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# Commonwealth of Kentucky

# Court of Appeals

NO. 2008-CA-002237-MR

WESTERN LEASING, INC. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 03-CI-000512

ACORDIA OF KENTUCKY, INC. APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Western Leasing, Inc. appeals from the Jefferson Circuit Court's entry of an October 27, 2008, summary judgment order in favor of Acordia of Kentucky, Inc. That order dismissed all of Western Leasing's claims against Acordia.

At the heart of this dispute is whether Acordia is subject to any liability for the production and issuance of a certificate of insurance ("COI") to

Western Leasing's predecessor-in-interest, Senstar Finance Company, which contained affirmative misrepresentations on the face of the document. For the reasons set forth herein, we hold that affirmative misrepresentations on the face of a COI can give rise to a claim of negligent misrepresentation in Kentucky.

## I. Factual Background

Since this appeal addresses the propriety of a summary judgment decree, we will recite the facts in a light most favorable to Western Leasing. *See Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) ("The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.").

In December 1997, Centennial Resources, Inc., Senstar Finance, and Western Leasing entered into a tri-party agreement. Centennial sold heavy mining equipment to Senstar Finance, who in turn leased the equipment to Western Leasing. Western Leasing was to provide this equipment to one of Centennial's contract miners for sublease. Until such time as it was delivered to the contract miner, the equipment was to remain in the possession of Centennial. Centennial was contractually obligated to "provide security, insurance, and storage" for any equipment remaining in its possession. The agreement further required that Senstar Finance must be named as an "additional insured and loss payee" on any insurance policies obtained by Centennial.

Centennial retained possession of certain equipment until late 1999, when it was delivered to Western Leasing. During this prior period of

Centennial's possession, Centennial sought through its insurance broker, Acordia, an insurance policy for the equipment. A policy effective from August 29, 1998, through August 29, 1999, from Reliance National Insurance Company ("Reliance Insurance") was obtained. Sometime in August 1998, Western Leasing asked for proof that Centennial had obtained insurance on the equipment and that Senstar Finance had been named as an additional insured and loss payee. In response to this request, Centennial asked Acordia to deliver a COI to Senstar Finance.

On August 31, 1998, Acordia delivered a COI to Senstar Finance. The COI indicated that Centennial was the "insured," Acordia was the "producer," and Senstar Finance was the "certificate holder." This document purported to "certify" that the following policies of insurance had been issued to Centennial for the policy period indicated: (1) commercial general liability insurance from National Union Fire Insurance Company; and (2) "Equipment Floater Blanket 'All Risk'" insurance from Reliance Insurance.

The COI further reflected that "Loss Payee & Additional Insured applies to Certificate Holder [Senstar Finance] as respects attached list of Equipment." An attached list contained a listing of the equipment that was owned by Senstar Finance and leased to Western Leasing. The list indicated that the "lessee" of the equipment was "Western Leasing, Inc. (Centennial Resources)" and that the "additional insured and loss payee" for the equipment was Senstar Finance.

At the top right-hand corner of the COI was the following disclaimer:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

In explaining the purpose of a COI, Acordia's Vice President stated during a deposition that "a [COI] is an agent's warranty to an interested party that there is coverage in force."

On or about October 13, 1998, Centennial filed for Chapter 11 bankruptcy. Sometime between this filing and April 1999, several critical parts and components were removed from Senstar Finance's equipment. The removal of these parts and components drastically reduced the equipment's value.

On December 1, 1999, Western Leasing sent Acordia an insurance claim on behalf of Senstar Finance for the damage done to the equipment. Acordia responded on December 28, stating that while "our policy provides insurance coverage for these items and the additional interests of [Senstar] and [Western Leasing]," coverage was not available in this case because Centennial's employees "freely admit removing the parts from these items for repairs and rebuilds of other equipment pieces."

Thereafter, Western Leasing conducted its own investigation over a ten-month period. It concluded that Centennial employees had not "cannibalized" the equipment. On December 22, 2000, Western Leasing sent Acordia another

insurance claim on behalf of Senstar Finance. Acordia never submitted either of these claims to Reliance Insurance.

