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SECOND DIVISION  
September 30, 2019

No. 1-18-2707

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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KACY HALE,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of Cook County, Illinois,
	)	County Department, Law Division
v.	)	
	)	No. 14 L 065028
THE TRAVELERS INDEMNITY CO.,	)	
	)	The Honorable
Defendant-Appellee.	)	Margaret Ann Brennan,
	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Lavin and Coghlan concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly entered summary judgment in favor of the insurance company on the plaintiff's civil conspiracy claim where there remained no genuine issues of material fact as to whether the plaintiff's former employer and the insurance company had conspired to force the plaintiff to sign a false affidavit under threat of termination. The insurance company presented an affidavit from its claims adjustor attesting that he did not know that the plaintiff's employment remained contingent upon his signing the affidavit.

¶ 2 This cause of action stems from an arbitration between two insurance companies that arose from a minor automobile accident caused by the plaintiff, Kacy Hale (Hale), while driving a vehicle he was interested in purchasing from his then employer International Imports, L.L.C.

(International). The plaintiff's personal insurer, Progressive Group of Insurance Companies (Progressive), and International's insurer, the defendant, Travelers Indemnity Co. (Travelers) disputed the ownership of the vehicle at the time of the collision. After initially paying for approximately \$6,000 in property damages for the vehicle that the plaintiff hit during the collision, Progressive later filed a demand for arbitration against Travelers to recoup those costs. At Travelers' request, for purposes of defending itself at the arbitration, International asked the plaintiff to sign an affidavit stating that he had purchased and owned the vehicle prior to the collision. After the plaintiff refused to sign this affidavit, maintaining that it was false, he was terminated from his employment.

¶ 3 The plaintiff initially filed a suit for wrongful termination against International. He subsequently added Travelers as a defendant, asserting numerous claims, including, relevant to this appeal, civil conspiracy, predicated on the allegation that Travelers drafted the false affidavit that International used as the basis for firing him when he refused to sign it. After the parties filed cross-motions for summary judgment, International settled with the plaintiff. The trial court entered summary judgment in favor of Travelers on all of the plaintiff's claims. The plaintiff now appeals solely from the entry of summary judgment in Travelers' favor on the civil conspiracy count. For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The record contains the following relevant undisputed facts and procedural history.

¶ 6 A. Undisputed Facts

¶ 7 International is a corporation engaged in the sale and repair of luxury automobiles with its principal place of business in Tinley Park. International is co-owned by the general manager Francis Anthony Mauro (Mauro), his father Ralph, and Tom Dexter. The plaintiff was employed

by International as a new and used car salesman from October 2012 through May 7, 2014. At all relevant times, Travelers was an insurance company that provided insurance coverage for the automobiles owned by International.

¶ 8 Shortly before August 3, 2013, while employed by International, the plaintiff became interested in purchasing a 2006 Infiniti M35 (hereinafter the vehicle or the Infiniti) from International. On August 3, 2013, International permitted the plaintiff to drive the Infiniti off the lot. The plaintiff was involved in an automobile collision with the Infiniti on August 4, 2013, which resulted in damage both to the Infiniti, and to the vehicle he struck.

¶ 9 On August 9, 2013, the plaintiff executed the purchase agreement, financing agreement, and title and registration paperwork for the Infiniti.

¶ 10 The plaintiff notified his personal insurance carrier, Progressive, of the collision and damage to both vehicles. International notified its insurance carrier of the same. Both Progressive and Travelers investigated the automobile collision and obtained information from International and the plaintiff. The plaintiff paid out of pocket for the damage to the Infiniti. Progressive initially paid for the damage to the vehicle that was struck during the accident, but later determined that the payment was made in error because the plaintiff did not own the vehicle at the time of the collision. Progressive filed a subrogation demand and arbitration against Travelers to recoup these costs, asserting that International owned the vehicle at the time of the collision.

¶ 11 On or about April 29, 2014, International presented plaintiff with an affidavit in relation to this arbitration and told him that he had to sign it. Among other things, according to the affidavit, the plaintiff would attest that although he purchased the Infiniti prior to August 4,

2014,<sup>1</sup> he had been told that he could not take possession of the vehicle until the financing was approved. Furthermore, according to the affidavit, the plaintiff would attest that on August 4, 2013,<sup>2</sup> he informed his manager, Bruce Clark (Clark), that the financing had gone through, upon which he was tendered possession of the vehicle. The plaintiff would further state that at the time he was given possession of the vehicle he considered himself (rather than International) to be the owner of Infiniti and intended for the vehicle to be insured under his personal automobile policy with Progressive (rather than with International's insurer, Travelers). Finally, the plaintiff would attest that after having taken possession of the Infiniti on August 4, 2014,<sup>3</sup> he was involved in an automobile accident while driving it, which resulted in physical damage both to the Infiniti and property damage to the third party's vehicle. The plaintiff refused to sign this affidavit, believing that it contained false statements.

¶ 12 On May 7, 2014, International presented the plaintiff with a revised affidavit, which omitted only one statement from the original affidavit, namely that the plaintiff was told prior to purchasing the vehicle on August 4, 2013, that he could not take possession of the vehicle until the financing was approved. The plaintiff again refused to sign the amended affidavit on the basis that it contained false information. Upon refusing to sign this affidavit, the plaintiff was immediately terminated from his employment with International.

