

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CA-01568-COA**

DONALD R. TRAYLOR AND JANE G. TRAYLOR

APPELLANTS

v.

COLONIAL INSURANCE COMPANY OF CALIFORNIA

APPELLEE

DATE OF JUDGMENT: 11/05/97

TRIAL JUDGE: HON. JERRY O. TERRY

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS: TIMOTHY D. CRAWLEY
THOMAS L. CARPENTER

ATTORNEYS FOR APPELLEE: JACKSON H. ABLES III
GRETCHEN L. GENTRY
THOMAS Y. PAGE
LOUIS G. BANE

NATURE OF THE CASE: CIVIL - INSURANCE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO APPELLEE

DISPOSITION: REVERSED AND REMANDED - 03/23/99

MOTION FOR REHEARING FILED: 4/20/99

CERTIORARI FILED:

MANDATE ISSUED: 6/29/99

EN BANC

PAYNE, J., FOR THE COURT:

PROCEDURAL POSTURE AND ISSUE PRESENTED

¶1. This case is before the Court challenging the grant of summary judgment in favor of Colonial Insurance of California (Colonial) against the appellants, Donald and Jane Traylor. After denial of their motion for reconsideration, the Traylor's perfected this appeal, alleging that issues of material fact existed as to whether Colonial appropriately denied coverage of their claims, whether the denial of coverage was in bad faith, and

whether the Traylors were entitled to punitive damages and attorney's fees.

¶2. Upon review of the record, briefs, and precedents in this matter, we find there were issues of material fact sufficient to defeat summary judgment. Accordingly, we find the trial court in error, and reverse and remand for further action by the trial court as set forth below.

FACTS

¶3. This case originates from a third-party complaint filed against Colonial by the Traylors in a suit by a Gulfport automobile repair company seeking to recover repair costs incurred on the Traylors' 1993 Cadillac automobile. In that third-party suit, the Traylors alleged that Colonial wrongly denied coverage for the expenses related to the automobile accident that occurred near the New Orleans International Airport on the morning of January 20, 1995. The Traylors maintained that their insurance was in full force and effect at the time of the accident. Colonial, through its agents, after initially agreeing that the claim was covered, later denied coverage on the following basis: 1) the Traylors' insurance policy on the automobile in question was month-to-month, and expired on December 30, 1994;⁽¹⁾ 2) the Traylors did not pay the premium for January 1995 during the ten day grace period; thus, their coverage expired and the policy became ineffective as of January 10, 1995; 3) on the morning of the accident, Jane called the Marvin Robinson Agency to inquire about the coverage and did not inform Colonial's agent about the car accident; and 4) the new policy⁽²⁾ went into effect at approximate 9:30 a.m. on January 20, 1995, after the accident occurred.

¶4. The Traylors counter this argument, alleging that they never received notice of the cancellation of the policy, as required by Mississippi law. Further, the Traylors rely on the fact that Colonial's agents, on numerous occasions, approved coverage. After reviewing the briefs, record, and applicable precedents, we agree that summary judgment was inappropriate. Consequently, we reverse and remand accordingly.

STANDARD OF REVIEW

¶5. This Court's standard of review for summary judgment is well-settled: "The standard for reviewing the granting or the denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). This Court conducts *de novo* review of orders granting or denying summary judgment and looks at all the evidentiary matters before it--admissions in pleadings, answers to interrogatories, depositions, affidavits, etc." *Aetna Cas. and Sur. Co. v. Berry*, 669 So. 2d 56, 70 (Miss. 1996) (citing *Mantachie Natural Gas v. Miss. Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992)). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Russell v. Orr*, 700 So. 2d 619, 622 (Miss. 1997); *Northern Elec. Co. v. Phillips*, 660 So. 2d 1278, 1281 (Miss. 1995). The burden of showing that no genuine issue of material fact exists lies with the moving party, and we give the benefit of every reasonable doubt to the party against whom summary judgment is sought. *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990). We do not try issues. Rather, we only determine whether there are issues to be tried. *Townsend v. Estate of Gilbert*, 616 So. 2d 333, 335 (Miss. 1993). Furthermore, it is well-settled that motions for summary judgment are to be viewed with a skeptical eye, and if a trial court should err, it is better to err on the side of denying the motion. *Aetna Cas. and Sur. Co.*, 669 So. 2d at 70 (Miss. 1996) (citing *Ratliff v. Ratliff*, 500 So. 2d 981, 981 (Miss. 1986)). The focal point of our *de novo* review is on material facts. In defining a "material" fact in the context of summary judgments, the Mississippi Supreme Court has stated that "[t]he presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The court must be convinced that the factual issue is a material one, *one that matters in an outcome determinative sense.*" *Simmons v.*

Thompson Mach. of Miss., 631 So. 2d 798, 801 (Miss. 1994) (quoting *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985)) (emphasis added).

