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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
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 INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY — APPELLEES

BRIEF OF APPELLEE ARCH SPECIALTY INSURANCE COMPANY

The undersigned does hereby certify that copies of this brief were served upon the following by first class mailing, postage prepaid, on this 2nd day of February, 2018: Hon. Jeffrey Thomas Burdett, Pulaski County Judicial Center, 50 Public Square, Somerset, KY 42501; Harlan Circuit Court, Justice Building, 129 South 1st Street, Harlan, KY 40831; J. Dale Golden, Kellie M. Collins, Golden Law Office, PLLC, 771 Corporate Drive, Suite 750, Lexington, KY 40503; Jeffrey R. Morgan, Jeffrey R. Morgan & Associates, PLLC, 850 Morton Blvd., Hazard, KY 41701; Christopher S. Burnside, Christopher G. Johnson, Griffin Terry Sumner, Frost Brown Todd, LLC, 400 West Market Street, Suite 3200, Louisville, KY 40202; Kenneth R. Friedman, Henry G. Jones, Friedman Rubin, 1126 Highland Avenue, Bremerton, WA 98337.

This is to further certify that the Circuit Court record was checked out on December 21, 2017, and returned on January 10, 2018.

Respectfully submitted,

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COUNTERSTATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

On November 4, 2013, and shortly following two mediations, the Appellee, Arch Specialty Insurance Company ("Arch"), paid its Policy limit of $1 million dollars to Appellants to settle and release all claims Appellants asserted against both of Arch's insureds Jean Coal Co, LLC ("Jean") and Terry G. Loving ("Loving"). The Appellants claim that Arch's mediation conduct –pooling its monies with those of another insurer in order to make global settlement offers on behalf of all the Defendants below - constituted bad faith and a violation of the Kentucky Unfair Claims Settlement Practices Act ("KUCSPA"). The trial court granted Arch's Motion for Judgment on the Pleadings and dismissed the bad faith and other extra-contractual claims against the Appellee Arch, and Appellants now appeal from that ruling. This appeal should be denied as the trial court properly ruled that even if the facts as alleged against Arch in the Amended Complaint were true, Arch's alleged conduct is legally insufficient to maintain a claim for bad faith, violation of KRS § 304.12-230 and KRS § 304.12-235, civil conspiracy and punitive damages.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Arch does not request, but does not oppose, an oral argument in this case. This Appellee defers to the Court as to whether an oral argument would be beneficial to its ultimate ruling.

I. COUNTERSTATEMENT OF THE CASE

On November 4, 2013, Arch paid its Policy limit of $1 million dollars to settle all wrongful death claims asserted against its insureds Jean and Loving, two of the five Defendants originally sued in the trial court action.[1] This followed two failed mediation. At a June 2013 mediation Arch tendered its Policy limit on behalf of its two insureds as part of a global settlement offer made on behalf of all the Defendants, and the global offer was rejected. At a September 2013 second mediation, Arch again tendered its Policy limit as part of a global offer by all Defendants, and the global offer made was again rejected. Arch refused to tender its $1 million for a settlement with Jean only, but within two weeks it ultimately settled the claims against its two insureds Jean and Loving for the full limit of the Arch policy ("the Policy"). Arch's aforementioned mediation conduct could not form the basis of a colorable bad faith under Kentucky law.

A. Factual Background

This case arises from the accidental death of Rhett Mosley ("Mosley"), who died while driving a truck on a mine site operated by Jean.[2] The Appellants filed suit against several interrelated companies who had some involvement with Mosley, including but not limited to, Rex Coal, Inc. ("Rex"), the mine owner and permittee; an employee leasing company, Regional Contracting ("Regional"), who employed Mosley; the mine operator, Jean, who contracted with Regional for Mosley's services; Loving, who was the principal of Jean; and Dixie Fuels Company ("Dixie"), the owner of the truck Mosley was driving on the mine site at the time of the accident.[3] Liability for all the wrongful

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[1] *See* Record on Appeal (hereinafter "ROA") 6364.
[2] *Id.*
[3] *Id.*

death claims was hotly disputed and multiple motions for summary judgment were filed on the issue of whether the Appellants' claims against all the Defendants were precluded by the exclusivity provision in the Kentucky Workers Compensation Act (the "Act").[4]

Arch's insureds Jean and Loving filed a motion for summary judgment arguing that Mosley was a "leased employee" of Jean, and that as such they were immune from Appellants' civil suit under the exclusive remedy provision of workers compensation law. That motion was first filed on March 27, 2013 and renewed on September 5, 2013 and was thus pending at the time of the two mediations. It had not been ruled upon by the time Arch ultimately settled the claims against Jean and Loving. Notwithstanding their strongly held position that Appellants' claims were barred by the Act, Jean, Loving, the other Defendants in the underlying wrongful death suit and their insurers agreed to participate in two mediations in an effort to settle the case. It is what transpired at those mediations that gave rise to the Appellants' Amended Complaint for bad faith against Arch and National Union Insurance Company ("National Union") – the insurer for Rex and Dixie.

