an insurance **[*55]** company to exercise that choice for him . . . should not be penalized for his prudence in that respect."). We are not surprised that such prudence was exercised in this case. When Dasher paid its premium, it purchased CIC's expertise in selecting an attorney and, when a claim was asserted, CIC performed. It simply makes no sense to conclude that CIC's performance of its duty to select Dasher's attorney also supports a finding that the attorney thereby became CIC's agent. Absent evidence that there was more to such selection and compensation than satisfaction of a duty to Dasher, we cannot conclude that this fact supports a finding that CIC controlled Murner.

The trial court and the Hofmeisters next place much reliance upon Murner's cooperation with CIC and the acknowledgment that he routinely obtained CIC's approval before offering settlement to the Hofmeisters. This reliance is misplaced.

As Dasher's agent, Murner had a duty to follow Dasher's instructions. If Murner's cooperation with CIC had been contrary to Dasher's instructions, that would support an argument for Murner's role as CIC's agent. But nothing in the record suggests such a thing occurred. Murner's cooperation with CIC **[*56]** was consistent with the duty he owed to his client, Dasher; it was consistent with Dasher's duty to CIC; it was consistent with Murner's relationship to CIC as an independent contractor. *See, Latham, supra, 282 S.W.2d at 848* (Fact that employer and independent contractor engaged in "daily conferences merely represented the [employer's] right to see that the work was progressing . . . and does not militate against the idea Latham was an independent contractor.").

The same can be said for Murner's act of obtaining CIC's approval before settlement was offered. Murner was, again, simply carrying out the contractual duty his client owed CIC.

It is also clear that Murner was not functioning as CIC's claims adjuster. The respective roles of the insured's attorney and the insurer's claims adjuster are entirely distinguishable. The adjuster's fundamental role is to settle the claim *apart from* litigation; the attorney's is to effectively conduct a defense in the litigation. The

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[16] We should not forget that a contract of liability insurance is simply an asset from which a liability may be satisfied. *See, Hillman v. American Mut. Liability Ins. Co., 631 S.W.2d 848, 848 (Ky. 1982)*(liability insurance policy was tortfeasor's "only asset[.]"). Accident victims assert claims against alleged tortfeasors, not directly against the tortfeasor's insurer. Nothing **[*54]** prevents a tortfeasor's satisfaction of a claim from his assets other than insurance. It is simply because use of an insurance asset has the least disruptive effect on the continued operation of a business that it is naturally the first asset a business considers when contemplating claims settlement. However, whether to actually utilize that asset first remains the option of the business. It is not the option of the accident victim or his attorney to demand that the claim be satisfied from a contract of insurance.

adjuster owes no independent loyalty to the insured apart from that owed by the insurer. The attorney's loyalty to his insured client is paramount. And, unlike the attorney whose conduct is controlled by his oath, the adjuster **[*57]** receives direction and authority from the insurer, which is why he has been deemed the insurer's agent. *Fidelity & Guaranty Ins. Underwriters, Inc. v. Gregory, 387 S.W.2d 287, 289 (Ky. 1965)*. Furthermore,

> the adjuster and the claimant usually deal directly with one another. If their negotiations fail, the adjuster negotiates with plaintiff's counsel, and even after litigation is begun, the adjuster frequently deals directly with plaintiff's counsel.

Gailor v. Alsabi, 990 S.W.2d 597, 608, 46 3 Ky. L. Summary 16 (Ky. 1999)(Lambert, C.J., dissenting).

Our conclusion that CIC did not control Murner is also strengthened by the undeniable fact that Murner and Dasher enjoyed an attorney-client relationship. When Murner undertook Dasher's legal representation, he became Dasher's agent, not CIC's. *Douthitt v. Guardian Life Ins. Co. of America, 235 Ky. 328, 31 S.W.2d 377, 379 (1930)*(*HN8*[↑] "an attorney is an agent of his client"). Kentucky has always jealously guarded the attorney-client relationship, for *HN9*[↑] while "[t]he relationship is generally that of principal and agent . . . the attorney [owes his client] a higher duty than any ordinary agent owes his principal." *Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky.App. 1978)*. As described **[*58]** *supra,* Murner's relinquishment of control to CIC would have required that he abdicate his professional responsibility, abandon his true principal, and jeopardize his career.

We conclude that *HN10*[↑] where there is no evidence other than the fulfillment of those duties existing between the lawyer and the insured as his client, and the fulfillment of those duties existing between the insured and the insurer, there can be no finding of an agency relationship between the insurer and the attorney it hires to defend its insured. These duties exist and will be carried out in every case of this nature. If we held that these facts alone would support a finding that the insurer controlled the attorney, not only would we have to conclude that the attorney is *always* the insurer's agent, we would be inviting, if not requiring, the very conflicts our caselaw and ethical rules seek to avoid. *See, e.g., American Ins. Ass'n, supra;* Kentucky Rules of Professional Conduct, (SCR) 3.130(1.7) and (1.8).

For their part, the Hofmeisters assert that additional evidence does exist. They claim Murner became directly involved in deciding whether CIC's policy covered his client's employee. Examination of the record does **[*59]** not support more than their attorney's argument to that effect, and the unrefuted evidence of record contradicts the assertion. In his testimony, Murner made the point, and we believe correctly, that the scope-of-employment issue (critical to his client's common law liability to Hofmeister) and the coverage issue (critical to CIC's contractual liability to Clark as a third-party beneficiary) were independent considerations, and that his focus was on the former. Murner's opinion regarding scope of employment may have affected CIC's decisions regarding coverage, but that alone will not support an agency relationship between CIC and Murner.

