NOT DESIGNATED FOR PUBLICATION

No. 113,291

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DANIEL BECKER,
Appellant,

v.

THE BAR PLAN MUTUAL INSURANCE COMPANY,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES CHARLES DROEGE, judge. Opinion filed December 23, 2015. Affirmed.

Matthew T. Geiger, and *Benjamin R. Prell*, of Geiger Prell, LLC, of Overland Park, and *David J. Langin*, of Langin Law Firm, LLC, of Overland Park, for appellant.

James C. Morrow, *M. Todd Moulder*, and *Marshall W. Woody*, of Morrow-Willnauer Klosterman Church, LLC, of Kansas City, Missouri, for appellee.

Before GREEN, P.J., GARDNER, J., and JOHNSON, S.J.

Per Curiam: This appeal involves an insurance coverage case. Daniel Becker hired Sheila Seck and her law firm to represent him in conection with loans to Brenda Wood and her company, Professional Cleaning and Innovative Services, Inc. (PCI). Seck neglected to perform a Uniform Commercial Code (UCC) search or to tell Becker about a prior filed perfected security interest in the same assets that were pledged by Wood and PCI to Becker as collateral for the Becker loans. The loans totaled $5,569,000. Becker sued Seck for attorney malpractice. The Bar Plan Mutual Insurance Company (The Bar

Plan) initially furnished Seck with a defense while conducting a coverage review of Becker's claim against Seck.

The Bar Plan later determined that Seck was not entitled to coverage and that she was not entitled to a defense under her claims-made policy. Seck would later confess judgment to Becker in the amount of $3,905,000 and assigned to Becker her right to bring a bad-faith claim against The Bar Plan. Both Becker and The Bar Plan moved for summary judgment. The trial court granted The Bar Plan's motion for summary judgment. The trial court held that The Bar Plan policy was a claims-made policy and provided coverage only to claims made and reported during the current policy period. The trial court further held that the unambiguous language of the policy did not provide coverage to claims made in a policy period where the insured had knowledge of the act or omission constituting the basis of those claims in a prior policy period and did not report the act or omission to The Bar Plan. Finding no error, we affirm.

In March 2010, Becker hired Seck and Seck & Associates, L.L.C., to advise him and represent him in making loans to Wood and her company, PCI. Woods represented that the loans would be secured by unencumbered collateral, when in fact, Wood had previously pledged the collateral to Farmers Bank in 2007. Farmers Bank had filed a financing statement reflecting its security interest. Seck and her firm prepared promissory notes, guaranties, and security agreements to facilitate the loans. In doing so, Seck failed to conduct a UCC search, advise Becker to perform a UCC search, or advise Becker of Farmers Bank's security interest in Wood's collateral. From March 8, 2010, to March 29, 2012, Becker loaned Wood and PCI $5,569,000. Becker made the loans to Wood because he believed the loans were secured. Becker did not know that Wood had already pledged the collateral to Farmers Bank and was defrauding him.

On December 19, 2011, Becker informed Seck by email that another attorney had discovered a UCC filing dating back to 2007 on the property owned by PCI. Becker

asked Seck: "[S]houldn't that have come up when we did our filing, ie did we check and see if there was already a filing on PCI . . .?" Seck replied via email that same day and said: "I will check. We did our own UCC search, but based on our recent dealings with Brenda [Wood], I won't be surprised if we find other stuff. Let me get back to you after I do the search." Becker responded: "Yes, I know we did a UCC search, my question is did we make an error in the search[?]"

On December 30, 2011, Becker sent Seck another email stating: "[I] don't understand[.] [I] have 5 m dollars out I would not have had out without collateral[.]" On January 3, 2012, Seck responded: "I don't understand why this is totally different than the report I ordered. Let me compare the two documents. They are both for the same company and should have the same chain of filing for all creditors."

On January 16, 2012, Becker again emailed Seck stating:

> "[T]hings have gotten significantly worse given that the prior UCC filing was discovered, Bryan Cave is engaged[.]
> "[A]t some point you and I have to have a serious discussion[.]
> "[I]t[']s your job to protect and to find these things out, it's a normal standard of practice to check and see if there is something else with a lien on the [] collateral your [*sic*] about to write a doc for[.]
> "[E]very lawyer knows this, [I']m a finance guy and even [I] know you should have checked . . . . [I] have paid for 5 different legal analysis on what is the proper and expected standard of care when you [are] writing these docs for me[.]
> "[I]f [I] told you once [I] told you 1000x times you have to protect me,—you know all this and you know there was a mistake made a big one[.]

