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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001340-MR

MICHEL WITHERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH MCDONALD-BURKMAN, JUDGE
ACTION NO. 16-CI-000821

KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY
and SHAWN BRYANT — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

KRAMER, CHIEF JUDGE: Michel Withers appeals an order of the Jefferson Circuit Court dismissing various claims he asserted against both of the above-captioned appellees relating to what he characterized as the wrongful denial of

coverage under a policy of automobile insurance issued to him by appellee, Kentucky Farm Bureau Mutual Insurance Company (KFB). For the reasons discussed below, we affirm in part, vacate in part, and remand.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On or about October 27, 2015, Withers met with appellee Shawn Bryant, a licensed insurance agent doing business at KFB's Shively Agency, to apply for and purchase a policy of automobile insurance for a 2000 Chevrolet Impala and a 2006 Honda Civic. Withers alleges that during their meeting he informed Bryant or one of Bryant's employees:[1]

> [H]e was not listed as the owner of the 2006 Honda Civic on the vehicle registration or title, but that he was in the process of purchasing said vehicle from his brother-in-law, Timothy Abney ("Abney"), whose name was listed on the title, and that title to said vehicle would be transferred by Abney into Withers' name once the existing lien(s) on said vehicle had been paid off. [FN]
>
> > [FN] The vehicle could not be transferred into Withers' name until after the liens had been paid off because Abney was in bankruptcy, as was fully explained to Bryant and/or his employee.
>
> Abney was also contacted during this meeting and verified the foregoing arrangement via speakerphone to Bryant and/or an employee of Bryant's office.

When their meeting concluded, Bryant issued Withers a policy of automobile insurance through KFB (designated as "insurance policy 20673158").

[1] Amended Complaint, Paragraph 9.

In relevant part, the policy provided it would be effective from October 28, 2015, through April 28, 2016. It recited Withers had been charged a total premium of $867.82 (which, aside from various fees, included a $269.60 premium for the Impala and $492.80 for the Civic). It also included the following addendum, written on KFB letterhead and signed by Withers:

> I, the undersigned insured, acknowledge that I am in the process of transferring into my name the following vehicle: (year) 06 (make & model) Honda Civic (vin#) JHMFA15586S010207. I also understand that since at the time I purchased the insurance policy #20673158 and received the accompanying proof of insurance, I have presented proof of ownership of this vehicle either by Title, Registration, or Sales Purchase Agreement. The agent's intention is to provide coverage for this vehicle ***only after the vehicle has been legally transferred into my name*** at the county clerk's office. ***I agree to supply my agent either a copy or faxed copy of the new registration showing the vehicle transferred into my name within 10 days of this date.***
>
> I also understand that should I fail to have this vehicle legally transferred into my name as I have indicated to the agent I am going to do, this policy may be canceled.

As alleged by Withers, Bryant or one of his employees contacted him about two weeks later concerning the status of transferring the title and registration of the Civic into his name. Withers responded by stating the title to the Civic "would be transferred from his brother-in-law, Abney, into [his] name once the existing lien(s) on said vehicle had been paid off so that the vehicle was free and clear."[2] However, it is undisputed that as of January 6, 2016, the title and

[2] Amended Complaint, Paragraph 15.

registration of the Civic still had not been transferred from Abney's name to Withers' name. And on that date, Withers was driving the Civic when a truck rear-ended him and he sustained injuries.

On February 9, 2016, Withers submitted an application to KFB for basic reparation benefits (BRB) and notified KFB that he would potentially seek underinsured motorist (UIM) coverage under the terms of his policy. On February 15, 2016, Withers then visited Bryant's office for the purpose of removing the Civic from his policy and replacing it with another vehicle he had purchased, a 2005 Dodge Ram pickup truck. Bryant made Withers' requested policy changes and also amended his policy to reflect, due to the addition of the Ram, that Withers' total premium had been adjusted from $867.82 to $876.43. Unbeknownst to both Withers and Bryant, however, KFB had, as of that same date, already rejected Withers' application for BRB, denied his claim, and decided to cancel the entirety of his policy. In a February 15, 2016 letter, KFB explained in relevant part:

