NOT DESIGNATED FOR PUBLICATION

No. 115,948

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CLAUDIA GEER,
Appellee,

v.

EDWARD EBY,
Defendant,

and

KEY INSURANCE COMPANY,
Appellant.

MEMORANDUM OPINION

Appeal from Cowley District Court; LADONNA L. LANNING, judge. Opinion filed May 26, 2017. Affirmed.

J. Franklin Hummer, of Shawnee Mission, for appellant.

James L. Sanders and *Casey G. Crawford*, of Wallace, Saunders, of Overland Park, for appellee.

Before POWELL, P.J., ATCHESON, J., and FAIRCHILD, S.J.

Per Curiam: Key Insurance Company (Key) appeals the district court's denial of its motion for summary judgment. Key's insured, Edward Eby, caused a collision with Claudia Geer, who was insured by State Farm. After State Farm paid over $24,000 for repairs to Geer's vehicle, it demanded reimbursement from Key. Eby's policy limit was $10,000, and Key refused to pay until Geer signed a release of liability for the balance of

the repair expenses. Geer refused and eventually filed suit against Eby. After a default judgment was entered against Key, it again made attempts to resolve the matter with an offer of the policy limit in exchange for a release. Geer again refused to sign a release and filed a garnishment against Key. Key, while arguing against the validity of the garnishment, moved for summary judgment. The district court denied Key's motion for summary judgment and granted the garnishment. After careful review, we agree with the district court and affirm its decision.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2014, Eby made a left turn in front of Geer's on-coming vehicle, causing a collision. Eby resides in Butler County, Geer resides in Cowley County, and the accident occurred in Butler County. Key insured Eby's vehicle, and State Farm insured Geer's vehicle. Geer and Eby both notified their insurance companies of the loss on the same day that the accident occurred. By mid-April 2014, State Farm had paid for the repairs to Geer's vehicle. State Farm then sought reimbursement from Key for the cost of the vehicle, less salvage offsets, for a total of $24,620.32. State Farm asked Key to remit payment in the amount of the repairs or contact it to discuss a settlement.

Key sent a letter to State Farm on May 1, 2014, informing State Farm that the nonstandard statutory minimum property damage liability limit of Eby's policy was $10,000, and stated that if its adjustors determined through their investigation that Eby was responsible for the accident, the policy limit may not be sufficient to compensate all parties for all damages. The letter stated: "We cannot offer any type of advance payment or provide anyone with a rental car or other relief as we'd be diminishing the amount of limits available with no release and protection for our insured." The letter concluded with: "Our investigation is continuing into all elements of this loss" and that State Farm should contact them with any questions.

On July 1, State Farm's retained counsel (hereinafter State Farm) wrote to Key concerning State Farm's subrogation claim in the amount of $24,620.32. State Farm requested a response within 30 days or it would pursue all available remedies to recover the loss. On the same day, State Farm separately wrote to Eby and demanded payment of the $24,620.32 within 30 days, or State Farm would file a lawsuit seeking the damages as well as interest, litigation costs, and attorney fees. State Farm sent a copy of this letter to Key.

On July 25, Key sent a letter to State Farm and offered $10,000 in exchange for a release. In a telephone conversation between the representatives of the two companies, State Farm rejected Key's offer on August 11. In a letter dated the same day, State Farm made a counteroffer that it would accept the $10,000, plus either a commitment from Eby to execute an installment payment agreement for the balance or a lump-sum payment of the amount owing in excess of the policy limit. In consideration for such an agreement, State Farm offered to refrain from filing suit and to waive any claim of interest and attorney fees. State Farm informed Key that Eby would need to contact State Farm to finalize a plan and that State Farm expected to hear from either Eby or Key by August 21, or it would proceed with filing suit.

