

RENDERED: JUNE 25, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-001137-MR

JOHN GERSTAL PERKINS

APPELLANT

v.

APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE DANIEL L. BALLOU, JUDGE  
ACTION NO. 99-CI-00280

INTERSTATE FIRE AND CASUALTY  
COMPANY; MIKE RICHARDS;  
TERESA COUCH; AND  
WAYNE COUCH

APPELLEES

### OPINION AFFIRMING

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BEFORE: NICKELL AND STUMBO, JUDGES; WHITE,<sup>1</sup> SENIOR JUDGE.

WHITE, SENIOR JUDGE: John Perkins appeals from a McCreary Circuit Court summary judgment in favor of Interstate Fire and Casualty Company (Interstate).

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<sup>1</sup> Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Perkins claims that Interstate's filings and motions should not have been considered by the trial court because Interstate is not an authorized insurer in Kentucky. Perkins further claims that Teresa Couch, Wayne Couch, and Mike Richards failed to meet their burden under the summary judgment standard. After a careful review of the record and the arguments of counsel, we conclude that both claims are without merit.

This case arises from a 1997 fire that destroyed a mobile owned by John Perkins' son and daughter-in-law, David and Daisy. The Kentucky Fire Marshall's office investigated the fire and prepared a report that identified the fire as suspicious with at least nine separate points of origin. The report provided in part, "[a] hole had been punched thru [sic] the ceiling adjacent to the TV and the opening into the attic stuffed with papers, this in an attempt to allow the fire to spread rapidly into the concealed space. A similar attempt had been made in a bedroom with a better result."

While the fire was still under investigation, police were notified that Wayne Couch witnessed his grandfather, Perkins, and his uncle intentionally set fire to the mobile home. Couch later met with police and made a statement indentifying Perkins and David as the arsonists. Based upon Couch's statement and the information compiled during the fire investigation, Perkins and his son were indicted for second-degree arson. At trial, however, the charges against both

men were dismissed upon directed verdict after Couch recanted the statement he made to police.

Shortly after his acquittal, Perkins' son filed suit against Interstate to recover insurance proceeds for the damage caused by the fire. The complaint alleged that Interstate acted in bad faith and utilized unfair settlement practices. As a result of the complaint, Detective Steve Faulconer, a Kentucky State Police arson investigator, was deposed. Detective Faulconer testified that Perkins was charged with arson after Couch told police that Perkins and David set fire to the mobile home. Upon further questioning, Detective Faulconer denied that the arson investigation was opened at the request of Interstate or an agent acting on its behalf. On July 30, 1999, Perkins filed a complaint against Interstate and its agent, Mike Richards, for malicious prosecution.

Perkins' initial attempts to serve Interstate failed. However, Interstate waived process of service and, on January 26, 2007, answered Perkins' complaint. On March 13, 2009, Interstate moved for summary judgment on the grounds that Perkins' pleadings did not present a genuine issue of material fact and failed to present a valid cause of action against Interstate. Following a hearing on Interstate's motion, the trial court granted summary judgment. This appeal follows.

First, Perkins claims KRS 304.11-040 prevented the trial court from considering Interstate's filings and motions because Interstate is an unauthorized

insurer in Kentucky. Specifically, Perkins relied on KRS 304.11-040(7), which provides:

Before any unauthorized person or insurer files or causes to be filed in any pleading in any court action, suit, or proceeding or in any notice, order, pleading, or process in such administrative proceeding before the executive director instituted against such person or insurer, by services made as provided in subsections (1) to (5), inclusive, of this section such person or insurer shall either:

(a) Deposit with the clerk of the court in which such action, suit, or proceeding is pending, or with the executive director in administrative proceedings before the executive director, cash or securities, or file with such clerk or executive director a bond with good and sufficient sureties, to be approved by the clerk or executive director in an amount to be fixed by the court or executive director sufficient to secure the payment of any final judgment which may be rendered in such action or administrative proceeding.

(b) Procure a certificate of authority to transact the business of insurance in this state.

Perkins claims that Interstate failed to take either action under the above statute.

Although the statute clearly requires unauthorized insurers doing business in Kentucky to take specific steps in order to defend themselves in legal actions, the statute does not apply to Perkins' case. Perkins did not have a contractual relationship with Interstate. He did not own the property that Interstate insured. He had no claim to any coverage proceeds. Further, Perkins' lawsuit against Interstate did not involve a business practice but a malicious prosecution claim. There is no requirement that an unauthorized insurer take the steps

specified in KRS 304.11-040(7) when defending itself against a non-business claim.

Next, Perkins claims that summary judgment should not have been granted in favor of Wayne Couch, Teresa Couch, or Mike Richards because none of those parties presented any evidence. Perkins only appealed the trial court's finding of summary judgment in favor of Interstate. Any judgments concerning Wayne Couch, Teresa Couch, and Mike Richards are irrelevant to this action.

Accordingly, we affirm the McCreary Circuit Court summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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