RENDERED: MAY 24, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001702-MR

HAROLD RAY DESPAIN — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 14-CI-00068

HARTFORD FIRE INSURANCE COMPANY[1] — APPELLEE

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

BEFORE: DIXON, JONES AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Harold Despain appeals from the Larue Circuit Court order denying his motions to compel and to alter, amend, or vacate its interlocutory order entered May 9, 2017, made final on June 19, 2017, granting summary judgment to Hartford Fire Insurance Company ("Hartford"). After careful review of the briefs

[1] Although David Probus was named an Appellee in the notice of appeal, he was dismissed as a party by order entered July 31, 2017.

and the law, we affirm the trial court's denial of Despain's motion to compel, but reverse its grant of summary judgment, which we remand with instructions for entry of an order consistent with this opinion.

At the outset, we recognize this case is one with both somewhat unusual and unique facts and procedural history. David Probus, who was initially employed at Despain's restaurant—the Hodgenville Grill—as a cook and dishwasher, expressed a desire to work more hours, and informed Despain of his construction background. Despain had stored certain restaurant equipment at a shed located on his personal property and decided to replace the shed's roof. Given Probus' request for more work and prior construction experience, coupled with Despain's dissatisfaction with the progress made by his then-current roofers, Probus and Despain agreed Probus would place a metal roof on the storage shed.

On June 12, 2013, Probus was on the shed's roof when he fell and was injured. That afternoon Despain met with his insurance agent who contacted Despain's restaurant's insurer, Hartford, to inform them of the injury.[2] Within a few days, a Hartford adjuster visited the scene of the accident, took photographs, and interviewed Despain and another of his employees who was working on Despain's property at the time of the accident. The adjuster requested Probus'

[2] At the time, Despain's personal property was uninsured.

contact information. Despain also gave Probus the adjuster's contact information. It appears some contact was made between Probus and Hartford.

Five days after the accident, on June 17, 2013, Hartford filed a First Report of Injury with Kentucky's Department of Workers' Claims ("DWC"). The accident description in the report states, "FELL OFF RESTAURANT EQUIPMENT STORAGE BUILDING ROOF WHILE ATTEMPTING TO REPLACE THE ROOF." Under the section for employment information, "HAROLD RAY DESPAIN" is listed as the named employer—consistent with the naming schema on the insurance policy—and the employer's physical address is listed as the restaurant's. According to the DWC's file, Hartford paid some of Probus' medical expenses as well as Temporary Total Disability ("TTD") income benefits to Probus through June 20, 2013. The date of termination of Probus' TTD income benefits coincided with his return to work for Despain's restaurant. On June 27, 2013, the DWC wrote Probus informing him of its receipt of notice from his employer's workers' compensation claims administrator (Hartford) that Probus' TTD income benefits as a result of a work-related injury were terminated as of June 20, 2013. The DWC further instructed Probus that his medical bills incurred for necessary treatment of his injury should still be forwarded to the claims administrator.[3]

[3] The remainder of the letter stated:

Nearly a year after the accident, on June 4, 2014, Probus brought the instant lawsuit against Despain. Despain was served with the complaint on June 21, 2014. Approximately two days later, Despain met with his insurance agent and showed the complaint and summons to him. Despain's agent forwarded the complaint to Hartford. Despain and his insurance agent discussed the complaint with a Hartford claims adjuster the same day who advised since Hartford was not being sued, there was no coverage. Despain timely answered the complaint, "[i]n the event [Probus] was in the course and scope of his employment at the time of the accident . . . then [Despain] asserts an affirmative defense and adopts and pleads all terms and provisions of the Kentucky Workers' Compensation Act [("Act")]."[4]

> You may request additional benefits that may be legally appropriate by filing an "Application for Resolution of Claim" with the Department of Workers' Claims. This "application" must be filed within two years after the date your injury occurred or within two years after the last voluntary payment of income benefits to you, whichever event last occurs.
>
> If an "Application for Resolution of claim" is not filed within the two-year time period, any claim for workers' compensation benefits, income and medical, as a result of the injury or disease will be barred. An exception to the two-year filing rule may be applied if the failure of the employer to file the termination notice in a timely manner caused the worker to miss the statutory deadline for filing a claim or if the parties submit a voluntary settlement agreement.

