STATE OF MICHIGAN

COURT OF APPEALS

CONNIE ANN HORNING and KIM HORNING,

Plaintiffs-Appellants,

v

MICHAEL T. REETER and LINDA K. REETER,

Defendants,

and

CITIZENS INSURANCE COMPANY OF AMERICA,

Garnishee-Defendant-Appellee.

UNPUBLISHED
June 4, 1999

No. 210950
Jackson Circuit Court
LC No. 96075073 NI

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of garnishee-defendant Citizens Insurance Company of America. We reverse in part and remand.

On appeal, we review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id*. Before judgment may be granted, the court must be satisfied that it is impossible for the claim or defense asserted to be supported by evidence at trial. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991), after remand 210 Mich App 449; 534 NW2d 160 (1995).

This case arises from an automobile accident involving Connie Ann Horning and Michael Reeter, which occurred on June 15, 1994. Plaintiffs Kim and Connie Ann Horning, husband and wife, filed suit against Michael T. and Linda (Minor) Reeter for damages incurred from the accident, and a consent judgment in their favor was entered on June 2, 1997, in the amount of $108,769.79.

Thereafter, plaintiffs initiated a garnishment proceeding against Citizens Insurance Company of America ("Citizens"), attempting to recover the judgment amount (or the policy limits if less) based on a policy issued to the Reeters by Citizens. Citizens answered plaintiffs' request for garnishment by stating the policy at issue had been canceled for failure to pay the policy premium several days before the accident. While Citizens sent a notice of cancellation to plaintiffs, the notice was sent to the wrong address. Plaintiffs contend that there is a possibility that the policy was erroneously canceled. Without addressing the issue of the policy cancellation, the circuit court denied plaintiffs' motion for summary disposition and granted summary disposition in favor of garnishee-defendant Citizens. The circuit court denied plaintiffs' motion for reconsideration. Pursuant to stipulation, the circuit court ordered that the judgment for plaintiffs be set aside.

Plaintiffs first argue that the circuit court erred when it granted summary disposition in favor of Citizens based on the conclusion that the Reeters did not request Citizens to defend the action because, plaintiffs argue, there is no requirement in the insurance policy or under the law that the plaintiffs or defendants must request the insurer to defend. Although the insurance policy does not expressly state that a formal request to defend must be made, the policy provides that Citizens has no duty to provide coverage under the policy unless it is sent copies, as soon as possible, of any notices or legal papers received in connection with an accident or loss. A provision of the financial responsibility act provides that in every motor vehicle liability policy, "[t]he insurance carrier shall not be liable on any judgment if it has not had prompt notice of and reasonable opportunity to appear in and defend the action in which such judgment was rendered . . . ." MCL 257.520(f)(6); MSA 9.2220(f)(6). Moreover, we have previously stated that "[a]bsent a request, an insurer has no duty to defend an insured." *DAIIE v Higginbotham*, 95 Mich App 213, 218; 290 NW2d 414 (1980). Because neither plaintiffs nor defendants requested Citizens to defend the lawsuit as insurers of defendants, plaintiffs' argument is without merit.

Plaintiffs also argue that if the request to defend requirement refers to the insured's duty to notify the insurer of the accident, then defendants substantially complied with that provision where Linda Reeter provided an affidavit which stated that she did not further process her claim because Citizens told her that the automobile was not covered by insurance. Plaintiffs' argument is inapposite because an insured's notice of claim does not excuse the insured's subsequent failure to timely notify the insurer of a suit arising out of such claim. *Koski v Allstate Ins Co*, 456 Mich 439, 446; 572 NW2d 636 (1998); see also *Aetna Casualty & Surety Co v Dow Chemical Co*, 10 F Supp 2d 800, 811 (ED Mich, 1998).

Next, plaintiffs argue that Citizens had knowledge of the lawsuit before judgment was entered, and thus cannot claim that it did not receive notice of the suit. Plaintiffs contend that receipt of a subpoena for documents in a negligence lawsuit in which two of Citizens alleged insureds were defendants suffices as notice of a lawsuit. Also, plaintiffs contend that the fact that defendants' policy was in question, in addition to the ensuing correspondence between plaintiffs' counsel and Citizens regarding whether the policy was wrongfully canceled, equally suffices as notice.

