IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

LAURE´ BEVERAGE CO., INC.,	)	C/A NO. 03A01-9506-CV-00171
	)	
Plaintiff-Appellant,	)	KNOX LAW
	)	
v.	)	HON. DALE C. WORKMAN,
	)	JUDGE
R. BRADFORD BRITTIAN, ET AL.,	)	
	)	VACATED AND
Defendants-Appellees.	)	REMANDED

LARRY C. VAUGHAN, VAUGHAN & ZUKER, Knoxville, for Plaintiff-Appellant.

JACK B. DRAPER, ARNETT, DRAPER & HAGOOD, Knoxville, for Defendants-Appellees.

OPINION

Franks. J.

In this malpractice action, the Trial Court concluded there was no disputed issue of material fact and entered summary judgment for defendants.

The complaint charges that plaintiff sought legal advice from defendants on obtaining a trade mark for intellectual property protection of the name "Laurel", and that defendants undertook to advise plaintiff on obtaining legal protection for the name. It is further alleged that defendants did not conduct a search to determine the availability of the mark before plaintiff expended

considerable sums of money in reliance on defendants' advice, but it subsequently determined that the mark was not available because of prior registrations.

Filed along with defendants' motion for summary judgment was the affidavit of R. Bradford Brittian which states in pertinent part:

> The standard of care in this case requires trademark counsel to advise a client concerning the meaning and effect of a trademark search, and the implications of having and not having such a search performed. The ultimate decision as to whether a search is conducted is the client's, and no search is conducted, or required to be conducted under the appropriate standard of care, without the authorization of the client. Indeed, it would not be proper to undertake a trademark search without the authorization of the client. Moreover, there is no requirement under the law that a trademark search be conducted.
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> . . .
>
> On September 24, 1990, I counseled Plaintiff's president, Mr. William Lizzio, as to the meaning and effect of a trademark search and the implications of having and of not having a search conducted. In addition, I recommended that he authorize me to have a search conducted. Mr. Lizzio made the decision not to authorize me to conduct a search. . . . Since Mr. Lizzio chose not to have me conduct a search, no search was performed by our firm and no charge was made, as is reflected by our statement for services rendered.

Responding to the motion for summary judgment, plaintiff filed the affidavit of William T. Lizzio which states in pertinent part:

> In September of 1990 I met with R. Bradford Brittian to discuss with him the obtaining of a trademark for the name and logo we wished to use for our new business, that is, Laurel Beverage Co. I had never had a trademark done before. I asked Mr. Brittian to do whatever was necessary to insure that we had this trademark and our rights to the use of the name would be protected.
>
> At no time did Mr. Brittian explain to me the implications of having and not having a search

> performed. This simply did not occur. Further, Mr. Brittian never recommended to me that I authorize him to have such a search conducted. Finally, at no time whatsoever did I ever direct Mr. Brittian not to conduct a trademark search.

The discovery deposition of Mr. Lizzio was taken and filed in connection with the motion for summary judgment. The Trial Court concluded "Mr. Lizzio's deposition testimony and his affidavits are inconsistent and contradictory concerning the key factual issue in this case", and on that basis granted summary judgment, relying on *Price v. Becker*, 812 S.W.2d 597 (Tenn. App. 1991). We do not agree.

Lizzio, in his discovery deposition, relates that he met privately with Brittian in the latter's office, advised Brittian that no trademark search has been done, but essentially could not recall the substance of what Brittian advised him. During cross-examination the following occurred:

> Q. He didn't make any comment at all when you said no search had been made?
>
> A. I'm sure he made the comments, I cannot recall the comments.
>
> Q. Well, do you recall that the subject of a search just kind of died?
>
> A. It came up, I know that there was information conveyed and that was the end of it.
>
> . . .
>
> Q. Now, did you leave the meeting with the impression that he was going to do a search?
>
> A. I left the meeting with the impression that I could use TM and that he was handling everything required so that we would be protected.
>
> Q. My question Mr. Lizzio is more specific. Did you leave the meeting with the impression that he was going to do a search?
>
> A. I cannot recall all the steps that he was going

to go through. I knew there was going to be papers filled out and checks written, and that's what I can recall.

Q. I'll ask it again. Did you leave the meeting with the impression that he was going to perform the search, yes or no?

A. I cannot recall.

The thrust of Lizzio's deposition is essentially summarized in these answers:

Q. What, if anything did he say to you [Brittian], and I would like for you to be as precise as you can, realizing it has been quite some time ago?

A. Sure, four years. You'd like for me to rehash the conversation. Well, I guess what I remember is that -

Q. Well, you don't need to rehash it, just tell me what he said.

A. Ok, I can't recall exact words and things like that. You can only come away from a meeting that long ago with some impressions. I conveyed to him what I was trying to accomplish, and that I wanted to protect a trademark or a logo.

And then he described, I guess, the process or the filing of papers, the things that need to be done to put us in a position where we could use a TM. When I left the office I left with the thought that he was my professional handling that, and I could now put on a TM on materials using the Laurel, Laurel Mountain Spring Water, or Laurel and logo.

Q. Did he tell you you could put TM on it?

A. Yes, sir, I believe he said we could use the TM, we could start using that.

A witness' not remembering a statement made by another does not dispute the other's testimony that the statement was made, but if the witness subsequently through jogging her memory or otherwise, recalls that the statement was not made, a factual dispute arises as to whether the statement was uttered. In

this case a disputed issue of material fact was established by Lizzio's affidavit. *See Tennessee Law of Evidence, Second Edition,* Cohen, Paine & Sheppeard, §612.1, p. 307.

For the foregoing reasons we vacate the summary judgment entered by the Trial Judge and remand to the Trial Court for further proceedings consistent with this opinion.

The costs of the appeal are assessed to appellees.

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Herschel P. Franks, J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.