IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

THOMAS H. JACKSON, JR., and BEVERLY V. JACKSON	)	HAMILTON COUNTY
	)	03A01-9504-CH-00116
Plaintiffs-Appellees, and	)	
ROBIN LYNN JACKSON, PEGGY ROSE, STACIE R. HENRY, and ALLSTATE INSURANCE COMPANY	)	
Intervening Plaintiffs-Appellees, and Cross-Appellant	)	HON. R. VANN OWENS, CHANCELLOR
v.	)	
JAMES G. HAYES and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	
Defendants-Appellants and Cross-Appellees	)	AFFIRMED AND REMANDED

JOSEPH C. WILSON, III, OF CHATTANOOGA FOR APPELLANTS JAMES G. HAYES and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

LEX A. COLEMAN OF CHATTANOOGA FOR APPELLEES THOMAS H. JACKSON, JR., BEVERLY V. JACKSON, ROBIN LYNN JACKSON, PEGGY ROSE, STACIE R. HENRY, and APPELLEE/CROSS-APPELLANT ALLSTATE INSURANCE COMPANY

OPINION

Goddard, P.J.

James G. Hayes[1] and State Farm Mutual Automobile Insurance Company appeal a judgment of the Hamilton County Chancery Court which provided in part the following:

> 2. State Farm Mutual Automobile Insurance Company, therefore, shall be liable to Robin Lynn Jackson for:
>
> (a) the $13,000 judgment entered in favor of Peggy S. Rose against Robin Lynn Jackson in Div. II Hamilton County Circuit Court case No. 92-CV-454, plus
>
> (b) post judgment interest on that judgment accrued at the applicable legal rate of interest from the date of entry of the judgment, June 8, 1993, until it is fully satisfied by State Farm, plus,
>
> (c) any court costs taxed in that case.
>
> 3. State Farm Mutual Automobile Insurance company shall also be liable to Robin Lynn Jackson for:
>
> (a) the $13,425.26 judgment entered in favor of Stacie Henry against Robin Lynn Jackson in United States District Court for the Eastern District of Tennessee case No. 1:92-cv-311, plus
>
> (b) post judgment interest on that judgment accrued at the applicable legal rate of interest from the date of entry of the judgment, June 8, 1993, until it is fully satisfied by State Farm, plus
>
> (c) any court costs taxed in that case.
>
> 4. State Farm Mutual Automobile Insurance Company shall also be liable to the Jacksons for the $2,346.00 in attorneys fees incurred with John Higgason for his representation of them in the Peggy Rose and Stacie Henry lawsuits.

The judgment was rendered as a result of damages sustained by Thomas J. Jackson, Jr., Beverly V. Jackson, and

---

[1] Although James G. Hayes, agent for State Farm, filed a notice of appeal and a joint brief with State Farm in this Court, he was not cast in judgment.

Robin Lynn Jackson, their daughter, arising from two law suits filed against them which their liability carrier failed to provide coverage or defend. Allstate Insurance Company ("Allstate"), the uninsured motorist carrier as to the vehicle in which the plaintiffs in the underlying case were riding, cross-appeals a judgment denying its claim for the attorney fees incurred in defense of the Jacksons in the above-mentioned actions.

The facts relevant to this appeal are as follows. On December 16, 1988, State Farm, through its agent James G. Hayes, issued an automobile liability policy to Thomas and Beverly Jackson. The policy insured Mr. and Mrs. Jackson's 1979 Oldsmobile Cutlass for a policy period beginning on December 16, 1988, and ending on June 16, 1989. The policy could be renewed every six months upon payment of the premium on or before the due date.

At that time, Mr. and Mrs. Jackson had various policies with State Farm, including two other separate automobile liability policies, a homeowners policy and flood insurance. Each of the policies had different due dates. Through the years Mr. and Mrs. Jackson sometimes exercised their option to pay half of a policy's premium, plus $2.00, during the first 90 days of the policy term.

Over the course of a year, Mr. and Mrs. Jackson received a large number of mailings from State Farm. State Farm regularly sent mailings on each of the various policies, including renewal notices, balance due notices, and cancellation notices. The various notices bore a policy number, a description of the insured vehicle, the amount due on the policy, and the applicable expiration or cancellation date.

As for the policy on the 1979 Cutlass, Mr. and Mrs. Jackson paid the premium in full at the time the policy was issued in 1988. Mr. and Mrs. Jackson again paid the premium in June of 1989. On December 11, 1989, Mrs. Jackson went to Mr. Hayes' agency prepared to pay the entire amount of the premium. Mr. Hayes' employees mistakenly advised Mrs. Jackson that the amount due on the policy was considerably less than the amount of the premium. Mrs. Jackson requested that the employee double check, which the employee did with the same result. Because of this mistake, the entire premium was not paid. As a result, State Farm treated the policy as lapsed and sent no more premium notices on the 1979 Cutlass and no more premium payments were made on that policy by Mr. and Mrs. Jackson.

