

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 0909

REGINALD WILEY
AND LLOYD HENDERSON

VERSUS

CORNERSTONE NATIONAL INSURANCE
COMPANY AND RENEE M. DAIGRE

Judgment Rendered: APR 25 2013

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 590590

Honorable William Morvant, Judge

Karl J. Koch
Baton Rouge, LA

Attorney for Appellants
Plaintiffs – Reginald Wiley and
Lloyd Henderson

R. Todd Musgrave
Amanda H. Aucoin
New Orleans, LA

Attorneys for Appellee
Defendant – Cornerstone National
Insurance Company

BEFORE: PARRO, McCLENDON, WELCH, THERIOT, AND DRAKE, JJ.

*Parro J. dissents and assigns reasons
by JW*

JW
MT
*Ernest Sh...
HME*

WELCH, J.

Plaintiffs, Reginald Wiley and Lloyd Henderson, appeal a summary judgment rendered in favor of defendant, Cornerstone National Insurance Company (Cornerstone), dismissing it from this personal injury litigation. We reverse.

BACKGROUND

On May 13, 2010, plaintiffs filed this lawsuit seeking damages allegedly sustained in an automobile accident occurring on May 13, 2009. Named as defendants were the driver of the other vehicle involved in the collision, Renee M. Daigre, and Cornerstone, which had issued a policy of automobile insurance to Ashley S. Daigre, alleged to be the owner of the vehicle Renee was driving.

Cornerstone filed a motion for summary judgment in which it asserted that the insurance policy it issued to Ashley Daigre did not provide coverage for the accident sued upon because it had been cancelled for nonpayment on April 11, 2009, prior to the date of the accident. Cornerstone urged that it complied with the statutory pre-cancellation notification requirements set forth in La. R.S. 22:1266(D). In support of its motion, Cornerstone submitted a document entitled "Premium Due Notice" as evidence of the valid cancellation. The top portion of the document, which was to be returned with payment, contains a table setting forth a notice date of March 13, 2009; a payment due date of April 2, 2009; a payment due now in the amount of \$177.63; a late payment amount of \$187.63; and, a notation that if postmarked after the due date, a late fee would apply, but that payment must be postmarked prior to the cancellation date of April 11, 2009, or it would not be accepted. The middle portion of the invoice, to be kept by the insured for her records, states that the last payment was received on March 12, 2009, in the amount of \$187.63, and sets forth a payment schedule of four installments due on the 2nd day of April, May, June, and July 2009. The bottom

portion of the Premium Due Notice contains the following language, in pertinent part:

Notice of Intent to Cancel for Non-Payment of Premium

Cancellation Date: 04/11/2009 at 12:01 am

Cancellation/Termination Reason:

You are hereby notified that in accordance with the terms and conditions of your automobile policy and the provisions of section 636.1B of the Louisiana Insurance Code, that your policy is cancelled or terminated on the date and time indicated, for the reason below.

Non Payment of Premium

Cornerstone argued that the above cancellation was valid because it gave Ashley Daigre, the named insured, more than ten days notice of the cancellation and the notice clearly and unambiguously explained the reason for cancellation – non payment of the premium. Cornerstone also submitted evidence in support of its claim that it mailed notice of the cancellation to its insured on March 13, 2009.

In opposition to the motion for summary judgment, plaintiffs objected to some of the documents offered by Cornerstone as proof of mailing. They argued that even if those documents were properly before the court, Cornerstone was not entitled to summary judgment because it failed to demonstrate that Ashley Daigre failed to pay the premium, or that a legally sufficient notice of cancellation had been sent to her, or that Cornerstone actually cancelled the policy prior to the accident. Plaintiffs pointed out that at the time Ashley Daigre received the notice of premium due from Cornerstone, her payments were up to date, as reflected on the premium due notice. They contended that Cornerstone’s action in providing an anticipatory “notice of cancellation” with its regular billing, which gave the insured notice of cancellation for nonpayment at a time when payments on the insurance policy were timely and not overdue, did not satisfy the notice of

cancellation requirements set forth in La. R.S. 22:1266, but instead represented a clear attempt to circumvent the law.

