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Commonwealth of Kentucky

Court of Appeals

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

CINCINNATI INSURANCE COMPANY — APPELLANT/CROSS-APPELLEE

v.

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

GEORGE HOFMEISTER AND KAY HOFMEISTER — APPELLEES/CROSS-APPELLANTS

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

** ** ** ** **

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

ACREE, JUDGE: This is the appeal and cross-appeal of a judgment entered in Scott Circuit Court after a jury found Cincinnati Insurance Company (CIC) liable to George and Kay Hofmeister for fraudulent misrepresentation and for violation of the Kentucky Unfair Claims Settlement Practices Act (UCSPA), Kentucky Revised Statutes (KRS) 304.12–230. CIC appeals the trial court's denial of its motions for summary judgment, motions for directed verdict and judgment notwithstanding the verdict, and entry of judgment awarding the Hofmeisters $10,000,000 in compensatory damages and $18,405,500 in punitive damages following a jury verdict. Prior to appeal, the trial court amended the judgment by reducing the punitive damages award to $10,000,000. The Hofmeisters filed a cross-appeal, challenging the reduction of the punitive damages award. We reverse the judgment and dismiss the Hofmeisters' cross-appeal as moot.

This case requires examination of a myriad of relationships and duties, some created by contract, others by statute, and still others by common law. It requires examination of settlement negotiations and litigation strategy and tactics, nearly all of which was placed in the hands of a jury to assess. Understanding this case necessitates a detailed examination of a voluminous record which we will abbreviate wherever possible.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

I. Facts and Procedure

The facts of the underlying automobile claim, which the jury found CIC settled unfairly, began at 10:00 a.m. on November 3, 1998. Eugene "Gene" Clark, a delivery driver for Dasher Express, Inc., had finished a workshift that exceeded ten hours. He returned his employer's vehicle to Dasher's offices in Lexington, Kentucky. He then drove home to Frankfort in his personal vehicle.

Clark was fatigued when he arrived home and discovered that he still had in his possession the company's credit card and the keys to his company's vehicle. He called Dasher's offices, informed the dispatcher of his mistake, and "indicated he was going to return the keys to Dasher." (Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee). Clark took a shower and changed clothes. Then he got back in his personal vehicle and left his Frankfort home. Ostensibly, his sole purpose was to return the Dasher vehicle keys and credit card.

George Hofmeister was driving his own vehicle and talking to his wife on a cell phone when he first saw Clark's vehicle approaching him from about a quarter-mile away. Clark's driving was erratic. In fact, Clark had fallen asleep despite having gone to a McDonald's restaurant for coffee. As the vehicles approached one another, Clark's vehicle crossed the centerline. Hofmeister slammed on his brakes but did not avoid the collision. Whether it was possible to have done so was never determined in the record.[2]

When Clark did not arrive at Dasher's offices after indicating he was going to return the keys, a Dasher employee called his telephone number and

> le[ft] a message for Gene, indicating whether or not he was returning the keys and when they or whomever [sic] was returning the keys would have them to Dasher. After that, we received a call that Gene had been in an accident and basically were waiting to see how he was and, you know, what the situation was.

(Trial Court's Opinion and Order, September 13, 2002, p.2, quoting testimony of Dasher employee).

The accident did not occur on the most direct route between Clark's home and Dasher's offices. Clark said the direct route he regularly took would have placed him on Interstate Highway 64 (I-64) all the way from Frankfort until he exited the highway southbound at the Newtown Pike exit in Lexington. But the accident site was on US 62 in Georgetown, Kentucky. This location necessarily required Clark to exit I-64 about halfway between his home and Dasher's offices, and to head away from his business destination. Clark was rendered unconscious by the accident, and said he did not recall exiting I-64 onto US 62 or why he did so.

[2] Mr. Hofmeister testified in the bad faith trial, however, that there was no place for him to exit the road on which the accident occurred.

Hofmeister's injuries were significant. He convalesced for a total of eight months, confined to a wheelchair for five of those months. During that time, Hofmeister engaged attorney Dale Golden to assist in recovering his damages.

Golden concentrated his settlement efforts on Clark and Clark's insurer, the Travelers Insurance Group. Travelers offered to pay Hofmeister its policy limits of $100,000. Pursuant to KRS 304.39-320(3), Golden sent notice of Travelers' offer to Hofmeister's underinsured motorist (UIM) coverage insurer, Kentucky Farm Bureau Mutual Insurance Company, whose policy limits were also $100,000. Farm Bureau elected to preserve its subrogation rights against Clark and substituted its own payment of $100,000 to Hofmeister under the procedure outlined in *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1983). Additionally, Farm Bureau paid $50,000 in personal injury protection (PIP) benefits to Hofmeister's medical providers. Hofmeister did not waive his right to file a civil action against Farm Bureau, and he subsequently did so.

The complaint first named Clark as a defendant. The second defendant identified was Farm Bureau. The claim against Farm Bureau sought to collect an additional $100,000 in UIM benefits available under any and all of the Hofmeisters' policies. Finally, the complaint named Dasher, asserting that Clark was acting within the scope of his employment at the time of the accident and, therefore, Dasher was vicariously liable.

Service of the complaint was Dasher's first notice that the Hofmeisters were asserting any claim against the company. Consistent with duties created by its contract of insurance, Dasher notified CIC of the claim. CIC's duty under the same contract was to provide a defense at its cost. To satisfy that duty, CIC made financial arrangements with attorney Dan Murner to answer and defend Dasher against the Hofmeisters' claims.

Murner drafted and served Dasher's answer to the complaint on November 4, 1999, asserting, among other defenses, that Clark was not acting within the scope of his employment at the time of the accident, and that Hofmeister was comparatively negligent. Murner simultaneously served discovery requests upon Hofmeister seeking information substantiating the damages claimed and the basis of Dasher's alleged liability.

The Hofmeisters responded to Dasher's discovery requests four months later, on March 3, 2000. The responses provided scant information upon which Dasher could assess its exposure to liability. On the contrary, they show the Hofmeisters: (1) had not yet compiled a list of medical expenses; (2) had not yet decided what witnesses to call at trial; (3) did not know what documents they intended to introduce at trial; and (4) were not prepared to identify any expert, including one who would testify regarding Mr. Hofmeister's claim for economic losses, or otherwise. Furthermore, in response to Dasher's request pursuant to Kentucky Rules of Civil Procedure (CR) 8.01(2) that damages be specified, the Hofmeisters replied that "[a] total has not been calculated at this time."

The Hofmeisters, too, engaged in discovery. On February 1, 2000, they submitted interrogatories and requests for production of documents to Dasher.

Consistent with a pattern repeated throughout this litigation, the Hofmeisters did not ask Dasher to produce insurance information in accordance with CR 26.02(2).[3]

In the meantime, Dasher noticed Hofmeister's deposition to be taken on May 12, 2000. Mr. Hofmeister's deposition testimony was the first indication Dasher had that Hofmeister was claiming a loss of income equaling or exceeding $5 million. When questioned about substantiation for this loss, Hofmeister explained that the primary entity through which he conducted his business, American Commercial Holdings, Inc. (ACH), had paid him a $5-million bonus for the year of the accident, but did not pay him any bonus the next year.[4]

Hofmeister's deposition testimony showed that while he did receive a Form W-2, he was not a typical employee. He was a self-made entrepreneur. Through various business entities he had created, including ACH, Hofmeister

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[3] CR 26.02(2) states:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

[4] As the CEO of ACH, Mr. Hofmeister largely controlled his own income. He testified that his salary the year after the accident actually increased from $577,402 in 1998 (10 months of which preceded the accident) to $624,135 in 1999. The Hofmeisters' tax returns show that 1998 was a good year for Mr. Hofmeister to take a $5-million bonus because his capital losses and Schedule E losses (from other partnerships and subchapter S corporations including ACH) exceeded $8 million. When those losses were deducted from his total income, including the $5-million bonus, the Hofmeisters' adjusted gross income (AGI) was less than zero (-$443,102). Consequently, the Hofmeisters paid no taxes in 1998. In 1999, the year after the accident, the Hofmeisters' businesses netted substantial capital gains resulting in an AGI of more than $9.5 million, and a tax liability of more than $1.8 million. Awarding himself any bonus in 1999 would have yielded an even higher tax burden. In 2000, Mr. Hofmeister's salary was again above $500,000. Also in 2000, and in 2001 and 2002 as well, the Hofmeisters continued to earn substantial capital gains. Those gains, however, were offset by greater Schedule E losses from other partnerships and S corporations, including the Hofmeisters' interest in equine partnerships.

made a career of purchasing troubled businesses, obtaining financing to keep the businesses afloat, and then reselling the businesses for a profit. Between 1995 and 1999, Hofmeister and ACH acquired approximately sixty (60) businesses. Hofmeister stated that he accomplished these acquisitions after obtaining bank financing to do so. At deposition, he testified that he had been turned down for a $25-million loan as a direct result of the accident and his injuries. Consequently, so he testified, he was unable to purchase more distressed businesses for resale. He had no documentation with him at the deposition that would have substantiated any of his prior acquisitions or sales, or any of his business activity at all. Nor could he document the denial of his $25-million loan application or the potential business acquisitions the loan would have facilitated. However, he agreed to later provide Dasher with that documentation through his own attorney.

Hofmeister's attorney, Golden, took the face-to-face opportunity immediately following Hofmeister's deposition to propose settlement. After the Hofmeisters departed, Golden sat down with Murner and Dasher's owners and verbally demanded $1,500,000 on behalf of his clients.[5] According to Murner's uncontradicted testimony, Golden said "[Y]ou don't want an excess verdict, you'd better settle this case." Once Golden had departed, Murner's clients asked him what was meant by an "excess verdict" and Murner explained it to them. What followed this meeting was a series of extrajudicial correspondence upon which much of the Hofmeisters' claim of fraud and bad faith rests.

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

On May 18, 2000, Murner wrote to Golden requesting further substantiation of Hofmeister's claim that his business losses were attributable to the accident and stating that such information was essential to a proper assessment of Golden's settlement demand. Murner also noted that the demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" He never stated what those policy limits were except to say that $1,500,000 exceeded them.

On May 22, 2000, Golden wrote to Murner "a little surprised that $1,500,000 is in excess of the policy limits of Dasher's insurance carrier." He declined Murner's request for additional support for Hofmeister's losses, stating, "The tax returns I have provided to you contain more than adequate information to show" Hofmeister's loss. He expressed his opinion that a "claim for punitive damages against Dasher alone could exceed $1,000,000." Nevertheless, based upon Murner's representation that $1,500,000 exceeded Dasher's liability policy limits, Golden agreed to recommend to Hofmeister "that he accept the amount of $1,000,000, *which I assume* from your correspondence is the policy limit." (Emphasis supplied).

Because Golden was unable to contact Mr. Hofmeister until early the next month, Golden agreed to extend the offer until June 9. Golden stated that if settlement was not accomplished by then, he would recommend that his client not accept less than $1,500,000. "In other words," Golden said, "assuming that Dasher has $1,000,000 in coverage, this is your one opportunity to resolve this matter within the limits of coverage."

The next day, May 23, 2000, Golden and Murner spoke by telephone. Based on that conversation, Golden wrote Murner again, agreeing to a short extension of the deadline for Dasher's response to his settlement demand. Golden also asked Murner to let him know "what additional information you will need and I will try to provide" it. He then reiterated that if Dasher did not agree to settle the claim for $1 million, "our demand will increase beyond the limits of Dasher's liability policy[.]"

One day later, May 24, 2000, Murner provided a list of information he needed to assess the claim and settlement demand, limiting the list to information Hofmeister already agreed in his deposition to provide through Golden. Among other things, this included: a list of Hofmeister's companies identifying those he purchased and sold in the previous five years, with the cost of acquisition and profit realized on resale; documentation relating to the denial of his $25-million loan application; quarterly earnings reports for three of Hofmeister's corporations; and an accounting of Hofmeister's 1999 income.

On May 26, 2000, while waiting for Golden's response, Murner sought to file a protective cross-claim against Clark. On behalf of Dasher, Murner continued to assert that Clark was not acting within the scope of his employment at the time of the accident, but claimed the right of indemnification from Clark should that issue be determined otherwise. The Hofmeisters initially objected to Dasher's motion to file the cross-claim, but soon after withdrew the objection.

