NOT DESIGNATED FOR PUBLICATION

No. 124,913

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

PATRICIA NICHOLSON, Individually, and on Behalf of the Heirs-at-Law of MARK NICHOLSON, Decedent,
Appellee,

v.

AVA MARIE MERCER,
Defendant,

and

KEY INSURANCE COMPANY,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; DAVID J. KING, judge. Opinion filed April 14, 2023. Affirmed.

James P. Maloney and *Abbigale A. Gentle*, of Foland, Wickens, Roper, Hofer & Crawford, P.C., of Kansas City, Missouri, and *James D. Oliver*, of Foulston Siefkin LLP, of Overland Park for appellant Key Insurance Company.

Dustin L. Van Dyk and *LJ Leatherman*, of Palmer Law Group, LLP, of Topeka, for appellee Patricia Nicholson.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

PER CURIAM: This is the second appeal arising out of a wrongful death action brought by Patricia Nicholson, individually and on behalf of the heirs at law of Mark

Nicholson, against Ava Mercer. This action was commenced by Patricia to recover damages resulting from the death of her late husband, Mark, who died from injuries he suffered after a car driven by Mercer struck a bicycle that he was riding. At the time of the accident, Key Insurance Company provided automobile liability insurance coverage to Mercer in the amount of $25,000. Although the insurance carrier provided Mercer with an attorney to defend her in the wrongful death action, it did not offer its policy limits to settle the case until after the lawsuit was filed.

Prior to trial, Patricia and Mercer entered into a covenant not to execute and assignment of claims. In response, Key Insurance Company moved to intervene as a party in the wrongful death action, but the district court denied its request. Even though the insurance carrier filed a timely appeal, it did not file a motion to stay the proceedings before the district court while the appeal was pending. As a result, the district court went forward with a bench trial at which Patricia presented evidence on the issues of liability and damages.

Mercer did not personally appear at the bench trial. Although her attorney appeared, he did not present any evidence or cross-examine witnesses. After considering the evidence presented by Patricia at trial, the district court found Mercer to be 100% at fault in causing the accident and entered a judgment against her in the amount of $2,829,892. Subsequently, Patricia filed a request for garnishment seeking to recover the full amount of the judgment entered against Mercer from her insurance carrier. She also alleged that Key Insurance Company had acted in bad faith in failing to timely settle the wrongful death action for its policy limits.

While the garnishment action was pending before the district court, a panel of this court dismissed the insurance carrier's appeal from the denial of its motion to intervene. A few months later, the district court held a three-day evidentiary hearing in the garnishment proceeding at which both Patricia and Key Insurance Company participated.

After considering the evidence presented by Patricia and Key Insurance Company, the district court once again ruled in favor of Patricia on the questions of liability and damages. In addition, the district court concluded that Key Insurance Company had acted in bad faith by failing to settle the wrongful death claim for its policy limits. In particular, the district court found that the insurance carrier's investigation of the wrongful death claim was inadequate. Accordingly, the district court entered judgment against Key Insurance Company for the full amount of the judgment plus interest.

In this appeal, Key Insurance Company raises two issues: first, whether the district court erred in failing to have a jury determine the issues of liability and damages; and second, whether the district court's judgment in the garnishment proceeding is void for lack of subject matter jurisdiction. For the reasons set forth by a panel of this court in the first appeal, we conclude the district court did not err by holding a bench trial in the underlying wrongful death action under the circumstances presented. Likewise, we conclude that a party has no right to a jury in a garnishment proceeding. Finally, we conclude that the district court had subject matter jurisdiction to consider the bad faith claim in the garnishment proceeding. Thus, we affirm the district court's decision.

FACTS AND PROCEDURAL HISTORY

On June 18, 2017, a vehicle driven by Ava Mercer collided with a bicycle ridden by Mark Nicholson in Leavenworth. As a result of injuries suffered in the accident, Mark died. At the time of the accident, Mercer held an auto insurance policy with Key Insurance Company in the amount of $25,000. After the parties were unable to reach a settlement, Mark's wife, Patricia Nicholson, filed a wrongful death action against Mercer on behalf of herself and Mark's heirs at law.

The facts of the underlying wrongful death action were summarized by the panel in *Nicholson v. Mercer*, No. 121,620, 2021 WL 2021498 (Kan. App. 2021) (unpublished

opinion) (*Nicholson I*). As such, they will not be repeated here. Instead, we will focus on the events that occurred after a mandate was issued in the earlier appeal. Moreover, we will refer to additional facts as necessary in the Analysis section of this opinion.