[4] Kentucky Revised Statutes ("KRS") Chapter 342.

Over a year after the complaint was filed and two years after the accident, Probus and Despain were deposed, on September 11, 2015. Despain testified Probus was working pursuant to his duties as a restaurant employee at the time of the accident. Probus stated that he believed Despain stored restaurant equipment in the shed.

Less than a week after the parties' depositions, on September 16, 2015, Despain's counsel spoke with a Hartford adjuster who indicated no denial letter had been sent but rather, the account was closed on October 17, 2014, due to Probus' failure to return the Hartford adjuster's phone calls.[5] Despain's counsel had been provided with a "Claim Inquiry" print-out from Hartford on which he made notes during this teleconference purportedly reflecting their conversation. The "Claim Inquiry" print-out dated March 3, 2015, indicated the claim was closed and listed payment details for $3,940.71 in medical payments with the last payment made on January 1, 2014. Despain's counsel also received a "First Notice of Loss Report" from Hartford which indicated Despain's company was their Insured and Probus' employer at the time of the accident. This report listed Probus' regular occupation as "cook/dishwasher" and occupation at the time of

[5] An affidavit of David A. Nunery dated and filed on February 17, 2017, states he was Despain's attorney and on September 16, 2015, had a telephone conversation with Annette Hawkins (a Hartford adjuster) who indicated no denial letter was sent and she closed the account on October 17, 2014, because Probus did not return her calls.

injury as "maintenance." The report further indicated Probus was injured while on the job, describing the accident as "[f]ell off restaurant equipment storage building roof while attempting to replace the roof."

Despain subsequently moved for summary judgment arguing: (1) Probus was working within the scope of his employment for the restaurant and KRS 342.690 excludes recovery via civil suit and (2) any hazards on the shed's roof constituted an open and obvious condition, thus precluding recovery.

Probus responded to Despain's motion for summary judgment, stating, "[a]s to [Despain's] assertion that he his [sic] immune under KRS 342.690(1), the record shows a material dispute over the issue of whether [Probus] was working for the Hodgenville Grill at the time of the accident." Probus relied on a letter dated February 11, 2016, addressed to his counsel from Hartford to claim the accident was not "work-related" and, therefore, not covered by Despain's insurance policy. Hartford's letter stated:

> The above claim was initially paid in error and upon further investigation it was discovered the plaintiff was not within the course and scope of employment as a cook at the time of the accident. Nor was he on the business premises at the time of the accident.
>
> We insure Harold Ray Despain dba Hodgenville Grill under business as a restaurant.
>
> Due to the facts surrounding the accident, there was no coverage afforded under our worker's compensation policy.

This letter attached to Probus' response to Despain's motion for summary judgment nearly three years after the accident, and two years after the lawsuit was filed, was the first indication provided to Despain that Hartford asserted Probus' accident was not work-related. The trial court thereafter denied Despain's motion for summary judgment without comment. Probus then moved the court to assign the case for a pretrial conference and trial.

After the matter was assigned a trial date, Despain moved the court for leave to file a third-party complaint against Hartford, which the trial court granted. The third-party complaint alleged the accident was covered under the restaurant's insurance policy and Hartford had duties to defend and indemnify Despain in this action. Hartford timely answered.

Thereafter Despain again moved the court for summary judgment, wherein he repeated his argument that Probus was working within the scope of his employment at the time of the alleged accident and his work-related injuries were covered by workers' compensation. Additionally, Despain moved the court to postpone the trial due to: (1) retirement and vacation of his primary counsel; (2) Hartford's intervening claim, petition for declaration of rights, and need to depose one of its employees; (3) Probus' failure to produce all relevant Medicaid payments; and (4) Probus' disclosure of additional fact witnesses and Despain's

desire to depose them prior to trial. The court granted the motion and postponed the trial.

