COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE 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

VS.

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

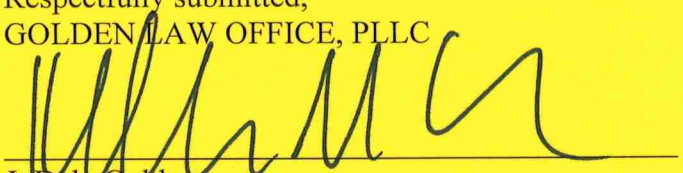
ARCH SPECIALTY FIRE INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY — APPELLEES

REPLY BRIEF OF APPELLANTS

This is to certify that an original and four copies of the Brief of Appellants was served by hand-delivering same to Hon. Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and that true and accurate copies have been served by first-class mail to Hon. Jeffrey Thomas Burdette, Pulaski County Judicial Center, 50 Public Square, Somerset, KY 42501; Harlan Circuit Clerk, Justice Building, 129 South 1st St., Harlan, KY 40831; Mindy G. Barfield, Dinsmore & Shohl LLP, Lexington Financial Center, 250 W. Main St., Ste. 1400, Lexington, Kentucky 40507; Jeffrey R. Morgan, Jeffrey R. Morgan & Associates, PLLC, 850 Morton Blvd, Hazard 41701; Christopher S. Burnside, Christopher G. Johnson, Griffin Terry Sumner, Frost Brown Todd LLC, Ageon Center, Ste. 3200, 400 West Market St., Louisville, Kentucky 40202; Kenneth R. Friedman, Henry G. Jones, Friedman Rubin, 1126 Highland Avenue, Bremerton, WA 98337, on February 20, 2018.

This is to further certify that the Circuit Court record was not checked out.

Respectfully submitted,
GOLDEN LAW OFFICE, PLLC



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STATEMENT OF POINTS AND AUTHORITIES

I. ARGUMENT

The fact that there is a high bar for plaintiffs to meet in order to be ultimately successful in a bad faith claim should not be used a sword against plaintiffs, preventing them from pursuing their claims when allegations support the same and questions remain to be answered in discovery. In the present action, Appellants were foreclosed from the ability to even get off the ground by the premature granting of the Appellees' dispositive motions.

A. Appellants' Amended Complaint satisfied the *Wittmer* elements.

Appellees are under the mistaken belief that the Appellants must have a judgment against Appellees' insureds to satisfy the first prong of *Wittmer v. Jones,* 864 S.W.2d 885 (Ky. 1993), in order for the Appellees to be obligated to pay under the terms of its insurance policy.[1] Obviously, if the insurance company denies coverage, there could never be an obligation to pay the claim. However, the Unfair Claims Settlement Practices Act clearly states that it is unlawful for an insurance company to deny a claim beyond a reasonable time period. Thus, it is clear that there need not be an obligation to pay for there to be a violation of the UCSPA.

Appellees' definition of "obligated to pay" is likewise misplaced. Contrary to their contention, "obligated to pay" corresponds to KRS 304.12-230(6), which clearly interprets the obligation to pay when "liability has become reasonably clear." *Wittmer* makes clear that an offer from an insurance company that is arbitrary, unreasonable or for ulterior

[1] Under the holding of *Wittmer*, the Appellants are entitled to recover against Appellees National and Arch. However, it should be noted that the 1984 and 1988 legislative history of the UCSPA, each of which predates the 1993 holding in *Wittmer*, contains subsection 5 that provides for a violation of the Act if an insurance company fails to "affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed."

motives can be "proof of bad faith." *See Wittmer,* 864 S.W.2d at 892. If an offer or lack of an offer from an insurance company can be evidence of bad faith, it is axiomatic that there need not be a final judgment as a prerequisite for a bad faith claim. The Appellees' reliance upon *Wittmer* is misplaced because *Wittmer* holds the exact opposite, as the Court stated:

> Wittmer sued Jones in tort, alleging property damage to her automobile and, in the **same Complaint**, sued State Farm charging violation of the UCSPA, demanding damages sustained by reason of such violation, plus prejudgment interest, attorney's fees and court costs. (emphasis added).

Wittmer, 864 S.W.2d at 887. (emphasis added)

The *Wittmer* Court also found that the liability issue was hotly contested, specifically noting that there was ". . . sufficient evidence of negligence to apportion fault against Wittmer." *Id.* at 888. Therefore, *Wittmer* itself specifically recognizes that the obligation to pay can arise before any judgment is entered and notwithstanding the fact that the parties to the litigation contest liability. United States District Judge Gregory Van Tatenhove, in a recent opinion denying an insurer's motion for summary judgment, reinforced that Kentucky's courts have recognized that bad faith can occur in the settlement of a disputed claim:

> While the *Wittmer* standard does speak specifically to an insurer's basis for "denying the claim," *see* 864 S.W.2d at 890, American Fire's argument is at odds with the way the *Wittmer* test is now applied. Bad faith litigation often occurs even after an insurance company ultimately settles a disputed claim. *See, e.g.*, *Phelps*, 736 F.3d at 704 ("The appropriate inquiry is whether there is sufficient evidence from which reasonable jurors could conclude that *in the investigation, evaluation, and processing of the claim*, the insurer acted unreasonably and either knew or was conscious of the fact that its conduct was unreasonable.") (emphasis added); *Adkins v. Shelter Mutual Ins. Co.*, No. 5:12–173–KKC, 2015 WL 1393583, at *5–6 (E.D. Ky. Mar. 25, 2015) (noting the Sixth Circuit's *Phelps* decision indicates an actual denial is not an absolute prerequisite to pleading damages); *Smith v. Liberty Mutual Ins. Co.*, No. 3:15–cv–00034–TBR, 2015 WL 7458641, at *1 (W.D. Ky. Nov. 23, 2015) (explaining that the insurer paid the full policy limits and settled the plaintiff's breach of contract claim before the Court considered the insurer's alleged bad faith in "investigating and settling Smith's claim").

Foster v. American Fire and Casualty Company, 219 F. Supp. 3d 590, 595 (E.D. Ky. 2016).

Therefore, Appellees' argument that, because liability was contested and coverage was in question, they cannot be liable for bad faith rings hollow as it is a direct contradiction to the holding of *Wittmer*.

B. The settlement conduct of the Appellees can serve as a basis for Appellants' bad faith claim.

Insurers have a quasi-fiduciary duty of good faith and fair dealing. *State Auto Property and Cas. Ins. Co. V. Hargis,* 785 F.3d 189, 197, 198 (6th Cir. 2015) (citing *Curry v. Fireman's Fund Ins. Co.,* 784 S.W.2d 176, 178 (Ky.1989)). That duty extends to conduct that occurs both before and after the commencement of litigation. *Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512, 517 (Ky. 2006) ("If KRS 304.12-230 were not applicable once litigation commenced, insurance companies would have the perverse incentive to spur injured parties toward litigation, whereupon the insurance company would be shielded from any claim of bad faith"), reasoning followed by appellate courts across the nation:

> Implicit in an insurance company's [handling] of [a] claims in litigation or the threat of litigation that involves the advice of counsel. To permit a blanket privilege in insurance bad faith claims because of the participation of lawyers hired or employed by insurers would unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices.

Cedell v. Farmers Inc. Co of Wash., 295 P.3d 239, 245 (Wash. 2013).

Kentucky's state and district courts have repeatedly recognized that the settlement conduct of an insurer can serve as a basis for a bad faith action, as recognized by United States District Judge Amul R. Thapar:

> The Sixth Circuit has already held that, under Kentucky law, the UCSPA applies to all three phases of insurance claim resolution—"negotiation, *settlement and payment* of claims." *See Cobb King v. Liberty Mut. Inc. Co.,* 54 F. App'x 833, 836 (6th Cir.2003) (quoting *Davidson v. Am. Freightways, Inc.,* 25 S.W.3d 94, 98 (Ky.2000)). In so holding, the Sixth Circuit rejected the argument that one phase might escape the UCSPA's requirements based on its position in the sequence. *See id.* ("[We decline] to adopt the position that once a settlement agreement is reached,

> the insurance company's actions are outside the purview of KUCSPA."). Instead, the UCSPA applies "[u]ntil the claim is finally *settled and paid in full.*" *Id.* Certainly, in most cases, settlement precedes payment. But, in either order, the UCSPA applies to both payment and settlement. *See Guar. Nat. Ins. Co. v. George,* 953 S.W.2d 946, 949 (Ky.1997) ("Clearly, one can envision factual situations where an insurer could abuse its legal prerogative in requesting a court to determine coverage issues [after fully paying the claim]. Those may well be addressed through ... an action for bad faith.").

Ellis v. Arrowood Indem. Co., CIV. 12-140-ART, 2015 WL 2061936, at *6 (E.D. Ky. Apr. 30, 2015).

Appellees' position that they can mandate global settlement offers and refrain from making offers on behalf of individual defendants is contrary to Kentucky law. Subsection 13 of the UCSPA specifically precludes insurance companies from settling 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." *See* KRS § 304.12-230(13). This prohibition against leveraging claims is a cornerstone of good faith practices for insurance companies. If an insurance company cannot leverage claims under its own policies, it is axiomatic that it cannot leverage claims among separate insurance companies and separate defendants to deprive a plaintiff of any recovery unless that plaintiff settles all claims against all defendants. In the present matter, Appellees acting in concert with each other to deny any payment to a widow unless she settles all other contingent claims is conduct that is certainly in violation of the pervasive and broad nature of the protection afforded by the UCSPA.

Clearly, the settlement conduct complained of by Appellants in their Amended Complaint was sufficient to withstand Appellees' premature dispositive motions, as the conduct complained of is admissible as proof of bad faith and is recognized as bad faith by Kentucky's courts.

C. Appellants pled a cognizable claim of bad faith against Arch under Kentucky law.

Appellee Arch in its responsive Brief conflates its Motion for Judgment on the Pleadings with that of a Motion for Summary Judgment. In a motion for judgment on the pleadings, the party opposing does not have to specify what discovery may be needed for his or her claim claim; it is merely whether the plaintiff pled a recognizable cause of action in his or her complaint:

> A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." So a court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved...." Accordingly, "the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true." This exacting standard of review eliminates any need by the trial court to make findings of fact; "rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox v. Grayson, 317 S.W.3d 1, 7 (Ky. 2010) (footnotes omitted).

In the case of Appellee Arch, Appellants sufficiently pled a cognizable claim of bad faith if all of the allegations within their Complaint are taken as true based on the preceding arguments of this Reply.