On May 31, 2000, the Hofmeisters served upon Dasher a second set of interrogatories and requests for production of documents. Despite Golden's being "a little surprised" that the initial demand exceeded policy limits, the discovery still did not include a request to provide insurance information.

Also on May 31, 2000, Golden wrote to Murner again. He enclosed a copy of an amended complaint alleging that Dasher had violated federal Department of Transportation regulations prohibiting drivers to spend more than ten consecutive hours on the road without an eight-hour break. Based on that alleged violation, the proposed amended complaint demanded punitive damages be assessed against Dasher. Golden stated he would file the amended complaint if the case was not settled by June 22 for $1,000,000.

Golden's correspondence did not provide the documentation Murner requested, but did say that he had sought it from "Mr. Hofmeister and he will be providing that information to my office within the next few days." Golden also confirmed for Murner that Mr. Hofmeister agreed "to lower his demand to $1,000,000, which, according to you, is the policy limit of Dasher's insurance." Nothing in the record supports Golden's assertion that Murner had confirmed what Golden had previously assumed – that the limit of Dasher's automobile liability insurance policy was $1,000,000.

On the contrary, according to Murner's testimony, a telephone conversation took place around this time during which he conveyed to Golden the information regarding Dasher's policy of excess insurance coverage. Murner initially told Golden, as he had been told by Dasher, that those policy limits were $3 million. Later, Murner learned that the policy limits were not $3 million, but $5 million. Following a hearing on a procedural motion in Scott Circuit Court, Murner conveyed that corrected information to Golden. There is no evidence in the record that impugns Murner's testimony.

Back at CIC's offices, senior claims examiner Julie Sullivan was developing a sense of the claim against CIC's insured, Dasher. Her role was to evaluate the claim based on information provided by Dasher's counsel. On June 9, 2000, she created a "Reserve Increase Memorandum," introduced at trial as Plaintiffs' Exhibit 5, stating:

> Information is sketchy at this time. . . . The claimant, George Hofmeister, DOB unknown, was in a wheel chair for five months and he had physical therapy. He was unable to conduct his business [but] is back to work now. His attorneys say he will likely need to have a joint replacement of his knee and hip. . . . His meds total around $100,000.

Hofmeister's economic circumstances, as well as a settlement demand in excess of Dasher's insurance coverage through CIC, also concerned Sullivan.

> Mr. Hofmeister is literally "worth millions." We have his tax returns [showing he did not receive a $5M bonus] which plaintiff may attribute to this accident. Dan [Murner] will meet with an accountant to review all this documentation. . . .
>
> In mid May a settlement demand of $1.5 million was initially proposed in the presence of Dasher officials. They immediately became very concerned due to personal exposure. . . . At that time, the issue of accepting the demand and tendering our limit of $1M,

> limiting the personal exposure of the insured to half a million versus potentially exposing them to millions was problematic due to coverage issues involved.

The coverage issues to which she referred included the fact that "Clark's personal carrier, KY Farm Bureau, tendered their $100,000 limits [and] some question regarding KY Farm Bureau stacking their coverage up to $600,000." Sullivan noted that "while the insured [Dasher] has an umbrella policy, it is not through CIC." This is the earliest indication in the record that a policy of excess insurance coverage existed. Still, neither the carrier nor the policy limits was identified.

On the other hand, Sullivan noted that there was still a question of Dasher's liability. The case had not developed far enough to know "whether Mr. Clark was on or off the clock." At that time, legal focus was on whether the "actions of Mr. Clark occurred outside the time restrictions of his employment."

As it turned out, Hofmeister's representations of his impaired physical condition were overstated. According to his pretrial disclosures in the spring of 2004, Hofmeister's medical expenses never totaled more than $50,037.92, far from the $100,000 to which he had testified. Also, Hofmeister never needed subsequent surgery or any other substantial medical treatment for his injuries. His pretrial disclosures placed a zero-dollar value on future medical costs. Nevertheless, for a time at least, the parties proceeded on Hofmeister's erroneous representations.

Meanwhile, the Hofmeisters, through Golden, had provided to Murner some documentation of Hofmeister's finances. However, according to a June 16, 2000, letter from Murner to Golden, there was still much requested documentation that had yet to be provided. Notably, there was no documentation of the $25-million loan application or its denial. An accounting expert hired on behalf of Dasher reported to Murner that the information Hofmeister had thus far provided only supported the conclusion that his businesses were losing money even before the accident. From 1995 to 1999, the cost of acquiring the businesses exceeded the cash generated by all of Hofmeister's businesses by $150 million. Dasher's expert could not reconcile Hofmeister's claim that his economic loss was attributable to the accident without additional documentation. He specifically requested documentation to support Hofmeister's income calculations, as well as records of intercompany loans and other subsidization of the losses shown to have been sustained by Hofmeister's equine-related and other businesses. Murner explained to Golden the reason such detailed information was necessary:

> As you know, this is not a W2 economic loss case. Your client derives his income from a myriad of sources, which we need to explore. If this cannot be accomplished by June 22 [Golden's settlement demand deadline], so be it. However, my client will not act on blind faith as you suggest. . . . [I]f you take out the economic claims and simply size this case up on medical expenses (past and future) and pain and suffering (past and future) the numbers do not come close to the limits of my client's insurance policy. For example, everything you have provided to us show [sic] medical expenses of approximately $50,000 rather than the $100,000 claimed by your client during deposition. . . . Your client is asking . . . me to assume without documentation that his economic losses make up the difference and exceed the policy limits . . . .
>
> I, of course, will put all of this in a formal request for production of documents. However, the deadline for

> your response [to that discovery request] will fall after the deadline your client has arbitrarily imposed [to respond to the settlement offer].

Golden responded to Murner on June 20, 2000, that "Cincinnati Insurance Company has known about the claim since October 1999. . . . A cursory review of any of Mr. Hofmeister's tax returns for the past five years would reveal to the layman that he has a solid basis for his economic damages claim." Golden declined to send Murner any further medical records to support a claim for future medical costs stating simply that "Cincinnati Insurance Company is creating additional requests for information to serve as the basis for its refusal to settle this claim."[6] Furthermore, Golden charged CIC with failing to timely investigate and pay the claim, and with asking "for more information than the court would ever require Mr. Hofmeister to produce and that would take us several months to acquire." He then stated his intention "to hold Cincinnati Insurance Company responsible."

On June 21, 2000, Murner spoke by telephone with Golden and invited him to his office to discuss settlement. Golden declined the invitation. Murner therefore had a settlement proposal hand-delivered to Golden's office on June 22, 2000. There were several aspects to the settlement proposal.

First, because the issue of whether Clark was acting within the scope of his employment at the time of the accident had not been resolved, Murner pointed out the possibility that Dasher would have no liability whatsoever.

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[6] The record reflects that no such medical records existed and, therefore, none could be sent.

Additionally, Murner's interpretation of the discovery produced thus far suggested some comparative liability on Mr. Hofmeister's part.

Second, because Hofmeister still had not provided the documentation Murner requested, both informally and through discovery, Hofmeister's claim for lost business earnings could not be properly assessed. Therefore, the settlement offer specifically reserved Hofmeister's right to pursue "any claim the Hofmeisters may have against Dasher for damages due to lost wages, or lost profits due to lost business opportunities[.]"

Third, Murner totaled "all of Mr. Hofmeister's medical expenses provided to Dasher by Plaintiffs' counsel to date," then subtracted "expenses previously paid for PIP [personal injury protection of $50,000]" by Hofmeister's own insurance. The balance was $9,275.[7] Dasher agreed to pay that sum and further agreed, having obtained CIC's consent, that CIC would "be responsible for negotiating any settlement for PIP, for expenses incurred as of the date of this settlement."

Fourth, Dasher agreed to pay Hofmeister $25,000 for future medical treatment despite the fact that "no medical evidence has been presented by the Hofmeisters' counsel regarding Mr. Hofmeister's need for future medical treatment[.]"

[7] These figures indicate that Murner continued to err in favor of Hofmeister regarding calculation of medical expenses since his estimate exceeds Hofmeister's pretrial disclosure by more than $9,200.

Fifth, recognizing Mrs. Hofmeister's "role in caring for Mr. Hofmeister[,]" Dasher agreed to pay her $25,000 on her loss of consortium claim.

Sixth, for Hofmeister's claim of past and future pain and suffering, Dasher agreed to add $50,000 to the $100,000 previously received from Clark's carrier making his pain and suffering claim about three times his medical expenses.

In effect, Dasher's total offer was $109,275, plus indemnification for the $150,000 previously paid by other insurers for a total of $259,275, plus the important reservation of Hofmeister's right to pursue his claim for lost income.

Before the workday ended, Golden, on behalf of the Hofmeisters, wrote to Murner stating that the "proposed settlement offer is rejected and that we hereby withdraw our offer to settle this matter for the policy limits of $1 million." Golden gave no credence to Murner's asserted defense that Clark was not acting in the scope of employment for Dasher, stating, "I have already presented to your office the applicable case law that clearly indicates Mr. Clark was acting within the scope of his employment[,]" and insisting that taking a contrary position "is a clear violation of the Unfair Claims Settlement Practices Act because liability has become clear." Similarly, according to Golden, Murner's position that Hofmeister might bear some percentage of fault "constitutes a violation of the Unfair Claims Settlement Practices Act." Finally, and contrary to the offer to reserve the claim for lost profits, Golden claimed that while Murner acknowledged a "viable claim for lost wages, lost profits, and lost business opportunities, [he] did not offer a dime to settle that portion of our claim. This, too, is in violation of the Unfair Claims Settlement Practices Act."

Settlement negotiations were thus suspended. Negotiations would not resume in earnest until the issue of Dasher's vicarious liability was determined by the trial court. This did not occur until shortly before the final date set for the trial, October 14, 2002.

Between these two periods of settlement negotiation – the summer of 2000 and autumn of 2002 – substantial discovery took place as well as a variety of procedural and other motions. The following events, including extrajudicial events subsequently memorialized as part of the record, are relevant to our review.

On February 9, 2001, Golden wrote a peculiar letter[8] to Murner ostensibly attempting to settle one portion only of his clients' claims. The letter did not present any *offer* to settle. On the contrary, Golden was attempting to resurrect and accept one portion of Dasher's June 22, 2000, offer that Hofmeister rejected *in toto* eight months earlier. With still no proof of future medical expenses, Golden, on behalf of the Hofmeisters, wanted now to accept that portion of Dasher's previous offer. He wanted Murner to explain the "decision to withdraw the offer of settlement of $25,000[.]" He also wanted to know why Hofmeister could not accept one portion of the offer without accepting the other portions. In Golden's opinion, this violated Kentucky's UCSPA. Using the same

[8] The oddity of Golden's letter surpasses the "curious letter" described in *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 495 (Ky. 1976), which is similar to some of Golden's other correspondence.

wording as KRS 304.12-230(13), Golden claimed this amounted to "failing to promptly settle a claim where liability has become reasonably clear under one portion of the insurance policy coverage in order to influence settlement under another portion of the coverage afforded by [CIC]."

Murner replied on February 15, 2001, documenting the history of Dasher's offer and Hofmeisters' rejection, and quoting Golden's June 2000 pronouncement that "[w]e will now proceed to trial and have the jury decide the issue of damages." Again, Murner insisted that liability was not as clear as Golden asserted and reminded Golden of the difficulty Dasher had in obtaining from Hofmeister sufficient information to assess his claim of lost profits. Finally, Murner stated, "I believe your allegations of bad faith that you have thrown about throughout this litigation are frivolous."

More than three years later, when Golden interrogated Murner at trial regarding this episode, Golden revealed that his February 9, 2001, letter was a calculated attempt to put Murner "on the spot."[9]

[9] On this point, Golden interrogated Murner, CIC representative Dan Walsh, and CIC's bad faith expert Carl Sumner. The essence of Golden's interrogation and argument is that: (1) the June 22, 2000, offer included $25,000 for future medical expenses; (2) there was no change in the medical proof between June 22, 2000, and February 9, 2001, when Golden "accepted" the offer, so the offer could not have become less justifiable; (3) despite this, CIC refused to pay over the $25,000; (4) Murner admitted that the $25,000-offer should not have been made; and (5) Murner's admission supported Golden's claim that it was a sham offer all along and, therefore, made in bad faith. This argument fails fundamentally since there was never any evidence of the need for future medical care. Murner's settlement recommendation to Dasher, and CIC's approval of the settlement offer for future medicals, was based on Golden's representation that he would eventually present such evidence. Golden attempts to make Murner and CIC the culprits because they relied on his representations in making the offer. The argument defies logic.