> After full review of the claim you presented to Kentucky Farm Bureau Mutual Insurance as a First party insured, investigation of such claim revealed the following:
>
> The vehicle you were driving and claimed ownership to does not belong to you nor is the owner of such vehicle insured with Kentucky Farm Bureau Insurance. You added such vehicle to your policy confirming that you owned the vehicle. Such represents false misrepresentation as you have never owned the 2006 Honda Civic (VIN #: JHMFA15586S010207).

On February 16, 2016, KFB wrote to Withers again to inform him that his policy and all the coverage it provided had been retroactively canceled as of October 28, 2015. KFB explained in relevant part:

> We can no longer continue as your automobile insurance carrier for the following reason(s): Our records indicate that on your application for insurance, information was misrepresented. Our records indicate that on your application for automobile insurance for the 2006 Honda Civic Vin#JHMFA15586S010207 you misrepresented to us that you had a valid interest in the 2006 Honda Civic Vin#JHMFA15586S010207 as the titleholder when written on October 28, 2015. Our records indicate that Timothy Abney was the true owner of the vehicle when the application was signed.

KFB also included a check payable to Withers in the amount of $728.45, representing what it characterized as a refund of his "remaining policy premium."[3]

Three days later, Withers filed suit in Jefferson Circuit Court against Bryant and KFB. He asserted KFB's denial of his BRB claim and his claim for potential UIM coverage[4] amounted to breach of contract; fraud; a violation of the

[3] Withers has peppered his Amended Complaint, various pleadings, and appellate briefs with the contention that $728.45 did not adequately reimburse his remaining policy premium, and that he should have been reimbursed about $870 instead. The circuit court did not address this point, nor is it clear which of Withers' several causes of action, if any, this issue relates to. Therefore, we will not address this issue and will instead allow the circuit court to revisit it on remand.

[4] It is unnecessary for a UIM claimant to secure a judgment against a tortfeasor, or even ascertain the tortfeasor's policy limits, prior to filing suit against his or her own UIM carrier. *See State Farm Mut. Auto. Ins. Co. v. Riggs*, 484 S.W.3d 724, 729-30 (Ky. 2016).

Kentucky Consumer Protection Act (KCPA);[5] and either bad faith or an unfair claim settlement practice as defined by KRS 304.12-230. He asserted KFB defamed him by falsely indicating in its two letters from February 2016 that he had misrepresented ownership of the Civic. Lastly, he asserted KFB had intentionally interfered with his prospective business relationships with other insurers by falsely indicating in its records that he was "at fault" for the accident he was involved in on January 6, 2016,[6] and disseminating this information to other insurance carriers. As a result, Withers alleged, other insurance carriers would only sell him insurance at much higher rates. Withers also named Bryant as a defendant with respect to his fraud and KCPA claims.

Ultimately, KFB filed a Kentucky Civil Rule of Procedure (CR) 12.03 motion for judgment on the pleadings. However, KFB did not argue in its motion and associated memoranda that it had the right to rescind Withers' policy because Withers had materially misrepresented ownership of the Civic. Instead, KFB asserted the only issue before the circuit court was whether KFB was obligated to pay the claim under the terms of the agreement between the parties. KFB contended it had never been obligated to do so. Under KFB's interpretation of the addendum set forth above, coverage under the subject policy had never activated

[5] Kentucky Revised Statutes (KRS) 367.110 *et seq*.

[6] Withers attached a traffic citation that was issued resulting from his January 6, 2016 automobile accident. It indicates the other driver was at fault.

because Withers had failed to meet a condition precedent: The only interest KFB was willing to insure relative to the Civic was Withers' *registered ownership* of that vehicle; and Withers had no such registered ownership.