Hartford responded to Despain's motion for summary judgment and countered with its own motion for summary judgment. Hartford contended that no coverage obligation was owed under the policy because Probus' injuries did not occur in the course of his restaurant employment. Hartford surmised if Probus' injuries did occur in the course of his restaurant employment, then Probus could not assert a civil action and the trial court would have no jurisdiction.

Prior to the trial court's ruling on the competing summary judgment motions, the parties began a small-scale discovery warfare. On February 6, 2017, Despain moved the trial court to compel Hartford's response to his discovery requests informally tendered on December 13, 2016, to produce its claims file. Hartford responded asserting the information was irrelevant and protected under the work-product doctrine. Probus moved the court to compel Despain to "fully and completely" answer his second set of written discovery.[6]

[6] Despain also moved the court to compel production of Probus' psychiatric records. After a hearing, the court granted Despain's motion. The discovery saga continued with Despain further moving the court to compel the medical examination of Probus by Dr. Gary Bray pursuant to Kentucky Rules of Civil Procedure ("CR") 35. The issue appeared to be amicably resolved by an agreed order entered on April 17, 2017; however, counsel was later informed Dr. Bray would be unable to provide certain information required under the agreed order. As such, Despain moved to set aside—or more accurately, modify—the order regarding the CR 35 examination. At hearing, the court denied Despain's motion.

On May 9, 2017, the court entered an interlocutory order, among other rulings, denying Despain's motion to compel discovery of Hartford's claims file and motion for summary judgment and, instead, granted summary judgment in favor of Hartford. In its ruling, the trial court specifically found:

> After reviewing authority cited in the parties' brief, the court finds that under current Kentucky law the facts do not support a conclusion Probus was acting within the scope of his employment. The act of repairing a barn roof is too far removed from cooking to be considered within the scope of Probus' employment. The court finds that storing some restaurant equipment in a barn is not sufficient to qualify Probus' actions as incidental to his restaurant employment. In light of this, the court finds Hartford does not have a duty to defend or indemnify Despain.

Pursuant to the requests of the parties, the court entered a subsequent order making its grant of summary judgment to Hartford final and appealable, which Despain then moved to alter, amend, or vacate. During the pendency of Despain's motion, the court entered the parties' agreed order of partial dismissal of Probus' claims. After the matter was fully briefed, the court ultimately denied Despain's motion to alter, amend, or vacate its final order granting summary judgment to Hartford. This appeal followed.

On appeal, Despain argues: (1) the trial court's grant of summary judgment in favor of Hartford was improper because, under the terms of the workers' compensation section of the insurance policy, he was owed a defense

and/or indemnification by Hartford in this action, or, (2) in the alternative, he was entitled to a defense and/or indemnification by Hartford under the terms of the "Employer's Liability Insurance" section of the insurance policy; and (3) the trial court abused its discretion in denying his motion to compel Hartford to produce its claims file.

Conversely, Hartford contends: (1) Despain is not entitled to a defense under the workers' compensation section of the policy because Probus did not make any allegations in his complaint falling under the clear policy language; (2) Despain is not entitled to defense and/or indemnification under the employers liability insurance section of the policy because Probus did not claim he was working within the course and scope of his restaurant employment; and (3) the trial court did not abuse its discretion in denial of Despain's motion to compel Hartford's claims file because the information is protected by the work-product doctrine and Despain cannot demonstrate that he is unable to obtain its equivalent without undue hardship.

The parties' first two arguments concern whether the trial court erred in its grant of summary judgment in favor of Hartford. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." CR 56.03. An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in finding no genuine issue of material fact exists and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). A grant of summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006) (citing *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000)).

As a threshold issue, we must first determine whether the trial court has jurisdiction over the issues now before us. The question of jurisdiction depends largely on whether the issues are governed under the Act.