D. Appellants were denied the opportunity to conduct discovery of relevant documents prior to summary judgment being granted in favor of National Union.

Appellants in this matter sought discovery concerning the very claims asserted against National Union in their Complaint. It is well recognized that parties may obtain discovery regarding subject matter which is relevant to the insurance bad faith claims involved in the pending action. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 811-816 (Ky. 2004). The trial court, in summarily dismissing the Appellants' claims, accepted

at face value without further examination that the materials National Union sought to protect were subject to privilege. Kentucky's appellate courts have repeatedly recognized the discoverability of the materials sought by Appellants in bad faith litigation, even in the face of Appellee's asserted privileges. The Kentucky Supreme Court has recognized that the work product doctrine is not absolute in a bad faith lawsuit:

> We find persuasive the language set forth in *The Attorney–Client Privilege and the Work–Product Doctrine,* published by the American Bar Association's Section of Litigation:
>
> > Generally speaking, when a lawyer's activities are instrumental in proving an issue in dispute, discovery of opinion work product is accorded.
> > * * * * * *
> > A plaintiff has a good chance of obtaining opinion work product from a defendant's counsel when the claim is that an insurance company wrongfully refused to settle an insurance claim, or that an action was prosecuted maliciously. In each such instance, the crucial issues that form the proof for the claim are likely to include what the lawyer knew, when the lawyer knew it, and how the lawyer knew it. Thus, the nature of the claim itself often necessarily puts work product into play.
> >
> > Edna Selan Epstein, *The Attorney–Client Privilege and the Work–Product Doctrine,* American Bar Association Section of Litigation (3d ed.1997).
> > ....
> >
> > We find this situation analogous to an action against an insurer for bad faith. The processing of a claim by an insurer is almost an entirely internal operation and its file reflects a contemporaneous record of the handling of the claim. The need for such information is not only substantial, but overwhelming. *See Brown v. Superior Court, supra* 670 P.2d at 734.

Morrow v. Brown, Todd & Heyburn, 957 S.W.2d 722, 726 (Ky. 1997).

Furthermore, the mediation conduct of Appellee constitutes discoverable information under Kentucky precedent:

> Finally, Hamilton Mutual challenges the nature of the evidence that the trial court allowed Buttery to introduce. It contends that much of the evidence dealing with the post-complaint issues pertained to how Hamilton Mutual practiced its case in court (*i.e.,* its trial tactics and strategies) as distinguished from *settlement behavior.*

> In *Knotts,* the Court allowed evidence of an insurer's **settlement behavior during litigation** to be used to demonstrate bad faith. However, it clearly distinguished that settlement conduct from an insurer's litigation tactics in general, holding that:
>
> > [w]e are confident that 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.
>
> Consequently, evidence of an insurer's general litigation tactics (distinguished from evidence of its settlement behavior during the course of litigation) is generally not admissible on the issue of bad faith.

Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, 295 (Ky. App. 2007) (emphasis added).

The importance of claims materials in the prosecution of a bad faith claim is highlighted in United States District Judge Amul Thapar's opinion in *Ellis v. Arrowood Indem. Co.*, CIV. 12-140-ART, 2015 WL 2061936, (E.D. Ky. Apr. 30, 2015). In *Ellis,* Judge Thapar denied an insurer's motion for summary judgment, finding that a jury could conclude that the insurer acted outrageously based on statements made within a claims file concerning settlement negotiations:

> In a 2012 email to an Arrowood adjustor, one of Arrowood's attorneys wrote, "The money is slowly coming back in." *See* R. 122–37. The Arrowood adjustor replied, "Progress, ever so slowly." *Id.* Why did Arrowood want the money back? To gain leverage in settlement negotiations. Arrowood's claims adjuster, Pamela Savage, admitted as much in a 2006 email, writing "[i]n order to give us some strength in our [settlement] negotiations, we will be filing a motion for disgorgement of all settlement money." R. 122–11. And for what purpose did Arrowood need leverage? To get a lower settlement. After all, Arrowood refused to resettle for the same amount as the 2005 settlement. *See* R. 86–14 at 7 (Arrowood's attorney refusing to settle for the 2005 settlement amount plus one dollar).
>
> Though Arrowood did not file the motion to disgorge the settlement payment until November 2010, it is hard to imagine a purpose the repayment demand might have served other than seeking "a more favorable settlement." *See Glass,* 996 S.W.2d at 452–53. Arrowood's own expert, Mark Arnzen, admited that such conduct would meet the UCSPA standard: "[I]t would be outrageous for an insurance company to use plaintiff's financial condition as leverage to extract a more favorable settlement." *See* R. 136–2 at 52. A reasonable jury could certainly agree.

Ellis v. Arrowood Indem. Co., CIV. 12-140-ART, 2015 WL 2061936, at *8 (E.D. Ky. Apr. 30, 2015).

Granting Appellee's Motion for Summary Judgment without addressing Appellants' discovery Motions deprived Appellants of the opportunity to fully address the merits of Appellee's arguments. Appellants asserted multiple claims against Appellee based on conduct that occurred for over a three and a half year period. Contrary to statements made by Appellee and the trial court's Order, Appellants did not have six years to develop discovery, as discovery relating to the bad faith case was stayed while the underlying claim was pending. Upon the final resolution of the underlying tort claim, Appellants were immediately faced with Motions to Dismiss from both Appellees, which further delayed the discovery process as in addition to trying to schedule a hearing date amongst counsel, a new judge had to be appointed to hear the Motions, the fourth judge to preside over this matter. After this, Appellee's Motion to Dismiss was overruled and Appellants began for the first time the discovery process. Appellants' underlying tort counsel appeared for deposition. Appellants also sought to subpoena records from Appellee National Union, but was met with a Motion from Appellee National Union. Appellants sought to compel the production of the privileged documents, and that Motion was still pending before the trial court when Appellee National Union filed its Motion for Summary Judgment:

> In the absence of a pretrial discovery order, there are no time limitations within which a party is required to commence or complete discovery. As a practical matter, complex factual cases necessarily require more discovery than those where the facts are straightforward and readily accessible to all parties. In this case, the facts involve the parties' dealings with the assets of a multi-million dollar corporation over a period of more than ten years and are factually complex.

Suter v. Mazyck, 226 S.W.3d 837, 842 (Ky. App. 2007), *as modified* (July 13, 2007).

E. Appellee National Union used a withdrawn Opinion for an impermissible purpose.

Appellee National Union argues that its inclusion of an "unpublished" Court of Appeals Opinion in its Reply was an "innocent mistake." However, the excuse and evidence in support of the same rings false. In its Reply filed with the trial court, Appellee attached the withdrawn version of the *Hofmeister* Opinion, which is not available on Westlaw.[2] In fact, Westlaw does not allow access to the text of either the withdrawn Opinion or the depublished Opinion of the Court of Appeals.[3] Lexis – Nexis, not the preferred resource of this Court, allows access to the withdrawn Opinion, but not in the format presented by Appellee to the trial court.[4] The Opinion presented to the trial court was the original Rendered Opinion of the Court of Appeals, which indicates it is to be published and does not reflect its withdrawn status. This version is not even available on the Court of Appeals website.[5] Clearly, the actions of counsel in tracking down this specific version of the Opinion is more than a mere "Westlaw oversight."

Furthermore, the Appellee readily admits that its reasoning for the use of this withdrawn, depublished Opinion is not for any legal argument but, instead, to "instruct this court how this case will be litigated by Plaintiffs' counsel," a reasoning in and of itself impermissible and outside the bounds of civil litigation practice. Appellee's citation to this action extended beyond its use in its Reply Memorandum but was also raised during oral arguments on the Motions as well. The actions cited to by Appellee in support of its use of the Opinion are in no way similar to the actions in the underlying action. *Hofmeister* was a

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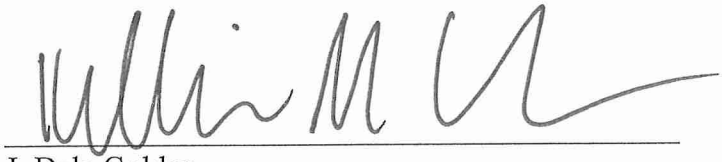
[2] *See* ROA at 7429-7500, the first page being attached hereto at **Appendix 3.**
[3] *See* **Appendix 4.**
[4] *See* **Appendix 5.**
[5] The first page is attached as **Appendix 6.**

suit arising from a motor vehicle accident between an individual and a commercial vehicle on a public roadway, with the bad faith allegations arising from the misrepresentation of the amount of policy coverages by defense counsel for the commercial vehicle. There is nothing instructive in the Court's analysis that can be reasonably and permissibly cited by Appellee in support of the legal argument at issue in the present matter. The inclusion and reference to the Opinion were calculated to inflame the passions and incite prejudices. *See Louisville & N.R. Co. v. Smith,* 84 S.W. 755, 758 (Ky. 1905). The prejudicial effect of the inclusion of the withdrawn *Hofmeister* opinion in both oral arguments and briefing at the trial court level merit reversal of the summary judgment granted to Appellee National Union.

II. CONCLUSION

Although the bar for a bad faith case may be high, in the present action, Appellants were prevented from getting their case off the ground by the trial court's premature granting of the dispositive motions of the Appellees. Appellants clearly plead a cognizable bad faith action with admissible settlement conduct supporting their claims. Therefore, Appellants' respectfully request this Honorable Court to reverse the grant of judgment on the pleadings for Appellee Arch and summary judgment for Appellee National Union and to remand this action back to the trial court to allow Appellants to begin their discovery.



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APPENDIX

ENTERED IN MY OFFICE THIS THE
30 DAY OF March 2016
WENDY FLANARY, CLERK
BY: DAP D.C.

COMMONWEALTH OF KENTUCKY
26TH JUDICIAL CIRCUIT
HARLAN CIRCUIT COURT
CIVIL ACTION NO. 11-CI-349

CRYSTAL LEE MOSLEY ET AL — PLAINTIFF

v.

ORDER

ARCH SPECIALTY INSURANCE COMPANY ET AL. — DEFENDANTS

* * * * * *

This matter is before the Court on the Defendant, Arch Specialty Insurance Company's ("Arch") Motion for Judgment on the Pleadings ("the Motion"). This Court, having reviewed the memoranda of the parties and heard oral argument at a hearing on February 3, 2016, and having concluded that, even if the facts as alleged in the Amended Complaint are true as it relates to Arch's alleged acts or omissions, this conduct is legally insufficient to maintain the Plaintiff's claims for bad faith, violation of KRS 304.12-230 and KRS 304.12-235, civil conspiracy and punitive damages, and thus the Court hereby GRANTS the Motion and enters a JUDGMENT on the pleadings in favor of Defendant Arch Specialty Insurance Company.