Withers, for his part, argued that despite his lack of ownership of and failure to register the Civic,[7] his policy nevertheless provided him with UIM and BRB coverage.[8] He argued that whether KFB validly denied him coverage was irrelevant to several of the other claims he asserted against KFB. He also asked for additional time to conduct discovery.

However, in an interlocutory order of August 24, 2016, the circuit court granted KFB's motion and dismissed the balance of Withers' claims against KFB with prejudice. In relevant part, the circuit court explained:

> KFB's requirement that the Civic be transferred into Withers' name is a condition precedent, a term that has been upheld by Kentucky courts without violating public policy. *T.M. Crutcher Dental Depot, Inc. v. Am. Indem. Co.*, 106 S.W.2d 621, 624 (Ky. 1937); *York v. Ky. Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 294 (Ky. 2005). The policy was extended to Withers and would be effective as of October 27, 2015 IF the Civic's registration was transferred into his name within 10 days. KRS 304.39-080 requires the owner or operator of motor vehicles registered or operated in Kentucky to carry a minimum amount of liability insurance on the vehicles. A vehicle may not be registered without proof of

[7] In Paragraph 47 of his Amended Complaint, Withers merely characterized himself as "the primary operator of said vehicle," rather than the owner. From this it appears Withers was, at most, a permissive driver of the Civic at the time of his accident.

[8] Withers offered several reasons in support of this overarching argument. His reasons are addressed in the context of our analysis.

> insurance. KRS 186.021(3). KFB gave Withers reasonable time to comply with its conditions, yet he had not done so over two months later. Withers being the registered owner of the Civic was an essential term to KFB. The application states the period for coverage was to be October 28, 2015 through April 28, 2016, but coverage was not in effect until the application was accepted. The application, at least as to the Civic, would not be considered accepted until proof of ownership was provided, and at that time coverage would be retroactively applied to the date of the application. Withers is charged with knowledge of the application and its terms. *Hornback v. Bankers Life Ins. Corp.*, 176 S.W.3d 699 (Ky. App. 2005). Because the condition of ownership was never satisfied, KFB's promise of insurance coverage never attached to the Civic. *T.M. Crutcher Dental Depot, Inc. v. Am. Indem. Co.*, 106 S.W.2d 621, 624 (Ky. 1937). KFB could therefore rescind the contract.
>
> In addition to a Breach of Contract claim, Withers has also alleged violation of the Kentucky Consumer Protection Act, Fraudulent Misrepresentation, Defamation, Bad Faith and violations of the Unfair Claim Settlement Practices Act, and Intention Interference with Business Relationships claims against KFB. These claims arise from KFB's rescission of Withers' insurance policy. As the Court has determined KFB acted properly in its rescission, the remaining claims against KFB must fail.

Subsequently, Withers moved the circuit court to amend its August 24, 2016 order to apply equally to Bryant—who had not filed any dispositive motion in this matter—because, as Withers asserted, the circuit court's reasoning applied equally to his claims against Bryant. The circuit court did so and it further designated its order final and appealable. This appeal followed.

STANDARD OF REVIEW

CR 12.03 provides as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

In *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003), the Supreme Court of Kentucky addressed the application of CR 12.03:

> [CR] 12.03 provides that any party to a lawsuit may move for a judgment on the pleadings. The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. The procedure is not intended to delay the trial in any respect, but is to be determined before the trial begins. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Archer v. Citizens Fidelity Bank & Trust Co.*, Ky., 365 S.W.2d 727 (1963). The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief. *Cf. Spencer v. Woods*, Ky., 282 S.W.2d 851 (1955).

Because the matter before this Court represents a question of law, our standard of review is *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

ANALYSIS

On appeal, Withers begins by reasserting the several arguments he offered below regarding why, in his view, his policy with KFB provided him with UIM and BRB coverage. We will begin our discussion with an analysis of these arguments. We will then discuss whether, in light of any coverage he may have been owed under the terms of his policy, the circuit court properly dismissed his claims against KFB and Bryant.