The Act provides the exclusive remedy for work-related injuries, when certain requirements, such as securing workers' compensation insurance by the employer, are met. *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 13 (Ky. 2007). The first sentence of KRS 342.690 provides:

> [i]f an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

The "exclusive remedy" provision has been a part of the Act since its enactment in 1916. The Supreme Court of Kentucky has elucidated:

> [i]t is elementary that "[w]orkers' compensation is a creature of statute, and the *remedies and procedures described therein are exclusive.*" *Williams v. Eastern Coal Corp.,* [952 S.W.2d 696, 698 (Ky. 1997)] (emphasis added); *see also Morrison v. Carbide and Carbon Chemicals Corp.*, 278 Ky. 746, 129 S.W.2d 547, 549 [(Ky. 1939)]. We have consistently held that, except for the clause pertaining to a "willful or unprovoked physical aggression" at the hands of the employer or insurer or their agents, KRS 342.690(1) and its predecessor statutes shield a covered employer and its insurer from any other liability to a covered employee for damages arising out of a work-related injury. *E.g., Shamrock Coal Co., Inc. v. Maricle,* [5 S.W.3d 130, 133, 134-35 (Ky. 1999)] (workers' compensation board has exclusive jurisdiction to adjudicate work-related injuries not caused by intentional physical aggression); *Zurich Ins. Co. v. Mitchell,* [712 S.W.2d 340, 342 (Ky. 1986)]. ("With the exception of failing to secure the payment of benefits as provided in KRS 342.690(2) or a willful and unprovoked physical aggression, the exclusive liability provisions of the act cannot be waived.").

Travelers Indem. Co. v. Reker, 100 S.W.3d 756, 760 (Ky. 2003).

> Essentially, the exclusive remedy provision grants immunity for liability arising from common law and statutory claims, meaning such claims cannot be pursued in the courts of this Commonwealth. The immunity is often considered part of a bargain provided by the Act, whereby employers are made strictly liable to their employees for compensation for work-related injuries.

Coleman, 236 S.W.3d at 13. This immunity is extensive and "[i]t is consequently inescapable that the circuit court has no jurisdiction to entertain" tort claims covered by the Act. *Id*. at 14.

> Subject matter jurisdiction issues are different than other issues because they may be raised at any time, even by the court itself. *See Commonwealth Health Corporation v. Croslin*, 920 S.W.2d 46, 48 (Ky.1996) (noting the Court's "inherent power" to raise sua sponte the issue of subject matter jurisdiction). They are all the more important when established so clearly by statute.

Id. at 15.

In the instant case, Despain procured workers' compensation insurance for his restaurant and Probus was an employee of the restaurant. According to Hartford's reports of injury, Probus' regular occupation for the restaurant was a "cook/dishwasher" and at the time of Probus' injury he was working for the restaurant performing "maintenance" on a "restaurant equipment storage building roof." Despain contacted his insurance agent and insurer, which filed a report of injury with the DWC, paid workers' compensation benefits and medical payments. The injury was accidental and not a product of the willful or unprovoked physical aggression. Further, having accepted payment of benefits under the Act, Probus is precluded from suing his employer in circuit court for the same injuries. *Am. Gen. Life & Acc. Ins. Co. v. Hall*, 74 S.W.3d 688, 691 (Ky. 2002).

Concerning the issue of potential waiver of jurisdiction, we note the instant case is somewhat factually and legally distinguishable from *Gordon v. NKC Hosps., Inc*., 887 S.W.2d 360 (Ky. 1994), in which the Supreme Court of Kentucky

held that "subject matter jurisdiction cannot be created by waiver or conferred by agreement; and that in general, 'subject matter' does not mean 'this case,' but 'this kind of case' . . . so long as the 'kind of case' identified in the pleadings is within the court's jurisdiction, one claiming a legal bar must plead it affirmatively." *Id.* at 362. Like the case at hand, *Gordon* was not initially pled as a workers' compensation claim but, rather, as a premises liability claim, which was not patently within the purview of the Act. In the absence of the issue being raised by the defendant, the trial court had no way of knowing that the defendant was exempt from liability. This case is distinguishable because Probus' brief two-page complaint, used the phrases "[Despain] requested that he perform labor," "[Probus] agreed to perform the labor," "[Probus] went onto the roof of the barn to begin work," and "he instructed [Probus] to work upon" and Despain raised the affirmative defense of the Act in his answer and many times thereafter. Therefore, the trial court had notice Probus' type of claim was covered by the Act and, thus, outside its jurisdiction.

