COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2018-SC-000586-D

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

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

ARCH SPECIALTY INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY RESPONDENT

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of this brief were served upon the following named individuals by United States mail on this 30th day of November, 2018: Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Jeffrey Thomas Burdett, Pulaski County Judicial Center, 50 Public Square, Somerset, KY 42501; Harlan Circuit Court, Justice Building, 129 South 1st Street, Harlan, KY 40831; J. Dale Golden, Kellie M. Collins, Golden Law Office, PLLC, 771 Corporate Drive, Suite 750, Lexington, KY 40503; Jeffrey R. Morgan, Jeffrey R. Morgan & Associates, PLLC, 850 Morton Blvd., Hazard, KY 41701; Christopher S. Burnside, Christopher G. Johnson, Griffin Terry Sumner, Frost Brown Todd, LLC, 400 West Market Street, Suite 3200, Louisville, KY 40202; Kenneth R. Friedman, Henry G. Jones, Friedman Rubin, 1126 Highland Avenue, Bremerton, WA 98337.

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INTRODUCTION

The Movants seek discretionary review of the Kentucky Court of Appeals recent decision affirming the trial court's March 30, 2016 Order granting Arch Specialty Insurance Company's ("Arch") Motion for Judgment on the Pleadings. The Kentucky Court of Appeals agreed with the trial court that, even assuming all the facts alleged in the Movant's Amended Complaint were true, that alleged conduct was insufficient as a matter of law to maintain the claims the Movants had made against Arch for bad faith (violation of KRS 304.12-230 and KRS 304.12-235), civil conspiracy and punitive damages as a matter of well-established Kentucky law. After all, as even the Movants conceded, at both the June and September 2013 mediations Arch offered to pay its $1 million policy limits towards a potential global settlement of all Defendants. No global settlement was reached, but in about two weeks of the second failed mediation Arch had agreed to pay the $1 million to settle the claims against its insureds. Arch's settled these claims despite the substantial questions which existed as to Arch's coverage for, and its insureds liability for, the claims against them. As this Court has repeatedly explained, reversible error alone is insufficient to merit discretionary review, and a motion seeking such review "will be granted only when there are special reasons for it." *See Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 419 (Ky. 2005). In affirming the trial court's entry of judgment for Arch, the Court of Appeals simply applied well-established Kentucky "bad faith law" precedents to the facts and issues involved in this case and those precedents dictated that the Court of Appeals affirm the trial court. There are no "special reasons" for this Court to further consider this matter, and thus the Motion for Discretionary Review should be denied.

BACKGROUND FACTS

A. The Underlying Wrongful Death Suit

This third-party bad faith case arises from the accidental death of Rhett Mosley while driving a truck on a mine site in Harlan County[1]. After the accident, Rhett's wife Crystal Mosley, individually and as Administratrix of Rhett's Estate, and for Rhett's minor child (collectively "Mosley"), filed a wrongful death suit against several interrelated companies that were part of the mining operation where the accident occurred, alleging their negligence contributed to Mosley's death. These interrelated companies were Rex Coal, Inc. ("Rex") (the mine owner and permittee); Dixie Fuel Company ("Dixie") (the owner of the truck Mosley was driving at the time of the accident); Regional Contracting ("Regional") (an employee leasing company which employed Mosley); Jean Coal Company ("Jean") (the mine operator who contracted with Regional for Mosley's services); and Terry Loving ("Loving") (the sole managing member of Jean and Regional).[2] It was and is undisputed that Rex, Dixie, Regional and Jean were all small businesses owned and managed by a common group of family members who pursued common defenses to Mosley's claims. They were defended in the case by a common defense lawyer of their choosing, Tom Goodwin ("Goodwin").

Liability for all the wrongful death claims was hotly disputed and multiple motions for summary judgment were filed on whether Mosley's claims against the Defendants were precluded by several defenses, especially the exclusivity provision of the Kentucky Workers' Compensation Act ("the Act").[3] Motions for summary judgment

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[1] *See* ROA 6364.
[2] *Id.*
[3] *Id.*

filed by Jean and Loving (Arch's insureds) were pending and had not yet been ruled upon at the time the two 2013 mediations took place. Notwithstanding their strongly held position that Mosley's claims were barred by the Act, the Defendants and their insurers National Union and Arch agreed to participate in two mediations.

