

SUPREME COURT OF RHODE ISLAND

Sparling v. Bizier

778 A.2d 808 (R.I. 2001) · No. No. 99-500-Appeal · Decided June 4, 2001

SUMMARY

The Rhode Island Supreme Court affirmed summary judgment for Metropolitan General Insurance Company in a coverage dispute arising from an automobile collision. The court held that the insurer properly canceled the policy for nonpayment of premiums, that proof of mailing the cancellation notice satisfied the applicable notice requirement, and that the policy expressly permitted cancellation for nonpayment. The court also held that the insureds waived an argument concerning notice to the vehicle lessor by failing to raise it below.

CASE DETAILS

COURT	Supreme Court of Rhode Island
WRITING FOR THE COURT	Per Curiam; Williams, C.J.; Lederberg, J.; Bourcier, J.; Flanders, J.; Goldberg, J.
JURISDICTION	Rhode Island
DECIDED	June 4, 2001
DOCKET	No. 99-500-Appeal
DISPOSITION	affirmed
PROCEDURAL POSTURE	Third-party plaintiffs Russell Bizier, Sr. and Russell Bizier, Jr. appealed the Superior Court's grant of summary judgment to Metropolitan General Insurance Company and denial of their cross-motion for summary judgment.
STANDARD OF REVIEW	The Supreme Court reviewed the summary-judgment ruling de novo, viewing the evidence in the light most favorable to the nonmoving party. Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Russell Bizier, Sr., Russell Bizier, Jr. v. Metropolitan General Insurance Company

TOPICS

insurance coverage

summary judgment

standard of review

waiver

appellate procedure

PRACTICE AREAS

insurance law

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether summary judgment was proper where the Biziers failed to produce evidence creating a genuine issue of material fact regarding payment of the premium or mailing of the cancellation notice.
2. Whether proof that the insurer mailed the cancellation notice to the address shown on the policy was sufficient to establish notice under Rhode Island Insurance Division Regulation XVI.
3. Whether the policy expressly permitted cancellation for nonpayment of premium.
4. Whether the Biziers could argue for the first time on appeal that the cancellation was ineffective because the insurer failed to notify the vehicle's lessor.

HOLDINGS

1. Summary judgment for Metropolitan was proper because the Biziers failed to set forth specific facts showing a genuine issue of material fact concerning payment of the premium, mailing of the cancellation notice, or the timeliness of that mailing.
2. Proof that the cancellation notice was mailed to the named insured at the address shown in the policy was sufficient proof that the required notice had been given.
3. The policy expressly permitted Metropolitan to cancel the policy for nonpayment of premium.
4. The Biziers waived their argument that the cancellation was ineffective because Metropolitan failed to notify the vehicle's lessor by failing to raise it in the Superior Court.

KEY QUOTATIONS

"We do not read in section 12 the ambiguity that the Biziers contend is present there, and we decline to engage in "mental gymnastics" in order to do so." (811)

FACTUAL BACKGROUND

Russell Bizier, Jr. was driving a vehicle owned by his father, Russell Bizier, Sr., when it collided with a vehicle occupied by the Sparlings and Giovanni Amato. Metropolitan had issued Russell Sr. a six-month automobile liability policy, but Russell Sr. had not paid the full premium. Metropolitan mailed a cancellation notice on April 16, 1997, making cancellation effective April 28, 1997; the collision occurred on May 2, 1997. Russell Sr. asserted that he did not receive the notice until May 3 and that the policy did not permit cancellation for nonpayment.

PROCEDURAL HISTORY

After an automobile collision, the Biziers filed a third-party complaint against Metropolitan seeking indemnity for any damages and reimbursement of defense costs, asserting that their automobile liability policy had not

been effectively canceled. Metropolitan moved for summary judgment, and the Biziers filed a cross-motion. The Superior Court granted Metropolitan's motion and denied the Biziers' cross-motion. The Supreme Court summarily decided the appeal after determining that cause had not been shown why it should not do so.

DISPOSITION

affirmed

CASES CITED

- Kiley v. Patterson, 763 A.2d 583, 585 (R.I. 2000)
- J.R.P. Associates v. Bess Eaton Donut Flour Co., 685 A.2d 285, 286 (R.I. 1996)
- DePasquale v. Venus Pizza, Inc., 727 A.2d 683, 685 (R.I. 1999)
- Marr Scaffolding Co., Inc. v. Fairground Forms, Inc., 682 A.2d 455, 457 (R.I. 1996)
- Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998)
- Trotta v. Pono, 116 R.I. 702, 709, 360 A.2d 552, 556 (1976)
- Sjogren v. Metropolitan Property and Casualty Insurance Co., 703 A.2d 608, 610 (R.I. 1997)
- Montecalvo v. Mandarelli, 682 A.2d 918, 926 (R.I. 1996)

OPINION

Sparling v. Bizier 778 A.2d 808

PER CURIAM.