On July 9, 1991, while being driven by Robin Jackson, the 1979 Cutlass was involved in an accident. As a result of the accident, suit was brought against Mr. and Mrs. Jackson and Robin in two separate court actions by Peggy Rose and Stacie Henry. State Farm, after investigation, denied coverage on the policy to

Mr. and Mrs. Jackson and Robin. Thus, State Farm did not participate in either of the actions. Mr. and Mrs. Jackson acquired the services of Mr. Higgason, an attorney, for their defense in these actions. Also, pursuant to the uninsured motorist interest in Miss Henry's grandmother's automobile insurance policy with the Allstate Insurance Company, Allstate entered a defense on behalf of Robin Jackson in both lawsuits.

The actions resulted in a judgment in favor of Ms. Rose in the amount of $13,000 against Ms. Jackson and a judgment in favor of Ms. Henry in an amount of $13,425.26, also against Ms. Jackson. Mr. and Mrs. Jackson incurred $2,346 in attorney fees to their attorney. Allstate claims to have incurred legal fees totaling $15,992.68.

Thereafter, Mr. and Mrs. Jackson and Allstate brought suit in the Hamilton County Chancery Court against State Farm and its agent Mr. Hayes for the judgments found against Robin, as well as the costs incurred in the defense of the actions. The Chancellor found that Mr. Hayes' employee had made a representation that was not in accord with the truth by representing that the premium that was due on the 1979 Cutlass was less than it was in actuality, that Mr. and Mrs. Jackson relied on this representation and as a result of this reliance, Mr. and Mrs. Jackson had changed their position to their detriment. Thus, the Chancellor found that State Farm was estopped to deny coverage and directed Allstate to pay the amount

of the awards in the Rose and Henry lawsuits, as well as the attorney fees incurred by Mr. and Mrs. Jackson. The Chancellor also directed Mr. and Mrs. Jackson to pay the overdue premiums on the policy covering the 1979 Cutlass. Allstate's claim for attorney fees was denied.

The Appellants, State Farm and Mr. Hayes, contend that the Chancellor erred in concluding that they were estopped, through the actions and statements of their employees, to deny coverage to Mr. and Mrs. Jackson and their daughter, Robin Lynn Jackson, for her accident of July 9, 1991. Allstate cross-appeals, arguing that the Chancellor erred in disallowing an award of attorney fees in its favor.

Estoppel in the insurance context was extensively discussed by our Supreme Court in Bill Brown Const. v. Glens Falls Ins. Co., 818 S.W.2d 1 (Tenn. 1991). There the Court cited the Tennessee Agency Statute for the proposition that any conflict arising from reliance, on the part of an insured, on the representations of the insurance agent should be construed in the favor of the insured. Any provision of the insurance policy may be waived by the acts of the insurer's agent. Bill Brown Const. Co., supra. However, the insured has the burden of proving the elements of estoppel.

Generally, when an insured reasonably but detrimentally relies on the statements of an insurance agent, the insurance

company will be estopped to deny coverage. "In an action on a contract of insurance, the insurance company is generally considered estopped to deny liability on any matter arising out of the fraud, misconduct, or negligence of an agent of the company." Henry v. Southern Fire & Casualty Co., 46 Tenn. App. 335, 330 S.W.2d 18 (1958). In order to succeed on a claim of estoppel, a claimant must show conduct on the part of the insurer or its agent which amounts to a false representation, that there was an intention or expectation that the representation would be acted upon by the insured, and actual or constructive knowledge of the facts. See Robinson v. Tennessee Farmers Mut. Ins. Co., 857 S.W.2d 559 (Tenn. App. 1993). The insured must also show lack of knowledge and the means of knowledge of the truth as to the represented facts, reliance, and prejudicial change in position.

The review of the findings of fact of the trial court is de novo and there is a presumption of correctness unless the preponderance of the evidence shows otherwise. Rule 13(d), Tennessee Rules of Appellate Procedure. Thus, only if the evidence preponderates against the Chancellor's findings will his judgment be reversed on appeal.

The Chancellor found that over the course of 15 years the Appellant provided Mr. and Mrs. Jackson with all of their automobile and homeowners insurance and that they had established a course of dealing in which Mr. and Mrs. Jackson frequently personally inquired as to the amount of premiums due rather than

relying on mailed statements. As to these inquiries, the Chancellor found that Mr. and Mrs. Jackson relied, on a regular basis, on the representations made by Mr. Hayes' employees concerning the amount of premium payments they owed. Further, the Chancellor found that upon attempting to pay the premium on the 1979 Cutlass, Mrs. Jackson was incorrectly informed of the amount of premium due on the policy. Mrs. Jackson informed the employee that she thought that more was due on the policy. The employee double checked and reassured Mrs. Jackson that the misrepresented amount was correct. As a result of this mistake, the policy lapsed and was canceled. Thus, it is apparent that the elements of estoppel as set out in Robinson are met and the evidence does not preponderate against the Chancellor's findings.