B. Procedural History of the Claims against Arch

In their Amended Complaint, the Appellants allege that Arch engaged in bad faith by participating in what they refer to as "unfair leveraging" at two mediations held on June 19, 2013 and September 12, 2013.[5] Specifically, their bad faith allegations are based solely on their contention that Arch and National Union made global settlement offers for all Defendants through a common defense attorney at the second mediation. Arch ultimately offered to pay its $1 million Policy limits as part of the global offers. When the

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[4] *Id.*
[5] *See* ROA 6367.

parties reached an impasse at the second mediation, Arch initially refused to pay its $1 million Policy limit to settle the claims against Jean only.

Several important undisputed facts provide context to Appellants' allegations of bad faith. First, while separate companies, the Defendants in the underlying action (Jean, Regional Contracting, Rex, Dixie) are all small businesses owned and managed by a common group of family members. These interrelated companies pursued common and similar defenses to the Appellants' claims against them and voluntarily chose to be represented by a common counsel. Naturally, these affiliated companies were interested in reaching a global settlement which released them all from future liability. The Appellants allege that offers were made which included Arch's Policy limit of $1 million (for its insureds Jean and Loving) and additional monies from National Union on behalf of Defendants Rex and Dixie.[6] Arch agreed to offer its $1 million Policy limit during the first mediation. Since the entirety of Arch's $1 million Policy limit had already been offered at the first mediation, and any further negotiation for an increased global offer would have been between Appellants and National Union, an Arch adjuster did not attend the second mediation.[7]

The second mediation, which occurred on September 12, 2013, was thus attended by an attorney representing all Defendants and a National Union adjuster. At that second mediation, after a global settlement was not reached, Appellants' counsel approached the common defense counsel and purportedly "agreed" to accept Arch's $1 million Policy limit to settle with Jean only.[8] Arch had previously offered the $1 million as part of a

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[6] *See* ROA 6365-6366.
[7] *See* ROA 6366.
[8] *Id.*

global settlement offer to Appellants in exchange for a release of all Defendants.[9] According to Appellants, the common defense lawyer for all Defendants rejected this demand and would not disclose how much of the global offer was allocated to the claims against Jean versus those against Rex and Dixie.[10] As for Appellants' demand to Arch, they initially offered to release only Jean and not Arch's other insured, Loving, in consideration of payment of the policy limit.[11] Arch did not and could not accept Appellants' demand as it had an obligation to secure a release for all its insureds.[12]

Soon thereafter, on or about September 19, 2013, Appellants filed a Motion to Amend claiming that it was bad faith for Arch and National Union to have permitted one attorney representing all Defendants to handle the mediation and to make global offers (which they refer to as "leveraging") and then for Arch to refuse to pay its Policy limit when asked at the second mediation.[13] It is undisputed that on September 25, 2013 – less than two weeks after the second mediation and even before the trial court granted the Motion to Amend – Arch offered to pay the Appellants the $1 million Policy limit in exchange for a release of both Jean and Loving.[14] After reviewing the Arch Policy and confirming Loving was in fact an insured thereunder, Appellants accepted Arch's offer and the settlement was finalized shortly thereafter.

In its Amended Complaint, the Appellants contend that the making of global offers by a single attorney for all the Defendants was a conflict of interest and that Arch acted in bad faith in not immediately agreeing to pay its Policy limits for a release of Jean

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[9] *Id.*
[10] *Id.* (*See* Amended Complaint at ¶¶ 4-9).
[11] *Id.*
[12] *Id.*
[13] *See* ROA 6367. (*See* Amended Complaint at ¶¶ 10-12).
[14] *Id.*

at the second mediation. They claim that this failure was without reasonable foundation and a violation of KRS § 304.12-235, entitling them to prejudgment interest and attorneys' fees. They also claim that the conduct of Arch and National Union in the making of global offers constituted a civil conspiracy.

As shown herein, even if all the facts alleged in the Amended Complaint are true, those facts do not justify the claims pled as a matter of law.

II. ARGUMENT

A. Standard on Review

A CR 12.03 motion tests the legal sufficiency of a claim as set forth in a pleading. The issue is whether – assuming all of the facts alleged are true - the Plaintiff has alleged a viable, actionable claim in their complaint. *City of Pioneer Village v. Bullitt County et al.*, 104 S.W.3d 757, 759 (Ky. 2003). A CR 12.03 motion can be filed at any time "after the pleadings are closed." Whether or not discovery has been taken or not is irrelevant. This Court must review the trial court's entry of a Judgment on the Pleadings *de novo*. *Gosney v. Glenn*, 163 S.W. 3d 894, 898 (Ky. App. 2005).

B. Appellants Were Not Entitled to Discovery Before the Trial Court Could Enter a Judgment Under CR 12.03 in Favor of Arch.

Appellants contend that once the wrongful death claims were resolved, they served bad faith discovery on Arch and National Union, and despite answers to discovery being overdue and a Motion to Compel being outstanding, Arch was granted a judgment on the pleadings.[15] Appellants therefore suggest Arch and/or the trial court cavalierly ignored their discovery requests and/or that they should have been given the opportunity to conduct discovery before the trial court ruled on Arch's CR 12.03 motion. Yet

[15] *See* Appellant's brief at pgs. 8-9.

