COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2018-SC-_____

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 — MOVANT

VS. Appeal from Harlan Circuit Court, Civil Action No. 11-CI-00349
And Appeal from Kentucky Court of Appeals No. 2017-CA-001252

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

MOTION FOR DISCRETIONARY REVIEW

This is to certify that an original and nine copies of the Motion for Discretionary Review were served by hand-delivering same to the Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Capitol Building, 700 Capitol Avenue, Room 209, 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 Nov 2, 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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COUNSEL FOR MOVANT

INTRODUCTION

Pursuant to CR 76.20, the Movant, 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, hereby files this Motion for Discretionary Review with the Supreme Court of Kentucky from the Opinion of the Court of Appeals of September 28, 2018, in Appeal No 2017-CA-001252-MR.[1]

The issue before the Court is the standard for maintaining a third-party bad faith action in the Commonwealth of Kentucky and the evidence that can be used to support a claim of bad faith.

The case at bar arises from the death of Rhett Mosley in an accident stemming from the negligence of Rex Coal, Dixie Fuel, Jean Coal, and Terry Loving.[2] Jean Coal and Terry Loving were insured by Arch Specialty Fire Insurance Company, while Dixie Fuel and Rex Coal were insured by National Union Fire Insurance Company.[3] Rex Coal, Dixie Fuel and Jean Coal are all distinct legal entities as recognized by the Kentucky Secretary of State. While Dixie and Rex may share a common set of owners related to Terry Loving, they insured the companies separately. The Movant's claims of violation of the Kentucky Unfair Claims Settlement Practices Act and conspiracy arose from the Respondents' conduct throughout the pendency of the underlying action.[4] Specifically, during the course of two mediations in 2013, the Respondents separately and in concert with one another

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[1] *See* Order Granting Arch Specialty Insurance Company's Motion for Judgment on the Pleadings entered March 30, 2016 (ROA 6873-6874); Order Granting National Union's Motion for Summary Judgment entered July 11, 2017 (ROA 7857-7874); Court of Appeals Opinion Affirming rendered September 28, 2018, **attached hereto as collective Appendix 1.**

[2] *See* Complaint, ROA 1-7.

[3] *See* chart showing relationship among companies and identity of insurer, ROA 6829, attached hereto at **Appendix 2.** Dixie Fuel and Rex Coal were insured by National Union with Dixie Fuel being the named insured and Rex Coal being an additional insured. Jean Coal and Terry Loving were insured by Arch.

[4] *See* Motion to Amend Complaint and Amended Complaint, ROA 2121-2122; 2315-2316; 6733-6742.

attempted to leverage claims, insisting on globalized and unitemized negotiations with respect to all underlying tortfeasors, as opposed to negotiating the claims separately.[5] Before Movant could complete discovery on her third party bad faith claims against Arch and National, they were dismissed via dispositive motions.

PARTIES

(1) Movant 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, is represented by J. Dale Golden and Kellie M. Collins, Golden Law Office PLLC, 771 Corporate Drive, Suite 750, Lexington, Kentucky 40503; Jeffrey R. Morgan, Jeffrey R. Morgan & Associates, PLLC, 850 Morton Blvd, Hazard 41701; and Kenneth R. Friedman, Henry G. Jones, Friedman Rubin, 1126 Highland Avenue, Bremerton, WA 98337.

(2) Respondent, Arch Specialty Fire Insurance Company, is represented by Mindy G. Barfield, Dinsmore & Shohl LLP, Lexington Financial Center, 250 W. Main St., Ste. 1400, Lexington, Kentucky 40507;

(3) Respondent, National Union Fire Insurance Company, is represented by Christopher S. Burnside, Christopher G. Johnson, Griffin Terry Sumner, Frost Brown Todd LLC, Ageon Center, Ste. 3200, 400 West Market St., Louisville, Kentucky 40202.

(4) The Opinion of the Court of Appeals was rendered on September 28, 2018.

(5) The Order granting Judgment on the Pleadings for Arch Specialty Insurance Company was entered March 30, 2016.

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[5] *See* KRS 304.12-230(13).

(6) The Order granting Summary Judgment for National Union Fire Insurance Company was entered on July 11, 2017.

(7) No supersedes bond was posted.

MATERIAL FACTS

At the time of his fatal accident, Rhett Mosley was working on mining operations at Rex 20 as a lube truck operator during the nightshift.[6] Rex 20 was permitted to Rex Coal, Inc., for mining, but Rex claims to have had no role in the active mining operations.[7] Allegedly, Jean Coal operated the mine for Rex Coal.[8] However, as Jean Coal had no employees, it worked with Regional Contracting to provide employees.[9] Terry Loving, the sole member of both Jean Coal and Regional Contracting, signed an agreement with himself to provide employees to the Rex 20 Mine site.[10] Adding yet another layer of complexity, the lube truck that Rhett Mosley operated was owned by another entity, Dixie Fuel.[11]

At 12:05 a.m. on November 23, 2010, Mosley was following instructions to bring the lube truck from the high-splint work area to the low-splint work area.[12] The truck was observed traveling at an extraordinary rate of speed, followed by a loud crashing sound.[13] Mosley was thrown from the vehicle and was found underneath the service bed of the truck, his body cut in half.[14]

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[6] *See* ROA 7621.
[7] *See* deposition of Terry Loving, ROA 1183-1185.
[8] *See* Contract Mining Agreement, Supplemental ROA (hereinafter "SROA"), Vol. 4, 299-321.
[9] *See* Contract Labor Agreement, SROA, Vol. 4, 322-330.
[10] *Id.* at 329-330.
[11] *See* deposition of Terry Loving, PP. 19-21, ROA 1183-1185.
[12] *See* MSHA Report of Accident, P. 2, ROA 7664.
[13] *Id.*
[14] *Id.*

As a result of Mosley's fatal accident, Rex Coal, the approved operator and permittee, was cited by MSHA for several violations of Federal regulations.[15] No other entity was cited because there was no other listed or approved operator on the permit. MSHA found at least six defective conditions on the truck, including the brakes and seatbelt.[16] A year prior to Mosley's accident, MSHA cited Rex Coal for safety violations involving the same truck, noting that the defective conditions, "create[d] a possible crash scene. The lack of a seatbelt could contribute to the operator being thrown around in or out of cab in event of a crash."[17] Therefore, it is not surprising that MSHA determined that several of the accident conditions were known prior to Mosley's death:

> During the investigation and interviews, the following defects affecting safety were revealed to exist on the truck, without recording or correcting the conditions:
> 1. Five of the six service brake chamber pushrod strokes for the truck exceeded the maximum allowable pushrod stroke adjustment limit.
> 2. Three of the four parking brakes were ineffective or compromised.
> 3. The operator seatbelt was improperly installed.
> 4. Both sections of the front windshield were cracked prior to the accident.[18]

Based on the aforementioned facts, the Movant contends that the Respondents' liability was reasonably clear, particularly for National Union's insured, Dixie Fuel, which (1) stipulated that there was no up-the-ladder immunity; and (2) owned the truck at issue.

The underlying tort action against Arch's insureds, Jean Coal and Terry Loving, settled on September 28, 2013,[19] for limits, while settlement with National's insureds was not accomplished until early August 2015. It was only after settlement with National's insureds that Movant could begin discovery on her bad faith claims.

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[15] *See* MSHA Report of Investigation, P. 8, ROA 7670.
[16] *See* MSHA Report of Investigation, PP. 4-5, ROA 7666-7667.
[17] *See* MSHA Investigator notes from August 24, 2009 (emphasis added), ROA 7696-7699.
[18] *See* MSHA Report of Investigation, P. 9, ROA 7671.
[19] *See* Motion to Enforce Settlement ROA 2123-2136.

The Movant's claims of violation of the Kentucky Unfair Claims Settlement Practices Act arose from the Respondents' conduct throughout the pendency of the underlying action.[20] During the course of two mediations in 2013, the Respondents, separately and in concert with one another, attempted to leverage claims, insisting on globalized and unitemized negotiations with respect to all underlying tortfeasors, including tortfeasors who were distinct legal entities and not insured under their policy of insurance, as opposed to negotiating the claims separately.[21] Most notably, during the second mediation conducted on September 12, 2013, one attorney, Tom Goodwin, was sent to negotiate on behalf of both insurance carriers and their insureds. During mediation, Attorney Goodwin would not negotiate the claims separately and explicitly refused to allow the Movant to accept a previous offer of $1,000,000 from Arch made on behalf of its insureds unless the Movant also accepted a reduced sum from National to resolve all claims against its insureds.[22]

Accordingly, on September 29, 2013, the Movant moved to amend her Complaint to add Arch and National, asserting claims of violation of the Kentucky Unfair Claims Settlement Practices Act (hereinafter "KUCSPA") and civil conspiracy.[23] In response, both Respondents argued that the Movant's claims were futile and would not be able to withstand a motion to dismiss.[24] This line of argument by the Respondents turned their responses into *de facto* motions to dismiss. In turn, these dispositive issues were fully briefed by both Arch and National, and both parties were present at oral arguments on the

[20] *See* Motion to Amend Complaint and Amended Complaint, ROA 2121-2122; 2315-2316; 6733-6742.
[21] *See* KRS 304.12-230(13).
[22] *See* correspondence, ROA 7704.
[23] *See* Plaintiffs' Motion for Leave to Amend, ROA 2121-2122; *See also* Plaintiffs' Reply, ROA 2260-2302.
[24] *See* Arch's Response, ROA 2137-2185; *See also* National's Response, ROA 2186-2209.

matter. Ultimately, the trial court disagreed with Respondents' assertions that the bad faith claims were futile, and the Movant's Amended Complaint was deemed filed. Discovery on these claims was stayed pending the resolution of the underlying tort action.

