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Commonwealth of Kentucky

Court of Appeals

NO. 2000-CA-001826-MR

VICKI WILSON; TAMMY PRICE — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 98-CI-01349

HORACE MANN INSURANCE COMPANY;
EMPLOYERS' REINSURANCE CORPORATION
— APPELLEES

AND: NO. 2001-CA-001033-MR

VICKI WILSON; TAMMY PRICE — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN
ACTION NO. 98-CI-01349

KENTUCKY SCHOOL BOARDS INSURANCE
TRUST (EMPLOYERS REINSURANCE CORPORATION);
EMPLOYERS REINSURANCE CORPORATION;
HORACE MANN INSURANCE COMPANY — APPELLEES

OPINION AND ORDER
AFFIRMING AND
DISMISSING APPEALS

** ** ** ** ** ** ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellants, Vickie Wilson and Tammy Price (hereinafter "Appellants"), seek review of orders of the Franklin Circuit Court granting summary judgment in favor of the Appellee insurers on the issue of coverage under an educator's liability policy, and dismissing claims for bad faith, outrage, wrongful use of civil proceedings, concert of action and conspiracy, in this consolidated appeal.[1] Finding no error, we affirm.

On November 4, 1998, Appellants filed a Complaint and Motion for Declaratory Judgment in the Franklin Circuit Court naming the Kentucky School Board Insurance Trust ("KSBIT")[2], Employers' Reinsurance Corporation ("ERC"), and Horace Mann as defendants (hereinafter, the "Appellee insurers"). Appellants sought a declaration that certain policies of insurance provided coverage for their judgment against the insured, Tony Luttrell,

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[1] No. 2000-CA-001826 is the appeal from the trial court's June 5, 2000 order granting summary judgment in favor of Appellee insurers with respect to the coverage issue. By order entered July 19, 2000, the trial court amended its June 5, 2000 order to the effect that summary judgment was granted only on the contractual claims, and did not affect the remaining extra-contractual claims. No. 2001-CA-001033 is the appeal from the circuit court's order dated April 26, 2001, dismissing the extra-contractual claims.

[2] KSBIT is a trust which administers a self-insured pool; however, we shall refer to KSBIT, ERC and Horace Mann as the Appellee insurers, for ease of reference. By order of this Court entered May 2, 2001 in No. 2000-CA-001826, KSBIT was dismissed as a party to that appeal.

an Edmonson County High School teacher, for sexual misconduct.[3] Appellants also sought damages for common law bad faith, statutory bad faith (violation of the Unfair Claims Settlement Practices Act), outrage, wrongful use of civil proceedings, and concert of action and conspiracy.

On July 23, 1999, the Franklin Circuit Court entered an order granting the Appellee insurers' motion to bifurcate the plaintiff's extra-contractual claims from the declaratory judgment action.

APPEAL NO. 2000-CA-001826 – THE COVERAGE ISSUE

On June 5, 2000, the Franklin Circuit Court entered summary judgment in favor of the Appellee insurers:

FACTS

> In November of 1998 plaintiffs filed suit against ERC, Kentucky School Board Trust [KSBIT], and Horace Mann . . . seeking a declaratory judgment that the policies issued by the defendant insurers provide coverage for a judgment entered against Mr. Tony Luttrell in federal court. The insured, formerly employed as a teacher . . . was found liable to . . . Wilson on claims of civil rights violations, third degree sexual abuse, and indecent exposure, and to . . . Price on claims of civil rights violations, assault, battery, and third degree sexual abuse.

[3] On August 5, 1998, judgment was entered in the US District Court for the Western District of Kentucky at Bowling Green, for Wilson in the amount of $51,000.00 compensatory damages and $100,000.00 punitive damages, and for Price in the amount of $100,000.00 compensatory damages, and $200,000.00 punitive damages.

A judgment in the amount of $451,000, as well as attorneys' fees and costs, has been entered in the United States District Court for the Western District of Kentucky. The plaintiffs as third party beneficiaries, now seek to recover this judgment from ERC under the terms of the insured's policy coverage. In order to prevail on their claim, the plaintiffs must demonstrate that the sexual abuse perpetrated by Mr. Luttrell constitutes an "educational employment activity" and is therefore covered by the insurance contract.