There are no questions as to the facts or circumstances concerning the accident. Where the facts are undisputed, whether an injury was work-related is essentially a question of law. *Jackson v. Cowden Mfg. Co*., 578 S.W.2d 259, 265 (Ky. App. 1978).

The case at hand bears certain striking similarities to *Aetna Cas. & Sur. Co. v. Freeman*, 427 S.W.2d 220 (Ky. 1968), in which a machine shop owner hired an employee to assist in the construction of another plant to house the machine shop. While applying new roofing, the employee fell and was injured. The insurer disputed coverage claiming the employee's actions were not necessary or incidental to the operation of the machine shop.

> While the provisions of KRS 342.375 tend to make liability of the insurer complete, regardless of contingencies and policy provisions to the contrary, nevertheless, our cases hold that the insurance coverage extends only to the particular business classification named in the policy. *Old Republic Insurance Company v. Begley*, [314 S.W.2d 552 (Ky. 1958)].
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> . . . .
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> In *Bob White Packing Company v. Hardy*, [340 S.W.2d 245 (Ky. 1960)] and in *Old Republic Insurance Company v. Begley*, . . . supra, we recognized that insurance coverage is not excluded where there is a 'natural connection between the business insured and the business in which the injured or deceased employee was serving.'
>
> In the instant case we believe that the providing of a new physical plant to house Berry's machine shop was just as much a part of the operation of this business as the purchase and installation of new equipment or the maintenance of the building and equipment prior to the relocation of the physical plant. In light of our decisions on the question at hand it would be unrealistic to decide that at the time Freeman was injured he was not engaged in performing duties that were necessary and incidental to the operation of Berry's business.

> Had Freeman been a regular employee at Berry's machine shop or had he been employed for and engaged in performing extra janitorial services there and been injured while working on a roof at this plant, it reasonably could not be argued that Aetna was not liable. The same reasoning we think is applicable in this case.

Freeman, 427 S.W.2d at 222. The classifications of risks in the *Freeman* policy and the one at issue in this case are similar and KRS 342.375 has not been substantively changed since *Freeman*. We are bound and obligated to follow *Freeman's* reasoning and holdings. As matter of fact and law, Probus was a regular employee of Despain's restaurant and he was employed for and engaged in performing extra maintenance services for the restaurant by installing the roof on the restaurant's equipment storage shed, making coverage under the policy all the more clear. Consequently, Probus' work-related injury arising out of and in the course of restaurant employment was one governed by the Act.

During the evolution of the underlying litigation, however, Despain and Probus voluntarily settled and Probus' claims were dismissed. The only remaining issues in this action concern the policy of insurance—including determination of Hartford's duties to defend and indemnify Despain. On review, it appears that, although the trial court initially had no jurisdiction to allow Probus' claims to proceed in its court, it does have jurisdiction to resolve the insurance disputes. The Supreme Court of Kentucky discussed these jurisdictional lines in *Custard Ins. Adjusters, Inc. v. Aldridge*, 57 S.W.3d 284, 287-88 (Ky. 2001).

At the heart of this dispute is the scope of the subject matter jurisdiction of the [DWC]. The jurisdiction of an administrative agency extends only to those matters that are delegated to it by the legislature. KRS 342.325 provides that "all questions arising under this chapter, if not settled by agreement of the parties interested therein . . . shall be determined by the [Administrative Law Judge] except as otherwise provided in this chapter." A number of provisions in Chapter 342 address the relationships between employers, their insurance carriers, and injured workers, and several of them are relevant to a consideration of the matter at issue. In summary, they are as follows:

> 1.) KRS 342.305—permits any party in interest to enforce a final award in circuit court and gives the circuit court sole jurisdiction over its enforcement. *See Fruchtenicht v. U.S.F. & G.*, [451 S.W.2d 835 (Ky. 1969)]; *Stearns Coal & Lumber Co. v. Duncan*, 271 Ky. 800, 113 S.W.2d 436 ([Ky.] 1938); *Pierce v. Russell Sportswear Corp.*, [586 S.W.2d 301 (Ky. App. 1979)].
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> 2.) KRS 342.340—requires that every employer must either insure or otherwise secure the payment of its workers' compensation liability.
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> 3.) KRS 342.360—charges the insurer with the employer's notice or knowledge of the injury; provides that "jurisdiction of the insured for the purpose of this chapter shall be jurisdiction of the insurer;" and provides that "the insurer shall in all things be bound by and subject to the awards, judgments or decrees entered against the insured."
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> 4.) KRS 342.365—requires workers' compensation insurance policies to contain an agreement by the insurer to promptly pay all benefits to those workers who are entitled to receive them and also provides that the agreement

> is to be construed as a direct promise between the insurer and the injured worker and that it is enforceable by the worker.
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> 5.) KRS 342.375—makes every workers' compensation insurance policy subject to the provisions of Chapter 342 and allows the Department of Workers' Claims to authorize an employer to purchase a separate policy for a specified location.
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> Each of these provisions dates to before the inception of the Kentucky Revised Statutes and has remained substantially unchanged over the years.
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> . . . .
>
> **[W]here the question at issue does not concern a matter of coverage but concerns whether an employer's insurance carrier has a duty to defend it against a workers' compensation claim, the dispute turns solely on the terms of the contractual relationship between the carrier and the employer**. It has no effect whatsoever on the relationship or the obligations that exist between either the employer or its carrier and the injured worker whose claim is the subject of the administrative proceeding. **Thus, the court has concluded that the matter does not arise under Chapter 342 and should be raised in circuit court rather than in the workers' compensation proceeding.** *Wolfe v. Fidelity & Casualty Insurance Company of New York,* [979 S.W.2d 118 (Ky. App. 1998)].

(Emphasis added). Probus' claims were covered and should have been brought under the Act; nonetheless, Probus and Despain settled, leaving the issues of whether Hartford owed Despain a defense under the policy, and indemnification

unresolved. Because these remaining determinations have no impact on Probus' claims, they do not arise under Chapter 342 and are appropriate for the trial court's jurisdiction.

Due to our holding Probus' claims fell under the Act, it follows that Hartford owed Despain both the duty to defend as well as the duty to indemnify under the insurance policy. The policy required Hartford to defend "any claim, proceeding or suit against [the insured] for benefits payable by this insurance." Prior to suit, Hartford filed reports of injury with the DWC and paid workers' compensation income and medical benefits to or on behalf of Probus. Probus made four references in his two-page complaint to "work" or "labor" and Despain's answer affirmatively pled defenses under the Act. Particularly in light of the facts known to Hartford, these initial pleadings were sufficient to trigger the duty to defend and subsequently to indemnify.

Despain's third argument on appeal is the trial court erred in its denial of his motion to compel production of Hartford's claims file. We review denial of such a motion, as an evidentiary matter within the trial court's discretion. We will reverse only for an abuse of discretion. The trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Despain's assertion of trial court error in declining to compel production of Hartford's claim file is unsupported by the record. To the contrary, the record demonstrates Despain did not attempt to obtain the documents in question through any of the various methods available to him pursuant to CR 26.01. "A court order is generally appropriate only upon the failure of a party or witness to comply with a proper discovery request. CR 37.01(b)(i)." *Metro. Prop. & Cas. Ins. Co. v. Overstreet*, 103 S.W.3d 31, 45 (Ky. 2003). This first requires a formal discovery request be made and, second, the discovery request be denied. Review of the written discovery requests propounded in this action shows Despain failed to request the claims file from Hartford through the requisite discovery process. No proper discovery request having been made, there can be no showing Hartford failed to comply; therefore, the trial court did not err in denying Despain's motion to compel Hartford to produce its claims file.

For the foregoing reasons, we AFFIRM, in part, the order of the Larue Circuit Court denying Despain's motion to compel production of Hartford's claims file and REVERSE, in part, its grant of summary judgment to Hartford, which we REMAND with instructions for entry of an order consistent with this opinion.

ALL CONCUR.

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