Golden: You admitted you shouldn't have made that offer. You admitted it was a sham. . . . I put you on the spot on the $25,000 you offered in future medicals, to show that that was just a sham.

Murner: I did not admit it was a sham. . . . You rejected the whole $109,000 . . . . And then six [sic] months later you said, oh well, I'll take the $25,000 that you were offering for medicals, and I said you already rejected the offer and you hadn't proved anything regarding future medicals, so why would I go there?

The Hofmeisters continued to engage in discovery between the summer of 2000 and autumn of 2002. They served additional requests for production of documents and a third and fourth set of interrogatories on Dasher in September 2000 and May 2001, respectively. Again, the Hofmeisters never took advantage of the discovery process to obtain information regarding Dasher's insurance coverage.

Dasher, too, continued efforts through discovery to obtain Hofmeister's financial records so it could assess whether there was a causal relationship between the accident and Hofmeister's business failures. The trial court permitted such discovery even over Golden's motion for a protective order. Even then, Dasher subsequently found it necessary to obtain the trial court's order compelling production of this documentation before Hofmeister would produce it.

On July 19, 2001, through Golden, the Hofmeisters moved to amend their complaint for a second time. They did not attach a copy of the proposed amended complaint to the motion, but stated their intent to assert a claim against CIC for violation of the UCSPA. Through Murner, Dasher moved the trial court pursuant to CR 11 to strike the motion as frivolous, having been filed for the improper purpose of attempting to force settlement of the underlying claim. Primarily, Dasher noted that its liability was still fairly debatable since no decision had yet addressed the scope-of-employment issue. Dasher also asserted that the Hofmeisters had continuously thwarted its efforts to substantiate their economic losses. The trial court granted the Hofmeisters' motion to amend the complaint and deferred a ruling on Dasher's CR 11 motion.

The second amended complaint listed a variety of grievances against CIC, each of which the Hofmeisters contended constituted a violation of the UCSPA. Shortly thereafter, the Hofmeisters amended the complaint again, adding an additional UCSPA claim against CIC. Now itself a defendant, CIC answered the two amended complaints and denied each of the substantive allegations in both.

In September 2001, the trial court agreed with CIC that the case against it for bad faith should be bifurcated from the underlying tort claim and entered an order to that effect. Attorney Michael Risley entered his appearance on behalf of CIC. The underlying tort claim went forward.

On March 15, 2002, Dasher took the deposition of a representative of the bank where Hofmeister had applied for and had been denied the $25-million loan. The bank representative acknowledged that he recommended Hofmeister's loan application to his superiors, but stated they ultimately denied the loan. He said that Hofmeister's medical condition following the accident did not affect either his recommendation or his superiors' denial of the application for credit. He testified, "I don't recall it being woven into the credit presentation as an issue we had to deal with[.]" Instead, "the final decision" to reject was based on "economic issues with his businesses, his horse business and other businesses, that he had that brought in risk factors that the bank [was] not willing to accept[.]" Nothing in the record indicates that the accident had any effect on the bank's denial of Hofmeister's application for a $25-million loan.

Trial was scheduled for the spring of 2002. Both the Hofmeisters and Dasher submitted proposed jury instructions that left the issues of Dasher's vicarious liability and Hofmeister's comparative negligence for resolution by the jury. For reasons which the Hofmeisters opposed but are not otherwise pertinent here, the trial was continued and eventually rescheduled for October 14, 2002.

The critical issue of whether Clark was acting in the scope of his employment was still not resolved when, between August 30 and September 4, 2002, the Hofmeisters, Clark and Dasher each filed motions on this issue. On September 13, 2002, the trial court entered an order finding that Clark was acting in the scope of his employment with Dasher.

There was conflicting evidence as to whether Dasher's dispatcher *ordered* Clark to return the keys and credit card himself that morning, or whether Clark, knowing the keys had to be returned, felt compelled to voluntarily undertake the task. The Hofmeisters argued that this specific question is irrelevant. The trial court seemed to agree, focusing instead on the facts that: (1) Dasher "indicated the keys had to be returned;" (2) return of the keys was for Dasher's benefit; (3) Dasher's dispatcher authorized the return of the keys; and (4) returning the keys was "incidental" to Clark's employment. The trial court noted and discounted the fact that Clark made two separate stops for coffee and fuel, stating those stops were "not evidence of any independent pursuit or deviation [but] merely in furtherance of Clark's primary mission[.]" The trial court did not address the facts that: (1) Clark was not on a direct route between his home and Dasher's offices when the accident occurred; (2) Clark did not recall why he deviated from the direct route to Dasher's offices; (3) Clark himself had created the circumstances necessitating a return of the keys and credit card; or (4) when asked in a pre-litigation interview whether he was on company or personal business, Clark himself responded, "[T]hat's debatable."

On October 3, 2002, rather than challenging the trial court's ruling, Dasher stipulated liability[10] and simultaneously presented the Hofmeisters with an offer of judgment, pursuant to CR 68, in the amount of $175,000.[11] Eight days later, on October 11, the offer increased to $300,000. On the day of trial, October 14, Dasher offered $500,000. Before trial started, Dasher offered the $1,000,000-

[10] Murner testified this was a tactical decision "to refocus the issues to the damages, which is what we always wanted to address in this case." On cross-examination, Golden attempted unsuccessfully to have Murner admit the stipulation indicated CIC knew Dasher was liable all along "because nothing had changed in the case" from the date of Dasher's original offer, June 22, 2000, until liability was conceded.

[11] The Hofmeisters have argued throughout the litigation, and now in this appeal, that the net value of this $175,000-offer was $25,000 because of "liens" in favor of Travelers and Farm Bureau. There is nothing in the record supporting the existence of such liens.

limits of its policy of automobile liability insurance. On behalf of the Hofmeisters, Golden accepted, but conditioned that acceptance upon certain concessions from some of the other defendants.

Because this occurred on the day trial was to commence, and because terms of the settlement were unclear, the parties agreed to go on the record with the trial court, as “the way to consummate this settlement[,]” to use Golden’s words. Golden and Murner were present on behalf of their respective clients. Also present, either in person or by telephone conferencing, were representatives of Clark’s personal insurer and the attorney for Farm Bureau Insurance. As the case against CIC for statutory bad faith had been bifurcated and all such claims were to be addressed later, attorney Risley was not present on behalf of CIC.

Golden initiated the discussion by representing he could “blackboard over $20 million in damages and that will expose Eugene Clark to that excess judgment[.]” Only moments into the hearing, a reference was made to the “excess policy with Dasher of $10 million[.]” Murner corrected the speaker and clarified that Dasher’s excess policy was only $5 million. Owing to telecommunications glitches, Murner had to repeat three times that the amount of Dasher’s excess insurance coverage was $5 million.

Before the negotiations ended, eleven separate references were made to the existence of Dasher’s policy of excess insurance. In addition, the excess insurer was identified as Fireman’s Fund three separate times. And the excess policy limits of $5 million were stated a total of four times. Nothing in the transcript indicates that anyone, including Golden, was surprised by or unaware of the existence of Dasher's policy of excess insurance.

The sticking point in settlement, however, was the relatively smaller amount of $100,000. This is one of the sums of insurance Golden collected for the Hofmeisters before initiating litigation. Before the parties could reach a settlement, one question had to be resolved: which party or insurance company would ultimately be responsible for that amount? The attorneys for the Hofmeisters and Dasher and Clark were attempting to convince the representatives of the insurance companies to waive the right to recover the sum from any of them.

Golden pointed out that he could easily prove more than $100,000 in damages and, if the trial went forward, the obstinacy of Clark's personal liability insurer "will expose Eugene Clark to that excess judgment." This prompted Clark's insurer to ask, "Isn't Mr. Clark an insured under the excess policy, also?" To this, Murner responded that he "had no authority from the excess carrier. A million dollars is what we're offering here." Golden proposed a simple solution: "[I]f [Clark's personal liability insurer] pays the hundred [thousand dollars] that it already committed to pay earlier, then we're all done and it's over with, we can all go home."

Clark's insurer balked. So, Golden announced he was prepared "to proceed against Eugene Clark, and if we ring him up, then we're going to take his personal assets . . . and our position is going to be that [Clark's personal liability insurer] has acted unreasonably and violated the Unfair Claims Settlement

Practices Act[.]" Eventually, the representatives of the affected insurers agreed to brief and argue this particular issue among themselves, leaving the remaining parties out of that particular fray and free to settle their claims.

On the points of settlement, Murner was very clear that the settlement for the limits of Dasher's automobile liability policy embraced a universal release of liability relative to the underlying tort claim.

> Mr. Murner: Okay, Your Honor, my position is—and if I'm wrong, somebody tell me now. Cincinnati, excess carrier, Dasher and Clark are protected, and free and clear from—
>
> The Court: I don't know what anybody else thinks, but I am clear on that, for whatever it is worth.
>
> . . . .
>
> Mr. Murner: What I want to make sure is that this is a complete release. I mean, this is the standard complete release with the exception of [the remaining issues among the insurers regarding subrogation issues apart from the parties].
>
> Mr. Golden: I agree.

In accordance with this agreement, Murner drafted a settlement agreement and release.[12] The Hofmeisters' right was reserved to continue pursuing the bad faith and UCSPA claims against CIC and Fireman's Fund. Otherwise, the Hofmeisters released Dasher, Clark, CIC and Fireman's Fund for all claims arising directly from the automobile accident only.

[12] Golden actually made the first attempt at drafting the agreement. However, that draft was incomplete in that it did not include the release of CIC and Fireman's Fund as to the underlying tort claim and it left unresolved the subrogation dispute between the Hofmeisters' insurer and Clark's insurer.

There was a delay in obtaining approval from the Hofmeisters' insurer and Clark's personal insurer relative to the subrogation issue. This delayed execution of settlement documents and disbursement of proceeds. Attempting to encourage movement on the issue, Golden filed a motion to enforce the settlement on behalf of the Hofmeisters, followed by a motion on his own behalf, based on his own lien, for immediate disbursement of his attorney fees and costs expended.

In his motions, Golden claimed that he never agreed to include CIC and Fireman's Fund in the release of the underlying tort action. Blaming Murner, Golden insisted that the trial court "stop the wrongful conduct of withholding the settlement proceeds in exchange for additional releases that were never bargained for[.]" Golden insisted the delay was to pressure the Hofmeisters into dismissing their bad faith claims.

On behalf of Dasher and Clark, Murner responded that he had

> never included a provision in any proposed settlement agreement providing for protection against allegations of violation of the Unfair Claims Settlement Practices Act [or] in any correspondence that any release must contain protection from any potential bad faith allegations[.] Thus, any claim by Plaintiffs' counsel that settlement proceeds are being withheld to solicit a release of bad faith claims on behalf of Cincinnati Insurance and/or Fireman's Fund Insurance Company are simply unsupported by the correspondence between counsel and the proposed settlement release.

Murner's position is easily verified by the language of the settlement agreement itself. Furthermore, nothing in the record contradicts Murner's position on this issue, nor does the record support Golden's suggestion otherwise.

Eventually, all of the issues were resolved by the attorneys without the need for the trial court to rule. However, the delay was long enough that it allowed Allied Capital Corporation, one of George Hofmeister's judgment creditors, to intervene in this action and garnish the settlement proceeds before the Hofmeisters received them.

In May 2003, the Hofmeisters sought leave to file another amended complaint. In essence, this amendment added two counts. First, the Hofmeisters alleged that CIC's rapid increase in offers between October 3 and October 14, 2002, from $175,000 to $1,000,000, violated Kentucky's UCSPA. Second, they alleged that CIC intentionally prolonged settlement to purposefully take advantage of the Hofmeisters' worsening financial circumstances. The motion was granted and the amended complaint ordered filed on June 5, 2003.