¶ 13 B. Procedural History

¶ 14 On July 3, 2014, the plaintiff filed a two-count complaint against International alleging: (1) common-law retaliatory discharge; and (2) intentional infliction of emotional distress. On September 30, 2014, the plaintiff amended his complaint to add a claim of racial discrimination

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<sup>1</sup> The parties agree that this affidavit inaccurately reported the year of the Infiniti's purchase and the time of accident, and listed the year 2014, instead of correctly 2013.

<sup>2</sup> There is no dispute that August 4, 2013, was a Sunday, and that the dealership was closed on this date.

<sup>3</sup> As already noted above, there is no dispute that 2014 was not the year in which the accident occurred.

and retaliation under the Illinois Human Rights Act (735 ILCS 5/1-101 *et seq.* (West 2014)). On June 5, 2015, the plaintiff filed his second amended verified complaint adding more claims against International, including, *inter alia*, numerous violations of the Illinois Whistleblower Act (Whistleblower Act) (740 ILCS 174/20, 20.2 (West 2014)).

¶ 15 The plaintiff filed his third amended verified complaint on December 23, 2015, adding Travelers to the lawsuit, and alleging claims for negligence, gross negligence, abuse of process, aiding and abetting, and reckless infliction of emotional distress. On February 29, 2016, Travelers filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2016)). On May 19, 2016, the circuit court dismissed the plaintiff's claims for negligence, gross negligence, and reckless infliction of emotional distress without prejudice against Travelers, but permitted the plaintiff to amend his complaint for a fifth time.

¶ 16 The plaintiff filed the instant fourth amended verified complaint on May 31, 2016. Therein, he additionally alleged civil conspiracy against Travelers and International and a violation of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2016)) against Travelers.

¶ 17 With respect to civil conspiracy, the plaintiff alleged that Travelers and International combined for the purpose of having the plaintiff execute the affidavit, which was drafted by Travelers to be used as evidence in its arbitration with Progressive, so as to avoid liability for damages arising from the August 4, 2013, automobile collision. The plaintiff alleged that Travelers knew that the information in the affidavit was false. In addition, he alleged that when International received that affidavit from Travelers to give to the plaintiff, it first reviewed the affidavit, and therefore also knew that it was false. According to the plaintiff, despite this knowledge, International presented this affidavit to him on behalf of Travelers and insisted that he sign it, threatening to terminate, and ultimately terminating his employment, when he refused.

¶ 18 On July 1, 2016, Travelers filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2016)) the plaintiff's Consumer Fraud Act claim. It filed an amended motion to dismiss that claim on July 5, 2016. On September 15, 2016, the trial court denied that motion.

¶ 19 After extensive discovery, which included, *inter alia*, the production of numerous documents and the deposition of over ten witnesses, on September 14, 2018, the plaintiff, Travelers and International all filed cross-motions for summary judgment. The trial court scheduled a final pretrial conference for November 27, 2018, at which the cross-motions were to be heard. Prior to this date, the plaintiff and International entered into a private and confidential settlement agreement disposing of all of the plaintiff's claims against International. The circuit court therefore proceeded solely on the plaintiff's counts against Travelers.

¶ 20 C. Evidence Presented in Support of the Cross-Motions for Summary Judgment

¶ 21 Because the present case solely involves the plaintiff's civil conspiracy claim against Travelers, we will summarize only that deposition and documentary evidence produced during discovery and referenced in the cross-motions for summary judgment, that is relevant to the disposition of that claim.

¶ 22 1. The Plaintiff

¶ 23 In his depositions,<sup>4</sup> the plaintiff testified that he first expressed an interest in purchasing the Infiniti from International in late July 2013. The plaintiff talked to Clark, who informed him of the price. The plaintiff then went to International's financing manager, Scott Farnaus (Farnaus), and together they attempted to achieve a credit approval from several different banks through International. The plaintiff testified that because this loan could not be approved, he was forced

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<sup>4</sup> The plaintiff was deposed twice, first in 2015 and then in 2017.

to look for an outside lender, and filled out several applications online. The plaintiff ultimately obtained financing from Santander Consumer USA (Santander).

¶ 24 The plaintiff testified that his Santander loan was not approved until August 9, 2013, when he signed the financing agreement. He acknowledged, however, that the August 9, 2013, financing agreement included a congratulatory letter from Santander dated August 2, 2013, stating that his loan had been approved. The plaintiff, nonetheless, claimed that he could not recall when he received that congratulatory letter, and that he believed that it did not formally approve anything.

¶ 25 The plaintiff further testified that on Saturday, August 3, 2013, he signed a "loaner" agreement with International, which permitted him to loan the Infiniti and to take it off the lot for the weekend. He testified that Clark filled out the "loaner" agreement for him and asked him only to sign the bottom of the page. The plaintiff claimed that "loaner" agreements were commonly used at the dealership and that their purpose was to allow customers, who either needed a service car or an incentive to leave their previously owned car with the dealership, to take a new car home. The plaintiff testified that it was his understanding that under such an agreement the customer would be responsible for paying the deductible through the dealership's insurance, because the dealership remained the owner of the vehicle. When presented with a "rental" agreement similar to the one he signed, the plaintiff acknowledged that the agreement stated that the customer assumed full responsibility for any damage to property through the use of the vehicle, and that it required the customer to certify that he was "presently insured" and provide his or her insurer's name.

¶ 26 The plaintiff testified that on August 3, 2013, he obtained permission from International's co-

owner and general manager, Mauro, to take the Infiniti home. The plaintiff explained that he approached Mauro and told him he was attempting to obtain financing approval through the dealership, and perhaps an outside loan, but wanted to take the Infiniti home for the weekend to make sure it was worth the trouble. Mauro then gave the plaintiff permission, through Clark, to take the vehicle home for the weekend.