On July 27, Key wrote to Eby and advised him of the status of the negotiations and of the threatened lawsuit. Key also advised Eby that his policy had a limit of $10,000, that the company would provide coverage up to that amount, and that claims in excess of the limits of coverage could become his personal responsibility. Key referred to an attached copy of an "excess letter" it sent to Eby in June and an attached copy of State Farm's demand. Key also told Eby that State Farm was requesting that he contact them regarding a promissory note for the remaining damage amount after the $10,000 policy limit was paid. Alternatively, he could offer a lump sum to satisfy the excess damages above the policy limit. Key's letter to Eby included State Farm's deadline date of August 21. Key stated: "While we will make every effort to resolve claims made against you

within your policy limits, you may choose, at your own expense, to retain legal counsel to assist in protecting you from any possible excess exposure." Key concluded the letter with: "It is also important that you contact [us] immediately if you receive any correspondence or are contacted by any of the parties involved in this accident, or their attorneys."

Eby called Key three times on August 18, attempting to get documentation regarding his driving record for his new employer. Key did not provide any documentation for Eby, in part because Key informed him that their investigation revealed that he appeared to be at fault for the accident. Key again told Eby that State Farm wanted him to enter into an agreement to pay the balance of the claim in excess of his $10,000 policy limit.

On August 19, Key sent State Farm a letter and copied Eby. That letter informed State Farm that Key had spoken with Eby and conveyed State Farm's request that he either sign a promissory note or pay the balance over the policy limit of $10,000 but that Eby would not commit to either option. Key, again, attached a release for the $10,000. State Farm did not reply to this letter.

Approximately 2 months later, on November 5, 2014, Geer filed suit in Cowley County against Eby seeking damages in the amount of $24,620.32. Eby was served with process on November 14, 2014, and his answer to the petition was due by December 5, 2014.

On January 8, 2015, Key, through its adjuster, received notice that State Farm had filed an arbitration proceeding regarding Geer's claim; the Key adjuster inquired of the State Farm adjuster why State Farm filed the demand for arbitration when the only issue was the execution of the release. The State Farm adjuster said it was protocol and did not inform the Key adjuster that suit had been filed.

Having received no answer to her petition from Eby, Geer filed a motion for a default judgment on February 4, 2015, amending the amount requested to cover costs and fees resulting in a total claim of $27,816.92. Eby received a notice of hearing and attended the proceeding in person on March 23, 2015. The trial court found that Eby offered no proof of excusable neglect for his failure to answer the petition and granted a default judgment to Geer in the amount of $27,284.04.

In a letter dated September 30, 2015, State Farm advised Key of the March 2015 default judgment in the amount of $27,284.04 and demanded payment of Key's policy limit of $10,000, together with court costs and interest. State Farm provided a copy of the journal entry of default judgment and requested a copy of Eby's insurance policy in effect at the time of the January 2014 accident. Prior to this letter, Key was not aware of any of the legal proceedings regarding Geer's claim against Eby.

In the 13 months between August 19, 2014, when Key sent a copy of its letter to State Farm to Eby, and September 30, 2015, when it learned of the default judgment, Key made no attempts to contact Eby regarding the Geer claim or the threatened law suit.

On October 7, 2015, Key sent an email to State Farm responding to the September 30 letter. Key offered to pay $9,750, representing the balance of the policy after reimbursing Geer's deductible of $250 and inquired where to send the money. Key refused to pay for court costs and interest but agreed to send a copy of Eby's policy. Key's representative then stated: "Let me know whom I will issue payment to so I can send a Property damage release letter as soon as possible." State Farm emailed a reply on October 12, refusing to sign a release, informing Key that State Farm would issue a garnishment to collect the amount it was owed, and advising Key how to pay a portion of the judgment if that is what it wished to do.

On October 22, 2015, State Farm (on behalf of Geer) filed a request for garnishment of the judgment amount of $27,284.04, naming Eby as the judgment-debtor and Key as the garnishee. An order of garnishment was issued on October 23, 2015, instructing Key to complete its answer within 10 days of service and informing Key that the garnishment was a continuing order until the amount was paid or the garnishment was released. Key was served on October 29. Key completed its answer on November 10 and answered that it held "$0" money to which Geer was entitled. State Farm responded to Key's answer on November 18 and served copies to Key and Eby.