The Appellants argue that estoppel should not be found in this case because Mr. and Mrs. Jackson had the ability to ascertain the truth of the representation. "[T]here can be no estoppel where both parties have the opportunity and the means of ascertaining the truth." Rambeau v. Farris, 186 Tenn. 503, 212 S.W.2d 359 (1948). See also Robinson, Supra. State Farm relies on a finding by the Chancellor that the Appellants provided Mr. and Mrs. Jackson with sufficient information that they could have ascertained the due dates and amounts owed on their various policies. However, as already noted, the Chancellor also found that for over 15 years, Mr. and Mrs. Jackson had all of their automobile and homeowners insurance with State Farm through Mr. Hayes' agency. Including the policy at issue, at the time of the

misrepresentation, Mr. and Mrs. Jackson had five separate insurance policies. These policies generated a large number of mailings. The Chancellor found that it became the practice of Mr. and Mrs. Jackson to inquire personally as to the status of the policies and not to rely on the various mailings. After the misrepresentation by Mr. Hayes' employee and the subsequent lapse of the policy, Mr. and Mrs. Jackson made additional inquiries and were assured that their policies were current.

Thus, we find that, by a preponderance of the evidence, the Chancellor was correct in finding the elements of estoppel were met. We accordingly affirm this portion of the Chancellor's judgment.

Allstate, as Cross-Appellant, argues that the Chancellor erred by denying its cost of defending Mr. and Mrs. Jackson in the Rose and Henry lawsuits. Allstate argues that because State Farm wrongfully denied coverage, they were forced to provide defense by virtue of Ms. Henry's grandmother's uninsured motorist coverage. Allstate contends that the Chancellor's ruling allows State Farm to be unjustly enriched by the value of the defense provided by Allstate. On this issue, the Chancellor found:

> State Farm is responsible for the attorney hired by Mr. and Mrs. Jackson. Allstate Insurance Company had their attorneys in the lawsuit *not to benefit or to protect Mr. and Mrs. Jackson or Robin Jackson. They were in the lawsuit to hold the judgment down to minimize any*

> *sums they would have to pay*. Such did not inure to the benefit of Mr. and Mrs. Jackson. (Emphasis supplied.)

The Tennessee Legislature, in T.C.A. 56-7-1206, has provided that when an uninsured motorist policy is relied on in an action against an uninsured, the uninsured motorist carrier "shall thereafter have the *right* to file pleadings and take other action allowable by law in the name of the owner and operator of the uninsured motor vehicle." (Emphasis supplied). Thus, it is clear that an uninsured motorist policy carrier, whose policy has been invoked, has a right, but no statutory duty, to defend on behalf of the uninsured motorist.

Allstate cites the rule in Tennessee that attorney fees are recoverable under an independent tort theory. The rule states:

> One who through the tort of another *has been required* to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action. (Emphasis supplied.)

Restatement (Second) of Torts § 914(2) (1977). See also Pullman Standard Inc. v. Abex Corp., 693 S.W.2d 336 (Tenn. 1985); Wilson Estate v. Arlington Auto Sales, 743 S.W.2d 923 (Tenn. App. 1987). This is consistent with the rule that these expenses may only be recovered "where the natural and proximate consequence of a

tortious act of defendant has been to involve plaintiff in litigation with a third person." Pullman Standard, supra.

In Wilson Estate, this Court awarded attorney fees when an insurance agent was forced to defend itself in an action in which the insurer had wrongfully denied coverage. This Court focused on the bad faith of the insurer and the relationship between the insurer and its agent.

In the present case, though we have found that State Farm wrongfully denied coverage, there has been no showing of bad faith. Rather, coverage was denied due to a clerical mistake or a computer error. Further, in Wilson Estate, the relationship of the parties was one of principal and agent. There is no similar relationship between State Farm and Allstate and they share no common liability with respect to the other parties in this these cases. Finally, as stated above, Allstate had no duty to provide any defense for Mr. and Mrs. Jackson. We agree with the reasoning of the Chancellor that Allstate entered a defense on behalf of Mr. and Mrs. Jackson in order to minimize the amount of any judgment rendered against Mr. and Mrs. Jackson or Robin which they would have to pay under the uninsured motorist policy. This defense enured to the benefit of Allstate more directly than any other party in this suit.

For the forgoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of the costs below. Costs of appeal are adjudged against State Farm.

_____
Houston M. Goddard, P.J.

CONCUR:

_____
Herschel P. Franks, J.

_____
Clifford E. Sanders, Sr.J.