Dated this 28th day of MARCH, 2016.

Hon. Jeffrey Burdette – Special Judge

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CLERK'S CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on this 30th day of February, 2016 upon:
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COMMONWEALTH OF KENTUCKY
26th JUDICIAL DISTRICT
HARLAN CIRCUIT COURT
CIVIL ACTION NO. 11-CI-00349

ENTERED IN MY OFFICE THIS THE 11 DAY OF July 2017
WENDY FLANARY, CLERK
BY: D.C.

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.

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).

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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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Southern Division, at Pikeville.

James A. ELLIS, et al., Plaintiffs,

v.

ARROWOOD INDEMNITY COMPANY, Defendant.

Civil No. 12–140–ART.

|

Signed April 30, 2015.

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Opinion

MEMORANDUM OPINION & ORDER

AMUL R. THAPAR, District judge.

*1 In 1998, plaintiffs James Ellis and his architecture firm (collectively, "the Ellis Parties") sued two former law firms, now joined by defendant Arrowood Indemnity Company (collectively, "Arrowood"), for malpractice. After seven contentious years, the parties finally reached a settlement in 2005. But that settlement was set aside when a Kentucky judicial commission concluded in 2006 that the presiding judge had failed to disclose a conflict of interest. After six more years of fruitless negotiations, the Ellis Parties finally reached a new settlement agreement with Arrowood. Five weeks later, on November 5, 2012, the Ellis Parties sued Arrowood for statutory bad faith and deceptive trade practices. At the close of discovery, Arrowood moved for summary judgment. For the reasons discussed below, the Court will grant the motion as to claims that accrued before November 5, 2007, and deny the motion as to claims that accrued after November 5, 2007.

BACKGROUND

Because the Court previously recounted the facts in this case, *see Ellis v. Arrowood Indem. Co.*, No. CIV. 12–140–ART, 2014 WL 2818458, at *1 (E.D. Ky. June 23, 2014), a brief review suffices here. Seventeen years ago, the Ellis Parties sued two of their former law firms for malpractice. *Ellis v. Caudill*, No.2006–SC–660, 2007 WL 1790397 (Ky. June 21, 2007). As the result of a trial on damages only, the jury found that, if liable, Arrowood would owe the Ellis Parties more than three million dollars. *Arrowood Indem. Co.*, 2014 WL 2818458, at *1. Soon thereafter, the parties settled their dispute (the "2005 settlement"). *Id.* As a result of the 2005 settlement, Arrowood paid the Ellis Parties $3.965 million. *Id.* But, when a business relationship between the presiding judge and the Ellis Parties' trial consultant emerged, the new judge set aside the 2005 settlement. *Ellis*, 2007 WL 1790397, at *2. Despite court-ordered mediation, the dispute continued for six years after the set-aside. *Arrowood Indem. Co.*, 2014 WL 2818458, at *1. On November 5, 2012, five weeks after the parties finally settled the original dispute, the Ellis Parties filed a different suit against Arrowood—this time for bad faith and deceptive trade practices in violation of the Kentucky Unfair Claims Settlement Practices Act ("UCSPA"), KRS § 304.12–230. R. 1–1 at 7–9.

DISCUSSION

Summary judgment is only appropriate when the pleadings and discovery materials "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Sullivan v. Oregon Ford, Inc.*, 559 F.3d 594, 594 (6th Cir.2009) (quoting former Fed.R.Civ.P. 56(c)). When evaluating a motion for summary judgment, the Court must draw all inferences and view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the moving party meets its initial burden to identify the parts of the record that "demonstrate[ ] the absence of a genuine issue of material fact," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), the burden shifts and the non-moving

party "must set forth specific facts showing that there is a genuine issue for trial." *United States v. Dusenbery,* 223 F.3d 422, 424 (6th Cir.2000) (quoting former Fed.R.Civ.P. 56(e)).

*2 Here, Arrowood filed a motion for summary judgment on three grounds: (1) the applicable statute of limitations bars the Ellis Parties' claims that accrued more than five years before this suit, (2) the Ellis Parties failed to state a claim under the UCSPA, and (3) the Ellis Parties cannot establish damages. Because the Ellis Parties can assert a claim and establish damages under the UCSPA, the Court will grant Arrowood's motion only as to the time-barred claims that accrued before November 5, 2007.

I. The Ellis Parties' UCSPA claims that accrued before November 5, 2007 are barred by a Kentucky statute of limitations.

For statutes like the UCSPA, which create liability but do not fix a statute of limitations, Kentucky law bars claims filed more than "five years after the cause of action accrued." KRS § 413.120(2). The Ellis Parties filed this suit on November 5, 2012. R. 11 at 2. So the Ellis Parties' claims for bad faith and deceptive practices that accrued before November 5, 2007 are time-barred. Though the Ellis Parties also allege instances of bad faith within the five years before they filed this suit, R. 86–16 at 2–3, Arrowood only seeks summary judgment on those that accrued before November 5, 2007. R. 121–1 at 28–30.

Claims accrue "when the cause or the foundation of the right [of action] [come] into existence." *Caudill v. Arnett,* 481 S.W.2d 668, 669 (Ky.1972) (citing *Jordan v. Howard,* 54 S.W.2d 613, 615 (Ky.1932)). A cause of action does not come into existence until "the last event necessary to create the cause of action occurs." *See Combs v. Int'l Ins. Co.,* 354 F.3d 568, 591 (6th Cir.2004). In Kentucky, that last event occurs at the "juncture of wrong and damage." *See Dodd v. Pittsburg, C., C. & St. L.R. Co.,* 106 S.W. 787, 794 (Ky.1908).

The Ellis Parties admit they suffered wrongs and damages before November 5, 2007. In its "Concise Statement of Material and Indisputable Facts Supporting Summary Judgment," Arrowood states that "[t]he Ellis Parties' asserted bad faith and deceptive practice claims against Arrowood are purely statutory claims pursuant to the UCSPA" and "began to accrue as early as September 2004." R. 121–1 at 19, ¶¶ 19, 20. The Ellis Parties respond in the same way to both assertions: "Agree." R. 122 at 12, ¶¶ 19, 20. Arrowood also states the Ellis Parties allege " 'instances' [of bad faith] that begin in September 2004, additional 'instances' prior to their acceptance and retention of the original $3,965,000 payment on June 5, 2005, and then more 'instances' after this payment." R. 121–1 at 19, ¶ 22. Again, the Ellis Parties, "[a]gree[d]." R. 122 at 12, ¶ 22.

Even without these blanket admissions, the Ellis Parties' specific allegations compel the same conclusion—that the Ellis Parties suffered "wrong and damage" before November 5, 2007. During discovery, Arrowood sent the Ellis Parties the following interrogatory: "Identify the period of time during which you allege Defendants acted in bad faith and identify with specificity the actions taken or not taken by Defendants which you allege were in bad faith." R. 121–9 at 1. In response, the Ellis Parties' listed Arrowood's "[s]pecific instances of bad faith" that occurred "between September 8, 2004 and ... the present [day]":

*3 (1) The Arrowood Adjuster's "refusal to appear in person at the first September 8, 2004 Mediation."

(2)Arrowood's "refusal to attend the Court-ordered January 14, 2005 Mediation."

(3)Arrowood's "refusal to settle the litigation for the amount of the November 17, 2004 Jury Award."

(4)Arrowood's "refusal to settle after the January 28, 2005 settlement amount that was within policy limits and later executed by a Settlement and Release on May 26, 2005, or at any of the multiple mediations held throughout the course of litigation despite liability being clear."

(5)Arrowood's "refusal to re-settle at the May 4, 2006 Mediation despite liability being clear."

R. 121–9 at 1–2. The Ellis Parties' reiterated these instances of bad faith in their response to Arrowood's motion for summary judgement: Until May 6, 2005, they argue, Arrowood repeatedly refused to settle despite "multiple demands by the insureds for the case to settle within policy limits" in order "to not risk an excess liability verdict." R. 122 at 13; *see also* R. 122–2 (explaining that the insured law firms had both demanded that Arrowood settle with the Ellis Parties within the policy limit). The Ellis parties also claim that after the set-aside of the 2005

settlement, and throughout 2006 and 2007, Arrowood "repeatedly refused to simply resettle the case on the terms it had always considered not only fair, but *below* the authority granted to its adjustors." R. 122 at 3–5. Because these wrongs occurred before November 5, 2007, they predate the Ellis Parties' filing date by more than five years.

The Ellis Parties also claim damages that predate November 5, 2007. *See Dodd,* 106 S.W. at 794 ("It is a juncture of wrong and damage that gives rise to a cause of action."). During his deposition, Ellis agreed that he was "seeking bad faith damages" for the period of time "[g]oing back to [the 2004] mediation [that Arrowood] boycotted." *Id.* at 220. Ellis said that he started suffering mental and emotional symptoms "related to this claim" in the fall of 2005. *See* R. 121–10 at 256. The Ellis Parties' list of "compensable damages resulting from defendants' violations of Kentucky's UCSPA statutes" includes more than 150 individual expenses incurred between September 27, 2005, and November 1, 2007—five years and four days before the Ellis Parties filed this action. *See* R. 121–12 at 3, 6–13. So, even based on the Ellis Parties' own, specific allegations, they reached the "juncture of wrong and damage" more than five years before the date of filing. *See Dodd,* 106 S.W. at 794.

The Ellis Parties also agree that the "five-year limitation period applies." R. 122 at 25. But, predictably, they do not concede that the statute of limitations bars their pre–2007 claims. Instead, the Ellis Parties argue that "the broad public policy underlying the [UCSPA] ... allows for claims against an insurer for the entire course of an insurer's bad faith claims handling." R. 122 at 25. In support, the Ellis Parties cite *Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512, 517 (Ky.2006)). But *Knotts* has nothing to do with any statute of limitations and so cannot even arguably support the Ellis Parties' position.

