APPENDIX

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-20261
Summary Calendar

[Filed October 20, 2017]

NAUTILUS INSURANCE COMPANY,	)
Plaintiff - Appellee	)
	)
v.	)
	)
IRMA MIRANDA-MONDRAGON,	)
Defendant - Appellant	)
	)

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-2881

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Nautilus Insurance Company brought a declaratory judgment action against its insured Houston Star Security Patrol and against Irma Miranda-Mondragon.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Nautilus argued that it owed no duty to defend or indemnify Houston Star regarding the claim brought by Miranda-Mondragon. The district court granted summary judgment to Nautilus. We AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

Irma Miranda-Mondragon was working as a waitress at a nightclub when armed gunmen entered and began shooting at patrons and employees. Miranda-Mondragon was shot in her chest and required significant medical treatment for her injuries.

Miranda-Mondragon filed a lawsuit in Texas state court against the nightclub's operators, Gustavo Alvarez and Huetamo Enterprises Incorporated. She later amended her complaint to include Houston Star Security Patrol as a co-defendant. Miranda-Mondragon alleged that Houston Star was the "security company on duty" the night she was shot and was negligent "in not providing adequate security for" her. Houston Star was served with process but did not make an appearance.

On June 10, 2016, the state court granted Miranda-Mondragon's motion for default judgment against Houston Star. Six weeks later, Miranda-Mondragon's counsel sent a letter to Houston Star's insurer, Nautilus Insurance Company. The letter contained a copy of the default judgment rendered against Houston Star and sought from Nautilus "a resolution, and payment of the judgment amount."

Nautilus responded by filing for a declaratory judgment in the United States District Court for the Southern District of Texas. Nautilus sought a determination that it owed no duty to defend or indemnify Houston Star for the claim Miranda-Mondragon had brought against Houston Star. Although Nautilus named Miranda-Mondragon and Houston Star as defendants, Nautilus was unable to serve Houston Star. That company has never made an appearance.

Nautilus and Miranda-Mondragon later filed cross-motions for summary judgment. The district court held a hearing on the motions and then entered a final judgment granting Nautilus's motion and denying Miranda-Mondragon's.

The district court first found that Nautilus had not received notice of the initial lawsuit until over 40 days after the state court entered a default judgment against Houston Star. The district court concluded that under Texas law, such a delay by an insured in providing notice of a suit resulted in Nautilus having no duty either to defend Houston Star in the lawsuit or to indemnify its insured for the default judgment. The absence of timely notice also meant Miranda-Mondragon could not recover against Nautilus.

The district court alternatively held that even if Houston Star had provided Nautilus with timely notice, Miranda-Mondragon could still not recover against Nautilus because her claim was excluded from Houston Star's insurance policy. We do not address this second part of the district court's judgment because we affirm as to the first part.

Miranda-Mondragon timely appealed.

DISCUSSION

We review *de novo* a district court's summary judgment ruling. *Aldous v. Darwin Nat'l Assurance Co.*, 851 F.3d 473, 477 (5th Cir. 2017). When there are competing motions, we address "each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745 (5th Cir. 2009). "We will affirm the district court's judgment if no genuine issues of fact are presented and if judgment was proper as a matter of law." *Cal-Dive Int'l, Inc. v. Seabright Ins. Co.*, 627 F.3d 110, 113 (5th Cir. 2010).

Miranda-Mondragon contends that genuine issues of fact are present. There is no factual dispute, though, that Nautilus first received notice of the lawsuit when counsel sent a letter to Nautilus over 40 days after the state court entered default judgment against Houston Star. Settled Texas law provides: "Compliance with the notice of suit provision is a 'condition precedent to the insurer's liability on the policy.'" *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173–74 (Tex. 1995) (quoting *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367, 369 (Tex. 1978)). "[W]hen an insurer first receives notice of a suit after a default judgment has been entered, prejudice exists as a matter of law." *Berkley Reg'l Ins. Co. v. Philadelphia Indem. Ins. Co.*, 690 F.3d 342, 350 (5th Cir. 2012) (citing *Liberty Mut. Ins. Co. v. Cruz*, 883 S.W.2d 164, 166 (Tex. 1993)). Such prejudice "relieves the insurer of liability under the policy." *Cruz*, 883 S.W.2d at 165.