¶ 27 The plaintiff testified that after being involved in the automobile accident on August 4, 2013, he notified both his insurance company, Progressive, and his direct supervisor at International, Jeff Bass about the accident. Bass did not answer his telephone but instead sent the plaintiff a text message instructing him to report the accident to International's controller, Vicki Renier (Renier), on Monday.

¶ 28 Following Bass's instructions, on August 5, 2013, the plaintiff returned the vehicle to the dealership and spoke to Bass and Clark. According to the plaintiff, Clark was angry that the plaintiff had been in the accident because the dealership still owned the Infiniti and he believed they would be liable for the accident. The plaintiff next spoke to Renier, whereupon the keys of the vehicle were taken from him. According to the plaintiff, Renier was also angry about the accident and asked the plaintiff whether he had personal insurance. He believed that Renier was angry because as International's controller she was aware of every contract leaving the dealership and knew that he had not signed any agreement for the purchase of the Infiniti and therefore did not own it yet. The plaintiff admitted that he did not ask either Renier or Clark to report the accident to International's insurer. The plaintiff testified that he paid for the damage to the Infiniti out of pocket by taking it to a friend, who repaired it for \$600. He was not aware that between August 5, 2013, when he returned the damaged Infiniti to the dealership and August 9,

2013, when he signed the bill of sale and the financing agreement for it, International took the Infiniti to Riverdale Body Shop for an estimate of damages.<sup>5</sup>

¶ 29 At the time of the accident, the plaintiff also owned a Jeep Grand Cherokee that was insured through Progressive. The policy with Progressive, however, did not include collision coverage. The plaintiff acknowledged that on August 7, 2013, he received a letter from Progressive confirming that at his request the Jeep Grand Cherokee would be replaced with the vehicle he intended to purchase from International.

¶ 30 The plaintiff stated that at the time of the accident, he did not know which company insured International's vehicles. Sometime after August 9, 2013, Renier told him that International would file a claim through their insurer, and that they would just "let the insurance companies fight it out."

¶ 31 On August 9, 2013, the plaintiff was contacted by a Travelers' claims adjuster, Margaret Gregory (Gregory), and for the first time learned that International was insured by Travelers.<sup>6</sup> During that conversation, the plaintiff told Gregory that he had just spoken with an agent from Progressive who informed him that the claim would be handled by Progressive because he "was in the process of buying the vehicle." The plaintiff explained to Gregory that "[a]t the time, [he] was signing a "loaner" agreement because [he] hadn't finalized everything," and had not "forwarded [all of the paperwork] to the bank yet." The plaintiff then stated, "[s]o I don't know. I guess you're going to say that I was the owner of the vehicle at the time." The plaintiff later learned from Progressive that Travelers denied International's claim.

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<sup>5</sup> The record contains a copy of the estimate performed by Riverdale Body Shop on the Infiniti. This estimate lists International as the "customer" requesting the estimate.

<sup>6</sup> The record contains a transcript of the recorded telephone conversation between the plaintiff and Gregory.

¶ 32 According to the plaintiff, a year later, on August 8, 2014, he was contacted by another claims adjuster from Travelers, Michael Simpson (Simpson). The record contains a partial transcript of that April 8, 2014, recorded telephone conversation. Numerous sections of the transcript are marked as inaudible. According to the plaintiff, during this conversation, Simpson informed him that Progressive had filed an arbitration claim against Travelers for reimbursement of the damages it paid for the August 4, 2013, accident. Simpson then asked the plaintiff whether he had contacted Progressive to notify them of his Infiniti purchase before or after the accident. The transcript shows that the plaintiff replied that he had done so "after the accident, because [he] didn't own the vehicle at that time." The plaintiff explained to Simpson that instead he had signed a "loaner" agreement with International before the accident. The plaintiff also told Simpson that he understood that his insurance would be responsible for any damage to the vehicle under that "loaner" agreement but that Progressive was telling him otherwise. The plaintiff vehemently denied that in the portion of the transcript marked inaudible, he agreed with Simpson that it was his understanding that when he was given the keys to and possession of the Infiniti prior to the accident, he became the owner of the vehicle.

¶ 33 The plaintiff testified that on August 29, 2014, he was called to Bass's office, where Renier gave him an affidavit stating, "our lawyers say you have to sign this." The plaintiff had no way of knowing that the affidavit had anything to do with the arbitration between Progressive and Travelers. He explained that he had not given any information to anyone, and nobody had asked him about the affidavit beforehand, so he did not know what it was about. When the plaintiff read the affidavit, he informed Renier and Bass that he would not sign it because it was false. He explained that he did not want to subject himself to perjury or insurance fraud.

¶ 34 The plaintiff testified that on May 7, 2019, he was asked to go to Mauro's office, where

Mauro handed him the affidavit and asked him why he would not sign it. The plaintiff responded that the affidavit was false. Mauro then gave the plaintiff the revised affidavit and asked if he would sign the new version, which excluded the accusation that the plaintiff had taken the vehicle off the lot without permission. The plaintiff again refused, and told Mauro that he did not purchase the Infiniti before August 4, 2013. Mauro informed the plaintiff that nothing else would be changed in the affidavit and that if he did not sign it he would be terminated.

