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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-0984-MR

A.M., BY AND THROUGH HER COURT-APPOINTED GUARDIAN AND CONSERVATOR, AUDREY MARTIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 22-CI-004195

AMERICAN ALTERNATIVE INSURANCE CORPORATION; ALISSA HEBERMEHL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; CARL KLING, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; CORDELIA HARDIN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; JASON NEUSS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN BUNTING, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MARTIN POLLIO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; MUNICH REINSURANCE AMERICA, INC.; TAMARA OYLER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; TONKEYTA RODGERS,

INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY; AND
UNDERWRITERS SAFETY AND
CLAIMS, LLC APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CALDWELL, ECKERLE, AND MCNEILL, JUDGES.

CALDWELL, JUDGE: A.M., by and through her court-appointed guardian and conservator, Audrey Martin ("A.M."), sued the Jefferson County Board of Education and employees thereof (collectively "JCBE"), alleging she had been subjected to inappropriate sexual contact by another student at a high school. That action, which we shall refer to as "the first action," was resolved via settlement. Soon thereafter, A.M. filed the present action, alleging JCBE and its insurers misled her about JCBE's insurance policy limits, and that deception caused her to settle the first action for a lower amount than she otherwise would have. The Jefferson Circuit Court dismissed A.M.'s complaint. We affirm.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

The facts which gave rise to the first action are not directly relevant to the issues raised in this appeal, so we shall not recite them in detail. A.M., a special needs student, alleged she was raped by another student at school. A.M.

alleged school personnel failed to provide adequate supervision and failed to respond appropriately after learning the other student had touched her in a sexual manner in the days preceding the alleged rape.

During the pendency of the first action, A.M.'s counsel inquired about the applicable insurance policy limits and told opposing counsel the amount of insurance funds available would impact A.M.'s settlement stance. A.M. alleges JCBE's counsel indicated at least three times, twice in writing and once orally, that JCBE's policy limits were $5.5 million. JCBE's insurer was American Alternative Insurance Company ("AAIC"); AAIC's third-party administrator was Munich Reinsurance America ("Munich"); and JCBE's third-party administrator was Underwriters Safety and Claims, LLC ("Underwriters").

After extensive negotiations, including mediation, A.M. agreed to settle the first action for $1,500,000 – roughly 27% of the purported policy limits.[1] A.M.'s counsel admits he received in discovery a copy of JCBE's insurance policy, but he did not read it before the first action settled.

Soon after the settlement of the first action was completed, A.M. brought the action at hand against JCBE, AAIC, Munich and Underwriters (we shall collectively refer to AAIC, Munich and Underwriters as "the insurance

[1] Though the settlement amount would typically be confidential, it was noted in the trial court and is discussed in the parties' briefs.

defendants"). The gist of A.M.'s sprawling complaint is that her counsel was actionably misled about JCBE's policy limits in the first action. A.M. alleges she would not have settled the first action for $1.5 million if she had known the true policy limits were (in her view) $12.5 million.[2]

All defendants filed motions to dismiss A.M.'s complaint for failure to state a claim upon which relief may be granted. *See* CR 12.02(f). After the trial court granted the motions to dismiss, A.M. filed this appeal.

II. ANALYSIS

A. The Scope of Our Review

Before we begin our substantive analysis, we note that the trial court record and the parties' five briefs are lengthy. We have carefully examined the record and the briefs. However, in the interests of judicial economy, we shall discuss only the arguments and authorities we discern are absolutely necessary. We have concluded any argument or citation to authority not discussed herein is redundant, lacks merit, or is otherwise unnecessary for us to examine. *Schell v. Young*, 640 S.W.3d 24, 29 (Ky. App. 2021). Also, we may affirm on alternate

[2] Kentucky Rules of Civil Procedure ("CR") 8.01(1) provides that a pleading "shall contain . . . a short and plain statement of the claim[s]" and CR. 8.05(1) provides that "[e]ach averment of a pleading shall be simple, concise, and direct." Nonetheless, A.M.'s complaint contains 387 numbered paragraphs, is seventy-three pages in length, and has hundreds of pages of attached, unindexed exhibits. *See* CR 10.03 (providing that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). In sum, A.M.'s unnecessarily verbose complaint facially violates CR. 8.01 and 8.05. Federal courts have often struck similarly nonconforming complaints. *See* 5 Fed. Prac. & Proc. Civ. § 1217 (4th ed. 2025) (listing cases).

grounds supported by the record and applicable law. *See Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 496 (Ky. 2014).