On February 4, 2016, Geer filed a memorandum of law to demonstrate she met her burden to disprove Key's contention that it did not owe any money to Geer. In its memorandum Geer made the following arguments: that Eby timely notified Key of the accident, that Key offered to pay to the limits of its policy only if Geer would sign a release of liability as to the balance of damages, that this offer was made even after Key learned of the default judgment and prior to the garnishment proceedings, and that Key held funds subject to garnishment. Geer also argued that Key cannot now claim an affirmative policy defense against paying the claim due to Eby's conduct, nor can Key establish prejudice for lack of notice. Finally, Geer argued that Key had been willing to pay its limit on the policy since shortly after the accident happened but that the parties had been in a stalemate since that time because Key demanded that Geer release Eby from any obligation to pay the amount of the damages Geer had incurred above the policy limit. She concluded by stating that the burden had shifted to Key to show it had been prejudiced and requested judgment against Key in the amount of $10,000.

On the same day, Key filed a motion for summary judgment in which it claimed it always believed there were defenses on the merits of the claim, but its "duty to its insured to get a release was paramount." Key claimed it had been prejudiced by Eby's breach of the policy when he failed to notify Key of the legal proceedings and that because it owed nothing to Eby, it owed nothing to Geer. Key acknowledged that its offers to pay the

policy's limits were made before Eby breached the policy and then argued that "the renewal of the same offer post-judgment was made in an attempt to buy peace for Key."

Geer filed a response to Key's motion for summary judgment on February 12, 2016. In her response, Geer argued that the cases upon which Key relied in its motion for summary judgment were distinguishable because of the difference in the notice provisions. She also argued that if Key believed it had a meritorious defense, it would have argued its defense during negotiations between May and August 2014. Geer concluded by incorporating the arguments contained in her February 4 memorandum of law and demanding judgment in the amount of $10,000.

Eby's insurance policy with Key at the time of the accident was attached in its entirety to the parties' joint stipulation. The parties stipulated that Key's "applicable policy language . . . regarding communication with Key" was in a section on pages 5-6 of the policy called "Reporting a Claim—Duties After an Accident or Loss." The parties further stipulated that the policy stated that Key "may not" provide coverage under certain stated circumstances. The policy also required the insured to deliver to Key within 72 hours any correspondence or legal papers received relating to an insured's claim or suit; required an insured to refrain from entering into any settlement agreement or release with others without Key's knowledge and written consent; and required that the insured not appear in court without prior notification to Key.

The stipulations did not provide that the quoted sections of the policy were the only portions that applied to the facts of this case. The copy of the policy included in the stipulations does not appear to contain any redactions. The record contains no documents or references to documents wherein Key consented to Eby entering into a settlement agreement with Geer or State Farm. The stipulations reflect that Eby did not notify Key of any of the legal proceedings and that Key never asked State Farm to directly notify Key of any legal action or future efforts to collect from Eby on Geer's claim.

The section of Eby's insurance policy called "Cancellation of Policy Mid-Term" is on page 16 of the policy but is not quoted in the joint stipulations. This section states: "If **WE** cancel this policy, **WE** will provide **YOU** with the reason for **OUR** decision. **OUR** notice of cancellation will be mailed at the U.S. Post Office to the address shown on the Declarations page. Proof of mailing the notice is proof of cancellation." The record neither contains a copy of a notice of cancellation of Eby's policy, nor does it contain proof that one was mailed to him.

Oral arguments on Key's motion for summary judgment were heard on February 17, 2016, and the district court took the matter under advisement. The court reviewed the cases and statutes applicable to the issues, considered the stipulated facts, and reviewed the exhibits. The court reconvened on April 12, 2016, and denied Key's motion for summary judgment while granting judgment to Geer in the amount of $9,750. The court found that Geer met her burden to establish the validity of the garnishment and Key failed to meet its burden to establish a policy defense. The district judge then spoke regarding the discretionary language of the insurance policy, stating, "[B]ut [the policy] says: 'We may not provide any coverage.'" The court found that Eby notified Key of the loss immediately after the accident and that Key had the opportunity to investigate. The court then found that Key never notified Eby he would lose coverage if he did not comply exactly with the policy; that Key did not follow the protocol the policy required in order to cancel the policy; and that Key did not prove that it cancelled Eby's policy. The court also found that Key was "very aware" of the lawsuit and did not prove its policy defense.

Key filed a timely appeal.