During the first mediation on June 19, 2013, Arch ultimately offered to contribute its $1 million policy limits towards a global settlement which would have released all Defendants. When no settlement was reached, a second mediation was scheduled for September 12, 2013. Since it had already offered its policy limits, and the only new monies to add to the global settlement offers would come from National Union, no adjuster from Arch attended the second mediation. It was instead attended by Goodwin – the attorney representing all Defendants - and a National Union adjuster. After a global settlement was not reached at the second mediation, Mosley's counsel approached Goodwin and agreed to accept Arch's $1 million policy to settle with Jean only and not Arch's other insured Loving.[4] Arch did not and could not immediately accede to this demand as it had an obligation to secure a release for all its insureds – which it ultimately sought and obtained.

B. Procedural History of the Claims against Arch

Within days of the failed second mediation, or on September 19, 2013, Mosley sought to amend the Complaint alleging the two insurers Arch and National Union had engaged in "unfair leveraging" at the two mediations on June 19, 2013 and September 12, 2013.[5] Specifically, their bad faith allegations were based solely on their contention that Arch and National Union made global settlement offers for all Defendants at the

[4] *See* ROA 6366.
[5] *See* ROA 6367.

mediations through a common defense attorney.[6] Importantly, on September 28, 2013 – and thus weeks before Mosley's Motion to Amend was heard and granted - Arch offered to pay the $1 million policy limits in exchange for release of both Jean and Loving and Mosley accepted. [7]

While the trial court ultimately granted the Motion to Amend and allowed the bad faith claims to go forward, it stayed the bad faith claims pending resolution of the underlying wrongful death suit against Rex, Dixie and Regional by Order dated December 13, 2013. After those claims were finally settled in August 2015, but before the Court's stay was formally lifted, Mosley propounded discovery on the bad faith claims.[8] In response, Arch filed its Motion for Judgment on the Pleadings and a Motion to Stay Discovery pending a ruling on its dispositive motion. National Union also moved for summary judgment. On March 28, 2016, the trial court granted Arch's Motion for Judgment on the Pleadings, noting that even if the allegations in the Amended Complaint were true, the alleged conduct was legally insufficient to maintain a claim for bad faith, violation of the KUCSPA, civil conspiracy, and punitive damages.[9]

On appeal, the Court of Appeals correctly affirmed the trial court decision granting Arch's Motion for Judgment on the Pleadings under Kentucky Rule of Civil Procedure (CR) 12.03. The Court of Appeals determined that the issues before them were legal in nature and that the trial court was not required to make any factual determination. The Court of Appeals then relied on the longstanding law in Kentucky that an insurer cannot be liable for bad-faith claims handling unless it is clear and beyond reasonable

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[6] *Id.*
[7] *Id.*

[8] *See* ROA 6154-6186; 6187-6217.
[9] *See* Order granting Arch's Motion for Judgment on the Pleadings, attached as Appendix 1.

debate that the insurer had a duty to pay the underlying claim. Since the claim here was reasonably debatable, the bad-faith claim failed as a matter of law. For the same reasons the Harlan Circuit Court granted judgment on the pleadings, the Court of Appeals affirmed. Movant subsequently filed the instant Motion for Discretionary Review.

THIS CASE IS NOT APPROPRIATE FOR DISCRETIONARY REVIEW

The Court of Appeals correctly held as a matter of law that Movant failed to demonstrate that Respondent could be liable for third-party bad faith. The decision by the Court of Appeals follows the clear precedents set by this Court, which provides that a trial court must determine whether a plaintiff has presented sufficient evidence to make a colorable showing of bad faith as a matter of law.

A. The Trial Court and Court of Appeals correctly determined that the evidence was insufficient to support a colorable bad-faith claim.

Movant incorrectly argues that the Court of Appeals erred in upholding the trial court's finding that the Movant did not satisfy the *Wittmer v. Jones,* 864 S.W.2d 885 (Ky. 1993), elements for a bad faith claim under the KUCSPA. According to Movant, the court's application of the *Wittmer* elements was inconsistent and in contravention of the language articulated in *Wittmer* and the KUCSPA. Movant 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, Movant stated that Arch made a global offer of settlement for all Defendants. But Arch insured both Jean and Loving, and therefore had a duty to both its insureds to settle the claims within the policy limits and obtain a release of all future liability. The Court of Appeals agreed that Arch had a legal obligation to

obtain releases for all its insureds in exchange for paying the Policy limits to the Movant to avoid subjecting any one of them to an excess verdict. *Shaheen v Progressive Casualty Insurance Company,* 114 F. Supp.3d 444, 449-450 (W.D. Ky. 2015), aff'd, 673 Fed. App'x 481 (6th Cir. 2016). Thus, "a claim is settled within the meaning of the statute only when it is fully disposed of, which means that the claimant has released all claims against the insured." *Id.* Arch rightfully refused to tender policy limits for only one insured party and leave the other one without coverage. The Court of Appeals agreed that Arch exhibited no bad faith in refusing to negotiate policy limits for only one client.

