RENDERED: SEPTEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002233-MR

MOUNTAIN CITY FORD, LLC — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 08-CI-00050

OWNERS INSURANCE COMPANY AND
AUTO-OWNERS INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Mountain City Ford (Mountain City or Mountain City Ford) appeals from a jury verdict in favor of Owners Insurance Company and Auto-Owners Insurance Company (Auto-Owners) and from the Lawrence Circuit Court's denial of its motion for a judgment notwithstanding that verdict. After

careful review of the record and the applicable law, we affirm the judgment of the Lawrence Circuit Court.

Ultimately, the issue to be resolved by this Court is whether Mountain City Ford or Auto-Owners should bear the loss for the $1,030,000.00 sum paid in settlement to the original plaintiffs for injuries, including the death of Joey Kirk. These injuries were incurred in a motor vehicle accident between a Mountain City Ford vehicle driven by Rick Gussler and another vehicle driven by Paul Justice. Auto-Owners' policy insuring Mountain City Ford was predicated upon an insurance application prepared by The Elite Agency, Inc. (Elite) and signed by Mountain City, but the policy did not list Gussler as a driver. All parties agree that Auto-Owners never knew of Gussler's existence as a driver of Mountain City vehicles, and it is undisputed that Gussler was not listed anywhere on Mountain City's application to Auto-Owners. Further, the proof at trial was undisputed that had Gussler been listed, Auto-Owners would never have issued the policy to Mountain City Ford.

Because this case concerns issues of agency and interpretation of insurance contracts, a thorough factual background is necessary to aid in understanding the relationships among the parties.

Background on Mountain City Ford

Mountain City Ford and Mountain City Chevrolet are two small dealerships in Inez, Kentucky, that are owned by James Booth; his daughter, Angela Wilson; and Craig Preece. These three individuals first purchased the Chevrolet dealership and purchased the Ford dealership a few years later. At the time of purchase, the Ford dealership was run down and performing very poorly. Craig Preece was the Chief Financial Officer (CFO) of both dealerships and was actively involved in the day-to-day management. He hired Jeremy Wellman as the general manager for both dealerships. When purchased, the dealerships had separate garage insurance policies with Universal Insurance.

Background on The Elite Insurance Agency

Elite is an independent insurance agency founded in 1989 by Jim Booth, Craig Preece, and two other investors. Mr. Preece is a licensed property and casualty insurance agent. At all pertinent times he was president of Elite and was actively involved in managing its daily operations. As of 2007, Elite had offices in seven cities in Kentucky and had some fifty-five employees. In February 2007, Elite entered into an agency contract authorizing it to write insurance contracts for Auto-Owners.

Background on Auto-Owners

Auto-Owners is a regional insurance carrier headquartered in Michigan. Auto-Owners writes property and casualty insurance as well as other lines. In 2007, Auto-Owners had a regional office in Lexington, Kentucky.

Elite and Auto-Owners

Tim Preston was the Auto-Owners marketing representative who met with Elite and signed the agency contract appointing Elite as a company agent in February 2007. He supervised the installation of Auto-Owners proprietary rating and forms software on Elite's computers and conducted a training session in Paintsville, Kentucky, for Elite. Preston explained that the premium rating was initially done by the agent, the application was completed on-line, and then a copy of the application for insurance would be printed out for the customer to sign.

Mountain City, Elite, and Auto-Owners

Mark Grim was the commercial lines manager for Elite and was an experienced insurance agent with a property and casualty license and a surplus lines broker license. He had been an insurance agent since 1979. Grim estimated that he probably completed thousands of business or commercial automobile applications.

Grim first talked with Tim Preston from Auto-Owners about Elite soliciting the insurance business of the Mountain City dealerships. He told Preston that Elite and Mountain City had common ownership. Preston testified that Auto-Owners thought common ownership was favorable and sometimes gave the insureds a discount.