Geer filed a Request for Garnishment on June 17, 2016, naming Key as the judgment-debtor and a bank as the garnishee, and listing the amount of judgment as $9,750. The Order of Garnishment was issued on June 21. The garnishee-bank was

served on June 27, 2016, with copies served on Eby and Key. The record is silent regarding any relevant proceeding after June 27, 2016.

DID THE DISTRICT COURT ERR IN DENYING KEY'S MOTION FOR SUMMARY JUDGMENT?

On appeal, Key argues the district court erred by denying its motion for summary judgment, specifically arguing that Key met its burden of proving its policy defense and that the district court abused its discretion in *sua sponte* considering whether Key cancelled Eby's policy.

"'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 622, 345 P.3d 281 (2015) (quoting *Stanley Bank v. Parish*, 298 Kan. 755, Syl. ¶ 1, 317 P.3d 750 [2014]). An appellate court reviews

> "the district court's denial of a motion for summary judgment de novo, viewing the facts in the light most favorable to the party opposing summary judgment. [Citations omitted.] If 'reasonable minds could differ as to the conclusions drawn from the evidence'—in other words, if there is a genuine issue about a material fact—summary judgment should be denied. [Citation omitted.]" *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015).

Even where there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013). When the controlling facts are based on the parties' joint stipulation, an appellate court determines de novo whether the moving party is entitled to a judgment as a matter of law. *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d

188 (2012). In this case, there are no factual disputes. The entire evidentiary record considered by the district court is contained in the joint stipulations and attached exhibits.

A. *Key's burden to prove its policy defense*

An affirmative policy defense in a contested garnishment proceeding must be proven by the pleader-garnishee. *Watson v. Jones*, 227 Kan. 862, 868, 610 P.2d 619 (1980). Key attempted to meet its burden to prove its policy defense by calling attention to the specific provisions of the insurance policy regarding Eby's obligation to notify Key of any court proceedings. Neither party denies that Eby never notified Key that he received a summons in Geer's lawsuit or that Geer had obtained a default judgment against him.

The law does not require that Eby be the one who notified Key of the lawsuit. The identity of the notice-giver is irrelevant; the crux of the matter is whether Key received notice and had an opportunity to make an investigation and defend the litigation. See *Johnson v. Westhoff Sand Co.*, 31 Kan. App. 2d 259, 272, 62 P.3d 685 (2003) (citing *Jameson v. Farmers Mutual Automobile Ins. Co.*, 181 Kan. 120, 127, 309 P.2d 394 [1957]). In this case, State Farm notified Key on August 2014 that suit was likely, if not imminent.

Additionally, failure by the insured to provide timely notice under provisions of an insurance policy is not alone sufficient to excuse performance by the insurer; Kansas also requires a showing that the insurer was actually prejudiced by the untimely notice. The burden is on the insurer to show substantial prejudice, and such prejudice is not presumed. *Johnson*, 31 Kan. App. 2d at 269-73 (adopting the rationale of the district court); see *Creek v. Harder Constr.*, 25 Kan. App. 2d 232, 236-37, 961 P.2d 1240 (1998). Key does not claim that it did not have notice of the loss, only the lawsuit. The record demonstrates that Key investigated the loss, appraised the damages, and determined that

the responsibility for those damages belonged to Eby. State Farm notified Key in mid-August 2014 that it intended to file a lawsuit. Key then notified Eby of the likelihood of an impending lawsuit. Key did not contact Eby again. Key does not attempt to explain the subsequent lack of communication with Eby regarding the Geer claim.

The facts demonstrate that Key offered State Farm the policy's limit on several occasions, including after learning of the default judgment in September 2015. However, each offer contained the condition that Geer must sign a release of Eby from any further obligation to her and to State Farm, even though at the time it knew that Eby had failed to notify the company of the lawsuit and default proceedings. Thus, the record shows that even after learning of Eby's breaches of policy provisions, Key continued to advocate for him. It is reasonable to infer from this timeline that had Key believed it had any meritorious defense or affirmative policy defenses, it would have asserted them at that time. It was not until after the garnishment proceedings commenced that Key began to claim it was substantially prejudiced by Eby's failure to notify it of the lawsuit and default proceedings.