In August 2003, ten months after the settlement negotiations were recorded before the trial court, it occurred to the Hofmeisters that they had an opportunity to file yet another amended complaint. Here, they alleged that CIC "misrepresented pertinent facts regarding the amount of insurance that was available" and "failed to disclose the existence of an excess insurance policy." The motion was granted and the amended complaint ordered filed on September 15, 2003.

In February 2004, the Hofmeisters sought leave to file what became their final amended complaint. Seemingly aware of this Court's nonfinal opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004) that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim, the Hofmeisters' "Fifth Amended Complaint"[13] alleged that all of CIC's actions also supported a claim for common law fraud and intentional infliction of emotional distress. It appears from the record that this tactical decision was intended to avoid the potential that *Knotts*, once final, would totally defeat the Hofmeisters' claims under the UCSPA. The motion was granted and the amended complaint ordered filed on May 17, 2004, three days before trial.

Before trial commenced on May 20, 2004, CIC moved for a continuance because the amended complaint had been filed so close in time to the commencement of trial. The motion was denied because there were no additional factual allegations, only additional legal theories. The trial judge also addressed numerous procedural and evidentiary motions, filed by both sides. Over CIC's objection, the trial court ruled that Murner was CIC's agent for purposes of settlement negotiation. *See*, *infra*, Section II.C.

Both sides tendered proposed jury instructions. The parties announced ready and the trial proceeded. At the close of evidence, each party moved for directed verdicts. As to the issues now before this Court, those motions were denied. The jury was instructed in preparation for its deliberations.

The trial court took the parties' respective proposed jury instructions into consideration but crafted its own. The court incorporated its previous holding that Murner was CIC's agent into Instruction No. 2, addressing violations of the

[13] While this was the fifth amendment of the complaint after CIC was named as a defendant, it was the sixth time the original complaint was amended.

UCSPA, and Instruction No. 3, addressing fraudulent misrepresentation. Therefore, the jury was entitled to attribute Murner's conduct to CIC for liability purposes. The jury received no instruction regarding fraud by omission, *i.e.*, the Hofmeisters' allegation that CIC failed to disclose the existence of the policy of excess insurance coverage. Further details of the jury instructions will be discussed as necessary in the context of the parties' various arguments. The case was turned over to the jury which found for the Hofmeisters on both Instruction No. 2 and Instruction No. 3, though not unanimously on either.

CIC filed motions for judgment notwithstanding the verdict; for a new trial; and to alter, amend or vacate the judgment. To the extent the bases for these motions are relevant to this appeal, they will be discussed *infra*. It is sufficient now to note only that all post-judgment motions were denied with the exception of the motion to reduce the punitive damages award. These appeals followed.

II. *Cincinnati Insurance Company v. Hofmeister*, 2004-CA-002296

CIC presents a plethora of arguments on appeal. Many of these arguments center on one central question: What legal relationship exists between an insurer and legal counsel hired to defend its insured? Surprisingly, Kentucky has never addressed this question squarely, but the answer is crucial to resolution of this case. After addressing this question generally, we will apply the law to the facts of this case, and then address CIC's additional arguments *seriatim*.

We further preface our discussion by noting two factors that will distinguish this case from many others. First, the underlying litigation was a negligence action brought by a claimant seeking restitution from a tortfeasor. It was not a contract action brought either by the first-party insured, by a third-party beneficiary of an insurance contract, or a third party who stood in the shoes of the insured as a result of an assignment. Second, the Hofmeisters made no attempt to settle the case with Dasher prior to the filing of the complaint. Consequently, whether the concepts discussed here have equal application to pre-litigation conduct will depend on circumstances not present in this case.

A. Standard of Review

Many of the issues addressed here were preserved in more ways than one. The issues which are dispositive of this case involve the denial of CIC's motions for directed verdict and for judgment notwithstanding the verdict. The same standard applies to both. *Prichard v. Bank Josephine*, 723 S.W.2d 883, 885 (Ky.App. 1987). A directed verdict or judgment notwithstanding the verdict is appropriate when, drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict. *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky.App. 1998); *see also, Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). A reviewing court may not disturb a trial court's decision on a motion for directed verdict unless that decision is clearly erroneous. *Bierman* at 18. The denial of a directed verdict by a trial court should only be reversed on appeal when it is shown that the verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Id.* at 18-19.

B. Relationship of Attorney Defending Insured and Insurer – Generally

In Kentucky, the relationship of the insurer to the attorney hired to defend the insured has been discussed primarily in caselaw interpreting the Rules of Professional Conduct, Supreme Court Rule (SCR) 3.130. While the trial court was not inclined to consider these cases because Murner's professional responsibility was not directly in issue, we believe they are illuminating.

In *American Ins. Ass'n v. Kentucky Bar Ass'n,* 917 S.W.2d 568 (Ky. 1996), the insurance industry sought permission for its insurer members to use in-house lawyers to defend their insureds, or at least to engage outside counsel on a "set fee" or retainer basis to handle all litigation. Both requests were denied.

Reaffirming the sanctity of the relationship between the insured and the attorney hired to defend him, our Supreme Court reemphasized that "[n]o man can serve two masters[.]" *American Ins. Ass'n* at 571, *quoting Kentucky State Fair Bd. v. Fowler*, 310 Ky. 607, 615, 221 S.W.2d 435, 439 (1949). It is axiomatic that a lawyer must serve his client dutifully and loyally. Building upon that axiom, the Supreme Court recognized that granting the industry's request would move the attorney closer to certain "inherent pitfalls and conflicts" that would interfere with his duty and loyalty to the client. *Id.* at 571.

> Inherent in all of these potential conflicts is the fear that the entity paying the attorney, the insurer, and not the one to whom the attorney is obligated to defend, the insured, is *controlling* the legal representation.

American Ins. Ass'n at 573 (emphasis supplied). To quell that "fear," "[w]e continue to adhere to the view that it would be contrary to public policy to allow the insurer to control the litigation[.]" *Wheeler v. Creekmore*, 469 S.W.2d 559, 563 (Ky. 1971).

American Ins. Ass'n was not the first time we rejected a "rule [that] would be inimical to the preservation of traditional and longstanding concepts associated with attorney-client relationship, as recognized by Kentucky law." *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky.App. 1998) (rejecting excess insurer's claim of right to sue its insured's attorney for malpractice). Our courts simply cannot ignore Kentucky's consistent refusal to allow the insurer any right to control the attorney's independent manner of representing its insured. That independence has a long history.

In *New Independent Tobacco Warehouse, No. 3 v. Latham*, 282 S.W.2d 846 (Ky. 1955), our highest court said that the "general rule is the services of a professional man, such as a lawyer . . . are rendered under an independent contract[.]" *Id.* at 848. That is, a lawyer is one "who follows [his] employer's desires only as to results of work, and not as to means whereby it is to be accomplished." *Romero v. Administrative Office of Courts*, 157 S.W.3d 638, 642 (Ky. 2005), *quoting* BLACK'S LAW DICTIONARY 770 (6th ed.1990). These same rules apply when an insurer selects and pays an attorney to represent its insured. The Tennessee Supreme Court accurately described the relationship:

> In the typical situation in which an insurer hires an attorney to defend an insured, the relationship of the insurer and its attorney is precisely that of principal to independent contractor. [T]he attorney is engaged in the distinct occupation of practicing law . . . one in which the attorney possesses special skill and expertise. [T]he attorney generally supplies his or her place of work and tools; the attorney is employed and paid only for the cases of individual insureds; and he or she alone, consistent with ethical obligations to ensure competence and diligence in the representation, determines the time to be devoted to each case. Finally, and obviously, the practice of law is not, nor could it be, part of the regular business of an insurer.

Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 393-94 (Tenn. 2002); *see also, Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755, 756-57 (Ky. 1955)(factors for determining independent contractor status); *see also, Vires v. Dawkins Log & Mill Co.,* 240 Ky. 550, 42 S.W.2d 721, 722 (Ky. 1931)("independent contractor is . . . independent of his employer in the execution of his work, and may labor at the times and in the manner he prefers.").

Clearly, the factor most critical to the attorney's retention of his status as an independent contractor, *vis-à-vis* the insurer, is the attorney's retention of control over the means by which he accomplishes the insurer's desired result – defense of its insured. *Home Ins. Co. v. Henderson Lodge, No. 732, Loyal Order of Moose*, 201 Ky. 522, 257 S.W. 422, 423 (Ky. 1923)("If [one] is merely subject to the control or direction of the [employer] as to the result to be obtained, he is [still] an independent contractor. If [one] is subject to the control of the employer as to the means, he is not an independent contractor.")(quotation marks and citation omitted). We conclude that the relationship of an attorney hired to defend an insured relative to the insurer that hired him, at least initially, is that of independent contractor.[14]

As a general rule, an employer is not liable for the torts of an independent contractor in the performance of his job. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994). While general rules often have philosophical or logical origins, their exceptions typically are born of practical realities. Therefore, we cannot ignore the practical reality that an insurer may seek to exercise actual control of an attorney's work, even though lacking the right to do so. Our common law embraces that possibility.

Long ago, Kentucky recognized that if a principal lacking the right of control nevertheless "personally interferes with, undertakes to do, manage or control the work of the independent contractor, he thereby destroys the relationship of independent contractor." *Madisonville, H. & E.R. Co. v. Owen,* 147 Ky. 1, 143 S.W. 421, 424 (Ky. 1912). The independent contractor would thus convert to an employee or agent. Our review of authority reveals that Kentucky independent contractors, once possessed of the right to control their own work, are not inclined

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[14] This same conclusion has been reached by many of our sister states. *See*, *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 439 Mass. 387, 788 N.E.2d 522, 539-41 (Mass. 2003)(Where lawyer "controls the strategy, conduct, and daily details of the defense . . . an insurer cannot be vicariously liable for the lawyer's negligence."), *and cases cited therein, and, Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F.Supp. 452, 454-55 (M.D.Pa. 1997)("The attorney's ethical obligations to his or her client, the insured, prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"), *and cases cited therein*.

to relinquish that right to the employer. In fact, we failed to discover any case in which that has occurred.[15]

However low the rate at which typical independent contractors relinquish the *right* to control their own work, logic compels the conclusion that the rate would be even lower when that right is coupled with a *duty*. Unlike other independent contractors, the attorney who relinquishes the right to control will perforce violate his duty under the Rules of Professional Conduct, Rule 1.8(f)(2), and "clearly subject himself to severe discipline." *Summit v. Mudd,* 679 S.W.2d 225, 226 (Ky. 1984). An attorney's maintenance and protection of his independent contractor status is thus additionally reinforced. We therefore agree with our sister court that "cases in which an insurer may be held liable under an agency theory will be rare indeed." *Givens* at 395.

We also believe *Givens* indicates the proper standard for determining whether the insurer has exercised actual control of the attorney despite lacking the right to do so. Such control must be invidious in that it "affect[s] the attorney's independent professional judgment . . . interfere[s] with the attorney's unqualified duty of loyalty to the insured, or . . . present[s] a reasonable possibility of advancing an interest that would differ from that of the insured." *Givens* at 695.

We now apply these criteria to the facts of this case.

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[15] Several cases, notably *United Engineers & Constructors, Inc. v. Branham,* 550 S.W.2d 540 (Ky. 1977), reaffirm the longstanding rule that "the main dispositive criterion is whether it is understood that the alleged principal or master has the *right* to control the details of the work." *Id.* at 543 (emphasis supplied). Here we are speaking of a different concept – the principal's exercise of control despite having no right to do so.

C. Whether the Trial Court Erred in Failing to Direct a Verdict That Murner Was Not CIC's Agent

The trial court concluded that Murner was CIC's agent for purposes of settlement negotiations. CIC claims that ruling was error. We agree.

The trial court did not engage in the analysis indicated above, but instead applied the reciprocal analysis of whether Murner was CIC's agent. Whereas independent contractor status is shown by the *absence* of the principal's control over the work to be performed, agency is shown by its *presence*. Just as with the independent contractor analysis, "the right to control is considered the most critical element in determining whether an agency relationship exists." *Phelps v. Louisville Water Co.,* 103 S.W.3d 46, 50 (Ky. 2003)(citation and quotation marks omitted). Therefore, the trial court's analytical approach was effectively the same as ours.