B. The Motions to Dismiss Were Not Converted to Motions for Summary Judgment

Before we begin our analysis of the substantive issues, we must resolve a procedural question involving whether the motions to dismiss should have been treated as motions for summary judgment because extra-pleading materials were presented to, and not specifically excluded by, the trial court. *See* CR 12.02 ("If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, 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 in Rule 56 . . . .").[3]

Determining whether conversion should have occurred matters for two main reasons. First, even though they are related, "the standards for granting summary judgment and for dismissing a complaint for failure to state a claim upon which relief may be granted under CR 12.02 are not interchangeable . . . ." *Schell*, 640 S.W.3d at 33. Second, the trial court here dismissed A.M.'s complaint before

[3] The trial court neither excluded nor discussed the extraneous matters in the decision which led to this appeal. We reject the argument that a trial court must actively cite the extraneous materials in its decision to convert the motion to dismiss to one for summary judgment. The plain language of CR 12.02 requires conversion if the extraneous materials are "not excluded by the court . . . ." The plain language of the rule premises conversion on the court failing to exclude the materials; nothing in the rule premises conversion upon the court discussing the extraneous materials. We decline the invitation to graft additional language onto CR 12.02.

much, if any, discovery had occurred and precedent holds that "summary judgment motions should not even be considered by trial courts until the opposing party has had an adequate opportunity for discovery." *Normandy Farm, LLC v. Kenneth McPeek Racing Stable, Inc.*, 701 S.W.3d 129, 141 n.9 (Ky. 2024). A.M. seizes on that general rule and argues she was entitled to conduct discovery.

To ascertain whether conversion should have occurred here, we must first determine what CR 12.02 means when it refers to "matters outside the pleading . . . ." CR 7.01 defines a "pleading" to include only complaints, answers, replies to counterclaims, third-party complaints, and third-party answers. Therefore, the only "pleading" relevant here is A.M.'s complaint.

The voluminous exhibits to A.M.'s complaint did not result in conversion. *See Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 564 (Ky. App. 2017); 61A AM. JUR. 2D *Pleading* § 486 (2025). Concluding that exhibits to a complaint do not cause conversion aligns with CR 10.03, which provides in relevant part that, "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

A motion to dismiss is not a pleading. *Hawes v. Cumberland Contracting Co.*, 422 S.W.2d 713, 714 (Ky. 1967). Therefore, neither is A.M.'s response. In fact, the conversion argument here is based on the nine total exhibits

to A.M.'s response. Of course, conversion may occur even if the extraneous materials are presented by the non-movant. *Schell*, 640 S.W.3d at 33.

Conversion does not automatically occur whenever extra-pleading materials are presented to, and not excluded by, the trial court since "there are exceptions to the conversion rule." *Id*. For example, neither matters of public record or "matters incorporated by reference or integral to the claim" cause conversion. *Id.* (internal quotation marks and citations omitted). For the incorporation by reference or matters integral to the complaint exception to apply, "the plaintiff must have (1) actual notice of the extraneous information and (2) [have] relied upon the documents in framing the complaint." *Id.* (internal quotation marks and citations omitted).

Turning to the exhibits attached to A.M.'s response, Exhibit 1 is a financial document from JCBE. That exhibit does not result in conversion because it is a matter of public record and is a duplicate of Exhibit 30 to the complaint. Exhibits 3, 4, and 5 to the response are copies of court decisions in unrelated cases, so they also fall within the public records exception. Similarly, the precedent attached as exhibits to the motions to dismiss fall within that exception. Exhibits 6 and 7 to the response do not result in conversion because they are duplicates of Exhibits 9 and 16 of the complaint. The two sealed exhibits, which are the settlement document in the first action and photocopies of the settlement checks

drawn on an account of Underwriters, also do not result in conversion. A.M. obviously had knowledge of those documents and relied upon them in drafting her complaint in the action at hand.

That leaves only Exhibit 2 to A.M.'s response. That exhibit is a document from Underwriters' website which says at the top "Wednesday, January 5, 2022 – An Important Press Release[.]" The two-page document includes a summary of the services Underwriters performs for its clients as a third-party claims administrator.

It is unclear how the contents of Exhibit 2 are directly tied to the issues in the motion to dismiss or the claims in A.M.'s complaint. After all, it seems undisputed that Underwriters was JCBE's third-party administrator. It is difficult to immediately grasp the evidentiary value of an exhibit which only reiterates an undisputed, largely irrelevant fact. The lack of meaningful value in Exhibit 2 is underscored by the fact that A.M. references it in footnote 78 to her response to support the unremarkable assertion that "Underwriters' website confirms that it is engaged in the adjustment and handling of insurance claims. Exhibit 2." Presentation of matters outside the pleadings which are "irrelevant to the plaintiff's claim[s]" do not cause conversion. 61A AM. JUR. 2D *Pleading* § 486 (2025). Exhibit 2 falls within that exception.