At the time of the first appeal in this case, the garnishment proceeding was still pending before the district court. In that proceeding, Patricia attempted to collect the wrongful death judgment entered against Mercer in the amount of $2,829,892 from her insurance carrier. In addition, under the terms of the covenant not to execute and assignment of claims, Patricia asserted a claim of bad faith against Key Insurance Company for failing to settle for the $25,000 liability policy limit prior to the filing of the wrongful death action. In its defense, the insurance carrier asserted that the judgment was not binding on it and that it had a right to defend on liability as well as the amount of damages. Additionally, the insurance carrier requested that these issues be presented to a jury for decision.

After the parties completed discovery, the district court conducted a three-day evidentiary hearing in the garnishment proceeding beginning on August 2, 2021. It is unclear from the record on appeal whether Key Insurance Company's request for a jury trial in the garnishment action was expressly ruled upon by the district court. Nevertheless, it is undisputed that the issues presented in the garnishment proceeding were presented to the court.

At the beginning of the evidentiary hearing, the district court reiterated its reasoning for denying Key Insurance Company's motion to intervene in the wrongful death action. In doing so, the district court found that the parties had agreed that the insurance carrier would be entitled to defend both liability and damages in the garnishment proceeding. This is consistent with the opinion issued by this court in the first appeal in which the panel found that "the appropriate remedy" at that point—since the wrongful death bench trial had already been conducted—would be for Key Insurance

Company "to pursue its defenses in the garnishment proceedings currently pending before the district court."

During the garnishment hearing, Patricia introduced 73 exhibits into evidence. In addition, Patricia called 14 witnesses who testified about liability and damages. These witnesses included seven experts. Three of these experts—Jack Nevins, a consultant with specialized training in mobile device forensics who opined on the data from the GPS device on Mark's bicycle, Timothy Krehbiel, an accident reconstructionist, and Kevin Haney, an accident reconstructionist previously retained by Key Insurance Company in the underlying wrongful death action— each rendered the opinion that Mercer's vehicle struck Mark's bicycle from behind. Patricia also called William Gary Baker, Ph.D.—an economist—as an expert witness to opine on the damages suffered by the Nicholson family. Baker testified that the Nicholson family incurred an economic loss as a result of Mark's death due to lost income, fringe benefits, and household services.

In support of her claim of bad faith against the insurance carrier, Patricia called Robert Larson—an adjustor for Key Insurance Company—who testified about the handling of her claim against Mercer. Patricia also called Chantal Roberts—who is a claims handling standards practices and procedures consultant—as an expert witness to render her opinion regarding the handling of the claim by the insurance carrier. Roberts opined that Key Insurance Company failed to conform to industry standards by failing to adequately investigate the accident, failing to contact the Nicholson family in a timely manner, and failing to tender its policy limits prior to the filing of the wrongful death action.

In its defense, Key Insurance Company introduced 115 exhibits into evidence. On the issue of liability, the insurance carrier called Mercer, who testified that she did not see Mark's bicycle until the moment of impact. It also called three eyewitnesses to the accident who testified that Mark turned in front of Mercer's vehicle, that the center of

Mercer's vehicle hit the rear of Mark's bicycle, and that Mercer told one of the eyewitnesses that she did not see Mark prior to the collision. The insurance carrier did not call any expert witnesses to rebut the opinions rendered by Patricia's experts nor did it call any witnesses to dispute her claim for damages.

Regarding the bad faith claim, Key Insurance Company recalled Larson to testify about the handling of the wrongful death claim. In addition, the insurance carrier called the manager of its claims' department, Leonard Gragson, to further testify regarding the company's handling of the claim. It also called James W. Fletcher, Jr.—the attorney retained by Key Insurance Company to defend the wrongful death action—to testify about his representation of Mercer as well as his decision not to put on a defense at the bench trial.

During closing argument, the attorney representing Key Insurance Company asserted that his client's right to a jury trial had been effectively taken away when the parties entered into the covenant not to execute and assignment of claims. However, the district court found that the insurance carrier had been provided with the opportunity to present its defenses—including defenses as to both liability and damages—before an impartial factfinder in the garnishment proceeding. Regarding this issue, the transcript of the hearing contains the following colloquy between the district court and counsel for Key Insurance Company:

> "THE COURT: Did you present any evidence to controvert Plaintiffs' claim damages?
>
> "MR. MALONEY: The amount of the damages that they—that were suffered as a result of the wrongful death of Mr. Nicholson?
>
> "THE COURT: Correct.
>
> "MR. MALONEY: No. And I did not intend to.

"THE COURT: You had the full opportunity to do that in this case.

"MR. MALONEY: Correct.

"THE COURT: You chose not to do that?

"MR. MALONEY: Chose not to do that.