¶ 35 The plaintiff stated that he believed that Travelers and International (specifically Reiner, and Mauro and at least Simpson) conspired to create the false affidavit and force him to sign it so as to avoid liability in the arbitration. He contended that at that time he believed that they wanted him to commit insurance fraud and perjury.

¶ 36 2. Jeffrey Bass

¶ 37 In his deposition, the plaintiff's direct supervisor, Bass testified consistently with the plaintiff regarding the purpose of "loaner" agreements. He testified that a "loaner" agreement does not transfer any ownership to a customer, and that he is not aware of any customer ever being permitted to purchase a car or take ownership of it from International without first filling out any title, financing agreement, and purchasing paperwork. Bass could not recall any conversations he had with anyone at International regarding the plaintiff taking the vehicle off the lot, or any subsequent conversations with Mauro regarding when the plaintiff purchased the vehicle, or whether he was permitted to take it off the lot prior to that purchase.

¶ 38 3. Francis Anthony Mauro

¶ 39 In his deposition, Mauro denied ever having a meeting with the plaintiff on August 3, 2013, to discuss his interest in purchasing the Infiniti and allowing him to take the Infiniti off the dealership lot, either directly or through Clark. Instead, he claimed that he learned of the

plaintiff's interest in the Infiniti from International's financing manager, Farnaus, who came to ask his permission for the plaintiff to obtain financing from an outside lender. Mauro admitted, however, that on a previous occasion, he had permitted the plaintiff to take a different vehicle off the lot, without first having him sign the purchase or financing agreement papers.

¶ 40 Mauro also claimed that the plaintiff never signed any "loaner" agreement with Clark for the use of the Infinity on August 3, 2013. Instead, according to Mauro, Clark later admitted to him that the "loaner" agreement was executed after the accident because Clark wanted to cover his own mistake of permitting the plaintiff to take the vehicle off the lot. According to Mauro, Clark did not permit the plaintiff to take the Infiniti for an overnight test drive. Instead, Clark was under the impression given to him by the plaintiff that the plaintiff had already purchased the vehicle and that the financing had gone through. Because Clark trusted the plaintiff he did not think he needed any proof of the purchase agreement. After the accident, Clark discovered that there was no purchase agreement on record and tried to backtrack and cover his mistake by filling out the "loaner" agreement to have the plaintiff's insurance on file.

¶ 41 Mauro testified that after he learned about the accident on August 5, 2013, he instructed Reiner and Bass to investigate it. He claimed that both Renier and Bass informed him that there was no signed "loaner" agreement on file for the Infiniti dated August 3, 2013. Mauro admitted that during this investigation, the plaintiff was not permitted to use the Infiniti. Specifically, he acknowledged that between August 5 and August 9, 2013, when the purchase and financing agreements for the Infiniti were executed, the keys of the Infiniti were taken from the plaintiff and the Infiniti was taken by International to a body shop for an estimate of damages. Mauro further admitted that he did not speak to the plaintiff about the accident, or the lack of a "loaner"

agreement on file, until May 7, 2014, when he presented him with the revised affidavit created by Travelers for purposes of the arbitration with Progressive.

¶ 42 Mauro admitted that Renier and he had conversations with Travelers immediately after the accident, but could not remember any details of those conversations. Mauro only recalled that a year later, in August, 2014, Travelers asked International to have the plaintiff sign the affidavit for use in defending the arbitration claim against Progressive. Mauro claimed that he learned from Renier that the plaintiff refused to sign the affidavit because it contained a single inaccuracy.

¶ 43 Mauro testified that he approached Clark, who had already signed his version of the same affidavit, to make sure that the statements therein were accurate, and Clark confirmed that they were. Specifically, Clark reaffirmed that the "loaner" agreement was not signed until after August 3, 2013. Mauro instructed Renier to remove the one statement that the plaintiff had objected to in the affidavit, namely that he had been given permission to take the vehicle off the lot. According to Mauro, Travelers obliged, and provided International with a revised affidavit.

¶ 44 Mauro then presented the plaintiff with both affidavits. He averred that he told the plaintiff in no uncertain terms that he did not want him to sign anything that was inaccurate or false, but claimed that the plaintiff refused to sign even the revised affidavit although he could not point to any factual errors in it. In his testimony, however, Mauro admitted that on its face both affidavits contained obvious inaccuracies. First, the dates on both affidavits were inaccurate and listed the accident and purchase years, as 2014, rather than 2013. The affidavits also contained inaccurate dates as to the plaintiff's employment. Mauro also admitted that even if the years had been correctly listed, the statement that the vehicle was tendered to the plaintiff on August 4, had to be incorrect because August 4 was a Sunday and the dealership was always closed on

Sundays. Mauro denied ever telling the plaintiff that no more changes would be made to the affidavit, but admitted that he implied to the plaintiff that if the plaintiff did not sign the affidavit he would be terminated immediately. He also acknowledged that on May 7, 2014, he wrote an email to Renier stating that the plaintiff "has until close of business tomorrow to sign [the affidavit] or he will be let go."

¶ 45 4. Bruce E. Clark

¶ 46 In his deposition, Clark testified that the "loaner" agreement was never signed by the plaintiff on August 3, 2013. Instead, according to Clark, on August 5, 2013, Renier gave him a "loaner" agreement, and instructed him to fill it out and have the plaintiff sign it, so that there would be some form of insurance on file for the Infiniti. Renier also told Clark to instruct the plaintiff to say, if anyone asked him, that he signed the "loaner" agreement on August 3, 2013, the day before the accident. Clark obliged and had the plaintiff sign the "loaner" agreement on August 5, 2013. He also instructed the plaintiff to say that he signed it on August 3, 2013.