The Hofmeisters also believe that CIC should be judicially estopped from denying the agency relationship because of a prior assertion in this same proceeding that CIC's communications with Murner were privileged. We disagree. *HN11*[↑] "The judicial estoppel doctrine . . . prevent[s] a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party *in a prior proceeding.*" *Colston Investment Co. v. Home Supply Co., 74 S.W.3d 759, 763 (Ky.App. 2001)*(emphasis supplied). Even if we were to expand the doctrine to include **[*60]** inconsistent positions within the same proceeding, we certainly could not do so selectively. We would have to apply the doctrine equally to the Hofmeisters who sought to avoid the attorney-client privilege by arguing below that Murner was not CIC's attorney. To use the Hofmeisters' attorney's words, "As this Court is well aware, an attorney can only represent the insured."

The Hofmeisters next argue that Murner had either actual or apparent authority to bind CIC in settlement negotiations. Though the brief makes virtually no reference to the record on this point, our examination does not disclose evidence to justify such a conclusion. Until the complaint was amended in mid-August 2001, there was no claim against CIC to be settled. After that point, attorney Risley was hired to represent CIC. We find it difficult to understand this argument under these circumstances. Evidence that Murner sought a release that would include CIC, and even evidence that Murner conveyed information to Golden that CIC would be responsible for negotiating Hofmeister's PIP settlement, is not inconsistent with Murner's independent contractor status *vis-a-vis* CIC.

However, the trial court, citing *Clark v. Burden, 917*

S.W.2d 574 (Ky. 1996), **[*61]** appears to have accepted this last argument. We believe that case is inapposite. The attorney with settlement authority at the center of *Clark* represented the tort claimant. Id. at 575. The only other attorney involved represented the joint tortfeasors and not either of their insurers. *Id.* In fact, no insurer is mentioned at all. *Clark* simply stands for the proposition that, under proper circumstances, an attorney can bind his client. CIC was not Murner's client. Excluding a sort of circular argument, we simply cannot see how *Clark* supports the finding the CIC exercised the kind of control over Murner that would have made Murner its agent.

The Hofmeisters' argument that Murner could bind CIC in settlement reveals a fundamental confusion about the nature of the underlying claim. An automobile accident gives rise to a tort claim against the tortfeasor, but not any kind of claim against that tortfeasor's insurer (unless, of course, the claimant is also an insured under the same policy). The HN12[↑] accident victim has no right, prior to obtaining a judgment against the tortfeasor, to assert a direct claim to insurance policy proceeds. Central Mut. Ins. Co. v. Pippen, 271 Ky. 280, 111 S.W.2d 425, 426 (Ky. 1937); **[*62]** *cf.*, Wheeler v. Creekmore, 469 S.W.2d 559, 564 (Ky. 1971)(where one jurist lamented the fact that an insurance contract is not "viewed as one vesting in the injured third party a direct cause of action;" Osborne, J., concurring). Consequently, CIC had no liability in the underlying tort action that would have required negotiation or compromise. If there had been evidence that Murner had authority to bind CIC, it would have been, at best, merely incidental to his duty to defend Dasher.

The record is devoid of any evidence that CIC exercised any actual control, invidious or otherwise, over the means by which Murner accomplished his representation of Dasher, including his efforts toward settlement of the tort claim. These settlement efforts are best characterized as an appropriate attempt by Dasher's attorney, utilizing a Dasher asset (the contract of insurance), in accordance with contract terms requiring Dasher's cooperation and CIC's approval, to settle a tort claim against his client. [17]

We therefore agree with CIC that the trial court erred by denying its motion for directed verdict that Murner was not CIC's agent. Murner began and maintained his representation of Dasher as CIC's independent contractor. Consequently, the general rule prevails and CIC is not vicariously liable for any of Murner's actions undertaken in the performance of his representation of Dasher. Miles Farm Supply v. Ellis, 878 S.W.2d 803, 804 (Ky.App. 1994).

D. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Fraudulent Misrepresentation

CIC asserts the trial court erred by denying its motion for directed verdict on the Hofmeisters' claim of fraudulent misrepresentation. We agree.

HN13[↑] Common law fraudulent misrepresentation requires proof of six elements: "(1) that the declarant made a material **[*64]** misrepresentation to the plaintiff, (2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff." Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256, 262 (Ky.App. 2007). There must be clear and convincing proof of each of these elements. With regard to at least three of these elements, the proof was entirely lacking. Therefore, the trial court's denial of a directed verdict and judgment notwithstanding the verdict was clearly erroneous.

The trial court adopted the Hofmeisters' proposed fraud instruction language which misidentified the misrepresentation as "that there was only one (1) million dollars in insurance coverage[.]" [18] They claimed

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[17] In view of our holding, we need not rely on the alternative basis for reversal that the record is completely devoid of evidence sufficient to constitute the required mutual "manifestation of consent" **[*63]** that Murner serve as CIC's agent. Phelps v. Louisville Water Co., 103 S.W.3d 46, 50 (Ky. 2003). Without contradiction, Murner testified that he never consented to have either his litigation conduct or his settlement conduct controlled by CIC, and that his loyalty to his client was never compromised by any obedience to CIC inconsistent with his duty as Dasher's attorney.

[18] There is a technical difference between the instruction's wording and the actual language the Hofmeisters alleged misled them - that their $ 1.5-million demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" The October 14, 2002, settlement conference is the first time the record reflects that either Murner or CIC represent that the limits of the policy CIC wrote for Dasher were $ 1,000,000. CIC proposed more generally that the instruction simply ask the jury to determine whether CIC had misrepresented "pertinent facts" regarding insurance coverage. Jury

Murner made this statement as CIC's agent in his letter to Golden dated May 18, 2000. We have already determined that Murner was not an agent of CIC, but its independent contractor. Thus CIC is not vicariously liable for that statement. It is not debatable that no other CIC representative made such **[*65]** a statement. CIC cannot be the declarant of the alleged actionable representation. Therefore, no evidence supports the first element of fraudulent misrepresentation - that CIC made a material misrepresentation.

The Hofmeisters respond by arguing that even if Murner was an independent contractor, CIC can still be liable for fraudulent misrepresentation on its own account. Arguing for what might be termed reverse engineering of the tort, they urge us to conclude that the jury inferred fraudulent misrepresentation from CIC's **[*66]** breach of its duty to disclose that Dasher had another asset to satisfy their claim, *i.e.,* the excess policy. This presumes a duty to disclose. However, the duty to disclose describes an element of the different tort of fraudulent concealment requiring proof of "substantially different elements." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky.App. 2003)*.