"THE COURT: You wanted to do that by intervening in the case?

"MR. MALONEY: That—that related far more to liability, Your Honor, than to damages.

"THE COURT: Well, you had the full opportunity to present your case of liability in this case as well—

"MR. MALONEY: We—

"THE COURT: —of questionable liability and—and you've relied on the eyewitnesses and that's it pretty much it, isn't it?

"MR. MALONEY: That's . . . that's the defense case. That's the defense case for the wrongful death."

After taking the matter under advisement, the district court entered a comprehensive 61-page memorandum opinion in the garnishment proceeding on October 7, 2021. At the outset, the district court reviewed the applicable law. Then, it turned to the evidence presented by the parties during the evidentiary hearing. Ultimately, the district court stood by its previous decision during the bench trial that Mercer was 100% at fault in causing the accident and found that the insurance carrier had failed to dispute the amount of damages.

Furthermore, the district court determined that Key Insurance Company had acted in bad faith in the way in which it handled the wrongful death claim and in failing to offer to settle with Patricia for the $25,000 policy limits prior to the filing of the lawsuit. In reaching this conclusion, the district court found that the evidence presented during the garnishment hearing showed that "88 days after the occurrence, Key's investigation was so inadequate that it: (1) had not been to the scene of the occurrence, (2) was unaware that there was a 'turn lane', and (3) that it had done nothing to investigate physical evidence of the occurrence."

On October 22, 2021, the district court entered a judgment against Key Insurance Company in the amount of $2,829,892. Additionally, the district court ordered the insurance carrier to pay both prejudgment and postjudgment interest. Thereafter, Key Insurance Company timely filed this appeal.

ANALYSIS

Impact of the First Appeal

At the outset, we will address the dispute of the parties regarding the impact of the first appeal brought by Key Insurance Company in this case. See *Nicholson I*, 2021 WL 2021498. The prior appeal was brought by Key following the district court's denial of its motion to intervene as a matter of right under K.S.A. 2018 Supp. 60-224(a)(2). It is undisputed that the insurance carrier attempted to intervene in the underlying wrongful death proceeding after Patricia and Mercer entered into a covenant not to execute and assignment of claims.

As the panel found in the first appeal, "Key—for whatever reason—did not request a stay on appeal or request that this court 'preserve the status quo' under K.S.A. 2020 Supp. 60-262 or K.S.A. 2020 Supp. 60-2103. As a result, the underlying proceeding

was not stayed. [Citation omitted.]" *Nicholson I*, 2021 WL 2021498, at *3. The panel further found, that "[b]ecause the underlying proceedings were not stayed, the district court had the authority to proceed to a bench trial on the claims asserted by Patricia against Mercer." *Nicholson I*, 2021 WL 2021498, at *3. In other words, by failing to request a stay until after this court ruled on the issue of intervention as a matter of right, Key Insurance Company lost its right to directly challenge the verdict rendered by the district court following the bench trial. Consequently, the panel dismissed the first appeal and no petition for review was filed.

Nevertheless, the panel in the first appeal recognized that Key Insurance Company could still "pursue its defenses in the garnishment proceedings currently pending before the district court." 2021 WL 2021498, at *3. In reaching this conclusion, the panel noted that in the post-trial garnishment proceeding "Key would be allowed to present all of the defenses that it could have asserted in the trial of the wrongful death action—including defenses as to both liability and damages." 2021 WL 2021498, at *3. Significantly, the panel did not suggest that the insurance carrier would have the right to a jury trial to determine these issues in the garnishment proceedings.

Kansas courts have long applied the law of the case doctrine. See *State v. Collier*, 263 Kan. 629, 631, 952 P.2d 1326 (1998). In *Waddell v. Woods*, 160 Kan. 481, Syl. ¶ 3, 163 P.2d 348 (1945), the Kansas Supreme Court held that where there are multiple appeals in the same case, the first decision is the settled law in that case on all questions resolved in the prior appeal or appeals. See also *Bartlett v. Davis Corp.*, 219 Kan. 148, 153, 547 P.2d 800 (1976). The law of the case doctrine serves the interests of finality, consistency, and judicial economy in that it generally prohibits—absent extraordinary circumstances—the reconsideration of issues previously decided on appeal.

As indicated above, the panel dismissed the prior appeal because Key Insurance Company did not request a stay or preservation of the status quo after the district court

denied its motion to intervene as a matter of right. As a result of Key's decision not to seek a stay of the underlying proceedings while the appeal was pending, the district court proceeded to trial, heard the evidence, and rendered its verdict. *Nicholson I*, 2021 WL 2021498, at *3. Moreover, the panel expressly found that "[e]ven if we assume that the district court erred in denying the motion to intervene, the appropriate remedy for Key under these circumstances is to pursue its defenses in the garnishment proceedings currently pending before the district court." *Nicholson I*, 2021 WL 2021498, at *3.