On February 6, 2012, Becker terminated Seck and her firm via email stating:

> "Sheila

"Please use this email as official termination of your services. I would like to request a copy of my file, with copies of any and all invoices, with the itemized detail of what you worked on. Most importantly email strings from your work with John and Brenda and anything that may be of use in recovering funds from PCI in the future.

"I have found and been advised of two monumental errors on your part. The first is an error in the UCC filing, where Brenda pledged 900 shares and you filed 500. The second is the lack of diligence and attention in bothering to check to see if someone else had a lien on Brenda's assets.

"We are currently in analysis mode in trying to correct and ascertain the damages, as well as quantify them.

"I found [an] amazing lack of concern, diligence, prudence and ability to think outside the box in the performance of your services. I understand I changed documents and agendas quickly. That does not alleviate you from the basics of being a business lawyer. I also understand, what you said early about contracts etc. But, you were flighty, forgetful, absent minded, and lazy and when I asked you about these errors, your first response was to blame it on the client.

"What was equally amazing is your response when I told you I was hiring Greg. Im [*sic*] surprised you were surprised. Per industry norms, I expect you to continue to maintain attorney client privilege in all the things we have discussed in the course [of] our business together.

"We can talk over this all at a later date, I have a lake house now requiring my legal time.

"Pls [*sic*] forward my file or bring it over when you get the chance. I would also appreciate your inquiry with your insurance carrier, as said I have not yet quantified what I expect to be very large damages."

Becker did not demand any money or services from Seck at that time. Becker and Seck did not discuss the UCC search issue again after February 6, 2012. Becker and Seck

returned to their normal social lives which included them playing tennis together, having their kids play together, and having lunch and dinner together.

Becker initially focused his recovery efforts on Wood. When Wood filed for bankruptcy in October or November 2012, Becker realized that he was going to incur a big loss. So, on November 12, 2012, he sent a demand letter to Seck and her firm. The Bar Plan contracted to provide Seck and her firm with professional liability coverage of $100,000 per claim and $300,000 in the aggregate from October 1, 2011-October 1, 2012, and from October 1, 2012-October 1, 2013. On November 19, 2012, Seck reported Becker's claim to The Bar Plan. The Bar Plan assigned attorney Charles Coffey to the claim file.

On November 29, 2012, Coffey received a packet of information from Becker's attorney, which included a cover letter, a timeline, an expert report, and a disc of documents. The disc of documents included the February 6, 2012, email (February 6 email) where Becker terminated Seck's services. After reading this information, Coffey told Seck that he had "not seen anything that would cause coverage of this matter to be declined."

On January 10, 2013, Becker sued Seck and her firm for legal malpractice alleging that she had failed to "conduct any UCC search for Becker or failed to conduct the search to a reasonable standard of care, and failed to advise Becker of the Farmers Bank security interest and the consequences to him."

On January 18, 2013, The Bar Plan undertook the defense of Seck and her firm. On January 25, 2013, The Bar Plan assigned Mimi Doherty as defense counsel for Seck and her firm. The Bar Plan began defending Seck before it had completed a coverage review. At this point, The Bar Plan still had not received Seck's legal file even though it had repeatedly and continuously requested the file from her. On February 4, 2013,

Doherty told Coffey that "this is one that we will want to settle given the fact that the plaintiff lost at least $400K and possibly upwards of a million and the limit on the policy is $100K." Doherty further stated that this case "will be [hard] to win."

On February 11, 2013, The Bar Plan finally received Seck's entire legal file regarding Becker's claim. On February 22, 2013, Becker made a settlement offer to The Bar Plan for $300,000 minus reasonable defense costs and other costs incurred by the insurer. The Bar Plan did not make a counteroffer.

On February 25, 2013, The Bar Plan began reviewing Seck's file for coverage issues. On March 5, 2013, The Bar Plan opened a coverage file after determining that the February 6 email triggered a coverage issue. The coverage file was assigned to attorney Valerie Polites who conducted a coverage analysis.