The insurance policy here contained a notice of suit provision requiring Houston Star to notify Nautilus "as soon as practicable . . . [i]f a claim is made or 'suit' is brought against" it and "[i]mmediately [to] send [Nautilus] copies of any demands, notices, summonses or legal papers received in connection with the claim or 'suit'[.]"

The first notice Nautilus received of the lawsuit came from Miranda-Mondragon's counsel 41 days after the state court entered default judgment against Houston Star. The delayed notice prejudiced Nautilus as a matter of law and relieved Nautilus of liability under the policy. *See Berkley*, 690 F.3d at 350; *Cruz*, 883 S.W.2d at 165.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-16-2881

[Filed March 17, 2017]

NAUTILUS INSURANCE COMPANY,	)
Plaintiff,	)
	)
v.	)
	)
DARWIN VARGAS d/b/a HOUSTON	)
STAR SECURITY PATROL, *et al*.	)
Defendants.	)
	)

FINAL JUDGMENT

For the reasons stated in detail on the record at the hearing of today's date, the motion for summary judgment filed by the defendant, Irma Miranda-Mondragon, (Docket Entry No. 14), is denied. The cross-motion for summary judgment filed by the plaintiff, Nautilus Insurance Company, (Docket Entry No. 15), is granted. Based on the record evidence, including the insurance policy, and the undisputed facts showing the lack of timely notice by the insured of the underlying suit until 40 days after default was granted and as to the assault that gave rise to the underlying suit, the court enters declaratory judgment for the plaintiff, Nautilus Insurance Company, as follows:

(1) Plaintiff Nautilus Insurance Company had no duty to defend the underlying suit against defendant Houston Star Security Patrol or to indemnify Houston Star Security Patrol for the default judgment.

(2) Defendant Irma Miranda-Mondragon cannot recover against Nautilus Insurance Company because Houston Star Security Patrol failed to provide timely notice of the lawsuit against it and because the claims in the underlying lawsuit are excluded from policy coverage.

Each party is to bear its own costs. This is a final judgment.

SIGNED on March 17, 2017, at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
Chief United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

4:16-CV-02881

[Dated March 17, 2017]

NAUTILUS INSURANCE COMPANY,	)
PLAINTIFF,	)
	)
VS.	)
	)
IRMA MIRANDA-MONDRAGON,	)
DEFENDANT.	)
	)

HOUSTON, TEXAS
MARCH 17, 2017
8:44 A.M.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LEE H. ROSENTHAL
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFF:

Ashley Parker
PHELPS DUNBAR LLP
One Allen Center
500 Dallas Street
Suite 1300
Houston, Texas 77002

FOR THE DEFENDANT:

Justice Botchway Adjei
LAW OFFICES OF JUSTICE B. ADJEI
8700 Long Point Road
Suite 110
Houston, Texas 77055

Mayra Malone, CSR, RMR, CRR
malonereporting.com

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APPEARANCES - CONTINUED

OFFICIAL COURT REPORTER:

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Houston, Texas 77002
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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

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PROCEEDINGS

THE COURT: I think we are ready to proceed. Go ahead and state your appearances, please.

MS. PARKER: Ashley Parker for Nautilus Insurance Company.

THE COURT: Come up and use the microphone at the podium, please.

Yes, sir? State your appearance, please.

MR. ADJEI: Good morning, Judge.

THE COURT: Go ahead and state your appearance for the record, please, sir.

MR. ADJEI: Yes. Justice Adjei for the defendant Irma Miranda-Mondragon.

THE COURT: All right. Thank you. I believe this is your motion for summary judgment.

MS. PARKER: Yes, Your Honor. Plaintiff -- I'm sorry -- defendant has also filed a cross motion for summary judgment.

THE COURT: Yes. You go ahead with yours and then I will hear from the plaintiff, please.

MS. PARKER: Okay. Well, Your Honor, as you know, this declaratory injunction action arises out of an underlying lawsuit. In that lawsuit, Miranda-Mondragon sued Houston Star, a security company insured by Nautilus Insurance Company for its failure to provide adequate security after she was shot by

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gunmen who entered the nightclub where she was working.