¶ 47 5. Vicki Sue Renier

¶ 48 In her deposition, *inter alia*, Renier had a hard time remembering many of the events surrounding the Infiniti. She admitted that despite numerous requests from Travelers, she never provided them with a copy of the "loaner" agreement that the plaintiff had allegedly signed on August 3, 2013. She claimed that she did not do so because Clark told her that the document was not valid, as it was signed after the collision. Renier could not recall providing Progressive with the "loaner" agreement either. She could not recall if she ever told Travelers or Progressive that the "loaner" agreement was invalid or that the plaintiff had fraudulently signed it after the fact.

¶ 49 Renier recalled presenting the plaintiff with an affidavit drafted by Travelers in August 2014

and asking him to sign it. When the plaintiff refused, Renier immediately went to Mauro. Mauro subsequently informed her that there was an issue with one of the paragraphs in the affidavit and asked her to tell Travelers to remove it. Renier had no recollection of asking Travelers to remove the paragraph but knew that it was removed.

¶ 50

#### 6. Julia Craven

¶ 51

In her deposition, Progressive's claim adjuster, Craven, stated that she initially spoke to the plaintiff on August 5, 2013, when he called to report the collision. According to the transcript of that telephone conversation, Craven asked the plaintiff for the owner of the vehicle, and the plaintiff responded, "the name of the company is International Imports, L.L.C." Craven admitted that according to her August 7, 2013, claims notes she still needed clarification as to the owner of the vehicle and needed both a copy of the "loaner" agreement and the bill of sale. Craven then acknowledged that after subsequent conversations with the plaintiff she noted that he had signed a bill of sale both on August 3, 2013, prior to the accident and then on August 9, 2013, after the accident. Craven explained that on August 15, 2013, the plaintiff explained to her that he signed a "loaner" agreement on August 3, 2013, because his financing on the vehicle had not gone through yet. The plaintiff advised her that under that "loaner" agreement he was liable for any collision damages.

¶ 52

Craven testified that on August 19, 2013, she telephone International and spoke to Clark who advised her that the plaintiff agreed to buy the Infiniti on August 3, 2013, and took possession of the vehicle prior to a financing determination. Clark told her that the plaintiff signed the paperwork on Monday after the accident. Clark confirmed that the "loaner" agreement was signed on August 3, 2013. Clark promised to send the "loaner" agreement to Craven but never followed through.

¶ 53

7. Michael Simpson

¶ 54

In his affidavit and deposition testimony, Travelers' claim adjuster, Simpson averred that on April 4, 2014, he was assigned to handle the arbitration between Progressive and Travelers in connection with the plaintiff's August 4, 2013, collision. Simpson contacted Renier at International and informed her that he was the new claim adjuster for Travelers. He averred that the only person he ever spoke to at International was Renier. According to Simpson's claim notes between April 4, and April 7, 2014, Travelers believed that there was an issue as to when the plaintiff took possession of the Infiniti and as to when he added that vehicle to his Progressive policy. Simpson's April 7, 2014, note states that Travelers "may need to have [Clark]/[the plaintiff] sign affidavit[s] stating when the keys were turned over sale was completed, and this was their understanding." The note further states "Insured is still an employee of the company and will fully cooperate with Travelers investigation." Simpson acknowledged that he received this information from Renier and that he understood it to mean that according to International, the plaintiff would be willing to sign such an affidavit.

¶ 55

In his deposition and affidavit, Simpson further averred that in order to prepare the arbitration response he spoke to the plaintiff on April 8, 2014. This conversation was recorded and transcribed, but as already noted above, contains numerous indescribable portions. Simpson claimed that during this conversation he asked the plaintiff whether it was his understating that ownership of the Infiniti had transferred to him when he took the keys and possession of the vehicle prior to the accident, and that the plaintiff answered "yes it was." Simpson averred that this was reflected in the inaudible portions of the recorded telephone conversation, and claimed

that those portions were indiscernible because of static. Simpson stated that he did not intentionally cause the static on the recording, and does not know how it occurred.<sup>7</sup>

¶ 56 Simpson acknowledged that he asked the plaintiff about the "loaner" agreement and that the plaintiff told him that he had signed that agreement prior to the accident. He further claimed that the plaintiff told him he did not have a copy of this agreement and that Simpson would have to obtain it from International. When Simpson emailed his contact at International, Renier, asking for a copy of the "loaner" agreement, Renier emailed back stating that the plaintiff did not sign the "loaner" agreement until after the accident. Simpson averred that ultimately he was never provided with a copy of that "loaner" agreement.

¶ 57 Simpson testified that on April 17, 2014, he confirmed with Renier that she would be willing to ask the plaintiff and Clark to sign affidavits for use in the arbitration, and that consequently he asked Travelers' in house counsel, Christopher Sowers, to draft affidavits for the plaintiff and Clark. The record contains Simpson's April 17, 2014, email to Sowers, stating that International advised him that "they would be willing to have the sales manager [Clark] and the employee that purchased the vehicle [the plaintiff] sign an affidavit saying that when the keys were given to the employee on 08/03/2013 that all parties believed that the ownership had transferred to the employee at that time." Simpson admitted that he never spoke directly to the plaintiff regarding this affidavit and that the only time he actually spoke with him was during their initial April 8, 2014, recorded conversation. Simpson averred that after Sowers emailed him the proposed affidavits on April 25, 2014, he forwarded those affidavits via email to Renier, and asked her to

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<sup>7</sup> The record contains the report of an expert audio recording specialist attesting that his analysis of the August 8, 2014, recorded conversation between the plaintiff and Simpson reveals no manipulation of the recorded speech.

have them "signed, notarized and returned to him as soon as possible." Reiner responded via email with "will do."

