Reverse and Render and Opinion Filed May 4, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01125-CV

UNITED AUTOMOBILE INSURANCE SERVICES AND OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY, Appellants
V.
ALVIN GLENN RHYMES, Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-07623

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

Appellee Alvin Glenn Rhymes sued appellants United Automobile Insurance Services (UAIS) and Old American County Mutual Fire Insurance Company. Rhymes claimed that (i) he was injured in an auto accident with Maria S. Hernandez, (ii) Maria was insured under an Old American auto insurance policy, (iii) he obtained a default judgment against her for about $54,000, and (iv) he was entitled to recover on the Old American insurance policy.[1] The parties filed cross-motions for summary judgment, and the trial court granted summary judgment for Rhymes.

[1] Rhymes asserted his claims against both UAIS and Old American even though he acknowledged that UAIS is "a managing general agent" and "an authorized claim representative" for Old American.

The evidence established that Maria never gave notice of suit to or requested a defense from UAIS or Old American. The pivotal question in this case is whether that fact conclusively defeats Rhymes' claims. Because it does, we reverse and render judgment that Rhymes take nothing.

I. BACKGROUND

A. Facts

We draw these facts from the summary judgment evidence:

Old American writes personal auto insurance in Texas through managing general agents like UAIS. UAIS handles any claims arising under Old American policies it issues.

Francisco Hernandez bought an Old American personal auto insurance policy through UAIS. The policy went into effect in May 2011 and listed Maria Hernandez as an authorized driver. The bodily injury policy limit was "30,012/person."

In June 2012, Rhymes sued Maria S. Hernandez[2] in a Texas district court, alleging that he was injured in a June 2011 auto accident that she negligently caused. Maria was served with process but did not answer. In November 2012, the court signed a default judgment awarding Rhymes $53,073 in damages and $737.95 in court costs against Maria. Rhymes sent a copy of the default judgment to UAIS over six months later.

Meanwhile, Rhymes' attorney was also communicating with UAIS about the accident and attempting to settle his personal injury claim against Maria. UAIS made several unsuccessful attempts to contact Francisco and Maria about the matter before the default judgment was signed. Maria and Francisco never contacted UAIS or Old American, never sent suit papers to them, and never asked them to defend Maria.

[2] We note the middle initial because there was evidence that Maria S. Hernandez had a sister named Maria M. Hernandez. Unlike Maria S. Hernandez, Maria M. Hernandez did communicate with UAIS on two occasions. No one claims that the Maria S. Hernandez that Rhymes sued was not insured by the Old American policy at issue. Accordingly, we omit the middle initial in the remainder of this opinion.

B. Procedural History

Rhymes sued appellants. His live pleading asserted two claims: One was a contract claim based on Rhymes' status as a third-party beneficiary of the Old American policy. The other was styled a "*Stowers/Negligence*" claim based on appellants' "negligent failure to settle" Rhymes' personal injury claim against Maria within policy limits.

Rhymes filed a motion for partial summary judgment "on the issue of coverage," and Appellants filed a summary judgment motion seeking a final take-nothing judgment.

Each side responded to the other's motion. Rhymes' response included evidence that he had obtained a turnover order in the underlying suit against Maria. The order required Maria to turn over to Rhymes all rights, title, and interest in the insurance policy.

After a hearing, the trial judge signed two orders. One denied appellants' motion. The other order (i) recited that the insurance policy covered Rhymes' damages and (ii) awarded Rhymes $30,012 against "Defendant."[3] Although the second order did not mention Rhymes' "*Stowers/Negligence*" claim, it implicitly denied that claim by including language sufficient to make it a final judgment.

Appellants timely appealed.

II. ISSUES PRESENTED

Appellants raise two issues. Their first issue argues that the trial court erred by granting summary judgment for Rhymes instead of for appellants because the evidence established that (i) Maria never gave appellants notice that she had been sued and (ii) the default judgment prejudiced appellants. Their second issue argues that the trial court erred by granting summary judgment against appellant UAIS because UAIS is not the insurer on the insurance policy in question.