***4** The Ellis Parties also claim that their pre–2007 claims are not time-barred because Arrowood's alleged bad-faith conduct "constituted a continuing violation ... under the [UCSPA]." R. 122 at 26. As a result, the Ellis Parties argue, they only needed to file their claims within five years of the insurance claim's *resolution. Id.* at 25 ("Ellis brought his claim five weeks after the conclusion of the underlying litigation, well within the five-year limitation period."). But Kentucky has never applied the continuing violation doctrine to claims under the UCSPA, and the Ellis Parties do not cite a single case in support of their novel theory. Indeed, they do not develop any argument for why the doctrine should apply in this case—except to incorrectly warn that "[t]his is exactly the kind of conduct the *Knotts* Court feared would happen if the [UCSPA] was limited." *Id.* at 26. Such "perfunctory" treatment of an issue, "unaccompanied by some effort at developed argumentation," necessarily waives the issue. *See McPherson v. Kelsey,* 125 F.3d 989, 995 (6th Cir.1997). It is not the Court's job—nor, arguably, prerogative—to put flesh on the bones of so skeletal an argument. *See id.* at 995–96.

Regardless, the Ellis Parties are wrong; the continuing violation doctrine does not apply here, and it is worth noting why. Kentucky courts and the Sixth Circuit are only willing to apply the continuing violation doctrine to certain employment discrimination claims and common law property claims with well-established continuing violation exceptions—unless, of course, the Kentucky legislature explicitly directs otherwise. *See LRL Props. v. Portage Metro Hous. Auth.,* 55 F.3d 1097, 1105 n. 3 (6th Cir.1995) ("Courts have been extremely reluctant to apply this doctrine outside of the context of Title VII."); *Phat's Bar & Grill, Inc. v. Louisville–Jefferson Cnty. Metro Gov't,* No. 3:10–CV–00491–H, 2013 WL 124063, at *4 (W.D.Ky. Jan. 9, 2013) ("Kentucky courts have traditionally only applied the doctrine in employment discrimination contexts."); *Com., Natural Res. & Envtl. Prot. Cabinet v. Kentucky Ins. Guar. Ass'n,* 972 S.W.2d 276, 285 (Ky.Ct.App.1997) ("[T]he legislature has the ability to carve out an exception to [the statute of limitations] for continuing violations, so its inaction must be construed to manifest an intent to include them within the limitations period."); *Fergerson v. Utilities Elkhorn Coal Co.,* 313 S.W.2d 395 (Ky.1958) (explaining the limited application of the continuing trespass doctrine). With no exception to the statute of limitations, UCSPA claims are time-barred five years after they accrue. *See* KRS § 413.120(2).

This opinion does not, in any way, condone Arrowood's pre–2007 actions. But parties cannot sit on claims—even strong claims—indefinitely. *See Chase Sec. Corp. v. Donaldson,* 325 U.S. 304, 314 (1945) ("[Statutes of limitations] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim."). Ellis hired a new attorney in December 2008. R. 121–10 at 146. Soon after, that attorney advised Ellis to

"keep a low profile" in the hopes that the judge would not order him to return the 2005 settlement money. *Id.* at 146–49. Ellis could have rejected that advice, raced to the courthouse, and filed his claims under the UCSPA. Instead, Ellis's sat on his rights for three more years. When the legislature chooses to elevate the value of finality over the potential merits of a claim, it is not for this Court to insert its own judgment to the contrary.

*5 Ellis argues that he had no choice but to lay low—after all, he had no hope of paying the money back, as the judge would have ordered if Ellis had asked for a new trial on liability. *See* R. 122–16 at 33. But that dilemma is precisely what a prompt claim under the UCSPA could have remedied. Ellis could have filed his claims under the UCSPA as soon as, in his view, Arrowood unreasonably delayed settlement and caused harm despite clear liability. Instead, Ellis chose to wait. Because he waited too long —more than five years—the statute of limitations bars the Ellis Parties' claims for bad faith and deceptive trade practices that accrued before November 5, 2007.

II. The Ellis Parties assert a claim under the UCSPA.

According to Arrowood, the post–2007 claims must fail as well, because the Ellis Parties cannot state a claim under the UCSPA. In support, Arrowood makes numerous, sometimes contradictory, arguments. All are unpersuasive.

A. An insurer can violate the UCSPA without denying the claim.

First, Arrowood points to the Kentucky Supreme Court's seminal opinion on the UCSPA, in which the court adopted a three-element test for a bad faith claim under the UCSPA: "(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." *See* R. 121–1 at 23 (citing *Wittmer v. Jones,* 864 S.W.2d 885, 890 (Ky.1993)). The Ellis Parties do not argue that Arrowood actually denied their claim. So, because *denial* of the claim is "a required element of *Wittmer,*" Arrowood argues, the Ellis Parties cannot prevail. *Id.* at 24.

But Arrowood is wrong. The Ellis Parties do not need to prove that Arrowood denied Ellis's claim. Even a cursory review of Kentucky Supreme Court and Sixth Circuit case law, which is binding on this Court, compels the same conclusion. *See Phelps v. State Farm Mut. Auto. Ins. Co.,* 736 F.3d 697, 704 (6th Cir.2012) (quoting *Farmland Mut. Ins. Co. v. Johnson,* 36 S.W.3d 368, 376 (Ky.2000)) ("The Kentucky Supreme Court has cautioned insurance companies that 'coming up with an amount that is within the range of possibility is not an absolute defense to a bad faith case.' ").

That *Wittmer* wrote in terms of "denial" merely reflected the UCSPA provisions at issue in the case. In *Wittmer,* the plaintiff asserted claims under UCSPA subsections (4) ("Refusing to pay claims without conducting a reasonable investigation ....") and (14) ("Failing to promptly provide reasonable explanation of the basis ... for denial of a claim...."). 664 S.W.2d at 887, 889. *Wittmer* does not even mention the primary subsection at issue in this case, subsection (6) ("Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear."). So it should not be surprising that *Wittmer* wrote in terms of "denying" claims.

*6 A court—even the Kentucky Supreme Court—cannot rewrite the statute. *Compare JP Morgan Chase Bank, N.A. v. Longmeyer,* 275 S.W.3d 697, 702 n. 10 (Ky.2009) (quoting *Sutton v. Transportation Cabinet, Com. of Ky.,* 775 S.W.2d 933, 934 (Ky.Ct.App.1989) ("[C]ourts are not 'empowered to rewrite statutes to suit our notion of sound public policy when the General Assembly has clearly and unambiguously established a different notion." ') *with J.A.S. v. Bushelman,* 342 S.W.3d 850, 865 (Ky.2011) (Minton, C.J., dissenting) (explaining that he cannot join the majority opinion because "it is [not] proper for this Court to amend the statute[ ] by construing them in a manner contrary to the legislature's clear intent"). Nor does *Wittmer* purport to exercise such power. In the sentence immediately preceding the elements that Arrowood quotes, the *Wittmer* court acknowledges the specific context before it: "[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.*" *Wittmer,* 864 S.W.2d at 890.

B. The UCSPA applies even when payment precedes settlement.

Arrowood next argues that the delay between the 2005 payment and the 2012 settlement could not have violated

the UCSPA because "any delay in payment giving rise to a bad faith claim naturally must *precede* the insurer's payment." R. 121–1 at 24–25. Arrowood's argument misses the point. The Ellis Parties' primary contention is that Arrowood delayed settlement, not payment. *See* R. 122 at 17–24 (citing KRS § 304.12230(6)). And Arrowood cites no authority for the proposition that an insurance company cannot violate the UCSPA by disputing a prior payment in bad faith. Indeed, once again, the precedent suggests otherwise. The Sixth Circuit has already held that, under Kentucky law, the UCSPA applies to all three phases of insurance claim resolution—"negotiation, *settlement and payment* of claims." *See Cobb King v. Liberty Mut. Inc. Co.,* 54 F. App'x 833, 836 (6th Cir.2003) (quoting *Davidson v. Am. Freightways, Inc.,* 25 S.W.3d 94, 98 (Ky.2000)). In so holding, the Sixth Circuit rejected the argument that one phase might escape the UCSPA's requirements based on its position in the sequence. *See id.* ("[We decline] to adopt the position that once a settlement agreement is reached, the insurance company's actions are outside the purview of KUCSPA."). Instead, the UCSPA applies "[u]ntil the claim is finally *settled and paid in full.*" *Id.* Certainly, in most cases, settlement precedes payment. But, in either order, the UCSPA applies to both payment and settlement. *See Guar. Nat. Ins. Co. v. George,* 953 S.W.2d 946, 949 (Ky.1997) ("Clearly, one can envision factual situations where an insurer could abuse its legal prerogative in requesting a court to determine coverage issues [after fully paying the claim]. Those may well be addressed through ... an action for bad faith.").

C. Once voided, the 2005 settlement did not absolve Arrowood of its duty under the UCSPA.

***7** Arrowood eventually argues that even if delaying settlement, rather than merely delaying payment, can violate the UCSPA, the Ellis Parties must "resort" to an "inventive attempt to salvage their claims." R. 123 at 6. That is, when the Ellis Parties inserted a bracketed "re" into the language of subsection (6) to distinguish between the set-aside 2005 settlement and the much-delayed 2012 "[re]settlement," *see, e.g.,* R. 122 at 18, 21, 23, Arrowood accuses the Ellis Parties of "attempting to add new language to" the UCSPA. R. 123 at 6 (quoting R. 122 at 18). Arrowood essentially argues that its duty to "attempt[ ] in good faith to effectuate prompt, fair and equitable settlement" lapsed after the 2005 settlement. *See* KRS § 304.12–230(6). The word "resettlement," after all, never appears in the statute.

But this Court has already held that Judge Caudill's set-aside rendered the 2005 settlement void *ab initio*—as if it never happened. R. 90 at 5. So, from 2006 to 2012, there was no settlement in place. Arrowood has reason to be glad that was the case. If the 2005 settlement were still valid, then Arrowood's 2010 demand that Ellis return the settlement payment would raise its own concerns under the UCSPA. *See* R. 121–7 (motion for disgorgement/ return of settlement funds). But the 2005 settlement was set aside-a fact the Ellis Parties' clarifying brackets did not change. So, with no settlement in place after 2006, the parties' 2012 agreement was a settlement—regardless of whether the Ellis Parties called it a "resettlement." From 2006 to 2012, the UCSPA required Arrowood to "attempt[ ] in good faith to effectuate prompt, fair and equitable settlement" of Ellis's claim, so long as "liability ha[d] become reasonably clear." *See* KRS § 304.12230(6).