JUDGMENT

The issue of whether sexual misconduct by a schoolteacher constitutes an "educational employment activity" is a matter of first impression in Kentucky.

The insurance contract provides that . . . in order for the policy to be triggered, the loss for which recovery is being sought must derive from an "educational employment activity." The policy defines "educational employment activities" in pertinent part as "activities of the insured performed . . . pursuant to the express or implied terms of his or her employment by an educational unit . . . at the express request or with the express approval of his or her supervisor, . . . or as a member of a state board or commission. . . ."

. . . .

The California Court of Appeals addressed this very issue of policy construction in *Horace Mann Ins. Co. v. Analisa N.,* 214 Cal. App.3d 850, 263 Cal. Rptr. 61 (Cal.Ct.App. 1989). In *Analisa*, the insured was a third grade teacher who was alleged to have sexually abused one of his students on school property. The defendant's insurance carrier sought a declaratory judgment seeking a determination that it had no duty

to pay any judgment entered against the teacher. *Id.,* at 852. The trial court found that the teacher's conduct was not within the coverage provided by the policy. The decision was affirmed by the appellate court which held:

> Contrary to Analisa's argument, . . . the plain language of the policy requires at the very least, that an insured event occur while the teacher is engaged in an activity which is reasonably related to the goal of educating children. This conclusion is suggested not only by the language of the insuring clause and the applicable definitions, which as we have seen, restrict coverage to activities performed pursuant to the terms of the teacher's employment, but by the very name of the policy – "Educator's Employment Liability Policy." Given its terms and its title we do not believe a reasonable insured could expect that exclusively personal pursuits would be protected by the policy . . . we cannot fathom a more personal activity less related to the goal of education than [the teacher's] acts.

214 Cal. App. 3d at 856, 263 Cal. Rptr. at 64.

Further support for this position is found in *Horace Mann Ins. Co. v. D.A.C.,* 710 So.2d 1274 (Ala. Civ. App., 1998), in which the Court of Civil Appeals of Alabama held coverage under Horace Mann's Educator's Employment Liability Policy was not triggered because a teacher's acts of sexually molesting a student were not "educational employment activities" as defined in the policy. *Id.,* at 274 [sic]. In reaching this decision, the court held that "sexually abusive acts 'were not of the kind [a school employee] was employed to perform' and were not 'motivated . . . by a purpose to serve the employer.'" *Id.,* at

> 1275 (citing *Worchester Ins. Co. v. Fells Acres Day School, Inc.,* 408 Mass. 393, 558 N.E. 2d 958 (1990)).
>
> Finally, the Court relies upon *Horace Mann Ins. Co. v. Fore,* 785 F.Supp. 947 (M.D. Ala 1992), where the district court held that a teacher's sexually abusive acts do not constitute "educational employment activity" within the meaning of an insurance policy. . . .
>
> In addition to the reasons set forth above, this Court also believes that public policy demands the result reached in this case. To find liability on the insurance carrier would subsidize sexual abuse of schoolchildren at the ultimate expense of other insureds to whom the added costs of indemnifying sex offenders will be passed and would have the effect of providing insurance coverage for intentional criminal acts. While the Court is sympathetic to the injuries suffered by the plaintiffs, these sympathies do not justify holding the insurance carrier liable for the sexual abuse committed by Mr. Luttrell.
>
> Any argument presented by the parties, whether addressed in this opinion or not, has been reviewed and considered by this Court.
>
> For these reasons, the defendants' Motion for summary Judgment is **GRANTED** and this matter is **DISMISSED.** (Emphasis original).

By order entered July 18, 2000, the above order was amended to the extent that the plaintiffs' claims for coverage under the specific contractual language of the policies written by ERC and Horace Mann were dismissed; however, the remaining claims for "common law bad faith, statutory bad faith, outrage, wrongful use of civil proceedings, concert of action and

conspiracy, and concert of action" were not dismissed or affected.

