Opinion issued April 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00420-CV

ROLAND AND KAREN GARCIA, Appellants

V.

HARTWIG MOSS INSURANCE AGENCY, LTD., Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Case No. 2017-57543

MEMORANDUM OPINION

Roland and Karen Garcia sued their insurance agent, Hartwig Moss Insurance Agency, Ltd., after discovering that the insurance policy Hartwig procured for them did not include flood coverage despite their request for flood coverage. The Garcias sued Hartwig under a negligence theory, seeking to recover

losses caused by Hurricane Harvey. The jury answered that Hartwig was not negligent and that Karen Garcia was.

The parties agree that an insurance agent has two common law duties: (1) to use reasonable diligence in attempting to place requested insurance and (2) to inform the client promptly if unable to do so.[1] This case is about whether an agent has additional common law duties beyond those two.

The Garcias argue that Hartwig owed them three more common law duties: (1) to keep them fully informed "so that they could remain safely insured at all times," (2) to know that its representations to them were, in fact, true, and (3) in essence, to carry out their instructions correctly such that total reliance on Hartwig would be justified. The Garcias also argue that the trial court committed charge error by failing to instruct the jury on these duties and by wrongly submitting a jury question on Karen Garcia's negligence. Finally, they argue that there was legally and factually insufficient evidence to support the take-nothing judgment entered against them.

We affirm.

Background

The Garcias wanted better and less expensive insurance and approached a family friend who worked at Hartwig Moss Insurance Agency to find better

[1] *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992).

coverage with another insurer. The family friend, Josh Golding, asked to review their current policies to obtain competing insurance quotes. Karen[2] gave him copies of various policies with State Farm. Josh asked for a copy of their flood insurance policy. Karen testified that she thought their State Farm homeowner's policy included flood coverage and, when Josh told her that flood insurance would have been separately billed, she told Josh that she could not locate any separate billing in her records for flood insurance. She understood from her conversations with Josh that he would procure flood insurance along with the other types of insurance she was requesting.

Josh asked Karen if she wanted flood extension coverage, telling her that, with flood extension coverage, "if anything happens, then [the insurer] handles everything. You don't have to deal with flood insurance at all. [The insurer] handles everything."

Josh sent Karen a quote for home, auto, jewelry, flood, and an umbrella policy. It was several thousand dollars less than she had been paying without flood coverage, so she told Josh that they wanted to "move forward."

Josh asked for a copy of an alarm monitoring certificate and a copy of the declaration page of their current flood policy. Karen looked again for a flood

[2] Because some parties share a last name, we will use given names when describing what occurred.

policy but could not find one. She emailed Josh a copy of the alarm monitoring certificate and stated that she could not find a flood policy declaration page.

A person at Hartwig wrote back to Karen that she would start processing everything. Then, Josh emailed Karen in March 2017 with copies of declaration pages for the Garcias' new insurance policies. The homeowner's policy included flood extension coverage. According to Karen, she thought that meant that the new homeowner's policy included flood coverage. She did not realize that the flood extension coverage was separate from flood coverage and would provide no benefit without an underlying flood policy. Josh's March 2017 email that enclosed the declaration pages asked again whether Karen had located a copy of the current flood policy. He explained, "We'll need that information before we're able to process the new flood quote."

Because Karen understood the reference in the new homeowner's policy to *flood extension* coverage to be *flood* coverage, she was not concerned about the request for an old policy that her earlier searches had failed to locate. She explained:

> Well, because there was no way for me to give him a flood policy that I didn't have; and I had already told him I didn't have it. So—and I had flood on my dec page from PURE [the new insurer]. So, I really didn't worry about it. He told me to send it if I had it.

Karen did not respond to Josh's email.

In April 2017, the insurance policies (without flood coverage) went into effect.

In July, Karen called Josh to file an insurance claim because a tree had fallen on a shed on their property. The insurer took action on her claim. At no time did Josh follow up about the never-received flood declaration page or the status of the Garcias' flood policy.

In August, Hurricane Harvey flooded the Garcias' home. Karen talked to Josh on the phone, intending to place a claim. According to Karen, Josh responded that he thought they still had flood coverage under an earlier policy and that he had not procured a new flood policy for them.

The Garcias spent over two years and $700,000 repairing their home. They sued Hartwig to recover their losses.

Whether the Incompleteness of the Reporter's Record Mandates Affirmance

Before discussing the duties an insurance agent owes an insured, we must address a preliminary argument Hartwig raises to suggest that we must affirm the take-nothing judgment without regard to the merits of the Garcias' appellate arguments.

