NOT DESIGNATED FOR PUBLICATION

SHERI FORSYTH, WIFE OF, AND MARK FORSYTH	*	**NO. 2000-CA-2173**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
CARLOS BROWN AND CYNTHIA RAGGIO	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-7843, DIVISION "F-10"
Honorable Yada Magee, Judge
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Judge Terri F. Love

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(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

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AFFIRMED

Paintiff, Mark Forsyth, appeals the judgment of the trial court, dismissing his claim against Millers Insurance Company. We affirm for the following reasons.

FACTS AND PROCEDURAL HISTORY

On April 2, 1996, Plaintiff, Mark Forsyth ("Mr. Forsyth") and defendants, Cynthia Raggio ("Mrs. Raggio") and Carlos Brown ("Mr. Brown") were involved in a car accident. On May 6, 1996, Mr. Forsyth's attorney contacted Mrs. Raggio's insurer, Millers Casualty Insurance Company ("Millers") and offered to settle Mr. Forsyth's claim for $10,000. Millers allegedly denied liability and refused the offer, urging Mr. Forsyth's attorney to file suit instead. Mr. Forsyth filed suit and served the petition upon Mrs. Raggio on May 31, 1996. On June 21, 1996, a default judgment was subsequently entered against her in the amount of $114,985.79 ($100,000 for general damages and $14,985.79 in special damages plus legal interest).

Mrs. Raggio contends that she called Millers and notified it of the

lawsuit filed by Mr. Forsyth. Millers contends that the insurance policy requires that Mrs. Raggio not only call them but also that she forward a copy of the petition to its office. Mrs. Raggio claims that when she called Millers it never requested that she send the petition; however, Millers argues that it is standard procedure to request the petition and that Mrs. Raggio simply failed to comply.

On December 6, 1996, Mrs. Raggio assigned Mr. Forsyth her right to sue Millers for any failure to defend the claim that Mr. Forsyth had filed against her. In exchange, Mrs. Raggio was personally released from the judgment rendered against her. Subsequently, plaintiff amended his petition to add Millers as a defendant. The petition alleged that Millers breached its insurance contract with Mrs. Raggio by failing to settle within the policy limits and failing to defend her, and that as a result, Mrs. Raggio suffered damages in the amount of $114,985.79.

At the trial of the issue concerning whether Mr. Forsyth could enforce the assignment of rights as against Millers, the trial court found in favor of the insurance company and dismissed his suit against Millers. It is from this judgment that Mr. Forsyth appeals.

An appellate court generally reviews the factual findings of a trial court according to the manifest error standard of review. *Burkett v. Crescent*

City Connection Marine Division, et al., 98-1237 (La. App. 4 Cir. 2/10/99), 730 So.2d 479, *writ denied*, 99-1416 (La. 9/3/99), 747 So.2d 543. Under the "manifest error/clearly wrong" standard of review, the Court of Appeal may not set aside the trial court's findings of fact unless those findings are clearly wrong in light of the record reviewed in its entirety. *Mariner's Village Mandeville, Inc. v. Fama, Inc.*, 95-1867 (La. App. 4 Cir. 3/14/96) 671 So.2d 1015.

The insurance contract at issue provided that the insured notify Millers promptly and send it any legal papers relating to the lawsuit. Mrs. Raggio was served the original petition on May 31, 1996. At trial, the Raggios testified that between the two of them, they made approximately five phone calls to Millers regarding the lawsuit. The Millers phone log contained in the trial record reflects that three phone calls originated from the Raggio's residence. Millers' phone records reflect that Mr. Raggio called the insurance company twice on June 4, 1996 – one phone call lasted one minute and seven seconds and the second call lasted 54 seconds. The records also reflect that one of the Raggios called Millers on June 5, 1999 and the phone call lasted approximately 30 seconds.

Mr. Raggio testified that he called and notified Millers of the lawsuit; however, he stated that he did not mail in a copy of the original petition.

When asked whether the Millers representative requested a copy of the petition, Mr. Raggio stated that Millers probably did and that he thought his wife sent in the copy of the petition. However, Mrs. Raggio testified that when she also called the insurance company, no one told her or requested that she send in anything and subsequently, she did not do so. Mrs. Raggio stated that Millers only asked for the name and case number of the lawsuit and then told her not to worry because it would take care of everything.

Both Mr. Martin Nigreville, a catastrophe adjuster and Ms. Elizabeth Schneider, a litigation adjuster for Millers, testified that typically when an insured calls the company concerning a lawsuit, Millers will request that the insured fax a copy of the petition or give it to a local Millers agent and have the agent fax it.