Disregarding, *arguendo,* that the jury was not instructed as to the tort of fraudulent concealment, and further *equating* fraudulent concealment with fraudulent representation, *cf., Bankers Bond Co. v. Cox, 263 Ky. 481, 92 S.W.2d 790, 792 (1936)*("such concealment was in fact a false representation"), we do not find merit in either of the Hofmeisters' arguments that CIC owed them such a duty.

The Hofmeisters quote *Williams v. Kentucky Dept. of Educ., 113 S.W.3d 145 (Ky. 2003)*, for the proposition that "when the principal is under a duty to provide protection for . . . others and confides the performance of that duty to a servant . . . who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, *i.e.,* is an independent contractor" such as **[*67]** Murner. *Id. at 151*. We believe *Williams* is not helpful. While an accurate quote, this is not an accurate reflection of the holding.

In *Williams,* two students skipped school and were involved in an automobile accident resulting in the death of one student. The student's estate sought relief against the Kentucky Department of Education (DOE) claiming negligent supervision. The principal issue in *Williams* was DOE's defense that

> local boards of education are not agents of the DOE but are separate and distinct agencies of the Commonwealth assigned to perform separate and distinct functions, *i.e.,* they are co-agents; and, thus, the DOE is not vicariously liable for the failures of employees of local boards[.]

Id. at 152. The principal holding in *Williams* was a rejection of that argument.

> From the language and structure of this statutory scheme, we conclude that the legislative intent was to vest the overall management, operation, and control of the common schools in the DOE, with the local boards of education *functioning as agents* of the DOE . . . . Thus viewed, the statutory relationship between the DOE and the local board was more *akin to that of principal-agent* than to that of co-agents.

Id. at 154 **[*68]** (emphasis supplied). The issues had nothing to do with independent contractors. The language upon which the Hofmeisters rely is mere *dicta.*

Furthermore, we believe the Hofmeisters misinterpret these *dicta.* They argue this language supports a holding that CIC owed a duty to "provide protection" to them by disclosing the existence of a potential source of recovery for a liability they had yet to establish. We believe no such duty exists. *Cf., National Sur. Corp. v. Hartford Cas. Ins. Co., 493 F.3d 752, 760-61 (6th Cir. 2007)*(a slightly different concept; "no Kentucky court has recognized a duty" nor is there "any reason why the Kentucky Supreme Court would impose a duty on an insurance company [even] to investigate whether its insured has other insurance coverage."). Support for our view can be found by reading *Williams* more closely.

The *Williams* quote, referencing a duty to provide protection for others, is based on *RESTATEMENT (SECOND) OF AGENCY § 251* (1958). Contrary to the Hofmeisters' suggestion, that section does not describe a manner in which vicarious liability may be *created* absent an agency relationship. As even the caption to § 251 illustrates, the kind of liability being described **[*69]** presumes the agency relationship *already exists.* RESTATEMENT (SECOND) OF AGENCY, *supra,* § 251 ("Liability For Physical Harm *Caused By A[n] Agent;"*

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instructions identifying the alleged representation must portray it with accuracy.

emphasis supplied). [19]

The Hofmeisters argue that there is an alternate source for CIC's duty. Citing *Smith v. General Motors Corp., 979 S.W.2d 127, 45 13 Ky. L. Summary 9 (Ky.App. 1998)*, the Hofmeisters claim CIC's duty arose "from a *partial disclosure* of information, [or] from particular circumstances such as where one party to a contract has *superior knowledge* and is relied upon to disclose same." *Smith at 129* (emphasis supplied). Neither argument has merit.

Taking the latter first, the "superior knowledge" argument requires that the "defrauder" and the "defraudee" be parties to the same contract. We should not have to point out that the Hofmeisters and CIC were not in privity.

The "partial disclosure" argument also fails. The **[*70]** Hofmeisters maintain that Murner's letter constitutes a disclosure about insurance coverage that, because it was only partially true, was a false representation of the *whole* truth. *See, Dennis v. Thomson, 240 Ky. 727, 43 S.W.2d 18, 23 (1931)*. Therefore, goes their argument, CIC had a duty to supplement Murner's information with a disclosure of the excess policy. The problem with this argument, whether under a theory of fraudulent concealment or fraudulent misrepresentation, is that the Hofmeisters' reliance on the information conveyed must be reasonable.

The reliance element contained in Jury Instruction No. 3(f) carried with it the implicit requirement that the reliance be reasonable. *Harralson v. Monger, 206 S.W.3d 336, 341 (Ky.2006)*("*[B]lind* reliance . . . fails the fifth requirement of fraud - *reasonable* reliance upon the claimed fraudulent act."). (Emphasis supplied). Based on the record before us, the Hofmeisters' reliance on their own or their attorney's impression of Murner's letter was unreasonable for several reasons.

Murner testified that when he learned Dasher had an excess policy, he told Golden about it, not once but twice. Golden did not take the stand to refute Murner, **[*71]** nor did the Hofmeisters present any other evidence contradicting Murner's testimony. Even if the jury chose to disregard Murner's testimony entirely, we are left with the transcript of the settlement negotiations, conducted on October 14, 2002, and attended by Golden, showing that the excess policy was referenced one-and-a-half dozen times. These references occurred before the conditions Golden placed on settlement were met and, therefore, before the Hofmeisters were legally committed to accept Dasher's settlement offer. In fact, after October 14, 2002, substantial issues remained and the Hofmeisters had to move the trial court to decide one of the issues remaining between the Hofmeisters' and Clark's insurers. The settlement agreement itself was not finalized until December 2002.