1. COVERAGE ISSUES

First, Withers argues the addendum itself should be disregarded and held to be of no legal effect because it does not appear to have been approved by the Kentucky Insurance Commissioner pursuant to KRS 304.14-120. We disagree. Assuming KFB was required to obtain approval from the Kentucky Department of Insurance specifically for the addendum at issue in this matter, KFB's failure to do so would not invalidate the addendum. Rather, it would merely invalidate "any condition, omission or provision not in compliance with the requirements of [the Kentucky Insurance Code]" within the addendum. *See* KRS 304.14-210(2).[9]

[9] KRS 304.14-210, entitled "Validity and construction of noncomplying forms," provides:

(1) A policy hereafter delivered or issued for delivery to any person in this state in violation of this code but otherwise binding on the insurer, shall be held valid, but shall be construed as provided in this code.

Withers does not cite any authority or make any argument to the effect that a particular condition, omission or provision within the addendum is not in compliance with the requirements of the Kentucky Insurance Code. Therefore, it is unnecessary to address this argument further.

Next, Withers argues KFB either waived or should have been estopped from asserting its "condition precedent" argument below because it was a purported "misrepresentation" on his part, rather than his failure to meet a condition precedent, that was KFB's stated basis for rescinding his policy in February 2016.

This argument has no merit. An insurer's failure to list *every* possible justification for denying coverage in its correspondence to its insured is not the kind of intentional act that establishes a waiver.[10] Moreover, even though an insurer initially gives an incorrect reason for denying a claim, an insurer is not liable for coverage or a bad faith denial of coverage—despite its insured's reliance upon that incorrect reason when filing suit—where proper grounds nevertheless

(2) Any insurance policy, rider, or indorsement hereafter issued and otherwise valid which contains any condition, omission or provision not in compliance with the requirements of this code, shall not thereby be rendered invalid but shall be construed and applied in accordance with such condition, omission or provision as would have applied had the same been in full compliance with this code.

[10] A "waiver" in the present context is "bottomed on a voluntary and intentional relinquishment of a known, existing right or power under the terms of an insurance contract." *Edmondson v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 781 S.W.2d 753, 755 (Ky. 1989) (quoting Long, The Law of Liability Insurance § 17.14).

existed[11] for the denial when it was made and, as is the case here, those grounds were raised in a timely fashion in subsequent litigation. *See Republic Insurance Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995) (cited with approval in *Kentucky Nat. Ins. Co. v. Shaffer*, 155 S.W.3d 738, 742 (Ky. App. 2004)).

In a similar vein, Withers appears to argue that KFB should be equitably estopped[12] from asserting his lack of ownership of the Civic as an issue in this matter or as a defense to providing coverage under the terms of his policy. His argument is based upon what he perceives were misrepresentations from KFB and its agent, Bryant, that his policy would cover the Civic even if he did not own the vehicle. From the face of his amended complaint, Withers asserts that those

[11] A claim of bad faith denial of coverage requires the following elements: "(1) [T]he insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) it must be shown that the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed[.]" *Wittmer v. Jones*, 864 S.W.2d 885, 890 (Ky. 1993) (Citation omitted).

[12] Withers classifies this argument as a claim of "fraud," but he is using fraud as a defensive measure in this context (*i.e.*, to prevent KFB, due to KFB's purported fraud, from asserting a contractual right or condition). This is equitable estoppel. As explained in *Electric and Water Plant Bd. of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974),

> The essential elements of equitable estoppel are (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And, broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

(Quotations and citations omitted).

misrepresentations came from two sources: (1) the addendum; and (2) KFB's decision to not cancel his policy after Bryant, its agent, discovered that ten days had elapsed since the policy was issued and title to the Civic still had not been transferred to Withers.

This argument has no merit. A plain reading of the addendum—which Withers copied into his amended complaint—reflects precisely the opposite: No coverage for the Civic was ever promised under the terms of Withers' policy, regardless of Withers' ownership of the vehicle, until Withers registered his title to the vehicle with the county clerk. Likewise, it makes no difference *when* KFB canceled his policy, and it would have made no difference even if KFB had never canceled his policy: Withers' policy included several different types of coverages; but, because Withers never registered title to the Civic with the county clerk, his policy never covered the Civic.