Marlena Lafferty

Marlena Lafferty was a young insurance agent who worked in the Inez, Kentucky, office of Elite. When she heard that Craig Preece, as co-owner of Elite and Mountain City, had suggested that Elite try to write insurance for the Mountain City dealerships, she began gathering information for an application to CarPac, another insurance company, to compare premium prices. Ultimately, she submitted the CarPac application on October 19, 2007, for both Mountain City dealerships. Page 12A of the CarPac application was an "employee/nonemployee list." On the CarPac application, Lafferty identified all 27 dealership employees and clearly disclosed that Rick Gussler was a salesman who was "not licensed." Lafferty testified that this information came from e-mails with Mountain City Ford in the first half of October. She also testified that in a telephone conversation with Wellman, he told her both Rick Crum at the Chevrolet dealership and Rick Gussler at the Ford dealership were prohibited from driving dealership vehicles because they did not have driver's licenses.

Lafferty left Elite for another position in late October 2007. She was never asked to look at the Auto-Owners application at issue in this case, nor did anyone ever e-mail her to ask any questions about the Mountain City account.

Heather Goble, the secretary at Mountain City Ford, completed the e-mail chart of employees, which was mailed to Lafferty and Earlena Duncan at Elite on October 19, 2007. Goble did not copy general manager Wellman on that e-mail, so he did not review the list before its submission to Elite.

The Auto-Owners Application

Mr. Grim was the only person who completed the Auto-Owners application for the Mountain City dealerships. He admitted that he only had one phone call with Wellman about the dealerships' inventory but otherwise had no contact with the dealerships about the application. The list of 16 drivers he submitted to Auto-Owners came from a preliminary list supplied to him by Lafferty in August, which Grim never updated before finalizing the application to Auto-Owners in November 2007. Grim testified that he never saw Lafferty's revised page 12A of the final CarPac application that listed all 27 employees of the dealerships, their jobs, their driver's license numbers, and whether they were furnished dealership vehicles. As a result, the list of 16 drivers Grim submitted to Auto-Owners was inaccurate, compared to the information the Mountain City dealerships had supplied to Lafferty for the CarPac application. Because Lafferty left to take another job and took her laptop computer with her, Grim never saw the October 2007 e-mails between Lafferty and Mountain City Ford.

The Mountain City dealerships application was the first Grim ever submitted to Auto-Owners. He did not read Elite's Agency Contract with Auto-Owners or its underwriting guidelines before preparing and submitting the application for Mountain City. When Lafferty asked Grim if he wanted a copy of the employee list she used to complete the CarPac application, Grim told her no. He never asked to see a copy of the final CarPac application. Grim also never had any conversations with general manager Wellman or co-owner Craig Preece about

the Auto-Owners application. Instead, he simply e-mailed it to Earlena Duncan for her to print out and have Preece sign it in the Inez office.

Grim calculated the premium for Auto-Owners based on total payroll for all employees except any clerical staff who never drove dealership vehicles. At the end of the year, Auto-Owners would audit the payroll and adjust the premium up or down. Even though Grim did not know who Gussler was, Gussler's compensation was included as a salesman in the total payroll figures; therefore, Mountain City alleges on appeal that Auto-Owners did receive and did collect from Mountain City Ford the full premium for Gussler, regardless of whether he "drove" or not.

Abby Douglass

Abby Douglass testified by deposition as an out-of-state witness. Abby worked as an underwriter in the Lexington, Kentucky, underwriting office of Auto-Owners until January 2008. Immediately before the Mountain City dealerships' application, Douglass worked on another application for a Chrysler dealership in Knox County. It had a salesman who had a DUI conviction within the last three years. She testified that because the salesman was moved to a non-driving position and he signed a "do not drive" letter, her boss approved issuance of a policy for that dealership. Douglass never broached the subject of that kind of precaution with Mountain City Ford, because Elite never disclosed Gussler as a

salesman without a driver's license, even though such information was disclosed to CarPac.

Mark Grim was the only person Douglass communicated with about the Mountain City application, and then only about other coverages but not the automobile liability coverage. Douglass admitted in her deposition:

> Q: In your experience as a commercial lines underwriter, and an underwriter that's handled garage policies, if you saw or if you knew that a dealership had an employee that was unlicensed, would you assume that the employee would not be allowed to drive dealership vehicles?
>
> A: I would assume so, yes.
>
> Q: Did the Elite Agency have the authority to bind coverage?
>
> A: Yes.
>
> Q: And did the Elite Agency actually bind the garage liability and other coverage for this account?
>
> A: Yes.
>
> Q: Did Auto-Owners expect the agents, in this case the Elite Agency, to review the account to determine whether or not the account met underwriting guidelines before binding coverage?
>
> A: Yes.