After performing its coverage analysis, The Bar Plan sent Seck a reservation of rights letter on March 11, 2013. On April 16, 2013, The Bar Plan sent a letter to Seck declining coverage of Becker's claim stating that Seck was "aware of circumstances which could be expected to give rise to a claim no later than February 6, 2012." Seck requested a reconsideration of the denial, which was denied.

Following its denial of coverage, The Bar Plan received another settlement offer from Becker on April 29, 2013. Again, The Bar Plan did not make a counteroffer.

On August 23, 2013, Seck and her firm consented to a reduced judgment to Becker in the amount of $3,905,000. On August 26, 2013, Seck and her firm assigned all rights to Becker to sue The Bar Plan for bad-faith refusal to settle and bad-faith refusal to defend.

On August 27, 2013, Becker sued The Bar Plan alleging bad-faith refusal to settle and bad-faith refusal to defend. Becker moved for partial summary judgment on coverage defenses. The Bar Plan also moved for summary judgment. The trial court ultimately denied Becker's motion for partial summary judgment and entered summary judgment for The Bar Plan.

Did the Trial Court Err in Granting Summary Judgment to The Bar Plan?

On appeal, Becker argues that the trial court erred in granting summary judgment to The Bar Plan because the trial court decided genuine issues of disputed material fact that should have been reserved for the jury and because the trial court weighed conflicting evidence in favor of The Bar Plan instead of in favor of Becker.

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, summary judgment is appropriate. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, the same rules apply; summary judgment must be denied if reasonable minds could differ as to the conclusions drawn from the evidence. *Stanley Bank v. Parish*, 298 Kan. 755, 759, 317 P.3d 750 (2014).

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). An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary

judgment. In other words, if the disputed fact, however resolved, could not affect the judgment, it does not present a "genuine issue" for purposes of summary judgment. See *Dana v. Heartland Management Co.*, 48 Kan. App. 2d 1048, 1056, 301 P.3d 772 (2013); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935-36, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013).

Moreover, to the extent that resolving this issue requires us to interpret the provisions of an insurance contract, this court has unlimited review. Additionally, this court is not bound by the lower court's interpretation of a contract. *Prairie Land Elec. Co-op. v. Kansas Elec. Power Co-op*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). In construing an insurance policy, a court should review the policy as a whole and endeavor to ascertain the intent of the parties from the language used, taking into account the parties' situation, the nature of the subject matter of the policy, and the purpose to be accomplished. Insurance policy language is reviewed by what a reasonably prudent insured would understand the language to mean, not by what the insurer intended the language to mean. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 707, 317 P.3d 70 (2014). Finally, limiting or exclusionary insurance provisions are to be construed narrowly against the insurer. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 327, 961 P.2d 1213 (1998).

Seck's policy with The Bar Plan was a claims-made liability policy that covered both loss and defense costs. "Under a claims-made policy, coverage is only triggered when, during the policy period, an insured discovers and notifies the insurer of either claims against the insured or occurrences that might give rise to such claims." *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1142, 192 P.3d 614 (2008).

The Bar Plan policy covered losses that Seck "shall become legally obligated to pay as DAMAGES AS A RESULT OF CLAIMS . . . FIRST MADE AGAINST AN

INSURED DURING THE POLICY PERIOD . . . by reason of any act or omission by an insured acting in a professional capacity providing Legal Services."

The policy provisions at issue in this case are listed as follows:

"II. COVERAGE

"A. PROFESSIONAL LIABILITY AND CLAIMS-MADE AND REPORTED CLAUSE:

"The Company will pay on behalf of the Insured all sums, subject to the Limit(s) of Liability, Exclusions and terms and conditions contained in this Policy, which an Insured shall become legally obligated to pay as Damages as a result of CLAIMS (INCLUDING CLAIMS FOR PERSONAL INJURY) FIRST MADE AGAINST AN INSURED DURING THE POLCIY PERIOD OR ANY APPLICABLE EXTENSION PERIOD COVERAGE AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD, THE AUTOMATIC EXTENDED CLAIM REPORTING PERIOD, OR ANY APPLICABLE EXTENTION PERIOD COVERAGE by reason of any act or omission by an Insured acting in a professional capacity providing Legal Services.