Ultimately, Key owed the same amount it continuously offered to pay prior to the entry of the default judgment against Eby. This fact shows that the lack of notice and subsequent entry of judgment did not prejudice Key.

B. *The district court's consideration of the entire insurance policy*

Key argues that the district court abused its discretion by *sua sponte* considering whether Key cancelled Eby's policy. This issue is an element of the court's finding that Key failed to meet its burden to prove its policy defense. Key contends that none of the joint stipulations related to the cancellation of Eby's policy, and neither party raised cancellation with the court.

A district court abuses its discretion when (1) no reasonable person would take the view adopted by the trial judge; (2) the ruling is based on an error of law; or (3) the exercise of discretion is based on an error of fact. *Wiles v. American Family Life Assurance Co.*, 302 Kan. 66, 74, 350 P.3d 1071 (2015). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. *Matson v. Kansas Dept. of Corrections*, 301 Kan. 654, 656, 346 P.3d 327 (2015).

Generally, parties are bound to their stipulated facts, and both trial and appellate courts must render judgment based on those facts. *Double M Constr. v. Kansas Corporation Comm'n*, 288 Kan. 268, 269, 202 P.3d 7 (2009). In this case, Key does not argue that the entire insurance policy was not properly before the court. Rather, on appeal, Key objects to the district judge looking outside of the pages and sections of the policy specifically quoted in the body of the stipulations. However, facts and exhibits admitted by stipulation must be regarded as evidence. *Kirkpatrick v. Ault*, 174 Kan. 701, 701-02, 258 P.2d 262 (1953); *Cadena v. Pacesetter Corp.*, 30 F. Supp. 2d 1333, 1343 (D. Kan. 1998), *aff'd* 224 F.3d 1203 (10th Cir. 2000) (party waived all objections to joint stipulated exhibit); see also *Hardesty v. Coastal Mart, Inc.*, 259 Kan. 645, 650, 915 P.2d 41 (1996) (stipulation to admissibility of evidence means that party agreeing to stipulation waives any objection to evidence). Further, the policy contains no redactions and the stipulations contain no restrictive language.

Key's argument that the district court abused its discretion by looking at the cancellation provision in the policy is particularly confusing in light of its defense that the policy was cancelable due to Eby's failure to notify the company about the legal proceedings. It is incongruent for Key to expect the court to scrutinize Eby's obligations under the policy but not its own. The court did not go outside the record but stayed within the parameters of the stipulations and exhibits provided by the parties. The district court made reasonable inferences from the facts and evidence provided and correctly observed

that the record contained no evidence that Key cancelled Eby's policy for his breach in failing to notify the company of the lawsuit. "A party cannot avoid summary judgment on the mere hope that something may develop later during discovery or at trial. [Citation omitted.] Mere speculation is similarly insufficient to avoid summary judgment. [Citation omitted.]" *Kincaid v. Dess*, 48 Kan. App. 2d 640, 656, 298 P.3d 358, *rev. denied* 297 Kan. 1246 (2013).

It was not unreasonable for the district court to stay within the framework of the stipulations and exhibits and thoroughly consider all of the evidence it was given under a joint agreement by the parties. The district court did not abuse its discretion by incorporating the policy's mid-term cancellation policy in its finding that Key had not met its burden to prove its policy defense.

The record demonstrates that despite its claim that Eby breached the policy provisions, Key did not cancel Eby's policy. Key acknowledged its obligation on behalf of Eby and offered to pay the limits of its policy throughout the negotiations and again after learning of the default judgment. It now argues that it canceled the policy and owes nothing. Key has failed to show that it was substantially prejudiced by Eby's failure to notify it of the lawsuit and default proceedings. The district court's finding that Key failed to meet its burden to establish its policy defense is sustained.

When viewing the facts of this case in the light most favorable to Geer, reasonable minds could not differ on the conclusion drawn by the district court that Key failed to prove its policy defense because it did not demonstrate a lack of notice or substantial prejudice. As an element of that analysis, we find that the district court did not abuse its discretion by relying on the record as a whole when it decided that Key did not cancel Eby's insurance policy for his failure to notify it of the lawsuit against him.

Affirmed.