During oral argument of the issue, the trial court stated, "[I]t's pretty clear to me that Mr. Murner was *controlled and guided* by Cincinnati Insurance Company in terms of settling this case." (Emphasis supplied). The trial court determined that CIC exercised sufficient control over Murner to make him CIC's agent based on the following three facts alone:

(1) "Murner was hired by Defendant [CIC] to represent Dasher;"

(2) "Murner was required to report to [CIC];" and

(3) CIC "would have to approve any settlement offers [recommended by Murner]."

Having examined the record and finding no additional facts that would reinforce this list, we conclude that CIC was entitled to a directed verdict that Murner was not CIC's agent.

Respectfully, we believe the learned trial judge erred by not considering closely enough just what caused these three facts to occur. The trial court concluded they occurred because an agency relationship existed between Murner and CIC. But the record reveals that none of these three facts was intended as a means by which CIC would exercise control over Murner as its agent. Instead, each fact relates directly to a specific duty created by the insurance contract between CIC and Dasher. The contract and these duties existed well before CIC engaged Murner as Dasher's legal counsel.

The insurance contract created specific reciprocal duties that CIC and Dasher were required to satisfy when certain claims of Dasher's liability were asserted. CIC's duty was to defend such claims and to satisfy the legitimate ones. These duties were conditioned upon Dasher's satisfaction of its own duty to cooperate with CIC "in the investigation, settlement or defense of the claim[.]" To be entitled to the benefits of its bargain with CIC, Dasher had to obtain CIC's approval of any settlement it expected CIC to pay. At the same time, however, the contract did not prohibit Dasher from paying a claim without CIC's approval and outside the contract – that is, by utilizing any other Dasher asset to settle the

Hofmeisters' demands – but such a payment would be, according to the insurance contract, "at the 'insured's' own cost."[16]

CIC performed its duty to defend Dasher by selecting and agreeing to pay Murner to serve as Dasher's legal counsel. Experience tells us that an insurer is better able than its insured to select legal counsel to represent that insured. *State Farm Mut. Auto. Ins. Co. v. Marcum,* 420 S.W.2d 113, 120 (Ky. 1967)(insurer is "a professional defender of law suits[.]"), *overruled on other grounds, Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493 (Ky. 1975). Our courts will not penalize a party because he prudently authorized his experienced insurer to select the right attorney to defend him. *Asbury v. Beerbower,* 589 S.W.2d 216, 217 (Ky. 1979)(An insured who "has paid an insurance company to exercise that choice for him . . . should not be penalized for his prudence in that respect."). We are not surprised that such prudence was exercised in this case. When Dasher paid its premium, it purchased CIC's expertise in selecting an attorney and, when a claim was asserted, CIC performed. It simply makes no sense to conclude that CIC's performance of its duty to select Dasher's attorney also supports a finding that the attorney thereby became CIC's agent. Absent evidence that there was more to

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[16] We should not forget that a contract of liability insurance is simply an asset from which a liability may be satisfied. *See, Hillman v. American Mut. Liability Ins. Co.*, 631 S.W.2d 848, 848 (Ky. 1982)(liability insurance policy was tortfeasor's "only asset[.]"). Accident victims assert claims against alleged tortfeasors, not directly against the tortfeasor's insurer. Nothing prevents a tortfeasor's satisfaction of a claim from his assets other than insurance. It is simply because use of an insurance asset has the least disruptive effect on the continued operation of a business that it is naturally the first asset a business considers when contemplating claims settlement. However, whether to actually utilize that asset first remains the option of the business. It is not the option of the accident victim or his attorney to demand that the claim be satisfied from a contract of insurance.

such selection and compensation than satisfaction of a duty to Dasher, we cannot conclude that this fact supports a finding that CIC controlled Murner.

The trial court and the Hofmeisters next place much reliance upon Murner's cooperation with CIC and the acknowledgment that he routinely obtained CIC's approval before offering settlement to the Hofmeisters. This reliance is misplaced.

As Dasher's agent, Murner had a duty to follow Dasher's instructions. If Murner's cooperation with CIC had been contrary to Dasher's instructions, that would support an argument for Murner's role as CIC's agent. But nothing in the record suggests such a thing occurred. Murner's cooperation with CIC was consistent with the duty he owed to his client, Dasher; it was consistent with Dasher's duty to CIC; it was consistent with Murner's relationship to CIC as an independent contractor. *See, Latham, supra*, 282 S.W.2d at 848 (Fact that employer and independent contractor engaged in "daily conferences merely represented the [employer's] right to see that the work was progressing . . . and does not militate against the idea Latham was an independent contractor.").

The same can be said for Murner's act of obtaining CIC's approval before settlement was offered. Murner was, again, simply carrying out the contractual duty his client owed CIC.

It is also clear that Murner was not functioning as CIC's claims adjuster. The respective roles of the insured's attorney and the insurer's claims adjuster are entirely distinguishable. The adjuster's fundamental role is to settle the claim *apart from* litigation; the attorney's is to effectively conduct a defense *in* the litigation. The adjuster owes no independent loyalty to the insured apart from that owed by the insurer. The attorney's loyalty to his insured client is paramount. And, unlike the attorney whose conduct is controlled by his oath, the adjuster receives direction and authority from the insurer, which is why he has been deemed the insurer's agent. *Fidelity & Guaranty Ins. Underwriters, Inc. v. Gregory*, 387 S.W.2d 287, 289 (Ky. 1965). Furthermore,

> the adjuster and the claimant usually deal directly with one another. If their negotiations fail, the adjuster negotiates with plaintiff's counsel, and even after litigation is begun, the adjuster frequently deals directly with plaintiff's counsel.

Gailor v. Alsabi, 990 S.W.2d 597, 608 (Ky. 1999)(Lambert, C.J., dissenting).

Our conclusion that CIC did not control Murner is also strengthened by the undeniable fact that Murner and Dasher enjoyed an attorney-client relationship. When Murner undertook Dasher's legal representation, he became Dasher's agent, not CIC's. *Douthitt v. Guardian Life Ins. Co. of America*, 235 Ky. 328, 31 S.W.2d 377, 379 (1930)("an attorney is an agent of his client"). Kentucky has always jealously guarded the attorney-client relationship, for while "[t]he relationship is generally that of principal and agent . . . the attorney [owes his client] a higher duty than any ordinary agent owes his principal." *Daugherty v. Runner,* 581 S.W.2d 12, 16 (Ky.App. 1978). As described *supra*, Murner's relinquishment of control to CIC would have required that he abdicate his professional responsibility, abandon his true principal, and jeopardize his career.

We conclude that where there is no evidence other than the fulfillment of those duties existing between the lawyer and the insured as his client, and the fulfillment of those duties existing between the insured and the insurer, there can be no finding of an agency relationship between the insurer and the attorney it hires to defend its insured. These duties exist and will be carried out in every case of this nature. If we held that these facts alone would support a finding that the insurer controlled the attorney, not only would we have to conclude that the attorney is *always* the insurer's agent, we would be inviting, if not requiring, the very conflicts our caselaw and ethical rules seek to avoid. *See, e.g., American Ins. Ass'n, supra*; Kentucky Rules of Professional Conduct, (SCR) 3.130(1.7) and (1.8).

For their part, the Hofmeisters assert that additional evidence does exist. They claim Murner became directly involved in deciding whether CIC's policy covered his client's employee. Examination of the record does not support more than their attorney's argument to that effect, and the unrefuted evidence of record contradicts the assertion. In his testimony, Murner made the point, and we believe correctly, that the scope-of-employment issue (critical to his client's common law liability to Hofmeister) and the coverage issue (critical to CIC's contractual liability to Clark as a third-party beneficiary) were independent considerations, and that his focus was on the former. Murner's opinion regarding scope of employment may have affected CIC's decisions regarding coverage, but that alone will not support an agency relationship between CIC and Murner.

The Hofmeisters also believe that CIC should be judicially estopped from denying the agency relationship because of a prior assertion in this same proceeding that CIC's communications with Murner were privileged. We disagree. "The judicial estoppel doctrine . . . prevent[s] a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party *in a prior proceeding*." *Colston Investment Co. v. Home Supply Co.,* 74 S.W.3d 759, 763 (Ky.App. 2001)(emphasis supplied). Even if we were to expand the doctrine to include inconsistent positions within the same proceeding, we certainly could not do so selectively. We would have to apply the doctrine equally to the Hofmeisters who sought to avoid the attorney-client privilege by arguing below that Murner was not CIC's attorney. To use the Hofmeisters' attorney's words, "As this Court is well aware, an attorney can only represent the insured."

The Hofmeisters next argue that Murner had either actual or apparent authority to bind CIC in settlement negotiations. Though the brief makes virtually no reference to the record on this point, our examination does not disclose evidence to justify such a conclusion. Until the complaint was amended in mid-August 2001, there was no claim against CIC to be settled. After that point, attorney Risley was hired to represent CIC. We find it difficult to understand this argument under these circumstances. Evidence that Murner sought a release that would include CIC, and even evidence that Murner conveyed information to Golden that CIC would be responsible for negotiating Hofmeister's PIP settlement, is not inconsistent with Murner's independent contractor status *vis-à-vis* CIC.

However, the trial court, citing *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), appears to have accepted this last argument. We believe that case is inapposite. The attorney with settlement authority at the center of *Clark* represented the tort claimant. *Id.* at 575. The only other attorney involved represented the joint tortfeasors and not either of their insurers. *Id.* In fact, no insurer is mentioned at all. *Clark* simply stands for the proposition that, under proper circumstances, an attorney can bind his client. CIC was not Murner's client. Excluding a sort of circular argument, we simply cannot see how *Clark* supports the finding the CIC exercised the kind of control over Murner that would have made Murner its agent.

The Hofmeisters' argument that Murner could bind CIC in settlement reveals a fundamental confusion about the nature of the underlying claim. An automobile accident gives rise to a tort claim against the tortfeasor, but not any kind of claim against that tortfeasor's insurer (unless, of course, the claimant is also an insured under the same policy). The accident victim has no right, prior to obtaining a judgment against the tortfeasor, to assert a direct claim to insurance policy proceeds. *Central Mut. Ins. Co. v. Pippen,* 271 Ky. 280, 111 S.W.2d 425, 426 (Ky. 1937); *cf.*, *Wheeler v. Creekmore*, 469 S.W.2d 559, 564 (Ky. 1971)(where one jurist lamented the fact that an insurance contract is not "viewed as one vesting in the injured third party a direct cause of action;" Osborne, J., concurring). Consequently, CIC had no liability in the underlying tort action that would have required negotiation or compromise. If there had been evidence that

Murner had authority to bind CIC, it would have been, at best, merely incidental to his duty to defend Dasher.

The record is devoid of any evidence that CIC exercised any actual control, invidious or otherwise, over the means by which Murner accomplished his representation of Dasher, including his efforts toward settlement of the tort claim. These settlement efforts are best characterized as an appropriate attempt by Dasher's attorney, utilizing a Dasher asset (the contract of insurance), in accordance with contract terms requiring Dasher's cooperation and CIC's approval, to settle a tort claim against his client.[17]

We therefore agree with CIC that the trial court erred by denying its motion for directed verdict that Murner was not CIC's agent. Murner began and maintained his representation of Dasher as CIC's independent contractor. Consequently, the general rule prevails and CIC is not vicariously liable for any of Murner's actions undertaken in the performance of his representation of Dasher. *Miles Farm Supply v. Ellis*, 878 S.W.2d 803, 804 (Ky.App. 1994).

D. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Fraudulent Misrepresentation

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

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[17] In view of our holding, we need not rely on the alternative basis for reversal that the record is completely devoid of evidence sufficient to constitute the required mutual "manifestation of consent" that Murner serve as CIC's agent. *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 50 (Ky. 2003). Without contradiction, Murner testified that he never consented to have either his litigation conduct or his settlement conduct controlled by CIC, and that his loyalty to his client was never compromised by any obedience to CIC inconsistent with his duty as Dasher's attorney.

Common law fraudulent misrepresentation requires proof of six elements: "(1) that the declarant made a material misrepresentation to the plaintiff, (2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff." *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 256, 262 (Ky.App. 2007). There must be clear and convincing proof of each of these elements. With regard to at least three of these elements, the proof was entirely lacking. Therefore, the trial court's denial of a directed verdict and judgment notwithstanding the verdict was clearly erroneous.