Unbeknownst to Craig Preece, Grim was uninformed about both Gussler being an employee and the Eligibility Guidelines of Auto-Owners.

Lee Rademacher

Lee Rademacher was the Kentucky vice president for Auto-Owners. Elite was awarded the agency contract from Auto-Owners for Lexington and Catlettsburg by his predecessor. Rademacher met with Mark Grim of Elite and underwriter Amy Bradford in the summer of 2007 about Elite pursuing the insurance business of the dealerships for Auto-Owners. Without his approval, Elite could not have bound coverage for the dealerships because Inez was more than 50 miles outside Elite's approved "local areas" of Lexington and Catlettsburg.

Rademacher conceded that Auto-Owners expects its appointed agents to gather information in order to be able to fill out an application fully and completely. He testified that the process of gathering information for an application is within the course and scope of its appointed agents' authority.

Binding the Policy

Claudia Clawson was the head underwriter for Auto-Owners in Lexington. She confirmed that coverage for Mountain City Ford was bound by Elite as agent when Mark Grim submitted the completed application, effective as of November 9, 2007. The policy for garagekeepers liability and third party property (TPP) coverage was issued on December 11, 2007, by Auto-Owners and sent to Elite. The "Scheduled Drivers List" for the policy was issued by Auto-Owners separately on December 14, 2007. Unfortunately, this was the same day as Gussler's accident. While the list asked the insured to compare the list with its current

records and contact the agent with any changes, Mountain City Ford had no opportunity to see it before the accident.

In the underlying trial, Auto-Owners defended Mountain City Ford and Rick Gussler, but did so under a reservation of rights. Despite its misrepresentation coverage defense, Auto-Owners settled the claims for a total of $1,030,000.00 and then pursued this action to void the policy and seek reimbursement from Mountain City and Elite under theories of material misrepresentation and negligence.

Auto-Owners sought rescission and reimbursement from the dealerships for material misrepresentation because Gussler was not listed on the list of "drivers" in the application prepared by Elite. Elite knew of the existence of the unlicensed salesman and had disclosed him on an application to another insurance company, CarPac, but omitted to inform Auto-Owners of his existence. At trial, the jury found against Mountain City but found that Elite was not liable for its failure to list Gussler on the drivers list on the application to Auto-Owners. Mountain City filed a motion for judgment notwithstanding the verdict, arguing that Elite was acting as Auto-Owners' agent under Kentucky law and, thus, that the policy should not be voided *ab initio*.

The trial court denied Mountain City's motion for judgment notwithstanding the verdict, holding that Elite was acting as the agent of Mountain City or as a dual agent for both Auto-Owners and the dealerships when it submitted the application for insurance coverage. Citing *Flener v. Pac. Indem.*

Ins. Co. (*In re Miller*), 267 B.R. 785 (Bankr. W.D. Ky. 2000) (applying Kentucky law), and *State Farm Mutual Ins. Co. v. Crouch*, 706 S.W.2d 203 (Ky. App. 1986), the court held:

> The jury has made the factual finding to the effect that Richard Gussler was in fact a driver of insured vehicles. The jury has also made a finding that the omission was material to the risk, and that the Plaintiff [Owners] would not have issued the policy of insurance had that fact been known. Those facts, coupled with the extraordinarily close relationship between Mountain City Ford, LLC, and the Elite Agency, persuades the Court that Elite was acting either as the agent for Mountain City, LLC, or at the very least, was acting in the capacity as a dual agent, for both Mountain City Ford, LLC, and Auto-Owners in preparing and submitting the application for insurance, and then issuing a binder. That being the case, the inaccuracy in the application cannot be attributed to the Plaintiff and the Plaintiff is entitled to have the insurance policy rescinded *ab initio*.

On appeal, Mountain City challenges the trial court's conclusions of law in the order denying its motion for judgment notwithstanding the jury verdict. Mountain City contends as a matter of law that Elite was an agent for Auto-Owners and, therefore, all the information Mountain City provided to Elite was imputed to Auto-Owners. Therefore, Auto-Owners is estopped from claiming rescission. Alternatively, Mountain City alleges that there were serious errors in the jury instructions requiring a new trial.