778 A.2d 808 (2001) Michael SPARLING et al. v. Russell BIZIER, Jr., et al. v. Metropolitan General Insurance Company. No. 99-500-Appeal. Supreme Court of Rhode Island. June 4, 2001. Kevin M. Cain, Gerald P. McOsker, For Plaintiff. Richard G. Riendeau, Providence, For Defendant. Present WILLIAMS, C.J., LEDERBERG, BOURCIER, FLANDERS, and GOLDBERG, JJ.

OPINION

PER CURIAM. The third party plaintiffs in this case, Russell Bizier, Sr. (Russell Sr.) and Russell Bizier, Jr. (Russell Jr.) (collectively the Biziers), appeal from the entry of summary judgment in favor of the third-party defendant, Metropolitan General Insurance Company (Metropolitan), and from the denial of their cross-motion for summary judgment. For the reasons hereinafter set out, we deny their appeal. I Case Facts/Travel On May 2, 1997, a vehicle operated by Russell Jr., and owned by his father, Russell Sr., was involved in a collision with a vehicle operated by Jennifer Sparling and owned by her father, Michael Sparling (collectively the Sparlings). At the time of the collision, Giovanni Amato (Amato) was a passenger in the Sparling vehicle.

*809 The Sparlings and Amato each made claim for damages, both personal and property, against the Biziers. Russell Sr. forwarded notice of the claim to Metropolitan, which he believed insured his vehicle for liability claims. Metropolitan promptly informed Russell Sr. that the liability policy issued to him on February 2, 1997, had been canceled, effective April 28, 1997, because of his

failure to pay the policy premium. Because the collision in question occurred on May 2, 1997, five days after the policy was canceled, Metropolitan informed Russell Sr. that it was denying him coverage and would not defend him on the claim.

The Biziers then retained their own attorney to file answers in a civil action that had been commenced against them by the Sparlings and Amato. They also filed a third-party complaint against Metropolitan, claiming that the liability policy that it had issued did not permit cancellation for nonpayment of premiums and that they had not received notice of the cancellation until May 3, 1997, the day after the automobile collision. They sought relief requiring Metropolitan to indemnify them for any damages recovered against them by the plaintiffs and for costs incurred in retaining counsel to defend them in the pending civil action for damages. Metropolitan, after answering the third-party complaint, moved for summary judgment against the Biziers. The Biziers, meanwhile, filed a cross-motion for summary judgment against Metropolitan. Prior to a hearing on the cross-motions, affidavits were submitted in support of both motions. At the summary judgment motion hearing, the affidavits, exhibits, and arguments of counsel disclosed that on February 2, 1997, Russell Sr. had purchased a six-month term comprehensive automobile liability insurance policy from Metropolitan. That policy insured two vehicles owned by him, and four family member drivers. The total premium due for the policy was \$3,636. At the time of purchase, Russell Sr. paid \$840.50 toward the total premium. He said that some time thereafter, he paid an additional \$500 premium payment, leaving a \$2,295.50 balance due to Metropolitan. According to the affidavits of Madeline Perry and Ruth Walter, both Metropolitan employees, notice of policy cancellation was mailed to Russell Sr. on April 16, 1997, at the address noted on his policy. The notice informed him that because he did not pay the total policy premium, his liability insurance policy would be canceled effective on April 28, 1997. Russell Sr., by affidavit, asserted that he did not receive the notice of cancellation until May 3, 1997, the day after the accident. He also contended that by its terms and provisions, the policy could not be canceled for nonpayment of premiums. Both summary judgment motions were consolidated for hearing before a justice of the Superior Court on September 7, 1999. After that hearing, and the motion justice's consideration of the affidavits and case pleadings filed in support of the respective motions, she found that Russell Sr. had failed to prove that he had paid the required policy premium; failed to show that the notice of policy cancellation had not been mailed on April 16, 1997; and failed to show that notice of policy cancellation had not been timely mailed. Accordingly, she granted Metropolitan's motion for summary judgment and denied the Biziers' cross-motion. This appeal by the Biziers followed. Pursuant to an order of this Court entered on March 23, 2000, directing the parties in this appeal to appear before the Court and to show cause, if any, why the issues raised in this appeal should not be summarily decided, the parties did appear *810 on May 14, 2001. After hearing the arguments of their counsel and examining the memoranda filed by them, we conclude that cause has not been shown, and we proceed to decide the appeal at this time. II Case Analysis "Only when a review of the evidence in the light most

favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, will this Court uphold the trial justice's order granting summary judgment." *Kiley v. Patterson*, 763 A.2d 583, 585 (R.I. 2000) (quoting *J.R.P. Associates v. Bess Eaton Donut Flour Co.*, 685 A.2d 285, 286 (R.I. 1996)). Recognizing that summary judgment is a drastic remedy and should be granted cautiously, and only when no issue of material fact is in dispute, we are satisfied from our de novo review of the record before us that in this case, entry of summary judgment was both proper and without error. See *DePasquale v. Venus Pizza, Inc.*, 727 A.2d 683, 685 (R.I. 1999); *Marr Scaffolding Co., Inc. v. Fairground Forms, Inc.*, 682 A.2d 455, 457 (R.I. 1996). For the Biziers to have resisted summary judgment in favor of Metropolitan, they had an affirmative duty to set forth specific facts showing that a genuine issue of material fact existed that required resolution by a fact-finder. See *Bourg v. Bristol Boat Co.*, 705 A.2d 969, 971 (R.I. 1998). The Biziers failed to do so. In their appeal, the Biziers have attempted to persuade us that genuine issues of fact did, indeed, exist and that entry of summary judgment by the motion justice was error. They contend first that Metropolitan's notice of cancellation stated that the amount of the unpaid premium was \$1,893.50, when it actually was \$2,295.50. How that contention can assist the Biziers is left unexplained. What was certain, however, as noted by the motion justice, was the unrefuted proof by Metropolitan that whatever amount was due, it had never been paid. Next, the Biziers assert that the motion justice erred in granting summary judgment because a genuine issue of material fact existed concerning when Russell Sr. had been given notice of the policy cancellation. Metropolitan's un rebutted affidavits disclosed that on April 16, 1997, the notice of cancellation was mailed to Russell Sr. at his address as given on the policy. The Biziers assert that regardless of the date of mailing, Russell Sr. did not receive the notice until May 3, 1997, some seventeen days later and, coincidentally, one day after the automobile collision in question. In *Trotta v. Pono*, 116 R.I. 702, 709, 360 A.2d 552, 556 (1976), this Court took judicial notice of the Department of Business Regulation Insurance Division, Regulation XVI, entitled *Automobile Insurance Policies; Cancellation and Renewal Provisions*. There, we concluded that Section 6(B) of that Regulation made proof of mailing of the notice of cancellation sufficient proof that notice had been given. We again take judicial notice of that Regulation and find that it reads today as it did when *Trotta* was decided.[1]

*811 The Biziers presented no evidence to rebut the affidavits submitted by Metropolitan stating that the notice of cancellation for reason of nonpayment of the policy premium had been mailed on April 16, 1997, to Russell Sr. at the address as shown on the face of his policy. Consequently, the motion justice did not err in finding the Biziers had been given the required notice of the cancellation of Russell Sr.'s Metropolitan policy.

Finally, the Biziers contend that there is no explicit provision contained in Metropolitan's policy that permits it to cancel the policy for nonpayment of the policy premium. We, as did the motion justice, disagree. Section 12 in the policy, entitled "Termination" provides: "We cancel this policy by delivering to you or by mailing to you, at your last known address shown on our records, notice

stating when the cancellation will be effective. This notice will be mailed to you not less than the minimum statutory time permitted by state law, but not less than 10 days, for non-payment of premium * * *." (Emphasis added.) We do not read in section 12 the ambiguity that the Biziers contend is present there, and we decline to engage in "mental gymnastics" in order to do so. See *Sjogren v. Metropolitan Property and Casualty Insurance Co.*, 703 A.2d 608, 610 (R.I. 1997). We do not reach the Biziers' additional appellate contention made here that Metropolitan's notice of cancellation was ineffective because it failed to notify the lessor of the insured vehicle, Primuse Automotive. That issue was never raised at the Superior Court hearing; therefore, it is deemed to have been waived and cannot be raised for the first time here on appeal. See *Montecalvo v. Mandarelli*, 682 A.2d 918, 926 (R.I. 1996). For the reasons above given, the third party plaintiff's appeal is denied, and the summary judgment entered in favor of Metropolitan General Insurance Company is affirmed. The papers in this case are ordered to be returned to the Superior Court.

NOTES

[1] Department of Business Regulation Insurance Division Regulation XVI Automobile Insurance Policies; Cancellation and Renewal Policies, Section 3(B) provides:

"No insurer shall exercise its right to cancel a policy unless a written notice of cancellation is mailed or delivered to the named insured, at the address shown in the policy, at least thirty days prior to the effective date of cancellation, except that when cancellation is for non-payment of premium such notice shall be mailed or delivered to the named insured at the address in the policy at least 10 days prior to the effective date of cancellation and shall include or be accompanied by a statement of the reason therefor. This section shall not apply to the failure to renew a policy." Section 6(B) provides: "Proof of mailing of a notice of cancellation, reduction of limits, elimination of coverages or of intention not to renew or proof of the mailing of the reasons therefor, to the named insured at the address shown in the policy, shall be sufficient proof of the giving of notice and the giving of reasons required by this Regulation."