¶ 58 Simpson testified that sometime later, Renier informed him that the plaintiff refused to sign his affidavit unless one line was removed from it. Simpson stated that he removed that line and on April 29, 2014, emailed Reiner the plaintiff's revised affidavit.

¶ 59 According to Simpson's April 30, 2014, claim note International was "still waiting on its employees to sign the affidavit." According to the May 2, 2014, note, Simpson again requested an update on the status of the affidavits. On May 6, 2014, he was informed by Renier, that the insured "had been out for several days last week (sick) but he [wa]s back today[, and] will sign the affidavits."

¶ 60 Simpson claimed that after not hearing from Renier for several days, on May 9, 2014, he again requested the affidavits, at which point Renier responded with the following email:

"We asked [the plaintiff] to sign [the affidavit] last night. He refused. He is no longer employed here. We asked him if he disagreed with any of the items. He said no and just refused to sign it.

Sorry it didn't work. What else can I do?"

¶ 61 Simpson averred that Renier at no time informed him that the plaintiff's continued employment with International was contingent upon him signing the affidavit.

¶ 62 Simpson also stated that Clark signed his affidavit and that it was included in the response he submitted in the arbitration, but that the arbitrator ultimately ruled in favor of Progressive and against Travelers.

¶ 63 D. The Circuit Court's Finding

¶ 64 After hearing oral arguments and considering the aforementioned evidence attached to the parties' cross-motions for summary judgment, the circuit court granted Travelers' motion. With respect to the civil conspiracy count, the circuit court held that summary judgment was proper because under Illinois law civil conspiracy cannot be based on the tort of subornation of perjury. In the alternative, the court held that even assuming perjured testimony could be submitted to an arbitration between two insurance companies, as a matter of law, such conduct would not give rise to insurance fraud because the insurance fraud statute does not apply to a dispute between two insurance companies. In addition, the circuit court found that there was no genuine issue of material fact as to the existence of an agreement between International and Travelers to force the plaintiff to do anything or to defraud Progressive. The plaintiff now appeals.

¶ 65 II. ANALYSIS

¶ 66 On appeal, the plaintiff solely contends that the trial court erred in granting summary judgment in favor of Travelers on his civil conspiracy claim. For the reasons that follow, we disagree.

¶ 67 Summary judgment is proper where "the pleadings, depositions, 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." 735 ILCS 5/2-1005(c) (West 2016); see also *Epple v. LQ Management, LLC*, 2019 IL App (1st) 180853, ¶ 14; *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Epple*, 2019 IL App (1st) 180853, ¶ 14; see also *Happel v. Wal-Mart Stores, Inc.*,

199 Ill. 2d 179, 186 (2002). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof and may meet it either "by affirmatively showing that some element of the case must be resolved in his favor or by establishing that there is an absence of evidence to support the nonmoving party's case." (Internal quotation marks omitted.) *Epple*, 2019 IL App (1st) 180853, ¶ 15. Our review of the trial court's entry of summary judgment is *de novo*, and we may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. See *Epple*, 2019 IL App (1st) 180853, ¶¶ 14-15; see also *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 68 Where, as here, the plaintiff makes a claim of civil conspiracy, he must establish the following elements: (1) a combination of two or more persons; (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means; (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act. *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927-28 (2010); see also *Redelmann v. Clair Sprayway Inc.*, 375 Ill. App. 3d 912, 923 (2007); *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004); *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62-63 (1994). The function of a conspiracy claim is to extend tort liability from the active tortfeasor to those

who have only planned, assisted or encouraged the tortfeasor's conduct. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d at 62 (citing W. Prosser, Torts § 46, at 293 (4th ed.1971)).

¶ 69 In order to connect a defendant to an alleged civil conspiracy, the plaintiff must prove the existence of an agreement between the co-conspirators, *i.e.*, that the defendant knowingly and voluntarily participated in the common scheme at the heart of the alleged civil conspiracy. *Id.* Because the defendant's participation must be both knowing and voluntary, our supreme court has held that neither "mere knowledge of the fraudulent or illegal actions of another" nor "[a]ccidental, inadvertent, or negligent participation in a common scheme" amount to conspiracy. *McClure*, 188 Ill. 2d at 133–34 (citing *Adcock*, 164 Ill. 2d at 64). Consequently, "[a] defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable under the theory of civil conspiracy." *Id.* However, "[a] defendant who understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly[,] to do its part to further those objectives \*\*\* is liable as a conspirator." *Id.* "Once a defendant knowingly agrees with another to commit an unlawful act or a lawful act in an unlawful manner, that defendant may be held liable for any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature." *Adcock*, 164 Ill. 2d at 64.