When the tort claim was settled, the Movant propounded discovery upon Arch and National on August 20, 2015, and August 21, 2015, respectively.[25] During the week of September 14, 2015, Movant's counsel made multiple attempts to communicate with the Respondents to remind them of their upcoming deadline to respond to discovery. Both of Respondents' counsel were unresponsive. In lieu of answering discovery, Respondents filed Motions for Judgment on the Pleadings and Motions to Stay Discovery in the interim.[26]

With no discovery of Respondents being completed, the trial court granted Arch's Motion for Judgment on the Pleadings, finding:

> ... 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.[27]

The Court denied National Union's Motion for Judgment on the Pleadings. Movant cooperated with National Union's request to depose Attorney Jeff Morgan, who was Movant's lead counsel in the tort action. However, during that same time, National Union continued to refuse to provide complete answers to Movant's discovery requests and objected to their subpoenas for materials, forcing Movant to file a Motion to Compel.[28] While the Motion to Compel was pending, and prior to being heard by the trial court,

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[25] *See* ROA 6154-6186; 6187-6217.
[26] *See* ROA 6364-6389; 6390-6391; 6394-6559; 6560-6618.
[27] *See* Order of March 30, 2016, ROA 6873-6874.
[28] *See* Motion to Compel of March 14, 2017, ROA 6912-7018.

National Union renewed its dispositive motion.[29] After the extensive briefing was completed, a hearing was held on June 16, 2017, in which the trial court acknowledged he had not read the briefs and asked each counsel to submit a detailed order for him.[30] Movant filed a Declaration on June 9, 2017, in conjunction with her response, listing the documentation needed to respond to the dispositive motion.[31] However, the trial court granted National Union's Motion for Summary Judgment without addressing Movant's outstanding discovery requests. The Court of Appeals upheld the trial court's grant of dispositive relief to the Respondents in its Opinion of September 28, 2018. Movant now seeks discretionary review from this Court to reverse the rulings of the lower courts and remand the action fur further discovery.

QUESTIONS OF LAW

1. **What is the standard to maintain a third party bad faith action?**

2. **Is mediation conduct admissible in a bad faith action?**

REASONS FOR GRANTING DISCRETIONARY REVIEW

1. Movant articulated a colorable bad faith claim against Respondents.

The lower courts all found that Movant did not satisfy the *Wittmer v. Jones,* 864 S.W.2d 885 (Ky. 1993), elements for a bad faith claim under the KUCSPA. However, the courts' application of the *Wittmer* elements was inconsistent and in contravention of the clear language articulated by this Court in *Wittmer,* its progeny, and the KUCSPA.

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[29] *See* Motion and Memorandum in Support of Summary Judgment dated April 20, 2017, ROA 7166-7556.
[30] *See* ROA 7770.
[31] *See* Friedman Declaration of June 2, 2017, ROA 7644-7769. Interestingly, in response to Appellants' Motion for Trial Date, Appellee, National Union, argued too much insurance discovery to be completed within a year. *See* ROA 7641-7643.

a. The insurer must be obligated to pay the claim under the terms of the policy.

The first element of *Wittmer* corresponds to KRS 304.12-230(6), which clearly interprets the obligation to pay when "liability has become reasonably clear." Respondent Arch argued during the pendency of the action that, based on the terms of its policy, it was under no obligation to provide indemnification to its insureds for the death of Mr. Mosley. However, Arch took no action to have a judicial determination as to its coverage position by filing a separate declaratory judgment action or interpleading in the tort action and continued to defend its insureds. Arch continued its argument to the Court of Appeals as to its belief of why the policy in question did not provide coverage, to which the Court of Appeals, *sua sponte* declared that "Arch had no duty to pay for Rhett's bodily injury" despite concluding a paragraph later that Arch "provided insurance coverage parties if the parties were liable."[32]

As to National Union, it was established that National Union was obligated to pay the claim as against Dixie Fuel under the terms of the policy issued to Dixie Fuel on or before March 28, 2013, when it stipulated that there was no up-the-ladder workers' compensation immunity for Dixie Fuel and that Dixie Fuel owned the truck at issue.

Therefore, Movant met the requirement under the first prong of *Wittmer* to maintain her bad faith action.

b. The insurer must lack a reasonable basis in law or fact to deny the claim.

The lower courts again rely on *Wittmer* for the false contention that a bad faith action can never proceed where liability is debatable. However, the Kentucky Supreme

[32] Note this issue was not preserved for review by Arch as it did not timely file its Supplemental Prehearing Statement in a timely manner and was not addressed by Movant in hers.

Court dispelled this myth in *Farmland Mut. Ins. Co. v. Johnson,* 36 S.W.3d 368 (Ky. 2000), stating that the existence of jury issues in an underlying case does not preclude bad faith. The court elaborated, providing clarification on the concept of liability being reasonably clear or fairly debatable:

> Although matters regarding investigation and payment of a claim may be 'fairly debatable,' an insurer is not thereby relieved from its duty to comply with the mandates of the KUCSPA. Although there may be differing opinions as to the value of the loss and as to the merits of replacing or repairing the damaged structure, an insurance company still is obligated under the KUCSPA to investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner. In other words, although elements of a claim may be 'fairly debatable,' an insurer must debate the matter fairly.

Id. at 375.

The Court of Appeals attempts to distinguish the *Farmland* opinion by arguing that since it arose from a first party action it is not applicable in the third-party context. However, the *Farmland* court did not include such limiting language in its opinion, and the underlying reasoning to its decision is as applicable to third party bad faith cases as first party bad faith cases – namely, that an insurer must debate the elements of claim fairly. *Wittmer* itself belies the contention that liability must be beyond dispute in a claim as the *Wittmer* 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.

Wittmer, 864 S.W.2d at 887.

Not only did this Court condone a tort claim and a bad faith claim proceeding simultaneously in the same action, it also noted that the liability issue was hotly contested. In fact, the Court specifically noted that there was "...sufficient evidence of negligence to apportion fault against Wittmer." Therefore, *Wittmer* specifically recognizes that the

specter of bad faith can arise before any judgment is entered and notwithstanding the fact that the parties to the litigation contest liability and allege comparative fault.

The recent *Hollaway v. Direct Gen. Ins. Co. of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016) decision rendered by this Court does not compel a contrary result. In that third-party case, the plaintiff could not establish that the insurance company should have necessarily concluded that any of her damages were caused by the accident. *Id* at 739. The *Hollaway* court held that there was no bad faith liability because the insurer's duty to pay the claim was not "clearly established" by the plaintiff. *Id.* There was a real possibility that the insurer owed nothing to the plaintiff based on the nature of the accident and the injuries of which she complained. In contrast, in the matter now before this Court there is no dispute the accident caused the death of Mr. Mosley, and there can be no dispute that Respondents' insureds had an obligation to pay something for his death. There can be a dispute in every case over the exact amount of a "reasonable" settlement, but that does not relieve a company from making a good faith effort to reach one.

c. The insurer must know there was no reasonable basis for denying the claim or acted with reckless disregard for whether such basis existed.

As to the third requirement of *Wittmer* 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" (*Id.* at 890), the failure to allow Movant to conduct discovery as to the claims file and related discoverable documentation prevents a full presentation of this element. However, Movant outlined the behavior she believed was egregious by the Respondents, *i.e.*, the settlement behavior which included the leveraging of claims in her Amended Complaint.[33]

[33] *See* ROA 6733-6742.

i. Mediation conduct of the Respondents should be admissible to support Movant's claim of bad faith.

The KUCSPA cites that "[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" is specific evidence of bad faith. KRS 304.12-230 (13). Kentucky's courts have specifically held that evidence of an insurer's settlement behavior *throughout* the litigation may be examined and presented in order to establish an insurer's bad faith. *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery,* 220 S.W.3d 287, 294 (Ky. App. 2007), citing *Knotts v. Zurich Ins. Co.,* 197 S.W.3d 512 (Ky. 2006) (emphasis added). Under the reasoning advanced by the Court of Appeals in its decision, the protections offered by the KUCSPA would be rendered impotent. Movant did not seek to introduce statements as to liability made by counsel or the mediator during the mediation, nor did she introduce the back and forth of the settlement numbers. Movant sought to introduce via correspondence occurring outside of mediation specific settlement conduct that violated the KUCSPA. Respondents are arguing for an absolute cloak of secrecy over the mediation process which, if granted, would give insurers carte blanche to insist on whatever terms they desire during "settlement" without fear of consequence.

Furthermore, this cloak of secrecy is not counseled for in either the Model Mediation Rules or KRE Rule 408. Model Mediation Rule 12, Confidentiality, simply recognizes that mediation is closed to all persons outside of the litigation, is regarded as settlement negotiations for purposes of KRE 408, and that mediators shall not be subject to process requiring the disclosure of any matter discussed during mediation, none of which are applicable in the present action. Kentucky Rule of Evidence 408 is not a blanket

prohibition on the use of mediation statements but, rather, it prohibits the use of evidence to prove liability for or invalidity of the claim or its amount." In the present matter, Movant seeks to introduce the mediation conduct of Respondents to show that the conduct in question constituted a clear breach of the KUCSPA, not to assert it as evidence of liability. Additionally, KRE 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Again, this exclusion applies to the present matter before this Court. There are numerous appellate cases in which settlement conduct was introduced during the course of trial. *See Hamilton Mut. Ins. Co. of Cincinnati, Ohio v. Barnett,* 2007-CA-000029-MR, 2008 WL 3162321, at *6 (Ky. App. Aug. 8, 2008) (unpublished), and *Hamilton Mut. Ins. Co. of Cincinnati v. Buttery,* 200 S.W.3d 287 (Ky. 2007).

Specifically, in *Hale General Contracting, Inc. v. Motorist Mutual Insurance Company,* 2015-CA-000396-MR, 2016 WL 1068997, at *2–3 (Ky. App. Mar. 18, 2016), *review denied* (Sept. 15, 2016), the Court of Appeals recognized that mediation conduct could be introduced in bad faith actions "for another purpose." In *Hale*, the insurer, Motorist Mutual, actually sought to introduce evidence of its mediation offers to Hale to prove that they were not engaging in outrageous conduct:

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

Hale General Contracting, Inc. v. Motorist Mutual Insurance Company, 2015-CA-000396-MR, 2016 WL 1068997, at *2–3 (Ky. App. Mar. 18, 2016), *review denied* (Sept. 15, 2016). (emphasis added)

As in *Hale*, the purpose for which Movant seeks to introduce the mediation conduct is "for another purpose," namely to show that the conduct that occurred during the same was in violation of the KUCSPA. Therefore, said conduct should be admissible as evidence of outrageous conduct against the Respondents.