D. A jury could conclude that Arrowood acted outrageously.

Finally, Arrowood argues that, as a matter of law, the Ellis Parties cannot prove that Arrowood's actions were sufficiently outrageous as to constitute bad faith. R. 121–1 at 25–27. The bad faith "threshold is high." *United Servs. Auto. Ass'n v. Bult,* 183 S.W.3d 181, 186 (Ky.Ct.App.2003). Only "conduct that is outrageous," either because of an "evil motive" or "reckless indifference to the rights of others," is sufficient. *Id.* Arrowood argues that the Ellis Parties' claims cannot clear this threshold because mere delay is not outrageous and because the 2005 settlement could not be outrageous since the Ellis Parties settled for the same amount in 2012. Neither argument is persuasive.

Arrowood correctly notes that "mere delay" is not sufficiently outrageous to violate the UCSPA. R. 121–1 at 26 (citing *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 452 (Ky.1997)). Delay only becomes outrageous when there is "evidence supporting a reasonable inference that the purpose of the delay was to extort a more favorable settlement." *Glass,* 996 S.W.2d at 452–53. According to Arrowood, there are "two undeniable, inarguable reasons" that it made "no effort or attempt ... to 'extort' a 'more favorable' settlement." R. 121–1 at 27. Upon examination, both defy reason. The first is that, after the 2005 payment, there was "simply nothing to 'extort' ... because the Ellis Parties held and continue to hold *all* of the money." *Id.*

*8 But there *was* something to "extort" after the 2005 settlement payment—that something was the settlement payment itself. Arrowood thought it should get the entire payment back. R. 122–8 at 20 ("[A]ll of that money should come back to [Arrowood] because of the conduct of the judge."). Indeed, Arrowood demanded that the Ellis Parties give up the settlement money. R. 121–7 at 3 (motion for disgorgement/return of settlement funds). In a 2012 email to an Arrowood adjustor, one of Arrowood's attorneys wrote, "The money is slowly coming back in." *See* R. 122–37. The Arrowood adjustor replied, "Progress, ever so slowly." *Id.* Why did Arrowood want the money back? To gain leverage in settlement negotiations. Arrowood's claims adjuster, Pamela Savage, admitted as much in a 2006 email, writing "[i]n order to give us some strength in our [settlement] negotiations, we will be filing a motion for disgorgement of all settlement money." R. 122–11. And for what purpose did Arrowood need leverage? To get a lower settlement. After all, Arrowood refused to resettle for the same amount as the 2005 settlement. *See* R. 86–14 at 7 (Arrowood's attorney refusing to settle for the 2005 settlement amount plus one dollar).

Though Arrowood did not file the motion to disgorge the settlement payment until November 2010, it is hard to imagine a purpose the repayment demand might have served other than seeking "a more favorable settlement." *See Glass,* 996 S.W.2d at 452–53. Arrowood's own expert, Mark Arnzen, admited that such conduct would meet the UCSPA standard: "[I]t would be outrageous for an insurance company to use plaintiff's financial condition as leverage to extract a more favorable settlement." *See* R. 136–2 at 52. A reasonable jury could certainly agree.

Arrowood's second "undeniable" reason it made no effort to extort a better settlement is equally nonsensical. *See* R. 121–1 at 27. Arrowood claims that "no 'more favorable' settlement could have been 'extorted' " because the 2005 settlement amount was precisely the same as the 2012 settlement amount. *Id.* If Arrowood truly believed it could not have gotten a settlement better than the 2005 settlement, then why—for six years—would Arrowood reject the best offer it could get? Arrowood may have a compelling explanation. But viewing the facts in the light most favorable to the Ellis Parties—as the Court must at this stage—a jury could fairly conclude that Arrowood delayed in order to "extort" a "more favorable settlement." *See Glass,* 996 S.W.2d at 452–53.

Arrowood also claims that its 2005 payment could not have been outrageous because the Ellis Parties settled for the same amount in 2012. R. 121–1 at 25. Once again, Arrowood misses the point. The Ellis Parties do not claim that the 2005 settlement amount was itself outrageous —Ellis wanted to keep the settlement in place. *See* R. 12110 at 128. Instead, the Ellis Parties claim that it was outrageous for Arrowood to delay settlement for six years after the 2006 settlement was set-aside and to demand the settlement money back years after much of the settlement had gone to pay taxes and attorneys' fees. R. 122 at 18–21.

*9 Though Arrowood's argument falls flat against the Ellis Parties, it carries more force against Arrowood. Arrowood has not explained why its settlement payment of $3.965 million was "fair and equitable" in 2005 and in 2012 but not during the years in between. Nor has Arrowood demonstrated what, if anything, made liability less than "reasonably clear" after the 2005 settlement. On these questions, and on others, genuine issues of material fact persist. And a jury could reasonably conclude that Arrowood's actions were outrageous. Accordingly, the Ellis Parties can assert a claim for statutory bad faith under the UCSPA.

III. The Ellis Parties can establish damages under the UCSPA.

The Ellis Parties claim pre- and post-judgment interest, attorneys' fees, settlement and mediation expenses, mental and emotional injuries, and punitive damages. R. 1–1 at 8, ¶¶ 36–37. Arrowood argues that the Ellis Parties' claims fail because, as a matter of law, they cannot succeed in establishing any compensatory damages. R. 121–1 at 30–31. And, "absent actual damage," Arrowood argues, the Ellis Parties cannot bring bad faith claims under the UCSPA. *Id.* at 31 (citing *Motorists Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 452 (Ky.1997) ("A condition precedent to bringing a statutory bad faith action is that the claimant was *damaged by reason of the violation of the statute.*")) (emphasis added).

But there is a genuine dispute as to damages. Take, for example, Ellis's claim of "out-of-pocket travel/per diem expenses" that Ellis incurred during "attendance at multiple Court-ordered Hearings, Mediation/Settlement Conferences, and meetings with legal counsel." R. 1–1 at 8, ¶ 37. Arrowood argues that the Ellis Parties cannot claim these expenses because they filed the documentation

after the supplemental disclosure deadline and because Kentucky law bars third-party claims for attorneys' fees. *See* R. 121–1 at 31–34. Both arguments fail.

True, the Ellis Parties filed the calculation of damages after the supplemental disclosure deadline. *See* R. 121–12 at 2 (certifying that the Ellis Parties served Arrowood with the documentation on April 8, 2014); R. 17 at 2 (listing the supplemental disclosure deadline as August 20, 2013); R. 32 (same). Indeed, the Ellis Parties should have produced the calculation of damages without prompting as part of their initial disclosure. Fed.R.Civ.P. 26(a)(1)(A)(iii). And when a party fails to supply information as required by Rule 26(a), "the party is not allowed to use that information ... to supply evidence on a motion ... or at a trial"—"unless," of course, "the failure was substantially justified or is harmless." Fed.R.Civ.P. 37(c)(1).

The Ellis Parties do not claim that the delay was justified, arguing instead that "Arrowood has made no showing they have been harmed by the timing of the damages calculations' disclosure." R. 122 at 28. Arrowood did not even allege harm in its motion for summary judgment. R. 121–1 at 31–32. And in its reply brief, Arrowood simply argued that the late disclosure "clearly prejudiced and harmed Arrowood ... because Arrowood was required to depose Mr. Ellis without such information." R. 123 at 11. Arrowood never explains how deposing Ellis without the information caused harm. Arrowood does not list any question it would have asked Ellis about the documents. And Arrowood does not point to any objection to the late disclosure. Nor does Arrowood ever ask to re-depose Ellis in the nearly nine months between the late disclosure and the close of discovery. *See* R. 70 at 2 (extending the close of discovery to December 31, 2014).

***10** Nevertheless, the Ellis Parties' assertion of harmlessness fails for two reasons. First, Arrowood does not have the burden to demonstrate harm. Instead, the Ellis Parties must prove that their delay was harmless. *R.C. Olmstead, Inc., v. CU Interface, LLC,* 606 F.3d 262, 272 (6th Cir.2010) ("The burden is on the potentially sanctioned party to prove harmlessness.").

And, second, the Ellis Parties failed to plead a necessary element of harmlessness. The Sixth Circuit interprets harmlessness in Rule 37(c) as requiring an "honest mistake" by the violating party and "sufficient knowledge" by the wronged party. *Sommer v.. Davis,* 317 F.3d 686, 692 (6th Cir.2003) (quoting *Vance v. United States,* No. 98–5488, 1999 WL 455435, at *5 (6th Cir. June 25, 1999) (unpublished table decision)). Even if Arrowood had sufficient knowledge, the Ellis Parties never claim that the discovery violation was an honest mistake. *See* R. 122 at 27–29. As a result, Rule 37(c) requires a sanction. *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transp.,* 596 F.3d 357, 370 (6th Cir.2010) (quoting *Vance ex rel Hammons v. United States,* 182 F.3d 920 (6th Cir.1999)) ("[T]he [test] for exclusion of the evidence under Rule 37(c) ... 'is very simple: the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless.' ").

So the Court must impose a sanction—though not necessarily total exclusion. Rule 37(c) "tempers" the harshness of a mandatory sanction by authorizing courts to impose lesser sanctions. *Roberts ex rel. Johnson v. Galen of Virginia, Inc.,* 325 F.3d 776, 783–84 (6th Cir.2003) (quoting *Vance v. United States,* No. 98–5488, 1999 WL 455435, at *4 (6th Cir. June 25, 1999)). Because district courts are in the "best position" to examine discovery disputes, a court's "discretion is especially broad" in this context. *Ames v. Van Dyne,* 100 F.3d 956 (6th Cir.1996) (quoting *Doe v. Johnson,* 52 F.3d 1448, 1464 (7th Cir.1995)).

Here, total exclusion is not the appropriate sanction. The Ellis Parties did not wait until the eve of trial to disclose their calculation of damages. *See, e.g., Rowe v. Case Equip. Corp.,* 105 F.3d 659 (6th Cir.1997) ("Rowe's failure to disclose his expert's report until the eve of trial, leaving Case little opportunity to depose the expert and secure a rebuttal witness, was more than harmless to Case."). Instead, the Ellis Parties produced the calculation of damages nearly nine months before the close of discovery. *See* R. 70 at 2 (extending the close of discovery to December 31, 2014); R. 121–12 at 2 (certifying that the Ellis Parties served Arrowood with the documentation on April 8, 2014). Arrowood never objected to the Ellis Parties' late disclosure nor asked to re-depose Ellis to cure any harm caused by the delay. If not for the Ellis Parties' waiver, Arrowood's inaction might suggest that the delay was justified or harmless. *See Roberts,* 325 F.3d at 783. If nothing else, however, Arrowood's lack of concern until its motion for summary judgment suggests that total exclusion would be too harsh.

