IN THE COURT OF APPEALS OF TENNESSEE

LANDIS POSEY and DIXIE POSEY, as Administrators of the Estate of LANDIS STEVEN POSEY, Plaintiffs-Appellants, v. TROY D. WILLIAMS, DeWILLIS WILLIAMS and JERRY L. GRAY, Defendants, and TENNESSEE FARMERS MUTUAL INSURANCE COMPANY, Unnamed Uninsured Motorist Carrier, Defendant-Appellee.	)	C/A NO. 03A01-9603-CV-00080 SCOTT COUNTY CIRCUIT COURT HONORABLE CONRAD TROUTMAN, JUDGE

For Appellants

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For Appellee

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O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

This case presents a question of coverage under the uninsured motorist provisions of an automobile insurance policy issued by Tennessee Farmers Mutual Insurance Company (Tennessee Farmers) to Landis Posey and his wife, Dixie Posey (collectively referred to as "the Poseys"). The Poseys, as administrators of the estate of their son, Landis Steven Posey (Steven Posey), filed a tort action against three individuals for the wrongful death of their son. Process was served on Tennessee Farmers pursuant to the Tennessee uninsured motor vehicle statutes, T.C.A. § 56-7-1201, et seq. The trial court granted Tennessee Farmers' motion for summary judgment because it found from the undisputed facts that the plaintiffs had failed to give Tennessee Farmers timely notice of the automobile accident in which their son sustained fatal injuries. The plaintiffs appealed. They argue that summary judgment was improperly granted to Tennessee Farmers.[1] We affirm.

I

On June 3, 1992, Steven Posey was traveling as a passenger in an automobile owned by the defendant DeWillis Williams and being driven at the time by his son, the defendant Troy D. Williams, when their vehicle collided with a vehicle driven by the defendant Jerry L. Gray. Steven Posey was critically injured. He died the same day.

[1]The trial court directed the entry of a final judgment as to the plaintiffs' complaint against Tennessee Farmers, pursuant to Rule 54.02, Tenn. R. Civ. P. This appeal is only as to that part of this litigation.

The deceased was 30 years old at the time of the automobile accident that took his life. He had been residing with his parents. For the limited purpose of this summary judgment motion, Tennessee Farmers concedes that he was an additional insured under his parents' insurance policy.[2]

On May 27, 1993, seven days short of the one-year anniversary of the accident, Landis Posey notified Tennessee Farmers of his son's accident and death, and inquired as to whether their policy afforded any coverage for their son's death. Tennessee Farmers denied coverage, claiming it had not received timely notice of the accident.[3]

II

On this appeal, we must decide anew if the trial court's grant of summary judgment is appropriate. ***Cowden v. Sovran Bank/Central South***, 816 S.W.2d 741, 744 (Tenn. 1991); ***Mansfield v. Colonial Freight Sys***., 862 S.W.2d 527, 530 (Tenn. App. 1993). Since our inquiry presents us with a question of law, the judgment of the trial court comes to us unaccompanied by a presumption of correctness. ***Gonzales v. Alman Construction Co***., 857 S.W.2d 42, 44 (Tenn. App. 1993).

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[2]For the purpose of this appeal, the parties apparently concede that the individual defendants are uninsured.

[3]The Poseys argue that their agent read about the accident in a newspaper, the *Oneida Weekly*; however, there is no evidence to support their assertion that an agent of the company knew that the Poseys' son was involved in an accident covered by the policy in question. In the absence of such evidence, we do not find it necessary to address the significance of such a factual scenario.

The burden rests on Tennessee Farmers to show that it is "entitled to a judgment as a matter of law based on the undisputed facts." ***Wilkins v. Third National Bank in Nashville***, 884 S.W.2d 758, 761 (Tenn. App. 1994). If there is any doubt regarding its entitlement to a judgment at this preliminary stage of the proceedings, the motion must be denied. ***Byrd v. Hall***, 847 S.W.2d 208, 216 (Tenn. 1993).

III

The policy[4] issued to the Poseys contains the following provisions relevant to the issue before us:

> A person or entity seeking coverage must give us written notice of the accident or loss as soon as reasonably possible. The notice must state:
>
> 1. name, address and telephone number of the person or entity seeking coverage; and
> 2. the names and addresses of all persons involved; and
> 3. the names and addresses of all witnesses; and
> 4. facts of the accident or loss, including the hour, date, and place.
>
> * * * *
>
> . . . persons and entities seeking coverage under Uninsured Motorist Coverage must:
>
> 1. notify us as soon as possible of their intention to seek such coverage; . . .