On January 25, 2000, Acordia informed Western Leasing that the August 31, 1998, COI contained several errors. First, the equipment set forth on the list attached to the COI was not actually covered under the policy disclosed on the face of the certificate.[1] According to Acordia, this equipment had been deleted from the policy in February 1998. Centennial had subsequently requested that the equipment be reinstated under the policy, but this never happened. It was also discovered that, contrary to what was reflected on the COI, the policy did not include Senstar as an "additional insured and loss payee." The COI was also false in its reporting of a "blanket" policy. Rather, the actual policy was a scheduled policy, whereby each piece of equipment needed to be listed on the policy in order to be afforded coverage.

Western Leasing subsequently purchased the damaged, uninsured equipment from Senstar Finance. Pursuant to this purchase, Senstar Finance assigned all of its rights, title, and interest in the COI, including any rights Senstar Finance might have in pursuing a claim under the COI, to Western Leasing.

On January 16, 2003, Western Leasing filed a complaint against Acordia, which was subsequently amended on August 22, 2006. As amended, the complaint asserted three contract claims, two negligence claims, an Unfair Claims Settlement Practices Act ("UCSPA") claim, a common law bad faith claim, and a

[1] According to Western Leasing, this representation was partially false. Subsequent review of the policy revealed that at least two pieces of the equipment were covered under the policy.

claim under the Kentucky Insurance Code. These eight claims were subsequently dismissed by order of summary judgment entered on October 27, 2008. An appeal to this Court now follows.

## II. Standard of Review

On appeal, Western Leasing argues that the trial court erred in summarily dismissing all of its claims against Acordia. The standard of review for summary judgment is "whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. National Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). "[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial." *Steelvest*, 807 S.W.2d. at 483. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* at 480.

Designed to be narrow and exacting so as to preserve one's right to trial by jury, summary judgment is nevertheless appropriate in cases where the nonmoving party relies on little more than "speculation and supposition" to support his claims. *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (internal citation and quotation omitted). Thus, nonmoving parties are obligated to set forth "at least some affirmative evidence showing that there is a genuine issue of material fact for trial" to withstand a properly supported motion for summary judgment. *Steelvest*, 807 S.W.2d at 482. "The party opposing summary judgment cannot rely on their

own claims or arguments without significant evidence in order to prevent a summary judgment." *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 199 (Ky. 2001).

### III. Negligent Misrepresentation

In its first assignment of error, Western Leasing argues that the trial court erred in dismissing its claims of negligence and negligent misrepresentation. The trial court addressed these claims separately in its summary judgment order. However, negligent misrepresentation is simply a subcategory of negligence. Thus, a general claim of negligence simply merges into the more specific claim of negligent misrepresentation under the facts presented here. To be sure, nearly identical arguments are utilized by both the trial court and the parties in their discussions relating to these claims. Accordingly, our discussion and holding will address negligent misrepresentation only.

In order to prevail on any negligence claim, Western Leasing was required to set forth three elements: "(1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). It is generally recognized "that summary judgments in negligence cases should be granted with extreme caution, because determination of the issue of fact of negligence depends upon application of the inexact standard of care of an ordinarily prudent man." *Payne v. B-Line Cab Co.*, 282 S.W.2d 342, 344 (Ky. 1955); *see also Dossett v. New York Min. and*

*Mfg. Co.*, 451 S.W.2d 843, 845 (Ky. 1970) and *Poe v. Rice*, 706 S.W.2d 5, 6 (Ky. App. 1986).

Citing to cases from foreign jurisdictions, the trial court ruled that Acordia owed no duty of care to Western Leasing's predecessor-in-interest, Senstar Finance,[2] in the production or issuance of the COI. Pursuant to this ruling, any negligent, or even reckless, conduct on the part of Acordia in setting forth information on the certificate was simply not actionable. *See Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd.*, 7 A.D.3d 292, 293 (N.Y. App. Div. 2004) (insurance brokers owe no duty of care to non-customers when issuing COIs); *see also Lu-An-Do, Inc. v. Kloots*, 721 N.E.2d 507, 510 (Ohio App. 1999).

The following reasons were offered in the above-referenced cases to justify their rulings: (1) the parties receiving the COI lacked privity or any contractual relationship with the insurance broker; and (2) the COIs expressly contained language stating that the certificates were for "information only" and did not "amend, extend, or alter" the coverage provided in the actual policies. *White Night Restoration*, 7 A.D.3d at 293; *Kloots*, 721 N.E.2d at 510-511.