ANALYSIS AND DISCUSSION OF LAW

I. WHETHER COLONIAL APPROPRIATELY DENIED COVERAGE OF THE TRAYLORS' CLAIMS?

¶6. As their first complaint with the trial court's order of summary judgment, the Traylor's maintain that their insurance coverage never ceased because they were not given notice of termination as required by Mississippi law. Our statutory law is clear:

No notice of cancellation of a policy to which Section 83-11-3 applies shall be effective unless mailed or delivered by the insurer to the named insured at least thirty (30) days prior to the effective date of cancellation; provided, however, that where cancellation is for nonpayment of premium at least ten (10) days' notice of cancellation accompanied by the reason therefor shall be given. Unless the reason accompanies or is included in the notice of cancellation, the notice of cancellation shall state or be accompanied by a statement that upon written request of the named insured, mailed or delivered to the insurer not less than fifteen (15) days prior to the effective date of cancellation, the insurer will specify the reason for such cancellation. This section shall not apply to nonrenewal.

Miss. Code Ann. § 83-11-5 (1998 Supp.). This statute has been interpreted to create a rebuttable presumption of receipt of cancellation by the insured if the insurer claims to have mailed the notice and has proof of mailing. *Carter v. All State Indemnity, Co.*, 592 So. 2d 66, 75 (Miss. 1991). Further, the *Carter* court issued the following caution to insurers: "mere mailing of a cancellation notice is not conclusive with regard to whether the insured actually received the notice. Insurers would thus be prudent to take whatever steps are reasonably necessary to ensure that a cancellation notice actually reaches the insured's last known address." *Id.*

¶7. In this case, Colonial claims it mailed a notice to the Traylor's, and the Traylor's maintain they never received the notice. However, aside from the issue of receipt of the cancellation notice, there appears in the record a copy of a notice that Colonial sent to the Traylor's' lienholder, Hancock Bank, as found in Exhibit B of the Third Party Complaint, stating that the Traylor's' policy was canceled. However, this cancellation notice was dated January 11, 1995, and contained a provision, consistent with our statutory law, that the lienholder's interest would be extended for ten days from the date of the notice. Thus, ten days from January 11, 1995, would be January 21, 1995. Therefore, the material issue of fact to be determined by a trial on the merits is whether either policy was in effect at the time of the accident and, if so, which one was in effect and whether that one was lawfully obtained in order that the trial court might determine if Colonial was liable on that policy at the time of the accident in New Orleans on January 20, 1995.

¶8. A jury question existed as to whether the claims were denied in bad faith by Colonial as well as whether the Traylor's were entitled to punitive damages and attorney's fees with regard to the first policy. While our ruling here in no way should be read as an assessment of the merits of the case, summary judgment was inappropriate and must be reversed.

¶9. **THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL**

COSTS OF THIS APPEAL ARE TAXED AGAINST THE APPELLEE.

**KING, P.J., BRIDGES, COLEMAN, DIAZ, IRVING, LEE, AND THOMAS, JJ., CONCUR.
McMILLIN, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
SOUTHWICK, P.J.**

McMILLIN, C.J., DISSENTING:

¶10. I respectfully dissent. The sole issue left alive in this proceeding is the bad faith claim asserted by the Traylor's against Colonial. At some previous point in this dispute, there may have been a legitimate justiciable issue as to whether the Traylor's accident was covered by either one of two Colonial policies issued to the Traylor's. Even so, however, there is no arguable basis to conclude that the issue of coverage under either policy was so clearly in the Traylor's favor that Colonial's persistence in denying coverage was an act of bad faith.