[3] No one complains that the judgment doesn't specify which defendant is liable for the $30,012. Since we are reversing and rendering judgment against Rhymes, any error is a nonissue.

We agree with appellants' first issue and thus need not address the second.

III. STANDARD OF REVIEW

We review a summary judgment de novo. *Durham v. Children's Med. Ctr. of Dallas*, 488 S.W.3d 485, 489 (Tex. App.—Dallas 2016, pet. denied).

When both sides move for summary judgment, each bears the burden of establishing that it is entitled to judgment as a matter of law. If the trial court grants one motion and denies the other, a non-prevailing party may appeal both the granting of the prevailing party's motion and the denial of its own motion.[4] We review the summary-judgment evidence presented by both parties and determine all questions presented. We may affirm the trial court's summary judgment, reverse and render judgment for the other side if appropriate, or reverse and remand if neither side met its summary judgment burden. *Dallas Cent. Appraisal Dist. v. Mission Aire IV, L.P.*, 279 S.W.3d 471, 473–74 (Tex. App.—Dallas 2009, pet. denied).

IV. ANALYSIS

A. Issue One: Did the insured's failure to give appellants notice of suit, plus the default judgment against her, entitle appellants to summary judgment?

Appellants' first issue argues that Maria's complete failure to give appellants notice of Rhymes' suit, coupled with the default judgment against her, defeats Rhymes' claim under the policy. For the reasons that follow, we conclude that it does.

B. Applicable Law and Policy Provisions

Generally, an injured person cannot sue the tortfeasor's liability insurer directly until the tortfeasor's liability has been determined by agreement or judgment. *See Ohio Cas. Ins. Co. v. Time Warner Entm't Co., L.P.*, 244 S.W.3d 885, 888 (Tex. App.—Dallas 2008, pet. denied). After

[4] If the trial court grants a motion for final summary judgment and denies a cross-motion for partial summary judgment, and the appellate court concludes that the summary judgment grant was erroneous, it can be inappropriate for the appellate court to consider and render judgment on the motion for partial summary judgment. *See CU Lloyd's of Tex. v. Feldman*, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam). But here the trial court granted the partial summary judgment motion and rendered final judgment, so we cannot avoid reviewing Rhymes' motion. Moreover, the appellate court can address the motion for partial summary judgment if it addresses the same issues as the opposing party's summary judgment motion. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Here, both sides' motions addressed the coverage issue.

judgment, the injured person can sue the insurer as a third-party beneficiary of the insurance policy. *See Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924, 929 (Tex. App.—Dallas 2011, no pet.). As a third-party beneficiary, Rhymes therefore "steps into the shoes" of Maria and is bound by the policy's conditions precedent. *See id*.

Rhymes also obtained Maria's rights in the policy through a turnover order, but he does not contend that this order increased his rights under the policy. Indeed, in his summary judgment response, he argued only that the turnover order gave him "the rights, duties, and obligations of the insured" under the policy. Thus, even under the turnover order Rhymes stands in Maria's shoes with respect to the insurance policy. *Cf. John H. Carney & Assocs. v. Tex. Prop. & Cas. Ins. Guar. Ass'n*, 354 S.W.3d 843, 850 (Tex. App.—Austin 2011, pet. denied) ("An assignee 'stands in the shoes' of the assignor but acquires no greater right than the assignee possessed.").

We next review Maria's duties under the policy. The policy contains these notice requirements within "PART E – DUTIES AFTER AN ACCIDENT OR LOSS":

> **A.** We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses. If we show that your failure to provide notice prejudices our defense, there is no liability coverage under the policy.
>
> **B.** A person seeking any coverage must:
>
> > **1.** Cooperate with us in the investigation, settlement or defense of any claim or suit.
> >
> > **2.** Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

Thus, paragraph B.2 obligated Maria to promptly send Old American the notices and legal papers she received in connection with Rhymes' suit against her.