[4]The Poseys argue in their brief that they "cannot be found to have violated some contractual provision which is not in evidence." It is true that their policy was not made a part of the record until January 11, 1995, some 12 days after the motion for summary judgment was argued on December 30, 1994. It is also true that we can only consider matters that were before the trial court. Rule 56, Tenn. R. Civ. P.; ***Reeves v. Thompson***, 490 S.W.2d 525, 527 (Tenn. 1973). However, the order granting summary judgment was not entered until March 9, 1995, long after the policy was filed. That order recites, among other things, that "the policy . . . requires notice as soon as possible of a claim under the policy." It is clear the policy was before the trial court when it formally awarded summary judgment.

The Poseys acknowledge that the first contact either of them had with Tennessee Farmers following the June 3, 1992, accident was Mr. Posey's notification and inquiry to the company on May 27, 1993.

In ***Lee v. Lee***, 732 S.W.2d 275 (Tenn. 1987), a case involving uninsured motorist coverage, the Supreme Court interpreted notice provisions conceptually identical to the one at issue in this case. The court held that such provisions require "notice within a reasonable time under the circumstances of the case." *Id*. at 276. The court further expounded on the requirement by holding that such provisions

> . . . impos[e] a duty on an insured to give notice when he becomes, or should become 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.

The ***Lee*** case also addresses those situations where a claimant argues that he or she did not know, until shortly before giving notice, that a policy of insurance existed providing uninsured motorist coverage; or did not know that the alleged tortfeasors were uninsured:

> . . . it is . . . a general rule that in order for ignorance of coverage to excuse an insured or additional insured from following the procedures set out in an insurance

> policy, it must be shown that the claimant exercised due diligence and reasonable care in ascertaining that there was coverage under the policy.

Id. The Supreme Court in ***Lee*** also held that "[w]here the facts and inferences are undisputed that notice was not given within the time required by the policy, the reasonableness of the delay becomes a question of law for the court." *Id*.

It is clear, and Tennessee Farmers does not attempt to argue to the contrary, that the deceased was never in a position to give the required notice. He was immediately in extremis. He died the day of the accident. The question before us is whether the administrators, as named insureds in the policy, gave "notice of the accident . . . as soon as reasonably possible" with respect to the claim asserted by them in their representative capacity under the uninsured motorist insurance coverage afforded by the policy.

Obviously, the Poseys were aware of the fact that they were covered by an automobile insurance policy. They are charged with knowledge of its provisions. *See* ***Giles v. Allstate Ins. Co., Inc.,*** 871 S.W.2d 154, 156 (Tenn. App. 1993); ***DeFord v. National Life & Accident Ins. Co.,*** 185 S.W.2d 617, 621 (Tenn. 1945).

IV

We think that under the totality of the circumstances in this case, the Poseys, as named insureds, failed to give Tennessee Farmers timely notice of the accident that led to the claim asserted in this case. In so holding, we fully recognize that their claim is being asserted solely in their representative capacity. We are comfortable in this holding even though the record is silent as to when they qualified to administer their son's estate. In this particular case, we do not believe the date of qualification is a critical fact.

Steven Posey was living with his parents when he graduated from high school in 1980. For the most part, he continued to live with them until he went into the Air Force, a year and a half after graduation. During this pre-induction period, he married Michelle Van Hook. They were married for about a year before he was inducted into the service. During this year, he and his wife lived with the Poseys, except for a week or so when they resided elsewhere.

Steven Posey was divorced while serving in the Air Force. He was discharged in 1984 and returned to Tennessee. He resumed living with his parents. From then until his fatal accident on June 3, 1992, he lived in their residence.

The Poseys partially supported their son during the entire time he lived with them following his graduation from high school, both before and after his Air Force service. He never contributed rent, food or utilities. He worked sporadically.

Steven Posey was survived by an eight-year old daughter. When he had his child for weekend visitation--about three weekends a month--she stayed with him at the Poseys' house.[5]

The record reflects that Landis Posey talked to an attorney about the accident "right after it first happened." When asked why he did not notify Tennessee Farmers at an earlier time he replied, "I can't answer that." Mrs. Posey was also unable to give an explanation for the long delay.

The Poseys acknowledge that they did nothing to determine whether the individual defendants named as tortfeasors in this case had liability insurance covering the accident.

