NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHN R. MANFRIN and EDNA R. MANFRIN,

Appellants,

v.

AUTO OWNERS INSURANCE COMPANY,

Appellee.

Case No. 2D00-4311

Opinion filed November 28, 2001.

Appeal from the Circuit Court for Hillsborough County, James M. Barton, II, Judge.

Thomas John Dandar of Dandar & Dandar, Tampa, for Appellants.

Neil A. Roddenbery of Gray, Harris, Robinson, Lane, Trohn, Lakeland, for Appellee.

DAVIS, Judge.

John R. and Edna Manfrin challenge the circuit court's order denying their motion for summary judgment and granting summary judgment in favor of Auto Owners Insurance Company (Auto Owners). The Manfrins argue that the trial court erred in the following three ways: by granting Auto Owners summary judgment relief when Auto

Owners did not file a motion for summary judgment, by entering summary judgment when there remained genuine issues of material fact, and by failing to exempt the Manfrins from the exclusionary clause of the policy because it did not recognize their status as "innocent co-insureds." We find no merit in the first and third arguments; however, because there exists a genuine issue of material fact, we reverse.

The Manfrins and their adult son, John W. Manfrin, were the named insureds on a mobile homeowner's insurance policy issued by Auto Owners. Only the Manfrins' son resided on the insured property. On April 24, 1996, a fire destroyed the mobile home, and the Manfrins and their son filed a claim on the policy. Auto Owners denied coverage, maintaining that the fire was the result of arson committed by John W. Manfrin and thus came within the terms of the exclusionary clause. The Manfrins and their son brought suit requesting coverage.

The State Attorney's office subsequently charged John W. Manfrin with criminal mischief. He entered a pretrial intervention agreement, a condition of which was that he withdraw his claim against Auto Owners. The Manfrins, however, continued to pursue their claim and moved for summary judgment. The trial court denied their motion but granted affirmative relief to Auto Owners, even though Auto Owners had not sought summary judgment relief. The trial court found that there was no genuine issue of material fact to be resolved and that the evidence showed that John W. Manfrin had started the fire. Thus, the trial court determined, Auto Owners properly denied coverage and was entitled to a final judgment as a matter of law. We do not agree.

While a trial court may, under certain circumstance, enter summary judgment in favor of a nonmoving party (City of Pinellas Park v. Cross-State Utils. Co., 176 So. 2d 384, 386 (Fla. 2d DCA 1965)), summary judgment is not appropriate unless the record demonstrates that there is no genuine issue as to any material fact and that the party is entitled to the judgment as a matter of law. Snyder v. Cheezem Dev. Corp., 373 So. 2d 719 (Fla. 2d DCA 1979). Here, the evidence before the trial court was inconclusive as to who started the fire. Although Auto Owners filed the deposition testimony of a fire investigator who concluded that the fire was the result of arson committed by John W. Manfrin, the trial court also had before it John R. Manfrin's affidavit, which stated that he believed the fire was accidental. These conflicting opinions created a genuine issue of material fact to be resolved by the jury. Accordingly, we reverse the trial court's summary judgment and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

THREADGILL, A.C.J., Concurs.
NORTHCUTT, J, Concurs specially.

NORTHCUTT, Judge, Concurring.

I agree that the summary judgment must be reversed, but for reasons that differ slightly from those of my colleagues. First, I conclude that it was error to grant

summary judgment to Auto Owners without motion or notice. Although there is authority for the proposition that a summary judgment may be awarded to a nonmoving party, the circumstances in which such would be permissible are rare. Certainly, no party may properly suffer a summary judgment if it has not had a meaningful opportunity to rebut the asserted factual or legal basis for the judgment. See John K. Brennan Co. v. Cent. Bank & Trust Co., 164 So. 2d 525, 530 (Fla. 2d DCA 1964).

Here, the Manfrins moved for summary judgment on the ground that they were innocent co-insureds who had no involvement in the alleged arson. Their motion did not implicate the question whether their son committed the arson, and Auto Owners did not move for summary judgment on that or any other basis. Consequently, prior to the summary judgment hearing the Manfrins were never notified that they were obliged to submit proof on that issue. For this reason, granting summary judgment to Auto Owners on that theory violated the Manfrins' right to due process. John K. Brennan, 164 So. 2d 525.

Second, I would not reverse on the ground that the sworn submissions created an issue of material fact as to whether the Manfrins' son intentionally started the fire. Rather, I would reverse because the record contains no proof that he did so. As the majority mentions, Auto Owners submitted the deposition testimony of a fire investigator who opined that John W. Manfrin had set the fire. The investigator, a deputy state fire marshal, recounted that he had arrested the younger Manfrin based on his conclusion that there was probable cause to believe he had committed the arson. Thus, the record contained nothing more than evidence of the investigator's belief. It did not contain proof that he was correct.