Next, Movant argued that bad faith occurred at the mediations because a single attorney represented all the parties, which created a conflict of interest. Since Arch offered its policy limits at the first mediation, it was unnecessary for its adjuster to attend the second mediation. Further, the Defendants who were owned and managed by a common group of family members, voluntarily chose to be represented by common counsel since they pursued common and similar defenses to Mosley's demands. The Court of Appeals were correct in concluding that this did not constitute bad faith.

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

However, as the Court of Appeals rightly recognized, the Movants misread *Farmland* and *Phelps* and/or their holdings.

The issue in *Farmland* was not whether an insured's *liability* for causing a third party loss and damages was "fairly debatable" or not. *Farmland* did not even involve a third party claim and an insured's liability for a loss. Instead, *Farmland* involved a first party property damage claim where the carrier's liability for paying the loss was undisputed. *Phelps* involved a third party case where the insured's liability was undisputed, but the insurer delayed paying the claim. 172 S.W.3d 390, 395. The *Phelps* court concluded that the KUCSPA did not obligate a carrier to settle a claim when its liability was not "beyond dispute." *Id. Farmland* and *Phelps* followed the *Wittmer* standard and applied it to cases where liability was undisputed. Here, liability was in dispute.

To prevail on their bad faith "leveraging" claim under the *Wittmer* standard, Movant had to prove three elements: (1) the insurer must be obligated to pay under the contractual terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. *Wittmer*, 864 S.W.2d at 890. Movant must establish more than a technical violation of the KUCSPA. Movant must demonstrate that Arch's violation caused actual damage to them by reason of the violation and that the alleged conduct was "outrageous," to warrant punitive damages. *Motorist Mut. Ins. Co. v. Glass,* 996 S.W.2d 437, 452 (Ky. 1997), and holding modified by *Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, 497 S.W.3d 733 (Ky. 2016). The evidentiary threshold is high for bad faith claims.

This Court, has repeatedly—and recently—rejected claims like those made by the Movant. In *Hollaway*, 497 S.W.3d at 733, a plaintiff made a similar argument after the trial court dismissed her third-party bad-faith claim on summary judgment. The trial court entered a summary judgment for the insurer given that its insured's liability for causing a car accident and the plaintiff's resulting injuries was not "reasonably clear" or "beyond dispute." The Kentucky Supreme Court sustained, concluding that in these circumstances an insurance company has the right to make no offer at all and instead litigate the fault and causation issues before a jury. Id. at 733. The high court also determined that the plaintiff failed to present any evidence of malevolent intent by the insurer, and/or "outrageous conduct," which is required to prevail on a claim for bad faith under Kentucky law. Holloway argued like Mosley does here that the trial court had erroneously made "factual" determinations that should have been left to a jury, but this Court plainly and unequivocally rejected her position:

> Hollaway fails to offer any proof of intentional misconduct, instead suggesting that the process was a matter of interpretation, better fit for jury determination than summary judgment. Direct General's lack of interest in her initial six-figure demand, and the insurer's preference of waiting until she returned to work to complete its investigation of her claim are the main points Hollaway raises to support this inference. But even that only invokes speculation. She offers nothing to support the assertion that Direct General never intended to negotiate with her fairly to reach a settlement for her claims. The KUCSPA only requires insurers to negotiate reasonably with respect to claims; it does not require them to acquiesce to a third party's demands. We are confident that the lower courts were correct in determining that summary judgment in favor of Direct General is appropriate at this juncture.

497 S.W.3d at 739. The Court concluded by determining, *as a matter of law*, that the plaintiff "failed to present a colorable bad-faith claim under KUCSPA." *Id.* Movant's arguments here are no different. The Court of Appeals correctly upheld that trial Court's

Judgment in favor of Arch as the Movant failed to establish they could meet any of the required *Wittmer* elements.

1. The Trial Court and Court of Appeals correctly determined that Arch had no contractual duty to pay the Movant's claim under the insurance policy.

