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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001892-MR

CHARLES ARMSTRONG, ADMINISTRATOR OF
THE ESTATE OF CRAIG ARMSTRONG — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 14-CI-00954

MARTIN CADILLAC, INC., D/B/A
MARTIN DODGE JEEP CHRYSLER,
THE TRAVELERS INDEMNITY COMPANY,
THE ESTATE OF JONATHAN ELMORE,
STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, NEWS PUBLISHING, LLC, AND
ABC BOWLING GREEN, LLC — APPELLEES

OPINION
AFFIRMING, IN PART, AND REVERSING AND REMANDING, IN PART

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Charles Armstrong, the administrator of Craig Armstrong's estate, appeals summary judgment motions entered in his wrongful death lawsuit.

Jonathan Elmore delivered newspapers to earn money. He had a contract with News Publishing, LLC ("News Publishing") to deliver the *Daily News*. On April 5, 2014, Elmore and Craig Armstrong were in the same vehicle delivering newspapers. Elmore was driving his 1996 Chevrolet Cavalier when it appears he ran a stop sign and pulled into the path of another vehicle that had the right of way. The collision killed Elmore and Armstrong. Armstrong's father, as administrator of the estate, filed wrongful death claims against multiple defendants, including the current appellees.

Following discovery, the trial court granted summary judgment in favor of multiple defendants. On December 2, 2015, and prior to trial, the remaining defendants reached an agreement, and the trial court entered an Order and Judgment as follows:

- Judgment for the Estate of Craig Armstrong against the Defendant, the Estate of Jonathan Elmore, in the sum of $1,000,000;
- No factual findings or conclusions of law regarding any issues in dispute, including liability damages;
- All dispositive motions are expressly reserved for appellate review.

A timely notice of appeal was filed. Armstrong now appeals the orders granting summary judgment in favor of the Appellees. As Appellant raises nine issues on appeal, the facts and analysis of each issue are presented separately below.

STANDARD OF REVIEW

All issues stem from orders granting summary judgment. A trial court considering the summary judgment motion must view "[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Mfg. Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Soc'y, Inc*., 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id*.

Under that review, summary judgment should only be granted "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). "'[I]mpossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS OF ISSUES

I. Who owned the 1996 Chevrolet Cavalier?

The first six issues raised by Appellant concern the ownership of the 1996 Chevrolet Cavalier that Elmore was driving when the fatal collision occurred.[1] Principally, Appellant claims Martin Cadillac, Inc. ("Martin Cadillac") is the owner of the automobile. He claims Elmore, who had purchased the automobile from DeWalt Auto Sales ("DeWalt Auto") weeks before the accident, was not legally the vehicle's owner because Martin Cadillac still maintained the vehicle's title.

Needless to say, the facts surrounding the Cavalier's ownership are not entirely straightforward. As the trial court noted, "The Cavalier Elmore was driving had a lengthy history of transfers." Its ownership is important as each owner possessed insurance from a different company. Ascertaining the owner determines which insurance company is potentially liable for damages. *See, e.g., Calhoun v. Provence*, 395 S.W.3d 476, 484 (Ky. App. 2012) ("Legend Suzuki is properly designated as the primary insured at the time of the accident.").

The Cavalier was first acquired as a trade-in by Martin Cadillac on November 30, 2013. It valued the car at $800 on the trade in. Martin Cadillac has two insurance policies through Travelers Indemnity Company ("Travelers"): a general liability policy with a $1,000,000 limit; and an umbrella policy with a $20,000,000 limit.

[1] Elmore's estate joins Appellant's argument that Martin Cadillac, Inc. is the Cavalier's owner.

A week later, on December 6, 2013, Martin Cadillac placed the Cavalier in an auction, where it sold for $600 to DeWalt Auto. The auction was conducted by Auction Broadcasting Company ("ABC"). ABC's representative sold the automobile for cash to Terrez DeWalt ("DeWalt") of DeWalt Auto. DeWalt was not required to prove he had liability insurance prior to the purchase. Instead, ABC's representative stated that Kentucky law requires dealers to maintain liability insurance. DeWalt later stated that he did have liability insurance at the time that he purchased the vehicle. Martin Cadillac never obtained written proof that DeWalt had insurance on the vehicle. In fact, it was stipulated at Joseph Henderson's deposition that Martin Cadillac "did not receive, ask for or get proof of insurance on who would ultimately purchase that vehicle through the auction house[.]" Depo., p. 34.

DeWalt Auto then took possession of the Cavalier. It sold the vehicle to Elmore for cash on January 20, 2014. DeWalt Auto required Elmore to produce written proof of insurance before Elmore took possession of the vehicle. Elmore complied. Elmore obtained a policy through Nationwide that had a $100,000 per incident and $50,000 per person policy limitation. The insurance Elmore acquired was in force on April 5, 2014, when the accident occurred.[2]

DeWalt Auto did not possess the title certificate for the vehicle when it sold the vehicle to Elmore. According to the Counterstatement of the Case provided by Martin Cadillac, the title was never transferred from Martin Cadillac

[2] Nationwide has delivered to the Warren Circuit Court Clerk the full $50,000 of its policy limitation.

to DeWalt Auto Sales or Elmore. Appellee's Brf. at 2-3. Instead, Martin Cadillac admits it assigned the title to ABC at some point. *Id*. at 3. Henderson, general manager of Martin Cadillac, stated in his deposition that Martin Cadillac delivered the title to ABC on January 24, 2014. Depo., p. 31. The trial court's order granting summary judgment noted that as of "January 2, 2014, Martin Cadillac still had title to the vehicle; shortly after that date, Martin apparently transferred the title to ABC. ABC's records indicate it received the title on March 18, 2014." Opinion, p. 2. Henderson admitted, however, that as of April 5, 2014, the title document still reflected Martin Cadillac as the vehicle's title holder. Depo., p. 31.

Reviewing the Certificate of Title that was submitted with Armstrong's motion for partial summary judgment, we note that the first dealer assignment, for Martin Cadillac, was signed and notarized on November 30, 2013. The second dealer assignment section has the transferor's signature and is dated January 14, 2014. It has no transferee's signature, nor does it have the "Seller Dealer No." nor the "Purchasing Dealer No."

At issue, then, is who owned the car – and whose insurance is potentially responsible for damages stemming from the traffic collision. The trial court found that Elmore, as the purchaser for use who provided proof of insurance prior to the vehicle's possession, was the vehicle's owner, and his insurance company was potentially responsible for damages. Appellant argues that Martin Cadillac was the vehicle's owner because it held legal title and transferred possession of the vehicle to DeWalt without obtaining proof of insurance. That

DeWalt later attempted to transfer ownership of the vehicle to Elmore is of no consequence according to Appellant, because DeWalt never possessed ownership to transfer. We thus must resolve under these facts who was the vehicle's owner.