The trial court adopted the Hofmeisters' proposed fraud instruction language which misidentified the misrepresentation as "that there was only one (1) million dollars in insurance coverage[.]"[18] They claimed Murner made this statement as CIC's agent in his letter to Golden dated May 18, 2000. We have already determined that Murner was not an agent of CIC, but its independent contractor. Thus CIC is not vicariously liable for that statement. It is not debatable that no other CIC representative made such a statement. CIC cannot be the declarant of the alleged actionable representation. Therefore, no evidence

[18] There is a technical difference between the instruction's wording and the actual language the Hofmeisters alleged misled them – that their $1.5-million demand was "in excess of the policy limits provided by Dasher's insurance carrier[.]" The October 14, 2002, settlement conference is the first time the record reflects that either Murner or CIC represent that the limits of the policy CIC wrote for Dasher were $1,000,000. CIC proposed more generally that the instruction simply ask the jury to determine whether CIC had misrepresented "pertinent facts" regarding insurance coverage. Jury instructions identifying the alleged representation must portray it with accuracy.

supports the first element of fraudulent misrepresentation – that CIC made a material misrepresentation.

The Hofmeisters respond by arguing that even if Murner was an independent contractor, CIC can still be liable for fraudulent misrepresentation on its own account. Arguing for what might be termed reverse engineering of the tort, they urge us to conclude that the jury inferred fraudulent misrepresentation from CIC's breach of its duty to disclose that Dasher had another asset to satisfy their claim, *i.e.*, the excess policy. This presumes a duty to disclose. However, the duty to disclose describes an element of the different tort of fraudulent concealment requiring proof of "substantially different elements." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky.App. 2003).

Disregarding, *arguendo*, that the jury was not instructed as to the tort of fraudulent concealment, and further *equating* fraudulent concealment with fraudulent representation, *cf., Bankers Bond Co. v. Cox,* 263 Ky. 481, 92 S.W.2d 790, 792 (1936)("such concealment was in fact a false representation"), we do not find merit in either of the Hofmeisters' arguments that CIC owed them such a duty.

The Hofmeisters quote *Williams v. Kentucky Dept. of Educ.*, 113 S.W.3d 145 (Ky. 2003), for the proposition that "when the principal is under a duty to provide protection for . . . others and confides the performance of that duty to a servant . . . who causes harm to them by failing to perform that duty, vicarious liability attaches even if the agent or subagent is not a servant, *i.e.*, is an independent contractor" such as Murner. *Id.* at 151. We believe *Williams* is not helpful. While an accurate quote, this is not an accurate reflection of the holding.

In *Williams*, two students skipped school and were involved in an automobile accident resulting in the death of one student. The student's estate sought relief against the Kentucky Department of Education (DOE) claiming negligent supervision. The principal issue in *Williams* was DOE's defense that

> local boards of education are not agents of the DOE but are separate and distinct agencies of the Commonwealth assigned to perform separate and distinct functions, *i.e.*, they are co-agents; and, thus, the DOE is not vicariously liable for the failures of employees of local boards[.]

Id. at 152. The principal holding in *Williams* was a rejection of that argument.

> From the language and structure of this statutory scheme, we conclude that the legislative intent was to vest the overall management, operation, and control of the common schools in the DOE, with the local boards of education *functioning as agents* of the DOE . . . . Thus viewed, the statutory relationship between the DOE and the local board was more *akin to that of principal-agent* than to that of co-agents.

Id. at 154 (emphasis supplied). The issues had nothing to do with independent contractors. The language upon which the Hofmeisters rely is mere *dicta.*

Furthermore, we believe the Hofmeisters misinterpret these *dicta.* They argue this language supports a holding that CIC owed a duty to "provide protection" to them by disclosing the existence of a potential source of recovery for a liability they had yet to establish. We believe no such duty exists. *Cf.*, *National Sur. Corp. v. Hartford Cas. Ins. Co.,* 493 F.3d 752, 760-61 (6th Cir. 2007)(a slightly different concept; "no Kentucky court has recognized a duty" nor is there "any reason why the Kentucky Supreme Court would impose a duty on an insurance company [even] to investigate whether its insured has other insurance coverage."). Support for our view can be found by reading *Williams* more closely.

The *Williams* quote, referencing a duty to provide protection for others, is based on RESTATEMENT (SECOND) OF AGENCY § 251 (1958). Contrary to the Hofmeisters' suggestion, that section does not describe a manner in which vicarious liability may be *created* absent an agency relationship. As even the caption to § 251 illustrates, the kind of liability being described presumes the agency relationship *already exists*. RESTATEMENT (SECOND) OF AGENCY, *supra*, § 251 ("Liability For Physical Harm *Caused By A*[*n*] *Agent;*" emphasis supplied).[19]

The Hofmeisters argue that there is an alternate source for CIC's duty. Citing *Smith v. General Motors Corp.*, 979 S.W.2d 127 (Ky.App. 1998), the Hofmeisters claim CIC's duty arose "from a *partial disclosure* of information, [or] from particular circumstances such as where one party to a contract has *superior knowledge* and is relied upon to disclose same." *Smith* at 129 (emphasis supplied). Neither argument has merit.

Taking the latter first, the "superior knowledge" argument requires that the "defrauder" and the "defraudee" be parties to the same contract. We should not have to point out that the Hofmeisters and CIC were not in privity.

[19] Generally, RESTATEMENT (SECOND) OF AGENCY § 251 describes the liability of a party who, once owing a non-delegable duty of protection to a third person, cannot avoid liability on agency law grounds for the injury to that third person resulting from the negligence of an agent, regardless of whether the agent is a servant or a non-servant.

The "partial disclosure" argument also fails. The Hofmeisters maintain that Murner's letter constitutes a disclosure about insurance coverage that, because it was only partially true, was a false representation of the *whole* truth. *See, Dennis v. Thomson*, 240 Ky. 727, 43 S.W.2d 18, 23 (1931). Therefore, goes their argument, CIC had a duty to supplement Murner's information with a disclosure of the excess policy. The problem with this argument, whether under a theory of fraudulent concealment or fraudulent misrepresentation, is that the Hofmeisters' reliance on the information conveyed must be reasonable.

The reliance element contained in Jury Instruction No. 3(f) carried with it the implicit requirement that the reliance be reasonable. *Harralson v. Monger*, 206 S.W.3d 336, 341 (Ky.2006)("[*B*]*lind* reliance . . . fails the fifth requirement of fraud – *reasonable* reliance upon the claimed fraudulent act."). (Emphasis supplied). Based on the record before us, the Hofmeisters' reliance on their own or their attorney's impression of Murner's letter was unreasonable for several reasons.

Murner testified that when he learned Dasher had an excess policy, he told Golden about it, not once but twice. Golden did not take the stand to refute Murner, nor did the Hofmeisters present any other evidence contradicting Murner's testimony. Even if the jury chose to disregard Murner's testimony entirely, we are left with the transcript of the settlement negotiations, conducted on October 14, 2002, and attended by Golden, showing that the excess policy was referenced one-and-a-half dozen times. These references occurred before the conditions Golden placed on settlement were met and, therefore, before the Hofmeisters were legally committed to accept Dasher's settlement offer. In fact, after October 14, 2002, substantial issues remained and the Hofmeisters had to move the trial court to decide one of the issues remaining between the Hofmeisters' and Clark's insurers. The settlement agreement itself was not finalized until December 2002.

Most significantly, it is well established that "[i]f the truth or falsehood of the representation might have been tested by ordinary vigilance and attention, it is the party's own folly if he neglected to do so, and he is remediless." *Bassett v. National Collegiate Athletic Ass'n.*, 428 F.Supp.2d 675, 684 (E.D.Ky. 2006), *quoting Mayo Arcade Corp. v. Bonded Floors Co.*, 240 Ky. 212, 41 S.W.2d 1104, 1109 (1931). The case cited most frequently in Kentucky for this point of law is one of our earliest. In *Moore v. Turbeville*, 2 Bibb 602, 5 Ky. 602, 1812 WL 644, 5 Am.Dec. 642 (Ky. 1812), our high court said:

> [W]here an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim "*vigilantibus non dormientibus jura subveniunt*," emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law.

Moore, 5 Ky. at 604.

In the two and one-half years of substantial discovery that occurred in this case, the Hofmeisters elected never to seek discovery of the extent of Dasher's insurance as authorized by CR 26.02(2). We believe use of CR 26.02(2) perfectly illustrates the kind of "ordinary vigilance and attention" expected by this rule of law. On May 22, 2000, the Hofmeisters' attorney was "a little surprised" by Murner's representation of insurance.[20] This uneasiness could have been eliminated if only the Hofmeisters had asked for insurance information when they prepared and served discovery requests nine days later on May 31, 2000.[21] Failing to exercise that ordinary diligence at any time throughout the litigation, the Hofmeisters can claim no more than that theirs was the kind of "blind reliance" deemed unsatisfactory in *Harralson, supra*.

In response, the Hofmeisters cite *Meyers v. Monroe*, 312 Ky. 110, 226 S.W.2d 782 (1950), for the proposition that CIC "cannot escape on the ground that the complaining party should not have trusted him[.]" *Id.* at 785. They fail to note that *Bankers Bond Co. v. Cox*, 263 Ky. 481, 92 S.W.2d 790 (1936), relied upon as authority in *Meyers*, applies this concept only "where the one claiming to be deceived is not shown to have at hand any reasonably available means of determining the truth of representations made to him[.]" *Id.* at 792. Clearly, the Hofmeisters do not fall in the category of claimants contemplated by *Meyers*. Proof of the fifth element of fraudulent misrepresentation – reasonable reliance – is therefore entirely lacking.

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[20] Mr. Hofmeister testified that he too was surprised and, in response to Golden's examination at trial said, "I asked you to ask them about that [excess coverage] because I was surprised that they didn't have more insurance."

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

There is yet a third element of fraudulent misrepresentation that entirely lacks proof in this case. There is no evidence that Murner knew the statement to be false when made on May 18, 2000. The Hofmeisters offered no evidence at all to refute Murner's testimony that he did not know of the existence of the excess insurance until later.[22] The earliest documentary evidence of the excess policy is dated June 9, 2000. Therefore, no evidence supports the third element of fraudulent misrepresentation.

While CIC presents arguments regarding each of the six elements of fraudulent misrepresentation, our examination is sufficient to convince us that the Hofmeisters could not and did not establish that claim. The trial court erred by denying CIC's motion for a directed verdict on the Hofmeisters' claim of fraud.

E. Whether the Trial Court Erred in Failing to Direct a Verdict in Favor of CIC on the Claim of Violations of the UCSPA

The Hofmeisters alleged violations of several sections of the UCSPA. Although the jury was instructed on four of those sections, the allegations boil down to a claim that CIC did not promptly offer to pay the Hofmeisters what their claims were reasonably worth. *See, Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 454 (Ky. 1997).

[22] The Hofmeisters argue in their brief that Murner admitted that he kept the excess carrier "in the loop the entire time." They suggest this statement means Murner knew of the excess policy from the time he was engaged as Dasher's attorney. But this general statement, made as it was in a general context (and, in fact, denied by the excess carrier), is entirely consistent with Murner's specific testimony on this specific question. The general statement certainly is not clear and convincing evidence that would convince a reasonable person that Murner's specific testimony was a fabrication.

This case exemplifies one of our Supreme Court's warnings about UCSPA claims – the fact "that the statute is not specifically designed to accommodate third party claims[[23]] . . . makes trial nearly impossible and appellate review most difficult." *Glass* at 460 (Lambert, C.J., dissenting). However, we have some clear guidance in *Wittmer v. Jones*, 864 S.W.2d 885 (Ky. 1993) – "the leading case on 'bad faith' in Kentucky." *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). Applying *Wittmer,* we have no difficulty concluding that the trial court erred in failing to grant a directed verdict in favor of CIC.

Justice Leibson's opinion in *Wittmer* was "the culmination of the development of 'bad faith' liability in our jurisprudence." *Id.* Writing for a unanimous Court, "Justice Leibson gathered all of the bad faith liability theories under one roof and established a test applicable to all bad faith actions, whether brought by a first-party claimant or a third-party claimant, and whether premised upon common law theory or a statutory violation." *Id.* at 100.