In response, Cornerstone submitted the supplemental affidavit of Patrick Long, Cornerstone's general agent, in which he attested to the following: Ashley Daigre did not tender her premium payment due on April 2, 2009; he is not aware of any payment made by Ashley Daigre after March 12, 2009; and Cornerstone cancelled her policy on April 11, 2009, at 12:01 a.m. when the premium payment was not received.

A hearing on the motion was held, during which the trial court concluded that Cornerstone submitted sufficient evidence to make out a *prima facie* case that the notice of cancellation was mailed to Ashley Daigre's address, that the notice indicated the policy would be cancelled effective April 11, 2009, for nonpayment of the premium, and that the policy was in fact cancelled on that date when the payment was not received. The court concluded that the document sent by Cornerstone to Ashley Daigre constituted a valid notice of cancellation and entered summary judgment in favor of Cornerstone. Judgment in accordance with this ruling was signed on March 3, 2011. This appeal, challenging Cornerstone's dismissal from the litigation, followed.

DISCUSSION

Appellate courts review a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **George S. May International Company v. Arrowpoint Capital Corporation**, 2011-1865 (La. App. 1st Cir. 8/10/12), 97 So.3d 1167, 1170. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

It is well settled that where an insurer defends a claim on the ground that the policy has been cancelled, the insurer bears the burden of establishing facts that will relieve it of liability. See **Accardo v. Clarendon National Insurance Company**, 99-398 (La. App. 5th Cir. 1/4/00), 751 So.2d 975, 977 writ denied, 2000-0369 (La. 4/7/00), 759 So.2d 761. The insurer must show facts constituting positive and unambiguous proof of understanding of cancellation of the policy. See **Direct General Insurance Company of Louisiana v. Mongrue**, 2004-248 (La. App. 5th Cir. 8/31/04), 882 So.2d 620, 623.

Louisiana Revised Statute 22:1266¹ sets forth the notice requirements that must be followed by an insurance company in order to effect a cancellation of an insurance policy. Prior to its amendment by 2010 La. Acts, No. 703 §1, La. R.S. 22:1266 provided, in pertinent part:

B. (1) A notice of cancellation of a policy shall be effective only if it is based on one or more of the following reasons:

(a) Nonpayment of premium.

* * *

D. (1) No notice of cancellation of a policy to which Subsection B...of this Section applies shall be effective unless mailed by certified mail or delivered by the insurer to the named insured at least thirty days prior to the effective date of the cancellation; however, when cancellation is for nonpayment of premium at least ten days notice of cancellation accompanied by the reason therefor shall be given. ...

An insurer must strictly comply with the statutory provisions for a valid notice of cancellation of an insurance policy. **Mongrue**, 882 So.2d at 622. The obvious purpose of the notice requirement is to protect the insured and the public against unnoticed termination of insurance coverage. **Taylor v. MFA Mutual Insurance**

¹ La. R.S. 22:1266 was renumbered from La. R.S. 22:636.1 by 2008 La. Acts, No. 415, §1, effective January 1, 2009.

Company, 334 So.2d 402, 403 (La. 1976). The notice requirement is designed to ensure that the insured is aware his policy is being terminated and to afford him time to obtain other insurance protection. *Id.* at 404.