We begin with the statutory definition of owner. A vehicle's "owner" is the "person who holds the legal title of a vehicle or a person who pursuant to a bona fide sale has received physical possession of the vehicle subject to any applicable security interest." Kentucky Revised Statutes (KRS) 186.010(7)(a). *See also* KRS 186A.345; *Nantz v. Lexington Lincoln Mercury Subaru*, 947 S.W.2d 36, 37 (Ky. 1997). That owner may trade in a car to a dealer, and the dealer may then "title by assignment" the trade-in vehicle into the dealer's name. KRS 186A.230. From that point, the dealer may then sell the vehicle and transfer ownership.

Transferring ownership depends on whether the transferor is a dealer or a non-dealer. Relevant here, Martin Cadillac is a licensed motor vehicle dealer. When the owner is a licensed motor vehicle dealer, the dealer transfers its ownership to a "purchaser pursuant to a bona fide sale" when the dealer "transfers physical possession of the motor vehicle" and complies with the requirements of KRS 186A.220. KRS 186.010(7)(c). Under KRS 186A.220, when a dealer transfers a vehicle to a "purchaser for use," the dealer has to deliver a "properly assigned certificate of title," and other appropriate documents to "such purchaser."

KRS 186A.220(5)(a).[3] At that point, the vehicle's purchaser has the obligation to file the title transfer paperwork with the county clerk. KRS 186A.215.

Dealers who either do not have the title documents in hand, or for other reasons decide not to deliver the documents directly to the purchaser, have an option to transfer ownership while temporarily retaining the vehicle's title. The

[3] KRS 186A.220(5) was amended on July 15, 2016. At the time relevant to the instant traffic incident, the statute read as follows:

> (5) When he assigns the vehicle to a purchaser for use, he shall deliver the properly assigned certificate of title, and other documents if appropriate, to such purchaser, who shall make application for registration and a certificate of title thereon. The dealer may, with the consent of the purchaser, deliver the assigned certificate of title, and other appropriate documents of a new or used vehicle, directly to the county clerk, and on behalf of the purchaser, make application for registration and a certificate of title. In so doing, the dealer shall require from the purchaser proof of insurance as mandated by KRS 304.39–080 before delivering possession of the vehicle. Notwithstanding the provisions of KRS 186.020, 186A.065, 186A.095, 186A.215, and 186A.300, if a dealer elects to deliver the title documents to the county clerk and has not received a clear certificate of title from a prior owner, the dealer shall retain the documents in his possession until the certificate of title is obtained.

The statute's recent amendments, in relevant part, split the aforementioned language into three subsections to read thusly:

> (5) (a) When a dealer assigns the vehicle to a purchaser for use, he shall deliver the properly assigned certificate of title, and other documents if appropriate, to such purchaser, who shall make application for registration and a certificate of title thereon.
>
> (b) The dealer may, with the consent of the purchaser, deliver the assigned certificate of title, and other appropriate documents of a new or used vehicle, directly to the county clerk, and on behalf of the purchaser, make application for registration and a certificate of title. In so doing, the dealer shall require from the purchaser proof of insurance as mandated by KRS 304.39-080 before delivering possession of the vehicle.
>
> (c) Notwithstanding the provisions of KRS 186.020, 186A.065, 186A.095, 186A.215, and 186A.300, if a dealer elects to deliver the title documents to the county clerk and has not received a clear certificate of title from a prior owner, the dealer shall retain the documents in his possession until the certificate of title is obtained.

dealer may transfer the vehicle's possession and ownership to a "purchaser" if the "purchaser" consents to the dealer delivering the title directly to the county clerk. KRS 186A.220(5)(b). Under this provision, ownership does not transfer unless the dealer "require[s] from the purchaser proof of insurance" *before* delivering possession of the vehicle. *Id*.

Because the language of the statute is "clear and unambiguous[,]" the dealer "must receive proof of this insurance" in order to sufficiently transfer ownership. *Gainsco Companies v. Gentry*, 191 S.W.3d 633, 637 (Ky. 2006). Neither knowing that the purchaser has, in the past, carried insurance on vehicles, nor later verifying via a telephone call that the purchaser has insurance, is sufficient to satisfy the statutory requirements of receipt of proof of insurance. *Id*. at 635, 637-38. "[T]he term 'proof' clearly contemplates verification beyond mere assumption or knowledge." *Id*. at 638. *Cf.* 806 Ky. Admin. Regs. (KAR) 39:070 Section 3 ("Methods of Proving Motor Vehicle Insurance").

The statutory duty to obtain proof of insurance before delivering possession of the vehicle to the purchaser applies even when a dealer sells the vehicle to another dealer. *Calhoun v. Provence*, 395 S.W.3d 476, 484 (Ky. App. 2012). If a dealer verifies insurance before surrendering the vehicle's possession to the owner, the dealer must then "promptly" deliver the title documents to the county clerk. *Ellis v. Browning Pontiac-Chevrolet-GMC Truck-Geo, Inc.*, 125

As the newly-enacted statute provides clarity by dividing the statute into subsections, and it contains no changes material to the instant case, we will utilize references to the newly-enacted statute herein.

S.W.3d 306 (Ky. App. 2003) (disc. rev. denied Feb. 11, 2004). When "the lapse of time between the dealer obtaining possession of the documents and delivery to the clerk [is] not sufficiently prompt[,]" then the dealer is "deemed the owner of the vehicle[.]" *Id*. at 305 (finding thirty-nine-day delay is not prompt); KRS 186A.215(3). Thus, a dealer attempting to retain title while transferring possession must "use due diligence in making a prompt transfer." *Ellis*, 125 S.W.3d at 308.

Under these standards, we now examine the various transfers that occurred in the instant case. For the first transfer, from Martin Cadillac to DeWalt Auto, it is clear that Martin Cadillac, who at the time of the collision still retained the vehicle's title, did not validly transfer its ownership to DeWalt Auto at the Cavalier's auction. Martin Cadillac never obtained "proof of insurance" from DeWalt Auto. KRS 186A.220(5)(b). Nor did Martin Cadillac deliver the properly assigned certificate of title to DeWalt Auto. KRS 186A.220(5)(a).

Martin Cadillac and Travelers argue that these deficiencies are irrelevant because under the second transfer – DeWalt Auto to Elmore – DeWalt Auto complied with the statute. Indeed, the facts as presented demonstrate that DeWalt Auto complied with KRS 186A.220(5)(b) by obtaining proof of insurance from Elmore before delivering possession of the Cavalier. However, there does not appear to have been any factual development regarding DeWalt Auto's due diligence in obtaining and filing the proper title documents with the county clerk. *Ellis*, *supra*. The issue, then, is whether and how a dealer who has not yet validly obtained title can transfer the vehicle's ownership to another person. Partial

resolution of this issue is found in the holdings of *Auto Acceptance Corp. v. T.I.G. Ins. Co.*, 89 S.W.3d 398 (Ky. 2002), *Gainsco,* 191 S.W.3d 633, and *Calhoun v. Provence*, 395 S.W.3d 476. The remainder of the resolution is found in *Ellis, supra,* and KRS 186A.215(3).