The first prong of the *Wittmer* test requires the plaintiff to prove that the insurer had a contractual obligation to pay the claim under the relevant policy. *Wittmer*, 864, S.W.2d at 880. The Court of Appeals correctly concluded that Arch had no such duty. Clearly, Mosley's claim was one for "bodily injury" under the insurance Policy's definitions, which includes "death".[10] Pursuant to Exclusion (e), the Arch Policy specifically excluded coverage for liability for "bodily injury" to a Jean "employee" while working for Jean, including a "leased worker" such as Mosley.[11] Coverage for Mosley's wrongful death claim was excluded by Exclusion (e) of the Arch Policy. Accordingly, Arch had no contractual duty to pay Mosley's bodily injury claim.

In her Motion, Movant claims Arch was required to seek a judicial determination as to its coverage position by filing a separate declaratory judgment action or interpleading in the tort action, and that absent such an action, Arch could not raise the coverage issue in defense of the bad faith claim. Of course, the Movant cites no legal authority for their argument because there is none. In fact, the opposite is true. *See Kentucky National Ins. v Shaffer*, 155 S.W.3d 738 (Ky. App. 2005) (while the insurer's failure to raise the exclusion to coverage would estop it from denying coverage, the exclusion could be raised to defeat the subsequent bad faith claim since no bad faith claim can lie against an insurer where its policy does not provide coverage for the claim).

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[10] *See ROA 6371.*
[11] *Id.*

There can be no "bad faith through estoppel". The fact that Arch only raised this coverage issue in defense of the bad faith claim and did not raise it during the litigation of the wrongful death claim is irrelevant. As a legal matter, no bad faith claim can lie unless the policy provides coverage for the claim, and here it did not. Thus, the first prong of the *Wittmer* test -obligation to pay the claim, was not and could not have been met - and any bad faith claim alleged against Arch fails as a matter of law.

2. The Trial Court and Court of Appeals correctly determined that the Liability of Arch's insureds was not "reasonably clear" or "beyond dispute."

Movant erroneously cites *Farmland* to argue that a bad faith action can proceed where liability is fairly debatable. The Court of Appeals correctly distinguished the *Farmland* opinion by noting that it arose from a first party action and involved a first party property damage claim where the carrier's liability for paying the loss was undisputed and liability was clear. The case at bar is a third party claim and liability for causing Mosley's death was fiercely disputed. *Farmland* did not set a new standard for bad faith claims but merely clarified how *Wittmer* applied in cases where liability on a first party claim was not disputed. Importantly, *Farmland* also involved an intentional misrepresentation of coverage by the insurer which is not at issue in this third party injury case involving fault and causation.

While the accident indisputably caused the death of Rhett Mosley, the Movant errs when claiming there is no dispute that Arch's insureds had an obligation to pay "something" for his death. In addition to the fact that there was no coverage under the Arch Policy for the claim, liability on the part of Jean and Loving in causing Mosley's death was not reasonably clear or "beyond dispute". After all, the exclusivity of the

Workers' Compensation Act may have provided the mine operator Jean immunity from suit, rendering its liability as unclear and not "beyond dispute."

The Movant misstates the application of *Farmland* and *Hollaway* to this case. This Court made clear in *Hollaway,* 497 S.W.3d at 733, that if there is a legitimate dispute over its insured's liability, an insurer is entitled to forego any effort to settle and instead litigate the liability issue before a jury. The *Hollaway* court also clarified that the word "liability" in the KUCSPA's directive to insurers to settle a claim when "liability is reasonably clear" is referring not only to the insured's liability for causing the incident but also the insurer's liability to pay the claimant's damages. *Id.* This confirmed that an insurer's legitimate dispute over whether a claimant's injury or treatment was caused by the accident could not constitute bad faith as a matter of law.

Just like Direct General in *Hollaway,* Arch questioned its insureds' fault in causing the accident and Mosley's death. It also questioned whether a liability claim against its insured would be preempted by the exclusive remedy of Workers' Compensation. Liability was clearly in dispute and Arch's "absolute duty to pay the claim was not clearly established." Arch could have refused to make any offers until the trial court's summary judgment decision and/or a jury's adjudication of liability and damages. Instead it offered the $1 million dollar policy limit. *Hollaway* confirmed that an insurer's offer to settle – like Arch's here - is not an admission of liability. In fact, Arch's offer to settle a highly disputed claim for $1 million with the Movants is evidence of its utmost good faith. In light of *Hollaway,* Movants could not possibly establish bad faith, as Arch's absolute duty to pay the claim was never established. The Court of Appeals correctly affirmed that the Movants failed to meet prongs (2) and (3) of the *Wittmer* test.