Appellants never articulated below what particular discovery they needed in order to rebut Arch's Motion.[16] At oral argument on Arch's Motion for Judgment on the Pleadings on February 3, 2016, the trial judge asked counsel for the Appellants to identify any other facts or conduct on the part of Arch he was relying upon for his claims against Arch.[17] Counsel identified nothing..[18]

What the Appellants also fail to mention is that the trial court stayed all discovery on the bad faith claims by Order dated December 13, 2013, and the stay was to remain until the "resolution of the underlying claims." Thereafter the remaining wrongful death claims against the other Defendants, Rex and Dixie, were tentatively settled in August 2015. However, the parties continued negotiating acceptable language for their settlement agreement and a final settlement was not reached until November 16, 2015. Rex and Dixie were not dismissed as parties from the case until December 2, 2015. Since the "underlying claims" were not resolved until December 2015, the Appellants' written discovery was served at a time when a court-ordered stay of discovery was still in effect.

On or about September 22, 2015 and just after discovery was served, Arch filed its Motion for Judgment on the Pleadings.[19] Arch also filed a Motion to Extend the Discovery Stay (in the event the trial court concluded the stay was no longer in existence), arguing that in the interests of judicial economy Arch should be relieved from engaging in any discovery on bad faith until its dispositive motion was ruled upon.[20] The Appellants filed a Response to both Motions, and filed their own Motion to Compel. The

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[16] *See* February 3, 2016 Video of the trial Court hearing.
[17] *See* February 3, 2016 video of the trial Court hearing.
[18] *Id.*
[19] *See* ROA 6364-6379.
[20] *See* ROA 6390-6391.

trial court considered all such briefings, and heard oral argument on February 3, 2016.[21] At no time in the pleadings, motions or oral argument did the Appellants ever articulate what particular document or deposition they needed in order to respond to Arch's Motion or how that discovery would change the outcome of their CR 12.03 motion. Ultimately, the trial court denied the Appellants' Motion to Compel and granted Arch's Motion to Extend the Discovery Stay and Arch's CR 12.03 Motion. The Order granting Arch's CR 12.03 Motion was entered on March 30, 2016.[22] The Appellants objected to this Order being made "final and appealable," thus rendering it interlocutory and not appealable at that time.

Importantly, entry of summary judgment need not await the completion of discovery, where "controlling precedent compels a determination" that a defendant is entitled to a summary judgment. *Patel v. Game*, 2017 Ky. App. Unpub. LEXIS 495 at *23 (Ky. App. July 7, 2017). Where the only issue in dispute is one of law, and no amount of additional discovery would make a difference, even a *sua sponte* summary judgment has been affirmed by the Kentucky Supreme Court. *See Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006); *see also Benningfield v. Pettit Envtl. Inc.*, 183 S.W.3d 567 572-73 (Ky. App. 2005) ("...Benningfield has not alleged anything that would support his IIED claim, and the hope that something will come to light in additional discovery is not enough to create a genuine issue of material fact. Therefore, the timing of summary judgment was also proper.").

If a trial court can permissibly enter a summary judgment on a legal issue prior to any discovery being taken, it can certainly enter a judgment on the pleadings under CR

[21] *See* February 3, 2016 Video of the trial court hearing.
[22] *See* ROA 6873-6874.

12.03 in the absence of discovery. After all, a motion under CR 12.03 tests the legal sufficiency of a claim at the pleading stage. Arch sought a ruling that Appellants' claims based on alleged unfair "leveraging" during a mediation were legally insufficient under Kentucky law. No amount of discovery would have changed the result. The trial court therefore did not err when it entered a Judgment on the Pleadings prior to allowing the Appellants to take discovery on their claims against Arch.

C. The Trial Court's Judgment Must be Affirmed As Appellants' Bad Faith Claims Did Not Pass the *Wittmer* Test.

Appellants dispute the appropriate standard for evaluating whether his "unfair leveraging" constitutes a colorable claim for bad faith under Kentucky law, primarily citing the Kentucky Supreme Court's decisions in *Farmland Ins. Co. v. Johnson*, 36 S.W.3d 368, 375 (Ky. 2000) and *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005). Appellants contend that these latter cases demonstrate that a bad faith case may proceed to trial even when the insured's liability for an auto accident victim's bodily injuries and other damages is "fairly debatable."

Appellants misread *Farmland* and *Phelps* and/or their holdings. The issue in *Farmland* was not whether an insured's *liability* for causing a third party loss and damages was "fairly debatable" or not. It did not even involve a third party claim and an insured's liability for a loss. Instead, *Farmland* involved a first party property damage claim where the carrier's liability for paying the loss was undisputed. The issue in dispute was the amount of the indemnity owed to the insured. Initially the insurer misrepresented the extent of coverage to the insured, claiming it only owed the cost to repair the burned building. Even after adopting the correct measure of damages, the

insurer's replacement cost estimate was lower than the one proposed by the insured, and the jury's verdict was a sum between the two estimates. The *Farmland* court concluded that while the replacement cost of the building was "fairly debatable," that did not necessarily insulate a carrier from a bad faith claim when the carrier had not "debated the claim fairly," i..e, made a misrepresentation as the insurer did in *Farmland*. 360 S.W.3d at 375-76. *Phelps* involved a third party case where the insured's liability was undisputed, but yet the insurer delayed paying the claim. 172 S.W.3d at 390, 395. Even there, the *Phelps* court concluded that the KUSCPA did not obligate a carrier to settle a claim when liability was "beyond dispute."