It is also beyond reasonable dispute that A.M. knew Underwriters was JCBE's third-party administrator prior to filing her complaint and that she relied on that knowledge when drafting the complaint. Thus, the exhibit falls within the matters integral to the complaint exception. Moreover, Exhibit 2 was purportedly drawn from a public press release contained on a public website. We conclude therefore that Exhibit 2 did not trigger conversion.

Our conclusion is reinforced by the fact that A.M. has not cited to precisely where she, or even the Appellees, asked the trial court to treat the motions to dismiss as motions for summary judgment. In at least one published opinion, we based our conclusion that conversion was not required in part on the fact that no party had "asserted" to the trial court that conversion should occur. *Schell*, 640 S.W.3d at 33.

In sum, we conclude the motions to dismiss were not converted to motions for summary judgment.[4]

C. Standards of Review

As our Supreme Court has held:

> A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material

[4] Under these unique facts, "our conclusion would not be changed if we applied the summary judgment standard provided in CR 56.03 under which a party is entitled to summary judgment if there is 'no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010). Discovery would not have rendered viable A.M.'s facially deficient claims.

> facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . . Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo.

Fox, 317 S.W.3d at 7 (internal quotation marks, footnotes, and citations omitted).

Though we must deem A.M.'s factual allegations as true, we are not similarly required to give full credence to the conjecture and unsupported legal conclusions therein. "[T]he general rule of pleading [is] that facts and not conclusions should be pleaded, and that, if only the latter is contained in the pleading, it will not authorize the granting of relief, unless waived or cured . . . by some recognized method . . . ." *Seiller Waterman, LLC v. RLB Properties, Ltd.*, 610 S.W.3d 188, 195 (Ky. 2020) (internal quotation marks and citations omitted) (brackets and ellipses in *Seiller Waterman*). *See also, e.g.*, 71 C.J.S. *Pleading* § 618 (2025) ("Unsupported factual or legal conclusions are not enough to withstand the motion" to dismiss.) (footnotes and citations omitted).

D. Bad Faith Claims Against Insurance Defendants

We next analyze the propriety of the dismissal of A.M.'s bad faith claims against the insurance defendants. Settling the first claim for less than the policy limits does not preclude A.M. from raising bad faith claims here. *Bowlin Group, LLC v. Rebennack*, 626 S.W.3d 177, 189 (Ky. App. 2020).

Our Supreme Court has explained the elements of a viable bad faith claim as follows:

> a plaintiff has a "steep burden" of satisfying three requirements before a trial court should find the plaintiff to have brought a viable bad-faith claim. Those requirements are:
>
> (1) the insurer must be obligated to pay the insured's 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. The failure to show any of these elements eliminates the bad-faith claim as a matter of law.

Mosley v. Arch Specialty Insurance Company, 626 S.W.3d 579, 584 (Ky. 2021) (footnotes and citations omitted). A viable bad faith claim requires evidence of "punitive conduct . . . ." *Hollaway v. Direct General Insurance Company of Mississippi, Inc.*, 497 S.W.3d 733, 737-39 (Ky. 2016).

The parties raise a plethora of bad faith arguments, including Underwriters' argument that it cannot be subjected to a bad faith claim because it is not an insurer. We need not address most of those arguments because the bad faith claims are doomed by the fact that JCBE's liability in the first action was not beyond dispute.

An insurance company "is entitled to challenge a claim and litigate it if the claim is debatable on the law or facts." *Belt v. Cincinnati Insurance Company*, 664 S.W.3d 524, 535 (Ky. 2022) (internal quotation marks and citation omitted). Therefore, bad faith requires a showing "that the insured's liability is beyond dispute." *Mosley*, 626 S.W.3d at 586. Agreeing to settle the first action does not suffice. *Holloway*, 497 S.W.3d at 738 ("[U]nder Kentucky law, settlements are not evidence of legal liability, nor do they qualify as admissions of fault.").

Paragraph 331 of A.M.'s complaint admits the defendants in the first action had pending dispositive motions when that action was settled. Those motions, and A.M.'s responses thereto, are not in the record before us. Unsurprisingly, A.M. asserts those motions would have been denied. Perhaps. But perhaps not.

A.M.'s confidence seems to have been matched by JCBE. Exhibit 13 to A.M.'s complaint is a January 2022 letter from JCBE's counsel expressing

confidence "in the immunity defenses." Moreover, A.M.'s belief that she would have prevailed on the merits in the first action is contradicted, at least in part, by the fact that some of her claims were dismissed. *See* Exhibit 14 to A.M.'s complaint (an email from A.M.'s counsel noting that A.M.'s Title IX claims had been dismissed). As the trial court aptly noted, the parties "heavily disputed JCBE's liability . . . ." From the limited record before us, it is not plain that the insurance defendants' liability was beyond dispute as to all of A.M.'s claims.

Neither the parties, nor we, may know with reliable confidence how the dispositive motions would have been resolved. Because of the unresolved dispositive motions and the fact that at least some of A.M.'s claims in the first action were dismissed, A.M. cannot show that JCBE's liability in the first action was beyond dispute. Accordingly, we affirm the dismissal of the bad faith claims.

E. Judicial Statements Privilege

We next examine the Appellees' assertion that application of the judicial statements privilege, sometimes called the judicial proceedings privilege, required dismissal of many of A.M.'s claims. We agree, as to JCBE.

A.M.'s complaint alleges JCBE's counsel stated once orally and twice in writing during the first action that JCBE's policy limits were $5.5 million. We accept that factual recitation as true. A.M. insists that she was misled because the actual policy limits were $12.5 million, though A.M. carefully does not assert

JCBE's counsel knowingly lied about the policy limits. Appellees do not concede that JCBE's counsel's statements about the policy limits were incorrect. There appears to be a genuine dispute between the parties as to how to properly interpret the relevant insurance policy to determine how much coverage was available to JCBE in the first action. For purposes of resolving the motion to dismiss, we assume JCBE's counsel was mistaken about the policy limits.

1. Background and Elements of Judicial Statements Privilege

The judicial statements privilege bars claims based on statements made during litigation. So, if the privilege applies, JCBE's counsel's statements about the policy limits could not be used to support a cause of action. *See, e.g.*, *Halle v. Banner Industries of N.E., Inc.*, 453 S.W.3d 179, 184 (Ky. App. 2014) (describing the privilege as providing "an absolute privilege to statements made preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding" so long as the statements "have some relation to a proceeding that is contemplated in good faith and under serious consideration") (internal quotation marks and citations omitted).

The ancient privilege has been recognized in Kentucky since the antebellum period:

> The principle is well settled and is indeed essential to the ends of justice, which demand that there should be a free resort to judicial tribunals and to the remedies furnished by the law, that words spoken or written in the course of

> justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal to which they are addressed and to the remedy sought in that tribunal, are not actionable though they be false, unless the proceeding were resorted to merely for the purpose of conveying the scandal and as a cover for the malice of the party, and not in good faith as a remedy for the assertion of a right or the redress of a wrong.

Forbes v. Johnson, 11 B. Mon. 48, 50 50 Ky. 48, 51 (1850). *See also, e.g., Smith v. Hodges*, 199 S.W.3d 185, 194 (Ky. App. 2005) (holding that a statement fell within the privilege because it had "some relation to the subject matter" of an action); *Maggard v. Kinney*, 576 S.W.3d 559, 567 (Ky. 2019) ("The judicial statements privilege . . . provides that statements in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice.") (internal quotation marks and citations omitted).

Our Supreme Court has explained the rationale underlying, and the requirements for the application of, the judicial statements privilege as follows:

> The prevailing rule regarding the judicial statements privilege in Kentucky is that communications made pursuant to judicial proceedings are absolutely privileged even if otherwise defamatory. This includes pleadings and statements of witnesses. The emphasis is on judicial (or quasi-judicial) proceedings.
>
> A communication must fulfill two requirements in order to fall within the ambit of the judicial statements privilege. First, the communication must have been

> made "preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of a judicial proceeding." *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1127 (6th Cir. 1990) (citing *Restatement (Second) of Torts* § 587 (1977)). Second, the communication must be material, pertinent, and relevant to the judicial proceeding.
>
> *Morgan & Pottinger, Attys., P.S.C. v. Botts*, 348 S.W.3d 599, 602 (Ky. 2011), *overruled on other grounds by Maggard*, 576 S.W.3d at 570. The privilege is limited to communications and does not cover conduct.
>
> The doctrine behind the judicial statements privilege rests upon public policy which looks to the free and unfettered administration of justice, though, as an incidental result, it may, in some instances, afford an immunity to the evil-disposed and malignant slanderer.

New Albany Main Street Properties, LLC v. Stratton, 677 S.W.3d 345, 348-49 (Ky. 2023) (some quotation marks and citations omitted).

