Affirmed and Memorandum Opinion filed August 4, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00197-CV

KRYSTLE D. LEWIS, INDIVIDUALLY AND AS NEXT FRIEND OF ELISEO LEWIS AND CHRISHELLE WORTHAM, Appellant

V.

ACCC INSURANCE COMPANY, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2018-21544

M E M O R A N D U M O P I N I O N

After obtaining default judgment against another driver for bodily injuries she and her children sustained in an auto accident, Krystle Lewis sued the other driver's insurer to collect the judgment. The trial court granted summary judgment in favor of the insurer on the ground that the insurer was prejudiced as a matter of law by the insured's failure to notify the insurer of the lawsuit and request a defense. On appeal, Lewis maintains that the insurer was not prejudiced as a matter of law because she,

as a third-party beneficiary of the policy, gave the insurer actual notice of the lawsuit, of the pending motion for default judgment, and of the hearing on unliquidated damages. Under *National Union Fire Insurance Company v. Crocker*,[1] however, an insurer is prejudiced when the insured fails to request a defense and allows a default judgment to be taken—even if the insurer has actual knowledge of the suit from another source. Thus, we affirm the trial court's judgment.

I. BACKGROUND

While driving on a Houston highway, ACCC Insurance Company's insured Jose Jasso-Garcia struck a concrete barrier and lost control of his vehicle, which collided with the vehicle in which Krystle Lewis and her minor children were traveling. Lewis and her children were injured, and her attorney contacted ACCC to attempt to settle the claim. ACCC paid for the property damage to Lewis's vehicle, but Lewis rejected ACCC's settlement offer for the bodily injuries she and her children sustained.

Lewis sued Jasso-Garcia and notified ACCC when he had been served. In response, ACCC stated that, as a courtesy, it would attempt to contact him; however, ACCC pointed out that the "policy requires the insured to forward lawsuit papers to ACCC and to request a defense in the lawsuit," and emphasized that it did not waive this condition.

About six weeks later, Lewis sent ACCC a courtesy copy of her motion for default judgment on liability. After the trial court granted the motion, Lewis also sent ACCC a courtesy copy of the notice of the hearing on unliquidated damages. The hearing resulted in a final judgment for Lewis and her children for $39,048.21. When Lewis asked ACCC to pay the judgment, ACCC refused on the ground that

[1] 246 S.W.3d 603 (Tex. 2008).

Jasso-Garcia's failure to advise the insurer of the suit or request a defense had prejudiced ACCC.

Lewis then sued ACCC for breach of contract, promissory estoppel, and negligent misrepresentation. ACCC filed a combined motion for traditional and no-evidence summary judgment in which it asserted there was no evidence that Jasso-Garcia complied with the policy's notice provisions and that the default judgment conclusively established that Jasso-Garcia's failure to notify ACCC of the suit and request a defense prejudiced ACCC as a matter of law. The trial court granted the motion, and Lewis now appeals the judgment as to the breach-of-contract claim.

II. STANDARD OF REVIEW

To prevail on a traditional motion for summary judgment, the movant must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). If the movant carries this burden, the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018) (citing *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995)). A movant for no-evidence summary judgment need only identify "one or more essential elements of a claim or defense . . . as to which there is no evidence" to shift the burden to the non-movant. *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259 (Tex. 2020) (per curiam) (quoting TEX. R. CIV. P. 166a(i)). We review both types of summary judgment de novo, construing the evidence in the light most favorable to the non-movant by crediting evidence favorable to the non-movant if a reasonable juror could and disregarding contrary evidence unless a reasonable juror could not. *See Trial v. Dragon*, 593 S.W.3d 313, 316 (Tex. 2019); *Mann Frankfort Stein & Lipp*

Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

III. Analysis

ACCC moved for no-evidence summary judgment on the breach-of-contract claim on the ground, among others, that there is no evidence that Jasso-Garcia complied with the policy. *See Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524, 539 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (one element of a breach-of-contract claim is that the other party to the contract "tendered performance or was excused from doing so"). Like many liability policies, ACCC's policy requires the person covered by the policy to promptly send the insurer "copies of any notices or legal papers received in connection with [an] accident or loss" and cooperate with the insurer "in the investigation, settlement or defense or any claim or suit." The policy states that ACCC may deny coverage if ACCC can show that the covered person's failure to comply with those terms materially prejudiced the insurer.

Lewis produced no evidence of Jasso-Garcia's compliance; indeed, it is undisputed that Jasso-Garcia did not comply with these terms. Thus, the issue before us is whether ACCC met the burden it assumed in its traditional motion for summary judgment to conclusively prove that Jasso-Garcia's non-compliance actually prejudiced ACCC.