The court in *Wittmer* established the criteria for both a first and third party bad faith claim under Kentucky law, and it governs here. *See Lee v. Medical Protective Company*, 904 F. Supp.2d 648, 653-54 (E.D.Ky. 2012) (citing *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993). Neither *Farmland* nor *Phelps* set a new standard for bad faith claims: they simply followed or clarified the *Wittmer* standard and applied it to cases where liability was undisputed. When liability is clear or "beyond dispute" a claim must be paid. Phelps, 172 S.W.3d at 395. When it is not, then a carrier may pursue their defense of the case and an adjudication of liability until its duty under the KUCSPA to pay the claim is triggered. *Lee*, *supra*.

There is no dispute that the entire factual predicate for the Appellants' bad faith and civil conspiracy claims against Arch was the "unfair leveraging" Arch allegedly engaged in at the two mediations by participating in global settlement offers. To prevail on their bad faith "leveraging" claim against Arch under the prevailing *Wittmer* standard, the Appellants had to prove three elements: (1) the insurer must be obligated to pay the

claim under the contractual 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,* 864 S.W.2d at 890.[23] Further, the Appellants had to establish more than a technical violation of the KUCSPA.[24] They must demonstrate that Arch's violation caused actual damage to them by reason of the violation ***and*** that the alleged conduct was "outrageous," *i.e.*, sufficient for the imposition of punitive damages. *Id.*; *Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 and 454 (Ky. 1997); *see also Hamilton Mut, Ins. Co. of Cincinnati v. Buttery*, 200 S.W.3d 287, 294 (Ky. App. 2007) (the conduct "must be sufficient for a jury to conclude that the insurer's intentional misconduct emanated from an evil motive or a reckless indifference to the rights of others"); *United States Auto. Ass'n v. Bult*, 183 S.W.3d 181, 186 (Ky. App. 2003) (noting that "the element of malice or flagrant malfeasance must be shown" for a claim to lie for bad faith).[25] Ultimately the trial court determined that Appellants' claim against Arch as pled failed to meet the elements of an actionable bad faith claim as outlined in *Wittmer*. The trial court's Judgment in favor of Arch should be upheld as Appellants failed to establish they could meet any of the required *Wittmer* elements.

1. Arch's Policy Excluded Coverage for a Claim by a Leased Employee Like Mosley, and Since it Had No Duty to Pay the Claim, it Cannot be Sued for Bad Faith.

No bad faith claim can lie if the insurer lacked a contractual obligation to pay the claim under the terms of the relevant insurance policy. *Wittmer*, 864 S.W.2d at 880.

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[23] *See* ROA 6369-6370.
[24] *See* ROA 6370.
[25] *Id.*

Appellants could not meet this essential element. Although Arch did not deny its insureds' claims, but rather provided them a full defense under the terms of the Arch Policy Arch actually had no contractual duty of indemnification with respect to those claims.[26] The named insured under the Arch Policy was Jean. Loving, as the sole member of Jean, was also an insured. Under the Arch Policy, Arch was obligated to "pay those sums that the insured becomes legally obligated to pay because of "bodily injury" or "property damage" to which this insurance applies."[27] (*See* Arch Policy, at Section I, Coverage A Bodily Injury and Property Damage Liability, at p. 1 of 16)[28]. Clearly, Mosley's claim was one for "bodily injury" under the Policy's definitions, which includes "death."[29] However, Arch made clear in the Exclusions section of Coverage A that its Policy did not apply in certain circumstances, including coverage for "**Employer Liability,**" as set forth in Exclusion (e).[30] Pursuant to Exclusion(e), the Policy excludes coverage for "bodily injury to (1) [a]n "employee" of the insured arising out of and in the course of: (a) [e]mployment by the insured; or (b) [p]erforming duties related to the conduct of the insured's business."[31] Under the Policy's definitions, "employee" includes "a leased worker."[32] The term "leased worker" is further defined in the Policy as "a

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[26] *See* ROA 6370.
[27] *Id.*
[28] The Arch Policy is generally referenced in the Amended Complaint and thus is part of the pleadings. (*See Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) (citing *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999)) ("[W]hen a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.").
[29] *See* ROA 6371.
[30] *Id.*
[31] *Id.*
[32] *Id.*

person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business."[33]

Here, the Arch Policy specifically excluded any coverage for liability for "bodily injury" to a Jean "employee" while working for Jean, including a "leased worker" such as Mosley.[34] As admitted in the pleadings in this case, and by prior Order of this Court, Mosley was employed by Regional Contracting which leased Mosley to Jean.[35] Mr. Mosley was thus a leased employee of Jean's and as such, met the definition of a Jean "employee" in the Arch Policy.[36] Mosley's claim is for wrongful death arising from his work for Jean while a leased employee of theirs, and this claim was excluded from coverage by Exclusion (e) of the Policy.[37]

Notwithstanding that coverage was clearly excluded under the Arch Policy, Arch, acting with the utmost good faith and in the interest of its insureds, resolved the claims against its insureds through a settlement.[38] Arch's good faith conduct in paying the claim may not be used as a basis for a bad faith claim against Arch.[39] Indeed, in *Ky. National v. Shaffer*, 155 S.W.3d 738 (Ky. App. 2005), the insurer belatedly learned of an exclusion which obviated coverage under the policy.[40] The Court held that even though the insurer had engaged in conduct prior to settling the claim that the plaintiff claimed constituted "bad faith," no bad faith claim could be pursued against the insurer regardless of its claim handling conduct since it never had a contractual duty to pay the claim in the first place.