[2] In addressing Western Leasing's contract claims, the trial court found that Western Leasing had lawfully obtained all the rights and interests of Senstar Finance for the purposes of this litigation, despite the existence of a non-assignability clause in the underlying insurance policy. No other discussion regarding this issue is contained in the summary judgment order, nor is any discussion contained in Acordia's brief regarding how Western Leasing may lawfully acquire Senstar's interest and rights in the contract claims but not the negligence claim. As adequate briefing has not been presented and Acordia has not filed a cross-claim to dispute the trial court's finding that it would allow Western Leasing to proceed "as if [Western Leasing] were Senstar," we decline to address or make any opinions as to the propriety of the trial court's ruling on this issue. Rather, we will presume, for the purposes of this opinion only, that Western Leasing may lawfully litigate any claims Senstar Finance may have under the COI.

Whether one owes another a duty of care is a question of law we review *de novo*. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Upon careful review, we agree with Western Leasing that the trial court's reliance on the foreign case law cited above was erroneous in light of contrary Kentucky authority.

As argued by Western Leasing, the recent case of *Ann Taylor, Inc. v. Heritage Ins. Svs., Inc.*, 259 S.W.3d 494 (Ky. App. 2008) sets forth the controlling law in Kentucky. In *Ann Taylor*, this Court noted that Kentucky has adopted the following cause of action for negligent misrepresentation set forth in the Restatement (Second) Of Torts § 552 (1977):

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

*Id.* at 496 (*quoting Presnell Const. Managers, Inc. v. E.H. Const., LLC*, 134 S.W.3d 575, 580 (Ky. 2004)).

As adopted in this jurisdiction, section 552 of the Second Restatement of Torts specifically states that all persons have a duty to exercise "reasonable care or competence" when they obtain or communicate information in the course of their business, profession or employment "for the guidance of others in their business transactions . . . ." *Presnell*, 134 S.W.3d at 580. Privity is not required to establish this duty. *Id.* at 582; *Ann Taylor*, 259 S.W.3d at 496.

In this case, Acordia conceded that it issued a COI directly to Senstar Finance pursuant to the request of its client, Centennial. Acordia further conceded that the purpose of this certificate was to warrant to interested parties that coverage was in force. Acordia clearly knew that Senstar Finance was an interested party and that Senstar Finance intended to utilize the COI for guidance in its business transactions. Accordingly, we hold that the trial court erred as a matter of law in ruling that Acordia did not have a duty to exercise reasonable care or competence in the communication of information on the COI that it issued directly to Senstar Finance.

Yet, establishing the existence of a duty on the part of Acordia is not sufficient to justify the reversal of the trial court's order of summary judgment

pertaining to Western Leasing's claim of negligent misrepresentation. We must further determine whether there is sufficient evidence to allow a reasonable juror to conclude that Senstar Finance "justifiably relied" on the false information supplied by Acordia. For the reasons set forth herein, we hold that such evidence exists on this record.

While plaintiffs are not required to demonstrate privity in order to maintain an action for negligent misrepresentation in Kentucky, they are required to demonstrate that they "justifiably relied" on false information resulting from a breach of the above duty. *Presnell*, 134 S.W.3d at 582 (*quoting* 2 Dan B. Dobbs, THE LAW OF TORTS § 472 (West Group 2001)); *Ann Taylor*, 259 S.W.3d at 496. Whether one's reliance was justifiable or not is a question of fact. *See Halterman v. Louisville Bridge & Iron Co.*, 280 S.W.2d 175, 177 (Ky. 1955) (whether purchaser relied upon skill and judgment of seller in buying building was a question of fact for jury); 6 Litigating Tort Cases § 68:25 (citing numerous cases from other jurisdictions).

In determining whether it was "justifiable" for a plaintiff to rely on information appearing on the face of a COI, *Ann Taylor* analyzed the presence of "disclaimer" language on the certificate. As here, the COI in *Ann Taylor* specifically stated that the certificate was being issued as a "matter of information only" and that it did not "amend, extend, or alter" the coverage set forth in the actual insurance policy. 259 S.W.3d at 497.