The specific settlement conduct Movant refers to in her Amended Complaint as forming the basis for her claim of bad faith arises from Arch's refusal to settle Movant's claims for policy limits against Jean Coal without releasing the claims as against Dixie Fuel and Rex Coal. This conduct occurred despite the parties being separate legal entities and, in the case of Dixie Fuel and Rex Coal, entities insured by another company, National. Jean Coal did not share corporate officers with Dixie Fuel and Rex Coal and irrespective of the same, the incestuous nature of the corporate structure chosen by these entities does not create a special duty to release related entities. The Court of Appeals found that Movant ignored "the fact that both insurance carriers had a legal obligation to obtain releases from all insured parties to avoid subjecting any one of them to an excess verdict." *Opinion* at 23. However, that was clearly not the issue in the present matter, as Movant agreed that in acceptance of the offer of the policy limits for Jean Coal and Terry Loving, she would release Jean Coal and Terry Loving from all liability. However, Arch would not agree until Movant released claims against all of the entities, including those entities that were not insured by Arch and which were distinct legal entities.

Respondents' 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, Respondents, 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.

Therefore, this behavior which was pled in Movant's Amended Complaint as against Arch was sufficient to survive a Motion for Judgment on the Pleadings when all of the allegations as plead by Movant are taken as true. *See City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003).

As to the conduct of National, Dixie Fuel was the owner of the truck in question, yet National refused to allow Movant to her settle claims against Dixie Fuel without also settling with Rex Coal. Further, at the second mediation when counsel for the National entities was the only counsel present, National would not allow Movant to accept the offer of policy limits offered by Arch unless also accepting what National offered as settlement. The actions by National clearly constitute claims leveraging which, as discussed earlier, is in direct violation of the KUCSPA. Movant sought to explore the motivation behind the actions of National in discovery but was denied the opportunity. The Court of Appeals cites the volume of documents produced as evidence that enough discovery had been provided by National but, in light of the fact that the court record in this matter is over 8,000 pages

and National produced almost the entirety of the pleadings as part of its document production, and no part of the actual claims file was included in the production, it was clear National's actions in discovery were nothing more than a document dump. Movant attempted to address the deficiencies in National's discovery, only to be met with repeated delays while the case was reassigned to no less than two different judges. Counsel for Movant presented an affidavit in response to National's Motion for Summary Judgment clearly articulating the additional discovery needed. The grant of summary judgment when an articulable claim was presented and an ongoing discovery dispute was pending was premature at best.

Movant's Amended Complaint alleges the actions of Respondents caused incidental, foreseeable, consequential and compensatory damage as well as past, present and future mental anguish. As a result of the accident, Movant suffered the loss of a husband and father to her child. The fact that the Court of Appeals considers the offers of settlement "robust" does not excuse the delay of the Respondents in providing compensation to a grieving family.

CONCLUSION

The issues presented in this Motion for Discretionary Review provide an opportunity for the Court to clarify the requirements necessary to maintain an action for third party bad faith in the Commonwealth of Kentucky and seek to establish if mediation conduct can be admissible to prove bad faith, therefore warranting review by this Court.

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Counsel for Movant

APPENDIX

APPENDIX

1

ENTERED IN MY OFFICE THIS THE
30 DAY OF March 2016
WENDY PLANARY, 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

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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 February, 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:
March

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[0144159v1]

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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*, 374 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 899 (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.

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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. *Hibble 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

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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

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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. 1958) ("[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. *Brick 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.

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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 confidentiality 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

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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.[2] 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.

[2] 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. Lellchfield 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*." *Holloway 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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RENDERED: SEPTEMBER 28, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001252-MR

CRYSTAL LEE MOSLEY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RHETT LEE MOSLEY, DECEASED AND RHETT LEE MOSLEY, JR., A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, CRYSTAL LEE MOSLEY — APPELLANTS

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 11-CI-00349

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

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: Crystal Lee Mosley, individually and as administratrix of her husband's estate, and Rhett Lee Mosley, Jr., her son

(hereafter collectively referred to as "Mosley"), brought bad faith claims against two insurers: Arch Specialty Insurance Company ("Arch")[1] and National Union Fire Insurance Company ("National Union"). They aver that Arch acted in bad faith in defense of its insured, Jean Coal Company, LLC ("Jean Coal") and Terry G. Loving ("Loving"), and that National Union acted in bad faith in defense of its insureds, Rex Coal Company, Inc. ("Rex Coal") and Dixie Fuel Company, LLC ("Dixie Fuel").

After careful consideration, we affirm.

FACTS

This third-party bad faith claim arises out of a wrongful death action involving a fatal accident at a surface coal mine near Harlan, Kentucky, where Rhett Mosley ("Rhett") was killed while driving a truck. The appeal challenges the denial of bad faith claims against the two insurance companies.

After the accident, Mosley filed suit against several interrelated companies which were a part of the mining operation where the accident occurred. These companies included Jean Coal, the surface mine operator and the bailee responsible for the operation and maintenance of the Dixie Fuel truck, Regional Contracting, an employee leasing company and Rhett's employer, and Loving, the

[1] Appellants identify the insurance company as *Arch Specialty Fire Insurance Company* in the notice of appeal. In fact, the company is titled *Arch Specialty Insurance Company*.

sole managing member of Jean Coal and Regional Contracting. These entities were insured by Arch. Additionally, Jean Coal contracted with Regional Contracting for Rhett's employment at the mining site.

Mosley also sued Dixie Fuel, the owner of the truck operated by Rhett at the time of the accident and Rex Coal, the owner of the surface mine. (In the underlying suit, Rex Coal claimed to have no role in the active mining operations at this mine site.) Both Dixie Fuel and Rex Coal were insured by National Union.

Although the Defendants/Appellees in the underlying wrongful death actions are separate companies, they are all small businesses (Jean Coal, Regional Contracting, Rex Coal, and Dixie Fuel) owned and managed by a common group of family members. Loving was the principal for Jean Coal and Dixie Fuel. These interrelated companies pursued common and similar defenses to Mosley's claims. Moreover, Rex Coal and Dixie Fuel, although insured by National Union, were also indemnitees under Arch's policy, and therefore, entitled to a defense by Arch until Arch tendered its policy limits.

The alleged liability in the underlying matter was fiercely disputed over five years of litigation and included multiple motions for summary judgment on whether Mosley's claims against the Defendants/Appellees were precluded by several defenses including, among others, the exclusivity provision of the Kentucky Workers' Compensation Act, immunity, the law of bailment, and

comparative fault. On September 28, 2013, Arch settled with Mosley, and in early August 2015 National Union settled. These settlements left only Mosley's bad faith claims.

The bad faith claims were initiated on September 29, 2013, when, after two mediations, Mosley moved to amend its complaint against Arch and National Union. The amended complaint asserted claims of violations of the Kentucky Unfair Claims Settlement Practice Act ("KUCSPA") and civil conspiracy. Arch and National Union contested these claims and filed motions to dismiss. Ultimately, the trial court permitted the bad faith claims to go forward, but discovery was stayed pending resolution of the underlying tort action.

After the tort action settled, in August 2015 Mosley moved for discovery on the bad faith claims against Arch and National Union. In response, Arch filed a motion for judgment on the pleadings and to stay discovery. National Union moved for summary judgment of Mosley's third-party bad faith claims and Mosley moved again for more opportunity to complete discovery.

On March 28, 2016, the trial court granted Arch's motion for judgment on the pleadings noting that even if Arch's alleged acts or omissions are true, the conduct is legally insufficient to maintain a claim for bad faith, violation of KUCSPA, civil conspiracy, and punitive damages. Sometime later, on July 11, 2017, the trial court granted National Union's motion for summary judgment on

these claims holding that Mosley was unable to establish the elements of bad faith under Kentucky law. Further, the trial court determined that additional discovery by Mosley could not raise a genuine issue of material fact since the insureds' liability was never beyond dispute.

Mosley now appeals the order granting Arch's judgment on the pleadings and the order granting National Union's motion for summary judgment.

On appeal, Mosley argues that they are entitled to discovery on the bad faith claims before having them dismissed. They characterize the issue for Arch as whether Mosley pled a recognized cause of action and the issue for National Union as whether any genuine issues of material fact exist regarding the asserted claims. Thus, although stating that discovery is the only issue, Mosley expands the issue in the brief to whether the rulings were proper.

Mosley, in making the bad faith claim, highlights the conduct of the Appellees during the pendency of the litigation and contends their actions were improper. The crux of the facts establishing the alleged bad faith occurred during the two mediations in 2013. Mosley observed that Arch and National Union, separately and together, engaged in bad faith when they attempted to leverage claims at two mediations by insisting on settlements that were global and not itemized. Mosley proffers that it was bad faith to fail to negotiate these claims separately. Further, they are particularly troubled by the fact that at the second

mediation only one attorney was sent to negotiate on behalf of both insurance companies and their insured parties. They allege that Arch and National Union would not settle unless Mosley, after accepting Arch's $1,000,000 settlement offer, reduced their settlement request from National Union.

In sum, Mosley's argument is that Arch and National Union's conduct during mediation – pooling their monies to make global settlement offers and using one attorney at the second mediation – constituted bad faith and a violation of the KUCSPA.

Nonetheless, on September 25, 2013, which was less than two weeks after the second mediation ended, Arch offered to pay Mosley its $1 million policy limit in exchange for releasing Jean Coal and Loving. Mosley accepted this offer, and Arch paid the settlement on November 4, 2013. The language in the settlement said it settled all claims against Arch's insured parties – Jean Coal and Loving. In August 2015, Mosley settled their claims against Rex Coal and Dixie Fuel, National Union's insured, for $2 million. As an aside, Mosley also received a workers' compensation settlement from Regional Contracting's (Mosley's employer) insurance carrier.