Cornerstone contends that its cancellation for nonpayment of the premium was valid because it met La. R.S. 22:1266(D)'s two requirements: (1) it mailed notice of cancellation to its insured on March 13, 2009, more than 10 days prior to the effective cancellation date of April 11, 2009, and (2) the notice of cancellation is clear and unambiguous because it informed the insured that the policy "is cancelled" if the premium is not paid by April 11, 2009. In furtherance of its argument that its notice is in full compliance with La. R.S. 22:1226(D), Cornerstone adopts the holding of a fourth circuit case, **Narcisse v. Evans**, 2001-1092 (La. App. 4th Cir. 1/16/02), 807 So.2d 339, in which another appellate court held that a notice similar to the one sent by Cornerstone to its insured constituted an effective cancellation. In **Narcisse**, as in this case, the policy premium was to be paid in monthly installments; the insurer, Clarendon, forwarded to its insured a "Premium Due Notice" for the installment payment due on July 19, 1995, and the premium due notice contained a "Notice of Intent to Cancel for Non-Payment of Premium." **Narcisse**, 807 So.2d at 340. Unlike the instant premium due notice, the premium due notice issued by Clarendon notified the insured that this was the only notice the insured would receive. *Id.* The Clarendon notice informed the insured that its policy "will be cancelled" on July 30, 1995, if the premium due is not postmarked prior to that date and that a payment postmarked on or after the cancellation date would not be accepted. *Id.* The court concluded that the notice sent to the insured was an unambiguous and unequivocal notice of cancellation clearly putting the insured on notice that his coverage would terminate on July 30, 1995, if his payment was not received or postmarked prior to that date. *Id.* at 344.

We decline to follow **Narcisse**, as we find that decision to be at odds with this court's decisions in **Travelers Insurance Company v. Jenkins**, 285 So.2d 839 (La. App. 1st Cir. 1973), and **State Farm Mutual Automobile Insurance Company v. Villneuve**, 98-2421 (La. App. 1st Cir. 12/28/99), 747 So.2d 777, writ denied, 2000-0273 (La. 3/24/00), 758 So.2d 156. In **Jenkins**, this court held that in order for an insurer to satisfy the statutory notice requirement, the cancellation notice must express a specific intent to cancel as of the notice date, effective upon such date as would afford the insured at least the prescribed statutory notice. This court observed that there is a distinct difference in language which informs the insured that a policy "will be cancelled" and language stating that a policy "is cancelled," or "is hereby cancelled," or "stands cancelled." This court explained that in the first instance, there is no concurrent cancellation as of the notice date, not even a conditional cancellation. The notice at issue in **Jenkins** informed the insured that a check it had written to the insurer for a renewal premium was returned for insufficient funds, the insurer would continue coverage until July 11, 1969, and that if a replacement payment was not received within that time, the policy "will be cancelled" effective that date. *Id.* at 842. This court held that the notice amounted only to a demand for payment of premiums and did not suffice as a notice of cancellation. In so doing, this court observed that the notice did not cancel the policy at the time of the notice, effective on a given future date, but merely informed the insured that unless premiums due were paid, the policy would be cancelled. *Id.* at 844; see also **Ellzey v. Hardware Mutual Insurance Company of Minnesota**, 40 So.2d 24, 28 (La. App. 1st Cir. 1949) (wherein this court stated that a cancellation notice must clearly and unequivocally show a "present cancellation").

In **Villneuve**, this court held that a notice of cancellation, contained in a premium due notice, sent to the insured twenty days prior to the due date of an

installment payment, which informed the insured that the policy “will be cancelled” for nonpayment if the premium was not paid by the due date, was not an adequate notice of cancellation. **Villneuve**, 747 So.2d at 780-781. This court held that the notice was merely a demand for payment, specifying that the policy would be cancelled if the premium was not paid. This court further noted that there was no outstanding balance at the time the notice was mailed. Under these circumstances, this court held that the notice did not amount to the positive notice of cancellation required by statute and by **Jenkins**. In reaching this conclusion, this court left open the issue of whether a notice of cancellation for nonpayment of a premium could ever properly be issued prior to the premium due date where there was no outstanding premium balance due at the time of the notice. *Id.*