In *Auto Acceptance*, J.D. Byrider, a dealer, sold a vehicle to Wayne Chandler, an individual. J.D. Byrider did not have the certificate of title from the vehicle's previous owner. The dealer nonetheless executed a retail sales contract and a Kentucky application for title and registration, and it obtained proof of insurance.[4] Chandler took possession of the vehicle and was involved in a collision the next day. At issue was whether J.D. Byrider validly transferred the vehicle's ownership to Chandler.

The steps J.D. Byrider took conformed with the 1994 amendments to KRS 186A.220(5). Prior to the amendments, the "general statutory scheme" made "the title holder the owner of a vehicle for insurance purposes." *Auto Acceptance*, 89 S.W.3d at 401. The 1994 amendments "created an exception" where "a car dealer can . . . first verify[] that the buyer has a valid and current insurance policy that covers the purchased vehicle[,]" and second, with the consent of the purchaser, deliver the certificate of title directly to the county clerk on behalf of the purchaser, making application for registration and certificate of title. *Id*. As J.D. Byrider

[4] Whether the proof of insurance was sufficient was not an issue in the case. It is noteworthy that Chandler only produced proof that he had a policy on another vehicle that permitted Chandler to add a vehicle to his coverage within 30 days of becoming the vehicle's owner. *Auto Acceptance*, 89 S.W.3d at 400.

complied with both prongs, Chandler was the owner of the vehicle for insurance purposes. *Id*.

Contrasting *Auto Acceptance*, the Court in *Gainsco* was faced with the repercussions of a dealer not complying with the statutory transfer elements. There, a Kentucky dealer purchased a truck from a dealer in Alabama, which was unable to immediately transfer the truck's title. The Kentucky dealer then sold the truck to an individual in Kentucky. Though the dealer was aware that the individual had insurance, the dealer did not verify and confirm insurance coverage until two days after the sale. Five days after the sale to the individual, and three days after the Kentucky dealer verified insurance, the vehicle was involved in a collision that permanently disabled a passenger. 191 S.W.3d at 635.

At issue was whether the Kentucky dealer or the individual who purchased the vehicle was the owner for insurance purposes at the time of the accident. The Kentucky Supreme Court held that the dealer was the owner for insurance purposes because it did not verify that the individual had insurance before relinquishing the vehicle's possession. *Id*. at 636.

Utilizing the foregoing established jurisprudence that dealers must strictly comply with the statutes, the Court of Appeals addressed a situation similar to the case at bar. In *Calhoun*, a collision occurred when a vehicle operated by Charles Provence suddenly accelerated backward into a vehicle driven by Mary Calhoun. 395 S.W.3d at 478. Due to the multiple dealer transactions and the automobile title's in-flux nature, the resulting negligence lawsuit required the trial

court to determine who had primary responsibility for maintaining liability insurance on the vehicle. *Id*. at 482-83. A brief history of the transactions is informative.

On April 21, 2007, Legend Suzuki, a dealer, received title to, and possession of, the vehicle from an individual. *Id*. at 483. Due to a lien, the individual could not provide unencumbered title. *Id*. Legend Suzuki then sold the vehicle to Yaden's Auto Sales, who then delivered possession and control of the vehicle to Kentucky Auto Exchange for the purposes of auctioning the vehicle. *Id*. At the auction a third-party purchaser placed the winning bid, subject to a test drive with an independent arbitrator. *Id*. On May 15, 2007, Provence, the arbitrator, test drove the vehicle to determine if it had a defective four-wheel drive system. *Id*. This test drive resulted in the traffic collision. *Id*.

The trial court determined that Legend Suzuki failed to verify that Yaden's Auto Sales had proof of insurance and thus retained its status as the vehicle's primary insurer. *Id*. A panel of this Court affirmed the trial court's ruling because "Legend Suzuki had a statutory duty to require from Yaden's Auto Sales proof of insurance before delivering possession of the vehicle." *Id*. at 484. It held that because Legend Suzuki neither "strictly compl[ied] with the statute requiring it to verify Yaden's Auto Sales' insurance[,]" nor "notif[ied] the clerk

about the transaction within 15 days as required by the statute[,]"[5] it retained its status as the vehicle's primary insurer. *Id*.

Finally, in *Ellis v. Browning Pontiac-Chevrolet-GMC Truck-Geo, Inc.*, 125 S.W.3d 306 (Ky. App. 2003), a dealer sold a vehicle to an individual who produced proof of insurance. The dealer informed the buyer that the dealer would transfer the title. The title was not transferred until 39 days after the individual took possession. A traffic incident occurred with the vehicle in the interim. At issue again was who the owner was for insurance purposes – the dealer or the individual.

Though the dealer complied with the KRS 186A.220(5) requirements, the dealer took 39 days to comply with the title transfer requirements of KRS 186A.215(3). Those requirements, the panel of this Court held, "applied to all transfers including those covered by KRS 186A.220." *Id*. 125 S.W.3d at 308. The 39-day delay was not prompt, and the "unjustified delay[] in transferring title could potentially result in uninsured drivers on our roadways." *Id*. Thus, even though the dealer complied with KRS 186A.220, its failure to exercise due diligence in complying with KRS 186A.215(3) resulted in the dealer remaining the owner for primary insurance purposes.

[5] KRS 186A.220(1) provides that, "Except as otherwise provided in this chapter, when any motor vehicle dealer licensed in this state buys or accepts such a vehicle in trade, which has been previously registered or titled for use in this or another state, and which he holds for resale, he shall not be required to obtain a certificate of title for it, but shall, within fifteen (15) days after acquiring such vehicle, notify the county clerk of the assignment of the motor vehicle to his dealership and pay the required transferor fee."

Utilizing the relevant case law and statutes, the answer to the issue of whether a dealer who has not yet validly obtained title can transfer the vehicle's ownership to another person is clear. Yes, a dealer may transfer ownership even if the dealer has not yet validly obtained title from the previous owner or dealer. *See, e.g., Gainsco, supra*. This answer does not end the inquiry, though, as the case law above shows that dealers must strictly comply with the transfer statutes, even in dealer-to-dealer transactions. The transfer statutes include a promptness or due diligence requirement. KRS 186A.215(3). Failure to comply with the due diligence requirement in transferring title is fatal to a dealer's reliance on the remainder of the transfer statutes. *Ellis, supra*. Thus, we must analyze whether Martin Cadillac or DeWalt Auto strictly complied with the transfer statutes, including the "prompt[]" filing requirement. KRS 186A.215(3).