ANALYSIS

The underlying significance of the KUCSPA is that an insurance company is required to deal in good faith with a claimant, whether an insured or a

third-party, with respect to a claim which the insurance company is *contractually obligated* to pay. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 100 (Ky. 2000). As one of the only states that permits a private cause of action for third-party bad faith claims, Kentucky imposes a high threshold for such claims to be brought before a jury, and trial courts are the gatekeepers to discern whether claims are meritorious. *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993).

The foundation of the modern common-law bad faith action was laid out by the Kentucky Supreme Court in *Wittmer*. The Court set forth three elements necessary to sustain a cause of action for bad faith against an insurer: (1) the insurer must be obligated to pay the insured's 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. *Id.* at 890. The failure to show any of these elements eliminates the bad faith claim as a matter of law. *Id.*

Mosley maintained that during two mediations, held in 2013, Arch and National Union engaged in bad faith by separately and together attempting to unfairly leverage claims by treating separate claims as one claim rather than negotiating them individually. Specifically, the bad faith allegations are based on the contention that Arch and National Union made global settlement offers on

behalf of all Defendants/Appellees, and further, at the second mediation used a common defense attorney to represent them.

We address the actions of each Appellee during the litigation to ascertain whether the trial court properly granted the dispositive motions.

I. Arch and National Union's Actions

1. Arch

The trial court granted Arch's motion for judgment on the pleadings. "Under [Kentucky Rule of Civil Procedure (CR)] 12.03, a judgment based on a motion for judgment on the pleadings is reserved for those cases in which the pleadings demonstrate that one party is conclusively entitled to judgment." *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 194 (Ky. 2017). The purpose of such a judgment is to "expedite the termination of a controversy where the ultimate and controlling facts are not in dispute." *Id.* at 196. A judgment on the pleadings "should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003).

Furthermore, the trial court is not required to make any factual determination because the question is a legal one. *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002). CR 12.03 may be treated as a motion for summary

judgment, *Schultz v. Gen. Elec. Healthcare Fin. Services Inc.*, 360 S.W.3d 171, 177 (Ky. 2012). Finally, appellate review of a judgment on the pleadings is *de novo*. *Scott v. Forcht Bank, NA*, 521 S.W.3d 591, 594 (Ky. App. 2017).

In the matter at hand, we must determine whether the trial court erred in granting Arch's motion for a judgment on the pleadings since the trial court concluded that even if the facts as alleged in the amended complaint were true, the conduct was legally insufficient to support Mosley's claim for bad faith.

2. National Union

The trial court granted National Union summary judgment after permitting additional discovery on the bad faith claims. We recognize that "[t]he standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). The review is *de novo*. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010).

Mosley contends that National Union acted in bad faith in representing Rex Coal and Dixie Fuel, but National Union responds that because it asserted defenses to liability including "up the ladder" immunity, causation, the law of bailment, and comparative fault, its settlement actions did not violate common-law or statutory bad faith. Further, National Union insists that besides

disputed liability, its conduct during the court-ordered mediation is confidential, and thus, this conduct cannot be used to support a bad faith claim.

National Union supports its contention of disputed liability by pointing out that its insured, Rex Coal and Dixie Fuel, could not be held legally responsible for Rhett's death. Even if Kentucky law ultimately found liability on the part of Rex Coal and Dixie Fuel, because liability, as to all parties, was not beyond dispute; a jury would still have had to apportion fault among current and former parties as well as Rhett. For example, a possibility of a comparative fault dispute existed since Rhett was not wearing a seatbelt at the time of the accident.

Discovery

1. Arch

Mosley claims that the trial court prevented them from engaging in discovery and obtaining the evidence they needed to prove bad faith. Keep in mind the original complaint was filed on June 7, 2011, and the underlying matter settled prior to addressing the bad faith claims. Thus, even before the bad faith matter was addressed more than four years had passed. Moreover, Mosley fails to mention that the trial court stayed all discovery on the bad faith claims on December 13, 2013, and the stay was in effect until the underlying matter was resolved.

Although the claims against Arch's insured parties were settled in 2013, the claims against National Union were settled later. Its insured parties tentatively settled in August 2015 but continued to negotiate the settlement language until December 2015. Consequently, when Arch filed its motion for judgment on the pleadings on September 22, 2015, discovery had just been served, and more significant, the stay on discovery was still in effect.

Because of the amount of time Mosley had for discovery, their claim that they were thwarted in their efforts to conduct discovery when Arch tendered its motion for judgment on the pleadings is somewhat disingenuous. Besides, a CR 12.03 motion may be filed at any time "[a]fter the pleadings are closed[.]" Therefore, whether discovery has occurred is not relevant since the motion may be filed at any time and is only reviewed for legal issues, that is, *de novo*. Besides the timing of the motion for discovery, Mosley never articulated the documents or depositions needed to respond to Arch's motion or its possibly impact on Arch's motion.

As explained in *James*, 95 S.W.3d at 883-84, a motion to dismiss for failure to state a claim upon which relief can be granted is considered differently than a motion for summary judgment. Such a CR 12.03 motion should not be granted unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of a claim. Hence, a trial court is

not required to make any factual determination when deciding whether to grant the motion because the question is purely a matter of law.

Because a CR 12.03 motion tests the legal sufficiency of a claim at the pleading stage, Arch's motion requested a legal ruling on whether Mosley's allegations of bad faith were legally sufficient. The trial court concluded that Arch's conduct, both during the litigation and specifically during the mediation sessions, did not legally support bad faith and granted the judgment on the pleadings. We concur with the trial court's holding because no amount of additional discovery would have changed the result.

2. *National Union*

Mosley claimed that the trial court prevented them from obtaining adequate discovery for their bad faith claim against National Union's insured parties – Rex Coal and Dixie Fuel. But after National Union's initial motion to dismiss the bad faith claims was denied, National Union timely provided voluminous discovery material. In fact, it produced over 4,300 pages of documents. Nonetheless, National Union proffered that many requested documents were protected by attorney-client privilege and the work product doctrine. Thus, National Union produced a privilege log describing the withheld documents.

For one year, Mosley did not assert any deficiency with National Union's discovery response. Meanwhile, National Union deposed Jeffery Morgan, Mosley's primary counsel, in the underlying matter. He confirmed that the Plaintiffs/Appellants were aware of the weaknesses in the claims against Rex Coal and Dixie Fuel. Specifically, Morgan acknowledged that fault could have been apportioned to other defendants and that legal barriers existed from the workers' compensation coverage.

Finally, after the one year of inactivity, Mosley filed a motion to compel the documents which were listed in National Union's privilege log. National Union responded that these documents were protected by attorney-client privilege and the work product doctrine. It also renewed its motion for summary judgment.

Thereafter, the trial court granted summary judgment because no genuine issues of material fact had been provided by Mosley. In the trial court's grant of National Union's summary judgment motion, it explicitly addressed Mosley's request for additional discovery by noting that the issues raised by Mosley were immaterial to the efficacy of the summary judgment. The trial court properly denied any additional discovery because Mosley did not demonstrate that additional discovery would affect the outcome of the case.

Under CR 56.02, a defending party may move for summary judgment at any time. Therefore, regarding discovery, contrary to Mosley's assertion, no requirement exists that discovery be complete before a party may move for summary judgment. Rather, the only requirement is that the non-moving party had an opportunity for discovery. *Carberry v. Golden Hawk Transportation Company*, 402 S.W.3d 556, 564 (Ky. App. 2013) (quoting *Hartford Insurance Group v. Citizens Fidelity Bank & Trust Company*, 579 S.W.2d 628, 630 (Ky. App. 1979)).

Given the history of this litigation, Mosley had sufficient opportunity and years to conduct discovery. First, Mosley had time to discover evidence related to the ostensible liability in the original case. Two dozen depositions were conducted, which included six expert depositions, and numerous filings were made about the varied and complex liability issues. The complaint was amended in 2013 to add the bad faith claim, and although the trial court stayed discovery on the bad faith claim during the resolution of the underlying matter, discovery on that issue commenced in February 2016. (As noted, National Union responded with voluminous records.)

Between the length of the original liability action and Mosley's sixteen months to conduct additional discovery on the bad faith claim, they had adequate time for discovery. Hence, the trial court did not err in denying further discovery from National Union after it granted summary judgment. The trial

court's reasoning was that any additional discovery would not have enabled Mosley to meet the elements to support a bad faith claim under KUCSPA. Mosley presented no affirmative evidence that any genuine issue of material fact even existed to support the bad faith claim.

Consequently, the trial court's decision to grant National Union's motion for summary judgment was legally sound since Mosley was unable to supply genuine issues of material fact to support the elements of bad faith. Accordingly, the trial court did not err in denying additional discovery.

II. Bad Faith Claims

1. Arch

We begin with our discussion of the bad faith claims with Arch's situation. Mosley maintains that the amended complaint stated a cognizable cause of action with sufficient supporting evidence to support common-law bad faith, statutory violations under KUCSPA, and civil conspiracy to survive a judgment on the pleadings.

To support the bad faith claims, Mosley stated that Arch made a global offer of settlement for both Jean Coal and Loving. Ostensibly, the offer was improper because it was a global offer. But Arch countered that it insured both Jean Coal and Loving, and therefore, had a duty to represent both parties. Thus, according to Arch, Mosley put it in an intolerable position by suggesting it settle at

policy limits for only one client. In doing so, Mosley completely discounted Arch's authorized representation of dual clients. Arch believes it rightfully refused to tender policy limits for only one insured party and leave the other one without coverage. We agree and believe that Arch exhibited no bad faith in refusing to negotiate policy limits for only one client.

Then, Mosley argued bad faith occurred at the second mediation because a single attorney represented all the parties, which created a conflict of interest. Arch counters that after it offered its policy limits at the first mediation, which was rejected by Mosley, it was unnecessary for its adjuster to attend the second mediation and that the Defendants/Appellees voluntarily chose to be represented by common counsel at the second mediation.

It is important to keep in mind that although the Defendants/Appellees were separate small businesses, they were owned and managed by a common group of family members. Hence, they pursued common and similar defenses to Mosley's demands and in doing so did not act in bad faith.

