IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

TERRY NORRIS and wife, MELISA NORRIS,	)	C/A NO. 03A01-9611-CV-00373
Plaintiffs-Appellants,	)	HAMILTON CIRCUIT
v.	)	HON. THOMAS A GREER, JR., JUDGE BY DESIGNATION
JON P. SEABORG, DON W. POOLE, PHILLIP C. LAWRENCE, HERBERT A. THORNBURY, W. LLOYD STANLEY, JR., and JOHN R. MORGAN, individually and as partners doing business under the name and style of POOLE, LAWRENCE & THORNBURY; POOLE, LAWRENCE, THORNBURY & STANLEY; and POOLE, LAWRENCE, THORNBURY, STANLEY & MORGAN,	)	AFFIRMED AND REMANDED
Defendants-Appellees.	)	

TAYLOR W. JONES, and LINDA R. GREER, JONES COPELAND LEFKOWITZ & GREER, Atlanta, and EDWIN Z. KELLY, JR., KELLY, KELLY & GOUGER, P.C., Jasper, for Plaintiffs-Appellants.

E. BLAKE MOORE and JOHN B. BENNETT, SPEARS, MOORE, REBMAN & WILLIAMS, Chattanooga, for Defendants-Appellees.

OPINION

Franks. J.

In this legal malpractice action, the Trial Court granted defendants summary judgment and plaintiffs have appealed.

Plaintiff-Appellant Terry Norris was allegedly injured on February 14, 1984, by a piece of wood which fell from his employer's garage door. Defendant-Appellee Jon Seaborg was retained by Norris to represent him in a worker's

compensation claim against his employer and in a negligence action against Crawford Door Company. This action is based upon Seaborg's allegedly negligent representation of Norris in the suit against Crawford Door Company.

A letter dated May 10, 1984 was sent by Seaborg to the President of Crawford Door, Arthur Hunley[1]. Hunley in his affidavit executed in 1989, stated that he had received a letter from Seaborg, but could not be certain that the letter exhibited was the actual letter. He stated that he explained to Mr. Seaborg in a telephone conversation that he ?made it plain to Mr. Seaborg that I did not feel there was any liability on my company?, and had no recollection of whether anything concerning liability insurance was discussed. But, he was ?certain? that he did not mention that the company had filed for bankruptcy.[2] Subsequently, in May of 1993, Hunley gave his deposition and stated that during the conversation with Seaborg, Seaborg advised that he was not going to take the case and not to pay any attention to ?anything else?.

In his affidavit Seaborg states that he sent the letter of May 10, 1984 to Hunley, which letter concludes:

> Please forward this notice of our intent to pursue this claim to your insurance carrier or else contact me at your earliest convenience for further discussion.

In a matter of days, Arthur L. Hunley, Jr., President of Crawford Door, called Seaborg in response to the letter. Hunley stated that Crawford Door Company of Chattanooga had no

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[1] Hunley died in June of 1995.

[2] Crawford Door Company filed a bankruptcy petition on May 2, 1984, a and the bankruptcy was converted to a Chapter 7 on March 20, 1985.

liability insurance to cover the accident. Seaborg opined that he had no reason to question Hunley's statement that there was no insurance.

On March 11, 1988, plaintiff Norris examined the bankruptcy records and found the name of Crawford's insurance company listed. The insurance company was then finally notified on July 28, 1988. In a separate suit, the insurance company successfully defended against covering the claim because of the lack of timely notice.

This malpractice action was filed in July of 1991. The Trial Court granted summary judgments for defendants on the ground that Crawford Door had failed to give notice of the claim within the time required by its policy of insurance. Noting that the Tennessee Rules of Procedure provide no method for discovering the existence of insurance, the Court found that the time for notice had expired long before either of the lawyers were aware of the bankruptcy or could have discovered the existence of the insurance policy. Accordingly, he held that any subsequent failure of lawyers to discover the existence of the insurance was immaterial.

Crawford Door's insurance policy contained the following provision:

> (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonable attainable information with respect to the time, place and circumstances thereof and the names and addresses thereof injured and of available witnesses shall be given for the insured to the company or any of its authorized agents as soon as practicable.
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> (b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

This contractual requirement of notice to the insurer is a condition precedent to recovery under a policy. *Lee v. Lee*, 732 S.W.2d 275 (Tenn. 1987). The notice must be given promptly when a reasonable and prudent person would believe that an accident could give rise to a claim for damages. *Id.* at 276.