The significance of such disclaimer language, *Ann Taylor* directs us, is to set and guide the certificate holder's expectations in his or her use of the information provided on the certificate. *Id.* at 498. In that case, Ann Taylor entered into an agreement with a shipping company to transport its goods from Louisville, Kentucky to other warehouse facilities. *Id.* at 495. Pursuant to this agreement, the shipping company agreed to provide and carry motor cargo insurance that was acceptable to Ann Taylor for the shipments while they were in transit. *Id.* Ann Taylor requested and received a COI from the shipping company's insurance broker which reflected that the shipping company did have motor cargo insurance for the shipments in the amount required by Ann Taylor. *Id.*

Sometime after the issuance of the COI, an Ann Taylor shipment was stolen from the shipping company's truck while the driver was away from the vehicle. *Id.* When Ann Taylor made a claim with the insurer for the stolen goods, the insurer denied the claim, citing to an "unattended vehicle" exclusion in the policy. *Id.* Ann Taylor subsequently sued the insurance broker and the insurance agent, claiming that it justifiably relied on negligent misrepresentations set forth on the face of the COI. *Id.* Specifically, Ann Taylor claimed that it was materially misleading for the insurance broker and agent to fail to list the insurance policy's exclusions on the face of the document. *Id.*

In holding that it was not justifiable, as a matter of law, for Ann Taylor to rely upon the COI for a listing of all exclusions appearing in the policy, a

panel of this Court held that "[w]e agree with the circuit court that the COI clearly set forth [through its disclaimer language] that it was not a complete recitation of the exclusions and applicable provisions of the insurance policy . . . ." *Id.* at 498. This Court went on to explain that the disclaimers set forth on the COI reasonably relayed to any certificate holder that "the purpose of such certificates is more general" and that these certificates should only be relied upon to evidence "that an insurance policy has been written, and [to] set[] forth in general terms what the policy covers." *Id.* (*quoting Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006)).

After analyzing several cases from other jurisdictions in which recoveries were permitted in cases involving affirmative misrepresentations or overstatements of coverage on a COI, the *Ann Taylor* Court held that "the situation of conflicting language between a COI and a policy is not presently before this Court, and we decline to rule on this issue." *Id.* at 499-501. Unlike the facts set forth in *Ann Taylor*, Western Leasing argues that this case does present such a situation of "conflicting language" between the COI and the actual insurance policy. We agree.

This case differs from the facts set forth in *Ann Taylor* because there were affirmative misrepresentations and overstatements of coverage on the COI delivered by Acordia to Senstar Finance.[3] The parties concede that this certificate

[3] While most of the trial court's order addresses Western Leasing's claims "as if [Western Leasing] were Senstar," a portion of the trial court's order reasons that since the COI was not issued directly to Western Leasing and Western Leasing had little to no direct contact with Acordia, it was not justifiable for Western Leasing to rely on the representations made by

affirmatively misrepresented Senstar Finance as an "additional insured and loss payee" for equipment set forth on a list attached to the COI. The COI also affirmatively misrepresented that Centennial was insured under a "blanket" policy, or at the very least, that the equipment listed on the attachment was insured by the policy disclosed on the COI. The actual insurance policy conflicted with these representations to the following extent: (1) the policy did not include Senstar Finance as an "additional insured and loss payee," (2) the policy was not a "blanket" policy; and (3) the policy did not cover all of the equipment on the attached list.

As noted in *Ann Taylor*, it is a matter of first impression as to whether affirmative misrepresentations on the face of a COI can give rise to a claim of negligent misrepresentation in Kentucky. *Id.* at 500-501. The *Ann Taylor* Court set forth several cases from foreign jurisdictions holding that despite the presence of disclaimer language on the face of the COI, parties making affirmative misrepresentations on these certificates can be held liable when others suffer pecuniary loss caused by their reliance on such misrepresentations. *See St. Francis De Sales Federal Credit Union v. Sun Ins. Co. of New York*, 818 A.2d 995, 1004 (Me. 2002) (despite disclaimer language, affirmative misrepresentations appearing on the face of a COI were sufficient to give rise to a claim of fraud); *R.H. Grover,*

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Acordia on the COI issued to Senstar Finance. As set forth in the previous footnote, since no cross-appeal has been filed to address these inherent conflicts in the trial court's order nor has there been adequate briefing to address the issue, we are proceeding with the assumption that Western Leasing lawfully acquired the rights and interest of Senstar Finance for the purposes of this litigation.