¶ 70 While the agreement is a necessary and important element of the cause of action for civil conspiracy, it does not assume the same importance as in a criminal action. *Adcock*, 164 Ill. 2d at 62-63; see also *Fiala v. Bickford Sr. Living Group, L.L.C.*, 2015 IL App (2d) 150067, ¶ 62. An agreement to commit a wrongful act is not a tort, even if it might be a crime. *Id.*; see also W. Prosser, Torts § 46, at 293 (4th ed. 1971). An action for civil conspiracy exists only if one of the parties to the agreement commits a tortious act in furtherance of the agreement; the gist of the

claim of civil conspiracy is not the agreement, but the tortious act carried out in furtherance of the agreement. *Id.* It is only when means are employed or purposes are accomplished, which themselves constitute a tort, that the conspirators who have not acted but have promoted the act will be held liable. *Id.*

¶ 71 From its very nature, it is evident that a civil conspiracy is almost never susceptible to direct proof. *McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 2d 102, 134 (1999) (quoting *Adcock*, 164 Ill. 2d at 66). Rather, it is usually established " 'from circumstantial evidence and inferences drawn from evidence, coupled with common-sense knowledge of the behavior of persons in similar circumstances.' " *Id.* As such, a conspiracy may be inferred where the parties pursue the same objective by common means, one performing one part and the other performing another part. *Forking v. Cole*, 192 Ill. App. 3d 409, 427 (1989). Where civil conspiracy is proved by circumstantial evidence, that circumstantial evidence must be both clear and convincing. *Redelmann*, 375 Ill. App. 3d at 924.

¶ 72 In the present case, the plaintiff contends that in the very least, he has demonstrated by clear and convincing evidence that there remains a genuine issue of material fact as to whether Travelers and International combined for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means. Travelers, on the other hand, first contends that, summary judgment was proper as a matter of law, because the plaintiff's civil conspiracy claim is entirely based on the tort of subornation of perjury, which is not a recognized tort under Illinois law.

¶ 73 Travelers, however, misstates the plaintiff's civil conspiracy claim. The plaintiff has never alleged or claimed that Travelers committed the tort of subornation of perjury, or that his civil conspiracy claim is premised on that tort. In fact, the plaintiff agrees that no such tort exists in

the State of Illinois, and that civil conspiracy cannot be premised on such a nonexistent tort. See *John Allen Co. v. Brandow*, 59 Ill. App. 2d 328, 333-34 (1965).

¶ 74 Instead, the plaintiff has maintained and continues to maintain on appeal that Travelers and International combined for the purpose of committing the *crime* of subornation of perjury (720 ILCS 5/32 (West 2016)<sup>8</sup>), which was the *unlawful means* by which they sought to achieve their ultimate and unlawful goal (*i.e.*, to defraud Progressive and avoid liability in the insurance arbitration), and that during the execution of that conspiratorial scheme, International committed three separate and recognized torts, namely: (1) a violation of section 174/20.2 of the Whistleblower Act (740 ILCS 174/20.2 (West 2016)), which prohibits an employer from threatening an employee with any act that would constitute retaliation under that statute; (2) a violation of section 174/20 of the Whistleblower Act (740 ILCS 174/20 (West 2016)), which prohibits an employer from retaliating against an employee for refusing to participate in any activity that would result in a violation of state or federal law (such as the crime of perjury); and (3) common-law retaliatory discharge.

¶ 75 We agree with the plaintiff that the unlawful means used by a tortfeasor in a civil conspiracy claim most certainly may include the commission of a crime. In that respect, we find *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340 (2000) instructive. In that case, the court found that summary judgment in favor of the employer was improper where the plaintiff presented sufficient evidence that his former employer and the defendant detective agency

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<sup>8</sup> It is a crime in Illinois to suborn perjury, which is categorized and punishable as a Class 4 felony. 720 ILCS 5/32-3 (West 2016). "A person commits subornation of perjury when he or she knowingly procures or induces another to make a statement in violation of [s]ection 32-2 which the person knows to be false." *Id.* Section 32-2 provides that "[a] person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law the oath or affirmation is required, he or she makes a false statement, material to the issue or point in question, knowing the statement is false." 720 ILCS 5/-32-2 (West 2016).

combined to implement a scheme whereby the plaintiff would be improperly induced to commit a crime (*i.e.*, a narcotics possession), which in turn, would provide adequate grounds for his termination by the employer (*i.e.*, the tort of malicious prosecution). *Id.* at 350. Similarly, here the plaintiff has repeatedly maintained that International and Travelers combined to implement a scheme whereby the plaintiff would be improperly induced to commit a *crime* (*i.e.*, signing a false affidavit and therefore committing criminal perjury), which in turn, would permit Travelers and International to achieve the purpose of defrauding Progressive at the arbitration hearing.

¶ 76 Travelers, nonetheless, asserts that the plaintiff cannot succeed with his civil conspiracy claim, because, as a matter of law, Travelers and International could not have conspired to commit insurance fraud against Progressive since they were not making an insurance claim under Progressive's policy. We disagree.

¶ 77 It is undisputed that in Illinois insurance fraud is a creature of statute. Section 17-10.5(a)(1) of the Illinois Criminal Code of 2012 defines insurance fraud in the following manner:

"A person commits insurance fraud when he or she knowingly obtains, attempts to obtain, or causes to be obtained, by deception, control over the property of an insurance company or self-insured entity by the making of a false claim or by causing a false claim to be made on any policy of insurance issued by an insurance company or by the making of a false claim or by causing a false claim to be made to a self-insured entity, intending to deprive an insurance company or self-insured entity permanently of the use and benefit of that property." 720 ILCS 5/17-10.5(a)(1) (West 2016).