Most significantly, it is well established that ***HN14***[↑] "[i]f the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless." *Bassett v. National Collegiate Athletic Ass'n., 428 F. Supp. 2d 675, 684 (E.D.Ky. 2006), quoting Mayo Arcade Corp. v. Bonded Floors Co., 240 Ky. 212, 41 S.W.2d 1104, 1109 (1931)*. **[*72]** The case cited most frequently in Kentucky for this point of law is one of our earliest. In *Moore v. Turbeville, 2 Bibb 602, 5 Ky. 602, 1812 WL 644, 5 Am.Dec. 642 (Ky. 1812)*, our high court said:

> [W]here an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim "*vigilantibus non dormientibus jura subveniunt,*" emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law.

Moore, 5 Ky. at 604.

In the two and one-half years of substantial discovery that occurred in this case, the Hofmeisters elected never to seek discovery of the extent of Dasher's insurance as authorized by *CR 26.02(2)*. We believe use of *CR 26.02(2)* perfectly illustrates the kind of "ordinary vigilance and attention" expected by this rule of law. On May 22, 2000, the Hofmeisters' attorney was "a little surprised" by Murner's representation of insurance. [20]

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[19] Generally, *RESTATEMENT (SECOND) OF AGENCY § 251* describes the liability of a party who, once owing a non-delegable duty of protection to a third person, cannot avoid liability on agency law grounds for the injury to that third person resulting from the negligence of an agent, regardless of whether the agent is a servant or a non-servant.

[20] Mr. Hofmeister testified that he too was surprised and, in response to Golden's examination at trial said, "I asked you to ask them about that [excess coverage] because I was surprised that they didn't have more insurance."

This uneasiness could have been eliminated if only the Hofmeisters had asked for insurance **[*73]** information when they prepared and served discovery requests nine days later on May 31, 2000. [21] Failing to exercise that ordinary diligence at any time throughout the litigation, the Hofmeisters can claim no more than that theirs was the kind of "blind reliance" deemed unsatisfactory in *Harralson, supra.*

In response, the Hofmeisters cite *Meyers v. Monroe, 312 Ky. 110, 226 S.W.2d 782 (1950)*, for the proposition that CIC "cannot escape on the ground that the complaining party should not have trusted him[.]" *Id. at 785*. They fail to note that *Bankers Bond Co. v. Cox, 263 Ky. 481, 92 S.W.2d 790 (1936)*, relied upon as authority in *Meyers,* applies this concept only "where the one claiming to be deceived is not shown to have at hand any reasonably available means of determining the truth of representations made to him[.]" *Id. at 792*. Clearly, the Hofmeisters do not fall **[*74]** in the category of claimants contemplated by *Meyers.* Proof of the fifth element of fraudulent misrepresentation - reasonable reliance - is therefore entirely lacking.

There is yet a third element of fraudulent misrepresentation that entirely lacks proof in this case. There is no evidence that Murner knew the statement to be false when made on May 18, 2000. The Hofmeisters offered no evidence at all to refute Murner's testimony that he did not know of the existence of the excess insurance until later. [22] The earliest documentary evidence of the excess policy is dated June 9, 2000. Therefore, no evidence supports the third element of fraudulent misrepresentation.

While CIC presents arguments regarding each of the six elements of fraudulent misrepresentation, our examination is sufficient to convince us that the Hofmeisters could not and did not establish that claim. The trial court erred by denying CIC's motion for a directed verdict on the Hofmeisters' claim of fraud.

E. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Violations of the UCSPA

The Hofmeisters alleged violations of several sections of the UCSPA. Although the jury was instructed on four of those sections, the allegations boil down to a claim that CIC did not promptly offer to pay the Hofmeisters what their claims were reasonably worth. *See, Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 454, 44 12 Ky. L. Summary 28, 46 3 Ky. L. Summary 25 (Ky. 1997)*.

This case exemplifies one of our Supreme Court's warnings about UCSPA claims - the fact "that the statute is not specifically designed to accommodate third party claims [23] . . . makes trial nearly impossible and appellate review most difficult." *Glass at 460* (Lambert, C.J., dissenting). However, we have some clear guidance in *Wittmer v. Jones, 864 S.W.2d 885 (Ky. 1993)* - "the leading **[*76]** case on 'bad faith' in Kentucky." *Davidson v. American Freightways, Inc., 25 S.W.3d 94, 99 (Ky. 2000)*. Applying *Wittmer,* we have no difficulty concluding that the trial court erred in failing to grant a directed verdict in favor of CIC.

Justice Leibson's opinion in *Wittmer* was "the

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[21] They ignored the same opportunity when they served discovery requests in September 2000 and May 2001.

[22] The Hofmeisters argue in their brief that Murner admitted that he kept the excess carrier "in the loop the entire time." They suggest this statement means Murner knew of the excess policy from the time he was engaged as Dasher's attorney. But this general statement, made as it was in a general context (and, in fact, denied by the excess carrier), is entirely consistent with Murner's specific testimony on this specific question. The general statement certainly is not clear and convincing evidence that would convince a reasonable **[*75]** person that Murner's specific testimony was a fabrication.

[23] In fact, *KRS 304.12-230* was never intended by its creators to establish any private right of action at all. The statute "is an almost verbatim adoption of the 1971 version of the model act formulated by the National Association of Insurance Commissioners (NAIC)[.]" *Davidson v. American Freightways, Inc., 25 S.W.3d 94, 96 (Ky. 2000)*. It was intended by its drafters only as regulatory measure to assist state insurance administrators. NAIC emphasized the "original intent" of this model act when it issued this warning to legislatures: "A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action." NAIC Model Law, Regulations and Guidelines, Unfair Claims Settlement Practices Act, NAIC 900-1, Section 1. Purpose, Drafting Note (January 2008); *see also* NAIC 900-9 (January 2008), citing Proceedings of the NAIC, 1989 Proc. II 204. As a consequence, **[*77]** Kentucky is in that distinct minority of states that recognizes a private right of action for violations of the UCSPA. *See Hovet v. Allstate Ins. Co., 2004 NMSC 10, 135 N.M. 397, 89 P.3d 69, 76-77 (2004)*(allowing private right of action but requiring first that "there has been a judicial determination of the insured's fault and the amount of damages awarded in the underlying negligence action.").

culmination of the development of 'bad faith' liability in our jurisprudence." *Id.* Writing for a unanimous Court, "Justice Leibson gathered all of the bad faith liability theories under one roof and established a test applicable to all bad faith actions, whether brought by a first-party claimant or a third-party claimant, and whether premised upon common law theory or a statutory violation." *Id. at 100*.