"**PROVIDED ALWAYS THAT** such act or omission happens:

1. During the Policy Period; or
2. Prior to the Policy Period, provided that prior to the effective date of this Policy:

a. Such Insured did not give notice to the Company or any prior insurer of any such an act or omission; and

b. Such Insured had no basis to believe that such Insured had committed such an action or omission.

"NOTE: It is a condition precedent to coverage under this Policy that all Claims be reported in compliance with Section VII. CLAIMS, Paragraph A.

. . . .

> **"III. EXCLUSIONS**
> **"THIS POLICY DOES NOT PROVIDE COVERAGE FOR ANY CLAIM BASED UPON OR ARISING OUT OF:**
>
> . . . .
>
> "L. A Claim against an Insured who before the Policy effective date knew, or should reasonably have known, of any circumstance, act or omission that might reasonably be expected to be the basis of that Claim."

It should also be noted that the renewal application for the 2012 policy asked the following question: "[D]oes the firm or any attorney or employee in the firm have knowledge of any incident, circumstance, act or omission, which may give rise to a claim not previously reported to us?" The answer was marked no.

Following this question, the renewal application also listed the following reminder in capitals letters and bold font:

> **"TO AVOID LOSS OF COVERAGE IT IS IMPERATIVE THAT ALL KNOWN CIRCUMSTANCES, ACTS OR OMISSIONS WHICH COULD RESULT IN A PROFESSIONAL LIABILITY CLAIM AGAINST YOU, YOUR FIRM OR A PREDECESSOR IN BUSINESS BE REPORTED TO YOUR PRESENT INSURER WITHIN THE TIME PERIOD SPECIFICED IN YOUR PRESENT POLICY."**

Insurance companies commonly use these prior-knowledge conditions as a way to "ensure that only risks of unknown loss are potentially incurred," *Cahow*, 286 Kan. at 1143, and to prevent an insured from unfairly "obtain[ing] coverage for the risk of a known loss." 286 Kan. at 1144.

Based on the language in the renewal application, Becker maintains that only a subjective standard should apply. Nevertheless, the exclusion provisions in the 2012

policy clearly denies coverage of claims against an insured who knew, or reasonably should have known, of any acts or omissions that might reasonably lead to the basis of a claim. Moreover, some courts have applied an objective standard even when the application does not contain the reasonably foreseeable language that is commonly used to support an objective analysis. See, *e.g., International Ins. Co. v. Peabody Intern. Corp.*, 747 F. Supp. 477, 482-83 (N.D. Ill. 1990) (insurance application asked whether insured was "'aware of any circumstances, occurrence or condition . . . which may result in the . . . assertion of a claim'" was found to be objective rather than subjective). Based on this policy language, the trial court properly determined that the two-prong, subjective-objective analysis adopted by our Supreme Court in *Cahow* should apply in this case. See also *Cohen-Esrey Real Estate v. Twin City Fire Ins. Co.*, 636 F.3d 1300, 1303-06 (10th Cir. 2011) (court applied the two-prong, subjective-objective analysis established in *Cahow* to find that insured was not entitled to coverage under a claims-made policy based on the policy's prior knowledge condition). That test is examined here.

Did Seck Have Prior Knowledge Based on the Subjective-Objective Standard?

The subjective prong is "whether the insured knew of certain facts." *Cahow*, 286 Kan. at 1150. The objective prong should track the language of the application for the policy, which says "knowledge of any incident, circumstance, act or omission, which may give rise to a claim." Thus, the objective prong in this case would be whether Seck "knew of any incidence, circumstance, act or omission, which may give rise to a claim." The application also stated the following reminder: **"TO AVOID LOSS OF COVERAGE IT IS IMPERATIVE THAT ALL KNOWN CIRCUMSTANCES, ACTS OR OMISSIONS WHICH COULD RESULT IN A PROFESSIONAL LIABILITY CLAIM AGAINST YOU . . . BE REPORTED . . . ."**

We must first determine, under the subjective test, whether Seck knew of certain facts which supported Becker's claim. The following timeline shows the relevant uncontroverted facts of Seck's knowledge of the claim:

- December 19, 2011: Becker first told Seck that another attorney had discovered a UCC filing on the property owned by PCI dating back to 2007. Becker specifically asked Seck: "shouldn't that have come up when we did our filing, ie did we check and see if there was already a filing on PCI . . .?"