Of course, the judicial statements privilege only "precludes the use of those privileged communications to sustain a cause of action. It does not bar the cause of action but only renders it unsustainable if based exclusively on statements privileged under the law." *Halle*, 453 S.W.3d at 184. The scope of the privilege is broad, as shown by Kentucky's then-highest court quoting with approval a treatise which stated the privilege generally applied to "pleadings, motions, affidavits, and other papers in any judicial proceeding . . . though false and malicious . . . ."

Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281, 283 (Ky. 1942) (internal quotation marks and citation omitted).

2. The Limits of the Judicial Statements Privilege Here

The parties' briefs focus on three statements regarding JCBE's policy limits made by JCBE's counsel in the first action.[5] Nonetheless, without pointing to a statement which they made in the first action and while otherwise disputing that they were controlling the actions of JCBE's counsel, the insurance defendants assert the privilege also applies to them. We reject the assertion that the insurance defendants are vicariously entitled to application of the privilege.

The allegation, as we perceive it, is that the insurance defendants did not speak up to contradict JCBE's counsel when he orally stated that the policy limits were $5.5 million. Silence may indeed speak loudly but silence is not a basis for application of the judicial statements privilege. Instead, silence would appear to be conduct, and the judicial statements privilege does not apply to

[5] Although the precise relationship between them and A.M.'s causes of action is hazy, the complaint also mentions two statements by Underwriters. First, the complaint alludes to an assertion by Underwriters that JCBE was unwilling to pay $1 million to settle the case. Second, the complaint alludes to a statement of opinion by an Underwriters' employee expressing confidence that the first action could be amicably settled. Both statements are opinions and "mere statements of opinion or prediction of future performance will not support a claim of fraud." *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544, 552 (Ky. 2009). *See also, e.g.*, *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955) ("A mere statement of opinion or prediction may not be the basis of an action."). Moreover, the statements otherwise satisfy the requirements of the judicial statements privilege

conduct. *Stratton*, 677 S.W.3d at 349. Thus, the judicial statements privilege applies only to JCBE.

Next, we readily reject any policy-based arguments by A.M. that the privilege should not apply because it is unfair, unwise, or allows lying during litigation without consequence. As to lying without consequence, A.M. has carefully refrained from accusing JCBE's counsel of having done so. Moreover, lying during litigation may still result in negative consequences, such as perjury charges or professional disciplinary proceedings.

We decline to jettison the privilege on public policy grounds. The privilege has been repeatedly recognized by our Supreme Court, which has indicated it is keenly aware that application of the privilege "is not without cost" because "in some instances the privilege will immunize despicable, defamatory conduct." *Stratton*, 677 S.W.3d at 350. Nonetheless, our Supreme Court held that "the free and unfettered administration of justice requires such a cost . . . ." *Id.* We lack the authority to accept A.M.'s invitation to ignore, curtail, or abandon the privilege. *See* SCR[6] 1.030(8)(a).

3. The Statements Which Fall Within the Privilege

The three statements at issue regarding the amount of insurance coverage (twice in writing, once orally) are covered by the judicial statements

[6] Rules of the Supreme Court.

privilege.[7] The statements were made during ongoing litigation, and bore some relation to (*i.e.*, were relevant to) that litigation.

A.M. argues the statements are not relevant. However, all along A.M. has stressed in both actions that JCBE's policy limits governed the amount for which she was willing to settle the first action. Moreover, CR 26.02(1) provides that a party may generally obtain discovery regarding relevant matters and CR 26.02(2) states that a party may obtain discovery of the existence of, and contents of, an insurance policy. The insurance policy was relevant. We agree with JCBE's rhetorical question on page ten of its brief: "If the amount and availability of insurance were not material, pertinent and relevant to the [first action], why would [A.M.'s] counsel have repeatedly asked for it?"

In paragraphs 351 and 352 of her complaint, A.M. tellingly admits the statements about the policy limits were "material" misstatements which Appellees "knew, and/or should have known that Plaintiff would rely upon . . . . ." The statements were relevant, and A.M. thus is precluded from using them "to sustain a cause of action." *Halle*, 453 S.W.3d at 184.

[7] A letter may fall within the judicial statements privilege. *See Rogers v. Luttrell*, 144 S.W.3d 841 (Ky. App. 2004).

F. Fraudulent Misrepresentation

Paragraph 351 of A.M.'s complaint asserts Defendants "made false material representations to Plaintiff, including but not limited to false material representations regarding the amount of insurance coverage . . . ." A.M. does not list other specific, allegedly false misrepresentations. The fraudulent misrepresentation claim against JCBE fails due to the judicial statements privilege.