Next, Withers argues that KFB cannot assert the condition precedent set forth in the addendum because: (1) $492.80 of the premium he paid KFB related to the Civic; and (2) the declarations page of his policy, along with a proof of insurance card KFB issued him along with his policy, stated that coverage on the Civic became "effective 10/28/15."

It appears Withers is arguing that KFB either provided him with illusory coverage, or caused him some form of detrimental reliance. In either case, his argument has no merit. KFB provided him with something of value in

exchange for his premium—if Withers received title to the Civic from his brother-in-law and registered it with the county clerk on October 28, 2015, KFB would have been absolutely obligated to insure the Civic that day. The fact that Withers ultimately did not receive or register title to the Civic is not attributable to KFB. It was a risk that Withers accepted under the terms of the addendum and was more capable of controlling.

Moreover, KFB did not act in a contradictory or misleading manner by stating on the declarations page of Withers' the policy and proof of insurance cards that coverage on the Civic was "effective 10/28/15." KFB's insurance contract with Withers contemplated that coverage on the Civic could be effective on October 28, 2015, if he registered title to the vehicle with the county clerk on that date. But, Withers could not have registered the Civic at any time unless he had proof of insurance. *See* KRS 186.021(3). Stated differently, KFB issued proof of insurance cards with an effective date of October 28, 2015, not to mislead Withers, but to enable Withers to comply with the condition precedent to coverage relating to the Civic.

Next, Withers argues the circuit court erred when it found that his failure to meet a condition precedent in his policy with KFB justified rescinding all or part of his policy. We agree.

Essentially, KFB argued that Withers' failure to meet the condition precedent set forth in the addendum, combined with his "misrepresentation" in the

addendum that he qualified as the "owner" of the Civic, entitled it to the remedy of rescission based upon each of the three subsections of KRS 304.14-110. That statute provides:

> All statements and descriptions in any application for an insurance policy or annuity contract, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent; or
>
> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. This subsection shall not apply to applications taken for workers' compensation insurance coverage.

However, none of these three subsections could apply under the circumstances presented. KFB could not have been defrauded[13] by any

[13] Generally, a party claiming harm owing to fraud "must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury." *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 468 (Ky. 1999).

misrepresentation Withers made in the addendum regarding his ownership of the Civic because Withers' purported ownership of the Civic did not induce KFB to do *anything*. By the plain terms of the addendum, KFB, through its agent, unequivocally stated that it would not provide any coverage for the Civic, irrespective of Withers' ownership of the vehicle, unless and until title to the vehicle was registered with the county clerk. Likewise, Withers' failure to register title to the Civic with the county clerk did not cause KFB to accept or assume *any* kind of risk or hazard relative to that vehicle. To the contrary, because that condition was never met, KFB *never* assumed any detriment or risk in that regard.

In any event, the remedy of rescission, along with the remedy of cancellation, apply to contracts that *exist*:

> A rescission avoids the contract *ab initio* whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective. In other words, cancellation of a policy operates prospectively while rescission, in effect, operates retroactively to the very time that policy came into existence.

Progressive Northern Insurance Company v. Corder, 15 S.W.3d 381, 383 (Ky. 2000) (quoting 2 Couch On Insurance § 30:3 (3rd ed. 1996)).

By necessity, KFB's argument is not about an *existing* contract. In KFB's view, its contract with Withers, as far as its promise of coverage for the Civic was concerned, was dependent upon the county clerk's acceptance and registration of Withers' title to the Civic. KFB's "condition precedent" argument

is, therefore, that there was *nothing* to cancel or rescind because *no* contract existed in that respect. In other words, KFB's argument is based upon the principle of contract formation which provides that where an agreement is made subject to the happening of some future contingency, it must be viewed as a conditional agreement and, without the occurrence of the contingency, ineffective and executory in nature. *See, e.g., Green River Steel Corp. v. Globe Erection Co.*, 294 S.W.2d 507, 509 (Ky. 1956), explaining:

> A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done. . . . The general rule is that where an agreement is made, subject to the consent or approval of a third person, it must be looked on as a conditional agreement, dependent on such consent being given within a reasonable time, in default of which the agreement must be taken not to have become effective.

