

1971

Guy Kimball v. Kenneth L. Kingsbury and Kathleen Kingsbury, His Wife v. Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

KIMBALL,

Plaintiff and Appellant,

JOHN L. KINGSBURY and
JOHN KINGSBURY, his wife,

Defendants, Third Party
Plaintiffs and Appellants,

NATIONWIDE MUTUAL INSURANCE
COMPANY, NATIONWIDE MUTUAL
INSURANCE COMPANY,

Third Party Defendants
Respondents.

BRIEF OF APPEAL

FROM THE ORDER OF THE
SALT LAKE COUNTY, UTAH
HONORABLE JAMES S. ...

SNOW &
JOHN
Continental
Building
City, Utah
for Third
Defendants-
Plaintiffs

THOMAS
540
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judgment in favor of respondents and against appellants Kingsburys, no cause of action.

DISPOSITION IN THE LOWER COURT

Guy Kimball, plaintiff-appellant, hereinafter referred to as "Kimball", brought an action for personal injuries against appellant Kathleen Kingsbury, hereinafter referred to as "Mrs. Kingsbury", arising out of an automobile collision that occurred on October 8, 1968. Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, third party defendants-respondents, hereinafter referred to as "Nationwide", with whom Kingsburys were allegedly insured, failed to defend the action. Kenneth L. Kingsbury and Kathleen Kingsbury, his wife, herein referred to as "Kingsburys", brought an action against Nationwide for all sums which Kimball may be awarded against Mrs. Kingsbury.

Prior to October 8, 1968, Kingsburys had purchased an automobile liability policy from Nationwide, which policy required the sum of \$2.80 per month to be paid on or before the 26th day of each month. The said policy was conditioned for cancellation as of 12:01 A.M. on the 10th day following the due date if any installment was not paid.

(R.89)

Kingsburys did not pay the installment due September 26, 1968, on or prior to that date and Nationwide sent notice of that fact to Kingsburys. (Exhibit 3)

Upon receipt of the notice, Mrs. Kingsbury wrote a check to Nationwide (Exhibit 6) and deposited the same in the U. S. Mail in an envelope addressed to Nationwide prior to 12:00 noon on October 8, 1968. (R.90)

ARGUMENT

THE PAST DUE NOTICE SENT BY NATIONWIDE WAS AN OFFER WHICH WAS ACCEPTED BY KINGSBURYS

reinstatement and a check were mailed by the insured. After mailing but before the check and application were received at the branch office, the insured was killed in an accident. The court ruled that

The fact that the evidence of insurability and the payment of that portion of the amount due from the insured demanded by the company had not been received in the office of the insurer when the insured met his death can make no difference. The insurer had chosen the mails as a proper means of communication with the insured. When they made the offer of the conditions under which the policy would be reinstated, they in effect made the mails their agency for the purposes of the transaction. When the insured deposited the application to reinstate together with the evidences of insurability and partial payment in the mail at Joseph, Utah, he complied with their terms. From that moment the letter had passed out of his power and into the control of the insurer. The rule is well stated in 9 Cyc 295, as follows: "Where a person makes an offer and requires or authorized the offeree either expressly or impliedly, to send his answer by post or telegraph, and the answer is duly posted or telegraphed, the acceptance is communicated and the contract is complete from the

moment the letter is mailed or the telegraph sent. The request or authorization to communicate the acceptance by mail is implied in two cases, viz: (1. Where the post is used to make the offer as where a person makes an offer to another by mail and says nothing as to how the answer shall be sent".

Appellants contend that in reliance upon Exhibit 3, Mrs. Kingsbury mailed payment before 12:00 noon October 7, 1968, and, therefore, her accident policy was in effect when the collision with Kimball occurred at 4:00 P.M. that afternoon.

BEARING THE PAST DUE NOTICE AND ACCEPTING PAYMENT CONSTITUTED A WAIVER BY NATIONWIDE

The trial court found that the policy of insurance issued to the Kingsburys states that the premium must be paid on or before 11:01 A.M. on the tenth day following the due date of the installment or the coverage will be cancelled (R.90) and concluded that the policy was not in effect at the time of the collision between Mrs. Kingsbury and

Kimball. In so ruling the court recognized the forfeiture provision of the policy but ignored the well established principle that rights of forfeiture created by contract may be waived, either expressly or impliedly, by the party having the right of forfeiture. Parker v. California State Life Ins. Co., Ibid.

The first fact clearly showing waiver by Nationwide are the statements contained in the past due notice (Exhibit 3). The statements "Mail Your Installment Today", "Don't Lose Out On Your Prompt Payment Reward" and "If You Haven't Paid Your Installment, Right Now's A Good Time To Get It Into The Mail" reasonably warranted the inference that the policy was in effect. The sending of a notice containing such statements constitutes an express waiver of the right of forfeiture. Columbia Airways, Inc. vs. Stevens, 80 Utah 215, 14 P.2d 984 (1935).

The second act of Nationwide constituting a waiver was its acceptance of the check mailed by Mrs. Kingsbury (Exhibit 6). after she received the past due notice (Exhibit 3). Said check was endorsed by Nationwide and paid by the Kingsbury's bank on October 14, 1968. The Utah Supreme Court has considered this point and ruled that where payment is accepted on a contract after the due date the vendor has waived default and is required to give notice and an opportunity for payment before a forfeiture could be claimed. Columbia Airways, Inc. v. Stevens, Ibid., 99 A.L.R. 208.

It is interesting to note that Nationwide accepted the payment made by Mrs. Kingsbury and processed her check all before notification of the accident but upon notification that an accident involving

Mrs. Kingsbury had occurred, denied that the policy was in effect.

CONCLUSION

Appellants submit that Mrs. Kingsbury relied upon the past due notice which invited payment and mailed a check to Nationwide prior to the accident with Kimball and, therefore, that her accident coverage was in effect from the time she deposited the payment in the U. S. Mail. There is no dispute that the payment was mailed prior to 12:00 noon on October 7, 1968.

In addition, Nationwide waived its right of forfeiture by sending out the past due notice rather than sending a notice of termination, and by accepting Mr. Kingsbury's payment.

Based upon the foregoing, appellants respectfully submit that the judgment

of the trial court be reversed.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I, THOMAS R. BLONQUIST, hereby certify
that I delivered two copies of the foregoing
Brief of Appellants to WORSLEY, SNOW &
CHRISTENSEN, 7th Floor Continental Bank
Building, Salt Lake City, Utah, on the 21st
day of May, 1971.


THOMAS R. BLONQUIST