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[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *See* ROA 6371-6372.

Thus, while the insurer's delay in locating an applicable exclusion could estop it from denying coverage for the claim, it could not not serve as a predicate for a bad faith claim. Bad faith liability could only be extended to an insurer with a contractual duty to pay the claim under the policy. Bad faith liability cannot be created through estoppel. *Ky. National v. Shaffer*, 155 S.W.3d at 738.

Likewise, in this case, Arch had no contractual duty to pay the claim due to the "Employer Liability" exclusion in the Arch Policy. The fact that Arch only raised this coverage issue in defense of the bad faith claim and did not raise it during the litigation of the wrongful death claim is irrelevant. While its delay in raising this defense could have estopped Arch from denying coverage for the wrongful death claim, this delay could not form the basis of a bad faith claim through estoppel. Absent coverage, Appellants could not maintain a bad faith claim against Arch as a matter of law.[41] No discovery could ever change that fact. Appellants did not and cannot meet requirement (1) of the *Wittmer* test. Any bad faith claim alleged against Arch thus fails as a matter of law.[42]

2. Appellants Also Failed to Establish the Other Prongs of the *Wittmer* Test As the Liability of its Insureds was Not "Beyond Dispute."

Appellants also failed to meet prongs (2) and (3) of the *Wittmer* test for the simple reason that Jean and Loving's liability to the Appellants was not "reasonably clear" or "beyond dispute."[43] Prior to Arch's settlement with Appellants, Jean filed a Motion for Summary Judgment in the wrongful death case below, arguing that it was entitled to immunity from suit under the Workers Compensation exclusivity provision. Of all the

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[41] *See* ROA 6372.
[42] *Id.*
[43] *See* ROA 6373.

Defendants, Jean likely had the strongest argument for workers compensation exclusivity.[44] The trial court never ruled on Jean's Motion and it was pending at the time of the settlement. This Court need not opine on whether Jean would have prevailed or not on this Motion. However, this Court can determine as a matter of law that – based on legal arguments in Jean's prior Motion – there was, at the very least, a legitimate (if not strong) argument in favor of dismissal.[45] Certainly, Jean and Loving's liability to the Appellants was not "beyond dispute" or "reasonably clear" and Arch very likely had no "duty to pay" the Plaintiff's claims for that reason as well. *Phelps*, 172 S.W.3d at 389 (Ky. 2005) (insurer has no duty to settle claim where liability is not "beyond dispute"). If Jean and Loving's liability was not "beyond dispute" a bad faith claim cannot be pursued against them as a matter of law.[46]

As the Kentucky Supreme Court recently made clear in the landmark decision of *Hollaway v. Direct General Insurance*, 497 S.W.3d 733 (Ky. 2016), *Wittmer* and its progeny have set a very high bar for third party bad faith claims. If there is a legitimate dispute over its insured's liability, an insurer is entitled to forego any effort to settle and instead litigate the liability issue before a jury. The *Hollaway* court also clarified that the word "liability" in the KUCSPA's directive to insurers to settle a claim when "liability is reasonably clear" is referring not only to the insured's liability for causing the incident (i.e., fault) but also the insurer's liability to pay the claimant's damages. It thus confirmed that an insurer's legitimate dispute over whether a claimant's injury or treatment was caused by the accident could not constitute bad faith as a matter of law.

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[44] *Id.*
[45] *Id.*
[46] *Id.*

The *Hollaway* case arose from a low-speed automobile collision between Harry Sykes and Samantha Hollaway. Direct General, the insurance carrier for Sykes, investigated the accident and quickly learned that both Sykes and Hollaway blamed the other for negligently backing up. *Id.* at 735. Following the breakdown of settlement negotiations, Hollaway filed suit against Sykes. *Id.* While the underlying negligence claim was pending, Direct General settled the claim against Sykes. Hollaway thereafter pursued a third-party bad faith claim against Direct General under KRS § 304.12-230, the KUCSPA, on the theory that Direct General had failed to "reasonably evaluate, investigate, and negotiate a settlement of her bodily injury claim." *Id.* Direct General moved for summary judgment on the theory that it had not acted in bad faith because it had the right to insist that Hollaway prove her case that the insurer was liable before it had a duty to offer her any settlement. *Id.* Direct General pointed to the disputed nature the accident's causation, the lack of evidence that the accident caused Hollaway's injuries, and Hollaway's preexisting injuries to the same area of her body where she was allegedly injured from the accident. *Id.* The trial court concluded that since Sykes liability was not "beyond dispute" and there were legitimate disputes regarding his liability and causation, Plaintiff's bad faith claim against Direct General could not lie. *Id.* at 735-736. Hollaway appealed the trial court's ruling to the Court of Appeals, which affirmed the trial court's decision. *Id.*

The Kentucky Supreme Court agreed with Direct General and the courts below that because the insurer contested its insured's liability on both fault and damages, dismissal of the bad faith claim was justified. Hollaway argued the insurer had admitted its insured's fault by paying her property damage claims and by offering to settle the

bodily injury claim. The Court rejected these arguments, concluding that settlements are not evidence of legal liability nor do they qualify as admissions of fault under Kentucky law. *See Combs v Stortz,* 276 S.W.3d 282, 291 (Ky. App. 2009); *see also*, *Ashland Oil & Refining Co. v. General Tel. Co.,* 462 S.W.2d 190, 194 (Ky. 1970). Even if a jury might have ultimately disagreed with Direct General's positions had the case gone to trial, Direct General nevertheless had a reasonable basis in fact for contesting liability and causation of damages. The Kentucky Supreme Court thus concluded that "Direct General's absolute duty to pay [the] . . . claim is not reasonably established, [and] this alone would be enough to deny her claim under *Wittmer." Id.* at 739.