> We start with the proposition that there is no such thing as a "technical violation" of the UCSPA, at least in the sense of establishing a private cause of action for tortious misconduct justifying a claim of bad faith:
>
> > [A]n *HN15*[↑] insured must prove three elements in order to prevail against an insurance company for alleged refusal in bad faith to pay the insured's claim: **[*78]** (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer at 890 (quotation marks and citation omitted).

As it is the centerpiece of CIC's argument, we focus on the second element - the lack of a reasonable legal or factual basis for denying the claim. Considering all of the evidence in a light most favorable to the Hofmeisters, we conclude that CIC did have a reasonable basis for denying the Hofmeisters' claims. Those claims could not go forward against Dasher without establishing that Dasher was vicariously liable for Clark's acknowledged negligence. Vicarious liability depended upon whether Clark was acting in the scope of his employment at the time of the accident. Despite the Hofmeisters' insistence otherwise, the answer to that question was not clear.

Until the Hofmeisters filed their **[*79]** complaint nearly a year after the accident, no one exhibited any conviction that Clark was acting in the scope of his employment with Dasher. He had completed his work and gone home. He was in his own vehicle, not Dasher's. The Hofmeisters' entire focus was on Clark and *his* automobile liability insurer. Not even Clark was sure he was working for Dasher at the time of the accident. The record before us does not reflect that he ever filed a workers' compensation claim. And when the adjuster for Hofmeister's insurer asked Clark, "Were you working on the job at the time [of the accident] or were you just on personal business?" Clark responded, "That's uh . . . that's debatable."

After the Hofmeisters filed suit naming Dasher as a co-defendant, their attorney insisted Dasher's liability was clear and it was bad faith to deny it. However, it took two years before Dasher, Clark and the Hofmeisters each filed summary judgment motions asking the trial court to determine vicarious liability. Dasher's motion, and Dasher's opposition to the Hofmeisters' and Clark's separate motions, presented legal and factual argument that Clark was not acting in the scope of his employment. [24]

Although the trial court eventually concluded that Clark was acting within the scope of his employment, Clark never accounted for, nor did the trial court appear to consider, the fact that, in a geographic context, the accident occurred at a point that took Clark substantially away from the purported purpose for the trip - to return Dasher's keys. [25] In the language of the early common law, this is an example of a "frolic and detour." *See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 776, 118 S. Ct. 2275, 2278, 141 L. Ed. 2d 662 (1998)*(referring to "the classic 'frolic and detour' for which an employer has no vicarious liability").

Accepting the trial court's determination that Clark left his home in pursuit of Dasher's business, the law is clear **[*81]** that *HN16*[↑] to remain in the scope of employment, he must not have deviated from its pursuit. *Sharp v. Faulkner, 292 Ky. 179, 166 S.W.2d 62, 63 (1942)*. But because Clark turned off that direct route and headed in the opposite direction, toward Georgetown where the accident occurred, there is a genuine question whether he was still on his employer's business at the time of the accident. In *Dennes v. Jefferson Meat Market, 228 Ky. 164, 14 S.W.2d 408*

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[24] Dasher's filing **[*80]** of these pleadings is litigation conduct. Litigation conduct amounting to bad faith can be sanctioned by the trial court pursuant to the civil rules. See the discussion, *infra* at Section II.F.1., of *Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006)* distinguishing litigation conduct and settlement conduct.

[25] We set aside the substantial factual dispute whether Dasher "ordered" Clark to return the keys, or whether he did so voluntarily.

(1929), our highest court considered such deviation in the context of the employee's use of his employer's vehicle. Where the employee is using his own vehicle, we believe Dennes must apply at least equally so.

> HN17[↑] Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still executing his master's business. On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own. Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury.

Dennes at 409; see also, Wyatt v. Hodson, 210 Ky. 47, 275 S.W. 15, 16 (1925)(master **[*82]** not liable for employee's auto accident where employee deviated 4-1/2 blocks from direct route of master's business). As our high court said in *Wyatt,* this "is a case of going beyond the route required in the service of the master, and in doing this he was acting for himself and not in the course of his employment." Id.; see also, Winslow v. Everson, 221 Ky. 430, 298 S.W. 1084, 1085 (1927). As held in Model Laundry v. Collins, 241 Ky. 191, 43 S.W.2d 693 (1931), Clark's personal venture would not have terminated nor would his service for Dasher have resumed until he returned to the point of departure from the business route - Interstate 64 - a point he never reached. Id. at 693.

Because the underlying accident case was settled, the trial court's decision regarding scope of employment was never challenged. However, whether the trial judge was correct is not the issue - the issue is whether Dasher's defense was "debatable on the law or the facts." Wittmer at 890. We are satisfied that the "defense was not only fairly debatable, it had substantial merit." Bentley v. Bentley, 172 S.W.3d 375, 378 (Ky. 2005)(citation omitted). Since we conclude Dasher's defense was fairly debatable, we must **[*83]** also conclude that CIC's denial of the Hofmeisters' claim was reasonable. Therefore, under Wittmer's second element, there can be no UCSPA violation.

With regard to allegations that four individual sections of the UCSPA were violated, CIC specifically argues that the trial court should not have let the case go to the jury. We agree that the trial court turned the case over to the jury for resolution of an issue that was uniquely the trial court's alone to make.

HN18[↑] Whether a tort has occurred under KRS 304.12-230 is precisely what Wittmer requires the trial court, not the jury, to decide. The "threshold problem" is to determine "whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages[.]" Wittmer at 890. To do that, the trial court *must* weigh in on the question of punitive damages by answering "whether the proof is sufficient for the jury to conclude that there was conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* (internal quotation marks omitted). The order denying the Hofmeisters' summary judgment motion shows the trial court did not make such a finding.