2. National Union

Next, we address the bad faith claim against National Union. National Union argues that the disputed liability precludes the bad faith claims since it had an obligation to defend its insured, and Mosley improperly based their bad faith claims on alleged conduct during a court-ordered mediation, which is

litigation conduct occurring during a confidential mediation. Thus, Mosley's bad faith claim lacks any genuine issue of material fact to support a bad faith claim under Kentucky law.

Mosley contends that the actions of the two insurance companies during the mediations were without a reasonable foundation and a violation of Kentucky Revised Statute (KRS) 304.12-235 entitling them to prejudgment interest and attorney's fees. Moreover, they aver that the conduct of Arch and National Union amounted to civil conspiracy.

3. Wittmer test

Both Arch and National Union assert that Mosley's challenge of the trial court's orders which granted judgment on the pleadings and summary judgment on the bad faith and civil conspiracy claims, were insupportable. They argue that Mosley's bad faith claims do not meet the standards of the *Wittmer* test, which established the criteria for a third-party bad faith claim.

To prevail on a bad faith claim and civil conspiracy under *Wittmer*, Mosley must prove three elements – (1) an insurance company's obligation to pay under the policy; (2) an insurance company's lack of a reasonable basis for denying the claim; and (3) an insurance company's knowledge that no reasonable basis existed for denying the claim or acting with reckless disregard toward the claim. *Wittmer*, 864 S.W.2d at 890. Besides addressing these three prongs,

Mosely must also establish more than a technical violation of KUCSPA. They must demonstrate that the insurance carriers' alleged improprieties caused actual damage to them and the actual damage was outrageous. *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 452 (Ky. 1997), *as modified* (Feb. 18, 1999), and *holding modified by Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016).

Mosley's bad faith claim is based on the allegation that the insurers in this matter engaged in "unfair leveraging." Mosley believes that under the *Wittmer* standards, they have a colorable claim for bad faith regarding what characterizes as "unfair leveraging" on the part of the insurance carriers.

The evidentiary threshold is high for bad faith claims. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. *Holloway*, 497 S.W.3d at 738. 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), *as modified* (June 27, 2003). We now turn to the elements for a bad faith claim:

a.) Duty to pay the claim

A bad faith claim is not supportable if the insurer lacked a contractual obligation to pay the claim under the terms of the insurance policy. *Wittmer*, 864 S.W.2d at 890. Although Arch defended its insured and provided a defense, under

its contract, it had no contractual duty of indemnification for "bodily injury" to a leased employee based on the exclusionary language in the policy. Accordingly, Arch had no duty to pay for Rhett's bodily injury. Thus, the first prong of the *Wittmer* test, obligation to pay the claim, was not met. Still, Arch acted in good faith to resolve the Mosley's claim against its insured.

Likewise, National Union was not obligated to pay its insureds' claim since liability was not reasonably clear, the first prong of the *Wittmer* test.

Mosley seems to conflate *Wittmer's* "obligation to pay" element with insurance coverage. The obligation to pay prong references the insured's insurance coverage not the insured's liability. Therefore, both Arch and National Union provided insurance coverage for the parties **if** the parties were liable. The dispute rested on liability. This leads us to the second prong of *Wittmer*.

b.) Beyond dispute

Under the KUCSPA, liability is imposed for failing to make good faith efforts to "effectuate prompt, fair and equitable settlements of claims in which [insured's] liability has become reasonably clear[.]" KRS 304.12-230(6). "[R]easonably clear" has been interpreted by the Supreme Court as "beyond dispute[.]" *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005). Indeed, 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. *Id.* With this proviso in mind, we review the issue of liability in this matter.

Arch did not violate KUCSPA because liability on the part of Jean Coal and Loving was not reasonably clear or beyond dispute. First, the exclusivity of the Workers' Compensation Act may have provided Jean Coal immunity. Second, as noted, when liability is not beyond dispute, an insurer has no duty to settle a claim. *Id.* Therefore, if liability is not beyond dispute, there can be no bad faith claim as a matter of law because the insurer does not lack a reasonable basis in law or fact for challenging the claim.

And National Union provided undisputed facts that the case had debatable issues of liability including the complexity of the underlying matter and significant issues about the allocation of fault among the parties and Rhett himself, as well as other entities and individuals.

As stated in *Holloway*, 497 S.W.3d 733, if there is a dispute over liability, an insurance carrier is entitled to forgo any effort to settle and may take a dispute over liability to a jury. Additionally, the Court therein concluded that "settlements are not evidence of legal liability, nor do they qualify as admissions of fault[,]" under Kentucky law. *Id.* at 738.

Mosley cites *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 374-75 (Ky. 2000) for the proposition that a bad faith claim can proceed even where the

underlying claim was "fairly debatable." But that is not the holding in *Farmland*. In *Farmland*, liability was not disputed; rather, the liability was clear and the insurance company's actions were oppressive. Consequently, in the case at bar, *Farmland* is distinguishable. It involved a first-party claim rather than a third-party claim and did not involve an insured's liability for loss. *Farmland's* liability to pay the loss was undisputed, but the insurer misrepresented the extent of coverage. In the case at bar, it is a third-party claim and liability was fiercely contested.

Hence, *Farmland* did not set a new standard for bad faith claims but merely clarified *Wittmer* and applied it to cases where liability was not disputed. When liability is clear or "beyond dispute," a claim must be paid. *See Phelps*, 172 S.W.3d at 395. But when liability is not clear or disputed, an insurer may pursue its defense and contested liability until its duty under KUCSPA is triggered. *Lee v. Medical Protective Company*, 904 F. Supp. 2d 648, 654 (E.D. Ky. 2012).

The trial court determined that Mosley's claim against Arch and National Union failed to meet the second prong of *Wittmer*, and we agree.

c.) Damages and/or outrageous conduct

Finally, Mosley's allegations of bad faith do not meet the necessary high standard to be considered bad faith in Kentucky. A bad faith claim under

Kentucky law is a punitive action, and hence, the underlying conduct must be sufficiently egregious to warrant punitive damages. *Hollaway*, 497 S.W.3d at 739.

In the case at bar, Mosley has not demonstrated any actual damages, which are a prerequisite to a bad faith claim. *Glass*, 996 S.W.2d at 452. Nor have the allegations established conduct on the part of the insurance carriers that is so outrageous that punitive damages are justified. *Id.* Mosley never pled any actual damages based on their bad faith claim, and they received policy limits from Arch and another settlement from National Union. Second, Mosley has not highlighted any outrageous conduct on the part of the insurance carriers. Thus, the trial court correctly recognized that the conduct of Arch and National Union during the settlement process was not outrageous nor requiring of punitive damages.

Lastly, we direct our attention to the specific claims by Mosley of unfair leveraging, global offers, and creating a conflict of interest. Mosley suggests that the insurance carriers violated KRS 304.12-230(13). While it is true that under KUCSPA: "[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[,]" is considered an unfair settlement practice, that is not what happened in this case. KRS 304.12-230. Arch did not leverage the payment of a claim under one coverage to obtain a favorable settlement of a second claim under a different

coverage in the same policy. Rather than leveraging its coverage to influence the settlement under other parts of the policy, it, in fact, covered both insured parties, Jean Coal and Loving, under the same coverage in the policy.

Mosley's bad faith complaint is predicated not on the amount of the settlement offers, but on Arch and National Union's refusal to negotiate the respective claims against them separately. It ignores the fact that both insurance carriers had a legal obligation to obtain releases from all insured parties to avoid subjecting any one of them to an excess verdict. *See Shaheen v. Progressive Casualty Insurance Company*, 114 F. Supp.3d 444, 449-50 (W.D. Ky. 2015), aff'd, 673 Fed. App'x 481 (6th Cir. 2016).

The legal ramifications of this situation were explained in *Kentucky Motor Vehicle Insurance Law*:

> An insurance company can sometimes be placed in a position where it has two courses of action, one of which will place it in jeopardy of a traditional bad faith claim by its own insured, and the other of which will place it in jeopardy of a first-party claim by an accident victim. This will occur where plaintiff's counsel makes a demand for the payment of policy limits, but refuses to release the individual insured in return. Although each case will turn on its own facts, it would appear that, because of the insurer's duty to its policyholder, it will in most cases be safe in refusing such a demand.

Ky. Motor Veh. Ins. Law § 8:2 (2017-2018 ed.) (footnotes omitted).

Significantly, Mosley has never established that global offers on behalf of multiple insureds are prohibited by KUCSPA or Kentucky law. The prohibition on "leveraging" under KUCSPA applies only to attempts to condition settlements under one portion of an insurance policy on another portion of an insurance policy where liability has become reasonably clear. *See* KRS 304.12-230(13). As clarified, that is not the case here.

Second, Mosley contends that a conflict of interest occurred when one attorney represented all Defendants/Appellees at the second mediation. Additionally, Mosely asserts that this behavior was outrageous. A conflict of interest is ameliorated when all parties agree to representation by an attorney. Since, here, these parties agreed to have one attorney represent them at the mediation, the act did not trigger bad faith. Moreover, Mosley lacks standing to assert a conflict of interest for these clients against their attorneys.

Indeed, shortly after the failed second mediation, on November 4, 2013, Arch paid, and Mosley accepted, its $1 million-dollar policy limit to settle and release all claims against Jean Coal and Loving. And later, National Union settled with Mosley for $2 million for Rex Coal and Dixie Fuel. It is difficult to posit a bad faith claim when both insurance carriers made robust settlements with Mosley.

Lastly, the disputed liability in this matter is quite complex. The issues include, among others, "up the ladder" immunity in workers' compensation, Dixie Fuel's questionable duty to Rhett as a bailor of the truck without actual control of the truck for over one year, apportionment of liability among the Defendant/Appellees and other parties, the proof that Rex Coal or Dixie Fuel had knowledge about the truck's condition, and comparative fault apportioned to Rhett for failure to wear a seatbelt.

In sum, the actions by Arch and National Insurance in this dispute do not support a legal claim of bad faith. Hence, the trial court, in granting the judgment on the pleadings, observed that even if the facts asserted against Arch were true, its conduct was legally insufficient to maintain a claim for bad faith, a violation of KUCSPA, civil conspiracy, and punitive damages. When the trial court granted National Union's summary judgment, it noted that Mosley could present no genuine issues of material fact to support a common-law bad faith claim, a statutory bad faith claim, or civil conspiracy. We agree and affirm the trial court's grant of the judgment on the pleadings.

d.) Mediation

Finally, it is important to examine the process of mediation since Mosley's allegations of bad faith rest on Defendants/Appellees' conduct during mediation. Public policy provides that mediation discussions are confidential.