The Texas Supreme Court addressed the legal effect of an insured's failure to give its insurer notice as required by the policy in *Harwell v. State Farm Mutual Automobile Insurance Co.*, 896 S.W.2d 170 (Tex. 1995). In that case, the court considered notice provisions virtually

identical to those involved here and held that: (i) "[c]ompliance with the notice of suit provision is a 'condition precedent to the insurer's liability on the policy,'" *id*. at 173–74 (quoting *Weaver v. Hartford Acc. & Indem. Co.*, 570 S.W.2d 367, 369 (Tex. 1978)), but (ii) "[t]he insured's failure to notify the insurer of a suit against her does not relieve the insurer from liability for the underlying judgment unless the lack of notice prejudices the insurer," *id*. at 174. Furthermore, "[t]he failure to notify an insurer of a default judgment against its insured until after the judgment has become final and nonappealable prejudices the insurer as a matter of law." *Id*. On *Harwell*'s facts, the insurer was entitled to summary judgment because its insured failed to give notice of suit pre-judgment and the insurer was thus prejudiced as a matter of law. *Id*. at 175–76.

More recently, the supreme court again considered similar facts in *National Union Fire Insurance Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008). In that case, National Union's insured, Morris, never gave National Union notice of Crocker's personal injury suit against Morris. National Union knew about the lawsuit, however, and defended Morris's employer in the suit. After Crocker obtained a $1,000,000 default judgment against Morris, Crocker and National Union litigated National Union's liability on the policy in federal court. On certified questions from the Fifth Circuit, the Texas Supreme Court held, "National Union was obviously prejudiced in the sense that it was exposed to a $1 million judgment." *Id*. at 609. The court also connected (i) the insured's duty to give notice of suit to the insurer's duty to defend and (ii) the insurer's duty to defend to its duty to indemnify. *See id*. at 608, 609. The supreme court held that Morris's failure to give notice of suit meant National Union's duties to defend and indemnify were never triggered:

> Mere awareness of a claim or suit does not impose a duty on the insurer to defend under the policy; there is no unilateral duty to act unless and until the additional insured first *requests* a defense—a threshold duty that the insured fulfills under the policy by notifying the insurer that the insured has been served with process and the insurer is expected to answer on its behalf. . . .
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> . . . .

> . . . National Union had no duty to notify Morris of coverage and no duty to defend Morris until Morris notified National Union that he had been served with process and expected National Union to answer on his behalf. . . . Absent a threshold duty to defend, there can be no liability to Morris, or to Crocker derivatively.

Id. at 608–09 (emphasis in original).

C. Application of the Law to the Facts

Appellants do not dispute that the policy would have covered Maria for this accident had she complied with the policy's notice requirements. The question is whether her failure to do so combined with the default judgment negates appellants' duty to indemnify and thus defeats Rhymes' claim.

At least three of our sister courts have considered facts like those in this case, and each has concluded that *Weaver*, *Harwell*, and *Crocker* mandate summary judgment for the insurer. *See Egly v. Farmers Ins. Exch.*, No. 03-17-00467-CV, 2018 WL 895043 (Tex. App.—Austin Feb. 15, 2018, pet. filed) (mem. op.); *Hoel v. Old Am. Cty. Mut. Fire Ins. Co.*, No. 01-16-00610-CV, 2017 WL 3911020 (Tex. App.—Houston [1st Dist.] Sept. 7, 2017, pet. denied) (mem. op.); *Jenkins v. State & Cty. Mut. Fire Ins. Co.*, 287 S.W.3d 891 (Tex. App.—Fort Worth 2009, pet. denied); *see also Hudson v. City of Houston*, 392 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (similar case involving ordinances rather than a private insurance policy).