On August 2, 2000, Appellants filed a notice of appeal to this court. On appeal, they make a variety of arguments in an attempt to persuade us to construe the policy to provide coverage. First, they argue that public policy should allow insurance coverage for the sexual abuse of children, because insurance coverage is available for the sexual harassment of adult female workers. Appellants also contend that allowing coverage would not "subsidize sexual abuse of schoolchildren," as the trial court believed. We disagree.

In *Thompson v. West American Insurance Company*,[4] this court held, in determining the issue of coverage under a homeowner's policy:

> [It] is inconceivable that a criminal act of sexual molestation, the essence of which is the gratification of sexual desire, could possibly be an "occurrence" for purposes of insurance coverage.
>
> . . . .
>
> We believe that sexual molestation is so inherently injurious, or substantially certain to result in some injury, that the intent to injure, or the expectation that injury will result, can be inferred as a matter of law.

[4] Ky., 839 S.W.2d 579 (1992).

. . . .

> Because we hold there is not coverage under the insurance contract for Thompson's alleged acts of sexual molestation, we need not discuss the application of the "intentional loss" exception of the insurance contract. However, our holding that sexual molestation is an intentional act and the harm resulting therefrom is likewise intended, would be applicable to any such inquiry.[5]

Although *Thompson* was Kentucky's first incursion into the field of insurance-child molestation law, it was nothing new to many state and federal courts.[6] The majority view follows the inferred-intent approach:

> [A] person who sexually manipulates a minor cannot expect his insurer to cover his misconduct and cannot obtain such coverage simply by saying that he did not mean any harm. The courts following the majority approach have concluded that sexual misconduct with a minor is objectively so substantially certain to result in harm to the minor victim, that the perpetrator cannot be allowed to escape society's determination that he or she is expected to

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[5] *Id.* at 581.

[6] *Goldsmith v. Physicians Insurance Co. of Ohio,* Ky. App., 890 S.W.2d 644, 645 (1995). *Goldsmith* dealt with the issue of the applicability of the "inferred intent rule" when the insured asserts an incapacity to form an intent. *Goldsmith* extended *Thompson* to reflect the approach that, in cases "such as child sexual abuse, where the insured's conduct is both intentional and of such a nature and character that harm inheres in it," there is no need for a separate inquiry into capacity. *Id.* at 646-47.

> know that. Hence, these courts infer the intent to harm as a matter of law in sexual misconduct liability insurance cases involving minors.[7]

In *Goldsmith,* this Court rejected the argument that public policy should not preclude recovery, responding with a quote from *Horace Mann Ins. Co. v. Fore.*[8] "Forcing the insurer to indemnify the insured 'subsidizes the episodes of sexual abuse of which its victims complain, at the ultimate expense of other insureds to whom the added costs of indemnifying child molesters will be passed.'" [9]

Fore is among the authorities relied upon by the trial court in determining that there is no coverage in this case. Appellants maintain that the trial court erred in that regard. The trial court's interpretation of the insurance policy is a question of law which we review *de novo.*[10] Evaluation of an educator's liability policy requires consideration of the particular policy provisions, as does any coverage analysis. In claims made against teachers, the analysis includes whether the teacher's acts were within the meaning of educational employment

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[7] *Id.* at 646, quoting from *Whitt v. DeLeu,* 707 F.Supp. 1011 (W.D.Wis.1989).

[8] 785 F.Supp. 947, 956 (1992).

[9] *Id.* at 647.

[10] *Cinelli v. Ward,* Ky. App., 997 S.W.2d 474 (1998).

activities. Courts have consistently held that a teacher engaging in sexual molestation is not acting within his educational employment activities.[11] Our coverage analysis does not lead us to a contrary result in the case *sub judice*.