We acknowledge that Cornerstone’s cancellation notice uses the language “is cancelled,” which, under other circumstances, may be interpreted as unequivocal notice to the insured that a policy has been cancelled. However, we find that given the circumstances under which Cornerstone’s purported pre-cancellation notice was issued, the notice is not an unconditional, unequivocal notice of cancellation required by La. R.S. 22:1226(D) and this court’s decisions in **Jenkins** and **Villneuve**. When cancellation of a policy is initiated by the insurer, it requires that the notice prescribed by statute be given. **West v. Clarendon National Insurance Company**, 1999-1687 (La. App. 1st Cir. 7/31/00), 767 So.2d 877, 881. In this case, when it sent the notice of cancellation, Cornerstone was not initiating the cancellation of the policy; rather, it was sending its insured a bill for a payment due in the future. At the time the notice was issued, there was no outstanding premium due and the only statutory condition upon which Cornerstone could base its cancellation under La. R.S. 22:1266 – nonpayment of the premium – had not yet arisen. Cornerstone’s cancellation notice merely informed the insured that if payment was not received by the premium due date, the policy would be

cancelled, as did the notices in **Jenkins** and **Villneuve**. We find that the Cornerstone notice of cancellation, which is combined with a premium invoice and conditioned on the nonpayment of the premium by the due date, constitutes a demand for payment and not an unequivocal notice of cancellation. See State Farm Mutual Automobile Insurance Company v. Norwood, 2002-2399 (La. App. 1st Cir. 7/2/03)(*unpublished*) (wherein another panel of this court refused to follow **Narcisse** and held that a cancellation notice stating that the policy “will be cancelled” if the premium payment, which included an amount past due, was not received before the cancellation date, was not a sufficient notice of cancellation because it was conditioned on the nonpayment of premiums by the due date, similar to the cancellation notices in **Jenkins**, **Ellzey**, and **Villneuve** and thus constituted a demand for payment of premiums rather than an unequivocal notice of cancellation).

Moreover, the entire purpose of La. R.S. 22:1226(D)’s cancellation requirement is to protect the insured against the danger of losing insurance coverage through mere neglect to pay a premium by ensuring that the insured is notified that a policy is being terminated in sufficient time to obtain insurance coverage. To conclude that an insurer can satisfy La. R.S. 22:1226(D)’s strict requirements by merely sending notices of cancellation for nonpayment in every premium invoice, at a time when the policy premiums are current and there is not yet a basis for cancellation, would defeat the purpose of La. R.S. 22:1226(D) and render its protections meaningless. Accordingly, we find that the trial court erred in holding that Cornerstone met its burden of proving that the policy issued to

Ashley Daigre had been validly cancelled prior to the accident giving rise to the instant claim.²

CONCLUSION

Based on the foregoing, we reverse the summary judgment rendered in favor of Cornerstone and remand this case for proceedings consistent with this opinion. All costs of this appeal are assessed to appellee, Cornerstone National Insurance Company.

REVERSED AND REMANDED.

² Because of this holding, it is unnecessary to address appellants' argument regarding whether Cornerstone's insured was given notice at least ten days prior to the effective date of the cancellation.

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**BEFORE: PARRO, MCCLENDON, WELCH,
THERIOT, AND DRAKE, JJ.**

PARRO, J., dissenting.

I disagree with the majority and would affirm the trial court's March 3, 2011 judgment, which granted summary judgment in favor of Cornerstone. After reviewing the applicable provisions of LSA-R.S. 22:1266, it is my opinion that Cornerstone's notice of cancellation for nonpayment of premium to its insured, Ashley Daigre, constituted a valid notice of cancellation under the statute.

In accordance with LSA-R.S. 22:1266(B)(1), a "notice of cancellation of a policy shall be effective only if it is based on one or more of the following reasons: ... Nonpayment of premium."¹ Furthermore, LSA-R.S. 22:1266(D)(1) provides, in pertinent part:

[W]hen cancellation is for nonpayment of premium[,] at least ten days notice of cancellation accompanied by the reason shall be given. ... Notice of cancellation for nonpayment of premiums shall not be required to be sent by certified mail.