*11 At any point during those nine months before discovery closed, Arrowood could have requested a second deposition of Ellis. *See* Rule 37(c)(1)(C) (authorizing a range of lesser sanctions including any the Court finds "appropriate"). Re-deposing Ellis would have cured the only harm that Arrowood claims from the late disclosure. *See* R. 123 at 10–11 (explaining that the late disclosure caused Arrowood harm because it had to depose Ellis without the calculation of damages). Instead of a lesser sanction, however, Arrowood requested only total exclusion—a sanction that is too harsh for the Ellis Parties' violation.

Arrowood also argues that the Ellis Parties cannot recover "attorneys' fees and expenses related to legal hearings and other legal activities" because this is a "third-party bad faith claim under the UCSPA." R. 121–1 at 32–33. When an insurer fails to promptly pay a valid claim, KRS § 304.12–235(3) authorizes "the insured person or health care provider ... to be reimbursed for his reasonable attorney's fees." This Court has previously held that this provision does not apply to third-party claimants like the Ellis Parties because the statute's plain text only extends attorneys' fees to "insured person[s]" and "health care provider[s]." *Nevels v. Deerbook Ins. Co.*, No. CIV. 10–83–ART, 2011 WL 3903209, at *5 (E.D.Ky. Sept. 6, 2011) (citing *Glass*, 996 S.W.2d at 455 (limiting attorneys' fees to the "policyholder or the policyholder's health care provider")).

But the calculation of damages includes "out-of-pocket travel [or] per diem expenses" that Jim Ellis personally suffered as a result of his own attendance at various hearings, mediations, and settlement conferences—not attorneys' fees and expenses. *See* R. 1–1 at ¶ 37; R. 122 at 5 (citing R. 121–12) (referencing Ellis's "$91,160.45 in out of pocket expenses from participating in litigation"); R. 121–12 (listing numerous individual payments to hotels and restaurants). Arrowood does not demonstrate that all of the listed expenses in the calculation of damages fall within the statutory provision for attorneys' fees. Indeed, in *Glass*—the same case that limits attorneys' fees to the "policyholder or the policyholder's health care provider"—the Kentucky Supreme Court held that the third-party plaintiffs were "[c]learly ... entitled to their costs" and expenses. *Glass*, 996 S.W.2d at 455 (citing KRS § 453.040(1)(a)). So the limited authorization of attorneys' fees to first-party claimants in KRS § 304.12–235(3) cannot bar third-party claimants from seeking costs and expenses.

Glass also concluded that "there is no basis for an award of any costs or expenses incurred ... in this litigation except those authorized by KRS § 453.040(1)(a)," which allows a successful party to recover costs. *Glass*, 996 S.W.2d at 455. So, perhaps, Arrowood could have argued that the Ellis Parties cannot claim these expenses as damages and can only recover them after prevailing at trial. But Arrowood did not plead KRS § 453.040(1)(a) as a ground for barring Elllis's damages, so the Court will not make the argument on its behalf. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir.1997).

*12 And, regardless, the calculation of damages included at least some expenses that Jim Ellis incurred personally—not through attorneys—while trying to reach a settlement of the underlying insurance claim—not "in this litigation." *Glass*, 996 S.W.2d at 455. Indeed, all of the expenses listed in the calculation of damages predated this lawsuit, some by more than five years. *See* R. 121–12. Construing the facts in the Ellis Parties' favor, there is at least a dispute as to whether these expenses count as "damages [that Ellis] sustained by reason of [Arrowood's] violation" of the UCSPA. *See* KRS § 446.070; *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116, 117–18 (Ky.1988) (holding that KRS § 446.070 authorizes third-party plaintiff's like Ellis to recover damages that result from UCSPA violations). Accordingly, Arrowood has failed to demonstrate that the Ellis Parties' claims must fail for lack of compensatory damages.

CONCLUSION

After seventeen contentious years, this dispute continues still. Though the Ellis Parties waited too long to bring their earliest claims against Arrowood, the claims that accrued after November 5, 2007 survive Arrowood's motion for summary judgment.

Accordingly, it is **ORDERED** that:

(1) Arrowood's motion for summary judgment, R. 121, is **GRANTED** as to the Ellis Parties' claims that accrued before November 5, 2007, and **DENIED** as to the Ellis Parties' other claims.

All Citations

Not Reported in F.Supp.3d, 2015 WL 2061936

End of Document

RENDERED: SEPTEMBER 26, 2008; 2:00 P.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

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

CINCINNATI INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

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

GEORGE HOFMEISTER AND KAY HOFMEISTER — APPELLEES/CROSS-APPELLANTS

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

** ** ** ** **

BEFORE: ACREE AND KELLER, JUDGES; KNOPF,[1] SENIOR JUDGE.

[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.

Filed 11-CI-00349 04/20/2017 Wendy Flanary, Harlan Circuit Clerk

2008 WL 4601140
Only the Westlaw citation is currently available.

Court of Appeals of Kentucky.

CINCINNATI INSURANCE COMPANY, Appellant/Cross–Appellee,

v.

George HOFMEISTER and Kay Hofmeister, Appellees/Cross–Appellants.

Nos. 2004–CA–002296–MR, 2004–CA–002362–MR.

|

Oct. 17, 2008.

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Discretionary review denied; ordered not to be published May 13, 2009.

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Court of Appeals of Kentucky.

CINCINNATI INSURANCE COMPANY, Appellant/Cross–Appellee

v.

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Nos. 2004–CA–002296–MR, 2004–CA–002362–MR.

|

Sept. 26, 2008.

|

Opinion withdrawn on grant of modification October 3, 2008.

All Citations

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Cincinnati Ins. Co. v. Hofmeister

Court of Appeals of Kentucky

September 26, 2008, Rendered

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

Reporter
2008 Ky. App. LEXIS 302 *

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: Opinion withdrawn by *Cincinnati Ins. Co. v. Hofmeister, 2008 Ky. App. LEXIS 313 (Ky. Ct. App., Oct. 17, 2008)*

US Supreme Court certiorari denied by *Hofmeister v. Cincinnati Ins. Co., 2009 U.S. LEXIS 7442 (U.S., Oct. 13, 2009)*

Prior History: [*1] APPEAL AND CROSS-APPEAL FROM SCOTT CIRCUIT COURT. HONORABLE PAUL F. ISAACS, JUDGE. ACTION NO. 00-CI-00030.

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

Appellee accident victims sued appellant insurer in the Scott Circuit Court (Kentucky), for fraudulent misrepresentation and violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), *Ky. Rev. Stat. Ann. § 304.12-230*. The jury found for the accident victims. The trial court, which denied the insurer's motions for a directed verdict and judgment notwithstanding the verdict, reduced the punitive damages award. The parties appealed.

Overview
One of the accident victims was injured when a vehicle that an employee of the insured was driving collided with the victim's vehicle. The accident victims made no attempt with the insurer to settle their underlying negligence action against the insured before filing their complaint against the insurer. On appeal, the court found that the trial court erred by denying the insurer's motion for a directed verdict that the attorney retained by the insurer to represent the insured was not the insurer's agent. The attorney began and maintained his representation of the insured as the insurer's independent contractor. Therefore, the general rule prevailed and the insurer was not vicariously liable for any of the attorney's actions undertaken in his representation of the insured. Additionally, the trial court erred by denying the insurer's motion for a directed verdict on the victims' claim of fraud because the victims failed to prove the elements of fraud. Finally, the trial court committed reversible error when it failed to direct a verdict in favor of the insurer on the claims that the insurer violated the UCSPA because the insurer had a reasonable basis for denying the victims' claims.

Outcome
The judgment was reversed. The insureds' cross-appeal was dismissed as moot.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

HN1[] **Disclosure, Mandatory Disclosures**

See *Ky. R. Civ. P. 26.02(2)*.

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

HN2[] **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.

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

Legal Ethics > Client Relations > Conflicts of Interest

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Masters & Servants

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

HN3[] **Types, Attorney & Client**

No man can serve two masters. It is axiomatic that a lawyer must serve his client dutifully and loyally.

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

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN4[] **Types, Attorney & Client**

There is a fear that the entity paying an attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is controlling the legal representation. To quell that fear, the Supreme Court of Kentucky adheres to the view that it would be contrary to public policy to allow the insurer to control the litigation.

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

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN5[] **Types, Attorney & Client**

Kentucky has consistently refused to allow an insurer any right to control an attorney's independent manner of representing its insured.

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

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters

& Servants > Independent Contractors

HN6[] **Types, Attorney & Client**

The general rule is the services of a professional man, such as a lawyer are rendered under an independent contract. 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. These same rules apply when an insurer selects and pays an attorney to represent its insured.

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

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN7[] **Types, Attorney & Client**

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. The attorney is engaged in the distinct occupation of practicing law, one in which the attorney possesses special skill and expertise. The 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 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.

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

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN8[] **Types, Attorney & Client**

The factor most critical to an attorney's retention of his status as an independent contractor, vis-a-vis an insurer, is the attorney's retention of control over the means by which he accomplishes the insurer's desired result - defense of its insured. 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

Torts > Vicarious Liability > Employers > General Overview

HN9[] **Vicarious Liability, Independent Contractors**

As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job.

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN10[] **Independent Contractors, Masters & Servants, Independent Contractors**

Kentucky recognizes that if a principal lacking the right of control nevertheless personally interferes with, undertakes to do, manage or control 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. Kentucky independent contractors, once possessed of the right to control their own work, are not inclined to relinquish that right to the employer.

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Masters & Servants

HN11[] **Independent Contractors, Masters & Servants, Independent Contractors**

The main dispositive criterion for determining whether a party is an independent contractor is whether it is understood that an alleged principal or master has the right to control the details of the work.

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

Legal Ethics > Client Relations > Conflicts of Interest

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

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

HN12[] **Types, Attorney & Client**

Unlike other independent contractors, an attorney who relinquishes the right to control will perforce violate his duty under the *Ky. Sup. Ct. R. 1.8(f)(2)*, and clearly subject himself to severe discipline. An attorney's maintenance and protection of his independent contractor status is thus reinforced. Cases in which an insurer may be held liable under an agency theory when an attorney represents an insured will be rare indeed.

