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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001252-MR

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

v.

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

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

OPINION
AFFIRMING

** ** ** ** **

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

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

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

After careful consideration, we affirm.

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

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

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

The foundation of the modern common-law bad faith action was laid out by the Kentucky Supreme Court in *Wittmer*. The Court set forth three elements necessary to sustain a cause of action for bad faith against an insurer: (1) the insurer must be obligated to pay the insured's claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. *Id*. at 890. The failure to show any of these elements eliminates the bad faith claim as a matter of law. *Id*.

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

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

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

I. Arch and National Union's Actions

1. Arch

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

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

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

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

2. National Union

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

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

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

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

Discovery

1. Arch

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

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

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

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

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

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

2. National Union

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

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

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

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

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

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

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

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

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

II. Bad Faith Claims

1. Arch

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

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

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

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

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

2. National Union

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

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

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

3. Wittmer test

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

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

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

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

The evidentiary threshold is high for bad faith claims. Evidence must demonstrate that an insurer has engaged in outrageous conduct toward its insured. *Holloway*, 497 S.W.3d at 738. Absent such evidence of egregious behavior, the tort claim predicated on bad faith may not proceed to a jury. *United Services Auto. Ass'n v. Bult*, 183 S.W.3d 181, 186 (Ky. App. 2003), *as modified* (June 27, 2003). We now turn to the elements for a bad faith claim:

a.) Duty to pay the claim

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

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

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

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

b.) Beyond dispute

Under the KUCSPA, liability is imposed for failing to make good faith efforts to "effectuate prompt, fair and equitable settlements of claims in which [insured's] liability has become reasonably clear[.]" KRS 304.12-230(6). "[R]easonably clear" has been interpreted by the Supreme Court as "beyond dispute[.]" *Coomer v. Phelps*, 172 S.W.3d 389, 395 (Ky. 2005). Indeed, the statute only requires that an insurer make a good faith attempt to settle any claim, for

which liability is beyond dispute, for a reasonable amount. *Id*. With this proviso in mind, we review the issue of liability in this matter.

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

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

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

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

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

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

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

c.) Damages and/or outrageous conduct

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

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

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

Lastly, we direct our attention to the specific claims by Mosley of unfair leveraging, global offers, and creating a conflict of interest. Mosley suggests that the insurance carriers violated KRS 304.12-230(13). While it is true that under KUCSPA: "[f]ailing to promptly settle claims, where liability has become reasonably clear, under one (1) portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[,]" is considered an unfair settlement practice, that is not what happened in this case. KRS 304.12-230. Arch did not leverage the payment of a claim under one coverage to obtain a favorable settlement of a second claim under a different

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

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

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

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

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

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

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

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

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

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

d.) Mediation

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

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

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

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

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

Further, courts recognize the importance of confidentiality in mediation. For instance, the Sixth Circuit Court of Appeals noted that, "[t]he integrity of the mediation process depends on the confidentiality of discussions and offers made therein." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979 (6th Cir. 2003) (citation omitted). The bad faith and civil conspiracy claims proffered by Mosley are based entirely on the confidential settlement offers and conduct during mediation sessions.

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

e.) Civil Conspiracy

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

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

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

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

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

CONCLUSION

It is indisputable that an insurance carrier that does not act in good faith to achieve fair and equitable settlements of claims where liability is reasonably clear violates KUCSPA. Nevertheless, this Act does not mandate that an insurer's proposed settlement amount must provide the amount that a plaintiff claims for compensation. *Phelps*, 172 S.W.3d at 395. As stated by the Kentucky Supreme Court, "KUCSPA only requires insurers to negotiate reasonably with respect to claims; it does not require them to acquiesce to a third party's demands." *Hollaway*, 497 S.W.3d at 739.

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

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

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

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