The **[*84]** Hofmeisters specifically sought the trial court's determination that CIC had violated four sections of KRS 304.12-230. The court declined

> to find that the conduct of Defendant [CIC] was "outrageous because of the defendant's evil motive or his reckless indifference to the rights of others." Wittmer v. Jones, 864 S.W.2d 885, 890 (1993). Such a determination of evil intent or indifference . . . is within the province of the jury, but not within the province of this Court on a motion for summary judgment.

Trial Court's Opinion and Order, May 17, 2004. [26] The trial court's mistaken belief that this question was for the jury does not take away from the fact that, when presented with the question, it declined to find evidence of tortious conduct, outrageous behavior, evil motive or reckless indifference to the Hofmeisters' rights. Considering the threshold, this is not surprising.

> HN19[↑] The evidentiary threshold is high indeed. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an indifference to its insureds' rights. Absent such evidence of egregious behavior, the tort claim predicated on bad **[*85]** faith may not proceed to a jury.

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[26] However, in its Opinion and Order denying CIC's **[*86]** post-trial motions, the trial court stated that "regarding the claim of statutory bad faith there was sufficient evidence of bad faith to present the question of punitive damages to the jury." Opinion and Order, October 25, 2004, p.6. Much of that evidence, however, was of litigation conduct admitted over CIC's objection and contrary to the subsequent holding in Knotts v. Zurich Ins. Co., 197 S.W.3d 512, 522 (Ky. 2006).

United Services Auto. Ass'n v. Bult, 183 S.W.3d 181, 186 (Ky.App. 2003). While *Bult* is a first-party case, there is no justification for lowering the standard for third-party claims deriving as they must from the first-party's contract of insurance. Our Supreme Court has long embraced this approach in both first-party and third-party claims under the common law where it was recognized that bad faith determinations present "*troublesome, or even impossible, question[s] for the jury* [which] is just not equipped to evaluate [t]he issue of 'bad faith'[.]" Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493, 499-500 (Ky. 1976)(emphasis in original). We believe *Wittmer* simply extended to tort actions under KRS 304.12-230 the same requirement still existing under the common law that "[t]he *HN20*[↑] issue of 'bad faith' should be decided by the trial court." *Id. at 500*; *see*, Ruby Lumber Co. v. K.V. Johnson Co., 299 Ky. 811, 187 S.W.2d 449 (1945)("until repealed or altered by the Legislature . . . [w]e are not at liberty to ignore the common law totally [and] the intention to abrogate the common law is not presumed.").

A review of the evidence presented reveals a complete absence of the type of conduct required to clear the evidentiary threshold to send this case to a jury on a claim that CIC violated the UCSPA. The trial court's May 17, 2004, Opinion and Order implicitly supports this conclusion.

Our opinion is not changed, but bolstered, by our examination of the individual sections of the UCSPA upon which the jury was instructed - KRS 304.12-230(1), (6), (13), and (14).

Section (1) *HN21*[↑] prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." All previous discussion regarding the Hofmeisters' claim of fraudulent misrepresentation applies as well to this claim. In addition, this section addresses "coverages" - a term used **[*87]** through the Insurance Code, KRS Chapter 304. Though not defined by statute or Kentucky caselaw, "coverages" is a term that identifies "the amount and extent of risk *contractually* assumed by an insurer." Illinois Farmers Ins. Co. v. Tabor, 267 Ill. App. 3d 245, 642 N.E.2d 159, 163, 204 Ill. Dec. 697 (Ill.App.1994), *citing* BLACK'S LAW DICTIONARY 365 (6th ed. 1990)(emphasis supplied). It is an abbreviated means by which we define what the insured has contracted for in exchange for his premium. "Coverages at issue" therefore refers to an insured's [27] contractual dispute with his insurer, and not an accident victim's tort dispute with the insured-tortfeasor, or an accident victim's dispute with the insurer (unless as the assignee of the insured's rights under the contract he stood in the insured's shoes).

HN22[↑] Under section (6), an insurer violates the UCSPA by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" At least with regard to third-party claims, we believe the *Wittmer* standards encompass this provision. As we just described, *supra,* the requirement that liability be reasonably clear was not met. Furthermore, we have yet to mention Golden's unreasonable demand that Dasher, and CIC, should need nothing more as proof of Mr. Hofmeister's $ 5,000,000-loss than his partially self-determined tax returns. Again, we turn to *Wittmer,* with some modifications applicable to this case.

> *HN23*[↑] Although an insurer is under a duty to promptly investigate and pay claims where it has no reasonable grounds to resist in good faith, neither this duty nor any provision of the UCSPA requires **[*89]** the insurer to assume responsibility to investigate the amount of the claimant's loss for the claimant. The insurer'[s] legal responsibility is limited to payment upon proof of loss. The only proofs presented to [CIC] were the [largely] unsubstantiated amounts stated in the demand letter from [Hofmeister's] counsel. This letter provided neither supporting documents nor reference to reliable sources.

Wittmer at 891-92. Under these circumstances, the June 22, 2000, settlement offer can only be rationally viewed as a good faith offer. Despite a reasonable belief that Dasher may have no liability whatsoever, CIC

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[27] Of course, for purposes of defining the class of persons protected by the KRS 304.12-230(1), this would include both first-party insureds and third-party claimants to whom the insured assigned (as under common law) his claim against the insurer. A close reading of State Farm Mut. Auto. Ins. Co. v. Reeder, 763 S.W.2d 116 (Ky. 1988) indicates that, consistent with common law bad faith, Reeder was an assignee of the insureds' (the **[*88]** Hamptons') contractual rights. This is the only explanation for the Supreme Court's statement that the case involved "a *contractual* dispute over the amount of damages[.]" *Id. at 118* (emphasis supplied). Unless the Hamptons assigned their contractual rights to Reeder, Reeder could have had no contractual right at all *vis-a-vis* the insurer.

authorized Dasher's use of the equivalent of $ 259,000 of its $ 1,000,000-policy to settle all but the lost income portion of the Hofmeisters' demands. That offer was rejected. Most significantly, the Hofmeisters withdrew their $ 1,000,000-offer, never to present it again. Instead, they chose to litigate, making no further settlement demands. [28] We cannot find in the record any evidence that would have justified the trial court in allowing the jury to consider whether CIC violated KRS 304.12-230(6).

