1971

Guy Kimball v. Kenneth L. Kingsbury and Kathleen Kingsbury, His Wife v. Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company : Respondent's Brief

Utah Supreme Court

Thomas R. Blonquist; Attorney for AppellantBoyd Fullmer; Attorney for Respoondent

IN THE SUPREME COUR
OF THE STATE OF UTA

GUY KIMBALL,
Plaintiff-Appellant,

v.

KENNETH L. KINGSBURY and
KATHLEEN KINGSBURY, his wife,
Defendants and Third-Party
Plaintiffs-Appellants,

v.

NATIONWIDE MUTUAL INSUR-
ANCE COMPANY, NATIONWIDE
MUTUAL FIRE INSURANCE
COMPANY,
Third-Party Defendant-Respondent.

RESPONDENT'S B

Appeal from the District Court o
Honorable James S. Say

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CASES CITED

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NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
Third-Party Defendant-Respondent.

Case No. 12422

RESPONDENT'S BRIEF

NATURE OF THE CASE

This appeal involves an action to determine whether Kenneth L. Kingsbury and Kathleen Kingsbury had automobile liability coverage under an insurance policy issued by the third-party defendants at the time of an accident.

DISPOSITION IN LOWER COURT

The personal injury action against the Kingsburys was separated from the action by the Kingsburys against Nationwide to determine liability coverage. This appeal is from a judgment for Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company against the Kingsburys.

RELIEF SOUGHT ON APPEAL

This third-party defendant seeks affirmance of the lower court judgment.

STATEMENT OF FACTS

The appellants statement of facts is not complete.

On October 8, 1968, at about 4:00 p.m. Guy Kimball, the plaintiff, was involved in an automobile accident with Kathleen Kingsbury (R. 1). On November 20, 1968, Guy Kimball brought this action to recover damages arising out of the October 8, 1968 accident (R. 1, 2). Thereafter, Kathleen Kingsbury and Kenneth L. Kingsbury, her husband, (hereinafter called Kingsburys) brought a third-party action against Nationwide Mutual Insurance Company (hereinafter called Nationwide) seeking indemnity (R. 3, 4, 5).

In July of 1968 the Kingsburys purchased a policy of automobile liability insurance from Nationwide. See Exhibit 1. The policy was purchased on a monthly installment plan requiring the Kingsburys to pay a $2.80 prem-

ium on or before the 26th day of each month (Exhibit 12). Each premium payment card furnished with the Kingsburys' policy showed the premium due date. See Exhibit 9. The policy contained a ten day grace period providing for cancellation by the insureds effective as of 12:01 a.m. on the tenth day following the due date of any installment premium. The policy reads:

> **PREMIUM INSTALLMENTS—CANCELLATION BY INSURED**
>
> The premium for this policy shall be payable in installments as shown in the premium notice mailed to the Policyholder. Failure of the Company to receive any installment when due shall be DEEMED A REQUEST BY THE POLICYHOLDER TO CANCEL THE POLICY effective as of 12:01 A.M. on the tenth (10th) day following the due date of any such installment.
>
> Exhibit 1, page 10.

The Kingsburys did not pay their September 26, 1968 payment. Therefore, the policy coverage would be cancelled by its own terms unless payment was received by 12:01 a.m. on October 6, 1968 — the tenth day following the due date.

On the afternoon of October 8, 1968 Mrs. Kingsbury was involved in an accident with Guy Kimball. That same day a two month insurance premium was mailed to Nationwide. The envelope in which the payment was sent bears an October 8, 1968 p.m. postmark. See Exhibit 8. The check for the premiums was dated October 7, 1968. See Exhibit 6.

The issues between the Kingsburys and Nationwide were separated from those between Kimball and the Kingsburys and tried to the court without a jury on July 8, 1970 (R. 68).

The court found the past due notice (Exhibit 3) was mailed by Nationwide October 1, 1968 from Portland, Oregon, to the Kingsburys in Salt Lake City and would have been received by the Kingsburys on October 4, 1968, two days before the expiration of the grace period (R. 74). It found the installment due September 26, 1968 was not received by Nationwide until October 11, 1968 (R. 74) (See also Exhibit 12). The lower court also found that there was a clear warning on the jacket of the policy advising the Kingsburys that on the tenth day following the due date the policy would be cancelled if the premium was not paid (R. 75, 90).

On October 11, 1968 Nationwide received the Kingsburys' check and reinstated the Kingsburys' policy in accordance with its regular practice, as of 12:01 a.m. on October 9, 1968, the day following the postmark on the envelope.