  Seck replied via email that same day stating: "I will check. We did our own UCC search, but based on our recent dealings with Brenda, I won't be surprised if we find other stuff. Let me get back to you after I do the search."

  Becker then responded: "Yes, I know we did a UCC search, my question is did we make an error in the search[?]"

- December 22, 2011: Becker again emailed Seck saying:
  "I . . . need to know if there was a mistake made ion [*sic*] the sesarchnyu [*sic*] did or neglected to do a search. It's a big deal[.]"

- December 30, 2011: Becker again emailed Seck saying:
  "[I] don't understand[.] [I] have 5m dollars out I would not have had out without collateral[.]"

- January 3, 2012: Seck responded to Becker stating:

"I don't understand why this is totally different than the report I ordered. Let me compare the two documents. They are both for the same company and should have the same chain of filing for all creditors."

- January 16, 2012: Becker emailed Seck to tell her that she had failed to perform her professional duties to the acceptable standard of care by stating:

"[T]hings have gotten significantly worse given that the prior UCC filing was discovered, Bryan Cave is engaged[.]

"[A]t some point you and I have to have a serious discussion[.]

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"[I]f [I] told you once [I] told you 1000x times you have to protect me,--you know all this and you know there was a mistake made a big one[.]

- February 6, 2012: Becker emailed Seck to terminate her services stating:

"Sheila

"Please use this email as official termination of your services. I would like to request a copy of my file, with copies of any and all invoices, with the itemized detail of what you worked on. Most importantly email strings from your work with John and Brenda and anything that may be of use in recovering funds from PCI in the future.

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"We are currently in analysis mode in trying to correct and ascertain the damages, as well as quantify them.

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In considering the subjective prong of what facts were known to Seck about whether she had committed acts or omissions constituting Becker's claim against her, the trial court stated the following:

"Seck had knowledge that a UCC financing statement had been filed against PCI's collateral that was supposed to secure the loans Plaintiff had made to PCI and that the facts underlying the preexisting security interest in the collateral securing Plaintiff's

> loans, as reflected by the UCC filings by Farmers Bank, were 'totally different that the report [she] ordered.' Furthermore, Seck was aware that Plaintiff believed Seck had failed to perform her professional duties to the acceptable standard of care and was terminating her services as a result. Lastly, Seck knew that Plaintiff intended on involving her insurance carrier in the matter at hand. As such, Seck had definitive subjective knowledge of the facts forming the basis of Plaintiff's claims for legal malpractice against her no later than February 6, 2012. She had knowledge that she had not searched, found, or informed Plaintiff of the prior UCC filing by Farmers Bank on the same collateral securing Plaintiff's loan to PCI."

Based on the trial court's summary, it is clear that on or before February 6, 2012, Seck knew that Becker believed that she had failed to perform her professional duties to the acceptable standard of care and, as a result, he terminated her services. It is also apparent that Seck knew that Becker intended on involving her insurance carrier because he was not going to be able to recoup his losses against Wood's and PCI's assets. In fact, Becker told Seck in his February 6, 2012, email that he "was trying to correct and ascertain the damages." Thus Seck had a basis to believe that she had breached a professional duty owed Becker in this matter. For instance, the Third Circuit Court of Appeals reasoned as follows:

> "When an attorney has a basis to believe he has breached a professional duty, he has a reason to foresee that his conduct might be the basis of a professional liability claim against him. He cannot assume that the claim will not be brought because he *subjectively* believes it is time barred or lacks merit." *Coregis Ins. Co. v. Baratta & Fenerty, Ltd.*, 264 F.3d 302, 307 (3d Cir. 2001).

Nevertheless, Becker argues that Seck had no idea she was going to be sued based on her friendly relationship with Becker and their continued close social relationship after the incident. Becker maintains that he was not only silent about his claim but he also argues that he did not even contemplate suing Seck and her firm until October or November 2012. Becker asserts that based on this extended silence Seck had no reason to

foresee a claim against her. To support his argument, Becker relies on *Westport Ins. v. Ray Quinney & Nebeker*, No. 2:07-CV-236-TC, 2009 WL 2474005 (D. Utah 2009) (unpublished opinion). In *Westport Ins.*, the court denied summary judgment to the insurer because it was unclear whether the firm subjectively knew at the relevant time that it had in fact committed malpractice. The court noted that the extended silence over an 18-month period between the last correspondence and the policy's effective date significantly reduced the foreseeability of a claim. 2009 WL 2474005, at *6.