Turning to the fraudulent misrepresentation claims against the insurance defendants, our Supreme Court has held:

> Fraud by misrepresentation is established by clear and convincing evidence:
>
> (1) that the declarant made a material representation to the plaintiff,
>
> (2) that this representation was false,
>
> (3) that the declarant knew the representation was false or made it recklessly,
>
> (4) that the declarant induced the plaintiff to act upon the misrepresentation,
>
> (5) that the plaintiff [reasonably or justifiably] relied upon the misrepresentation, and
>
> (6) that the misrepresentation caused injury to the plaintiff.

Yung v. Grant Thornton, LLP, 563 S.W.3d 22, 45 (Ky. 2018) (brackets in *Yung*). *See also Collins v. Kentucky Lottery Corp.*, 399 S.W.3d 449, 453 (Ky. App. 2012).

Despite A.M.'s arguments to the contrary, we have held that the judicial statements privilege "applies to claims of fraud." *Halle*, 453 S.W.3d at 188.

We decline to unnecessarily lengthen this Opinion by discussing the distinguishable and/or non-binding precedent cited by the parties. Instead, we conclude the fraudulent misrepresentation claims fail for several reasons set forth by Kentucky precedent.

First, the claims fail because A.M. does not cite to specific misrepresentations made to her by the insurance defendants. At most, A.M. has alleged the insurance defendants did not express disagreement with JCBE's oral representation as to the insurance policy limits. "It is, of course, well established that mere silence is not fraudulent absent a duty to disclose." *Smith v. General Motors Corp.*, 979 S.W.2d 127, 129 (Ky. App. 1998).

A duty to disclose arises "from a fiduciary relationship, from a partial disclosure of information, or from particular circumstances such as where one party to a contract has superior knowledge and is relied upon to disclose same." *Id.* A.M. has not alleged she was in a fiduciary relationship with the insurance defendants, nor that there had been a partial disclosure of information (A.M. admits she was provided with the insurance policy), or that she was in a contractual relationship with the insurance defendants, and they had superior knowledge which obligated them to speak up. A.M. does not dispute she possessed the policy, which

would mean she had the same knowledge about the policy limits as the insurance defendants possessed—or A.M. would have had the potential to have the same knowledge if her counsel had examined the policy.

Next, A.M. has not cited to a knowingly false, or recklessly false, misrepresentation. An unintentional mistake is not sufficient; fraud requires a material misrepresentation which was knowingly false, or recklessly made, with the intent to induce the plaintiff to act to his or her detriment. *Collins*, 399 S.W.3d at 453. But Paragraph 237 of A.M.'s complaint states that A.M.'s counsel does not believe JCBE's counsel "would intentionally misrepresent the amount of insurance coverage in order to trick, swindle, or scam Plaintiff or her counsel (or for any other reason for that matter)." A.M.'s complaint thus does not allege an intentional falsehood nor an actionably reckless statement.

Finally, we agree with the trial court's cogent conclusion that A.M. cannot satisfy the reasonable reliance prong. "The plaintiff[']s reliance, of course, must be reasonable" because "the law imposes upon recipients of business representations a duty to exercise common sense." *Flegles, Inc.*, 289 S.W.3d at 549. According to our Supreme Court, "if the recipient of a fraudulent misrepresentation has the opportunity to verify a representation through ordinary vigilance or inquiry and does not do so, the false representation, even when made with the intention to deceive, has no legal effect on the rights of contracting

parties." *Yung*, 563 S.W.3d at 46. A.M. had the insurance policy, so through "ordinary vigilance" she could have verified the truth or falsity of JCBE's counsel's statements about the policy limits. In fact, she asserts on page seven of her opening brief that the plain language of the policy shows JCBE's counsel's statements about the policy limits were erroneous.[8]

We affirm the dismissal of these claims against all appellees.

G. Negligent Misrepresentation

We similarly affirm the dismissal of A.M.'s negligent misrepresentation claims. Paragraphs 357 through 360 of A.M.'s complaint assert Defendants "supplied false information" to A.M. about JCBE's policy limits. A negligent misrepresentation claim "requires proof by clear and convincing evidence of a material representation that a defendant knew, or should have known, to be false." *Collins*, 399 S.W.3d at 453 (internal quotation marks and citations omitted). Again, the only specific misrepresentations mentioned in A.M.'s negligent misrepresentation claims are those allegedly misstating JCBE's policy limits. Those statements fall within the judicial statements privilege, thereby dooming the negligent misrepresentation claims against JCBE.

[8] We recognize that "whether reliance is justified (or as sometimes stated, reasonable) is a question of fact in all but the rarest of instances." *Yung*, 563 S.W.3d at 47. We perceive this to be one of those rare instances. Since A.M. asserts the plain language of the policy shows the policy limits exceeded $5.5 million, and insists policy limits dictated what amount she was willing to accept to settle the first action, it was incumbent upon her counsel to exercise ordinary diligence by reading the policy. A.M.'s counsel's failure to do so was manifestly unreasonable.