> [I]n this state doubts concerning the meaning of contracts of insurance are resolved in favor of the insured. *State Auto. Mutual Ins. Co. v. Ellis,* Ky. App., 700 S.W.2d 801, 803 (1985). But, in the absence of ambiguities or of a statute to the contrary, the terms of an insurance policy will be enforced as drawn. *Osborne v. Unigard Indemnity Co.,* Ky. App., 719 S.W.2d 737, 740 (1986); *Woodard v. Calvert Fire Ins. Co.,* Ky., 239 S.W.2d 267, 269 (1951). Unless the terms contained in an insurance policy have acquired a technical meaning in law, they "must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured." *Fryman v. Pilot Life Ins. Co.,* Ky., 704 S.W.2d 205, 206 (1986). Although restrictive interpretation of a standardized adhesion contract is not favored, neither is it the function of the courts to make a new contract for the parties to an insurance contract. *Moore v. Commonwealth Life Ins. Co.,* Ky. App., 759 S.W.2d 598, 599 (1988). Under the "doctrine of reasonable expectations," an insured is entitled to all the coverage he may reasonably expect to be provided according to the terms of the

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[11] Harold A. Weston, Annotation *Educator's Liability Insurance,* 94 A.L.R.5th 567 (2001).

policy. W*oodson v. Manhattan Life Ins. Co.,* Ky., 743 S.W.2d 835, 839 (1987).[12]

The insuring agreement in the ERC contract states:

> Employers' Reinsurance Corporation, called ERC in the contract, agrees to provide the insured, as defined in Part II(H) below, with the coverages shown on the declarations page in return for the payment of the premium, and subject to the limits of liability, exclusions, conditions and other terms of this contract.

Coverage A, entitled "Educators liability" provides:

> ERC agrees to pay on behalf of the *insured* any and all *loss*, subject to the limit of liability, as set out in the declarations page for Coverage A. Such *loss* must be sustained by the *insured* by reason of liability imposed by law for damage caused by an *occurrence* in the course of the *insured's educational employment activities.* (Emphasis original).

"Educational employment activities," is defined under the ERC contract. The applicable provision states:

> The term *"Educational Employment Activities"* means the activities of the *Insured* performed:
>
> 1. Pursuant to the express or implied terms of his or her employment by an *educational unit. (*Emphasis original).

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[12] *Hendrix v. Fireman's Fund Ins. Co*., Ky. App., 823 S.W.2d 937, 938 (1991).

An educational unit is also defined under the ERC contract; for our purposes, the term *"Educational Unit"* means a school district.

The "Insuring Agreements" provision in the Horace Mann contract provides:

> Horace Mann Insurance Company, called *we* in this contract, agrees to provide the *insured,* as defined in part II(H) below, with the coverages shown on the declarations page in return for the payment of the premium, and subject to the limits of coverage, exclusions, conditions and all other terms of the contract.

Section III "Coverages" of the Horace Mann contract states:

> In this part *we* indicate the contract coverages subject to the exclusions, conditions, limits of coverage and other terms of this contract.
>
> **A. EDUCATORS LIABILITY**. We agree to pay all damages which *you* shall become legally required to pay as a result of any claim: Which comes from an *occurrence* in the course of *your educational employment activities;* and which is caused by *your* acts or omissions or those of other persons for whose acts *you* are held liable, not to exceed the limit of coverage stated in the declarations for this coverage.

"Educational employment activities" is defined under the Horace Mann contract. The applicable provision states:

> **EDUCATIONAL EMPLOYMENT ACTIVITIES.** The term *"Educational Employment Activities" means the activities of the* insured performed:

> 1. Pursuant to the express or implied terms of his or her employment by an *educational unit*; (emphasis original).

An educational unit is also defined under the Horace Mann contract; for our purposes, it means a school district.