The *Westport Ins.* case is clearly distinguishable from this case because the factual issue in *Westport Ins.* was whether the firm subjectively knew at the relevant time that it had in fact committed malpractice. In this case, it is clear that Seck subjectively knew on or before February 6, 2012, that she had breached her standard of care owed to Becker. Moreover, although there was an 8- or 9-month delay between when Becker terminated Seck's services and when he served her with a demand letter, that delay was not as long as the 18-month delay in *Westport Ins.* Additionally, that delay does not outweigh the fact that Becker was out $5 million as a result of Seck's error. A reasonable attorney in this situation would not have expected Becker to simply ignore the $5 million loss just because the two people were family friends.

Under those circumstances, it was clear that on or before February 6, 2012, Seck had the subjective knowledge of acts or omissions that might give rise to Becker's legal malpractice claim.

Next, under the objective test, we must determine whether a reasonable person in Seck's position should have known of any acts or omissions that might give rise to a claim. Again, this prong does not require that Seck actually formed an expectation that a claim would be filed. It simply requires a finding that a reasonable person in Seck's position might expect a claim to result. *Cahow*, 286 Kan. at 1158.

In this case, Becker told Seck that he believed she had breached the reasonable standard of care by failing to perform a UCC search. A transactional attorney who regularly creates promissory notes and security interests in personal property should know to perform a UCC search to determine whether the personal property to be pledged as collateral is encumbered by a prior lien. Failure to perform such a search would be considered a breach of the standard of care of a transactional attorney. For instance, this is even more true in a case such as this one where the client puts the attorney on notice of the attorney's errors, obtains different legal opinions stating that the attorney had failed to comply with the standard of care of a transactional attorney, claims damages as a result of these errors, and tells the attorney to notify her insurance carrier.

Based on the facts of this case, Seck knew that she had failed to properly perform a UCC search. Moreover, she knew that act or omission resulted in an enormous financial loss to her client, which might result in a claim. Again, this standard does not require that Seck actually form the belief that Becker was going to file a claim against her.

Moreover, a reasonable attorney in Seck's position would have known that Becker was doing everything he could to recoup his financial loss. A reasonable attorney would also have known that if Becker was unable to recoup his financial loss from Wood, Becker would likely seek recoupment against Seck and her insurance carrier. As a result, under the objective prong, we determine that a reasonable attorney in Seck's position would have expected that a claim might result in this matter.

Becker's claim against Seck was made and reported to The Bar Plan in November 2012. Seck did not notify The Bar Plan of any acts or occurrences regarding Becker prior to her 2012 policy effective date. When completing her renewal application in September 2012, Seck stated that there were no incidents, circumstances, acts or omissions which might give rise to a claim that was not previously reported. Seck maintained that when she filled out her renewal application, she did not believe that she had committed an act

or omission resulting in damage to Becker. Nevertheless, based on the facts of this case, Seck knew on or before February 6, 2012, that she had committed an act or omission in failing to perform a UCC search. A reasonable attorney in Seck's position would have expected that a claim might result from this error. Nevertheless, when Seck renewed her insurance with The Bar Plan in September 2012, Seck denied knowledge of any act or omission which might lead to a claim. Seck's insurance policy clearly excluded coverage for any claim based upon or arising out of a claim against an insured who, before the policy's effective date, knew or should have known of any circumstance, act or omission that might reasonably form a claim but failed to report it. Because Seck failed to report this possible claim, Seck was not entitled to coverage under the terms of her insurance contract.

In summary, we conclude that the prior knowledge condition under The Bar Plan's policy barred coverage to Seck. As a result, The Bar Plan was entitled to summary judgment.

Should The Bar Plan Be Estopped From Denying Seck Coverage?