(Citations omitted). *See also Frank v. Thompson*, 207 Ky. 335, 269 S.W. 295, 296 (1924) ("Persons who have entered into a contract to become partners at some future time, or upon the happening of some future contingency, do not become partners until the agreed time has arrived or the contingency has happened." (Citation and quotes omitted)).

Moreover, under the plain terms of the addendum, Withers' failure to properly register the Civic merely allowed KFB the option of *prospectively terminating* the other coverages provided under the terms of the policy that were *not* attached to the Civic—such as the coverages relating to his Impala, for

example. *See Corder*, 15 S.W.3d at 383 (defining the ordinary meaning of "cancellation" in the context of insurance coverage). Accordingly, while KFB offered the circuit court a valid reason for terminating Withers' policy on February 15, 2016 (*e.g.*, *after* Withers' accident), KFB did not offer the circuit court any justification in its CR 12.03 motion for finding Withers' policy retroactively invalid, or otherwise voiding any part of it *ab initio*.

Boiled down, the dispositive issue on appeal, as far as coverage is concerned, is simply what Withers' policy covered on January 6, 2016, the day of Withers' accident. We find no error in the circuit court's conclusions, based upon the clear language of the addendum, that when Withers applied for coverage, his "application, at least as to the Civic, would not be considered accepted until proof of ownership was provided, and at that time coverage would be retroactively applied to the date of the application," and that "[b]ecause the condition of ownership was never satisfied, KFB's promise of insurance coverage never attached to the Civic." But, did KFB promise Withers coverage that did *not* need to be attached to the Civic to be effective?

As discussed, Withers sought two types of coverages in this action: BRB and UIM. With respect to BRB, Kentucky law (specifically KRS 304.39–050[14]) contemplates the possibility of two categories of insurers: (1) those

[14] KRS 304.39–050, entitled "Priority of applicability of security for payment of basic reparations benefits," provides in relevant part:

> (1) The basic reparation insurance applicable to bodily injury to which this subtitle applies is the security covering the vehicle

covering the vehicle, who are primary obligors for basic reparation benefits; and (2) all others, who qualify as secondary obligors. Where a vehicle is secured by an insurance policy, but operated at the time of injury by a driver who is insured by a second policy—separate and apart from the vehicle's insurance—the insurance "covering the vehicle occupied by the injured person at the time of the accident" will take priority over other insurance. KRS 304.39–050(1). Similarly, where a vehicle is secured by *no* insurance policy, but is operated at the time of injury by a driver who is insured by a second policy unassociated with the vehicle, the owner or registrant of the vehicle is the primary obligor for basic reparation benefits, and any contract of basic reparation insurance under which the injured person is a basic reparation insured is secondary. *See* KRS 304.39-050(1); KRS 304.39-310(2).

Withers does not argue that KFB was liable for providing him with BRB coverage as a *secondary* obligor, nor does his amended complaint include any allegations to that effect. His theory of coverage is that KFB was directly liable as a *primary* obligor. But, for his theory to have prevailed, his coverage

> occupied by the injured person at the time of the accident or, if the injured person is a pedestrian, the security covering the vehicle which struck such pedestrian. If the reparation obligor providing such insurance fails to make payment for loss within thirty (30) days after receipt of reasonable proof of the fact and the amount of loss sustained, the injured person shall be entitled to payment under any contract of basic reparation insurance under which he is a basic reparation insured and the insurer making such payments shall be entitled to full reimbursement from the reparation obligor providing the security covering the vehicle.
>
> (2) If there is no security covering the vehicle, any contract of basic reparation insurance under which the injured person is a basic reparation insured shall apply.

needed to be attached to the Civic. *See, e.g.*, *Progressive Max Ins. Co. v. National Car Rental Systems, Inc.*, 329 S.W.3d 320, 324 (Ky. 2011) (explaining the insurer of the vehicle occupied by the injured person at the time of the accident is the primary obligor of BRB per the plain instructions of KRS 304.39–050). Accordingly, because Withers' policy afforded him no primary BRB coverage, the circuit court correctly dismissed Withers' breach of contract claims based upon KFB's denial of primary BRB coverage.