We initially note that the standard of review on appeal regarding a motion for judgment notwithstanding the verdict (JNOV) is a high one for an appellant to meet. In *Peters v. Wooten*, 297 S.W.3d 55 (Ky. App. 2009), this Court

explained that a trial court cannot enter a JNOV "unless there is a complete absence of proof on a material issue in the action." *Id.* at 65. The Court then explained that a reviewing court cannot disturb a trial court's decision on a motion for a judgment notwithstanding the verdict "unless that decision is clearly erroneous." *Id.* The Court concluded, "[t]he denial of a motion for a judgment notwithstanding the verdict 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*.

We agree with Auto-Owners that the jury verdict was not flagrantly against the evidence, and the jury verdict was not reached as a result of passion or prejudice. Thus, we decline to reverse the trial court's order denying the motion for JNOV. Further, we agree with the trial court's analysis of *In re Miller* and *Crouch*, *supra*.

Miller is the most recent decision addressing, under Kentucky law, whether an insurance agency is an agent for the insured or the insurer when preparing and submitting an application, given alleged material misrepresentations in an application. In determining agency, the court first held that there is no automatic rule on agency and that no one factor is determinative. The Court declared that agency must be decided on a case by case basis. *In re Miller*, 267 B.R. at 796. The *Miller* court then pulled together longstanding Kentucky precedent and the Kentucky statutory law, also relied upon by Mountain City Ford in this case, Kentucky Revised Statutes (KRS) 304.9-020 and KRS 304.9-035 and

engaged in a two-layer agency analysis before finding that the insurance agency was acting on behalf of the insurer and not the insured. Applying the court's reasoning to the case at bar, we agree with the jury and the trial court that Elite was acting as Mountain City's agent.

In *Miller*, the Millers procured a homeowners policy from Ford Agency. The policy was issued by Pacific Indemnity Insurance Company. The Millers had never done business with the Ford Agency before, and the Millers were only casually acquainted with Steve Ford (of the Ford Agency) from church. Based upon a series of phone calls with the Millers, the Ford Agency filled out an application and bound coverage with Pacific. It was undisputed that the application contained material inaccuracies about the Millers' prior claims and prior cancellations. It was also undisputed that: 1) the Millers never signed the policy application; 2) the Millers never verified the policy application; 3) the Millers never read the policy application; and 4) the Millers were never presented with a copy of the application prior to policy issuance.

Against this factual backdrop, the court engaged in a two-layer agency analysis, first evaluating the binding process and then the issuing process. First, the Court decided that the Ford Agency was Pacific's agent for binding purposes since the Ford Agency had met the conditions of the agency contract, and the contract gave it binding authority. The court then considered KRS 304.9-020 and KRS 304.9-035 and stated that the statutes supported its decision that the Ford Agency was acting for Pacific. However, importantly for these purposes, the court

also noted that the applicability of KRS 304.9-035 was not an issue since Pacific never claimed that the Ford Agency was not acting pursuant to its contract and was not acting within the scope of its authority.

In the instant case, Mountain City Ford argues that KRS 304.9-035 mandates that Auto-Owners is liable for the acts of its alleged agent, Elite. That statutory provision states:

> Any insurer shall be liable for the acts of its agents when the agents are acting in their capacity as representatives of the insurer and are acting within the scope of their authority. Licensed individuals designated by a business entity to exercise the business entity's agent license shall be deemed agents of the insurer if the business entity holds an appointment from the insurer.

(Emphasis added). However, Auto-Owners strongly denies the applicability of KRS 304.9-035 and Mountain City's argument that Elite was acting within the scope of its authority. According to Auto-Owners, Elite was authorized to bind coverage only where Auto-Owners' underwriting guidelines were met. Elite was contractually obligated to verify that the guidelines were met before it had authority to submit the application or to bind coverage. It was undisputed at trial that Gussler disqualified Mountain City from eligibility for any liability coverage. Elite never read the guidelines and made no effort to verify compliance before binding coverage. We agree with Auto-Owners that Elite was not acting within its authority to bind coverage for a driver who was not eligible to drive company vehicles and who should have been disclosed to Auto-Owners so it could make a

fully informed decision on supplying insurance coverage to Mountain City Ford. Thus, we agree that KRS 304.9-035 is not applicable to the case at bar.