Next, Becker argues that an insurance company cannot undertake to defend a lawsuit brought against its insured and then deny coverage under the policy, unless the insurance company has given specific notice to its insured of its nonwaiver and reservation of rights to deny coverage. Here, Becker maintains that since The Bar Plan should have known from the information submitted to it, which included the February 6, 2012 email, that Seck had prior knowledge, it should be estopped from denying coverage.

Here, The Bar Plan undertook Seck's defense on January 18, 2013. The Bar plan did not send Seck a reservation of rights letter until March 11, 2013. Based on these facts, Becker argues that The Bar Plan waived any coverage defenses it had by failing to send out a timely reservation of rights letter.

Kansas courts have consistently allowed insurers to raise policy defenses even when the insurer has breached its duty to defend or failed to reserve its rights. See *Gilmore v. Beach House, Inc.*, 38 Kan. App. 2d 949, 956, 174 P.3d 439 (2008); *Aselco, Inc. v. Harford Ins. Group*, 28 Kan. App. 2d 839, 851, 21 P.3d 1011, *rev. denied* 272 Kan. 1417 (2001). Therefore, although The Bar Plan's reservation of rights letter may have been untimely, that fact alone does not prevent it from raising its policy defenses. Moreover, Seck did not provide The Bar Plan her entire legal file until February 11, 2013, after numerous requests. Thus, The Bar Plan was not able to determine coverage issues until after February 11, 2013, when it finally had a complete file to review.

> "It is a general rule, acknowledged in this jurisdiction, that waiver and estoppel may be invoked to forestall the forefeiture of an insurance contract but they cannot be used to expand its coverage." *Western Food Prod. Co. v. United States. Fire Ins. Co.*, 10 Kan. App. 2d 375, 381, 699 P.2d 579 (1985) (citing *Ron Henry Ford, Lincoln, Mercury, Inc. v. Nat'l Union Fire Ins. Co.*, 8 Kan. App. 2d 766, 769, 667 P.2d 907 [1983]).

In this case, we have previously concluded that Seck's policy excludes coverage based on the prior knowledge in this case. As a result, Seck was never protected for the circumstances which took place. We determine that The Bar Plan should not be estopped from denying coverage here because estoppel would effectively expand the plain scope of the insurance policy. Although there may be public policy grounds for granting estoppel, courts generally will not create coverage where none has been contracted for. See *Aselco*, 28 Kan. App. 2d at 851.

Was Seck Entitled to Coverage Under Section VI(C) of the Policy?

Next, Becker argues that Seck was entitled to coverage based on section VI(C) of the policy. Becker maintains that under this section an insured is entitled to coverage when the insured receives a demand in an earlier policy period but a claim in a later

policy period, so long as the insurer provided coverage for both policy periods. Becker further asserts that this section deems the claim to be made and reported in the earlier period, which in essence eliminates The Bar Plan's untimely notice defense.

This issue requires us to interpret the provisions of an insurance contract, where we have unlimited review. In construing an insurance policy, a court should review the policy as a whole and endeavor to ascertain the intent of the parties from the language used, taking into account the parties' situation, the nature of the subject matter of the policy, and the purpose to be accomplished. Insurance policy language is reviewed by what a reasonably prudent insured would understand the language to mean, not by what the insurer intended the language to mean. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 707, 317 P.3d 70 (2014). And finally, limiting or exclusionary insurance provisions are to be construed narrowly against the insurer. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 327, 961 P.2d 1213 (1998).

The relevant policy language states:

"VI. **LIMITS ON LIABILITY**

. . . .

"C. MULTIPLE INSUREDS, CLAIMS AND CLAIMANTS:

"The demand for money or services by more than one person or entity shall not operate to increase the Company's liability. Two or more demands arising out of a single act or omission or a series of related acts or omissions shall be treated as a single Claim. Any such Claim, whenever made, shall be considered for the purposes of this insurance to have been first made and reported during the Policy Period . . . in which the earliest demand arising out of such act or omission was first made, provided that such demand is, in fact, asserted against an Insured and reported to the Company during a period in which the Company provided coverage."