As to the insurance defendants, A.M. again does allege a specific misrepresentation made by them which they knew, or should have known, to be false. Again, A.M. explicitly states in her complaint that JCBE's counsel did not intentionally misrepresent the policy limits. Moreover, A.M. had the opportunity to examine the relevant policy for herself but chose not to do so. A.M. cannot show the alleged misstatement made by JCBE's counsel supports a negligent misrepresentation claim against the insurance defendants.

H. Negligence and Gross Negligence

The precise contours and underlying factual basis for A.M.'s negligence and gross negligence claims are not entirely clear from that vague, conclusory section of her complaint. Again, the specific factual allegation in this section of the complaint is the alleged policy limits misstatements by JCBE's counsel.[9] For the reasons previously discussed, any such statements fall under the

[9] For example, Paragraph 369 of A.M.'s complaint alleges:

> The JCBE Defendants had ministerial duties, pursuant to common law and/or statute and/or administrative regulation and/or other written or unwritten policies, regulations and/or rules to act reasonably in their interactions with Plaintiff, which included the simple and straightforward duties to not lie regarding the amount of insurance coverage, and to not otherwise misrepresent the amount of insurance coverage.

Of course, it is difficult to square the references to lying with the notation elsewhere in the complaint that A.M. was not accusing JCBE's attorney of lying about JCBE's policy limits.

judicial statements privilege and, consequently A.M.'s negligence and gross negligence claims against JCBE fail.

A.M.'s negligence and gross negligence claims against the insurance defendants also fail. "The elements of a negligence claim are (1) a legally-cognizable duty, (2) a breach of that duty, (3) causation linking the breach to an injury, and (4) damages." *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016). Gross negligence "is something more than the failure to exercise slight care." *City of Middlesboro v. Brown*, 63 S.W.3d 179, 181 (Ky. 2001) (internal quotation marks and citations omitted). Instead, "there must be an element either of malice or willfulness or such an utter and wanton disregard of the rights of others as from which it may be assumed the act was malicious or willful." *Id.* (internal quotation marks and citations omitted).

The negligence and gross negligence section of A.M.'s complaint does not allege any specific act or omission taken by the insurance defendants. A.M. vaguely mentions alleged failure to hire or train employees and agents by all Appellees, including the insurance defendants. However, the relevance of hiring unknown employees with unknown relationships to the settlement is extremely murky. A.M. does not sufficiently link those alleged generic failures to any duties owed by the insurance defendants to A.M. or any breach thereof which led to A.M.

suffering damages.[10] Moreover, A.M. has not shown the insurance defendants had a duty to do more than to provide the insurance policy at issue to her.

It is also important to remember that A.M. is essentially asserting misconduct by opposing counsel in the first action. "As a matter of law, a party . . . is not entitled to assert a negligence claim against the legal counsel who represented an opposing party in prior litigation, because no duty flows from that counsel to their client's adversary." *Seiller Waterman, LLC*, 610 S.W.3d at 201. The complaint also does not contain allegations of malice or wanton disregard for

[10] For example, the complaint fuzzily provides in relevant part:

> 366. Defendants had a duty to exercise reasonable care and otherwise not act negligently during both their interactions with Plaintiff as well as in the hiring, training, retention, selection, and supervision of their employees, agents, servants, independent contractors, and those for whose conduct they are vicariously liable.
>
> 367. Defendants failed to exercise reasonable care during their interactions with Plaintiff (and/or her counsel), and/or acted negligently during their interactions with Plaintiff (and/or her counsel), and/or failed to exercise reasonable care in the hiring, training, retention, selection, and/or supervision of their employees, agents, servants, independent contractors, or those for whose conduct they are vicariously liable, and/or otherwise breached their legal duties to Plaintiff.
>
> 368. The conduct of all Defendants as described in part above was wrong, illegal, negligent, and constitutes a significant and/or gross deviation from a minimally acceptable standard of reasonable care, and was grossly negligent, wanton, oppressive, malicious, and/or reckless conduct.

A.M.'s rights sufficient to support gross negligence. We affirm the trial court's dismissal of the negligence and gross negligence claims.

I. Fraudulent Omission

Paragraph 344 of A.M.'s complaint alleges Defendants "had a duty to disclose a fact or facts, specifically the fact of the actual amount of insurance coverage and limits for the 2019 Lawsuit and failed to do so." To prevail on a fraudulent omission claim based upon a failure to "disclose a material fact," A.M. must show: "a) that the defendants had a duty to disclose that fact; b) that defendants failed to disclose that fact; c) that the defendants' failure to disclose the material fact induced the plaintiff to act; and (d) that the plaintiff suffered actual damages." *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 641 (Ky. App. 2003). "The existence of a duty to disclose is a matter of law for the court." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 747 (Ky. 2011).