Nautilus contends that it has no duty to defend or indemnify Houston Star in Ms. Mondragon's lawsuit because Houston Star failed to timely notice the lawsuit, failed to request a defense and because the all assault and battery exclusion in the policy precludes coverage.

THE COURT: Are there any factual disputes material to anything that you have just told me?

MS. PARKER: Not to my knowledge, Your Honor.

THE COURT: And the policy says what the policy says?

MS. PARKER: Correct.

THE COURT: There is no dispute apparently about the absence of notice?

MS. PARKER: Correct, Your Honor.

THE COURT: And the issue of the nature of the underlying tort seems similarly uncontested, being shot by a weapon that some third party was using in a nightclub is hard to think of as anything other than an aggravated assault.

MS. PARKER: Exactly, Your Honor.

THE COURT: Then let me turn to the plaintiff and ask why I shouldn't grant Nautilus's motion for summary judgment.

MR. ADJEI: Judge, I represent the defendant, Irma --

THE COURT: I'm sorry. You are right. You were the plaintiff below.

MR. ADJEI: Judge, we have some serious concerns about

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the statements being presented to this Court this morning.

THE COURT: Which statement? The argument just made?

MR. ADJEI: Yes, Judge.

THE COURT: All right. What are those concerns?

MR. ADJEI: Initially, when the plaintiff filed the cause of action Darwin Vargas DBA Houston Star Security patrol was -- he is still a named defendant. The plaintiff has maintained said impositions; that they were not notified; that Mr. Vargas had no duties; that he did not do that. We don't have any proof that the allegations or the arguments being propounded this morning are accurate because Mr. Vargas apparently has not been served. He is not here. I would think he is a missing link as far as this lawsuit is concerned.

Now, I will --

THE COURT: I'm sorry. I'm having trouble understanding what link is missing. Is there any record evidence, competent record evidence that the insurance company was given notice of the lawsuit before the date that I understood the record shows, which is July 21, 2016?

Do you have any evidence that Nautilus got notice of the suit against Star Security before that date other than the fact that the lawsuit was filed?

MR. ADJEI: Judge, Mr. Vargas has not presented us with any evidence that he contacted his insurance company.

THE COURT: Right.

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MR. ADJEI: And neither has the plaintiff presented any evidence to this Court that they did not receive any --

THE COURT: Sure, they have. Sure, they have. The record shows that they didn't get any notice. I don't see any controverting evidence in the record, however.

MR. ADJEI: The arguments that has been presented, they have not presented any documentary evidence.

THE COURT: You still have the problem of the all assault or battery endorsement that excludes the underlying tort from any coverage.

MR. ADJEI: Judge, if I may, I received a copy of the policy --

THE COURT: Yes.

MR. ADJEI: -- from counsel for plaintiff. If I may direct the Court's attention to, I believe -- this is page 41, I believe, of the policy where it says: "This endorsement changes the policy. Please read it carefully. Coverage Extension - Security and Patrol Agency Professional Liability." And if I may read it into the record, please.

"This endorsement modifies insurance provided under the following: Commercial General Liability Coverage, Part A. The following is added to 1.a, insuring agreement of Section 1, Coverage A, bodily injury and property damage liability.

"We will also pay those sums that the insurer

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becomes legally obligated to pay as damages because of the rendering of or failure to render professional services in providing security and patrol agency services.

"B: With respect to the coverage provided by this endorsement, the following exclusions are added to 2, Exclusions of Section 1, Coverage A, bodily injury and property damage liability, Coverage B, personal and advertising injury liability" --

THE COURT: The policy is part of the record. What is your point, please, sir?

MR. ADJEI: Judge, I would like to just -- the paragraph towards the middle part of the page where it states specifically: "Bodily injury, property damage, personal and advertising injury or medical payments covered under the ISO commercial general liability coverage form, whether or not such coverage is valid and collectible.

"However, this exclusion does not apply to bodily injury or property damage arising out of a negligent act, error or omission in the rendering of or failure to render professional services in providing security patrol and agency services."

Judge, our position is that that -- this particular paragraph where it says that the exclusion does not apply, and it has listed all of these as a result of failure to render professional services in providing security patrol and

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agency, is really the key to this entire case.