The circuit court also correctly dismissed Withers' bad faith and UCSPA claims based upon KFB's denial of primary BRB coverage. Absent a contractual obligation to provide coverage, bad faith and UCSPA claims are generally untenable. *See Nat'l Ins. Co. v. Shaffer*, 155 S.W.3d 738, 742 (Ky. App. 2004). More importantly, none of these claims were based upon the Kentucky Motor Vehicle Reparations Act, KRS 304.39 *et seq.*, which "provides an *exclusive* remedy where an insurance company wrongfully delays or denies payment of no-fault benefits." *Foster v. Kentucky Farm Bureau Mutual Insurance Company*, 189 S.W.3d 553, 557 (Ky. 2006) (emphasis added).[15]

With respect to UIM, however, it is unclear whether KFB promised Withers coverage that needed to be attached to the Civic to be effective. As a

[15] Withers also asserts that one of his "claims" against KFB for denying him BRB coverage was "punitive damages." To be clear, punitive damages are not a "claim." They are a *remedy*. *See Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky. App. 2002). Moreover, they are a remedy barred in the context of a claim for wrongful denial or delay of no-fault benefits. *See Foster*, 189 S.W.3d at 557.

general matter, UIM coverage is considered personal to the insured and *not* connected to a particular vehicle. *Dupin v. Adkins*, 17 S.W.3d 538, 543 (Ky. App. 2000). UIM coverage typically follows the insured regardless of whether the insured is injured as a motorist, a passenger in a private or public vehicle, or a pedestrian. *Id*. Even so, UIM coverage is "limited by the actual, valid exclusions of each insurance policy." *Id*.; *see also Philadelphia Indemnity Ins. Co., Inc. v. Tryon*, 502 S.W.3d 585, 592 (Ky. 2016) (explaining limitations to UIM coverage, such as regular-use and owned-but-not-scheduled exclusions, are enforceable).

Here, the record does not contain a copy of Withers' policy explaining the scope of Withers' UIM coverage; it only includes the addendum and a declaration page stating that Withers paid a premium for UIM coverage. Accordingly, the circuit court improperly dismissed Withers' breach of contract, bad faith, and UCSPA claims that were based upon KFB's denial of UIM coverage. Absent any review of Withers' policy, it is impossible to determine whether Withers had a viable claim for UIM coverage under the circumstances.

2. REMAINING CLAIMS

To review, the circuit court dismissed all of Withers' claims against KFB and Bryant solely on the basis that, in its view, Withers had no BRB or UIM coverage under the terms of his policy. We have discussed the proper disposition of Withers' claims of breach of contract, bad faith, and USCPA violations relative to those coverages. As far as his claim of BRB coverage is concerned, we agree

with the circuit court. As far as UIM coverage is concerned, however, we have determined that the circuit court's judgment was premature and must be vacated.

As to Withers' remaining claims, we agree his claims of fraud against KFB and Bryant were correctly dismissed. Fraud has the same elements as equitable estoppel,[16] and Withers has based his claims of fraud against KFB and Bryant upon the same argument he offered relative to equitable estoppel (*i.e.*, what he perceived were misrepresentations from KFB and Bryant that his policy would cover the Civic even if he did not own the vehicle). Thus, for the same reasons discussed relative to his equitable estoppel argument, these claims must likewise be rejected.