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

Legal Ethics > Client Relations > Conflicts of Interest

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

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

HN13[] **Types, Attorney & Client**

The proper standard for determining whether an insurer has exercised actual control of an attorney, despite lacking the right to do so, is 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 > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

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

HN14[] **Independent Contractors, Masters & Servants, Independent Contractors**

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.

Insurance Law > Remedies > Declaratory Judgments > General Overview

HN15[] **Remedies, Declaratory Judgments**

A contract of liability insurance is simply an asset from which a liability may be satisfied. Accident victims assert claims against alleged tortfeasors, not directly against the tortfeasor's insurer. Nothing 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.

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

Insurance Law > Remedies > Declaratory Judgments > General Overview

HN16[] **Types, Attorney & Client**

An insurer is better able than its insured to select legal counsel to represent that insured. Kentucky courts will not penalize a party because he prudently authorized his experienced insurer to select the right attorney to defend him.

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

Legal Ethics > Client Relations > Conflicts of Interest

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

Business & Corporate Law > Agency Relationships > Types > Insurance Agents & Insurance Companies

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

HN17[] **Types, Attorney & Client**

The respective roles of an 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 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 receives direction and authority from the insurer, which is why he has been deemed the insurer's agent. 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.

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

HN18[] **Types, Attorney & Client**

An attorney is an agent of his client. Kentucky has always jealously guarded the attorney-client relationship, for while the relationship is generally that of principal and agent the attorney owes his client a higher duty than any ordinary agent owes his principal.

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

Business & Corporate Law > ... > Agents Distinguished > Independent Contractors, Masters & Servants > Independent Contractors

HN19[] **Types, Attorney & Client**

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.

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

HN20[] **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 > Remedies > Declaratory Judgments > General Overview

Torts > Negligence > Types of Negligence Actions > General Overview

HN21[] **Remedies, Declaratory Judgments**

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 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 > Allocation

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Evidence > Burdens of Proof > Clear & Convincing Proof

HN22[] **Burdens of Proof, Allocation**

Common law fraudulent misrepresentation requires proof of six elements: (1) that the declarant made a material 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. There must be clear and convincing proof of each of these elements.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN23[] **Actual Fraud, Elements**

The duty to disclose describes an element of the tort of fraudulent concealment requiring proof of substantially different elements from the tort of fraudulent misrepresentation.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN24[] **Actual Fraud, Elements**

Blind reliance fails the fifth requirement of fraud - reasonable reliance upon the claimed fraudulent act.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN25[] **Actual Fraud, Elements**

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

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN26[] **Actual Fraud, Elements**

Where 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.

Evidence > Burdens of Proof > Allocation

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN27[] **Burdens of Proof, Allocation**

The concept that a defendant cannot escape on the ground that the complaining party should not have trusted him applies 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.

Governments > Legislation > Statutory Remedies & Rights

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

HN28[] **Legislation, Statutory Remedies & Rights**

The fact that the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, is not specifically designed to accommodate third party claims makes trial nearly impossible and appellate review most difficult.

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > National Association of Insurance Commissioners

Governments > Legislation > Statutory Remedies & Rights

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

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

HN29[] **State Insurance Commissioners & Departments, National Association of Insurance Commissioners**

Ky. Rev. Stat. Ann. § 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). It was intended by its drafters only as regulatory measure to assist state insurance administrators. The 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." As a consequence, Kentucky is in that distinct minority of states that recognizes a private right of action for violations of the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*.

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statutory Remedies & Rights

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

HN30[] **Burdens of Proof, Allocation**

There is no such thing as a technical violation of the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, at least in the sense of establishing a private cause of action for tortious misconduct justifying a claim 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.

Civil Procedure > Sanctions > Baseless Filings > Bad Faith Motions

Governments > Courts > Authority to Adjudicate

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Governments > Courts > Rule Application & Interpretation

HN31[] **Baseless Filings, Bad Faith Motions**

Litigation conduct amounting to bad faith can be sanctioned by a trial court pursuant to the civil rules.

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

HN32[] **Scope of Employment, Personal Activities**

For a frolic and detour an employer has no vicarious liability.

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

Governments > Courts > Authority to Adjudicate

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

HN33[] **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 a jury.

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

Governments > Courts > Authority to Adjudicate

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

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Governments > Legislation > Statutory Remedies & Rights

HN34[] **Jury Trials, Province of Court & Jury**

Whether a tort has occurred under the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, is precisely what the caselaw requires a 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. 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.

Evidence > Burdens of Proof > Allocation

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

HN35[] **Burdens of Proof, Allocation**

The evidentiary threshold for a claim predicated on bad faith by an insurer 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. There is no justification for lowering the standard for third-party claims deriving as they must from the first-party's contract of insurance. This approach has long been embraced 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, questions for a jury which is just not equipped to evaluate the issue of bad faith. The case law has simply extended to tort actions under the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*, the same requirement still existing under the common law that the issue of bad faith should be decided by a trial court.

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

Insurance Law > Liability & Performance Standards > Settlements > Policy Coverage

HN36[] **Bad Faith & Extracontractual Liability, Elements of Bad Faith**

Ky. Rev. Stat. Ann. § 304.12-230(1) prohibits an insurer from misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.

Insurance Law > Liability & Performance Standards > Settlements > Policy Coverage

HN37[] **Settlements, Policy Coverage**

"Coverages" is a term that identifies the amount and extent of risk contractually assumed by an insurer. It is an abbreviated means by which a court will define what an 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 > Policy Coverage

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

Insurance Law > ... > Declaratory Judgments > Procedure > Relevant Parties

HN38[] **Settlements, Policy Coverage**

For purposes of defining the class of persons protected by *Ky. Rev. Stat. Ann. § 304.12-230(1)*, coverages at issue would include both first-party insureds and third-party claimants to whom the insured assigned (as under common law) his claim against the insurer.

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

Insurance Law > Liability & Performance Standards > Settlements > Reasonable Basis

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

HN39[] **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. At least with regard to third-party claims, the bad faith standards under the caselaw encompass this provision.

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

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

Insurance Law > Liability & Performance Standards > Settlements > Reasonable Basis

HN40[] **Settlements, Good Faith & Fair Dealing**

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.

Governments > Legislation > Statutory Remedies & Rights

Insurance Law > Liability & Performance Standards > Settlements > Reasonable Basis

HN41[] **Legislation, Statutory Remedies & Rights**

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.

Governments > Legislation > Statutory Remedies & Rights

Insurance Law > Liability & Performance Standards > Settlements > Reasonable Basis

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

HN42[] **Legislation, Statutory Remedies & Rights**

Like *Ky. Rev. Stat. Ann. § 304.12-230(1)*, the class of persons protected by *Ky. Rev. Stat. Ann. § 304.12-230(13)* are first-party insureds and third-party assignees of the first-party's rights.

Governments > Legislation > Statutory Remedies & Rights

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

Insurance Law > Liability & Performance Standards > Settlements > Reasonable Basis

HN43[] **Legislation, Statutory Remedies & Rights**

Ky. Rev. Stat. Ann. § 304.12-230(14) makes an insurer liable for failing to promptly provide a reasonable explanation of the basis in an 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 a coverage issue that plainly refers to first-party claims.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

HN44[] **Appeals, Standards of Review**

The Court of Appeals of Kentucky will neither presume in any particular case, nor deny the proposition in general, that there is a prejudice which juries frequently apply against insurance companies. Kentucky courts have long been aware of this prejudice, as exemplified by the decisions in personal injury cases where the element of insurance has been improperly injected.

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

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

HN45[] **Preliminary Questions, Admissibility of Evidence**

Post-litigation conduct by an insurance company can be the basis of a claim under the Kentucky Unfair Claims Settlement Practices Act, *Ky. Rev. Stat. Ann. § 304.12-230*. However, litigation conduct is held inadmissible.

Civil Procedure > Sanctions > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Governments > Courts > Rule Application & Interpretation

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

Legal Ethics > Professional Conduct > Tribunals

HN46[] **Civil Procedure, Sanctions**

The remedies provided by the Kentucky 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. Attorneys, and even parties, are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, attorneys have significant duties under the Kentucky Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, the better approach is an absolute prohibition on the introduction of such evidence in actions brought under *Ky. Rev. Stat. Ann. § 304.12-230*.

Civil Procedure > Trials > Jury Trials > Jury Deliberations

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

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

HN47[] **Jury Trials, Jury Deliberations**

It is calamity to permit a jury to pass judgment on a defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct. It places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer. 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 the adversarial system on its head. The fear is that a jury, with the assistance of hindsight, and without the assistance of insight into litigation techniques, could second guess the defendant's rationales for taking a particular course.

Civil
Procedure > Remedies > Damages > Compensator y Damages

Torts > ... > Types of Losses > Lost Income > Award Calculations

Civil Procedure > Remedies > Damages > Monetary Damages

HN48[] **Damages, Compensatory Damages**

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.

Evidence > ... > Examination > Cross-Examinations > Collateral Matters

Evidence > ... > Examination > Cross-Examinations > Scope

HN49[] **Cross-Examinations, Collateral Matters**

A connection 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.

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

HN50[] **Liability & Performance Standards, Bad Faith & Extracontractual Liability**

Some attorneys exhibit a personal bias against insurance companies and in favor of using bad faith and Kentucky Unfair Claims Settlement Practices Act, Ky. Rev. Stat. Ann. § 304.12-230, allegations to extort payment of underlying claims from insurers.

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 for violation of the Kentucky Unfair Claims [*2] 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.

[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.

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 found CIC settled unfairly, began at 10:00 [*3] 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.

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 one another, Clark's vehicle crossed [*4] 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 site was on US 62 in Georgetown, Kentucky. [*5] 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.

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 injury protection (PIP) benefits to Hofmeister's [*6] 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.

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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.

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 time of the accident, and that Hofmeister was comparatively [*7] 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 this litigation, the Hofmeisters did not ask Dasher to produce [*8] 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 entrepreneur. Through various business entities he had created, [*10] 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

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

> *HN1*[] 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. The Hofmeisters' tax returns show that 1998 was a good year for [*9] 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.

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 departed, Golden sat down with Murner and Dasher's owners [*11] 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 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 limits of Dasher's insurance carrier." He declined Murner's [*12] 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 for Dasher's response to his settlement demand. Golden [*13] 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 right of indemnification from Clark should that issue [*14] 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.