Consistent with this public policy, the Kentucky Supreme Court has adopted model mediation rules. *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 459 (Ky. 2004).

National Union argues, based on *Knotts v. Zurich Insurance Company*, that insurer's litigation conduct cannot be used to establish bad faith. *Knotts v. Zurich Insurance Company*, 197 S.W.3d 512, 518 (Ky. 2006). Therefore, National Union posits that mediation and litigation conduct should not be the basis of a bad faith claim. Whether mediation is litigation or settlement practice is unclear. Further, while *Knotts* explains that the remedy for improper litigation behavior is found in the Civil Rules of Procedure, nothing in these rules directly addresses conduct during mediation. *Id.* at 522. Nor does National Union cite any case law that mediation is part of litigation rather than settlement process. We believe National Union's suggestion that conduct during mediation is merely litigation conduct is not persuasive since mediation is used at all stages of a case and outside court actions, too.

"To be sure, the chilling effect on compromise negotiations that [Kentucky Rules of Evidence (KRE)] 408 was designed to curb would remain in full force should we allow the contents of those discussions to form the basis for a new action." *Norton Healthcare, Inc. v. Deng*, 487 S.W.3d 846, 854 (Ky. 2016). According to Model Mediation Rule 12, mediation sessions are confidential. The

rule states that "[m]ediation shall be regarded as settlement negotiations for purposes of K.R.E. 408." Generally, evidence of compromises or settlement agreements are inadmissible at trial because the law looks with favor upon settlement of controversies. *Green River Elec. Corp. v. Nantz*, 894 S.W.2d 643, 645 (Ky. App. 1995), *as modified* (Mar. 17, 1995) (citation omitted).

Further, courts recognize the importance of confidentiality in mediation. For instance, the Sixth Circuit Court of Appeals noted that, "[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) (citation omitted). The bad faith and civil conspiracy claims proffered by Mosley are based entirely on the confidential settlement offers and conduct during mediation sessions.

Because the actions during the mediation are confidential, the bad faith claims fail for the reason that none of this conduct would be admissible. In sum, the trial court properly granted the motion for judgment on the pleadings and the motion for summary judgment because the source of Mosley's bad faith claims relies on conduct during mediation, which is confidential.

e.) Civil Conspiracy

Mosley also makes a claim of civil conspiracy against Arch and National Union. To prevail on a claim of civil conspiracy, the proponent must

show "a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*, 277 S.W.3d 255, 261 (Ky. App. 2008) (quoting *Smith v. Board of Education of Ludlow*, 264 Ky. 150, 94 S.W.2d 321, 325 (1936)).

The burden of proving conspiracy is inherently difficult and requires that the party alleging the conspiracy prove every element of the claim to prevail. *James*, 95 S.W.3d at 896. The charge that Arch and National Union used one attorney during a mediation session does not establish civil conspiracy. Mosley did not establish a scintilla of evidence of an unlawful agreement to perform an unlawful act. To succeed on proving civil conspiracy by the insurance carriers, Mosley must provide a factual basis of an agreement to act overtly unlawful in furtherance of the agreement. No facts were provided.

Accordingly, the trial court properly granted Arch's motion for judgment on the pleadings and National Union's summary judgment on the issue of civil conspiracy. Such a charge requires Mosley to show that Arch and National Union acted together to commit an underlying crime or tort. *See James*, 95 S.W.3d 875. Here, Mosley did not prove that the parties acted together, much less in bad faith.

As an addendum, we will not address Mosley's suggestions that National Union's brief should be stricken because of a mistaken citation to an unpublished opinion, *Cincinnati Insurance Company v. Hofmeister*, 2004-CA-002269-MR, 2008 WL 4601140 (Ky. App. Oct 17, 2008), *opinion not to be published* (May 13, 2009). Neither the trial court nor our court relied on this decision. Thus, even if error existed, the error would be harmless.

CONCLUSION

It is indisputable that an insurance carrier that does not act in good faith to achieve fair and equitable settlements of claims where liability is reasonably clear violates KUCSPA. Nevertheless, this Act does not mandate that an insurer's proposed settlement amount must provide the amount that a plaintiff claims for compensation. *Phelps*, 172 S.W.3d at 395. As stated by the Kentucky Supreme Court, "KUCSPA 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.

KUCSPA necessitates that an insurer makes a good faith attempt to settle any claim, for which liability is beyond dispute, for a reasonable amount. *Id.* Here, Mosley attempts an unwarranted expansion of the statutory bad faith cause of action with mere innuendo. Moreover, Mosley alleging bad faith without

demonstrating any outrageous behavior, which is required for punitive damages, fails the *Wittmer* test for bad faith.

We affirm the decision of the Harlan Circuit Court granting Arch's motion for judgment on the pleadings and National Union's motion for summary judgment. It properly granted Arch's motion since Arch's conduct was legally insufficient to maintain a claim for bad faith, violations of KRS 304.12-230 and KRS 304.12-235, and civil conspiracy. Furthermore, the trial court allowed adequate discovery.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Dale Golden
Kellie M. Collins
Lexington, Kentucky

BRIEF FOR APPELLEE
ARCH SPECIALITY INSURANCE
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NATIONAL UNION FIRE
INSURANCE COMPANY:

Christopher S. Burnside
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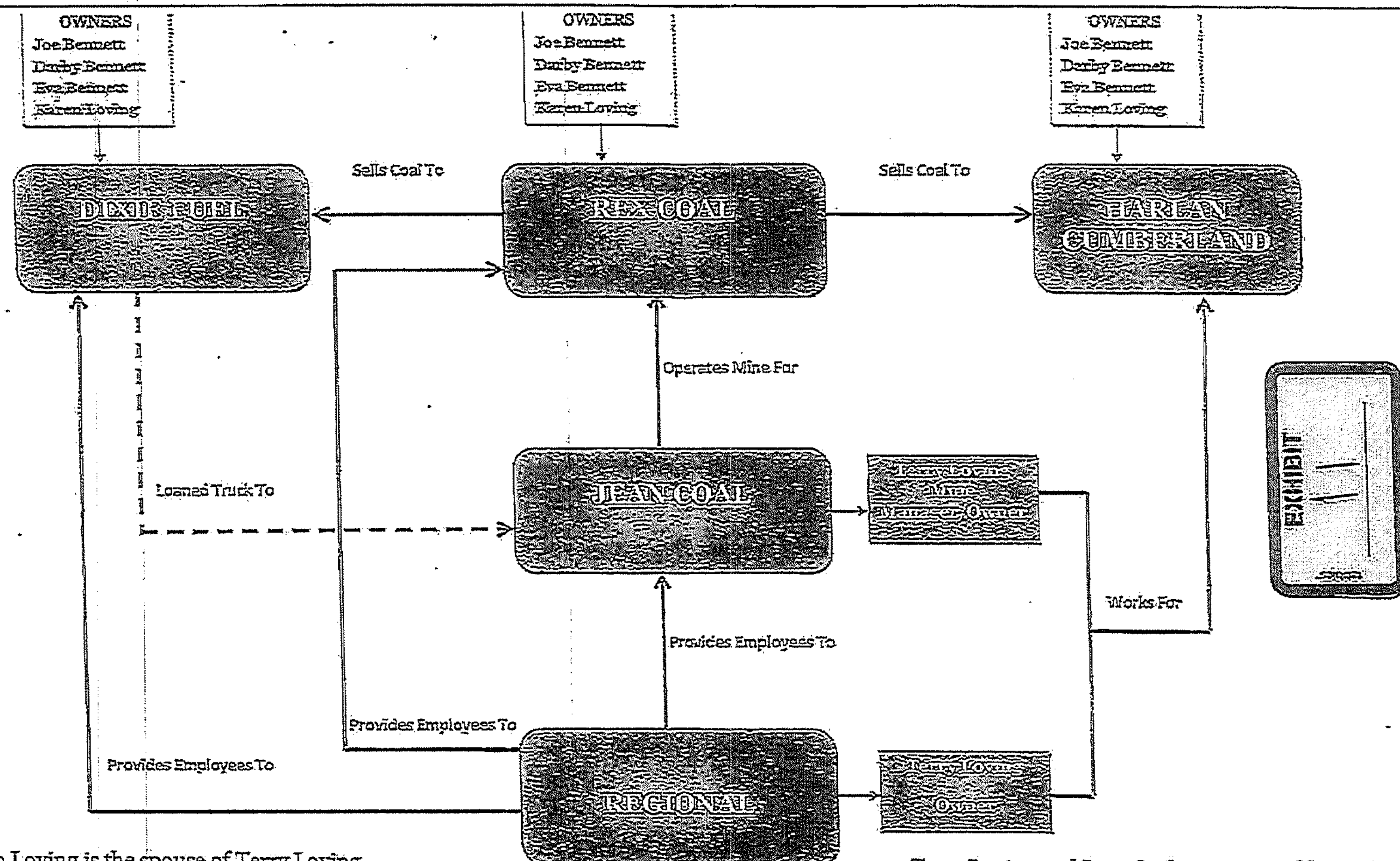
APPENDIX

2



Karen Loving is the spouse of Terry Loving.
Karen Loving is also the sibling of Joe Bennett.

Terry Loving and Jean Coal were insured by Arch.

Dixie Fuel and Rex Coal were insured by National Union; Dixie Fuel was the Named Insured and Rex Coal was an Additional Insured.

APPENDIX 3

2016 WL 1068997
Only the Westlaw citation is currently available.

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

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Hale General Contracting, Inc.; Terry Hale; and Brenda Hale, Appellants

v.

Motorist Mutual Insurance Company, Appellee

NO. 2015-CA-000396-MR

|

MARCH 18, 2016; 10:00 A.M.

|

Discretionary Review Denied by Supreme Court September 15, 2016

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

Attorneys and Law Firms

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

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

BEFORE: COMBS, KRAMER, AND NICKELL, JUDGES.