Thus, the next step in determining agency is to evaluate the policy issuance stage. The *Miller* court explained that even if an agency was the insurer's agent for binding purposes, it did not necessarily mean that it was the insurer's agent during policy issuance. In finding that the Ford Agency was still acting for Pacific in the issuance of the Millers' policy, the court emphasized how important it was that the Millers be required to sign or verify an application before being held responsible for inaccuracies in the application. The court stated, "[h]ad Pacific had in place a procedure assuring that a potential insured reviewed and authenticated the accuracy of the application…the result would have likely been different." *Id*. at 798. In other words, had Pacific required signature and verification as Auto-Owners did here, the court likely would have found for Pacific on the agency issue.

The *Miller* court then elucidated the factors which would indicate that an insurance agency was acting on behalf of the insured: that an insured signed and/or verified the policy; special pre-existing factual conditions; and/or "circumstances such as long-standing relationship between the Millers and the Ford Agency." *Id*. at 797. Auto-Owners argues that all the *Miller* factors for finding Elite was Mountain City's agent were proven at trial and should be upheld on appeal.

Again, we agree with Auto-Owners that all the *Miller* factors weigh in favor of finding that Elite was Mountain City Ford's agent. Specifically, the proof was

that Craig Preece, as CFO for Mountain City, signed and verified the application as required by Auto-Owners, and he had the full opportunity to review the application, even though he testified that he did not read the application. The evidence also demonstrated extensive special circumstances to support a finding that Elite was acting as Mountain City's agent during the application and policy issuance process. In fact, Mountain City and Elite had the long standing relationship the *Miller* court specifically mentioned—the companies shared common ownership. Given all this evidence, the trial court properly concluded that the special close relationship and circumstances between Elite and Mountain City Ford supported a finding that Elite was acting as Mountain City Ford's agent when it bound coverage through Auto-Owners.

After delineating the test for agency, the *Miller* court next examined prior Kentucky law on when applicants were responsible for inaccuracies in an application. The court first noted the early general rule in Kentucky that applicants were always responsible for any inaccuracies in an application, not the insurer, citing *Paxton v. Lincoln Income Life Ins. Co.*, 433 S.W.2d 636 (Ky. 1968). The court then noted the Kentucky courts' softening of this rule to find an applicant liable only where he signs an application. *In re Miller*, 267 B.R. at 798. The *Miller* court further cited with approval *State Farm v. Crouch*, *supra*, which involved material misrepresentations in an automobile policy application where the applicant/insured was held responsible for the inaccurate application and the

insurer was allowed to void the policy. *State Farm v. Crouch*, 706 S.W.2d at 206. Indeed, the trial court in the instant case relied upon *Crouch*, stating:

> In considering all this evidence, the Court is of the opinion that the most persuasive law is *State Farm Mutual Automobile Ins. Co v. Crouch*, *supra*, which cited KRS 304.14-110 as stating that representations in an application will not present [sic] a recovery unless, under section 3, the insurer in good faith would either not have issued the policy or not have issued at the same premium rate if the true facts had been made known as required by the insurance application. Applying that law to this case, it is clear that the application submitted to Mountain City Ford, LLC did not list Richard Gussler as a driver. The jury has made the factual finding to the effect that Richard Gussler was in fact a driver of insured vehicles. The jury has also made a finding that the omission was material to the risk, and that the Plaintiff would not have issued the policy of insurance had that fact been known. Those facts, coupled with the extraordinarily close relationship between Mountain City Ford, LLC, and the Elite Agency, persuades the Court that Elite was acting either as the agent for Mountain City Ford, LLC, or at the very least, was acting in the capacity as a dual agent, for both Mountain City Ford, LLC and Auto-Owners in preparing and submitting the application for insurance, and then issuing a binder.

Furthermore, careful examination of the insurance treatises such as *Couch on Insurance* 3d, Vol. 3 (2009) § 45:1 reveals the general rule that where an agency is "independent" (represents many insurers) as opposed to a sole agent (represents one insurer exclusively), the broker acts as an agent for the insured in the application process. *Couch* notes that the courts often use the terms "broker" and "agent" interchangeably, but that there is an important distinction in that acts of a broker are imputed to the insured versus the acts of an agent, which are

imputable to the insurer. *Id.* Finally, it explains that state statutes may be examined to establish agency, but the "statutes are not determinative of the issue." *Id*. at §45:2.