The lower court found no coverage in effect from October 6, the end of the grace period, through October 8, the day of the accident and the date the premium was mailed (R. 75, 80).

Findings of fact, conclusions of law, and a judgment in favor of Nationwide were signed and filed July 22, 1970 (R. 75). On August 21, more than ten days after the

entry of the judgment, the Kingsburys moved to amend the findings of fact, conclusions of law and judgment (R. --, 79). The judgment made and entered July 22, 1970 was in favor of Nationwide only and against only the Kingsburys (R. 75). No issues were generated in the coverage lawsuit between the plaintiff, Kimball, and Nationwide.

On August 25, 1970 Nationwide moved to strike the Kingsburys' motion to amend the findings of fact, conclusions of law and judgment. This motion was denied (R. 88).

The appellants did not order a transcript of the testimony.

ARGUMENT

POINT I. THE PAST DUE NOTICE WAS NOT AN OFFER OR A WAIVER.

Appellants argue that the past due notice Nationwide mailed to the Kingsburys was an offer which, when accepted, constituted a waiver by Nationwide of cancellation rights under the terms of the policy.

They rely entirely upon *Parker v. California State Life Insurance Co.*, 85 Utah 595, 40 P.2d 175 (1935) and *Columbia Airways, Inc. v. Stevens*, 80 Utah 215, 14 P.2d 984 (1932). Neither case is factually similar to this matter.

Columbia Airways was an action for claim and delivery in conjunction with the purchase of an airplane. The court there pointed to repeated attempts to secure payment on a note in lieu of exercising a right to take possession and held that the continuous demands for payment constituted a waiver of the right to take possession.

The finding of a waiver in *Parker* also involved repeated demands for payment. *Parker* arose from a claim for benefits under a life insurance policy. There, the insured initially defaulted on March 23, 1930. On April 15 the insurer executed an additional agreement extending the coverage, provided payment was made by September 23rd.

Again payment was not made. Three days later the insurer sent a letter requesting payment "suggesting that they believed the default to be an oversight . . . ." Still no payment was received.

Over a month passed when, on November 4, 1930, the insurer again wrote to the insured requesting payment. This time the insured responded and mailed in his check. He was accidentally killed before the insurer received payment.

The court held the insurer's repeated solicitations over a period of eight months constituted a waiver of its right to cancel.

This case involves no repeated attempts to secure payment long after it became due.

Here, Nationwide mailed a single past due notice within the ten-day grace period. It was received by the Kingsburys in sufficient time for them to mail payment within the grace period. This the Kingsburys did not do.

At the end of the grace period all coverage expired. When payment was received, Nationwide, according to its regular practices reinstated the policy effective at 12:01 a.m. on the day following date of postmark — October 9, 1968.

As the court pointed out in *Parker v. California State Life Insurance Co., supra:*

> "Whether a waiver has taken place or not ordinarily depends upon the peculiar facts and circumstances of a given case, and in most instances presents *a question of fact rather than of law,* or at least a mixed question of law and fact." 40 P.2d at 177 (Emphasis added.)

Parker affirmed the trial court's finding of waiver.

In this case the trier of fact found that there was no waiver. The credibility of the testimony was for the trier of fact, *Gittens v. Lundberg,* 3 Utah 2d 392, 284 P.2d 1115 (1955), *Cheney v. Rucker,* 14 Utah 2d 205, 381 P.2d 86 (1963), and on appeal the findings should not be disturbed if supported by the facts viewed most favorable to the findings. *Casey v. Nelson Brothers Construction Co.,* 24 Utah 2d 14, 465 P.2d 173 (1970), *Child v. Hayward,* 16 Utah 2d 351, 400 P.2d 758 (1965).

The decisions of this court show that the lower court's finding was proper.

In *Ballard v. Beneficial Life Insurance Co.*, 82 Utah 1, 21 P.2d 847 (1933), a life insurance policy was issued December 15, 1925. A loan was subsequently made to the insured on the policy with the loan being due December 15, 1928. About thirty days prior thereto the insured was given the usual written notice of such payment due, stating that the policy would become null and void unless the payment were made. No reply was received from the insured. On January 4, 1929 the defendant sent a second notice saying that the grace period was about to expire which it did on January 15, 1929 without payment being received. After this date the company offered to reinstate the policy if the insured would pay back premiums with interest and if he would furnish evidence of insurability.

Several months passed when, on April 10th or 11th 1929, the defendant received a check from Ballard requesting reinstatement of the policy.

Unknown to the company, Ballard had entered the hospital in Logan on April 5th with a condition which ultimately led to his death on October 13th of that year.

This court found as a matter of law that there was no waiver under those facts and circumstances.