OPINION

KRAMER, JUDGE:

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

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

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

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

In January of 2015, Hale's bad faith claim against Motorist proceeded to trial. The circuit court ultimately dismissed this claim with prejudice after a jury made the following findings: (1) Motorist had not failed to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (2) Motorist had not refused to pay Hale's claims without

conducting a reasonable investigation based upon all available information; (3) Motorist had not violated its duty to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability had become reasonably clear; and (4) Motorist had not compelled Hale to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amount Hale ultimately recovered in his lawsuit.

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

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

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

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

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

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

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

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

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

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

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

NICKELL, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

All Citations

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

Footnotes

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

2 KRE Rule 408 provides:

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

End of Document

2008 WL 3162321
Only the Westlaw citation is currently available.

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

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

HAMILTON MUTUAL INSURANCE COMPANY OF CINCINNATI, Ohio and EMC Insurance Company, Appellants/Cross–Appellees

v.

Harlon BARNETT, Administrator of the Estate of Steven Ray Barnett, Appellee/Cross–Appellant.

Nos. 2007–CA–000029–MR, 2007–CA–000064–MR.

Aug. 8, 2008.

Discretionary Review Denied by Supreme Court May 13, 2009.

Appeal and Cross–Appeal from Taylor Circuit Court, Action No. 00–CI–00004; Doughlas M. George, Judge.

Attorneys and Law Firms

Steven C. Call, David A. Nunery, Campellsville, KY, for appellant.

M. Austin Mehr, Lexington, KY, for appellee.

Before LAMBERT, MOORE, and WINE, Judges.

OPINION AND ORDER

LAMBERT, Judge.

*1 Hamilton Mutual Insurance Company (hereinafter "Hamilton Mutual") appeals from a jury verdict in favor of Harlon Barnett, finding that Hamilton Mutual acted in bad faith by delaying payment on a policy for underinsured motorists coverage. Hamilton Mutual additionally moves this Court to remove EMC Insurance Company from the style of the case. For the reasons set forth herein, we grant the motion to dismiss EMC as a party to the appeal, and we affirm in part and reverse in part the judgment below.

Steven Ray Barnett was a passenger in a fatal head-on collision on June 2, 1995. The drivers of both vehicles were intoxicated. The estates of all five of the young men killed in the accident filed various lawsuits in Marion Circuit Court, which were promptly consolidated into one action.

Harlon Barnett, Steven's father and administrator of Steven's estate, filed an underinsured motorist insurance claim (hereinafter "UIM"), requesting the full policy limits of $900,000.00 in May of 1996. Simultaneously, Barnett filed a complaint in Marion Circuit Court seeking damages as a result of his son's death. On December 6, 1996, the Marion Circuit Court issued an order stating that (1) Steven was at all times a resident of the Barnett household; (2) it was uncontested that the Barnetts had UIM coverage on three automobiles and paid premiums for all three vehicles; (3) there was UIM coverage of $300,000.00 per vehicle; (4) "stacking" was allowable under Kentucky law; and therefore (5) there was $900,000.00 available in UIM protection.

On January 9, 1997, Barnett's attorney sent a letter to one of Hamilton Mutual's attorneys demanding settlement for the policy limits of $900,000.00. Hamilton Mutual responded to this demand in a letter dated January 31, 1997, which proposed a structured settlement with a present value of $200,000.00. The letter explained that there were two concerns with Barnett's claim. First, Steven was riding with an intoxicated driver, which invoked comparative negligence. Second, while Barnett could claim damages in excess of $2,000,000.00, the reality was that conservative juries in Kentucky and Marion County specifically rarely awarded such substantial verdicts in wrongful death cases, especially where liability was not clear. Barnett rejected this offer.

On July 14, 1997, Barnett lowered his demand to $850,000.00. Mediation was held on November 7, 1997, with all parties to the consolidated action being present. As a result of the mediation, Barnett reduced his demand to $775,000.00, and Hamilton Mutual offered a structured settlement with a present value of $300,000.00. Barnett rejected this offer.

With a trial date set for January 9, 1999, Barnett resumed settlement negotiations. In early December 1998, Barnett

made a $690,000.00 settlement demand and indicated that he was not interested in a structured settlement. Hamilton Mutual responded to this demand with an offer of a structured settlement with a present value of $410,000.00. On December 21, 1998, Barnett reduced his settlement demand to $675,000.00, and Hamilton Mutual responded the following day with an offer of a structured settlement with a present value of $500,000.00. Barnett again refused. A follow-up letter reiterating the initial concerns Hamilton Mutual had regarding Barnett's claim was then sent, which concluded by urging Barnett to demand $587,500.00, the midpoint between the parties' last settlement positions. This demand was forwarded to Hamilton Mutual and, on January 8, 1999, the parties settled for an unstructured settlement amount of $587,500.00.

*2 The complaint in this action was filed January 4, 2000, and proceeded to trial September 25, 2006. Barnett alleged that Hamilton Mutual violated its duty to exercise good faith in the handling and settlement of his UIM claim. Furthermore, he asserted that Hamilton Mutual violated duties established under the Unfair Claims Settlement Practice Act and the Consumer Protection Act. Barnett contended that said actions were done fraudulently, maliciously, intentionally, oppressively, and with reckless disregard of his rights. He complained that he sustained the following damages: 1) enormous amount of pain, suffering, and emotional distress; 2) embarrassment and humiliation; 3) court costs and legal expenses; and 4) loss of interest and investment income on the money ultimately settled. He also claimed that he was entitled to recover punitive damages against Hamilton Mutual.

At trial, Hamilton Mutual asserted that it had relied on the experience of its attorneys in handling wrongful death claims to place a reasonable settlement value on the Barnett claim. On September 27, 2006, a jury returned a verdict in favor of Barnett with an award of $150,000.00 for loss of interest and investment income; $5,000.00 for legal costs expended in the underlying case; and punitive damages in the amount of $600,000.00. The court subsequently awarded Barnett an additional $195,833.33 pursuant to KRS 304.12–235 for legal expenses incurred in the underlying action. This appeal followed.

Hamilton Mutual first argues that the trial court erred in admitting evidence of litigation conduct and settlement offers in contravention of the Kentucky Supreme Court decision in *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky.2006). We disagree.

Abuse of discretion is the proper standard of review of a trial court's evidentiary rulings. *See Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky.2004). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

In *Knotts*, the Kentucky Supreme Court held that,

> [t]he commencement of litigation by the filing of a complaint, even when the claim adjustment process is underway, [ ] does not change the fundamental nature of what the claimant seeks. The "claim"—for compensatory payment under the insurance policy—is the same as before the litigation began. The claimant has simply opted to seek satisfaction of the claim through a different procedure. Nothing in KRS 304.12–230 limits its applicability to pre-litigation conduct, and since the statute applies to "claims," it continues to apply to an insurer so long as a claim is in play. As such, we hold that KRS 304.12–230 applies both before and during litigation.

Knotts, 197 S.W.3d at 517. Moreover,

> [o]ne should note a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct. The Rules of Civil Procedure provide remedies for the latter. 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 places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer. An insurer's settlement offers, on the other hand, are not a separate abuse of the litigation process itself. If a litigant refuses to settle or makes low offers, his adversary cannot avail himself of motions to compel, argument, or cross-examination to correct his failure.

> *3 In principle, an insurer's duty to settle should continue after the commencement of litigation. If the insurer were immunized for objectional [sic] settlement conduct occurring after litigation begins, the insured would be left without a remedy. It makes sense, therefore, to hold the insurer responsible for such conduct. The rules, however, provide litigants with protection against other forms of litigation [conduct], and for that reason a court could rationally exclude evidence of the insurer's other misdeeds committed during the litigation process.

See Knotts, at 523, *quoting* Stephen S. Ashley, *Bad Faith Actions Liability and Damages* § 5A:6 (2005). After carefully reviewing the record, it is clear that the trial court considered these meticulous distinctions. In its order on September 5, 2006, the court carefully laid out the nuances of the *Knotts* opinion and then reasoned that,

> [t]he majority of the litigation conduct that occurred after the December 6, 1996, ruling centered on settlement discussions between the parties. [Barnett] would not be able to rely on the rules of civil procedure for sanctions if [Hamilton Mutual] failed to make reasonable offers and delayed in making these offers. Therefore, the facts of this case encompass very little litigation conduct.

Hamilton Mutual attempts to define all its settlement discussions as litigation conduct. We, however, agree with the trial court's sound reasoning that the majority of the alleged litigation conduct was actually settlement discussions, and is therefore admissible both before and after the December 6, 1996, order.

As to any actual "litigation conduct" that was admitted, we reiterate the holding in our recent decision in *Hamilton Mutual Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287 (Ky.App.2007).

> In *Knotts*, the [Kentucky Supreme] 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.['] *[Knotts]*, 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.

In *Knotts*, litigation against the insurer was resolved by means of summary judgment. Therefore, the Kentucky Supreme Court did not address any evidence presented to the jury by the insured. In this case, after having reviewed the record, we are not persuaded that the introduction of the challenged evidence requires reversal of the judgment. Hamilton Mutual aggressively defended its actions based upon the "advice-of-counsel" defense. Throughout the bad faith action, it argued that its delay in ultimately satisfying Buttery's claim resulted from litigation decisions that it had made during the trial of the underlying action. Hamilton Mutual claimed that it had a reasonable basis to deny Buttery's claim because it had consistently acted on the advice of counsel. Because Hamilton Mutual effectively "opened the door" by presenting evidence of its litigation conduct, we hold that Buttery was entitled to comment on the evidence in rebuttal. *Harris v. Thompson*, 497 S.W.2d 422, 430 (Ky.1973). The admission of the challenged evidence does not constitute reversible error.

*4 *Buttery*, 220 S.W.3d at 294. Similarly, in the case at hand, Hamilton Mutual aggressively defended its actions under the "advice-of-counsel" defense. Therefore, we again find that they "opened the door" by introducing their litigation conduct as a defense. Accordingly, we do not find that the trial court abused its discretion in admitting the disputed evidence.