3. The Trial Court and Court of Appeals correctly determined that Arch's Alleged Conduct did not cause any Damages and was not Outrageous.

The Court of Appeals properly concluded that the Movant's allegations of bad faith in the Amended Complaint do not meet the very high threshold for bad faith claims under Kentucky law. For one, a bad faith claimant must show the insurer's alleged b bad faith conduct caused them actual damages. *See Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky. 1997). Here, Movants have not and cannot prove that they suffered any actual damages and they received the $1 million policy limits from Arch within two weeks of the failed mediation complained about in their Amended Complaint. Failing to identify the requisite damages alone justifies entry of a judgment in favor of Arch.

A bad faith claim under Kentucky law is a punitive action, and the underlying conduct must also be sufficiently "outrageous" to warrant punitive damages. *Wittmer,* 867 S.W.2d 890; *Hollaway*, 497 S.W.3d at 739. Arch's conduct was not "outrageous" as defined in *Wittmer.* Certainly the two week "delay" so as to obtain a release for both of its insureds in exchange for payment of the Policy limits does not constitute outrageous conduct as a matter of law. *See Shaheen,* 114 F.Supp.3d 449-50.

Movant focuses much of her Motion on her assertion that permitting a single attorney to make global offers on behalf of all Defendants – which she called "unfair leveraging" constitutes outrageous conduct. The protections associated with conflict of interest rules are afforded to those parties represented by the same attorney and do not extend to adverse parties. Thus, the Court of Appeals correctly stated that a conflict of interest is ameliorated when all parties agree to representation by an attorney. Here, these parties agreed to have one attorney represent them in the lawsuit and at mediation.

Movant lacks standing to assert any alleged conflict of interest that their adversary's lawyer may have in representing his own clients.[12] Both the trial court and the Court of Appeals correctly held that Arch's conduct was not outrageous as a matter of law, and thus Arch was entitled to a judgment in its favor on Movant's bad faith, civil conspiracy and punitive damages claims.

4. The Trial Court and Court of Appeals correctly determined that Mediation conduct is confidential and the bad faith claim fails because none of this conduct would be admissible.

In *Knotts v. Zurich*, 197 S.W.3d 512 (Ky. 2006), the Kentucky Supreme Court determined that the "litigation conduct" of insurers cannot be the basis of a bad faith claim. The Court of Appeals similarly concluded that a bad faith claim cannot be predicated on an insurer's "mediation conduct" since all such conduct is confidential under Model Mediation Rule 12B and KRE 408, and that since the Movant's claims were based entirely on the insurer's mediation conduct those claims must fail. Nothing about this ruling is novel or contrary to existing law. The unpublished decision in *Hale General Contracting, Inc. v. Motorist Mutual Insurance Company,* 2015-CA-000396-MR, 2016 Ky. App. Unpub. LEXIS 222 (Mar. 18, 2016) relied upon by the Movant sanctioned an insurer's introduction of the claimants' mediation offers to demonstrate that its alleged delay in making an offer did not damage the claimant, i.e., to rebut a bad faith claim. The court in *Hale* never sanctioned basing a bad faith claim against an insurer on its mediation offers or statements.

Importantly, the Court of Appeals Opinion affirming judgment in favor of Arch does not rise or fall on its conclusions concerning the confidentiality of mediation. In

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[12] *See* ROA 6375.

fact, the Court considered the very mediation conduct the Movants complain of – the making of global offers by a common lawyer – and concluded, on the merits, that it was not unethical, unlawful or inconsistent with Kentucky rules and case law precedent. The fact that this conduct was also confidential and could not be the basis of a bad faith claim was simply an alternative basis for its affirmance of the trial court's order and judgment in favor of Arch. Under either scenario, Arch was entitled to a judgment in its favor on the Movant's bad faith claims, and there is no reason at all for this Court to take up this case on discretionary review.

Respectfully Submitted,

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BY: UAP D.C.

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

CRYSTAL LEE MOSLEY ET AL — PLAINTIFF

v.

ORDER

ARCH SPECIALTY INSURANCE COMPANY ET AL. — DEFENDANTS

* * * * * *

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

Dated this 28th day of ~~February~~ MAR, 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~~ March, 2016 upon:

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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.

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