Based upon the foregoing facts, we must now turn to the applicable law to determine whether Mrs. Raggio properly notified Millers of the lawsuit filed against her.

Louisiana jurisprudence provides that an insurance policy is a contract that is subject to the general rules of contract interpretation. *Glass Services Unlimited v. Modular Quarters, Inc.*, 478 So.2d 1005 (La. App. 3 Cir. 1985). When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties

intent. La. C.C. art. 2046. In such cases, the insurance contract must be enforced as written. *Townsend v. State Farm Mutual Aubomobile Ins. Co.*, 34-901 (La. App. 2 Cir. 8/22/01), 793 So.2d 473.

Upon review of the trial testimony and evidence contained in the record, it is clear that the Mrs. Raggio failed to comply with the insurance contract obligating her to send in a copy of the lawsuit. At trial, the Raggios gave conflicting testimony in regards to the content of their conversations with Millers. Mr. Raggio claimed that Millers requested a copy of the petition and that he thought his wife had sent it in. Yet, Mrs. Raggio contended that Millers never asked for a copy of the petition and therefore she never sent in a copy. Nonetheless, the result is the same in that Millers never received a copy of the petition, providing them with formal notice of the suit as required by the insurance contract.

Despite Mrs. Raggio's failure to provide Millers with a copy of the petition, Mr. Forsyth argues that as long as the insurer receives sufficient information to act on the claim, "the manner in which it obtains the information is immaterial." *See Sevier v. USF&G*, 497 So.2d 1380 (La. 1986). Although this is true, this does not complete our analysis in reference to whether Mrs. Raggio provided Millers with sufficient notification of the lawsuit. Specifically and more in line with this case, we must turn to *Elrod*

v. P.J. St. Pierre, 663 So.2d 859 (La. App. 5 Cir. 1996), wherein a default judgment was entered against the insured and the insured attempted to recover the amount of the default judgment from the insurance company. The court found that a third party tort victim's claim against a defendant insurer will be recognized despite the lack of notice of process to the insurer by its insured *unless* the defendant insurer proves sufficient prejudice to defeat the plaintiff's claim. Refusing to impose liability upon the insurance company, the court expounded upon the prejudice experienced by the insurance company due to the lack of proper notice:

> In the instant case, OMI [the insurance company] has met its burden of proving sufficient prejudice to defeat the third party's claim against it at this juncture. Plaintiff is seeking payment of a default judgment entered against P.J. in a case where P.J. did not notify OMI that he had been sued and there was no showing that OMI received notice from any other source, and therefore, the insurer did not have opportunity to appear in the case and present a defense. Under the facts presented, the insurer was very active in the case and in providing plaintiff his maintenance and cure payments and in settlement negotiations. There is no doubt that had OMI known of the suit against its insured it would have presented a defense to the case. As stated in *Hallman,*
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>> . . . it would be difficult to conceive of greater prejudice, and of confiscatory result being reached, than a demand for payment of a default judgment of which a defendant is totally ignorant, and which, through the failure of the assured to comply with the terms of the contract and forward the process and pleadings to the insurer, it has been deprived of its right to defend the action.

See Elrod at 864. [Emphasis added].

Similarly, here, Mrs. Raggio also did not provide proper notification of the lawsuit and in doing so, failed to adhere to the contractual provisions contained in the insurance agreement. As stated, the trial court found against Mr. Forsyth. In explaining the basis for her decision, the trial court stated:

> The court finds that they did not mail the petition to Millers Insurance Company. The next issue is whether or not the notice [by telephone] was sufficient.
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> . . . .
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> The defendant's witnesses, both by deposition and live testimony stated that if they had in fact been notified of a lawsuit being served, that they would have told the insurance agent of the office to fax the petition.
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> The court is of the opinion that the Raggios are less than dutiful in their obligations under the law and were so in their failure to follow up the insurance company with its request to forward the petition and it has also been demonstrated by their disregard to the compliance with the subpoena to appear in this court.
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> Accordingly, the court finds that the Raggios did not take sufficient steps to give the insurance company sufficient notice of the pendency of the lawsuit and therefore finds in favor of defendants and against the plaintiffs.

Based upon the facts and aforementioned principles of law, we fail to find error in the trial court's assessment of facts. As such, we find that the trial court did not commit manifest error in regards to this issue. Thus, we decline to impose liability upon Millers.

Additionally, Millers raises an argument in regards to the legal effect

of Mr. Forsyth's acquisition of Mrs. Raggio's "right(s)" against Miller. Since we have already determined that Millers was not properly notified and thus had no obligation to defend the suit, we pretermit discussion of this issue.

For the reasons assigned herein, we affirm the judgment of the trial court.

AFFIRMED