Like Direct General in *Hollaway*, Arch questioned its insureds' fault in causing the accident and Mosley's death. It also questioned whether a liability claim against its insured would be preempted by the exclusive remedy of Workers' Compensation. Liability was clearly in dispute and Arch's "absolute duty to pay the claim was not clearly established." Arch could have refused to make any offers. It could have awaited the trial court's summary judgment decision and/or a jury's adjudication of liability and damages. Instead it offered the $1 million dollar policy limit approximately two weeks after the second mediation. As *Hollaway* confirmed, an insurer's offer to settle is not an admission of liability. Parties settle lawsuits for a variety of reasons. If anything, Arch's offer to settle a disputed claim with the Appellants (via a global offer or otherwise) is evidence of its utmost good faith. In light of *Hollaway*, Appellants could not possibly establish bad faith, as Arch's absolute duty to pay the claim was never established. This alone dictates that this court deny this appeal and uphold the trial court's Judgment in favor of Arch.

Importantly, the broadside challenge to *Hollaway* and its holding found in Appellant's Brief was not made below in response to Arch's Motion for Judgment on the Pleadings and cannot be made for the first time now. While the Kentucky Supreme Court had not yet rendered their decision in *Hollaway* at the time the trial court granted Arch's Motion for Judgment on the Pleadings, its predecessor *Phelps* had been rendered. Arch relied upon *Phelps* below, not *Holloway*. The *Phelps* court clarified that an insurer is obligated under the KUCSPA to settle a claim when the insured's liability is "reasonably clear", and that "reasonably clear" in that context means "beyond dispute." [47] *See Lee*, 904 F.Supp.2d at 654-654. Despite the fact that Arch cited *Phelps* in its summary judgment briefs – and *Phelps* embraced the same "beyond dispute" standard later reiterated in *Holloway* - Appellants never previously argued that *Phelps* erroneously supplanted the KUCSPA's provision requiring insurers to attempt to settle when liability became "reasonably clear" with a higher, "beyond dispute" standard. Because Appellants never raised these arguments below, they cannot be raised for the first time on appeal, and thus are not issues for this court to address here. *Norton Healthcare v. Lual Deng*, 487 S.W.3d 846, 852 (Ky. 2016).

Appellants arguments that Arch's litigation conduct can establish bad faith, and/or for a reconsideration of the Kentucky Supreme Court decision in *Knotts v. Zurich,* 197 S.W.3d 512, 523 (Ky. 2006), precluding introduction of defense counsel's litigation conduct to prove an insurer's bad faith, were also not raised below and thus cannot be considered in this appeal for the first time. *Norton*, *supra*.

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[47] See ROA 6373.

Nor are these arguments even persuasive. Plaintiff's "unfair leveraging" claim only involved mediation conduct, not litigation conduct. Even if mediation conduct did constitute litigation conduct, litigation conduct is clearly inadmissible for purposes of proving an insurer's bad faith under the well-reasoned *Knotts v. Zurich*. *Hollaway* is fully consistent with the whole body of bad faith law in Kentucky from *Wittmer* forward, and further demonstrates that the law in Kentucky is now and has always been that a bad faith claim cannot lie against an insurer when as here it engages in a legitimate dispute over its insured's liability to pay the claimant's damages.

3. The Trial Court's Judgment Must be Affirmed Since Arch's Claimed Conduct Did Not Cause Any Alleged Damage And Was Not Outrageous as a Matter of Law.

The factual predicate for the Appellants' bad faith allegations against Arch does not even come close to meeting the other high standards for such a claim under Kentucky law, which requires: (1) that any violation of the Act cause actual damage to the plaintiff; and (2) that the insurer's conduct be so outrageous as to justify the imposition of punitive damages. *Glass*, 996 S.W.2d at 452.

First, Appellants neither pled nor can ever prove that they suffered any actual damage from September 12, 2013 – when they demanded Arch's $1 million policy limit to settle their claim against Jean alone – to September 25, 2013 – when Arch offered, and Appellants accepted, Arch's $1 million Policy limit to settle the claims against both Arch insureds, Jean and Loving.[48] Actual damage is a prerequisite to a bad faith claim. *Glass*, *supra*. Failing to identify any actual damage alone justifies entry of a judgment in favor of Arch.