> We start with the proposition that there is no such thing as a "technical violation" of the UCSPA, at least in the

[23] In fact, KRS 304.12-230 was never intended by its creators to establish any private right of action at all. The statute "is an almost verbatim adoption of the 1971 version of the model act formulated by the National Association of Insurance Commissioners (NAIC)[.]" *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 96 (Ky. 2000). It was intended by its drafters only as regulatory measure to assist state insurance administrators. NAIC emphasized the "original intent" of this model act when it issued this warning to legislatures: "A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action." NAIC Model Law, Regulations and Guidelines, Unfair Claims Settlement Practices Act, NAIC 900-1, Section 1. Purpose, Drafting Note (January 2008); *see also* NAIC 900-9 (January 2008), citing Proceedings of the NAIC, 1989 Proc. II 204. As a consequence, Kentucky is in that distinct minority of states that recognizes a private right of action for violations of the UCSPA. *See Hovet v. Allstate Ins. Co.*, 135 N.M. 397, 89 P.3d 69, 76-77 (2004)(allowing private right of action but requiring first that "there has been a judicial determination of the insured's fault and the amount of damages awarded in the underlying negligence action.").

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 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.

Wittmer at 890 (quotation marks and citation omitted).

As it is the centerpiece of CIC's argument, we focus on the second element – the lack of a reasonable legal or factual basis for denying the claim. Considering all of the evidence in a light most favorable to the Hofmeisters, we conclude that CIC did have a reasonable basis for denying the Hofmeisters' claims. Those claims could not go forward against Dasher without establishing that Dasher was vicariously liable for Clark's acknowledged negligence. Vicarious liability depended upon whether Clark was acting in the scope of his employment at the time of the accident. Despite the Hofmeisters' insistence otherwise, the answer to that question was not clear.

Until the Hofmeisters filed their complaint nearly a year after the accident, no one exhibited any conviction that Clark was acting in the scope of his employment with Dasher. He had completed his work and gone home. He was in his own vehicle, not Dasher's. The Hofmeisters' entire focus was on Clark and *his* automobile liability insurer. Not even Clark was sure he was working for Dasher at the time of the accident. The record before us does not reflect that he ever filed a workers' compensation claim. And when the adjuster for Hofmeister's insurer asked Clark, "Were you working on the job at the time [of the accident] or were you just on personal business?" Clark responded, "That's uh . . . that's debatable."

After the Hofmeisters filed suit naming Dasher as a co-defendant, their attorney insisted Dasher's liability was clear and it was bad faith to deny it. However, it took two years before Dasher, Clark and the Hofmeisters each filed summary judgment motions asking the trial court to determine vicarious liability. Dasher's motion, and Dasher's opposition to the Hofmeisters' and Clark's separate motions, presented legal and factual argument that Clark was not acting in the scope of his employment.[24]

Although the trial court eventually concluded that Clark was acting within the scope of his employment, Clark never accounted for, nor did the trial court appear to consider, the fact that, in a geographic context, the accident occurred at a point that took Clark substantially away from the purported purpose for the trip – to return Dasher's keys.[25] In the language of the early common law,

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[24] Dasher's filing of these pleadings is litigation conduct. Litigation conduct amounting to bad faith can be sanctioned by the trial court pursuant to the civil rules. See the discussion, *infra* at Section II.F.1., of *Knotts v. Zurich Ins. Co*., 197 S.W.3d 512 (Ky. 2006) distinguishing litigation conduct and settlement conduct.

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

this is an example of a "frolic and detour." *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 776, 118 S.Ct. 2275, 2778, 141 L.Ed.2d 662 (1998)(referring to "the classic 'frolic and detour' for which an employer has no vicarious liability").

Accepting the trial court's determination that Clark left his home in pursuit of Dasher's business, the law is clear that to remain in the scope of employment, he must not have deviated from its pursuit. *Sharp v. Faulkner*, 292 Ky. 179, 166 S.W.2d 62, 63 (1942). But because Clark turned off that direct route and headed in the opposite direction, toward Georgetown where the accident occurred, there is a genuine question whether he was still on his employer's business at the time of the accident. In *Dennes v. Jefferson Meat Market,* 228 Ky. 164, 14 S.W.2d 408 (1929), our highest court considered such deviation in the context of the employee's use of his employer's vehicle. Where the employee is using his own vehicle, we believe *Dennes* must apply at least equally so.

> Where deviation from the course of his employment by the servant is slight and not unusual, the court may, as a matter of law, find that the servant was still executing his master's business. On the other hand, if the deviation is very marked and unusual the court may determine that the servant was not on the master's business at all but on his own. Cases falling between these extremes will be regarded as involving a question of fact for the determination of the jury.

Dennes at 409; *see also, Wyatt v. Hodson*, 210 Ky. 47, 275 S.W. 15, 16 (1925)(master not liable for employee's auto accident where employee deviated 4-1/2 blocks from direct route of master's business). As our high court said in *Wyatt*, this "is a case of going beyond the route required in the service of the master, and in doing this he was acting for himself and not in the course of his employment." *Id.*; *see also, Winslow v. Everson*, 221 Ky. 430, 298 S.W. 1084, 1085 (1927). As held in *Model Laundry v. Collins,* 241 Ky. 191, 43 S.W.2d 693 (1931), Clark's personal venture would not have terminated nor would his service for Dasher have resumed until he returned to the point of departure from the business route – Interstate 64 – a point he never reached. *Id.* at 693.

Because the underlying accident case was settled, the trial court's decision regarding scope of employment was never challenged. However, whether the trial judge was correct is not the issue – the issue is whether Dasher's defense was "debatable on the law or the facts." *Wittmer* at 890. We are satisfied that the "defense was not only fairly debatable, it had substantial merit." *Bentley v. Bentley*, 172 S.W.3d 375, 378 (Ky. 2005)(citation omitted). Since we conclude Dasher's defense was fairly debatable, we must also conclude that CIC's denial of the Hofmeisters' claim was reasonable. Therefore, under *Wittmer*'s second element, there can be no UCSPA violation.

With regard to allegations that four individual sections of the UCSPA were violated, CIC specifically argues that the trial court should not have let the case go to the jury. We agree that the trial court turned the case over to the jury for resolution of an issue that was uniquely the trial court's alone to make.

Whether a tort has occurred under KRS 304.12-230 is precisely what *Wittmer* requires the trial court, not the jury, to decide. The "threshold problem" is to determine "whether the dispute is merely contractual or whether there are tortious elements justifying an award of punitive damages[.]" *Wittmer* at 890. To do that, the trial court *must* weigh in on the question of punitive damages by answering "whether the proof is sufficient for the jury to conclude that there was conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* (internal quotation marks omitted). The order denying the Hofmeisters' summary judgment motion shows the trial court did not make such a finding.

The Hofmeisters specifically sought the trial court's determination that CIC had violated four sections of KRS 304.12-230. The court declined

> to find that the conduct of Defendant [CIC] was "outrageous because of the defendant's evil motive or his reckless indifference to the rights of others." Wittmer v. Jones, 864 S.W.2d 885, 890 (1993). Such a determination of evil intent or indifference . . . is within the province of the jury, but not within the province of this Court on a motion for summary judgment.

Trial Court's Opinion and Order, May 17, 2004.[26] The trial court's mistaken belief that this question was for the jury does not take away from the fact that, when presented with the question, it declined to find evidence of tortious conduct, outrageous behavior, evil motive or reckless indifference to the Hofmeisters' rights. Considering the threshold, this is not surprising.

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[26] However, in its Opinion and Order denying CIC's post-trial motions, the trial court stated that "regarding the claim of statutory bad faith there was sufficient evidence of bad faith to present the question of punitive damages to the jury." Opinion and Order, October 25, 2004, p.6. Much of that evidence, however, was of litigation conduct admitted over CIC's objection and contrary to the subsequent holding in *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 522 (Ky. 2006).

> The evidentiary threshold is high indeed. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. Furthermore, the conduct must be driven by evil motives or by an indifference to its insureds' rights. Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury.

United Services Auto. Ass'n v. Bult, 183 S.W.3d 181, 186 (Ky.App. 2003). While *Bult* is a first-party case, there is no justification for lowering the standard for third-party claims deriving as they must from the first-party's contract of insurance. Our Supreme Court has long embraced this approach in both first-party and third-party claims under the common law where it was recognized that bad faith determinations present "*troublesome, or even impossible, question[s] for the jury* [which] is just not equipped to evaluate [t]he issue of 'bad faith'[.]" *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 499-500 (Ky. 1976)(emphasis in original). We believe *Wittmer* simply extended to tort actions under KRS 304.12-230 the same requirement still existing under the common law that "[t]he issue of 'bad faith' should be decided by the trial court." *Id.* at 500; *see*, *Ruby Lumber Co. v. K.V. Johnson Co.*, 299 Ky. 811, 187 S.W.2d 449 (1945)("until repealed or altered by the Legislature . . . [w]e are not at liberty to ignore the common law totally [and] the intention to abrogate the common law is not presumed.").

A review of the evidence presented reveals a complete absence of the type of conduct required to clear the evidentiary threshold to send this case to a jury on a claim that CIC violated the UCSPA. The trial court's May 17, 2004, Opinion and Order implicitly supports this conclusion.

Our opinion is not changed, but bolstered, by our examination of the individual sections of the UCSPA upon which the jury was instructed – KRS 304.12-230(1), (6), (13), and (14).

Section (1) prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." All previous discussion regarding the Hofmeisters' claim of fraudulent misrepresentation applies as well to this claim. In addition, this section addresses "coverages" – a term used through the Insurance Code, KRS Chapter 304. Though not defined by statute or Kentucky caselaw, "coverages" is a term that identifies "the amount and extent of risk *contractually* assumed by an insurer." *Illinois Farmers Ins. Co. v. Tabor*, 642 N.E.2d 159, 163 (Ill.App.1994), *citing* BLACK'S LAW DICTIONARY 365 (6th ed. 1990)(emphasis supplied). It is an abbreviated means by which we define what the insured has contracted for in exchange for his premium. "Coverages at issue" therefore refers to an insured's[27] contractual dispute with his insurer, and not an accident victim's tort dispute with the insured-tortfeasor, or an accident victim's dispute with the insurer (unless as the assignee of the insured's rights under the contract he stood in the insured's shoes).

[27] Of course, for purposes of defining the class of persons protected by the KRS 304.12-230(1), this would include both first-party insureds and third-party claimants to whom the insured assigned (as under common law) his claim against the insurer. A close reading of *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988) indicates that, consistent with common law bad faith, Reeder was an assignee of the insureds' (the Hamptons') contractual rights. This is the only explanation for the Supreme Court's statement that the case involved "a *contractual* dispute over the amount of damages[.]" *Id.* at 118 (emphasis supplied). Unless the Hamptons assigned their contractual rights to Reeder, Reeder could have had no contractual right at all *vis-à-vis* the insurer.

Under section (6), an insurer violates the UCSPA by "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]" At least with regard to third-party claims, we believe the *Wittmer* standards encompass this provision. As we just described, *supra*, the requirement that liability be reasonably clear was not met. Furthermore, we have yet to mention Golden's unreasonable demand that Dasher, and CIC, should need nothing more as proof of Mr. Hofmeister's $5,000,000-loss than his partially self-determined tax returns. Again, we turn to *Wittmer*, with some modifications applicable to this case.

> Although an insurer is under a duty to promptly investigate and pay claims where it has no reasonable grounds to resist in good faith, neither this duty nor any provision of the UCSPA requires the insurer to assume responsibility to investigate the amount of the claimant's loss for the claimant. The insurer'[s] legal responsibility is limited to payment upon proof of loss. The only proofs presented to [CIC] were the [largely] unsubstantiated amounts stated in the demand letter from [Hofmeister's] counsel. This letter provided neither supporting documents nor reference to reliable sources.

Wittmer at 891-92. Under these circumstances, the June 22, 2000, settlement offer can only be rationally viewed as a good faith offer. Despite a reasonable belief that Dasher may have no liability whatsoever, CIC authorized Dasher's use of the equivalent of $259,000 of its $1,000,000-policy to settle all but the lost income portion of the Hofmeisters' demands. That offer was rejected. Most significantly, the Hofmeisters withdrew their $1,000,000-offer, never to present it again.