Under Kentucky law, a duty to disclose exists in only four circumstances. *Id.* The first circumstance is the existence of a confidential or fiduciary relationship. *Id.* A.M. has not alleged she had such a relationship with any Appellee regarding the settling of a lawsuit.[11] The second circumstance is a

[11] Arguably, A.M. had a special relationship with JCBE for educational purposes as she was a special needs student. But A.M. has not shown that special relationship extended to discussions

statutory duty to disclose. *Id.* A.M. has not cited to such a statute. The third circumstance is "when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure . . . ." *Id.* (internal quotation marks and citation omitted). Appellees provided the insurance policy to A.M. Thus, she cannot show a partial disclosure.

The fourth circumstance exists "where one party to a contract has superior knowledge and is relied upon to disclose same . . . ." *Id.* at 748. A.M. cannot satisfy this element for two reasons. First, she was indisputably not in a contractual relationship with Appellees. After all, A.M. was not a party to the insurance contract at issue. Second, A.M. received the entire policy in discovery. Therefore, Appellees' knowledge of the policy's contents was not superior to hers. We affirm the dismissal of the fraudulent omission claims.

J. Civil Conspiracy

The relevant portions of A.M.'s civil conspiracy claims are:

> 379. Defendants had an unlawful and/or corrupt combination or agreement with one another to do by some concerted action an unlawful act and/or to take lawful acts by unlawful means.
>
> 380. Defendants' unlawful acts and/or lawful acts by unlawful means for purposes of the foregoing paragraph included but were not limited to the conduct described hereinabove and specifically included but was not limited

to settle a lawsuit in which she and JCBE were on opposite sides. JCBE, in its role as a defendant, did not have a special relationship with A.M., in her role as a plaintiff.

> to the misrepresentations regarding the total amount of insurance coverage and other conduct intended to bamboozle, buffalo, and otherwise trick Plaintiff into settling the case for an amount below the fair and reasonable value of the case, as described in detail above.

"A conspiracy is inherently difficult to prove. Notwithstanding that difficulty, the burden is on the party alleging that a conspiracy exists to establish each and every element of the claim in order to prevail." *James v. Wilson*, 95 S.W.3d 875, 896 (Ky. App. 2002). Civil conspiracy "has been defined as a corrupt or unlawful combination or agreement between two or more persons to do by concert of action an unlawful act, or to do a lawful act by unlawful means." *Peoples Bank of Northern Kentucky, Inc. v. Crowe Chizek and Co. LLC*, 277 S.W.3d 255, 261 (Ky. App. 2008) (internal quotation marks and citation omitted). For A.M. to prevail on her civil conspiracy claim she "must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act." *Id.*

A.M.'s civil conspiracy claim must fail for two main reasons. First, she has not alleged an agreement between Appellees to act improperly towards her. She does not dispute that Appellees provided her with the insurance policy. So, A.M. cannot show there was an agreement by the Defendants to accomplish a nefarious goal of hiding the policy. *See Mosley*, 626 S.W.3d at 594 (holding that a

civil conspiracy claim failed due to the lack of a factual basis showing an agreement to act "in a tortious manner").

Second, though we recognize they are not binding, we are persuaded by various unpublished opinions we have issued which hold that there cannot be a civil conspiracy claim absent other viable claims. *See, e.g.*, *Stonestreet Farm, LLC v. Buckram Oak Holdings, N.V.*, No. 2008-CA-002389-MR, 2010 WL 2696278, at *13 (Ky. App. Jul. 9, 2010) (unpublished) ("Importantly, however, civil conspiracy is not a free-standing claim; rather, it merely provides a theory under which a plaintiff may recover from multiple defendants for an underlying tort.").[12] We have already concluded the trial court properly dismissed the remainder of A.M.'s claims, so the civil conspiracy claims necessarily fail.

III. CONCLUSION

For the foregoing reasons, the Jefferson Circuit Court is affirmed.

ALL CONCUR.

[12] *Stonestreet Farm* has been cited numerous times, especially by federal courts. *See Eifler v. Greenamyer*, No. 2017-CA-000079-MR, 2019 WL 2712618, at *7 n.20 (Ky. App. Jun. 28, 2019), *discretionary review denied* (Sep. 16, 2020) (unpublished) (citing *Stonestreet Farm* favorably and noting its civil conspiracy holding had, to that point, been cited over thirty times).

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