Furthermore, the term "false claim" is defined as:

"[A]ny statement made to any insurer, purported insurer, servicing corporation, insurance broker, or insurance agent, or any agent or employee of one of those entities, and made as part of, or in support of, a claim for payment or other benefit under a policy of insurance, or as part of, or in support of, an application for the issuance of, or the rating of, any insurance policy, when the statement does any of the following:

(1) Contains any false, incomplete, or misleading information concerning any fact or thing material to the claim.

(2) Conceals (i) the occurrence of an event that is material to any person's initial or continued right or entitlement to any insurance benefit or payment or (ii) the amount of any benefit or payment to which the person is entitled." 720 ILCS 5/17-0.5 (West 2016).

¶ 78 Contrary to Travelers' assertion, under the plain language of this statute, the plaintiff's allegations against International and Travelers constituted insurance fraud. Travelers cites to no case-law, and we have found none, to support its position that the Criminal Code does not prohibit one insurance company from committing insurance fraud against another insurance company. Nor does Travelers cite to any case law to suggest that under the plain language of this statute an insurance company would not be prohibited from conspiring with its insured to commit insurance fraud against another insurance company so as to defend itself against a subrogation of rights claim. Rather, according to the plain language of the statute a party commits insurance fraud when for the purpose of obtaining control over the property of an insurance company it causes a false claim (*i.e.* misleading information concerning any fact or thing material to the insurance claim) to be made. 720 ILCS 5/17-0.5, 10.5(a)(1) (West 2016). In the present case, the plaintiff alleged that International sought to obtain a false affidavit from

the plaintiff to submit to its "insurer"—Travelers—for the purpose of obtaining "control over property of an insurance company"—Progressive—by and through the "false claim." 720 ILCS 5/17-10.5(a)(1) (West 2016). In addition, the plaintiff alleged that Travelers assisted in causing the submission of the false claim, because it drafted that affidavit and the affidavit itself contained "false, incomplete, or misleading information concerning [a] fact or thing material to the claim." 720 ILCS 5/17-0.5 (West 2016). Under the plain language of the statute, this constituted insurance fraud.

¶ 79 The question that remains in this appeal, then, is whether, viewing the evidence in the light most favorable to the plaintiff, the plaintiff presented clear and convincing evidence of a genuine issue of material fact regarding the existence of an agreement (*i.e.* some concerted action) between International and Travelers to achieve this insurance fraud, in furtherance of which International committed at least one recognized tort.

¶ 80 We agree with the plaintiff that, taking the evidence in the light most favorable to him, he established that International committed at least one tort. The undisputed evidence shows that International violated section 174/20. 2 of the Whistleblower Act (740 ILCS 174/20.2 (West 2016)) when it threatened to terminate the plaintiff in retaliation for refusing to sign the affidavit, which the plaintiff believed to be false (*i.e.*, commit the crime of perjury). This is particularly true, where International's own general manager and co-owner, Mauro, admitted in his deposition that he threatened to terminate the plaintiff, and in fact terminated him, when he refused to sign the affidavit, and where International subsequently settled all of its numerous retaliatory discharge claims with the plaintiff prior to trial.

¶ 81 After a careful review of the evidence, however, we find that the record is devoid of any

evidence of an agreement by Travelers to participate in the common scheme at the heart of the alleged conspiracy. As already noted above, to establish agreement between the parties, the plaintiff must show that the defendant's participation was both knowing and voluntary. *McClure*, 188 Ill. 2d at 133–34 (citing *Adcock*, 164 Ill. 2d at 64). As such, neither "mere knowledge of the fraudulent or illegal actions of another" nor "[a]ccidental, inadvertent, or negligent participation in a common scheme" amount to conspiracy. *McClure*, 188 Ill. 2d at 133–34 (citing *Adcock*, 164 Ill. 2d at 64). However, "[a] defendant who understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly[,] to do its part to further those objectives \*\*\* is liable as a conspirator." *Id.* "Once a defendant knowingly agrees with another to commit an unlawful act or a lawful act in an unlawful manner, that defendant may be held liable for any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature." *Adcock*, 164 Ill. 2d at 64.

¶ 82 In the present case, even when viewing the evidence in the light most favorable to him, the plaintiff cannot establish any agreement between International and Travelers to force the plaintiff to sign the affidavit under threat of termination. While there may be issues of fact surrounding whether at the time the affidavit was created by Travelers, Simpson knew that the plaintiff did not believe that he owned the vehicle prior to the accident, so that he should have known that any statements in the affidavit contradicting that belief were false, there is not an iota of evidence to suggest that Simpson was aware that International was using the threat of termination (*i.e.* the wrongful or tortuous act) to force the plaintiff to sign that affidavit. In fact, Simpson averred that Renier, who was the only person he communicated with at International, never told him that the plaintiff's employment was contingent upon him signing that affidavit. In opposition to this sworn statement, the plaintiff has pointed only to email exchanges between Renier and Simpson

requesting that the affidavits be forwarded to the plaintiff, and Travelers' internal discussions about creating and using such affidavits at the arbitration, in light of their own lack of clarity as to who owned the vehicle at the time of the accident. None of these documents, however, contradict Simpson's sworn statement that he was never informed by anyone from International that the plaintiff's employment was contingent upon signing that affidavit. As such, the circumstantial evidence of the emails and Travelers' internal documents do not rise to the level of clear and convincing evidence necessary to create a genuine issue of material fact as to the existence of the requisite agreement between International and Travelers. Accordingly, the trial court properly granted summary judgment in favor of Travelers on the plaintiff's civil conspiracy claim.

¶ 83

### III. CONCLUSION

¶ 84

For the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 85

Affirmed.