Hamilton Mutual then argues that it was entitled to a judgment notwithstanding the verdict (hereinafter "JNOV"). We disagree.

> In ruling on a JNOV motion, the trial court is required to consider the evidence in a light most favorable to the party opposing the motion and to give that party every reasonable inference that can be drawn from the record. *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky.1985). The motion is not to be granted "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon

which reasonable men could differ." *Taylor*, 700 S.W.2d at 416. On appeal, we are to consider the evidence in the same light. *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky.1991).

See Brewer v. Hillard, 15 S.W.3d 1, 9 (Ky.App.1999). Moreover,

> [w]here there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts.... *Cf. Taylor v. Kennedy*, 700 S.W.2d 415 (Ky.App.1985). The reviewing court, upon completion of a consideration of the evidence, must determine whether the jury verdict was flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. If it was not, the jury verdict should be upheld. *Cf. Lewis v. Bledsoe Surface Mining Co.*, 798 S.W.2d 459 (Ky.1990); *NCAA v. Hornung*, 754 S.W.2d 855 (Ky.1988).

See Bierman v. Klapheke, 967 S.W.2d 16, 19 (Ky.1998).

The litany of issues Hamilton Mutual assert that could only fairly and equitably be found in their favor all involve issues of fact upon which reasonable minds could differ. Additionally, there is no evidence in the record that the jury's verdict was flagrantly against the evidence or a result of passion or prejudice. Therefore, we will not now substitute our judgment for the jury's.

Hamilton Mutual also contends that the jury should not have been instructed under KRS 304.12–235 because Barnett did not file a claim but instead filed a lawsuit and additionally that Barnett was not entitled to attorneys' fees because of the timing of the fee agreement. We disagree.

Barnett's attorney sent a letter to Hamilton Mutual on May 10, 1996, which notified that a claim was being made, the fact of Barnett's death, the accident report, and a draft complaint. Pursuant to the policy, Hamilton Mutual requires written notice to identify the injured person and to obtain information regarding time, place, and circumstances of the accident. These elements were satisfied. Moreover, the trial court noted that "[a]fter the [c]ourt's ruling on December 6, 1996, there appears to be no question as to the insurer's obligation to pay."

*5 In *Knotts*, the Kentucky Supreme Court clearly stated that,

> [t]his general use [of the word claim] is applicable to KRS 304.12–230. The "right" being asserted arises under the insurance policy and is the right to compensation for injuries for which liability has been established. Thus, "claim," as used in the statute, means an assertion of a right to remuneration under an insurance policy *once liability has reasonably been established.* This is usually done by making the claim directly to the insurance company, which then engages in the claim adjustment process. But it *may also be accomplished by instituting litigation, which is simply another means of asserting the right under the insurance policy.* Though litigation is distinct from the claims adjustment process in that it specifically invokes the courts' power to decide the issue of liability, both procedures are simply methods of pursuing claims under an insurance policy. It is often the case that both methods are employed, with litigation following (or preempting) the claim adjustment process.

Knotts, at 516–17 (emphasis added). We see no reason that a different definition of claim would be applicable in KRS 304.12–235 than in KRS 304.12–230, as the two statutes are part of the same legislative scheme. Therefore, we find no merit in Hamilton Mutual's assertion that Barnett's decision to file a lawsuit in lieu of filing a formal claim precludes instructions to the jury under KRS 304.12–235. Accordingly, we also conclude that there was no error in granting reasonable attorney's fees under KRS 304.12–235(3), which states that "[i]f an insurer fails to settle a claim within the time prescribed ... and the delay was without reasonable foundation ... the insured person ... *shall be entitled* to be reimbursed for his reasonable attorney's fees incurred." (Emphasis added).

Hamilton Mutual additionally argues that the jury should not have been instructed on Barnett's claim for loss of interest and investment income. Barnett alternatively contends that the trial court should not only have instructed on loss of interest and investment income but also on prejudgment interest under KRS 304.12–235.

First, KRS 304.12–235(2) is mandatory in nature. It states that "[i]f an insurer fails to make a good faith attempt to settle a claim ... the value of the final settlement *shall bear interest* at the rate of twelve percent (12%) per annum from and after the expiration of the thirty (30) day period." (Emphasis added). Since the jury found that Hamilton Mutual failed to make a good faith attempt to settle the claim within thirty days of notice of the claim, Barnett's assertion that he is entitled to interest on the value of the final settlement from and after January 5, 1997, is correct.

The statutory scheme governing bad faith conduct by insurance companies contemplates how to properly compensate the insured adequately. That is the function of KRS 304.12–235(2) discussed above. We agree with the trial court that allowing Barnett to collect both interest under KRS 304.12–235(2) and loss of interest and investment income would amount to double recovery. Estimating the loss of interest and investment income on Barnett's claim is simply too speculative in nature. More importantly, we would be deviating from clear legislative intent on how to adequately compensate an injured insured under KRS 304.12–235 if we endorsed loss of interest and investment income over the statutorily established 12% per annum. Therefore, we find that awarding loss of interest and investment income was an abuse of discretion, and we instruct the trial court to award 12% per annum from January 5, 1997, to the date of settlement, January 8, 1999, on the final settlement amount of $587,500.00. After careful review, however, we decline to reverse the trial court's decision to deny pre-judgment interest after January 8, 1999, as it was within its sound discretion to do so. *See Dalton v. Mullins*, 293 S.W.2d 470, 477 (Ky.1956); *see also, e.g., Curtis v. Campbell*, 336 S.W.2d 355 (Ky.1960); *Beckman v. Time Fin. Co.*, 334 S.W.2d 898 (Ky.1960); *Avritt v. O'Daniel*, 689 S.W.2d 36 (Ky.App.1985).

*6 Hamilton Mutual next asserts that the jury instructions were prejudicial, thereby warranting a new trial. "An error in a court's instructions must appear to have been prejudicial to the appellant's substantial rights or to have affected the merits of the case or to have misled the jury or to have brought about an unjust verdict in order to constitute sufficient ground for reversal of the judgment." *Miller v. Miller*, 296 S.W.2d 684, 687 (Ky.1956), *quoting* Stanley's Instructions to Juries, Sec. 44, p. 60. Hamilton Mutual argues that questions two, four, six, and eight of the jury instructions were repetitive and simply rephrased the applicable law in a manner that could only confuse the jury. After carefully reviewing the jury instructions, we find that the trial court correctly outlined the common law and statutory requirements for a finding of bad faith.

In order to sustain a claim of bad faith,

> an insured must prove three elements ...:(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 [or delaying] the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying [or delaying] the claim or acted with reckless disregard for whether such a basis existed.... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts.

Wittmer v. Jones, 864 S.W.2d 885, 890 (Ky.1993). The issue of delaying the claim was an essential element of the jury instructions, and there is no evidence that its inclusion in the disputed questions resulted in any prejudice or an unjust verdict. Moreover, despite Hamilton Mutual's contention, outrageous conduct is not required to prove bad faith. Thus there was also no error in the court not including that element in its jury instructions.

Furthermore, Hamilton Mutual fails to provide any evidence that the inclusion of denial of the claim as an element of the instructions prejudiced a substantial right, affected the merits of the case, or resulted in an unjust verdict. Therefore, we find any error in its inclusion harmless. "The test for harmless error is whether there is any reasonable possibility that absent the error the verdict would have been different." *See Crane v. Commonwealth*,

726 S.W.2d 302, 307 (Ky.1987). The record indicates that the jury answered every question affirmatively, meaning that even excluding the alleged improper instructions on denying the claim, the jury still found Hamilton Mutual's conduct constituted a violation of Kentucky's bad faith law. Therefore, we find that any error was harmless and thus not reversible.

Hamilton Mutual finally argues that the trial court abused its discretion in refusing to admit into evidence Judge Spragen's handwritten notes from the November 7, 1997, mediation, regarding the value of the Barnett Estate. The trial court excluded the notes as inadmissible hearsay, finding that there was no way to verify what each number was intended to represent. Hamilton Mutual wanted to assert that the values represented the fair range of values on the claim. However, hearsay is "a statement, [oral or written,] other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Kentucky Rules of Evidence (KRE) 801(c). They contend that the notes are exceptions to the general rule against hearsay either as a regular conducted activity or to establish an existing state of mind. However, it is illogical to imply that numbers alone written by a mediator rather than a party to the action indicate an existing state of mind pertinent to the action at hand. Moreover, despite that it was routine for Judge Spragen to keep notes during mediations, there is no evidence of what the numbers mean and no routine system to discern their meaning. Therefore, after reviewing the record and the Kentucky Rules of Evidence, we find that the trial court did not abuse its discretion in declining to submit the handwritten notes as inadmissible hearsay.

*7 As to the motion to dismiss EMC as a party, Barnett asserts that because EMC is the parent company of Hamilton Mutual, EMC should not be dismissed as a party. However, the complaint contains no allegation that Hamilton is the alter ago of EMC or that the corporate veil should be pierced. Nor does the complaint allege facts sufficient to state a claim for piercing corporate veil. Barnett does not allege that Hamilton is a shell corporation or mere facade for EMC, that Hamilton is fraudulently or otherwise undercapitalized, that Hamilton is fraudulently organized, that EMC's ownership and control of Hamilton has deprived Barnett of a remedy, that separate treatment will promote a fraud or injustice, that Hamilton's officers and directors are non-functioning, that Hamilton does not maintain corporate formalities, or that EMC siphons Hamilton's funds. *See White v. Winchester Land Dev., Inc.*, 584 S.W.2d 56, 60 (Ky.App.1979) (*citing Poyner v. Lear Siegler, Inc.*, 542 F.2d 955, 958 (6th Cir.1976), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1653, 52 L.Ed.2d 361 (1977)); *Big Four Mills, Ltd. v. Commercial Credit Co.*, 211 S.W.2d 831 (Ky.1948). Accordingly, EMC should be dismissed from this action.

Based upon the foregoing, we order that the motion to dismiss EMC as a party be and is hereby granted, and we affirm the judgment of the trial court in part and reverse and remand in part with instructions to award prejudgment interest as outlined in this opinion.

ALL CONCUR.

All Citations

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