Applying *Couch* to these facts, Elite was a broker and an agent for Mountain City. Because Elite did not represent Auto-Owners exclusively and instead had relationships with fifteen different insurance carriers, it would be deemed a broker and not a sole agent for one insurer exclusively.

Again, in summation, we do not find the jury's determination that Richard Gussler was driving insured vehicles and that this information was material to the risk to be in error. Nor do we find the trial court's conclusion that Elite was acting as Mountain City's agent to be in error, given the long-standing relationship and common ownership between the two entities. Accordingly, the trial court's denial of Mountain City's motion for JNOV was appropriate.

Mountain City further argues that the trial court erred in giving Jury Instructions Nos. 2 and 3 and contends that such instructions warrant a new trial. Upon review of the record, Jury Instruction No. 2 incorporated and recited KRS 304.14-110 and its requirements, and Instruction No. 3 restated the substance of a material misrepresentation claim and was an accurate reflection of the same.

Mountain City's position is that the trial court should have incorporated extensive statutory and caselaw language in Instruction No. 2. However, while Kentucky law does allow each party an instruction on his theory of the case, it is

clear that, "Kentucky law requires that jury instructions be limited to the 'bare bones' and not include 'an abundance of detail,' but rather, provide a 'skeleton [that] may be fleshed out by counsel on closing arguments.'" *Reece v. Dixie Warehouse & Cartage Co.*, 188 S.W.3d 440, 450 (Ky. App. 2006) (citing *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431, 433 (Ky. App. 1992)). We agree with Auto-Owners that Instruction No. 2 properly followed Kentucky's approach to bare bones instructions and that had Mountain City's approach been followed, it would lead to overly lengthy instructions which a jury likely could not follow or understand.

Mountain City also argues that Instruction No. 2 was erroneous because KRS 304.14-110 on material misrepresentation contains an objective test relating to materiality as opposed to a subjective test as to what Auto-Owners would have done in issuing this policy had the truth been known. The plain language of KRS 304.14-110 and the interpretative caselaw demonstrate that Mountain City's argument is not supported by current Kentucky law, and Instruction No. 2 properly did not include an objective test. *See Progressive Speciality Ins. Co. v. Rosing*, 891 F.Supp. 378 (W.D. Ky. 1995) (court adopted a subjective test and held it is no longer relevant if the insured is an honest man, or if he did not intend to misrepresent). Accordingly, Mountain City's contention that the instruction on material misrepresentation should have incorporated language including "usual customs and practices of insurance companies acting under similar circumstances"

and a citation to *Pacific Mut. Life Ins. Co. v. Arnold*, 90 S.W.2d 44 (Ky. 1935), in support of this contention is without merit.

Considering Instruction No. 3 on common law misrepresentation, we also discern no reversible errors. Mountain City argues that Elite tendered this jury instruction on common law negligent misrepresentation under *Presnell Construction Managers, Inc. v. E.H. Construction, LLC.*, 134 S.W.3d 575 (Ky. 2004). Mountain City objected to the inclusion of the instruction, arguing that Elite had never asserted a claim against the dealerships, and Auto-Owners did not plead negligent misrepresentation against it. Thus Elite tendering the instruction was improper. In fact, Auto-Owners did include a negligence allegation in its material misrepresentation allegations against Mountain City. Auto-Owners did not tender a negligent misrepresentation jury instruction because it believed such an instruction would be cumulative. Accordingly, Auto-Owners argues that the inclusion of this jury instruction, while cumulative, was harmless error.

When considering a harmless error claim, we must determine whether the results probably would have been the same absent the error, or whether the error was "so prejudicial as to merit a new trial." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 69 (Ky. 2010) (internal citations omitted). Auto-Owners argues that in the absence of Instruction No. 3, the result would have been exactly the same. We agree. The jury had already found that Mountain City had materially misrepresented under Instruction No. 2, and this finding alone amply supported the

verdict against Mountain City. Thus, the inclusion of Instruction No. 3 was not so prejudicial as to warrant a new trial.

For all the foregoing reasons, we affirm the Lawrence Circuit Court's November 2, 2009, order denying Mountain City's motion for judgment notwithstanding the verdict and finding that Elite was Mountain City's agent. Furthermore, no error with the jury instructions warrants a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin G. Henry
Lexington, Kentucky

BRIEF FOR APPELLEES:

Peter J. Sewell
Catherine M. Sewell
Louisville, Kentucky