We review summary judgments *de novo* with no presumption of correctness. T.R.A.P. Rule 13(d). Where there is no genuine issue of the material fact the Trial Court may grant summary judgment. T.R.C.P. 56.03. In considering the motion, the Court must take the evidence in the light most favorable to the non-moving party. *Byrd v. Hall*, 847 S.W.2d 208, 210-211 (Tenn. 1993).

Under this standard, Hunley's became aware of the incident when he received the letter of May 10, 1984 from Seaborg. Tennessee requires that notice of an incident be given to an insurer even if the insured believes no harm was caused or no suit will result. *Nationwide Mutual Insurance Company v. Shannon*, 701 S.W.2d 615, 620 (Tenn. App. 1985). If no notice is given within a reasonable time, an insurance company may refuse to provide coverage for lack of notice. *Allstate Ins. Co. v. Wilson*, 856 S.W.2d 706 (Tenn.App. 1992).

Hunley had reasonable grounds to believe a claim might arise against Crawford Door once Seaborg's letter was received. He later said that the letter meant ?that they was suing me.? [sic]. Under the terms of the policy, he was required to give notice to his insurer as soon as practicable and/or immediately. Such terms generally require that notice

be given within a reasonable time under the circumstances of the case. *Whaley v. Underwood*, 922 S.W.2d 110, 113 (Tenn. App. 1995).

The elements of a legal malpractice claim are the employment of the attorney, negligent breach of a duty owed by the attorney to the client, and damages resulting from such negligence. *Blocker v. Dearborn and Ewing*, 851 S.W.2d 825, 827 (Tenn. App. 1992). Expert testimony is required to establish the professional duty owed in a malpractice case. *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. App. 1986).

Plaintiffs filed the affidavit of Kimbrough Mullins, which addresses only those actions that should have been taken after suit was filed in February, 1985 and Crawford Door failed to respond.[3] The affidavit of William Schwall takes issue with Seaborg's general ?failure to investigate? by not ascertaining the names of witnesses and looking into the strengths of the Norris' claim against Crawford Door. Schwall emphasizes that it is important to encourage a Defendant to contact his insurer. Finally, Schwall states that failure to sue a possibly solvent corporation solely because they do not have insurance is negligence. He states that suit should have been filed without a delay of nine months.

Hunley's actions indicate that he at no time had any intention of notifying his insurer. Neither does the

[3] Mullins states that Seaborg failed to exercise the required standard of care once the suit was filed by not communicating with Crawford Door after filing suit, conducting no discovery, conducting no investigation of the status of Crawford Door, not taking a default judgment. She faults Poole for failing to contact anyone representing Crawford Door before or after refiling the suit, conducting no discovery, conducting no investigation of the status of Crawford Door, not attempting to take a default judgment until two years after the company was in default, and taking no action in the bankruptcy case on the Norris' behalf.

statement that the suit should have been filed earlier, assist the plaintiff. There is simply no basis to infer that Hunley would have reported the matter to his insurance carrier if suit had been filed at any given time. The corporation had filed for bankruptcy and Hunley states unequivocally in the record why he did not give notice of this claim to his insurer, which reason, however specious, is not in dispute. In his deposition, Hunley testified:

> Q. What did you do about his [Terry Norris'] claims after the conversation with Mr. Seaborg?
>
> A. About whose claims?
>
> Q. Mr Norris?
>
> A. I didn't do nothing. I didn't have no claims. I didn't even call the insurance company.
>
> Q. All right. Did you not feel that you had a responsibility --
>
> A. No, ma'am.
>
> Q. -- to call the insurance company?
>
> A. No, ma'am, absolutely not.
>
> Q. Okay. Why not?
>
> A. Because the man [Norris] is lying, that's the reason.

Hunley concluded that the plaintiff was lying about the accident which formed the basis for his not reporting the matter to his insurance company.[4] In the face of this undisputed evidence, a trier of fact could not reasonably infer from the evidence that the attorney, through any of his actions or omissions, could be held responsible for Hunley's

[4] Hunley's actions buttress his statement. He failed to notify his insurer when he received the letter and when he was twice served with suits for the claim.

not reporting the accident within a reasonable time from the date Hunley learned of the claim.

Without drawing any conclusions regarding the manner in which the case was handled beyond that point, we conclude that the Trial Judge did not err in determining that the insurance company's ability to defend for lack of notice rendered moot any consideration of the defendants' representation subsequent to that time.

We affirm the judgment of the Trial Court and remand at appellants' cost.

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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.