The copy of the policy, which is part of the record in this case and was provided to me by counsel for plaintiff specifically states that the exclusion which plaintiff's counsel have heavily relied on does not really apply in this case.

THE COURT: Do you want to respond?

MS. PARKER: Yes, Your Honor. That provision is not applicable here. While the policy does confer coverage, the all assault and bodily exclusion excludes certain acts from being covered. This assault and battery exclusion that we have here, Your Honor, is a very beefed up assault and battery exclusion. Not only does it say that any claims arising out of actual assault and battery, physical alteration, any act or omission in connection with the prevention or supervision of such acts, including the alleged failure to provide security, are not covered under the policy.

It even goes so far to say that if claims are brought that fall within the all assault and battery exclusion, that we will not provide defense and indemnity for those. So this exclusion removes coverage for these acts. And the policy that Mr. Adjei is referencing does not bring it back into coverage.

THE COURT: Did you want to respond to that, sir? And then I think we are ready for a ruling.

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MR. ADJEI: All right. Thank you, Judge.

Judge, it is the position of the defendant that the exclusion does not really apply to this -- the allegations of the defendant in this case and the plaintiff in the state court case where Ms. Miranda alleged negligence on the part of the defendant in providing security service.

THE COURT: But that doesn't deal with the negligent -- the assault that is the basis of the underlying case, and that's the problem. There is an exclusion from coverage for injuries arising from certain kinds of events, and one of them is assault. I don't see a way you can get around that.

MR. ADJEI: I specifically raised that, arising out of the negligent act or omission.

THE COURT: I understand, but there is an exclusion that is subject to the exclusion in addition to the notice problem. And I don't think that you are providing an answer to either of those that would preclude the entry of summary judgment for the plaintiff in this case and require me to deny your cross motion for summary judgment.

I think the facts that are undisputed in Texas law and the clear language of the policy requires me to award summary judgment, as I said, for Nautilus.

The cases that you cite are not on point and they do not provide a basis to rule in your favor. The record shows that there was no notice of the suit against Star Security,

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which is Nautilus's insured, until over 40 days after the default was entered. And your argument that Nautilus should have been aware of the underlying litigation, because lawsuits are a matter of public record, simply fails under Texas law. Texas law is clear under the Crocker case that there is no duty to provide a defense unless one is requested. One was not requested. So there was no duty to defend, absent that request.

Even if there had been a request or there was a disputed fact issue material to deciding whether there was a request, you still wouldn't have been entitled -- Star Security still would not have been entitled to a defense under the insurance policy because of the all assault or battery endorsement which covers -- which excludes from coverage any liability arising from assault or battery, whether committed by the insured or by a third party. And that includes whether it is alleged directly or indirectly through negligence or failure to provide adequate security, which is precisely your argument.

So looking at the facts of the claim, not merely the legal theory of relief which Texas laws requires, this is clearly an action for damages for assault and battery, and I think that it is excluded from coverage on that basis. So you face a double strike either -- and clearly both of which require me, as I said, to grant Nautilus's motion for summary judgment and deny yours and to enter a final take-nothing

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judgment declaring that there is no coverage. And that is the Court's ruling.

MR. ADJEI: Judge, am I allowed to -- since we are on the record, am I allowed to at least present some case law?

THE COURT: Sure. You can put it in the record.

MR. ADJEI: Judge, if I may just step back here for one second?

THE COURT: That's fine.

MR. ADJEI: Thank you.

(Pause)

MR. ADJEI: Judge, this reference I'm making comes out of VRV Development LLP, Formerly Known as VRV Development Incorporated, Marken Management GP LLC, Plaintiffs, versus Mid-Continent Casualty Company.

Without necessarily going into the facts of the case, I would just like to read from page 456, part of 456 and 457 where the Court in that case, dealing with a case similar to the one that we are here this morning states:

The duty to defend does not rely on the truth or falsity of the underlying allegations.

THE COURT: The face of the underlying allegations and the facts, however, seem to clearly establish that this is an assault and subject to the exclusion. I don't think that case helps you.

MR. ADJEI: Judge, may I proceed, please?

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THE COURT: You may.

MR. ADJEI: In facts ascertained before suit developed --

THE COURT: Why don't you just put the cite in the record? You don't need to read the case.

MR. ADJEI: Okay.