We agree Withers' claims against KFB and Bryant for alleged violations of the KCPA were correctly dismissed. According to his amended complaint, Withers based these claims entirely upon his *beliefs* that his policy covered the Civic, and that KFB had no right to cancel the entirety of his policy due to his failure to register title to the Civic with the county clerk.[17] Acts or

[16] Equitable estoppel is a remedy *from* fraud. *See Bennett v. Horton*, 592 S.W.2d 460, 463 (Ky. 1979). Specifically, it is "a defensive doctrine founded on the principles of fraud, under which one party is prevented from taking advantage of another party whom it has falsely induced to act in some injurious [or] detrimental way. Under Kentucky law, equitable estoppel requires both a material misrepresentation by one party and reliance by the other party." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 594-95 (Ky. 2012) (quotations and citations omitted).

[17] In his reply brief, Withers summarizes his KCPA claims against KFB and Bryant as follows:

> KFB and its agent, Bryant, have committed Consumer Protection Act violations by selling Withers a policy of insurance utilizing a nonstandard form; and over 60 days later, KFB illegally canceled Withers' policy retroactively on false pretenses after he attempted to make a claim as a result of an accident. However, KFB and Bryant's Consumer Protection Act violations do not stop there. KFB and Bryant took the further step of canceling Withers' coverage on his 2000 Chevrolet Impala

practices deemed actionable under the KCPA must, however, be "[u]nfair, false, misleading, or deceptive[.]" KRS 367.170(1). And, as discussed, Withers arrived at his beliefs due to either his own incorrect interpretation of the addendum's plain language, or his various theories of waiver or estoppel we have already discussed at length and rejected in our analysis of his policy coverage. In light of the clear language of the addendum Withers voluntarily executed, Withers had no reasonable expectation of coverage attached to the Civic until he registered title to the vehicle with the county clerk; nor is it unreasonable or violative of public policy for an insurer to demand ownership of a vehicle as a condition precedent to coverage under a policy.

We also agree that the claim of defamation Withers asserted against KFB was properly dismissed. Defamation requires: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *See Toler v. Süd–Chemie, Inc.*, 458 S.W.3d 276, 281-82 (Ky. 2014). In this claim, Withers takes issue with the statements in KFB's February 15 and 16, 2016 letters that accused him of misrepresenting that he owned or otherwise held a valid interest in the Civic at the

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and his 2005 Dodge Ram pickup for no reason having anything to do with either of these two vehicles, the day after they had agreed to remove the 2006 Honda Civic from the policy and replace it with the 2005 Dodge Ram pickup, and did not even refund Withers' full premium.

time he applied for his policy on October 27, 2015. Withers asserts he made no such misrepresentations.

However, the addendum clearly provides otherwise. It unequivocally states that Withers "presented proof of ownership" of the Civic when he applied for coverage. By signing the addendum, Withers adopted that statement as his own. *See Hornback v. Bankers Life Ins. Co.*, 176 S.W.3d 699, 704 (Ky. App. 2005). Accordingly, the face of Withers' amended complaint demonstrates that his defamation claim must fail: The first of the above elements of defamation cannot be met.

Lastly, KFB argues the circuit court's judgment with respect to Withers' remaining claim of intentional interference with business relationships should also remain intact. We disagree. Even if the circuit court correctly held that Withers had no coverage under the purview of his policy, that should have had no bearing upon the validity of this particular claim. As discussed, this claim has nothing to do with coverage; the asserted basis of this claim is that KFB intentionally interfered with Withers' prospective business relationships with other insurers by falsely indicating in its records that he was "at fault" for the accident he was involved in on January 6, 2016, and disseminating this information to other insurance carriers. Moreover, despite KFB's representations to the contrary, Withers clearly alleged each of the requisite elements of this tort in his amended complaint. Accordingly, we vacate this portion of the circuit court's decision.

CONCLUSION

For the reasons set forth above, and to the extent discussed herein, we AFFIRM IN PART, VACATE IN PART, and REMAND for further proceedings not inconsistent with this opinion.

ALL CONCUR.

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