Under these circumstances, we conclude that the law of the case doctrine is applicable to those matters previously decided in the first appeal. In particular, we decline Key's invitation for us to second-guess the previous panel's opinion or to revisit the events that occurred prior to the dismissal of the first appeal. Instead, in this opinion, we will focus on the issues that arise out of the garnishment proceeding. These issues are whether Key Insurance Company had the right to have a jury decide the issues of liability and damages at the garnishment proceeding and whether the district court's garnishment judgment is void for lack of subject matter jurisdiction.

Right to Jury in Garnishment Action

The Kansas Supreme Court has held that garnishment actions are an appropriate procedure for district courts to determine bad-faith claims asserted against automobile liability insurance carriers. *Gilley v. Farmer*, 207 Kan. 536, 544, 485 P.2d 1284 (1971) ("Under the circumstances appearing in this case, we hold that garnishment was a proper procedure for determining the garnishee's indebtedness."). Subsequently, in *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (1990), our Supreme Court held "that an insured's breach of contract claim for bad faith or negligent refusal to settle may be assigned." 247 Kan. at 314. In addition, the *Glenn* court determined that assignments of bad faith claims against insurance carriers and covenants not to sue or execute against an insured "may be

utilized if the judgment is reasonable in amount and entered into in good faith." 247 Kan. at 318.

Relying on a burden of proof analysis borrowed from the New Jersey Supreme Court in *Griggs v. Bertram*, 88 N.J. 347, 367, 443 A.2d 163 (1982), the *Glenn* court explained:

> "The initial burden of going forward with proofs of these elements rests upon the insured and the ultimate burden of persuasion as to these elements is the responsibility of the insurer. This rule reasonably accommodates and compromises the competing interests of the parties and considerations of public policy." *Glenn*, 247 Kan. at 318 (quoting *Griggs*, 88 N.J. at 368).

The *Glenn* court added that "[t]he personal injury plaintiff or assignee will carry the burden of proof in proving to the trier of fact that the insurer exercised bad faith in refusing to settle within the policy limits." *Glenn*, 247 Kan. at 319.

Over the years, numerous Kansas courts have followed *Glenn* in holding garnishment proceedings to determine bad faith claims against insurance carriers. See *Associated Wholesale Grocer, Inc. v. Americold Corp.*, 261 Kan. 806, 835, 934 P.2d 65 (1997); *Hawkins v. Dennis*, 25 Kan. 329, 344-45, 905 P.2d 678 (1995); *Gruber v. Estate of Marshall*, 59 Kan. App. 2d 297, 303, 482 P.3d 612 (2021); *Ortiz v. Biscanin*, 34 Kan. App. 2d 445, 459, 122 P.3d 365 (2004); *Sours v. Russell*, 25 Kan. App. 2d 620, 629, 967 P.2d 348 (1998); *Snodgrass v. State Farm Mut. Auto. Ins.* Co., 15 Kan. App. 2d 153, 167, 804 P.2d 1012 (1991); *Phillips v. Phillips*, No. 105,349, 2013 WL 1444259, at *7 (Kan. App. 2013) (unpublished opinion).

By the time Key Insurance Company had filed its first appeal in this case, Patricia had already initiated a garnishment proceeding in which it was claimed that the insurance carrier was liable for the entire of amount of the damages found by the district court

following the bench trial held on July 22, 2019. In the garnishment proceeding, Patricia also alleged that Key Insurance Company had acted in bad faith by failing to settle the wrongful death claim for its $25,000 policy limits prior to commencement of this lawsuit. In response, Key Insurance Company denied the allegations against it and asserted—among other things—that it was "entitled to . . . a jury trial on the issue of Mercer's liability and the plaintiff's damages."

In this appeal, Key Insurance Company argues that the district court erred by following the procedure set out in *Glenn* and—as a result—it was deprived of its right to present its defenses to a jury. However, it is well-settled in Kansas that a party is not entitled to a jury as a matter of right in a garnishment proceeding. See *Bollinger v. Nuss*, 202 Kan. 326, 342, 449 P.2d 502 (1969). In *Bollinger*, our Supreme Court held that a garnishment proceeding "is regarded as a special and extraordinary remedy provided by statute . . . [and] a jury trial may not be demanded as a matter of right." 202 Kan. at 342. Moreover, if a party is not entitled to a jury trial as a matter of right, a district court has the authority to resolve both questions of law and fact. See *Vanier v. Ponsoldt*, 251 Kan. 88, 105, 833 P.2d 949 (1992); see also *Sutherland v. Sutherland*, 187 Kan. 599, 602-03, 358 P.2d 776 (1961) ("The appellant not being entitled to a jury trial as a matter of right, the trial court was well within its power and discretion when it ruled the issues of fact would be determined by the court.").