*Inc. v. Flynn Ins. Co.*, 777 P.2d 338, 342 (Mont. 1989) (affirmative misrepresentations appearing on the face of a COI were sufficient to support claims of negligence); *Marlin v. Wetzel County Bd. of Educ.*, 569 S.E.2d 462, 470 (W. Va. 2002) (despite disclaimer language, affirmative misrepresentation by insurance agent on the face of a COI stating that owner was an additional insured estopped the insurer from denying coverage based on the actual terms of the policy); *City of Northglenn v. Chevron, U.S.A., Inc.*, 634 F.Supp. 217, 225 (D. Colo. 1986) (where there is conflict between the terms included on the COI and the terms of the policy, the COI's terms control); *Fagan v. John Hancock Mutual Life Ins. Co.*, 200 F.Supp. 142, 143-44 (D.C. Kan. 1961) (same).

Both the trial court and Acordia cited to a contrary conclusion set forth in the following excerpt from Russ & Thomas F. Segalla, Couch on Insurance § 242:33 (3d ed. 2008):

> Where an entity requires another to procure insurance naming it an additional insured, that party should not rely on a mere certificate of insurance, but should insist on a copy of the policy. A certificate of insurance is not part of the policy-if it states that there is coverage but the policy does not, the policy controls.

*Id.*

As to Senstar Finance's failure to request and read the actual insurance policy in this case, we find guidance in *Grigsby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W.2d 372 (Ky. 1990). In that case, the Kentucky Supreme Court held that due to the highly technical nature of fire insurance policies, an

insured justifiably relied on the assertions of his agent in the procurement of coverage and could not be held contributorially negligent for failing to read the actual policy. *Id.* at 373. Accord is also found in *Home Ins. Co. of New York v. Evans*, 201 Ky. 487, 257 S.W. 22, 24 (1923).

While this case does not involve a fire insurance policy, it similarly involves highly technical commercial insurance interests and the affirmative misrepresentations of a broker/agent in the procurement of such specialized coverage. While reading the actual policy is certainly preferred from a risk avoidance standpoint, we do not believe that failure to read the policy is an absolute bar to maintaining a negligent misrepresentation claim. If insurance brokers or agents do not intend for interested parties to rely on the direct affirmative assertions they make on certificates issued to these interested parties, then the brokers or agents should not issue such certificates. Rather, to avoid assuming any duty of competence or reasonable care, brokers and agents can simply hand over a copy of the insurance policy and instruct such parties to interpret the policy for themselves.

After careful consideration of the case law, both domestic and foreign, and the plain language of section 552 of the Second Restatement of Torts, we hold that affirmative misrepresentations on the face of a COI can give rise to a claim of negligent misrepresentation in Kentucky. As noted in *Ann Taylor*, while COIs are not intended to and should not be relied upon for a rendition of the full terms of an

insurance policy, they do serve a general purpose of evidencing the existence of an insurance policy and the general terms of what the policy covers.

If COIs cannot be relied upon for these limited purposes, then they would cease to have any legitimate use whatsoever. In light of this jurisdiction's adoption of the tort of negligent misrepresentation, we cannot sanction the issuance of documents among business professionals purporting to "certify" information that is affirmatively misrepresented or false. The production of such false information for the guidance of others in their business transactions is specifically actionable as a tort in this jurisdiction where the information is justifiably relied upon by another to his or her detriment.

In this case, when the COI is read as a whole, we do not believe its disclaimer language is sufficient to foreclose, as a matter of law, any justifiable reliance by Senstar Finance on the general terms and representations affirmatively set forth on the certificate. To be sure, the COI specifically states that it is "certifying" that the "policies of insurance listed below have been issued . . . ." Moreover, Acordia produced and created an attached list of equipment which it additionally certified was insured under the policy disclosed on the COI. As held in *Ann Taylor*, this COI's disclaimer language simply operated to relay to Senstar Finance that the certificate was "not a complete recitation of the exclusions and applicable provisions of the insurance policy . . . ." 259 S.W.3d at 498. It did not negate or render meaningless the plain and explicit representations set forth on the

face of the certificate, which Acordia knew or should have known would likely be relied upon by the certificate holder for guidance in its business transactions.

For these reasons, we hereby vacate the trial court's entry of summary judgment against Western Leasing on its claim of negligent misrepresentation and remand this matter for further proceedings in accordance with this opinion. A duty being established as a matter of law, the question remaining for trial shall be whether, based on the unique circumstances of this case, Western Leasing's predecessor-in-interest, Senstar Finance, justifiably relied upon the false information set forth on the COI issued by Acordia to its detriment.

## IV. Promissory Estoppel

Western Leasing also submits the following argument on appeal: "The trial court fundamentally misunderstood the Plaintiff's estoppel claim leading to a dismissal of all of [Western Leasing's] contract claims." In dismissing Western Leasing's estoppel claim, the trial court set forth three grounds for its ruling: (1) that Senstar Finance's reliance on the COI provided by Acordia was not reasonable; (2) that no injustice occurred in this case because Senstar Finance was paid in full by Western Leasing; and (3) since an insurance broker does not actually provide insurance coverage, a broker cannot be "estopped" from denying said coverage.

Western Leasing argues that because "reasonable reliance" may be demonstrated in this case, the trial court's ruling is erroneous. However, Western Leasing fails to address the trial court's two alternative grounds for denying

Western Leasing's contract claims. In the absence of any briefing or argument on the part of Western Leasing, we decline to conduct an independent review of the trial court's alternative determinations for error. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Accordingly, we affirm the trial court's summary dismissal of Western Leasing's contract claims.

**V. Unfair Claims Settlement Practices Act (UCSPA)**

Western Leasing next contends that the trial court erred in dismissing its UCSPA claim against Acordia. *See* Kentucky Revised Statutes (KRS) 304.12-230. After careful review of the pertinent authority, we affirm the trial court's summary dismissal of this claim.

Pursuant to *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94 (Ky. 2000), the UCSPA applies "only to persons or entities engaged in the business of insurance . . . ." *Id.* at 95. After considering the language set forth in *Davidson*, the trial court concluded that insurance brokers are not "engaged in the business of insurance" as that term is intended in the Act. We agree.

"An 'insurance broker' is one who acts as middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, and who, upon securing an order, places it with a company selected by the insured, or, in the absence of such a selection, with a company selected by himself; whereas an '[i]nsurance agent' is one who represents an insurer under an employment by it." *Travelers Fire Ins. Co. v. Bank of Louisville*, 243 S.W.2d 996, 998 (Ky. 1951) (internal quotation and citation

omitted). Generally, "in the absence of statutory authority or some special indicia of authority [an insurance] broker is the agent of the insured and not of the insurer. . . ." *J. Inmon Ins. Agency, Inc. v. Ky. Farm Bureau Mutual Ins. Co.*, 549 S.W.2d 516, 518 (Ky. 1977).

As noted in *Davidson*, insureds are not subject to the UCSPA. 25 S.W.3d at 95 (citing KRS 304.12-220). Rather, the UCSPA "was clearly intended to regulate the conduct of insurance companies." *Id.* at 96. Western Leasing concedes in its brief that Acordia was an agent for Centennial in procuring insurance on Centennial's behalf. As an agent of the insured, Acordia was neither an insurance company nor an agent of an insurance company under the facts of this case. Accordingly, Acordia was outside the scope of persons who are intended to be regulated under the UCSPA.

Language in *Davidson*, while dicta, further suggests that only persons "entering into contracts of insurance" may be considered to be engaged in the "business of insurance." *Id.* at 98. Insureds obviously enter into contracts of insurance, but they are exempt under KRS 304.12-220. We see no logical reason why insureds' agents would not also be exempt under this statute. This is especially so since insurance brokers do not actually enter into contracts of insurance, but rather, they help to procure such contracts on behalf of their principals, the insureds. Accordingly, we agree with the trial court that insurance brokers who operate as agents of the insured are not subject to regulation or liability under the UCSPA.

## VI. Other Miscellaneous Kentucky Insurance Code Claims

In its final argument, Western Leasing argues that the trial court erred in dismissing its other miscellaneous claims under the Kentucky Insurance Code (Chapter 304 of the Kentucky Revised Statutes). However, Western Leasing fails to identify any particular provisions of the substantially voluminous Insurance Code that were allegedly violated by Acordia. Rather, it broadly asserts "that the regulations enacted in support of the Kentucky Insurance Code govern brokers."

Presuming Western Leasing's assertion to be true, we fail to discern any reversible error in the absence of an alleged violation of the code. Accordingly, we reject Western Leasing's miscellaneous claims under the Kentucky Insurance Code as being without merit. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). ("An appellant's failure to discuss particular errors in his brief is the same as if no brief at all had been filed on those issues.").

## VII. Conclusion

For the reasons set forth herein, we hereby affirm the trial court's October 27, 2008, summary judgment decree except for that portion of the order which dismissed Western Leasing's claim of negligent misrepresentation. The trial court's entry of summary judgment against Western Leasing on its claim of negligent misrepresentation is hereby vacated, and this case is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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