V

The type of notice at issue in this case has been labeled by the courts of this state as "a vital and indispensable condition precedent to recovery under the policy." ***Hartford Accident and Indemnity Co. v. Creasy***, 530 S.W.2d 778, 779 (Tenn. 1975). "The general purpose of a notice provision is to make the insurer aware that a claim may be forthcoming and provide an adequate opportunity for investigation." ***Allstate Insurance Co. v. Fitzgerald***, 743 F. Supp. 539, 542 (W.D. Tenn. 1990). If notice is not timely given, "there need not be any showing of prejudice." ***Hartford Accident***, 530 S.W.2d at 779.

[5]The child lived with her mother in Mississippi for two years prior to the accident. They had moved back to Scott County shortly before Steven Posey's death.

Particularly pertinent to the facts of this case is the following language of the Supreme Court in the ***Hartford Accident*** case:

> The burden of offering an explanation or excuse for failure to give notice must rest heavily upon the insured since he seeks relief from the plain terms of a contract of insurance coverage.

Id. at 780. Also pertinent here is this court's decision in ***North River Ins. Co. v. Johnson***, 757 S.W.2d 334 (Tenn. App. 1988):

> . . . whether the facts establish a reasonable basis for late notice is determined by all the *surrounding circumstances*.

Id. at 335. (Emphasis added).

It is clear that a delay of 11 months, without reasonable explanation, does not satisfy a policy requirement that notice of an accident be given to the insurer "as soon as reasonably possible." The question of law for us is whether the delay in the instant case was reasonable.

The Poseys are the named insureds in the policy in question. Shortly after the accident, they contacted an attorney regarding their son's accident. They apparently recognized that, as a practical matter, it would fall to them to look after their son's affairs following his death. He was not married at the time and had no adult children. Except for the time he was in

the service, he had lived practically all of his life with the Poseys. They contributed significantly to his support even though he was no longer a minor.

The Poseys seem to argue that they had no fiduciary responsibilities to their son's estate, including the obligation to give notice to Tennessee Farmers, until they qualified. Hence, they argue that the failure of the movant to show the date of their qualification is fatally defective to their motion. They also argue that this wrongful death action is not being pursued for the Poseys' benefit, but rather for the benefit of their son's minor daughter.[6] They conclude from this that we must decide the issue of the reasonableness of the delay from the perspective of the minor daughter.

The issue before us is not whether the minor daughter should have been required to give earlier notice of the accident. Furthermore, we do not focus on the Poseys' responsibilities as administrators or when those responsibilities first arose. Those are not the issues. The question is whether these insured individuals, who undertook to handle their deceased son's affairs shortly after his accident and death, gave notice to Tennessee Farmers "as soon as reasonably possible" as to the claim later pursued by them in their representative capacity in this case. Furthermore, these insureds/administrators cannot--and apparently do not--claim "ignorance of coverage." They were the named insured--they are charged with knowledge of the notice

[6]Tennessee Farmers points out that there is no mention of the daughter in the complaint. We do not find this omission significant to the resolution of this case. The parents of Steven Landis had the right to pursue this suit under T.C.A. § 20-5-106.

requirement. Since they apparently did *nothing* to determine whether the tortfeasors had liability insurance covering this accident, they cannot claim that they "exercised due diligence and reasonable care in ascertaining" whether the uninsured motorist coverage of the Tennessee Farmer's policy applied to this accident. *See* ***Lee***, 732 S.W.2d at 276.

The Poseys rely upon ***McKimm v. Bell***, 790 S.W.2d 526 (Tenn. 1990) to support their position that timely notice was given in the instant case. The ***McKimm*** case is factually different from this case. In ***McKimm***, the plaintiffs had good reason to believe the party causing the accident had liability insurance. Within four days of ascertaining that the defendant was without coverage on the day of the accident, the plaintiffs' attorney advised the carrier of his clients' potential uninsured motorist claim.

The plaintiffs also rely on the ***Hartford Accident*** case, *supra*, and ***Bolin v. Tennessee Farmers Mutual Ins. Co.***, 614 S.W.2d 566 (Tenn. 1981) to excuse the delay in giving notice in the instant case. On the issue of excusable neglect, those cases are factually distinguishable from the case at bar.

Tennessee Farmers is entitled to summary judgment because we find, as a matter of law, that the plaintiffs' delay in giving notice was not reasonable under the totality of the circumstances of the undisputed facts before us.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants. This case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, J.

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Don T. McMurray, J.