Section (13) HN24[↑] of the UCSPA allows a private right of action against an insurer for "[f]ailing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]" Again, liability was not clear. Even if it had been, the Hofmeisters' claims were not claims under multiple portions of Dasher's insurance policy; they all arose under the same portion - Section II, Liability Coverage. Like KRS 304.12-230(1), the class of persons protected by this section are first-party insureds and third-party assignees of the first-party's rights.

Section (14) HN25[↑] makes an insurer liable for "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]" This is clearly another coverage issue that plainly refers to first-party claims. Still, logic requires that it fail for additional reasons. The Hofmeisters' underlying tort claim was not against CIC but against **[*91]** Dasher. The bases for denial of that tort claim for vicarious liability were fully set out in Dasher's answer and discovery responses. Any duty we can possibly read into section (14) would have required CIC to simply repeat Dasher's defenses. The law will not require such a useless exercise. Blackerby v. Monarch Equipment, 259 S.W.2d 683, 686 (Ky. 1953). But if somehow we concluded CIC did breach this section, we fail to see how the breach could cause any injury. It would be a mere "technical violation" for which no relief will be granted. Wittmer at 890.

For all of the foregoing reasons, we believe the trial court committed reversible error when it failed to direct a verdict in favor of CIC on the claims that it violated the UCSPA.

F. CIC's Remaining Arguments for Reversing the Verdict and Judgment

Consideration of the remaining claims of error is not necessary to determine CIC's liability. However, to understand the role of passion or prejudice in this jury's verdict, additional consideration is appropriate.

In particular, our consideration of three of CIC's arguments reveals aspects of that role. First, the trial court's denial of CIC's motion to exclude evidence of litigation conduct **[*92]** resulted in the jury's consideration of evidence deemed inadmissible both by Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006), and the Court of Appeals opinion it reversed. Second, the conduct of the Hofmeisters' attorney was considered "improper" by the trial court, but not so improper as to justify a new trial. That conduct, however, appears calculated to, and we believe did, have the effect of arousing the passion or prejudice of the jury. Third, while proof of the Hofmeisters' substantial reversal of economic fortune is undeniable, our examination of the record reveals nothing more than bold speculation that the reversal of fortune was caused by CIC's conduct.

We neither presume in any particular case, nor deny the proposition in general, that there is "a prejudice which juries frequently apply against insurance companies. Our courts have long been aware of this prejudice, as exemplified by our decisions in personal injury cases where the element of insurance has been improperly injected." *Aetna Freight Lines, Inc. v. R. C. Tway Co., 298 S.W.2d 293, 296 (Ky. 1957)*. We cannot quantify such prejudice in any case. But, in any degree, such an atmosphere combined with the other factors **[*93]** present in this case is entirely conducive to the creation of a "perfect storm" - a verdict and judgment so palpably and flagrantly against the evidence as to indicate it was the product of passion or prejudice.

1. Whether Litigation Conduct Is Actionable Under the UCSPA

Following the Supreme Court's rendition of Knotts v. Zurich Ins. Co., 197 S.W.3d 512 (Ky. 2006), both parties supplemented their briefs with additional authority. [29]

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[28] The Hofmeisters' February 2001 attempt to accept a portion of Dasher's earlier **[*90]** offer (which they had rejected) was not a demand for settlement.

[29] CIC referred us to Knotts while the Hofmeisters cited a case

Knotts reversed the Court of Appeals opinion in *Knotts v. Zurich Ins. Co., 2002-CA-001846, 2004 Ky. App. LEXIS 22 (Feb. 6, 2004)*, that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim. However, in reversing the Court of Appeals, the Supreme Court reopened the door only in the slightest degree. Litigation conduct was held inadmissible by both courts.

The Supreme Court identified "a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct." *Id. at 523*.

> We are confident that the remedies provided by the Rules of Civil Procedure for **[*94]** any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct.

Id. at 522. Attorneys, and even parties,

> are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, we also note that those attorneys have significant duties under the Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, we think the better approach *HN26*[↑] is an absolute prohibition on the introduction of such evidence in actions brought under *KRS 304.12-230*.

Id. This has been referred to as "*Knotts's* . . . litmus test for inadmissible litigation conduct[.]" *Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 535 (6th Cir.2006)*("bad litigation conduct that the Rules of Civil Procedure adequately remedy [is] inadmissible to prove bad faith.")(applying Kentucky law).

The trial court below did not have the benefit of *Knotts's* specific analysis but did have CIC's general argument and objection substantially to the same effect. Nevertheless, over CIC's objection, Golden was permitted to admit evidence and to argue the propriety of litigation tactics, including **[*95]** but not limited to: the timing and sequence of discovery; whether it was proper to file a third-party complaint against Clark before taking his deposition; the assertion of subrogation and indemnification rights; the decision not to file a declaration of rights action to determine whether the insurance policy covered Clark; and whether Murner should have subpoenaed documents from the Hofmeisters rather than using other more traditional means of obtaining information from adverse parties.

In *Knotts,* the Supreme Court considered it calamity to "permit the jury to pass judgment on the defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct" stating that it "places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer." *Id. at 523*. In fact, "given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head." *Id. at 522*. *Knotts* expresses the fear that a jury, "with the assistance of hindsight, and without the assistance of insight into litigation **[*96]** techniques, could second guess the defendant's rationales for taking a particular course." *Id. at 520-21*. The case before us represents the coming to fruition of that fear.