We agree with the foregoing cases and discuss *Hoel* due to its similarity. Salinas was insured under an auto policy with the same notice provisions as in this case. Hoel was injured in an auto accident with Salinas and sued him. Hoel's attorney communicated with Salinas's insurer about the claim before and during the lawsuit, but Salinas himself never contacted the claims adjuster, forwarded the suit papers, or requested a defense. Hoel eventually took a default judgment against Salinas and sued the insurer and the claims handler. The insurer and claims

handler won summary judgment, and the Houston First Court of Appeals affirmed. 2017 WL 3911020, at *1–2.

The appellate court first recited the rule that an insurer owes no duty to defend or indemnify if (i) the insured does not forward suit papers and request a defense in compliance with the policy and (ii) the insured's failure prejudices the insurer. *Id*. at *3. The court then discussed whether the insurer's actual knowledge of Hoel's suit negated the prejudice element. The court held that it did not because an insurer has no duty to defend or indemnify if the insured does not give notice of suit or request a defense. *Id*. at *4 (discussing *Crocker* and *Hudson*). Finally, the court held that the default judgment against Salinas conclusively established prejudice because it deprived the insurer of the ability to answer and defend Hoel's claims without first meeting a new burden of proof on new issues to set the default judgment aside. *Id*.; *accord Hudson*, 392 S.W.3d at 729; *see also Egly*, 2018 WL 895043, at *3; *Jenkins*, 287 S.W.3d at 899.

Here, appellants conclusively proved that Maria did not give them notice of suit or request a defense. They also conclusively proved that Rhymes took a default judgment against Maria. We agree with *Hoel* and the other cases cited above and hold that these facts entitled appellants to summary judgment.[5]

D. Rhymes' Counterarguments

Rhymes argues principally that appellants failed to prove prejudice. He cites several cases in support, but they are all distinguishable. For example, he relies on *PAJ, Inc. v. Hanover Insurance Co.*, 243 S.W.3d 630 (Tex. 2008). In that case, the insured under a comprehensive general liability policy sued its insurer for declarations that the insured was entitled to a defense and indemnity in a copyright suit. Unlike in this case, the insured gave the insurer notice of the

[5] Appellants also argue that *Crocker* stands for the premise that the insured's failure to give the insurer any notice of suit absolves the insurer of the need to prove prejudice. Because we agree with our sister courts that a default judgment shows prejudice as a matter of law, we need not address this argument. Likewise, we do not address what would happen had Maria given notice of the suit without requesting a defense as that question not before us.

suit, and the parties stipulated that (i) the insured did not give notice of suit as soon as practicable, as the policy required, and (ii) the insurer was not prejudiced. Consistent with *Harwell*, the supreme court held that the insured's failure to timely notify the insurer of a claim or suit does not defeat coverage if the delay did not prejudice the insurer. *Id*. at 636–37. Because the insurer stipulated it was not prejudiced, the court rendered judgment that the insurer could not deny coverage based on late notice. *Id*. at 637. *PAJ* is distinguishable because (i) *PAJ* involved late notice while this case involves a complete lack of notice and (ii) the parties in that case stipulated that there was no resulting prejudice.

Rhymes next relies on *Prodigy Communications Corp. v. Agricultural Excess & Surplus Insurance Co.*, 288 S.W.3d 374 (Tex. 2009). There, the supreme court addressed a claims-made policy's provision requiring the insured to give the insurer notice of a claim "as soon as practicable." The supreme court held that the insurer had to show prejudice from late notice to avoid coverage based on this provision. *Id*. at 382–83. Because the insurer in *Prodigy* admitted it was not prejudiced, it could not avoid liability based on late notice. *Id*. at 382. Here, by contrast, appellants proved prejudice in the form of Rhymes' default judgment.