Hartwig argues that judgment in its favor must be affirmed because the Garcias requested an incomplete reporter's record and failed to comply with the procedures set forth in Rule 34.6 when a limited record is requested. *See* TEX. R.

APP. P. 34.6(c). The Garcias respond that the small item omitted from the record—Hartwig's offer of proof—is unnecessary to resolve the issues they raised on appeal, that Hartwig failed to establish prejudice from any violation of Rule 34.6, and that Hartwig waived any claim of error by abandoning efforts to supplement the record.

A. Rule 34.6

When perfecting an appeal, the appellant requests the reporter's record. The request must designate the portions of the proceedings and exhibits to be included. TEX. R. APP. P. 34.6(b)(1). The appellant may request a partial reporter's record. When this occurs, "the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." *Id.* R. 34.6(c)(1). If the appellant requests a partial record, the "other party may designate additional exhibits and portions of the testimony to be included in the reporter's record." *Id.* R. 34.6(c)(2). "The appellate court must presume that the partial reporter's record designated by the parties constitutes the entire record for purposes of reviewing the stated points or issues." *Id.* R. 34.6(c)(4).

When the appellant fails to follow Rule 34.6(c)(1)'s requirement to provide a statement of points or issues being appealed, there can be a presumption against the appellant. *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002). If the appellant

"completely fail[s] to submit his statement of points or issues," then there is a presumption that the omitted portions support the trial court's findings. *Id.* Under the force of the presumption, the appellate court must affirm the trial court's judgment against a sufficiency-of-the-evidence challenge. *Id.*

There are at least two scenarios when the presumption may not work against the appellant. First, the failure to include a statement of points or issues when requesting a partial reporter's record does not raise a presumption when the issue on appeal is a strict question of law. *White Lion Holdings, L.L.C. v. Insgroup, Inc.*, No. 01-18-00851-CV, 2019 WL 7341670, at *3 (Tex. App.—Houston [1st Dist.] Dec. 31, 2019, pet. denied) (mem. op.); *see In re J.A.B.*, 13 S.W.3d 813, 815 (Tex. App.—Fort Worth 2000, no pet.); *see also* TEX. R. APP. P. 34.1 ("The appellate record consists of the clerk's record and, *if necessary to the appeal*, the reporter's record.") (emphasis added). For questions of law, a reporter's record is unnecessary. *See White Lion*, 2019 WL 7341670, at *3.

Second, the failure to include a statement of points or issues when requesting a partial record may not raise a presumption if later events alleviate concerns over noncompliance. For example, in *Bennett*, the appellant did not initially include a statement of issues. *Bennett*, 96 S.W.3d at 229. But the appellant supplemented about two months before the appellee's brief was due. *Id.* The Court held that failure to strictly comply with Rule 34.6 did not invoke the presumption. *Id.* The

objective behind Rule 34.6 was fully served under the facts, given that the statement of issues was eventually provided, well before the appellee's brief was due. *Id.* at 230.

Permitting less-than-strict compliance did not prejudice the appellee. The *Bennett* appellee had not shown that the lateness prevented him from identifying issues or supplementing the record. *Id.* at 299. Nor had the appellee shown that it impaired the appellee's appellate posture. *Id.* Without any showing of prejudice, the Court was inclined to adopt "a more flexible approach" that allowed "a slight relaxation of the rule" so that the merits of the appellate arguments could be reached. *Id.* Important to the *Bennett* Court's analysis, though, was that the appellant ultimately did provide the statement of issues versus a complete failure to comply. *Id.* ("There is no question that, had Bennett completely failed to submit his statement of points or issues, Rule 34.6 would require the appellate court to affirm the trial court's judgment.").

B. Analysis

Here, the Garcias initially requested a full record. Hartwig was copied on that request and anticipated a full record on appeal. Hartwig later learned, days before its appellate brief was due, that the record was only a partial record because the Garcias had narrowed their record request through private email correspondence with the court reporter. The Garcias do not dispute these events.

The main issue in this appeal is the common law duties an agent owes an insured and whether the trial court erred in failing to instruct the jury that such duties exist. Duty is a question of law. *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("The threshold inquiry in a negligence case is duty. . . . [T]he existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question.").

Because the Garcias' first appellate issue presents a question of law, we reach the issue regardless of the completeness of the reporter's record. *See White Lion*, 2019 WL 7341670, at *3; TEX. R. APP. P. 34.1.