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[48] *Id.*

Arch's original offer had been part of a global settlement effort on behalf of all Defendants. Arch never offered its limit to settle the claims against Jean alone. Indeed, if there were to be a settlement, Arch had a legal obligation to obtain a release for all its insureds, including Mr. Loving. *Shaheen v. Progressive Cas. Ins. Co.*, 2015 U.S. Dist. LEXIS 90242, at *10-11 (W.D. Ky. July 10, 2015) (If the KUCSPA were read as requiring payment of the policy limits without a "settlement of claims against the insured" the insurer "would be forced to watch both flanks... [The insurer] may be sued for unfair settlement practices by a claimant disgruntled by the company's failure to pay, and... may be sued by an insured disgruntled by the company's payment of the policy limit without obtaining a release."). Thus, "a claim is settled within the meaning of the statute only when it is fully disposed of, which means that the claimant has released all claims against the insured." *Id.* In this case, Arch had an obligation to obtain a release for both of its insureds in exchange for paying the Policy limit to the Appellants.

Second, Arch's settlement conduct is certainly not "outrageous" as defined in *Wittmer* i.e., conduct which justifies the imposition of punitive damages. *Wittmer,* 867 S.W.2d at 890. Requiring the Appellants here to release both Jean and Loving in exchange for payment of the Policy limit, and undertaking, on behalf of its insureds, to ensure that the settlement was comprehensive does not constitute outrageous conduct. *See Shaheen*, 2015 U.S. Dist. LEXIS 90242, *14-15 (requiring a release of insureds for policy limits settlement does not "rise to the standard of 'outrageous", as required for a finding of bad faith). The fact that Arch's Policy limits offers were made as part of global offers on behalf of all Defendants is irrelevant.[49] It is certainly not violative of the

[49] *See* ROA 6374.

KUCSPA for one insurer to combine its settlement offers with that of another insurer in order to globally settle all claims of all insureds against a common plaintiff. [50] While KRS §304.12-230(13) makes it a bad faith practice to "fail[] to settle a claim, 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," (e.g., when an insurer refuses to pay the plaintiff's property claim unless he/she settles the liability claim for a specified sum), that provision does not apply here. Arch did not leverage the payment of a claim under one coverage to obtain a favorable settlement of a second claim under a different coverage in the same policy– the only leveraging conduct prohibited by the KUCSPA.[51]

Permitting a single attorney to make global offers on behalf of all Defendants at a mediation similarly does not constitute outrageous conduct.[52] As the Court knows, the protections associated with conflict of interest rules are afforded to those parties represented by the same attorney. "Loyalty and independent judgment are essential elements in the *lawyer's relationship to a client*." Ky. SCR 1.7 (cmt. 1); 30-808 Moore's Federal Practice - Civil § 808.40 (emphasis added). These protections remain exclusively between the attorney and his client, and do not extend to adverse parties. Here, the Defendant clients all consented to one attorney representing them at the mediation, and the Plaintiff simply lacks standing to assert any alleged conflict that their adversary's lawyer may have in representing his own clients.[53]

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[50] *Id.*
[51] *See* ROA 6375.
[52] *Id.*
[53] *Id.*

D. The Mediation Conduct Alleged in the Amended Complaint Cannot Be the Basis for a Civil Cause of Action Against Arch.

Kentucky public policy encourages resolution of lawsuits through the mediation process. KRS § 454.011. Consistent with that public policy, the Kentucky Supreme Court has adopted Model Mediation Rules that govern all court-ordered mediations. *Ky. Farm Bureau v. Wright*, 136 S.W.3d 455, 459 (Ky. 2004). Model Mediation Rule 12B, which governs confidentiality, states that "[m]ediation shall be regarded as settlement negotiations for purposes of KRE 408." Under KRE 408, settlement offers or settlement statements or conduct are inadmissible to prove the validity, invalidity or amount of a claim[54]." Courts recognize that "the integrity of the mediation process depends on the confidentiality of discussions and offers made therein" and have thus determined that this information is privileged and to be kept secret. *Goodyear Tire & Rubber Co. v. Chiles Power Supply Inc.*, 332 F.3d 976, 979 (6th Cir. 2003) (where the court reasoned that "[i]n order for settlement talks to be effective, parties must feel uninhibited in their communications" and that failing to protect the confidentiality of mediation discussions would 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.").

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[54] While KRE 408 potentially leaves open the possibility of settlement conduct being admissible for "another purpose," none of the "other purposes" mentioned in the Rule are applicable here (i.e, "proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution"). There is also no Kentucky case law to suggest that any exceptions to KRE 408's strong exclusionary rule exist other than those explicitly listed in the Rule itself. (*See* Lawson, Ky. Evidence Handbook, 4th ed. at p. 201). ("There is no pre-Rules or post-Rules case law on purposes other than impeachment of witnesses for which evidence of settlements or offers or settlements might be admissible...").