2. Whether Conduct of Hofmeisters' Counsel Required a New Trial

CIC moved the trial court for a new trial based on the misconduct of the Hofmeisters' counsel. *See, CR 59.01(d)*. The trial court "agree[d] that Plaintiffs' attorney engaged in some improper behavior" but held that its admonition of both attorney and jury was sufficient to cure the impropriety.

Because Golden was a witness to much of CIC's alleged actionable conduct, his role as advocate was complicated, albeit by his own choosing. Often when Golden was cross-examining Murner regarding oral communications to which only they were privy, the challenging tone of the question itself bore the implicit counter-testimony to Murner's response. Golden's interrogation of Murner regarding his first disclosure of the excess coverage is an example.

> Golden: [T]he first time the excess carrier was brought up was back there when Melissa Wilson was on the phone [at the October 14, 2002, transcribed settlement conference] isn't that true?
> Murner: No, sir.

Of course, only Murner's **[*97]** answer is admissible evidence, but without taking the witness stand, Golden effectively represented to the jury that he knew nothing

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interpreting *Knotts, Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287 (Ky.App. 2007)*.

of the excess policy until that moment. [30]

We need not question the trial court's ruling on Golden's conduct. However, we cannot escape the belief that the jury's verdict was affected by the cumulative effect of his "improper behavior."

3. Whether the Hofmeisters Proved Any Economic Loss Was Caused by CIC

CIC's argument that there was no proof of a causal connection between its conduct and the Hofmeisters' economic woes is based on *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc., 436 S.W.2d 63 (Ky. 1968)*.

> *HN27*[] The test of whether there **[*98]** can be a recovery for loss of anticipated revenues or profits is . . . whether the cause of the damage or injury can with reasonable certainty be attributed to the breach of duty or wrongful act of the defendant. . . . But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.

Id. at 65.

The Hofmeisters claim the causal connection is obvious and readily revealed in their theory of damages. Their theory is as follows:

> (1) CIC misrepresented that Dasher had only $ 1,000,000 in insurance coverage;
>
> (2) In fact, the CIC and Fireman's Fund policies combined for a total of $ 6,000,000 in coverage;
>
> (3) If both insurers had tendered policy limits in June 2000, the Hofmeisters would have netted $ 4,000,000 after attorney fees;
>
> (4) Mr. Hofmeister testified that if he had received a net $ 4,000,000 in June 2000, "it would have made a huge difference" that would have allowed him "to work out plans with different companies . . . to go out and buy a whole series of those bonds because they were trading on the open market at a huge discount" and he could have made "[r]oughly **[*99]** a hundred million dollars."

The Hofmeisters, not having their own expert, claim CIC's economic expert, James O. King, Jr., supported this theory and the testimony. Our examination of the actual exchange between Golden and Mr. King makes us dubious.

> Golden: And you can't tell this jury, Mr. King, that if George Hofmeister was paid $ 4 million in cash in June of 2000, that it wouldn't have made a difference.
>
> King: $ 4 million. I mean, I don't know, that's a sizeable amount of money and it might have enabled someone to keep a business going for a while, I don't know.
>
> Golden: All right, the fact is you don't know, do you?
>
> King. No.

In the final analysis, the theory is both factually and logically flawed.

The Hofmeisters never demanded $ 6,000,000 (or even the net figure of $ 4,000,000) in June 2000 or at any time. [31] To suggest they were entitled to have CIC and Fireman's Fund write checks to the Hofmeisters totaling $ 6,000,000 based on Golden's unsubstantiated demand of only $ 1,500,000 is both factually unsupported and completely illogical.

Mr. Hofmeister's testimony that he could have turned $ 4,000,000 in "stake" money into $ 100,000,000 is the unadulterated epitome of speculation. Furthermore, there is reason to question the veracity of that testimony as the record shows Hofmeister borrowed $ 6,000,000 in January 2000 from a friend and business associate, Richard Burkhart, and Hofmeister's businesses still failed.

Nothing more than speculation supports the allegation that CIC's conduct caused the Hofmeisters' economic losses.

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[30] There are several instances of Golden stating a fact in his question of Murner for which Golden presented no evidence, each of which Murner denied: "Mr. Risley . . . talked about me withdrawing our demand for a million. I reinstated that demand right after that;" "I could have gotten a hundred million dollar verdict against those two young men [Dasher's principals];" "[Y]ou and I went back to that jury room right there, you said you were going to pay a million and I accepted;" and "[I] never agreed to release Fireman's Fund."

[31] Though it went without objection, Golden's question to King impermissibly assumed this fact was in evidence. Our Supreme Court held that "a connection **[*100]** must be established between the cross-examination proposed to be undertaken and the facts in evidence. A [party] is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence." *Commonwealth v. Maddox, 955 S.W.2d 718, 721, 44 12 Ky. L. Summary 24 (Ky. 1997)*(in a criminal context but citing *Kentucky Rule of Evidence 403*).

Regardless, we have identified sufficient factors to convince us that the jury's verdict was the product either of passion or prejudice or a combination of both. For the several reasons set forth above, the judgment against CIC must be reversed.

III. *Hofmeister v. Cincinnati Insurance Company,* No. [*101] 2004-CA-002362-MR

The Hofmeisters' appeal challenges only the trial court's reduction of the punitive damages award from $ 18,405,500 to $ 10,000,000. In view of our decision that CIC was entitled to directed verdicts on the fraudulent misrepresentation claim and the claim of violation of the UCSPA, Appeal Number 2004-CA-002362-MR must be dismissed as moot.

IV. Conclusion

Considering the law as applied to the undisputed facts, we must conclude that the Scott Circuit Court's denial of Cincinnati Insurance Company's motions for directed verdict and for judgment notwithstanding the verdict as to the claim of fraudulent misrepresentation and as to the claim that it violated *KRS 304.12-230* was clearly erroneous. For the foregoing reasons, the judgment of the Scott Circuit Court in Appeal Number 2004-CA-002296-MR is reversed.

KNOPF, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

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