Insurance Agent's Common-law Duties to an Insured

Both parties agree on the basic common-law duties an insurance agent owes an insured. These two duties come from *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666 (Tex. 1992). An agent has a duty to (1) use reasonable diligence in attempting to place requested insurance and (2) inform the client promptly if unable to do so. *Id.* at 669. Thus, for example, an insurance agent is liable when he misleads a potential insured into believing that the agent has obtained an insurance policy when he has not. *Id.* (discussing *Burroughs v. Bunch*, 210 S.W.2d 211 (Tex. Civ. App.—El Paso 1948, writ ref'd)). And an insurance agent is liable when he assures an insured that a certain event is covered when it proves to be excluded. *Id.*

(discussing *Rainey-Mapes v. Queen Charters, Inc.*, 729 S.W.2d 907 (Tex. App.—San Antonio 1987, writ dism'd by agr.)).

The Garcias argued to the trial court and now on appeal that additional, specific duties exist beyond these two. The scope of these purported duties is seen in the jury instructions the Garcias requested but were denied.

A. First jury-instruction request: "You are instructed that Hartwig Moss Insurance Agency, Limited, owed a duty to keep Roland and Karen Garcia fully informed so that they could remain safely insured at all times."

The Garcias cite *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440 (Tex. Civ. App.—Beaumont 1977, no writ), to argue that such a duty exists under Texas law. In *Burnette*, the insured held an automatic right to renew their policy. *Id.* at 442. The insurance agency president testified that his company always renewed policies for their insureds or notified them when their policies were not renewed. *Id.* The agent failed to renew this insured's policy or inform the insured that the policy was not renewed. *Id.* The *Burnette* court relied on a 1968 federal case to hold that the insurance agent has a "duty to keep his clients fully informed so that they can remain safely insured at all times." *Id.* at 442 (quoting *Cateora v. British Atlantic Assurance, Ltd.*, 282 F. Supp. 167, 174 (S.D. Tex. 1968)), in which an agent knew the insurer had become insolvent but did not inform the insured or seek replacement coverage). The *Burnette* court also held that the agent breached

his duty by not renewing the automatically renewable policy or telling the insured of its nonrenewal.

Both *Burnette* and the case it relied on—*Cateora*—dealt with an agent's duty to prevent the insured from losing coverage after a selected policy was obtained. The agent has a duty to keep his client fully informed so the client could "remain safety insured." That is not the scenario here. The Garcias sued because they never obtained coverage that they allegedly thought they bought. Neither *Burnette* nor *Cateora* inform the duties that might arise when some insurance is obtained but not the type of insurance that would cover the loss incurred.

The duty discussed in *Burnette* has no application in the context of a policy that exists but allegedly fails to cover a certain type of loss, which is the circumstance that led to the Garcias' negligence claim.

B. Second jury-instruction request: "Hartwig Moss Insurance Agency, Limited, has a duty to know what it represents to the plaintiffs is true."

The Garcias cite in support of this duty *Wyly v. Integrity Ins. Solutions*, 502 S.W.3d 901 (Tex. App.—Houston [14th Dist.] 2016, no pet.). But *Wyly* did not involve common law duties of an agent—which is the only source of duty the Garcias pursued.

In *Wyly*, the insured sued their agent for violating the Deceptive Trade Practices Act and the Insurance Code. *Id.* at 904. The agent conceded that an affirmative misrepresentation of insurance coverage may give rise to claims under

both statutes. *Id.* at 907. The dispute, then, was whether the agent made an affirmative misrepresentation to permit recovery under either statute. *See id.*

The discussion in *Wyly* from which the Garcias seek to derive a duty has no application outside the context of the statutory claims addressed in that case. Here, the Garcias asserted only a common-law negligence claim. They did not assert claims under the DTPA or the Insurance Code. *Wyly* does not apply.

C. Third jury-instruction request: "Roland and Karen Garcia were entitled to rely upon their instructions being properly carried out by the Hartwig Moss Insurance Agency, Limited."

Stated inversely, this request places a duty on the agent to carry out the insured's instructions and to do so with such completeness that the insured cannot be unreasonable in relying on the agent to do so. They cite for this duty *Insurance Network of Texas v. Kloesel*, 266 S.W.3d 466 (Tex. App.—Corpus Christi 2008, pet. denied). *Kloesel* does not support the existence of such a duty.