THE COURT: Thank you.

MR. ADJEI: The cite is 630 F. 3d 457.

THE COURT: Thank you.

MR. ADJEI: Coming out of the Fifth Circuit. It's a 2011 case.

THE COURT: Thank you. Anything further?

MR. ADJEI: Nothing further, Judge.

THE COURT: All right. Do you have anything further?

MS. PARKER: No, Your Honor.

THE COURT: Thank you very much. I'm going to enter judgment consistent with what I stated on the record for the reasons stated on the record.

MR. ADJEI: Okay. Thank you, Judge.

MS. PARKER: Thank you, Your Honor.

(Court recessed at 9:03 a.m.)

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* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause.

Date: April 26, 2017

/s/ Mayra Malone

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Mayra Malone, CSR, RMR, CRR
Official Court Reporter

APPENDIX D

IN THE DISTRICT COURT
127th JUDICIAL DISTRICT

CAUSE NUMBER 2014-05887

[Filed June 10, 2016]

IRMA MIRANDA-MONDRAGON	)
Plaintiff,	)
	)
vs.	)
	)
GUSTAVO ALVAREZ, Individually,	)
and HUETAMO ENTERPRISES, INC.	)
Defendants	)
And	)
HOUSTON STAR SECURITY PATROL	)
Co-Defendant	)
______________________________	)

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

On this __ day of _____, 2016, the Motion for Default Judgment filed by Plaintiff, **IRMA MIRANDA-MONDRAGON**, filed against Co-Defendant, **HOUSTON STAR SECURITY PATROL**, was presented to the Court. Plaintiff, **IRMA MIRANDA-MONDRAGON**, appeared in person and with her attorney of record, Justice B. Adjei. Attorney for Defendants appeared on behalf of Defendants, **GUSTAVO ALVAREZ**, Individually, and **HUETAMO**

ENTERPRISES, INC. Co-Defendant, **HOUSTON STAR SECURITY PATROL**, did not appear in person or by counsel. The Court finds that whereas Co-Defendant, **HOUSTON STAR SECURITY PATROL**, was served on October 21, 2015, it has failed and ignored to file an Answer in this case, and has not requested an extension of time to do so. Further, the statutory period for it to file an Answer has expired, and as a result it is in default. The Court upon hearing all of the testimony by Plaintiff, the evidence and arguments presented by attorney for Plaintiff, finds that the relief prayed for in the First Amended Petition filed by Plaintiff, **IRMA MIRANDA-MONDRAGON**, against Co-Defendant, **HOUSTON STAR SECURITY PATROL**, should be granted in its entirety.

IT IS THEREFORE ORDERED AND DECREED that Plaintiff, **IRMA MIRANDA-MONDRAGON**, is awarded the following.

1. Plaintiff, **IRMA MIRANDA-MONDRAGON** is awarded a judgment against Co-Defendant, **HOUSTON STAR SECURITY PATROL**, in the total sum of

~~$__________ for actual damages~~,
$0 for out of pocket medical [handwritten]

$ $100,000.^{00} for physical pain and suffering from the date of injury to the time of trial,

$ $100,000.^{00} for physical pain and suffering reasonably anticipated being sustained in the future,

$ $100,000.^{00} for mental anguish and emotional distress from the date of injury to the time of trial,

$ 75,000 for mental anguish and emotional distress reasonably anticipated being suffered in the future,

$ $106,748.57 for loss of earnings from the date of injury to the time of trial,

$ $100,000.00 for loss of earnings and earning capacity reasonably anticipated being suffered in the future,

$ $0 for reasonable and necessary medical expenses reasonably anticipated being sustained in the future for treatment of injuries,

$ 75,000.00 for past and future physical impairment.

2. Court costs and service fee in the total sum of $ 525.05.

~~3. Attorney fee in the total sum of $_____.~~

This is interlocutory [handwritten]

IT IS ALL SO ORDERED.

6/10/16 /s/
June 10 2016 JUDGE PRESIDING

Pre-judgment interest @ 5% for a total of $53,378.78 [handwritten]

Post-judgment interest @ 5% on $ ~~606~~ 710,127.35 until paid ^
[handwritten]

APPROVED AS TO FORM ONLY

/s/ Justice B. Adjei
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