As noted by the trial court, the California Court of Appeals addressed the issue of policy construction with which we are now confronted in *Analisa N.*[13] The case involved sexual abuse of a third grade pupil. At the time of the abuse, the teacher was covered by an "Educators Employment Liability Policy." The insurer sought summary judgment, in the declaratory judgment action, asserting that the teacher's conduct was not within the coverage provided by the policy; further, that sexual abuse was barred by an intentional acts exclusion and a provision of the Insurance Code. As in the case *sub judice,* the policy in *Analisa N.* provided coverage for "all damages which the insured shall become legally obligated to pay as a result of any claim arising out of an occurrence in the course of the insured's educational employment activities, and caused by any acts or omissions of the insured or any other person for whose acts the insured is legally liable."[14] Coverage

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[13] *Supra.*

[14] *Id.,* 214 Cal. App.3d at 851.

there, as here, depended upon whether the teacher's acts occurred in the course of activities performed pursuant to the express or implied terms of his employment as a teacher.

In analyzing the issue, the California court considered the doctrine of reasonable expectations which requires construction of the policy so as to give the insured the protection he reasonably had a right to expect. Despite its sympathy for Analisa's injuries, the court declined to expand the risks assumed by the insurer in issuing a policy to the teacher. A reasonable insured could not expect that "exclusively personal pursuits" would be protected by the policy. At the very least, the policy required that an insured event occur "while the teacher is engaged in an activity . . . reasonably related to the goal of educating children."[15] The California court could not fathom a more personal activity less related to that goal than the teacher's acts. Nor can we. As the court stated in *Fore,* it is "intuitively obvious" that sexual abuse is not an activity concerned with education."[16]

We conclude that no coverage exists for Luttrell's acts, under the plain language of the ERC and Horace Mann

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[15] *Id.,* 214 Cal. App.3d at 856.

[16] *Supra*, at 948.

contracts; accordingly, we do not discuss the remaining issues on appeal in No. 2000-CA-001826.

APPEAL NO. 2001-CA-001033 – THE EXTRA-CONTRACTUAL CLAIMS

In an Opinion and Order entered April 26, 2001, the trial court entered summary judgment for the Appellee insurers, explaining that:

> During the course of this litigation [in federal court against Luttrell], it was revealed that Wilson had committed perjury in several earlier proceedings. Based upon this information, leave was sought and granted by the district court for Luttrell to file a counter claim. It is the defendants' [insurers] involvement in this suit which forms the basis of the present action.
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> On January 12, 1998, Wilson moved for summary judgment on the counterclaims. In an order issued on March 24, 1998, the district court granted summary judgment on the false light and wrongful use of civil proceedings claims but allowed Luttrell's outrage and abuse of process claims to proceed.
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> A trial was conducted and on May 6, 1998, the jury found Luttrell liable for sexual misconduct and returned an award in [sic] favor of Price and Wilson. At this time the plaintiffs moved for summary judgment on the remaining counterclaims. The district court granted this motion.
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> Luttrell's insurance carriers, KSBIT, ERC, and Horace Mann, each denied coverage for the intentional torts. Suit was filed in this Court contesting this denial, and on June 5, 2000, the Court granted summary judgment to the defendant insurers, holding that the policies did not indemnify sexual misconduct.

> The plaintiffs have now filed suit alleging the torts of outrage, concert of action and conspiracy, as well as bad faith, the wrongful use of civil proceedings, and waiver of the defendants' reservation of rights. . . . [T]he Court now grants the defendants summary judgment.

On this appeal, Appellants raise numerous issues involving the extra-contractual claims. In a nutshell, they contend:

> [D]efending a sexual predator under a reservations of rights while actively financing and participating in a counterclaim against the predator's victim is not only actionable under the Unfair Claims Settlement Practices Act but is conduct that is outrageous and, because the counterclaim has now been terminated in favor of Vickie Wilson, it is grounds for wrongful use of civil proceedings. Because all of the insurance companies acted together, they are liable for conspiracy and concert of action.

We will refer to the record as only as necessary to resolve the issues before us. First, Appellants contend that the Appellee insurers cannot meet their burden of proving, on a summary judgment motion, that "it would be impossible for the Plaintiffs to produce evidence sufficient to support their claim." Appellants do not explain what evidence they had hoped to produce, but contend that summary judgment is premature, because there is "not enough evidence of record . . . [to] make an informed decision" on the extra-contractual issues.