There, the quarrel was over whether the insureds had an obligation to read their policy to discover that it lacked coverage for a risk that they likely anticipated and wanted to insure against. *See id.* at 476. The court noted that there is a presumption that an insured knows the contents of their policy but that the presumption can be overcome with evidence of why the insured does not. *See id.* If the insured comes forward with evidence of why they do not know the contents of their policy, the burden is on the agent to prove the insured was negligent in failing

to understand their own policy, such as by not reading it. *Id.* The issue is generally presented as a contributory negligence question. *Id.* at 476 & n.64. The insured's negligence is determined on a case-by-case basis, assessing the facts as they relate to whether it was reasonable to not understand the policy's terms and whether the insured reasonably relied on the agent's knowledge and their own assumption that the agent correctly procured the desired insurance. *Id.* at 477. The insured's negligence is dependent on the facts and not subject to categorical rule. *Id.* at 479, 483. Thus, the *Kloesel* trial court did not err in refusing to instruct the jury in a way that would have presented the issue as though one side's obligation was conclusive versus subject to a factual analysis. *Id.* at 483.

In its discussion of the insured's possible negligence, the *Kloesel* court discussed the concept of an insured "rely[ing] upon his instructions being properly carried out." *Id.* at 477. But the court rejected the idea that either side's duty was conclusive, holding instead that it depended on the facts. *See id.*

Kloesel does not support the contention that an insured has a conclusive right to rely on the insured's instructions being properly carried out by the agent. Instead, that court held that the question is one of degree and fact, analyzing the reasonableness of the insured's actions as part of an evaluation of contributory negligence by the insured. *Id.* The case does not support the Garcias' duty argument, which is phrased in absolute terms, contrary to the *Kloesel* holding.

D. Conclusion on duty

The Garcias' first appellate issue asks whether an insurance agent owes its insured the duties discussed above. We hold that none of the three cases that the Garcias rely on supports their contention that such a duty exists in the context of an insured receiving a policy but not the full extent of coverage requested.

We overrule the Garcias' first issue. Our resolution of the Garcias' first issue moots their second issue—whether the evidence established a violation of these duties—and half of their fourth issue—whether the trial court erred in refusing to instruct the jury that these duties exist under Texas law.

Jury Question on Insured's Alleged Negligence

The Garcias' third issue asks whether an insured "owe[s] a duty to the agent, and if so, does the evidence conclusively show no breach of such a duty" by Karen Garcia, and the other half of their fourth issue asks whether the trial court erred in submitting a jury question on Karen Garcia's negligence.

The Garcias contend that the jury question requested by Hartwig and submitted by the trial court—asking whether Karen Garcia was negligent—was erroneous because an insured does not owe a duty to their retained agent. That statement might, on the surface, appear to ring true. But the premise of the jury question was something other than an insured's possible duty to their agent.

The jury question about Karen Garcia's possible negligence did not ask whether Karen breached a duty to Josh or Hartwig. Instead, it asked whether Karen bore some responsibility for the lack of coverage such that she might have comparative responsibility for her financial losses, such as, for example, failing to read the policy she received from Josh, which stated that it did not include flood coverage or failing to respond to Josh's explanation that he needed her to provide a copy of her current flood policy before he could process a new flood quote.

On a negligence claim, the submission of an insured's comparative negligence, if the facts support the submission, is appropriate. *See Kloesel*, 266 S.W.3d at 476 & n.64 ("an insured's failure to familiarize himself with his policy simply allows the agent to assert a contributory negligence defense, presenting a jury question in negligence actions"); *see id.* at 481–82 (analyzing whether trial court erred in refusing jury instruction on duty of insured to read their insurance policy); *see also William M. Mercer, Inc. v. Woods*, 717 S.W.2d 391, 401 (Tex. App.—Texarkana 1986), *rev'd on other grounds*, 769 S.W.2d 515 (Tex. 1989).

The submission of a plaintiff's negligence is not allowed unless there is legally sufficient evidence to support it. *See Hauschildt v. Central Freight Lines, Inc.* No. 10-10-00185-CV, 2011 WL 455264, at *3 (Tex. App.—Waco 2011, pet. denied) (mem. op.); TEX. CIV. PRAC. & REM. CODE § 33.003(b).

The jury received evidence that Karen Garcia did not read the homeowner's policy that Josh procured as a Hartwig agent. The policy stated that it did not include flood coverage. Hartwig presented more than a scintilla of evidence to support submission of Karen Garcia's negligence for the jury to consider comparative fault.

Having rejected the Garcias' duty arguments, we overrule the Garcia's third issue.

Sufficiency of the Evidence

In their final issue, the Garcias argue that the evidence was legally and factually insufficient to support the take-nothing judgment.

The Garcias failed to comply with Rule 34.6 when obtaining their partial record. We presume, as we must, that the omitted portions of the record—the full extent of omission being unknown—support the jury's findings. *See Bennett*, 96 S.W.3d at 229; TEX. R. CIV. P. 34.6(c). We overrule this final issue.

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Justices Kelly, Landau, and Hightower.