There are numerous problems with Becker's interpretation of this section. First, the plain language of this section states that this policy only applies when "such demand is, in fact, asserted against an Insured *and reported* to the Company . . . ." It is undisputed that Seck failed to report this act or omission during the 2011 policy period. Second, this section requires that a demand for money or services must have been made during the earlier policy period. Becker admits that he did not demand money or services. Instead, Becker attempts to argue that he demanded his legal file which is sufficient. This argument fails. The policy defines "Claim" as: "Receipt by an Insured of a demand for money or services . . . ." Becker did not make a demand for money or services on Seck until November 12, 2012.

Moreover, it is clear that this policy was written to limit liability to the policy limits which applied when the act or omission first happened. The reasoning behind this is to prevent an insured from increasing the limits of liability for a known risk. Further, the trial court correctly noted that Becker's interpretation of this section "disregard[s] The Bar Plan's clear use of the term 'claims-made' in Section II and would render the remaining provisions regarding coverage and exclusions superfluous."

As a result, we conclude that Section VI(C) does not apply in this case and cannot be used by Becker to force coverage under the policy.

Did the Bar Plan Breach the Standard of Care By Failing to Negotiate a Settlement?

Finally, Becker argues that The Bar Plan breached its contractual obligation to enter settlement negotiations on Seck's behalf. Becker maintains that because The Bar Plan breached its implied good-faith settlement obligation to Seck, he is entitled to recover an excess judgment from The Bar Plan.

The Bar Plan contracted to provide Seck and her firm with professional liability coverage of $100,000 per claim and $300,000 in the aggregate from October 1, 2011-October 1, 2012, and from October 1, 2012-October 1, 2013. The parties dispute whether Becker's claim should be considered a single claim or multiple claims.

On February 22, 2013, Becker offered to settle with Seck for $300,000 minus defense costs. The Bar Plan did not respond to this settlement offer. Then again on April 29, 2013, Becker again offered to settle with Seck for $300,000 minus defense costs. By this point, The Bar Plan had already denied coverage to Seck on April 16, 2013; therefore, there was no reason for The Bar Plan to enter settlement negotiations at this point. Thus, the only issue before the court is whether The Bar Plan acted in bad faith in refusing to enter settlement negotiations following Becker's settlement offer on February 22, 2013.

In Kansas, a liability insurer owes to the insured the duty to act in good faith and without negligence. *Bollinger v. Nuss*, 202 Kan. 326, 333, 449 P.2d 502 (1969). "An insurance company may become liable for an amount in excess of its policy limits if it fails to act in good faith and without negligence when defending and settling claims against its insured." *Glenn v. Fleming*, 247 Kan. 296, 305, 799 P.2d 79 (1990). To be successful on this claim, Becker needs to show that The Bar Plan acted in bad faith when it refused to enter settlement negotiations.

The court should look to *Snodgrass v. State Farm Mut. Auto Ins. Co.*, 15 Kan. App. 2d 153, 804 P.2d 1012, *rev. denied* 248 Kan. 997 (1991), for guidance on this issue.

Similar to this case, the *Snodgrass* case involved a denial of coverage and a refusal to defend. Snodgrass recovered a judgment against the insured, Owen, over the policy limits and obtained an assignment of rights from Owen after the insurer, State Farm, denied coverage and refused to defend. During trial, State Farm rejected Snodgrass'

policy limits settlement offer. Snodgrass ultimately recovered an excess judgment against State Farm after the jury found State Farm negligently and in bad faith breached the contract. This court affirmed coverage but held that there was not substantial competent evidence to support the finding that State Farm denied coverage or rejected the settlement offer in bad faith or negligently. The *Snodgrass* court held:

> "In the present case, State Farm had legitimate grounds to believe it was justified in denying coverage. An insurance company should not be required to settle a claim when there is a good faith question as to whether there is coverage under its insurance policy. If there is no coverage, there is no fiduciary relationship between the tortfeasor and the insurance company. Given State Farm's good faith claim that its insurance policy did not cover the Camaro, it did not have to attempt to settle the claim, and there was no bad faith prior to judgment." 15 Kan. App. 2d at 166.

In this case, we have already found that Seck was not entitled to coverage under the policy. As a result, The Bar Plan should not have been required to settle the claim because there was a good-faith question as to whether Seck was entitled to coverage under its insurance policy. Based on these facts, Becker has failed to establish that The Bar Plan acted in bad faith when it refused to enter settlement negotiations. Thus, this claim fails.

Affirmed.