Instead, they chose to litigate, making no further settlement demands.[28] We cannot find in the record any evidence that would have justified the trial court in allowing the jury to consider whether CIC violated KRS 304.12-230(6).

Section (13) of the UCSPA allows a private right of action against an insurer for "[f]ailing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]" Again, liability was not clear. Even if it had been, the Hofmeisters' claims were not claims under multiple portions of Dasher's insurance policy; they all arose under the same portion – Section II, Liability Coverage. Like KRS 304.12-230(1), the class of persons protected by this section are first-party insureds and third-party assignees of the first-party's rights.

Section (14) makes an insurer liable for "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement[.]" This is clearly another coverage issue that plainly refers to first-party claims. Still, logic requires that it fail for additional reasons. The Hofmeisters' underlying tort claim was not against CIC but against Dasher. The bases for denial of that tort claim for vicarious liability were fully set out in Dasher's answer and discovery responses. Any duty we can possibly read into section (14) would have required CIC to simply repeat Dasher's defenses. The law

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

will not require such a useless exercise. *Blackerby v. Monarch Equipment*, 259 S.W.2d 683, 686 (Ky. 1953). But if somehow we concluded CIC did breach this section, we fail to see how the breach could cause any injury. It would be a mere "technical violation" for which no relief will be granted. *Wittmer* at 890.

For all of the foregoing reasons, we believe the trial court committed reversible error when it failed to direct a verdict in favor of CIC on the claims that it violated the UCSPA.

F. CIC's Remaining Arguments for Reversing the Verdict and Judgment

Consideration of the remaining claims of error is not necessary to determine CIC's liability. However, to understand the role of passion or prejudice in this jury's verdict, additional consideration is appropriate.

In particular, our consideration of three of CIC's arguments reveals aspects of that role. First, the trial court's denial of CIC's motion to exclude evidence of litigation conduct resulted in the jury's consideration of evidence deemed inadmissible both by *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), and the Court of Appeals opinion it reversed. Second, the conduct of the Hofmeisters' attorney was considered "improper" by the trial court, but not so improper as to justify a new trial. That conduct, however, appears calculated to, and we believe did, have the effect of arousing the passion or prejudice of the jury. Third, while proof of the Hofmeisters' substantial reversal of economic fortune is undeniable, our examination of the record reveals nothing more than bold speculation that the reversal of fortune was caused by CIC's conduct.

We neither presume in any particular case, nor deny the proposition in general, that there is "a prejudice which juries frequently apply against insurance companies. Our courts have long been aware of this prejudice, as exemplified by our decisions in personal injury cases where the element of insurance has been improperly injected." *Aetna Freight Lines, Inc. v. R. C. Tway Co*., 298 S.W.2d 293, 296 (Ky. 1957). We cannot quantify such prejudice in any case. But, in any degree, such an atmosphere combined with the other factors present in this case is entirely conducive to the creation of a "perfect storm" – a verdict and judgment so palpably and flagrantly against the evidence as to indicate it was the product of passion or prejudice.

1. Whether Litigation Conduct Is Actionable Under the UCSPA

Following the Supreme Court's rendition of *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512 (Ky. 2006), both parties supplemented their briefs with additional authority.[29] *Knotts* reversed the Court of Appeals opinion in *Knotts v. Zurich Ins. Co.*, 2002-CA-001846 (Feb. 6, 2004), that no post-litigation conduct by an insurance company can be the basis of a UCSPA claim. However, in reversing the Court of Appeals, the Supreme Court reopened the door only in the slightest degree. Litigation conduct was held inadmissible by both courts.

The Supreme Court identified "a distinguishing factor between the insurer's settlement behavior during litigation and its other litigation conduct." *Id.* at 523.

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

> We are confident that the remedies provided by the Rules of Civil Procedure for any wrongdoing that may occur within the context of the litigation itself render unnecessary the introduction of evidence of litigation conduct.

Id. at 522. Attorneys, and even parties,

> are subject to direct sanction under the Civil Rules for any improper conduct. Though it goes without saying, we also note that those attorneys have significant duties under the Rules of Professional Responsibility, which allow for further sanctions for unethical behavior. Thus, we think the better approach is an absolute prohibition on the introduction of such evidence in actions brought under KRS 304.12-230.

Id. This has been referred to as "*Knotts*'*s* . . . litmus test for inadmissible litigation conduct[.]" *Rawe v. Liberty Mut. Fire Ins. Co.,* 462 F.3d 521, 535 (6th Cir.2006)("bad litigation conduct that the Rules of Civil Procedure adequately remedy [is] inadmissible to prove bad faith.")(applying Kentucky law).

The trial court below did not have the benefit of *Knotts*'*s* specific analysis but did have CIC's general argument and objection substantially to the same effect. Nevertheless, over CIC's objection, Golden was permitted to admit evidence and to argue the propriety of litigation tactics, including but not limited to: the timing and sequence of discovery; whether it was proper to file a third-party complaint against Clark before taking his deposition; the assertion of subrogation and indemnification rights; the decision not to file a declaration of rights action to determine whether the insurance policy covered Clark; and whether Murner should have subpoenaed documents from the Hofmeisters rather than using other more traditional means of obtaining information from adverse parties.

In *Knotts*, the Supreme Court considered it calamity to "permit the jury to pass judgment on the defense counsel's trial tactics and to premise a finding of bad faith on counsel's conduct" stating that it "places an unfair burden on the insurer's counsel, potentially inhibiting the defense of the insurer." *Id.* at 523. In fact, "given the chilling effect that allowing introduction of evidence of litigation conduct would have on the exercise of an insurance company's legitimate litigation rights, any exception threatens to turn our adversarial system on its head." *Id.* at 522. *Knotts* expresses the fear that a jury, "with the assistance of hindsight, and without the assistance of insight into litigation techniques, could second guess the defendant's rationales for taking a particular course." *Id.* at 520-21. The case before us represents the coming to fruition of that fear.

2. Whether Conduct of Hofmeisters' Counsel Required a New Trial

CIC moved the trial court for a new trial based on the misconduct of the Hofmeisters' counsel. *See*, CR 59.01(d). The trial court "agree[d] that Plaintiffs' attorney engaged in some improper behavior" but held that its admonition of both attorney and jury was sufficient to cure the impropriety.

Because Golden was a witness to much of CIC's alleged actionable conduct, his role as advocate was complicated, albeit by his own choosing. Often when Golden was cross-examining Murner regarding oral communications to which only they were privy, the challenging tone of the question itself bore the implicit counter-testimony to Murner's response. Golden's interrogation of Murner regarding his first disclosure of the excess coverage is an example.

> Golden: [T]he first time the excess carrier was brought up was back there when Melissa Wilson was on the phone [at the October 14, 2002, transcribed settlement conference] isn't that true?
>
> Murner: No, sir.

Of course, only Murner's answer is admissible evidence, but without taking the witness stand, Golden effectively represented to the jury that he knew nothing of the excess policy until that moment.[30]

We need not question the trial court's ruling on Golden's conduct. However, we cannot escape the belief that the jury's verdict was affected by the cumulative effect of his "improper behavior."

3. Whether the Hofmeisters Proved Any Economic Loss Was Caused by CIC

CIC's argument that there was no proof of a causal connection between its conduct and the Hofmeisters' economic woes is based on *Roadway Exp., Inc. v. Don Stohlman & Associates, Inc.*, 436 S.W.2d 63 (Ky. 1968).

> The test of whether there can be a recovery for loss of anticipated revenues or profits is . . . whether the cause of the damage or injury can with reasonable certainty be

[30] There are several instances of Golden stating a fact in his question of Murner for which Golden presented no evidence, each of which Murner denied: "Mr. Risley . . . talked about me withdrawing our demand for a million. I reinstated that demand right after that;" "I could have gotten a hundred million dollar verdict against those two young men [Dasher's principals];" "[Y]ou and I went back to that jury room right there, you said you were going to pay a million and I accepted;" and "[I] never agreed to release Fireman's Fund."

> attributed to the breach of duty or wrongful act of the defendant. . . . But no recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from other sources.

Id. at 65.

The Hofmeisters claim the causal connection is obvious and readily revealed in their theory of damages. Their theory is as follows:

> (1) CIC misrepresented that Dasher had only $1,000,000 in insurance coverage;
>
> (2) In fact, the CIC and Fireman's Fund policies combined for a total of $6,000,000 in coverage;
>
> (3) If both insurers had tendered policy limits in June 2000, the Hofmeisters would have netted $4,000,000 after attorney fees;
>
> (4) Mr. Hofmeister testified that if he had received a net $4,000,000 in June 2000, "it would have made a huge difference" that would have allowed him "to work out plans with different companies . . . to go out and buy a whole series of those bonds because they were trading on the open market at a huge discount" and he could have made "[r]oughly a hundred million dollars."

The Hofmeisters, not having their own expert, claim CIC's economic expert, James O. King, Jr., supported this theory and the testimony. Our examination of the actual exchange between Golden and Mr. King makes us dubious.

> Golden: And you can't tell this jury, Mr. King, that if George Hofmeister was paid $4 million in cash in June of 2000, that it wouldn't have made a difference.

King:	$4 million. I mean, I don't know, that's a sizeable amount of money and it might have enabled someone to keep a business going for a while, I don't know.
Golden:	All right, the fact is you don't know, do you?
King.	No.

In the final analysis, the theory is both factually and logically flawed.

The Hofmeisters never demanded $6,000,000 (or even the net figure of $4,000,000) in June 2000 or at any time.[31] To suggest they were entitled to have CIC and Fireman's Fund write checks to the Hofmeisters totaling $6,000,000 based on Golden's unsubstantiated demand of only $1,500,000 is both factually unsupported and completely illogical.

Mr. Hofmeister's testimony that he could have turned $4,000,000 in "stake" money into $100,000,000 is the unadulterated epitome of speculation. Furthermore, there is reason to question the veracity of that testimony as the record shows Hofmeister borrowed $6,000,000 in January 2000 from a friend and business associate, Richard Burkhart, and Hofmeister's businesses still failed.

Nothing more than speculation supports the allegation that CIC's conduct caused the Hofmeisters' economic losses.

[31] Though it went without objection, Golden's question to King impermissibly assumed this fact was in evidence. Our Supreme Court held that "a connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A [party] is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997)(in a criminal context but citing Kentucky Rule of Evidence 403).

Regardless, we have identified sufficient factors to convince us that the jury's verdict was the product either of passion or prejudice or a combination of both. For the several reasons set forth above, the judgment against CIC must be reversed.

III. *Hofmeister v. Cincinnati Insurance Company*, No. 2004-CA-002362-MR

The Hofmeisters' appeal challenges only the trial court's reduction of the punitive damages award from $18,405,500 to $10,000,000. In view of our decision that CIC was entitled to directed verdicts on the fraudulent misrepresentation claim and the claim of violation of the UCSPA, Appeal Number 2004-CA-002362-MR must be dismissed as moot.

IV. Conclusion

Considering the law as applied to the undisputed facts, we must conclude that the Scott Circuit Court's denial of Cincinnati Insurance Company's motions for directed verdict and for judgment notwithstanding the verdict as to the claim of fraudulent misrepresentation and as to the claim that it violated KRS 304.12-230 was clearly erroneous. For the foregoing reasons, the judgment of the Scott Circuit Court in Appeal Number 2004-CA-002296-MR is reversed.

KNOPF, JUDGE, CONCURS.

KELLER, JUDGE, CONCURS IN RESULT ONLY.

ORAL ARGUMENT AND BRIEFS FOR APPELLANT AND CROSS-APPELLEE:

John T. Ballantine
Louisville, Kentucky

Ronald L. Green
Lexington, Kentucky

BRIEFS FOR APPELLANT AND CROSS-APPELLEE:

Michael D. Risley
Louisville, Kentucky

ORAL ARGUMENT AND BRIEFS FOR APPELLEES AND CROSS-APPELLANTS:

J. Dale Golden
Lexington, Kentucky

AMICUS CURIAE BRIEF FOR THE KENTUCKY DEFENSE COUNSEL:

Gregg E. Thornton
Luke A. Wingfield
Lexington, Kentucky