We begin with the uncontested elements. It is uncontested that Martin Cadillac did not verify DeWalt Auto's insurance when it sold the vehicle at auction. In fact, Martin Cadillac admits in its brief that "[t]he transaction between Legend Suzuki and Yaden's in *Calhoun* is similar to the dealer-to-dealer transaction between Martin Cadillac and DeWalt Auto Sales." Aplt's Brf. at 11. In that case, Legend Suzuki was the owner because it failed to obtain proof of insurance prior to the vehicle's transfer.

Furthermore, in Henderson's deposition he admitted that Martin Cadillac always conducts these types of dealer-to-dealer sales in violation of the statutory requirements by not providing the title documents at the point of sale,

KRS 186A.220(5)(a), and by not requiring proof of insurance before delivering possession of the vehicle, KRS 186A.220(5)(b):

> Q. In your dealings with ABC Auction, has it always been the practice to sell the vehicle TA or title absent?
>
> A. With our dealership and with any auction, we always sell it TA.
>
> . . .
>
> Q. When Martin Cadillac sends a vehicle to an auction house, whether it be ABC Auction, Manheim, Adesa, any one of them, is it your practice to obtain a proof of insurance from the buyer who eventually buys it?
>
> A. No, sir.
>
> . . .
>
> Q. Let me see if I can flesh it out a little bit for you. And I'm speaking generally not just about this particular transaction, but – but when Martin Cadillac wants to sell a vehicle through auction, who ends up actually making sure that the title documents are transferred to the person or entity that buys the vehicle at auction?
>
> A. I would think that it was the auction's responsibility because we provide a title that is prepared for the next individual. We give that title to the auction. They give us the proceeds. And then they deliver that to the buyer.

Depo., pp. 37, 42-43, 45.

This wholescale disregard for the statutory requirements flies in the face of longstanding Kentucky jurisprudence requiring strict statutory compliance. These statutory requirements are not herculean or cumbersome tasks. All Martin Cadillac would have to require is that the dealer who is purchasing the vehicle at

auction provide a document showing proof of insurance before taking possession of the vehicle. Given that licensed dealers should have insurance policies in place, it would not be difficult at all for those dealers to produce proof of insurance. Thus, there is no genuine issue of material fact -- Martin Cadillac failed to comply with KRS 186A.220(5). Conversely, it appears from the facts presented that DeWalt Auto complied with KRS 186A.220(5) when it transferred the Cavalier's possession to Ellis, as Ellis produced proof of insurance prior to obtaining possession of the vehicle.

While there does not appear to be a genuine issue of material fact regarding the KRS 186A.220(5) requirements, there is, however, a genuine issue of material fact regarding whether Martin Cadillac or DeWalt Auto failed to comply with KRS 186A.215(3), the prompt-filing requirement. That issue is pivotal to who maintained ownership of the vehicle, because even if a dealer complies with KRS 186A.220(5) before relinquishing a vehicle's possession to a purchaser, the dealer must "comply with the language and intent of the entire titling scheme" and "use due diligence" to "tak[e] the necessary title transfer documents to the county clerk." *Ellis*, 125 S.W.3d at 308. A dealer who does not comply with this requirement remains the vehicle's owner on the date of the traffic incident. *Id*. In other words, if either Martin Cadillac or DeWalt Auto failed to transfer the title documents promptly, then that dealer remains the owner for insurance purposes.

To analyze the prompt-filing requirement, we examine Martin Cadillac and Travelers' defenses. In an attempt to combat their flagrant disregard

for the statutory requirements, Martin Cadillac and Travelers proffer a handful of arguments. First, they claim Elmore was the vehicle's owner because he received possession of the vehicle pursuant to a "bona fide sale[.]" KRS 186.010(7)(a). They argue that because DeWalt Auto complied with KRS 186A.220(5)(b) by requiring Elmore to present proof of insurance prior to possessing the vehicle, Elmore became the vehicle's owner in spite of the invalid ownership transfer from Martin Cadillac to DeWalt Auto. Under the specific facts before us, we do not agree. The DeWalt Auto sale to Elmore did not transfer ownership to Elmore, thus insulating Martin Cadillac from being responsible for the vehicle's primary insurance, unless Martin Cadillac was acting with due diligence in making a prompt transfer of title to DeWalt Auto, and DeWalt Auto was acting with due diligence in making a prompt transfer of title to Ellis.

Without any question, Martin Cadillac became the vehicle's owner when it accepted the vehicle as a trade in and signed the first dealer assignment on the certificate of title. Martin Cadillac never transferred ownership to DeWalt Auto because Martin Cadillac did not comply with KRS 186A.220(5). Almost four months elapsed from when Martin Cadillac sold the vehicle to DeWalt Auto at auction on December 6, 2013, to when DeWalt Auto sold the vehicle to Elmore on January 20, 2014, to when the traffic incident occurred on April 5, 2014. And Martin Cadillac was still the listed owner pursuant to the certificate of title on the date of the traffic incident. This substantial time delay raises a material issue of

fact regarding Martin Cadillac and DeWalt Auto's due diligence in promptly delivering the transfer documents to the county clerk.

The title transfer's delay, then, is pivotal to this case. Dealers must "promptly . . . submit[] to the county clerk" "[t]he application [for title] with its supporting documentation attached[.]" KRS 186A.215(3). Neither the trial court's order nor the parties' arguments below or before us address this critical element. Determining whether Martin Cadillac or DeWalt Auto acted with due diligence in promptly transferring the title documents to the county clerk is a necessary factual predicate for determining whether Martin Cadillac or DeWalt Auto or Elmore is the owner. If the delay in Elmore becoming the vehicle's titleholder is due to Martin Cadillac failing to act with due diligence, then Martin Cadillac cannot shield its complete failure to follow the statutory title transfer requirements behind DeWalt Auto's attempt to comply with the statutory requirements.[6] To permit such insulation from liability would render irrelevant the due diligence requirement of KRS 186A.215(3) and nullify the holding in *Ellis*.

The fact remains that Martin Cadillac was the vehicle's owner pursuant to the title, and it was incumbent upon Martin Cadillac to promptly submit the title transfer documents to the county clerk. *Ellis*, 125 S.W.3d at 308;

[6] It is noteworthy that on March 20, 2015, Martin Cadillac filed a Third Party Complaint against ABC alleging that it was ABC's negligence that caused Martin Cadillac to be the owner. Martin Cadillac sought indemnity from ABC and/or apportionment of liability with ABC. ABC's motion to dismiss was granted after the trial court granted Martin Cadillac and Travelers' motion for summary judgment. The order granting dismissal expressly provides that the order does not limit Martin Cadillac's ability to bring a cause of action against ABC "after any appeal in this case[.]"