Finally, Rhymes cites *Lennar Corp. v. Markel American Insurance Co.*, 413 S.W.3d 750 (Tex. 2013). In that case, Lennar settled some claims without its insurer Markel's consent, despite a consent-to-settle provision in the insurance policy. *Id*. at 753. Markel conceded that Lennar's breach did not excuse Markel from liability under the policy unless Markel was prejudiced. *Id*. at 754. The supreme court upheld the jury's failure to find that Markel was prejudiced. *Id*. at 755–57. In this case, by contrast, appellants conclusively proved prejudice in the form of Rhymes' default judgment. *See, e.g.*, *Hoel*, 2017 WL 3911020, at *4–5.

Rhymes also argues that the notice of suit provision was actually satisfied here because his attorney sent appellants copies of the petition in the underlying suit and confirmation of service on Maria. Appellants reply that this fact is irrelevant. We agree with appellants.

Crocker makes clear that the insurer's duties are triggered when the *insured* gives notice and requests a defense. 246 S.W.3d at 608, 609. Notice given by a third party does not trigger the insurer's duty to defend and does not estop the insurer from asserting the insured's breach as a bar to liability. *See id*. at 608 ("Mere awareness of a claim or suit does not impose a duty on the insurer to defend under the policy . . . ."); *see also id*. (insurer does not have to "gratuitously subject[] itself to liability" before insured gives notice of suit); *Hoel*, 2017 WL 3911020, at *1, 3–5 (insured did not give notice of suit, even though injured party gave insurer several notices about suit).

Rhymes also argues that appellants were not prejudiced because their claim file relating to the accident showed that appellants viewed coverage as "clear" and liability as "accepted." Appellants reply that Rhymes is wrong because under *Crocker* Maria did not satisfy the policy's conditions precedent so as to trigger any duty to defend, and the default judgment establishes prejudice as a matter of law. Again we agree with appellants. The default judgment not only deprived appellants of the opportunity to litigate the claim's merits but also imposed "a new burden of proof on new issues" in order to set the default judgment aside. *Hoel*, 2017 WL 3911020, at *5. We conclude the claim file documents did not raise a genuine fact issue as to prejudice.

Finally, Rhymes argues that Old American failed to plead prejudice. But Rhymes did not raise a pleadings argument in his summary judgment response; rather, he argued the prejudice issue on the merits. Accordingly, Rhymes did not preserve his complaint about appellants' pleadings. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991) (issues can be tried by consent on summary judgment).

E. Conclusion

For the foregoing reasons, we hold that appellants conclusively proved that the insured failed to give them any notice of Rhymes' suit and that they were prejudiced thereby. The trial court erred by granting summary judgment for Rhymes and by denying appellants' summary judgment motion. Accordingly, we sustain appellants' first issue. We need not address their second issue because it presents only an additional basis for rendering judgment in favor of UAIS. And because Rhymes did not appeal the trial court's implicit denial of his "*Stowers/Negligence*" claim, we do not address it either. *See Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007) (per curiam).

V. DISPOSITION

We reverse the trial court's judgment and render judgment that Rhymes take nothing from appellants.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

UNITED AUTOMOBILE INSURANCE SERVICES AND OLD AMERICAN COUNTY MUTUAL FIRE INSURANCE COMPANY, Appellants

No. 05-16-01125-CV V.

ALVIN GLENN RHYMES, Appellee

On Appeal from the 95th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-07623.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that appellee Alvin Glenn Rhymes take nothing on his claims against appellants United Automobile Insurance Services and Old American County Mutual Fire Insurance Company.

It is **ORDERED** that appellants United Automobile Insurance Services and Old American County Mutual Fire Insurance Company recover their costs of this appeal from appellee Alvin Glenn Rhymes.

The District Clerk of Dallas County is directed to release the full amount of appellants' joint deposit in lieu of supersedeas bond to appellants United Automobile Insurance Services and Old American County Mutual Fire Insurance Company.

Judgment entered May 4, 2018.