IN THE COURT OF APPEALS OF TENNESSEE

PERMANENT GENERAL ASSURANCE CORPORATION,	)	C/A NO. 03A01-9507-CH-00215
	)	GREENE COUNTY CHANCERY COURT
Plaintiff-Appellee,	)	FILED January 26, 1996 Cecil Crowson, Jr. Appellate Court Clerk
v.	)	
TAMMY L. NEASE, ANNA RUTH WITT, JOSEPH D. WITT, WANDA CHIPPS, MIRANDA McMAHAN, b/n/f and mother, WANDA CHIPPS, and ARVINE TAYLOR,	)	HONORABLE DENNIS H. INMAN, CHANCELLOR
Defendants,	)	
and	)	
TENNESSEE FARMERS MUTUAL INSURANCE CO., and ATLANTA CASUALTY COMPANY,	)	
Defendants-Appellants.	)	AFFIRMED AND REMANDED

JEFFREY M. WARD of MILLIGAN & COLEMAN, Greeneville, for Appellants TENNESSEE FARMERS MUTUAL INSURANCE COMPANY and ATLANTA CASUALTY COMPANY

JERRY M. MARTIN, Knoxville, for Appellee

OPINION

Susano, J.

This is a declaratory judgment action filed pursuant to T.C.A. § 29-14-101, *et seq*. This litigation traces its genesis to a two-vehicle accident involving a 1986 Chevrolet Cavalier automobile driven by the defendant Tammy L. Nease (Nease). A number of claims were asserted against Nease whose negligence apparently caused the accident. Permanent General Assurance Corporation (PGA) filed the instant action against Nease and others seeking a determination that these claims were not covered under the liability feature of the automobile insurance policy issued by PGA to Nease's husband. This suit named as defendants the accident claimants as well as Tennessee Farmers Mutual Insurance Company and Atlanta Casualty Company (Tennessee Farmers/Atlanta Casualty). These two insurance companies had been sued as uninsured motorist carriers in the underlying tort action brought against Nease. The Chancellor, following a non-jury hearing, determined that PGA's policy did not afford coverage to Nease for the accident. Tennessee Farmers/Atlanta Casualty appeal, challenging the correctness of the Chancellor's ruling. The individual defendants did not appeal.

PGA acknowledges that its policy was in force at the time of the accident. It also concedes that Nease was insured under that policy as the spouse of the named insured. However, it takes the position that the Chevrolet Cavalier was not covered under the policy because that vehicle was owned by Nease when the policy was issued, but was not reflected as an owned vehicle on

the policy or added to the policy at any time prior to the accident. PGA relies upon the following exclusion in the policy:

> **EXCLUSIONS**
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> * * *
>
> **B.** We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> * * *
>
> 2. Any vehicle, other than "your covered auto," [a 1986 Mazda truck] which is:
>
> a. owned by you; or
>
> b. furnished or available for your regular use.

Tennessee Farmers/Atlanta Casualty argue that PGA is estopped to deny coverage because it undertook to adjust the claims arising out of the accident, paid $2,150 to settle a property damage claim asserted by one of the claimants, and waited some nine months after the accident before advising Nease in writing that it was adjusting the claims under a reservation of rights. PGA counters by arguing that it initially adjusted the claims based upon a misrepresentation by Nease that the Chevrolet Cavalier belonged to her ex-husband and was not, using the words of the policy, "available for [her] regular use." PGA claims that it acted promptly when it determined that the vehicle had been awarded to Nease in her divorce suit against her former husband.

I

On August 7, 1992, Nease's husband, Bobby Nease, purchased an automobile insurance policy from PGA through David Niehoff, an independent agent. The policy provided insurance for a 1986 Mazda truck. The Neases told Niehoff that they had another car, but that it was inoperable. Niehoff told them that it was not necessary to list the vehicle on the policy, because it could be added when it was operable.

At all relevant times, the 1986 Chevrolet Cavalier was titled in the name of Donald L. Paxton, Nease's ex-husband. However, Nease had been awarded the vehicle in her March 2, 1990, divorce from Paxton. As the Chancellor found in the instant case, Nease was the equitable owner of the car; the only step that had not been taken was the securing of a new title in Nease's name.

The accident occurred exactly one month after the policy was issued. Nease promptly called Niehoff and told him she had been involved in an accident while driving the Cavalier. Niehoff told her there was no coverage on the Cavalier[1], and he testified that she asked him whether they could "back date" an endorsement so as to include it within the policy's coverage. He told Nease that this was not possible. When Nease delivered the

[1]Niehoff testified that he assumed that the Chevrolet Cavalier was the inoperable car that the Neases had referred to when they applied for the PGA policy.

accident report to Niehoff, the latter noticed that it listed Donald L. Paxton as the owner of the Cavalier. He then told her that "[PGA] might pay the claim since it was not her car and she [was] covered driving other people's cars." Niehoff testified that they discussed the ownership of the car, but that he could not remember whether she told him she owned it as a result of the divorce. He stated that he had some question about who actually owned the Cavalier; but since he had no claims authority, he simply forwarded Nease's claim to PGA.

Niehoff testified that he later had a phone conversation with Jim Strickland, PGA's initial adjuster on the Nease file. Niehoff stated he told Strickland that the Cavalier was not titled in Nease's name and that there needed to be further investigation regarding the ownership and use of the vehicle. Strickland denied that Niehoff talked to him about Nease; however, it is clear that someone in PGA's claims office spoke to Niehoff because there is an entry, dated September 16, 1992, in the "data log" in the Nease file, documenting Niehoff's call. Significantly, the log entry makes no mention of any need to investigate the coverage issues of ownership and regular use of the car. Strickland testified that the handwritten entry in the data log was not put there by him.

Strickland testified that on September 9, 1992, he reviewed the file for the first time and also had a phone conversation with Nease. He testified that based on reading the

accident report, which stated that "the insured was driving her ex-husband's vehicle," and his discussion with Nease (who told him that the car was her ex-husband's and that she had borrowed it), he was proceeding on the assumption that there was coverage for the vehicle. He stated that the data log entry of September 16 raised coverage questions, but that those questions were answered by the notations in the log. The relevant part of the handwritten log entry is as follows:

> Discussed with agent
> 1) Liab? questionable
> 2) Primary insurance on vehicle
> I'd [insured] was driving? NONE
> 3) Freq and regular use? NO
> Lives in same household NO

Strickland did no further investigation on the question of whether the car was covered under the insurance policy. He testified that he did not discover that Nease actually owned the car until after he had stopped working for PGA.

On December 29, 1992, PGA settled the property damage claim against Nease for $2,150. PGA did not settle the claims against Nease for personal injuries.

In March, 1993, a new adjuster, David Weissinger, took over the Nease file from Strickland. He first reviewed the file on June 3, 1993, and he testified that he saw nothing in the file to indicate that someone other than Nease's former husband owned the car; or to suggest that Nease was a regular user of the car.

Weissinger also discovered on June 3 that a lawsuit had been filed against Nease[2] and that apparently Nease had not forwarded the suit papers to the company.[3] He testified that he tried unsuccessfully to call Nease on June 7 and June 9, and that he sent her a reservation of rights letter on June 11. He stated the reason for sending that letter was

> [b]ecause it appeared that suit had been filed and served and we had no knowledge or record in the file, and I was trying to get hold of her to find out if indeed she had been served, so I sent her a reservation of rights for failure to forward suit papers immediately.

On June 15, Weissinger talked with Nease; he testified that they did not discuss ownership or frequent use of the car at that time, because he was not then aware of any possible problems on these issues. On June 21, Weissinger spoke with the attorney who represented Nease's ex-husband in the divorce, who sent him a copy of the final divorce judgment, which clearly indicated that Nease was the owner of the Cavalier. Weissinger testified that prior to this point, he was unaware that there was any question regarding the car's ownership. He sent out a second reservation of rights letter on June 22, 1992, which stated:

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[2]The underlying tort action was served on Nease in the February/March, 1993, time frame.

[3]However, it is clear from the testimony of Nease and Niehoff that she promptly delivered the suit papers to Niehoff who immediately forwarded them to PGA.

> We are making this reservation of rights for the following problems or questions:
> 1. Driving an owned and or [sic] driving vehicle provided for regular use and any other policy violations or other valid reasons.
>
> Therefore, you are hereby notified that Permanent General Assurance, in investigating this loss or any claims which may result from it, does not waive any of its rights or admit any obligation under the policy.

In response to the Chancellor's inquiry as to why nine months had elapsed before PGA sent a reservation of rights letter, Weissinger testified that the Nease file had always reflected that she was driving a non-owned vehicle, not provided for her regular use, and therefore he had no reason to suspect there was a coverage problem.

On July 15, 1993, Weissinger had another phone conversation with Nease. He testified that when he asked why she was driving the Cavalier, she responded by saying "I borrowed the car from my ex-husband to take his kids to the doctor." When he asked her if she had received the car in the divorce, Nease acknowledged, for the first time, that it had been awarded to her. It appears that at that point they began to discuss the fact that PGA had erroneously paid the property damage claim. Nease indicated that she would be willing to pay back the

settlement to PGA in monthly installments.[4] Nease actually sent PGA at least three installment payments before she stopped. PGA filed its Complaint for Declaratory Judgment on July 21, 1993.

II

The standard of review in this non-jury case is *de novo*, but the record comes to us accompanied by a presumption of correctness that "carries the day" unless the preponderance of the evidence is otherwise. T.R.A.P. 13(d). We find that the evidence preponderates in favor of the Chancellor's holding that PGA should not be estopped from relying upon the exclusion in its policy.

The parties agree that the applicable Tennessee rule of law on the issue at bar is presented in the case of ***American Home Assurance Co. v. Ozburn-Hessey,*** 817 S.W.2d 672, 675 (Tenn. 1991), wherein the Supreme Court said:

> The general rule supported by the great weight of authority is that if a liability insuror, *with knowledge of a ground of forfeiture or noncoverage under the policy*, assumes and conducts the defense of an action brought against the insured, without disclaiming liability and giving notice of its reservation of rights, it is thereafter precluded in an action upon the policy from setting up such ground of forfeiture or noncoverage. In other words, the insuror's

[4]Nease testified that the main reason she agreed to repay the settlement money was that Weissinger threatened her with criminal fraud charges. Weissinger denied making any such threats.

> unconditional defense of an action brought against its insured, constitutes a waiver of the terms of the policy and an estoppel of the insured [sic] to assert such grounds.

Id., quoting ***Maryland Cas. Co. v. Gordon,*** 371 S.W.2d 460, 464 (Tenn. App. 1963), in turn quoting 29A Am. Jur.--Insurance--§ 1465, p. 577 [now 44 Am. Jur. 2d--Insurance--§ 1423, p. 369] (emphasis added). The key question in this case is the point at which PGA obtained knowledge that Nease was the owner of the Cavalier, and that she had the primary use and control of the car. The answer to that question will determine whether PGA acted in a timely fashion to reserve its rights to deny coverage. In this regard, the same section of *American Jurisprudence 2d,* indirectly quoted above, contains the following statement:

> A liability insurer does not, however, by conducting the defense of a suit against the insured, waive a ground of forfeiture or noncoverage of which it at that time has no knowledge, especially where, in addition to such lack of knowledge, the insurer is misled by misrepresentations into defending the suit.

44 Am. Jur. 2d--Insurance--§ 1423, p. 371; *Cf.* ***Fulton Co. v. Massachusetts Bonding & Ins. Co.,*** 197 S.W. 866, 868 (Tenn. 1917).

We find that the evidence in this case, as set forth above, preponderates in favor of the conclusion that PGA did not have knowledge that Nease was the owner and/or primary user of the Cavalier until Weissinger received a copy of the divorce

decree. The decree clearly showed the true owner, but up until that point, there was nothing in the Nease file to cause suspicion regarding ownership or control of the vehicle. As noted earlier, the file note of September 16 indicated that Nease was *not* a frequent and regular user of the automobile, suggesting there was coverage under the policy. The accident report stated that the "insured was driving her ex-husband's vehicle," in accordance with the fact that the car was still legally titled in Paxton's name. Both Strickland and Weissinger testified that they relied on Nease's assertions that she did not own the car.

The appellants point to the following testimony by Weissinger in support of their position that PGA had earlier knowledge that Nease owned the Cavalier:

> Q: So based upon the information that you had in the file, without talking to Mrs. Nease, you were able to generate a reservation of rights letter on two grounds immediately when you reviewed the documentation submitted by the agent?
>
> A: That's correct.
>
> Q: And that documentation was submitted back in September 1992?
>
> A: That's correct.
>
> Q: The same information that Mr. Strickland had in his possession?
>
> A: Um-hmmm.

When these statements are considered in the context of all of Weissinger's testimony, it is apparent that the "two grounds" referred to in the first reservation of rights letter were reasons other than those regarding ownership or regular use. The first reservation of rights letter contained the following two grounds for PGA's reservation of rights:

> 1. Failure to report receipt of legal papers.
> 2. Operating a non owned vehicle and not being a resident of the named insured's address and any other policy violations or other valid reasons.

Weissinger admitted that the second ground "doesn't make sense"; however, it is worth noting that the second ground given, although perhaps not a legitimate or correct reason to deny coverage, does state "operating a non owned vehicle," indicating that PGA did not know the car was actually owned by Nease when the first letter was sent. Regarding the first ground, it appears that Weissinger was alluding to the fact that the file did not reflect receipt of the suit papers[5]. We do not think Weissinger's statements should be construed as any kind of admission regarding knowledge on the dispositive ownership and regular use issues.

The record reveals that after Weissinger read the divorce decree and discovered that Nease was the true owner of

[5]It is not clear in the record before us as to what happened to the suit papers transmitted to PGA by Niehoff; however, in view of our resolution of this case, the solution of that "mystery" is immaterial.

the car, PGA acted promptly in reserving its rights to deny coverage. Since PGA did not have knowledge of the true ownership and regular use of the Cavalier until shortly before it sent the second reservation of rights letter, its action in settling the property damage claim, and its delay in sending the second letter, did not constitute a waiver of its right to rely upon the above-quoted exclusion provision.

We affirm the judgment of the Chancellor. This case is remanded for collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed and assessed to the appellants.

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Charles D. Susano, Jr., J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.