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

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 days." Golden also confirmed for Murner that Mr. Hofmeister [*15] 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 Increase Memorandum," introduced at trial as Plaintiffs' [*16] 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 coverage issues involved.

The coverage issues to which she [*17] 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. His pretrial disclosures placed a zero-dollar value on future [*18] 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 by Hofmeister's equine-related and other businesses. Murner [*19] 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 the settlement offer].

Golden responded to Murner on June 20, [*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 office on June 22, 2000. There were several aspects to the [*21] 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, that CIC would "be responsible for negotiating any settlement [*22] 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

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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.

lost income.

Before the workday ended, Golden, on behalf of the Hofmeisters, wrote to Murner stating that the [*23] "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] 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 not resume in earnest until the issue of Dasher's vicarious liability [*24] 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 portions. In Golden's opinion, this violated Kentucky's UCSPA. Using [*25] 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 Murner at trial regarding this episode, Golden revealed that his [*26] 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.
> 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

[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 been made; and (5) Murner's admission supported Golden's claim [*27] 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.

> 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 discovery even over Golden's motion for a protective order. Even **[*28]** then, Dasher subsequently found it necessary to obtain the 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. Shortly thereafter, the Hofmeisters amended the complaint again, **[*29]** 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 and other businesses, that he had that brought in risk factors that **[*30]** 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 the task. The Hofmeisters argued that this specific question **[*31]** 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 simultaneously presented the Hofmeisters with an offer of judgment, **[*32]** 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, and because terms of the settlement were unclear, **[*33]** 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. [12] 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, 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 **[*35]** 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 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

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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 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.

[12] At this point in the litigation, Murner was representing Dasher and Clark. Before the trial court determined that Clark was acting within the scope of his employment with Dasher, Clark had separate counsel. He had never requested coverage from CIC. Once the scope-of-employment issue was decided, CIC provided Clark's defense. Still, on the heels of the jury verdict in the case *sub judice*, Clark filed a civil action over this issue claiming CIC violated the UCSPA. *Clark v. Cincinnati Ins. Co., No. 2005-CA-000356-MR, 2006 WL 1044461 (Ky.App. April 21, 2006)*. This Court in *Clark* affirmed the Fayette Circuit Court's dismissal of Clark's claim. In an example of *litigation* making **[*34]** strange bedfellows, Clark's attorney was Dale Golden.

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 [*36] 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. 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.

In accordance with this agreement, Murner drafted a settlement agreement and release. [13] The Hofmeisters' right was reserved to continue pursuing [*37] 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 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 [*38] 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 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 [*39] 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 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

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[13] 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.

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 **[*40]** 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" [14] 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,* 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 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, **[*41]** 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 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 **[*42]** 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,* 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 **[*43]** 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 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

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[14] 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.

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)*. *HN2*[] 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)*. [*44] 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 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 [*45] of the relationship between the insured and the attorney hired to defend him, our Supreme Court reemphasized that *HN3*[] "[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 loyalty to the client. *Id. at 571*.

> Inherent in all of these potential conflicts is *HN4*[] 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 [*46] 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 *HN5*[] 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)*, our highest court said that *HN6*[] 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:

> *HN7*[] In the typical situation in which an insurer hires an attorney [*47] 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 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.").

HN8[] Clearly, the factor most critical to the attorney's [*48] 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 is not an independent contractor.")(quotation marks and citation omitted). We conclude that 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. [15]

HN9[] As a general rule, 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 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, *HN10*[] Kentucky recognized that 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, [*50] 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. [16]

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*. *HN12*[] Unlike other independent contractors, the 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 [*51] 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 *HN13*[] the proper standard for 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 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

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[15] 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 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 [*49] 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.*

[16] Several cases, notably *United Engineers & Constructors, Inc. v. Branham, 550 S.W.2d 540 (Ky. 1977)*, reaffirm the longstanding rule that *HN11*[] "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 supplied). Here we are speaking of a different concept - the principal's exercise of control despite having no right to do so.

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. *HN14*[] Whereas independent contractor status is shown by the *absence* of the principal's control over the work to be performed, agency **[*52]** 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 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 CIC's agent.

Respectfully, we believe the learned trial judge erred by not considering closely enough just what caused **[*53]** 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 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' **[*54]** demands - but such a payment would be, according to the insurance contract, "at the 'insured's' own cost." [17]

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 *HN16*[] an insurer is better able than its insured to select **[*55]** 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 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

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[17] We should not forget that *HN15*[] 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 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.

cannot conclude that this fact supports a finding that CIC controlled Murner.

The trial court and the Hofmeisters next place [*56] 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 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. [*57] *HN17*[] 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 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 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 [*58] 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)*(*HN18*[] "an attorney is an agent of his client"). Kentucky has always jealously guarded the attorney-client relationship, for 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 *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 *HN19*[] 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 [*59] 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 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 [*60] from denying the agency

relationship because of a prior assertion in this same proceeding that CIC's communications with Murner were privileged. We disagree. *HN20*[] "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 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 **[*61]** 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)*, 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 **[*62]** could bind CIC in settlement reveals a fundamental confusion about the nature of the underlying claim. *HN21*[] 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 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)*; *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 **[*63]** 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. [18]

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 **[*64]** 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

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[18] 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" 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.

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

HN22[] Common law fraudulent misrepresentation requires proof of six elements: "(1) that the declarant made a material 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 **[*65]** 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[.]" [19] They claimed 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 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 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, HN23[] 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"), **[*67]** 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 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 **[*68]** 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

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[19] 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 **[*66]** the instruction simply ask the jury to determine whether CIC had misrepresented "pertinent facts" regarding insurance coverage. Jury instructions identifying the alleged representation must portray it with accuracy.

of co-agents.

Id. at 154 (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 **[*69]** 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 presumes the agency relationship *already exists.* RESTATEMENT (SECOND) OF AGENCY, *supra,* § 251 ("Liability For Physical Harm *Caused By A[n] Agent;*" emphasis supplied). [20]

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 **[*70]** 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 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 **[*71]** be reasonable. *Harralson v. Monger, 206 S.W.3d 336, 341 (Ky.2006)*(*HN24*[ ] "*[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, 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 **[*72]** the Hofmeisters' and Clark's insurers. The settlement agreement itself was not finalized until December 2002.

Most significantly, it is well established that *HN25*[ ] "[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).* The case cited most frequently in Kentucky for this point of law is one of our

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[20] 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.

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 *HN26*[↑] 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 **[*73]** 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. [21] This uneasiness could have been eliminated if only the Hofmeisters had asked for insurance information when they prepared and served discovery requests nine days later on May 31, 2000. [22] 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)*, **[*74]** for the proposition that *HN27*[↑] 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 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. [23] 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 **[*76]** 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 - *HN28*[↑] the fact "that the statute is not specifically designed to accommodate third party claims [24] . . . makes trial nearly impossible

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[21] 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."

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

[23] The Hofmeisters argue in their brief that Murner **[*75]** 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 person that Murner's specific testimony was a fabrication.

[24] In fact, *HN29*[↑] *KRS 304.12-230* was never intended by its

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 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 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 **[*78]** 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 *HN30*[ ] 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:
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> > [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 the facts.
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> *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 **[*79]** 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 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 **[*80]** 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. [25]

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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 **[*77]** 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, 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:").

[25] Dasher's filing of these pleadings is litigation conduct. *HN31*[ ] Litigation conduct amounting to bad faith can be

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. [26] In the language of the early common law, this is an [*81] 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)(*HN32*[] 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 that 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 (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.

> *HN33*[] Where deviation from the course of his employment by the servant [*82] 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 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. Emerson, 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 [*83] 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 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.

HN34[] 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 [*84] 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 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

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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.

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

> 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. [27] 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 **[*85]** 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.

> *HN35*[] 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 faith may not proceed to a jury.

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* **[*86]** simply extended to tort actions under *KRS 304.12-230* the same requirement still existing under the common law that "[t]he 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 **[*87]** 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)*.

HN36[] Section (1) 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 through the Insurance Code, KRS Chapter 304. Though not defined by statute or Kentucky caselaw, *HN37*[] "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 **[*88]** for in exchange for his premium. "Coverages at issue" therefore refers to an insured's [28] 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).

HN39[] Under section (6), an insurer violates the

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[27] However, in its Opinion and Order denying CIC's 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)*.

[28] Of course, *HN38*[] 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 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.

UCSPA by "[n]ot attempting in good [*89] 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.

> *HN40*[] 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 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. [*90] 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 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. [29] 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)*.

HN41[] Section (13) 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 [*91] 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. *HN42*[] 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.

HN43[] Section (14) 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 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 [*92] 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 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 [*93] or prejudice of the jury. Third, while proof of the

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

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.

HN44[] 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 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 **[*94]** authority.[30] *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 *HN45*[] 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*.

> *HN46*[] We are confident that 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. 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 **[*95]** sanctions for unethical behavior. Thus, we think the better approach 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 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 **[*96]** more traditional means of obtaining information from adverse parties.

In *Knotts,* the Supreme Court considered *HN47*[] 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 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

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[30] CIC referred us to Knotts while the Hofmeisters cited a case interpreting *Knotts, Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287 (Ky.App. 2007)*.

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 [*97] 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 answer is admissible evidence, but without taking the witness stand, Golden effectively represented to the jury that he knew nothing of the excess policy until that moment. [31]

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)*.

> *HN48*[] 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.

Id. at 65.

The [*99] 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 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. [*100] 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

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[31] 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 [*98] 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."

time. [32] 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 [*101] 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.

Our Supreme Court has recognized that *HN50*[] 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." *Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437, 447, 44 12 Ky. L. Summary 28, 46 3 Ky. L. Summary 25 (Ky. 1997)*. The manner in which Mr. Golden zealously represented the Hofmeisters would not exclude him from this class of attorneys. 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. 2004-CA-002362-MR

The [*102] 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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[32] Though it went without objection, Golden's question to King impermissibly assumed this fact was in evidence. Our Supreme Court held that *HN49*[] "a connection 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*).

RENDERED: OCTOBER 17, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

OPINION OF SEPTEMBER 26, 2008 WITHDRAWN

SUPREME COURT ORDERED NOT PUBLISHED: MAY 13, 2009
(FILE NO. 2008-SC-0828-D)

Commonwealth of Kentucky

Court of Appeals

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

CINCINNATI INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

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

GEORGE HOFMEISTER AND KAY HOFMEISTER — APPELLEES/CROSS-APPELLANTS

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

** ** ** ** **