Cooper v. Foresters Underwriters, 2 Utah 2d 373, 275 P.2 675 (1954), is also in point. The policy involved in *Cooper* required payment of advance monthly premiums and provided that all periods of insurance would begin and end at 12:00 noon on the last day of the month. Coverage remained in effect for a period of 31 days after the premium was due. The plaintiff did not pay a premium for the months of September or October, 1951 until the evening of October 31. At that same time she submitted a claim for an accident occurring during the afternoon of October 31. In holding that the insurance company did not waive its rights this court said:

> Plaintiff must be charged with the knowledge of her contract and we cannot find that any belief that the company would accept late payments as a continuation of the policy rather than a reinstatement could be reasonably induced by the company's behavior. She had a right to reinstate subject to the exclusion of any accident occurring prior to the acceptance of the premium and could not reasonably have believed that the acceptance of the premium was to cover the entire period of time preceding. 275 P.2d at 677.

The front cover of Nationwide's policy is conspicuously marked:

> DON'T LOSE YOUR INSURANCE!
> Please Read "Premium Installments —
> Cancellation By Insured" — Page 10

On page 10 it is further stated:

PREMIUM INSTALLMENTS—CANCELLATION BY INSURED

The premium for this policy shall be payable in installments as shown in the premium notice

> mailed to the Policyholder. Failure of the Company to receive any installment when due shall be DEEMED A REQUEST BY THE POLICYHOLDER TO CANCEL THE POLICY effective as of 12:01 A.M. on the tenth (10th) day following the due date of any such installment.

The language of Nationwide's policy is clear and unambiguous; it should be given effect.

> "[I]nasmuch as insurance coverage is based on contract, unless there is some good reason to the contrary, we are obliged to assume that language included therein was put there for a purpose and to give it effect where its meaning is clear and unambiguous." *Marriot v. Pacific National Life Assurance Co.,* 24 Utah 2d 182, 467 P.2d 981, 983 (1970).

The critical fact in this case was undisputed: the Kingsburys mailed their premium in after the ten day grace period had expired. One failing to pay insurance premiums must also accept the consequences of that decision. The lower court properly found the Kingsbury's insurance coverage had lapsed at the time of Mrs. Kingsbury's accident.

Appellants' argument on waiver is deficient in another respect. The Third Party Complaint did not raise the issue (R. 3-5); no mention of the waiver theory is found in the findings (R. 73-75, 88-91); and nothing about the waiver theory is found in appellants' "Statement of Points on Appeal" (R. 95-96).

The purpose of filing a statement of points on appeal is to provide an orderly procedure when a complete transcript of the evidence is not requested.

In *Simpson v. General Motors,* 24 Utah 2d 301, 470 P.2d 399, 401 (1970), where an attempt was made to inject a new theory into the case for the first time on appeal this court said:

> "The contention relating to strict liability is an attempt to inject that doctrine into this case for the first time on appeal. It was dealt with neither in the plaintiff's complaint, nor in the pretrial conference, nor at the trial. It is therefore not appropriate to address such a contention to this court. Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation."

POINT II. THE PLAINTIFF HAS NO STANDING TO APPEAL.

The judgment in the lower court is in favor of Nationwide and against Kingsburys only. No issues were generated in the coverage lawsuit between the plaintiff and Nationwide. Under the terms of the policy no duty was owed by Nationwide to the plaintiff. As such he is not a proper party to this appeal.

In *Treadaway v. Meador,* 103 Ariz. 83, 436 P.2d 902 (1968), the Supreme Court of Arizona said that when

certain parties were not named in the judgment below from which the appeal was taken they were not proper parties to present an appeal.

In *Ammerman v. Farmers Insurance Exchange*, 19 Utah 2d 261, 430 P.2d 576 (1967), this court said a judgment creditor had no privity of contract with the defendant's insurer and the insurer owed no duty to the judgment creditor.

Plaintiff should be dismissed from this appeal.

CONCLUSION

The appeal as to the plaintiff Kimball should be dismissed as he has no standing. The judgment for Nationwide should be affirmed because the issues below were basically fact issues and the evidence and all inferences when considered in the light most fovorable to the judgment show the lower court's decision to be supported by substantial and credible evidence.

Respectfully submitted,

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MAILING NOTICE

I hereby certify I mailed two copies of the foregoing brief, postage prepaid to Thomas R. Blonquist, 640 Kennecott Building, Salt Lake City, Utah 84111 and Boyd D. Fullmer, 540 East Fifth South, Suite 203, Salt Lake City, Utah 84102, this ..... day of June, 1971.