KRS 186A.215(3). That Elmore received possession of the vehicle pursuant to a bona fide sale does not negate the due diligence requirement. *Ellis, supra*. To hold otherwise would encourage dealers to do precisely what happened here: ignore all of the statutory requirements, potentially fail to act with due diligence, and hope that a dealer or owner down the line actually complies with the statutes. The net result of these actions is a certificate of title that is in limbo and a legal quagmire of insurance liability. *See Ellis*, 125 S.W.3d at 308 ("[U]njustified delays in transferring title could potentially result in uninsured drivers on our roadways. Those who presented proof of insurance at the time of purchase may become uninsured during the delay in transfer of title.").

Given that Kentucky courts have routinely held dealers to strict compliance with the title transfer statutes, we must reverse and remand for further proceedings on the promptness requirement of KRS 186A.215(3). In reversing and remanding, we also reject Martin Cadillac and Travelers' other appellate defenses. Martin Cadillac argues that Appellant is simply attempting to "look back" in the chain of transfers to find an error and hold that dealer or person accountable as the primary insurer. We disagree. Martin Cadillac is the titleholder under the certificate of title. Appellant is not looking back in the chain of transfers. Instead, Appellant is beginning with the titleholder and determining whether the titleholder or someone else is the owner. Appellant's analysis is prospective, not retrospective. We reject this argument *in toto*.

Martin Cadillac and Travelers also argue that Martin Cadillac did not have to comply with KRS 186A.220(5) when it sold the vehicle to DeWalt Auto because DeWalt Auto is not a "purchaser for use." This argument fails for multiple reasons. First, only KRS 186A.220(5)(a) contains the "purchaser for use" language. Martin Cadillac admits it did not transfer title pursuant to KRS 186A.220(5)(a) by delivering the certificate of title documents to the "purchaser for use" at the point of sale. KRS 186A.220(5)(b), and the former second sentence of the previously-enacted KRS 186A.220(5), refers simply to the "purchaser," and it is this provision with which Martin Cadillac argues DeWalt Auto complied. "[T]he purchaser" encompasses more than just an individual buying a vehicle for personal use. It includes dealers selling vehicles to dealers.

Second, even a dealer-to-dealer transaction is a sale to a "purchaser for use." Dealers often use vehicles on their lot for a variety of purposes, including sales for profit. Accordingly, dealers buying vehicles at auction are purchasers for use. Finally, as *Auto Acceptance, Gainsco Companies*, *Ellis*, and *Calhoun* hold, KRS 186A.220(5) does apply even to dealer-to-dealer transactions. Thus, whether the language is "purchaser for use" or "purchaser," KRS 186A.220(5) applies to dealers.

Having rejected Martin Cadillac and Travelers' arguments, we reverse and remand the trial court's order granting summary judgment to Martin Cadillac and Travelers for further proceedings concerning whether Martin Cadillac and/or

DeWalt Auto complied with the promptness requirement of KRS 186A.215(3) and *Ellis v. Browning Pontiac-Chevrolet-GMC Truck-Geo, Inc.*

II. Travelers policy limits and bad faith claim.

Next, Appellant prays that we "opine that Travelers must provide primary coverage up to the amount of $21,000,000." Aplt's Brf. at 12. Appellant also argues that the trial court erred by dismissing the bad faith claim against Travelers. We address these issues in turn.

First, Appellant argues that because Martin Cadillac had two insurance policies in place at the time of the traffic incident (their collective limit was $21,000,000), and because Martin Cadillac is the vehicle's owner for primary insurance purposes, Travelers should be obligated to cover up to $21,000,000 in damages. Travelers disagrees that the policy's limits are $21,000,000. However, Travelers points us to the lengthy arguments filed of record below regarding the policy's limits and claims that this issue is not properly before us because the trial court has issued no ruling relating to the filings. We agree. Having reversed and remanded this case in Issue I, *supra*, for further proceedings regarding whether Martin Cadillac is the vehicle's primary insurer, *Gainsco*, 191 S.W.3d at 637, the issue of whether Travelers' insurance policies cover this traffic incident is not yet ripe. Should the trial court determine that Martin Cadillac is the vehicle's primary insurer, it will then have to address the parties' motions regarding the limits of Travelers' insurance policies.

Second, Appellant argues that the trial court erred by granting Travelers' motion to dismiss on the bad faith claim. The trial court's order is summary in nature. It was entered after the trial court's order granting summary judgment to Martin Cadillac on the issue of the vehicle's ownership. Appellant argues that if this Court finds Martin Cadillac was the vehicle's owner, then its bad faith claims should be reinstated.

Travelers argues that the ownership issue was "fairly debatable" and, thus, the trial court properly granted summary judgment pursuant to *Empire Fire & Marine Ins. Co. v. Simpsonville Wrecker Serv., Inc.*, 880 S.W.2d 886, 890 (Ky. App. 1994). We disagree. In that case, an insurance company refused to pay a claim based on a legitimate dispute regarding the status of the law. *Id*. at 890-91. The Kentucky Supreme Court later referred to the legal dispute as "a legal issue of first impression in Kentucky courts." *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 375 (Ky. 2000). The Kentucky Supreme Court has since held that where there was no unresolved legal issue of first impression, and where the dispute regarded only disputed factual matters, "an insurer is not thereby relieved from its duty to . . . investigate, negotiate, and attempt to settle the claim in a fair and reasonable manner." *Id*. "In other words, although elements of a claim may be 'fairly debatable,' an insurer must debate the matter fairly." *Id*.

In the instant case, the legal claim did not involve an issue of first impression. As shown above, the case law and the statutes are clear. Dealers must strictly comply with the statutes to transfer ownership when the title remains in the

dealer's name. Only the facts in this case are debatable, and we ultimately are reversing and remanding for additional factual development regarding the due diligence requirement. Thus, we also reverse and remand the trial court's order granting summary judgment on the bad faith claim. Though we remand for further proceedings, our opinion should not be construed as addressing the merits of the claim.

III. Was Elmore an employee of News Publishing, LLC, or was he an independent contractor?

Appellant's final three issues concern whether Elmore, the Cavalier's driver, was an employee of News Publishing, LLC, ("News Publishing"), or an independent contractor.[7] The trial court granted News Publishing's motion for summary judgment on the issue, finding that Elmore was an independent contractor. We begin with a summary of the facts.

Elmore was delivering newspapers for News Publishing, LLC. ("News Publishing") in Warren County, Kentucky, when the traffic incident occurred on April 5, 2014. News Publishing produces the *Daily News* that is delivered to households in Warren County and surrounding counties. To distribute these papers, News Publishing enters into contracts with people to sell and deliver the papers. Troy Warren, circulation manager for News Publishing, was deposed regarding the contract News Publishing had with Elmore. His testimony comprises the bulk of evidence regarding Elmore's employment status.