The claims of bad faith and civil conspiracy against Arch pled in the Amended Complaint are based *entirely* on the confidential settlement offers and settlement conduct of the parties at the two mediations that took place in this case, namely, the allegations in paragraphs 4-12 of the Amended Complaint that Arch and its co-defendant National Union made combined "global" settlement offers to settle the claims of their respective insureds at the June 19, 2013 and September 12, 2013 mediations of the underlying tort claims; refused to disclose how much of the global offer was offered by which insurer and for which insured defendants; and that common defense counsel for all defendants refused to settle the claims against Jean only for the policy limits at the September 2013 mediation even though Arch had extended policy limits authority to that counsel for use at the mediation.[55]

The Appellants cite cases from other jurisdictions (including cases from Montana and Massachusetts) in an effort to support their argument.[56] These cases are not binding on this court. Nor are they persuasive as they are factually distinguishable from the present case. The Montana case cited by Appellants references the leveraging of undisputed claims. (*See* Appellants' brief pg. 22, citing *Ridley v Guaranty Nat. Ins. Co.,* 286. Mont. 325, 336 (1997)). Here, the Appellants claims were clearly in dispute. The Massachusetts case cited by the Appellants discusses the duty to respond to a demand when liability was "reasonably clear." (*See* Appellants' brief pg. 23, citing *Metropolitan Property & Cas. Ins. Co. v. Choukas*, 47 Mass. App. Ct. 196, 200 (1999)). Likewise, for the reasons set forth above, liability here was not "reasonable clear" or "beyond dispute." The Appellants cite cases outside Kentucky because none of this settlement conduct is

[55] *See* ROA 6369.
[56] (*See* Appellants' brief pgs. 22-23).

admissible under the Kentucky Model Mediation Rules or KRE 408, and certainly cannot be actionable or the basis of civil liability. To permit such a claim would contravene Kentucky law providing for strict confidentiality surrounding the negotiations taking place at a mediation and the public policy of promoting mediated resolutions.

E. The Facts as Pled Do not Support a Claim for Civil Conspiracy.

Appellants' claim for "Concert of Action/Civil Conspiracy," was also properly dismissed.[57] Kentucky's Court of Appeals has clarified that Kentucky's recognition of civil conspiracy encompasses the Second Restatement of Torts' definition of Concert of Action. *See James v. Wilson*, 95 S.W.3d 875, 896 (Ky. App. 2002); *Farmer v. Newport*, 748 S.W.2d 162, 164 (Ky. App. 1988).

"Under Kentucky law, '[i]n order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act.'" *Westport Ins. Corp. v. Mudd*, 2010 U.S. Dist. LEXIS 118686 (W.D. Ky. Nov. 4, 2010) (citing *Peoples Bank of N. Ky., Inc. v. Crowe Chizek & Co.*, 277 S.W.3d 255, 261 (Ky. App. 2008)). Theories based in conspiracy are "inherently difficult to prove," and the party alleging the conspiracy has the burden of proving each element of the claim to prevail. *James v. Wilson*, 95 S.W.3d 875, 896 (Ky. App. 2002). Given the facts alleged, Appellants' claim could not survive dismissal.

Failure to allege each element renders Appellants' claim of conspiracy "fatally defective." *Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79 (Ky. 1945) "A necessary allegation is that the damage...resulted from some overt act done pursuant to

[57] *See* ROA 6375 - Amended Complaint at ¶¶ 20-24.

or in furtherance of the conspiracy." *Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79 (Ky. 1945)). The claim must allege that the parties agreed to "do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Smith v. Board of Education*, 264 Ky. 150, 157 (Ky. 1936).

While Appellants parrot the Restatement (Second) of Torts §876(a)-(b), they fail to demonstrate that Arch and/or National Union committed an unlawful or tortious act.[58] Appellants mistakenly allege that Arch and National Union's use of one attorney to make global offers for multiple defendants violated the KUCSPA.[59] As explained above, representation of multiple defendants by one attorney cannot violate the rights of the adverse party, and the KUCSPA makes no mention of such multiple representation being an act of bad faith.[60] In addition, Arch did not "refuse to pay its policy limits" as inaccurately claimed by Appellants.[61] There is no legal prohibition on the making of global offers. Further, Arch always agreed to pay its limit either as part of a global offer or for a release of all of its insureds only. It ultimately paid the limit and secured a release for both its insureds.[62] Arch owed a duty to each of its insureds, as discussed above, and during settlement negotiations awaited the Appellants' ultimate agreement to release both Loving and Jean, before agreeing to payment of the Policy limit payment.[63] Given the absence of any proof or legal support for the claim that Arch's mediation conduct was improper, the trial court's order of dismissal must be sustained.

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[58] *See* ROA 6376.
[59] *See* ROA 6376 – Amended Complaint ¶ 22.
[60] *See* ROA 6376.
[61] *See* ROA 6376 – Amended Complaint ¶ 23.
[62] *See* ROA 6376.
[63] *Id.*

To sufficiently plead a Civil Conspiracy Claim, Appellants must provide the factual basis of both an agreement between Arch and National Union, in addition to corresponding facts that establish overt unlawful conduct in furtherance of such agreement.[64] Although all factual allegations made by a plaintiff are taken as true, legal conclusions or unwarranted inferences are not. *Potter v. Trivette*, 197 S.W.2d 245, 246 (Ky. 1946). Assuming all of the facts claimed by Appellants are true, Appellants' claim of Civil Conspiracy/Concert of Action still fails as a matter of law. *Wilson*, 95 S.W.3d at 883-84; *Kentucky Jockey Club*, 551 S.W.2d at 803. If a plaintiff does not articulate a set of facts to support his or her claim, the defendant's motion to dismiss should be granted. *Potter v. Trivette*, 197 S.W.2d at 246. The court below properly granted the motion and for all the foregoing reasons, its dismissal should be affirmed.

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[64] *See* ROA 6377.