> The standard for summary judgment is abundantly clear in Kentucky. A movant must show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56.03. The record must be viewed in a light most favorable to the party opposing the motion for a summary judgment and all doubts must be resolved in favor of that party. . . . When any claim has no substance, or controlling facts are not in dispute, a summary judgment can be proper.[17]

In deciding the motion, the trial court assumed the evidence to be in Appellants' favor – specifically that the Appellee insurers "not only had knowledge of the counterclaim, but also approved and actively participated in its litigation." The trial court appropriately entered summary judgment, as more fully discussed below, because Appellants' various theories were either legally insufficient or unsupported by competent legal authority.

Next, Appellants contend that the Appellee insurers violated the Unfair Claims Settlement Practices Act ("UCSPA"), because they "authorized, funded, approved and actively participated in a counterclaim on behalf of the perpetrator" while defending under a reservation of rights.[18] In addition,

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[17] *Com. v. Whitworth,* Ky. 74 S.W.3d 695, 698 (2002).

[18] Horace Mann explains that it was initially misinformed by the Kentucky Education Association that the date of Luttrell's participation was outside its coverage period. Horace Mann advises that it did not participate in Luttrell's defense, because judgment
(FOOTNOTE CONTINUED)

Appellants contend that Horace Mann also violated the statute, by not opening a claims file and by failing to "adopt and implement reasonable standards for the prompt investigation of claims arising under its insurance policy." The trial court held that:

> Even if the plaintiffs could prove that Horace Mann violated the UCSPA by not opening a file, there simply is no evidence the plaintiffs suffered any harm as a result. Further there is no evidence Horace Mann was reckless or acted with improper motive by not opening a claim file. Likewise the UCSPA does not provide a cause of action against either KSBIT or ERC. . . . this Court has already ruled that denial of coverage was appropriate. Therefore, this claim must fail as a matter of law.
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> Kentucky law holds:
>
> [T]here is no such thing as a "technical violation" of the UCSPA, at least in the sense of establishing a private cause of action for tortious misconduct justifying a claim of bad faith:
>
> > "[A]n 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

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had already been entered in the federal district court action, by the time Horace Mann received corrected information.

> either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed.... [A]n insurer is ... entitled to challenge a claim and litigate it if the claim is debatable on the law or the facts."
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> This is a quote from Leibson, J., in dissent, in *Federal Kemper, supra,* 711 S.W.2d at 846-47, stating views which were incorporated by reference in this Court's Majority Opinion in *Curry v. Fireman's Fund,* 784 S.W.2d at 178. It applies to a claim of bad faith made by an insured against his own insurer, and *a fortiori* to a third-party's claim of bad faith against an insurance company.[19]

We agree with the trial court that these claims must fail as a matter of law, because the Appellee insurers were not obligated to pay the claim under the terms of the policy.

The next argument is that the Appellee insurers "subjected themselves to direct liability for wrongful use of civil proceedings" by authorizing and financing the counterclaim against Wilson. An essential element of the wrongful use of civil proceedings is that the tortfeasor acted without probable cause in the prior lawsuit. The existence of probable cause is for the court to decide.[20] Wilson provides no authority for her

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[19] *Wittmer v. Jones*, Ky. 864 S.W.2d 885, 890 (1993).

[20] *Prewitt v. Sexton*, Ky., 777 S.W.2d 891, 894 (1989).

assertion that there is "never probable cause" for insurance companies defending under a reservation of rights to pursue "a separate bifurcated tort claim against its insured's victim." The trial court found that the (lack of) probable cause requirement could not be satisfied as a matter of law, because the counterclaim was filed with the trial court's permission based upon the admitted perjury of Wilson. The trial court determined, as a matter of law, that the defendants had probable cause for bringing the countersuit. We find no error.