In order to be liable on a judgment, an insurer must have had prompt notice of and reasonable opportunity to appear in and defend the action. MCL 257.520(f)(6); MSA 9.2220(f)(6). Failure to

notify the insurer of an action bars a plaintiff's recovery from the insurer. *Kleit v Saad*, 153 Mich App 52, 57; 395 NW2d 8 (1985). However, the garnishee-defendant still has the burden of proving it was prejudiced by the insured's failure to notify it of the lawsuit because if the insurer was not prejudiced before it was notified of the action, it received prompt, reasonable notice when notified of the judgment. *Id.*, 58. To be relieved of liability because of lack of notice, a garnishee-defendant insurer must not have received timely notice of the lawsuit and must have been prejudiced by the lack of notice. *LeDuff v Auto Club Ins Ass'n*, 212 Mich App 13, 16; 536 NW2d 812 (1995). However, in *Weller v Cummins*, 330 Mich 286, 293; 47 NW2d 612 (1951), the Michigan Supreme Court stated:

> One of the purposes of the provision requiring notice of accident is to give the insurance company knowledge of the accident so that it can make a timely investigation in order to protect its interests. It is also true that the provisions in the insurance policy requiring the insured to "immediately forward to the company every demand, notice, summons, or other process received by him" is to give the insurance company knowledge and information that an action has been instituted against the insured party. It follows that if the insurance company received adequate and timely information of the accident or the institution of an action for the recovery of damages it is not prejudiced, regardless of the source of its information.

Plaintiffs rely on *Weller* when arguing that notice of suit was sufficient as gleaned from another source of information. It is undisputed that Citizens did not receive the legal documents related to an accident or loss as required by its policy until after judgment was entered. The delay of notice of suit was almost four years. The circuit court found, as a matter of law, that the subpoena and correspondence are insufficient to establish notice of a claim or suit under the automobile insurance policy. We review questions of law de novo, *Westchester Fire Ins Co v Safeco Ins Co*, 203 Mich App 663, 667; 513 NW2d 212 (1994), and deem the notice untimely.

Although Citizens was not provided timely notice, it still must demonstrate actual prejudice from defendants' failure to strictly comply with the notice provisions in the insurance policy. Untimely notice of a lawsuit bars coverage where the insurer demonstrates that the delayed notice of the lawsuit actually prejudiced the insurer. *Koski, supra,* 447; *LeDuff, supra,* 16. Generally, the finding of prejudice is a finding of fact, which we will not set aside unless it is clearly erroneous, *Henderson v Biron*, 138 Mich App 503, 508; 360 NW2d 230 (1984), but where the facts are so clear that only one conclusion is reasonably possible, the question of prejudice is one of law, *West Bay Exploration Co v AIG Specialty Agencies of Texas, Inc*, 915 F2d 1030 (CA 6, 1990), superseded by statute, *Aetna, supra,* 800, citing *Wehner v Foster*, 331 Mich 113, 120; 49 NW2d 87 (1951). The United States District Court for the Eastern District of Michigan explains:

> In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice, courts consider whether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4) [sic] to contest its liability to its insured.

* * *

> An insurer must do more than simply claim that evidence was lost, physically altered, or has otherwise become unavailable and that witnesses have died, disappeared, or their memories have faded. It must establish what is in fact lost by the missing evidence, how this prejudices its position, and why information available from other sources is inadequate [*Aetna, supra*, 813 (citations omitted).]

We determine that the circuit court erred when it found that prejudice can be presumed from the failure to comply with an insurance policy's notice of suit provision. Actual prejudice to the insurer must be found; not presumed. *Koski, supra*, 447; see also *Aetna, supra*, 813.

Other than Citizens' argument that the amount in the consent judgment was more than twice the disputed insurance policy limit of $50,000, the record does not reflect actual prejudice to Citizens. Because the circuit court allowed the consent judgment to be set aside, the problem encountered in *Koski, supra*, 439, with regard to setting aside a default judgment is avoided. The circuit court determined that Citizens did not receive timely notice of suit, thus under *LeDuff, supra*, 13, and *Koski, supra*, 439, Citizens must demonstrate actual prejudice before it is relieved of liability.

Here, the parties and the circuit court proceeded with the notice-of-suit analysis without first determining whether the Reeters' insurance policy with Citizens was in effect at the time of the accident. We find it premature to adjudicate this matter without a determination as to whether the insurance policy was in effect at the time of the accident. We reverse and remand with instructions to the circuit court to conduct a hearing to determine whether the Reeters' insurance policy was properly canceled by Citizens. If so, this matter must be dismissed. If the court determines that the policy remained in effect at the time of the accident, then a hearing must be conducted to determine whether actual prejudice existed under *Koski, supra*, 439.

Reversed and remanded. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood