IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JOANNE WHITE & DAVID WHITE,)
)
Plaintiffs/Appellees,) **Shelby Chancery No. 101989-2 R.D.**
)
VS.) **Appeal No. 02A01-9502-CH-00031**
)
TENNESSEE FARMERS MUTUAL)
INSURANCE COMPANY,)
)
Defendant/Appellant.)

FILED

April 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE FLOYD PEETE, JR.,CHANCELLOR

ANDREW HUME OWENS
Memphis, Tennessee
Attorney for Appellant

JERE FONES
THORP AND FONES
Memphis, Tennessee
Attorney for Appellees

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

DAVID R. FARMER, J.

HOLLY KIRBY LILLARD, J.

The primary issue in this case is whether the insured complied with certain notice

provisions of an automobile liability insurance policy issued by defendant. The trial court held that there was sufficient compliance with the policy and entered judgment against the defendant insurance company. For the reasons stated below, we affirm.

All of the determinative facts are undisputed. Defendant issued an automobile liability insurance policy to Pete Nickson, Jr. In 1987, plaintiffs were injured in an automobile accident that allegedly was a result of Nickson's negligence. Plaintiffs brought suit against Nickson, who was served on September 19, 1991. Nickson died on October 23, 1991, without having notified defendant of the pending suit and without having forwarded to defendant any papers relating to the suit.

Plaintiffs' attorney spoke with an agent of defendant on October 28, 1991, and informed the agent that a suit was pending against defendant's insured. Plaintiff''s attorney also told defendant's agent that more than thirty days had elapsed since effectuation of service of process upon the insured and that, therefore, plaintiffs were preparing to take a default judgment against Nickson. Defendant took no action to defend or otherwise appear in the suit. On December 23, 1991, a default judgment was entered in a Missouri circuit court against Nickson in the amount of $20,000.00.

Plaintiffs then filed a third party beneficiary suit against defendant in the Chancery Court of Shelby County, Tennessee, seeking to recover the amount of the judgment under Nickson's insurance policy. Defendant argued that it was not obligated to pay benefits under the policy because Nickson, the insured, failed to notify defendant promptly of the suit and failed to forward litigation papers to defendant, both of which were required by the policy.

Following a bench trial, the chancellor found that the insured had promptly notified defendant of the accident shortly after it occurred, and that defendant had actual knowledge of the lawsuit by October 28, 1991. The chancellor further found that defendant was not prejudiced by the insured's failure to notify it of the institution of the suit.

Accordingly, the trial court rendered a judgment against defendant in the amount of $20,000.00. It is from this judgment that defendant appeals.

The insurance policy provides, as pertinent to the issues before us:

> **PART E--DUTIES AFTER AN ACCIDENT OR LOSS**
>
> **A.** We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.
>
> **B.** A person seeking coverage must:
> 1. Cooperate with us in the investigations, settlement or defense of any claim or suit.
> 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss....
>
> * * * * * *
>
> **PART F--GENERAL PROVISIONS**
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> * * * * * *
>
> **LEGAL ACTION AGAINST US**
>
> **A.** No legal action may be brought against us until there has been full compliance with all the terms of this policy...

Defendant contends that the trial court erred in holding that plaintiffs were entitled to recover benefits under the policy when the insured failed to notify defendant promptly of the suit and failed to forward copies of notices and legal papers regarding the suit. Defendant further argues that the plaintiffs did not carry their burden of proof in offering an excuse for the insured's failure to provide such notices and suit papers.

We commence our analysis by noting that insurance contracts are subject to the same rules of construction and enforcement as apply to contracts generally. McKimm v. Bell, 790 S.W.2d 526, 527 (Tenn. 1990). Consequently, in the absence of fraud or mistake, an insurance policy will be interpreted and enforced as written, even though the policy may contain terms that are harsh or unjust. Allstate Ins. Co. v. Wilson, 856 S.W.2d 706, 708 (Tenn. App. 1992).

Policy requirements for prompt notice of a claim or suit to the insurer are valid and enforceable conditions precedent to coverage. Wilson, 856 S.W.2d at 709; McKimm, 790 S.W.2d at 528; Hartford Accident & Indemnity Co. v. Partridge, 192 S.W.2d 701, 702 (Tenn. 1946). In the absence of the requisite notice, no coverage is afforded, even if the insurer has not been prejudiced by the delay. Tennessee Farmers Mutual Ins. Co. v. Nee, 643 S.W.2d 673 675 (Tenn. App. 1982); Wilson, 856 S.W.2d at 709.

Although the subject insurance contract was between Nickson and defendant, plaintiffs' entitlement to benefits under the policy is subject to the provisions and limitations contained therein. This fact stems from the longstanding proposition that the rights of a third person can rise no higher than, and are dependent upon, the rights of the insured. Hartford Accident & Indem. Co. v. Partridge, 192 S.W.2d 701, 703 (Tenn. 1946); See accord, Wilson, 856 S.W.2d at 709; Jamison v. New Amsterdam Casualty Co., 36 Tenn. App. 267, 254 S.W.2d 353, 355 (1952).

Whether plaintiffs may recover under the insurance policy will ultimately turn upon the construction and application of the term "promptly." The policy requires the insured to notify defendant "promptly" of "how, when and where the accident or loss happened." The policy also requires the insured "promptly" to send to defendant "copies of any notices or legal papers received in connection with the accident or loss."

It is undisputed that the insured promptly notified defendant of the accident after it occurred. Thus, defendant may not properly attempt to deny coverage on grounds of untimely notice because, as defendant concedes, the insured did timely notify defendant of the accident. Accordingly, we will address only defendant's assertion that plaintiffs are precluded from recovery under the policy due to the insured's failure to forward notices and suit papers to defendant.

The word "promptly" has been interpreted by our courts in several cases. In the unreported decision of Allstate Ins. Co. v. Hamilton, No. 01-A-01-9006-CH-00221, 1990

WL 165071 (Tenn. App. Oct. 31, 1990), the court stated:

> The word, 'promptly' implies no less urgency of time than 'as soon as practicable', which has been held to mean when the insured becomes aware of facts which would suggest to a reasonably prudent person that the event for which coverage is sought might reasonably be expected to produce a claim against the insurer.

Id., No. 01-A-01-9006-CH-00221, 1990 WL, at *3.

This court, in both Whaley v. Underwood, No. 03A01-9408-CV-00305, 1995 WL 140723 (Tenn. App. March 31, 1995), and in Wilson, 856 S.W.2d at 709, quoted with approval the following passage from 44 AM. JUR. 2d *Insurance* § 1330:

> A requirement in a policy for 'prompt' or 'immediate notice' or that notice must be given 'immediately' 'at once', 'forthwith', 'as soon as practicable', or 'as soon as possible' generally means that notice must be given within a reasonable time under the circumstances of the case.

Wilson, 856 S.W.2d at 709; Whaley, No. 03A01-9408-CV-00305, 1995 WL, at *2.

Thus, in order for notices or legal papers to be deemed to have been sent or received "promptly," they must have been sent or received "within a reasonable time under the circumstances of the case." Lee v. Lee, 732 S.W.2d 275 (Tenn. 1987); Whaley v. Underwood, No. 03A01-9408-CV-00305, 1995 WL 247952 (Apr. 28, 1995 Tenn. App.). As this court recently stated, "the question of reasonableness in these type cases is an issue for the court." Whaley, No. 03A01-9408-CV-00305, 1995 WL, at *2 (citing Lee, 732 S.W.2d at 276).

All of the particular facts and circumstances of each case must be taken into consideration in determining the reasonableness of a delay in forwarding suit papers. Pertinent circumstances that may bear on the issue of the reasonableness are: (1) the time intervening between the accident and the date of notice to the insured, See generally, Melton v. Republic Vanguard Ins. Co., 548 S.W.2d 313, 315 (Tenn. App. 1976); (2) whether the claim is made directly by the insured person, Jackson v. State Farm Mutual Auto Ins. Co., 29 So. 2d 177 (La. 1946); C.T. Drechster, Annotation, *Liability Insurance: clause with respect to notice of accident or claim, etc., or with respect to forwarding suit*

papers, 18 A.L.R.2d 443 (1951); (3) the time when the injured party discovered the existence and identity of the insurer; Wilson, 856 S.W.2d at 709; (4) what, if any, prejudice to the insurer has been caused by the delay;[1] (5) good faith and due diligence of the injured party; Lee, 732 S.W.2d at 276; See generally, Hamilton, No. 01-A-01-9006-CH-00221, 1990 WL 165071 at *3; Hartford Accident & Indem. Co. v. Creasy, 530 S.W.2d 778, 780-81 (Tenn. 1975); Melton v. Republic Vanguard Ins. Co., 548 S.W.2d 313, 315 (Tenn. App. 1976); and (6) whether there was reasonable excuse for the insured's noncompliance.[2] Hamilton, No. 01-A-01-9006-CH-00221, 1990 WL 165071 at *3; Fisher v. Mutual of Omaha Ins. Co., 503 S.W.2d 191, 193 (Tenn. 1973); Creasy, 530 S.W.2d at 780; Melton, 548 S.W.2d at 314-15.

In evaluating the factors delineated above in conjunction with the facts of the present case, we conclude that the insured was excused from strict compliance with the policy requisites. First, it is undisputed that the insured notified defendant of the accident in a prompt manner. In addition, the injured party in this case is not the insured, but rather, is a third party claiming entitlement to benefits. Generally, where it is not the insured that is directly making a claim against its insurer, the fact that there is a delay is less likely to be deemed unreasonable. See, e.g., 18 A.L.R.2d at 449; Jackson v. State Farm Mutual Auto Ins. Co., 29 So. 2d 177 (La. 1946). Furthermore, we find that plaintiffs acted with due diligence in ascertaining and notifying defendant of the fact that a suit had been instituted against defendant's insured. Defendant was notified of the suit in ample time to appear and defend; consequently, we are unable to conclude that defendant was prejudiced by

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[1] There appears to be some disparity within Tennessee case law with respect to whether the existence or nonexistence of prejudice to the insurer has any bearing on notice provisions. It is well-established that "in the absence of notice as required no coverage is afforded even though...the insurer has not been prejudiced by the delay in notice." Wilson, 856 S.W.2d at 709; Hartford Accident & Indem. Co. V. Creasy, 530 S.W.2d 778 (Tenn. 1975); Phoenix Cotton Oil Co. v. Royal Indem. Co, 140 Tenn. 438, 205 S.W. 128 (1918). However, courts have found the existence of prejudice to an insurer to be relevant in several cases, including, McKimm, 790 S.W.2d at 527; Bush, 866 S.W.2d 575, 577 (Tenn. App. 1993); and Transamerica, Shelby Eq. No. 23, 1987 WL 12043, at * 2 (Tenn. App. June 10, 1987). From these cases can be gleaned the following proposition: When it is clear that an insured failed promptly to afford notice or forward papers, it is irrelevant whether the insurer was prejudiced. However, when initially determining whether the delay was "prompt," and was thus, reasonable, prejudice to the insurer is a factor to consider in assessing reasonableness. See, 18 A.L.R.2d at 449.

[2] Our courts have held that an insured's failure to notify or forward papers within a prescribed time is excusable. See, e.g., Munal Clinic v. Applegate, 38 Tenn. App. 280, 273 S.W.2d 712 (1954). Generally, however, a delay or failure to give notice must be attributable to circumstances beyond the control of the insured. Melton, 548 S.W.2d at 315.

the delay. Finally, we deem the fact that the insured passed away 34 days after he was served with process to be an adequate excuse for his failure to forward suit papers.

Plaintiffs have requested that they be awarded punitive damages due to defendant's alleged bad faith conduct. We do not find that this is an appropriate case for an award of punitive damages and, therefore, respectfully decline plaintiffs' request.

The judgment of the trial court is affirmed. Costs are taxed to defendant, for which execution may issue if necessary.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.