Consequently, under Kansas law, Key Insurance Company was not entitled to a jury trial in the garnishment proceeding. Instead, it was simply entitled to have the questions of fact and issues of law decided by a fair and impartial tribunal. *Bollinger*, 202 Kan. at 342. Here, there has been no suggestion that the Honorable David J. King was prejudiced or biased. Furthermore, as revealed by a review of his rulings from the bench, as well as his 61-page memorandum decision entered following the garnishment proceeding, Judge King took his responsibilities as the trier of fact seriously and thoughtfully considered the evidence presented by Key Insurance Company in support of

its defense. Accordingly, we conclude that Key Insurance Company had no right to a jury trial in the garnishment proceeding and that it has not shown that it was prejudiced by the district court serving as the finder of fact under these circumstances.

Subject Matter Jurisdiction

Key Insurance Company also contends—for the first time on appeal—that the district court did not have subject matter jurisdiction to enter a judgment against it in the garnishment proceeding. "'Subject matter jurisdiction is the power of the court to hear and decide a particular type of action.' [Citation omitted.]" *In re Estate of Lentz*, 312 Kan. 490, 496, 476 P.3d 1151 (2020). Because questions of subject matter jurisdiction concern the power of the court to hear a case at all, it may be challenged at any time including—as here—for the first time on appeal. See *In re Care & Treatment of Emerson*, 306 Kan. 30, 33-4, 392 P.3d 82 (2017).

In considering whether subject matter jurisdiction exists, it is important to start from the premise that Kansas district courts are courts of general jurisdiction. *State v. Matzke*, 236 Kan. 833, 835, 696 P.2d 396 (1985). Whether subject matter jurisdiction exists is a question of law over which we have unlimited review. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). To the extent that Key's argument requires us to interpret statutes, it also presents a question of law over which we have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Key Insurance Company argues that because its insured—Mercer—assigned her claims against it to Patricia in the covenant not to execute and assignment of claims, the assigned claims must be brought in a separate action. In support of its position, Key Insurance Company points us to *Ray v. Caudill*, 266 Kan. 921, 974 P.2d 560 (1999). But we find *Caudill* to be distinguishable from the present case. Significantly, it did not

involve automobile liability insurance. Instead, it involved an attempt by a judgment creditor to use a garnishment proceeding to collect underinsured motorist coverage. *Caudill*, 266 Kan. at 923.

As our Supreme Court explained in *Caudill*, unlike automobile liability insurance that protects a driver against claims from third parties, "uninsured and underinsured motorist coverage is first-party coverage owed by the insurer to its insured." 266 Kan. at 924. As a result, the underinsured motorist carrier owed nothing to the defendant and a third-party garnishment proceeding is not appropriate under those circumstances. 266 Kan. at 924-25. Instead, a separate action is necessary to collect against one's own underinsured motorist carrier because the claimant's underinsured motorist carrier is not the defendant's insurer.

In contrast, the Kansas Supreme Court has long recognized the validity of enforcing covenants not to execute and assignments of bad faith claims in garnishment proceedings brought against a defendant's liability insurance carrier. See *Glenn*, 247 Kan. at 318-19; see also *Americold*, 261 Kan. at 835. Of course, as an intermediate appellate court, we are to follow the precedent established by the Kansas Supreme Court unless there is an indication that it is departing from its previously stated position. *State v.* Rodriguez, 305 Kan. 1139, 1144, 390 P.3d 903 (2017); see also *Tillman v. Goodpasture*, 56 Kan. App. 2d 65, 77, 424 P.3d 540 (2018), *aff'd* 313 Kan. 278, 485 P.3d 656 (2021). In light of the fact that both our Supreme Court and this court have repeatedly cited *Glenn* and *Americold* with approval, we have no reason to believe that these cases do not represent the current status of the law in Kansas. See *Gruber*, 59 Kan. App. 2d at 303, 319; *Phillips*, 2013 WL 1444259, at *7, 8.

In conclusion, we find that the district court had subject matter jurisdiction in the garnishment proceeding to enter judgment against Key Insurance Company under *Glenn v. Fleming* and its progeny. We also find that the parties did not have a right to have a

jury resolve the issues presented in the garnishment proceeding. We, therefore, affirm the judgment of the district court.

Affirmed.