[7] Elmore's estate also joins Appellant on this issue.

News Publishing circulates the *Daily News* primarily in Warren County, Kentucky, but also in surrounding counties. It even has some papers delivered throughout the country via the U.S. Postal Service. Copies of the newspaper may be purchased in retail stores, and the articles it publishes are also available digitally on a website. Approximately 15,000 newspapers are circulated daily, and approximately 20,000 are circulated on Sundays. Of those, approximately 17,000 are home delivered on Sundays, and 12,000 are home delivered on weekdays. It takes about 110 carriers to make all of the home deliveries.

The carriers are given areas of primary responsibility ("APR"). Each APR is a geographic area – a paper route – that the carrier contracts with News Publishing for the rights to be the sole deliverer of the *Daily News* in that area. Some carriers contract for more than one APR. When a carrier ends his or her contract for an APR, News Publishing posts the APR in the *Daily News* to attract a new carrier.

A carrier desiring to obtain the APR contacts one of the district managers with News Publishing. After a telephone interview with the prospective carrier, where it is determined whether the newspaper delivery business fits the potential carrier's lifestyle, the APR list is given so the prospective carrier can go out and look at the area and make a decision if the carrier decides to contract for the APR.

If the carrier decides to contract for the APR, a standard, fill-in-the-blank contract form is used by News Publishing. No job application is required. News Publishing keeps a copy of the carrier's driver's license and social security card, vehicle insurance proof, and a federal tax 1099 form. Carriers also sign a document stating they will comply with all traffic laws. News Publishing does not perform any background check, criminal history check, driving record check, or drug screen on prospective carriers. No references are asked for or checked, and no prior experience is necessary. The standard APR form includes the following language on the agreement's first page: "It is understood and agreed that Carrier is a purchaser-for-resale and independent contractor."

News Publishing neither offers nor requires any training for its newspaper carriers. Carriers are simply given a list of customers, and they lay out their own routes. The customer list includes names and addresses of customers, along with customer requests (i.e., the customer wants the newspaper in the driveway or on the porch), and whether the customer receives a daily paper or just a Sunday paper.

Carriers pick up their newspapers at one of a handful of locations. Primarily, carriers get their papers at the *Daily News* loading dock in Warren County. Carriers purchase newspapers from News Publishing. In Elmore's case, pursuant to his January 8, 2014-signed agreement, he purchased at a rate of 100 papers for $4.00. News Publishing also "agrees to pay Carrier the delivery fee in

effect for Carrier's delivery of such other publications and products as Publisher may designate and furnish." That rate for Elmore was $0.08 per delivery.

Customers can subscribe to the *Daily News* in a variety of ways. They may come to the business' office and sign a subscription agreement. Customers doing so will pay the *Daily News* for their subscription term – be it a month or a year or some period in between – or they will be billed. The price the *Daily News* collects is the agreed upon retail price. Carriers who sign up customers are free to charge the customer more or less than the agreed upon retail price. Some customers are billed "carrier collect" where the customer pays the carrier directly, while others pay the subscription fee to News Publishing, who then credits the funds against the bill the carrier owes for the papers the carrier purchases.

Carriers are wholly responsible for their routes. If a carrier has an emergency and cannot make his or her deliveries, that carrier is in breach of the APR contract and is no longer under contract with News Publishing. News Publishing will then get one of the other carriers to cover the APR, or one of News Publishing's district managers will deliver the papers. For example, when Elmore perished in the collision, his district manager took over his paper route until the APR was contracted with another carrier. The district manager continues to receive her salary and is only compensated for mileage for driving the route.

Carriers are free to refuse service to customers for whatever reason. "If they don't like them because they used to date their sister; if they don't like them because they flipped them a bird when they drove by; if they don't like them

because they stand in their underwear on their porch, which has happened." (Deposition, p. 53). If the customer calls News Publishing to complain, the customer is told that the carrier is not going to service him or her. No one from News Publishing will deliver the newspaper to the customer.

News Publishing places a handful of requirements on its carriers. Carriers should deliver the papers by five o'clock in the evening. Carriers cannot place handbills or sales circulars for other businesses in the newspapers. The APR Agreement further provides:

> Carrier agrees to use his best efforts to promote, sell, and distribute newspapers published by Publisher and to meet the maximum sales potential of said route. One of Carrier's most important obligations hereunder is the regular and timely delivery of newspapers in dry, readable condition, adequately protected from reasonably foreseeable adverse weather conditions, in a manner satisfactory to the subscriber.

The APR agreement permits either side to terminate the agreement with two weeks' notice for no cause. It also permits News Publishing to terminate the agreement "immediately and without notice upon carrier's commission of any wrongful act resulting in loss, damage, or injury to publisher or any breach of the terms of this agreement." (Warren Depo., p. 74).

A few months before his death, Elmore signed an APR and began operating a newspaper route for News Publishing. On March 1, 2014, he orally contracted for a second APR from News Publishing. He had not yet signed the paperwork on that route when the traffic incident occurred on April 5, 2014, that

resulted in his loss of life. The route he was running when he perished was the route covered by the oral agreement. Warren believed the verbal agreement bound Elmore to the same terms as set forth in the written agreement. Under these facts, and others in the record, the trial court found Elmore was an independent contractor.

The first issue before us, then, is whether Elmore's employment status is an issue of law or fact. If it is the former, then the trial court could properly rule on the motion for summary judgment. If it is the latter, then the trial court erred and reversal and remand is necessary for a jury determination on this fact issue. We hold that under the instant facts, the trial court properly determined it was an issue of law.

The parties principally each cite two cases. Examination of those cases clarifies the instant issue. Appellant relies on *Concrete Materials Corp. v. Bank of Danville and Trust Co.*, 938 S.W.2d 254 (Ky. 1997) and *Crump v. Sabath*, 261 Ky. 652, 88 S.W.2d 665 (1935). In each of those cases the Court determined that an issue of agency was a fact issue. And in each case the facts were substantially in dispute regarding whether an agency relationship was created.

In contrast, News Publishing cites *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009) and *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116 (Ky. 1991). Those cases establish that if the facts surrounding the alleged agency relationship are not substantially disputed, and the parties "simply disagree[] with whether or not these facts establish[] an agency relationship[,]" *Nazar*, 291 S.W.3d

at 606, then whether an agency relationship exists is a question of law for the trial court. *See also Garland*, 805 S.W.2d at 117 ("Whether decedent was an employee or an independent contractor is a question of law if the facts below are substantially undisputed, and is a question of fact if the facts are disputed.").

In the instant case, we hold that the facts are not substantially disputed. Both parties principally rely on the deposition of Troy Warren, the director of circulation at the *Daily News*, for their facts. Thus, the trial court did not err by determining the legal issue of whether Elmore was an employee of News Publishing.