We conclude that ACCC established that it was prejudiced as a matter of law when Jasso-Garcia allowed summary judgment to be rendered against him. To understand why, we begin by explaining the purpose of the notice provision. We will then explain why the arguments Lewis advances do not merit a different outcome.

A. The Notice Provision Requires an Insured to Request a Defense.

As the Supreme Court of Texas explained in *National Union Fire Insurance Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603 (Tex. 2008), an insurance policy's notice provision serves at least two purposes. *See id.* at 607. First, requiring an insured to forward suit papers to the insurer "enable[s] the insurer to control the litigation and interpose a defense." *Id.* (quoting *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367, 369 (Tex. 1978)). Second, its "more basic purpose is to advise the insurer that an insured has been served with process *and that the insurer is expected to file an answer*." *Id.* (quoting *Weaver*, 570 S.W.2d at 369) (emphasis added). Because an insurer has "no duty to provide a defense absent a request for coverage," the insurer "ha[s] no duty to inject itself gratuitously into a lawsuit by defending an . . . insured who ha[s] not requested a defense and who fail[s] to comply" with the policy's requirement to forward suit papers. *Id.* at 607, 608. Rather, the insured "trigger[s] the insurer's duty to defend by notifying the insurer that a defense is expected." *Id.* at 608. Thus, the insurer has "no unilateral duty to act unless and until the . . . insured first *requests* a defense"—even if the insurer has actual knowledge of the suit. *Id.*

If the insured does not comply with the obligations to notify the insurer of the suit and forward copies of the suit papers and instead allows a default judgment to be rendered, then the notice provision's first purpose—that of "enabl[ing] the insurer to control the litigation and interpose a defense—has been defeated. This can be seen by the difference in the insurer's position before and after the default. Before a default judgment, the plaintiff bears the burden of proof, but after a default judgment, the "insurer can no longer defend against the underlying claim unless it first meets a new burden of proof on new issues." *Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 288 & n.9 (Tex. App.—Houston [14th Dist.] 2007, pet.

denied) (addressing the elements that must be proved to set aside a default judgment as set forth in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939)). Thus, "[e]ntry of a default judgment will ordinarily constitute prejudice as a matter of law." *Id.* at 287.

B. The Insurer's Actual Knowledge of the Suit Does Not Substitute for the Insured's Request for a Defense.

In the issue that is dispositive of this appeal, Lewis argues that ACCC was not prejudiced as a matter of law by Jasso-Garcia's failure to comply with the policy's notice provisions because ACCC had actual knowledge of the suit, having received from Lewis, as a third-party beneficiary of the policy, (1) timely notice of the claim, (2) a courtesy copy of the petition, and (3) notice of the default-judgment hearing.[2]

But as explained above, *Crocker* demonstrates that an insurer has no duty to defend—and hence, no liability—if the insured never requests a defense and instead allows a default judgment to be taken. In that case, National Union insured Emeritus Corporation, which owned a nursing home. *Crocker*, 246 S.W.3d. at 604. After nursing-home resident Beatrice Crocker was injured by a door swung open by the home's employee Richard Morris, she sued Emeritus and Morris in federal court. *See id.* Morris was unaware that he was an additional insured under the National Union policy, so he did not forward the suit papers to National Union, inform the insurer that he had been sued, or request a defense. *Id.* at 605. Although National Union defended Emeritus, it did not inform Morris of coverage or offer to defend

[2] This is Lewis's second issue. Lewis states her first issue as, "Broadly, whether the existence of prejudice is established as a matter of law by the failure of a policyholder to *personally* notify his carrier of suit (as opposed to notice by a third-party beneficiary), or whether the existence of prejudice remains a fact issue for the jury." Because we are concerned only with the question of whether actual prejudice was proved under the specific facts this case—including the rendition of a default judgment against the insured—we do not address that broader issue. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147 (Tex. 2012) (Texas courts lack jurisdiction to render advisory opinions).

him, even though National Union knew that he had been served. *Id.* Morris did not answer or appear, and after the claims against him were severed from the case, a jury found that Emeritus did not negligently cause Crocker's injuries "by and through its agents acting within the course and scope of their employment." *Id.* In the severed case, however, the trial court rendered a $1 million default judgment against Morris. *Id.*