¶11. The facts necessary to show that there is no viable bad faith claim are not in dispute. The Traylor's had insurance coverage for the month of December 1994 that, on its face, ran only until the end of that month. Under Colonial's procedures, if the policy were to be renewed for January 1995, the monthly premium was due December 31, 1994. The Traylor's did not pay the required monthly premium necessary to renew coverage for January and Colonial presented evidence that it mailed the Traylor's a notice of nonrenewal for nonpayment of premium on December 31, 1994, extending a ten day grace period to pay the premium and renew coverage. The Traylor's did not take advantage of that opportunity. In fact, they claim that the notice was never received. On January 20, 1995, at approximately 7:00 in the morning the Traylor vehicle was involved in an accident. The Traylor's called an agent of Colonial. They claim that they only called to verify existing coverage and allege that they were assured that coverage was in place. Interestingly, however, the Traylor's did not report the fact of their accident in this telephone call. Colonial, undoubtedly having a different understanding of the purpose of the Traylor's call, issued the Traylor's a new policy having an inception date of January 20, 1995 -- the date of the call. In keeping with their standard practice, the policy bound coverage from 12:01 a.m. on that date - a time that predated the then-unreported accident. From these facts, a dispute over coverage arose in which the Traylor's assert alternate theories of coverage, claiming either (a) the second policy provided coverage on its face since its inception time was prior to the time of the accident, or (b) the first policy remained in effect since no notice of non-renewal had been received.

¶12. The law seems clear that, if the Traylor's were relying on this second policy to establish coverage, they would be in some measure of difficulty. An insured procuring an insurance policy that would, on its face, be in force at the time of an accident that has already occurred when the insured does not disclose the fact of the accident will not be permitted to enforce coverage as to that event. *State Farm Mut. Auto Ins. Co. v. Calhoun*, 236 Miss. 851, 862, 112 So. 2d 366, 370-71 (1959). Therefore, the only viable claim the Traylor's had that the accident was covered was based on their purported failure to receive the notice that their earlier policy would not be renewed. There is some doubt as to whether this in itself is a viable claim. Notice of cancellation of an existing policy during the term of the policy for nonpayment of the premium can only be accomplished by giving ten days' notice to the insured of intent to cancel. Miss. Code Ann. § 83-11-5 (Rev. 1991). On the other hand, once an existing policy's term has expired, there is no corresponding duty on the part of the insurance company to give notice that the expired policy will not be renewed for another term if the basis for nonrenewal is failure to pay the renewal premium. Miss. Code Ann. § 83-11-

7(c) (Rev. 1991). The facts of this case bear a striking resemblance to those appearing in the case of *Willis v. Miss. Farm Bureau Mut. Ins. Co.*, 481 So. 2d 256 (Miss. 1985). In that case, Willis had a policy that expired on October 15, 1982. Despite receiving a premium notice to renew the policy, Willis failed to pay the premium. He was involved in an accident on November 5, 1982, and claimed that, because of a long association between the company and his family, he was entitled to assume that his policy would be renewed despite his failure to pay the premium and that "Farm Bureau was required to send him an express notice of cancellation before his coverage could be terminated." *Id.* at 257-58. The Mississippi Supreme Court rejected that notion, observing the distinction between cancellation of an existing policy, for which notice is required, and nonrenewal of an expiring policy for which no notice is required if the reason for nonrenewal is failure to tender the required premium. *Id.* at 258-59. Thus, the *Willis* case makes it an extremely doubtful question as to whether the issue of mailing and receipt of notice of nonrenewal was even a material fact on the issue of the existence of coverage under the first policy.

¶13. However, giving the Traylors the benefit of the doubt and treating this as a cancellation case rather than a nonrenewal case, Colonial produced evidence that it had sent a notice on December 31, 1994, that would appear to meet the requirements of Section 83-11-5. Having such evidence, Colonial was entitled to rely on the legal presumption that mail properly addressed and posted is delivered to the addressee. *Thames v. Smith Ins. Agency*, 710 So. 2d 1213, 1216 (Miss. 1998), *Threatt v. Threatt*, 212 Miss. 555, 558, 54 So. 2d 907, 908 (1951). The presumption is, of course, rebuttable. *Id.* By denying that the mailing was ever received, the Traylors, at best, created a

disputed issue of fact that could only be resolved by an impartial fact-finder presented with all available evidence bearing on the subject.

¶14. Conceding that to be the case, however, it is obvious that there simply is no justiciable issue as to whether (a) the Traylors' bare denial that they received the non-renewal notice was a material fact on the issue of bad faith, and (b) assuming for argument that it was material, the denial was so compellingly believable that Colonial proceeded in bad faith when it elected to disbelieve it and rely instead on its evidence of mailing and the legal presumption of delivery.

¶15. There may have been a legitimate dispute over coverage in this case. However, the very fact that the dispute over coverage was a *legitimate* one destroys any possibility that Colonial's earlier denial of the claim was an act of bad faith. In my view, the summary judgment ought to be affirmed.

SOUTHWICK, P.J., JOINS THIS SEPARATE WRITTEN OPINION.

1. Policy number 237019510
2. Policy number 237023056.