Having determined the trial court properly ruled that the agency question was an issue of law, we now turn to Appellant's second claim, namely that the trial court's legal analysis was substantively erroneous. In Kentucky, determining whether one is an employee or an independent contractor requires courts to utilize the ten-factor test from the *Restatement (Second) of Agency* § 220. *Kentucky Unemployment Ins. Com'n v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S.W.3d 575, 579 (Ky. 2002). The factors are:

> (1) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (2) whether or not the one employed is engaged in a distinct occupation or business;
>
> (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
>
> (4) the skill required in the particular occupation;

> (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (6) the length of time for which the person is employed;
>
> (7) the method of payment, whether by the time or by the job;
>
> (8) whether or not the work is a part of the regular business of the employer;
>
> (9) whether or not the parties believe they are creating the relation of master and servant; and
>
> (10) whether the principal is or is not in business.

Id. Each case is fact-specific, and no single factor is determinative. *Id*. at 580.

Using these factors and the facts presented by the parties, the trial court thoroughly analyzed the summary judgment motion:

> News Publishing exerted very little control over the details of Elmore's work. Elmore's only instructions were to deliver the papers by 5:00 p.m. in a dry, readable condition. News Publishing did not instruct Elmore as to which houses he should deliver to first, where he was to place the paper on the property, or what steps he should take to ensure the papers were dry and readable. It did not provide the tools or instrumentalities to Elmore. It suggested plastic sleeves would keep papers dry and offered to sell those sleeves to Elmore. However, Elmore could have purchased plastic sleeves from anywhere, or simply placed the paper in a dry location. One who offers tools for purchase is a seller, not a provider. Moreover, Elmore used his own personal vehicle to deliver papers. He could have used a bicycle or walked if he so chose. If an employer exerted control over an employee and also provided the instrumentalities, then clearly the work would be under the employer's direction. However, if the work is performed by a

specialist without supervision, then the employer is not exerting control or providing tools. Since News Publishing exerted no control over Elmore, nor did it provide Elmore with instrumentalities, Elmore appears to be a specialist who engaged in work unsupervised.

The method by which News Publishing paid Elmore also implies his independent contractor status. The company sold newspapers to Elmore at a whole sale price and he in turn re-sold them for retail value. News Publishing did not pay Elmore wages, nor did it withhold taxes. Elmore was permitted to affix any retail price the laws of supply and demand would allow and, if his clients did not agree on the price, they would not receive a delivery. Moreover, in the event a paper was not delivered or was damaged, a customer could call *The Daily News* office and it would "redeliver" the paper. News Publishing would then charge Elmore a "redelivery fee." If Elmore were paid in wages, this would be similar to docking an employee's pay for a mistake, which would violate KRS 337.060. However, if Elmore were an independent contractor, this behavior would be acceptable and similar to seeking damages for breach of contract when the client must hire another contractor to complete the work properly.

Finally, the record supports a finding that the parties believed they created an independent contractor relationship. The contract states this fact, and Troy Warren's testimony at his deposition reveals he always made sure the carriers knew they were considered independent contractors. While it is true that merely calling an individual an independent contractor is not enough, Elmore willingly accepted the responsibility for paying his own taxes and securing his own insurance in addition to accepting the title of independent contractor and entering a contractual relationship with the above hallmarks of contractor status.

Arguably, factors (d) and (j) imply an employer-employee status. Little skill is required in delivering papers, and News Publishing is engaged in business. Factor (b) also tilts more in plaintiff's favor. The record

does not reflect whether Elmore was engaged in a distinct occupation from delivering papers, although the defendant argued Elmore was allowed to deliver other items if he chose. Finally, factor (h) arguably favors the plaintiff. The defendant, however, is a publisher of news and is involved in creating content. The defendant has argued much of the fact that it is shifting to internet-based content, and that the age of physical papers is rapidly approaching the fate of the dinosaur, and no one would argue that the internet service providers are employees. *The Daily News* does have approximately 17,000 physical papers subscribers, but some are serviced by U.S. Mail, which belies the argument that News Publishing is in the delivery business since no mailman could be considered an employee.

Plaintiff has also argued that News Publishing could fire Elmore whenever it wished and that this fact should show that the contract is unenforceable and he is an employee at will. This argument has been specifically rejected by Kentucky courts. *See Courier Journal & Louisville Times Co. v. Akers*, 175 S.W.2d 350, 352 (Ky. 1943) (citing *Ruth Bros. v. Stambaugh's Adm'r*, 122 S.W.2d 501, 505 (Ky. 1938)).

After a complete review of the factors, it is apparent that Elmore was an independent contractor. The facts of this case are similar to those in *Akers*. In that case, the plaintiff also attempted to argue an individual that delivered papers for the Courier Journal was an employee of the paper. The only difference in *Akers* is that the delivery boy was also engaged in a separate taxi business. However, the relationship and expectations between that carrier and the Courier Journal are practically identical to the relationship and expectations between Elmore and News Publishing.

Clearly the appellant's interest was confined to the physical act of getting the newspapers delivered at Katterjohn's Drug Store, and it employed the Yellow Cab Company for that purpose. It did not attempt, by agreement or otherwise, to direct, oversee, or take charge of the manner or method of delivery; it did not designate

any particular or specific place about the premises where the newspapers were to be deposited; nor did it prohibit or caution against leaving them one place or another in or about the store. Randle used his own automobile; he could have used a truck, or any other vehicle suitable to him, and he operated at his own expense. He was at liberty to do the work in his own way, choose the manner and method of delivery which suited him best and was responsible to the appellant for only one thing, namely, delivery of the papers.

Akers, supra, at p. 352.

As in the *Akers* case, News Publishing's interest was confined to the physical act of getting newspapers delivered to its route customers, and it contracted with Elmore for that purpose. It did not attempt, by agreement or otherwise, to direct, oversee, or take charge of the manner or method of delivery; it did not designate any particular or specific place about the premises of the paper customers where the newspapers were to be deposited – whether porch, driveway, red newspaper tube, or elsewhere – that decision was up to Elmore and his customers; nor did it prohibit or caution against leaving the papers in one place or another at the customer's house. Elmore used his own automobile; he could have used a truck, or any other vehicle suitable to him, and he operated at his own expense, purchasing his gas, the newspapers themselves, and plastic sleeves or rubber bands if he chose to use them. He was at liberty to do the work in his own way, choose the manner and method of delivery that suited him best, and was responsible to News Publishing for only one thing, namely, delivery of the papers by 5:00 p.m. in a readable condition. He was not paid a salary or even a fee for each delivery, but, instead, bought the papers from News Publishing and resold them. If he did not want to service a customer because that person would not pay enough, or was rude, or for any other reason, that person would not get a paper delivered to his house.