When Crocker sued National Union to collect on the judgment, National Union argued that it was not liable because Morris did not comply with the policy's notice provisions, invoke coverage, or request a defense. *See id.* Crocker responded that National Union was not prejudiced by Morris's non-compliance because National Union had actual knowledge of the suit. *See id.* The federal district court agreed with Crocker and granted her motion for summary judgment, and on appeal, the Fifth Circuit certified the following question to the Supreme Court of Texas:

> Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

Id. at 609. The Supreme Court of Texas answered that question, "no." *Id.*

Lewis asserts that the Supreme Court of Texas reached this result "because whether a carrier with actual knowledge of a lawsuit is prejudiced by the failure of its additional insured to personally provide notice of such lawsuit is a fact issue which may not be determined as a matter of law." But, that is exactly what the high court did: it held that "National Union was *obviously prejudiced* in the sense that it was exposed to a $1 million judgment," and explained that "[a]bsent a threshold duty to defend, *there can be no liability* to Morris, or to Crocker derivatively." *Id.* (emphasis added). Thus, when the case was returned to the Fifth Circuit, that court

succinctly held, "It is clear from the opinion of the Texas Supreme Court that, because Morris never gave National Union any notice of the suit, . . . and never in any manner requested a defense . . . , National Union . . . was entitled to rely on its policy provisions precluding coverage on the basis of such noncompliance." 526 F.3d 240, 241 (5th Cir. 2008) (per curiam).

The parties in this case stand in the same position as the parties in *Crocker*. Here, as in *Crocker*, the insurer had actual knowledge that the insured had been sued and served. And as in *Crocker*, the insured breached the policy's notice provisions; Jasso-Garcia, like Morris, failed to forward suit papers or to request a defense and instead allowed a default judgment to be rendered against him. In both cases the insured never triggered the insurer's "threshold duty to defend," and in both cases, the insurer was "exposed to a [default] judgment" awarding damages. Thus, here, as in *Crocker*, the insurer has been "obviously prejudiced" and "there can be no liability" on the part of ACCC to Jasso-Garcia, or to Lewis derivatively.

C. Lewis Cannot Cure Jasso-Garcia's Non-Compliance with the Notice Provision.

To avoid this result, Lewis reframes the issue and argues that the default judgment against Jasso-Garcia does not conclusively establish prejudice to ACCC because an insurer cannot prove prejudice as a matter of law "by the failure of a policyholder to *personally* notify his carrier of suit" if the injured plaintiff, as a third-party beneficiary of the policy, provides actual notice.[3] Lewis implies that by forwarding copies of the suit papers to ACCC, she cured any prejudice to ACCC from lack of notice. In making this argument, Lewis reads the notice provision too narrowly and interprets "third-party beneficiary" too broadly.

[3] Emphasis in original.

The notice provision's purpose is not solely to provide information to the insurer about the lawsuit; if that were so, then actual notice of the suit in time to interpose a defense would be sufficient to prove the absence of prejudice, and *Crocker* would have reached the opposite result on the certified question discussed above. Lewis, however, does not address *Crocker*'s holding that the more basic purpose of a notice provision is to inform the insurer that an insured expects the insurer to provide a defense.

This brings us to Lewis's interpretation of her status as a third-party beneficiary of the policy. A third-party beneficiary of a liability policy "steps into the shoes" of the insured, and the same defenses that would have been available to the insurer in a suit for coverage by the insured are available to the insurer in a suit by the third-party beneficiary. *See, e.g.*, *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38, 40–41 (Tex. 1998); *United Auto. Ins. Servs. v. Rhymes*, No. 05-16-01125-CV, 2018 WL 2077561, at *3 (Tex. App.—Dallas May 4, 2018, no pet.) (mem. op.); *Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924, 929 (Tex. App.—Dallas 2011, no pet.). But, the person injured by an insured is not a third-party beneficiary of the policy for all purposes. As explained in *Crocker*, one of the purposes of a notice provision is to require the insured to request a defense. But an insurer promises to provide a defense only to those covered by the policy, not to the insured's adversaries, and an injured party who provides the liability carrier with suit papers does not, by doing so, turn over control of her litigation to her adversary's insurer. Thus, it cannot be said that a person allegedly harmed by the insured "steps into the insured's shoes" for the purpose of requesting a defense from the insurer. Rather, the consequences of the insured's failure to request a defense is binding on the third-party beneficiary, as *Crocker* illustrates. By providing ACCC actual notice

of the suit and the motion for default judgment, Lewis did not, and could not, request a defense on Jasso-Garcia's behalf.

D. The Insurer's Settlement of Lewis's Property-Damage Claim and Offers to Settle the Bodily-Injury Claims Do Not Affect the Prejudice Analysis.