We are not persuaded by Appellants' next argument, that ERC is estopped from asserting a reservation of rights, for its alleged failure to disclose its reservation of rights letter to Wilson and Price. One of the basic elements of an estoppel is that the person claiming it must have been prejudiced by the action of the person against whom it is asserted.[21] Appellants do not claim any prejudice in this regard. Nor do they cite any authority that an insurer is required to notify persons claiming against the insured of a reservation of rights.[22]

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[21] *Universal Underwriters Ins. Co. v. Travelers Ins. Co*., Ky., 451 S.W.2d 616, 622 (1970).

[22] We note in the record a letter from Luttrell's counsel, Winter Huff, to Appellants' counsel, dated October 7, 1998, which states, in part:

> As I previously explained in my letter of September 11, 1998, I did not deliberately omit supplementation of those responses to discovery. Rather, I simply did not recall a

(FOOTNOTE CONTINUED)

Nor are we persuaded by the argument that the Appellee insurers waived their reservation of rights by filing a counterclaim against Wilson in the federal district court action. The trial court stated that "the plaintiffs have been unable to cite any statutes or case law from this jurisdiction to support their position. Absent such authority this Court is unable to conclude the defendants have waived their rights and will not impose liability." Nor will we. We find no error.

Appellants also argue that a fiduciary relationship existed between them and the Appellee insurers, and that "an egregious breach" of that relationship occurred rising to the level of outrage. Presumably, the basis for this claim is the filing of the counterclaim against Wilson in the federal district court action. The trial court found as a matter of law that the action of the defendants could not be deemed

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> particular request for a reservation of rights letter made more than two years earlier, and further, you had long since been well aware by that time of the fact that the insurers were defending under a reservation of rights, and denying coverage for your clients' claims against Mr. Luttrell. You were made so aware verbally by both me and by representatives of the insurers, at least as early as May of 1995, when you sought to join ERC as a defendant in this action. Further, as I have explained to you ad nauseam, I **do not** represent ERC, and had advised you I had no objection to your communications directly with the insurers. By May of 1995, it was well established that you were in direct communication with the insurers, and had been advised of the lack of coverage for your clients' claims. (Emphasis original).

intolerable or outrageous in a civilized community,[23] because the counterclaim was based upon Wilson's admissions that she had committed perjury on several prior occasions. "These admitted lies provided a solid factual basis for the filing of a counterclaim." We agree. The trial court properly dismissed this claim, because a requisite element of outrage cannot be satisfied.

The trial court also properly dismissed the remaining claims for conspiracy and concert of action, having concluded that they too failed as a matter of law. Conspiracy requires an agreement to do by concerted action an unlawful act[24]; as the trial court stated, "the filing of a judicially authorized counterclaim is not an unlawful act." Further, concert of action involves a tortious act in concert with another,[25] and the trial court would "not construe the filing of a judicially authorized counterclaim as a tortious act."

Having determined that the trial court properly entered summary judgment for the Appellee insurers on the coverage issue and on the extra-contractual claims, the remaining discovery-related issues are rendered moot. We affirm

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[23] *Craft v. Rice*, Ky., 671 S.W.2d 247 (1984).

[24] *McDonald v. Goodman,* Ky. App., 239 S.W.2d 97 (1955).

the Opinion and Order of the Franklin Circuit Court entered June 5, 2000, as amended by Order entered July 18, 2000, and the Opinion and Order entered April 26, 2001, and dismiss these consolidated appeals.

ALL CONCUR.

ENTERED: March 21, 2003

_/s/ David A. Barber____
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

J. Dale Golden
Lexington, Kentucky

BRIEF FOR APPELLEE, HORACE MANN INSURANCE COMPANY:

James W. Taylor
Lexington, Kentucky

W. Brian Burnette
Lexington, Kentucky

BRIEF FOR APPELLEE, EMPLOYERS REINSURANCE CORPORATION:

Kristin R. Connor
Atlanta, Georgia

J. Randolph Evans
Atlanta, Georgia

BRIEF FOR APPELLEE, KENTUCKY SCHOOL BOARDS INSURANCE TRUST:

Robert E Stopher
Louisville, Kentucky

Robert D. Bobrow
Louisville, Kentucky

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[25] *Farmer v. City of Newport*, Ky. App., 748 S.W.2d 162 (1988).