> There is no issue of material fact here, and plaintiff's counsel, at the hearing, argued only that inferences from those facts are disputable. However, this Court disagrees, and, after carefully considering all of the factors, this Court FINDS that Elmore, as a matter of law, was an independent contractor.

Order, pp. 5-8.

Having reviewed the trial court's well-written Order, and having reviewed the facts and law *de novo*, we find no error in the trial court's analysis. Though there are some factors that indicate an employee-employer relationship, the majority of factors indicate an independent contractor relationship.

For example, News Publishing exerted minimal control over the details of the work. Carriers are free to determine their own routes, their own transportation, their own subcontractors and employees, and their own delivery methods. They were also free to deny service to customers. The APR agreement only generally required papers to be delivered in a "dry, readable condition, adequately protected from reasonably foreseeable adverse weather conditions, in a manner satisfactory to the subscriber." This general requirement is in stark contrast to the requirements in *Landmark*, where the publisher controlled minute delivery details: carriers had to install hooks or tubes on designated routes; they had to keep newspapers dry, and were required to place the papers in plastic bags if the weather report called for rain; they had to deliver a weekly "Extra" section to non-subscribers at designated points on the route; carriers were required to place

newspapers in coin boxes along their routes; and all papers had to be delivered no later than 7:00 a.m. on the day of publication. 91 S.W.3d at 577.

The method of payment in the instant case also indicated an independent contractor relationship. Carriers purchased papers at a contracted rate and were free to sell the papers for whatever rate they pleased. Though News Publishing sold subscriptions for an agreed retail price and passed along those funds to carriers, carriers could request additional funds from customers.

The carrier also supplied the instrumentalities, tools, and place of work. Carriers were given a geographical area to service – not a specific route – and were permitted to determine their own routes, their own transportation, their own employees or subagents, and their own methods of delivering papers in a dry, readable condition. Though News Publishing sold plastic bags and rubber bands to carriers if they desired them, carriers could purchase their own bags and rubber bands from another supplier.

Furthermore, the delivery of newspapers is less and less a part of the regular business of News Publishing. In this digital age, newspapers are routinely placing their articles online and collecting fees and advertising from their websites. Newspaper delivery is only a portion of the newspaper business.

The method of payment also demonstrates an independent contractor relationship. Carriers purchase newspapers from News Publishing and then sell them either at the agreed retail price or any other price carriers negotiate with their

customers. News Publishing does not pay carriers a per-paper or per-day delivery fee.

Additionally, that News Publishing utilizes the United States Postal Service to deliver some of its newspapers across the country further evidences the independent contractor status of its carriers. We certainly would not state that United States Postal Service employees are also employees of News Publishing. They are simply independent contractors who have been entrusted with a parcel for delivery, much in the same fashion as the other carriers News Publishing uses to distribute its newspapers.

In contrast, as the trial court held, some of the ten-factors favor an employee-employer relationship. Newspaper delivery requires minimal skills, as is evidenced by the lack of training provided to carriers. The contracts are indefinite, thus carriers could potentially be "employed" for many years. And, finally, newspaper creation and production is a part of the regular business of News Publishing, and delivery of those newspapers is an essential aspect of that portion of News Publishing's business. These factors are not sufficient to overcome the overwhelming evidence that the parties created an independent contractor business relationship. Accordingly, we affirm the trial court's order granting summary judgment.

Finally, Appellant argues that controlling Kentucky precedent holds that newspaper carriers are employees rather than independent contractors. He cites to *Evansville Printing Corporation v. Sugg*, 817 S.W.2d 455 (Ky. App. 1991).

In that case, the Workers' Compensation Board found that a newspaper carrier was an employee rather than an independent contractor for workers' compensation benefits because a statute then in effect, KRS 342.640(5), rendered all newspaper delivery persons employees of the publisher for worker's compensation benefit purposes. A panel of this Court held that the "Kentucky's Workers' Compensation Statute, evidencing a legislative policy to protect a specific class of workers, is the controlling authority and supersedes common law." *Sugg*, 817 S.W.2d at 457 (citing *Ream v. Dept. of Revenue*, 314 Ky. 539, 236 S.W.2d 462 (1951)).

This holding does not control the outcome of the instant case in any way. KRS 342.640(5) was amended to remove newspaper carriers from workers' compensation benefits *after* Elmore's fatal traffic incident. Thus, Elmore's estate was paid workers' compensation benefits as he was deemed an employee pursuant to the statute. That he was statutorily an employee does not control the underlying tort claim nor the analysis, *supra*, regarding whether Elmore was an independent contractor. *Cf. Landmark*, 91 S.W.3d at 579 (utilizing ten-factor analysis for unemployment compensation benefits). The statute only controls the workers' compensation claim. *See Sugg*, 817 S.W.2d at 457 ("Because we hold that Sugg was statutorily covered, we need not analyze the various factors . . . which distinguish an employee from an independent contractor.").

Accordingly, *stare decisis* does not control the instant case. The preceding analysis on the ten-factor test demonstrates that the trial court properly

found Elmore was an independent contractor. Therefore, we affirm the order granting summary judgment in News Publishing's favor.

CONCLUSION

Three issues were principally before us. The first issue concerned who maintained ownership of Elmore's vehicle. On that issue, we reverse and remand the trial court's order granting summary judgment to Martin Cadillac and Travelers for further proceedings concerning whether Martin Cadillac and/or DeWalt Auto complied with the promptness requirement of KRS 186A.215(3) and *Ellis v. Browning Pontiac-Chevrolet-GMC Truck-Geo, Inc.*, 125 S.W.3d 306 (Ky. App. 2003).

The second issue concerned the bad faith claim against Travelers. Having found the legal issue underlying Travelers refusal to negotiate is not a novel issue nor is it debatable that dealers must strictly comply with the statutes, and having reversed and remanded for further factual development on the promptness requirement of KRS 186A.215(3), we also reverse and remand the trial court's grant of summary judgment for Travelers on the bad faith claim. Though we reverse and remand, our Opinion should not be construed as addressing the merits of the claim.

The final issue concerned the *respondeat superior* liability claim against News Publishing. We find the trial court correctly found that Elmore was an independent contractor. Accordingly, we affirm the trial court's summary judgment order in News Publishing's favor.

Therefore, for the foregoing reasons we affirm in part and reverse and remand in part.

STUMBO, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN PART, AND DISSENTS IN PART.

VANMETER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent from Parts I and II of the majority opinion. In my view, the Warren Circuit Court correctly analyzed the provisions of KRS Chapters 186 and 186A in holding that Elmore was the legal owner of the vehicle in question. I concur with Part III of the majority opinion holding that Elmore was an independent contractor of News Publishing, LLC. I would affirm the trial court in all respects.

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