In the same issue, Lewis also asserts that ACCC is not prejudiced by Jasso-Garcia's failure to comply with the policy's notice provisions because ACCC (1) "[a]ccepted 100% liability for the accident," (2) paid the property-damage portion of the claim, (3) provided a written settlement offer, and (4) "[d]enied coverage only after default judgment was entered." It is unclear if these assertions of fact are intended to show anything other than that ACCC had actual notice of the claim from Lewis. Lewis does not argue that, by these actions, ACCC waived Jasso-Garcia's failure to notify ACCC of the suit or to request a defense, or that ACCC is estopped to deny coverage. *Cf. Crocker*, 246 S.W.3d at 609 ("Because [National Union] was not under a duty to defend the suit against its insured when [it received notice of the claim], it is not estopped from asserting [the insured's] breach of the policy as a bar to its liability." (quoting *Harwell*, 896 S.W.2d at 175 (alterations in original))). But in any event, none of Lewis's factual assertions affect our prejudice analysis.

Lewis's first contention, i.e., that ACCC "accepted 100% liability for the accident," is not supported by the summary-judgment record. Lewis neither raised this argument in her summary-judgment response nor cited evidence in her response to support such an argument, and "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c).[4]

[4] In support of her appellate assertion that ACCC accepted liability, Lewis cites only an internal "claim note" which appears to be part of ACCC's discovery responses, but this particular "claim note" is not mentioned in Lewis's summary-judgment response or motion for new trial.

Her arguments that ACCC paid the property-damage portion of her claim and offered to settle the bodily-injury claims also do not affect our analysis. A settlement agreement is neither an agreement to pay damages nor an admission of liability; to the contrary, a "settlement agreement does nothing more than buy peace." *State Farm Cty. Mut. Ins. Co. of Tex. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989) (per curiam); *cf.* TEX. R. EVID. 408 (settlement offers and agreements are not admissible to prove or disprove a claim's validity); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 649 (Tex. 1995) (settlement agreements are not admissible at trial to prove liability); *Loncar v. Progressive Cty. Mut. Ins. Co.*, 553 S.W.3d 586, 593 (Tex. App.—Dallas 2018, no pet.) ("[W]hether the motorist admits or denies liability in a settlement document will not affect the insured's claim against the insurer."). Settlement of the property claim indicates nothing about whether an insurer was actually prejudiced by the insured's failure notify the injurer of a subsequent lawsuit for bodily injuries or by the insured's failure to request a defense to those claims.

Finally, Lewis states that ACCC denied coverage only after default judgment was entered, but she offers no argument or authority that ACCC owed Lewis a duty to deny coverage at an earlier time. Before the default judgment, Lewis had no claim against ACCC to deny, because under the policy's terms, a person damaged by an insured has no legal action against ACCC until the policy's terms have been complied with, and either (1) ACCC "agree[s] in writing that the covered person has

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Moreover, it is part of an internal assessment about whether the claim would be covered under the policy, which is a separate inquiry from whether ACCC can be held legally liable for the default judgment against Jasso-Garcia. *Cf. Crocker*, 246 S.W.3d at 604–05, 609 (stating that, where the additional insured failed to comply with the notice provisions, there was no duty to defend and no liability to the additional insured or to the injured plaintiff "even though the claims against [the additional insured] *were covered by the policy* and the [insurer] knew he was a named defendant that had been served" (emphasis added)).

an obligation to pay," or (2) "the amount of that obligation has been finally determined by judgment after trial."

Moreover, Lewis was aware of ACCC's position from the outset of this suit. When Lewis advised ACCC that Jasso-Garcia had been sued and served, ACCC responded by citing *Crocker* and pointing out, "The captioned policy requires the insured to forward lawsuit papers to ACCC and to request a defense in the lawsuit. ACCC has no duty or authority to engage counsel to provide a defense until requested to do so by the insured." Although it had no duty to do so, ACCC even suggested that, viewing Jasso-Garcia's noncompliance in light of *Crocker*, Lewis's counsel might find it in his client's best interest to forestall default proceedings.

Because none of Lewis's legal or factual arguments change the result dictated by *Crocker*, we overrule the issue presented.

IV. CONCLUSION

When a default judgment is rendered against an insured who has failed to notify the insurer of the lawsuit or request a defense, the insurer is prejudiced as a matter of law, regardless of whether the insurer has actual notice of the suit and of the injured plaintiff's motion for default judgment while the suit is still pending. We accordingly affirm the trial court's summary judgment in ACCC's favor.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.