¹ Louisiana Revised Statute 22:1266(A)(6) provides: " 'Nonpayment of premium' means failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums on a policy, or any installment of such premium"

Cornerstone's March 13, 2009 "PREMIUM DUE NOTICE" informed Ashley Daigre that her next payment was due on April 2, 2009, and that, if postmarked after the due date, a "\$10.00 LATE FEE" applied. Moreover, the notice also informed her that her payment had to be "postmarked prior to the Cancellation Date of 4/11/2009 or it will NOT be accepted[.]" Furthermore, Cornerstone's "Notice of Intent to Cancel for Non-Payment of Premium," which was contained in the bottom portion of the same one-page document referred to as the "PREMIUM DUE NOTICE," unequivocally informed Ms. Daigre that her policy "is cancelled" as of April 11, 2009, at 12:01 a.m. for "Non Payment of Premium."

At this point, Ms. Daigre had the following options: pay the premium by April 2, 2009; send her payment by mail, postmarked prior to April 11, 2009; or, have her insurance policy cancelled on April 11, 2009, at 12:01 a.m. Ms. Daigre did not pay the premium that was due on April 2, 2009, nor was any payment postmarked prior to the cancellation date. Accordingly, because more than ten days had elapsed since the notice of cancellation for nonpayment of premium had been given to Ms. Daigre, her policy was cancelled as of April 11, 2009, at 12:01 a.m., pursuant to the terms of her contract of insurance and LSA-R.S. 22:1266(D)(1).

The majority notes that "[a]t the time the notice was issued, there was no outstanding premium due and the only statutory condition upon which Cornerstone could base its cancellation under La. R.S. 22:1266 - nonpayment of the premium - had not yet arisen." However, LSA-R.S. 22:1266 does not require that the notice of cancellation be sent only when there is an outstanding premium due and only after nonpayment of that outstanding premium. The statute only requires that "when cancellation is for nonpayment of premium[,], at least ten days notice of cancellation ... shall be given." See LSA-R.S. 22:1266(D)(1). Cornerstone's notice of cancellation, indisputably given at least ten days prior to cancellation of Ms. Daigre's policy, fully complies with this statutory requirement.

The majority also concludes that "Cornerstone's cancellation notice merely informed the insured that if payment was not received by the premium due date, the policy would be cancelled, as did the notices in **Jenkins** and **Villeneuve**." However,

there is a critical and decisive difference between Cornerstone's cancellation notice and those at issue in Jenkins and Villneuve. Cornerstone's cancellation notice clearly informed Ms. Daigre that her policy "is cancelled" as of April 11, 2009, at 12:01 a.m. for nonpayment of premium, whereas the notices in Jenkins and Villneuve both informed the insureds that their policies "will be cancelled" for nonpayment if the premium was not paid by a certain date. As noted by the Jenkins court, 285 So.2d at 844, there is "a distinct difference in language which informs the insured that the policy 'will be cancelled', and verbiage which states the policy 'is cancelled', 'is hereby cancelled', or 'stands cancelled'." And, according to Jenkins, "the more equitable rule dictates an interpretation of the statute^[2] that requires expression of specific intent to cancel as of notice date, effective upon such date as will afford the insured at least the prescribed statutory notice." Id. Here, Cornerstone's cancellation notice did exactly that – it informed Ms. Daigre, as of the March 13, 2009 notice date, of its specific intent to cancel her policy for nonpayment, effective April 11, 2009, thereby fully complying with the prescribed statutory ten-day notice contained in LSA-R.S. 22:1266(D)(1).

I also note that, contrary to the cancellation notice at issue in Villneuve, 747 So.2d at 780, Cornerstone's cancellation notice did "positively put [Ms. Daigre] on notice that the policy was going to be cancelled" by stating, "your policy is cancelled ... on the date and time indicated [04/11/2009 at 12:01am], for the reason below [**Non Payment of Premium**]"; see also Folds v. Protective Casualty Insurance Co., 26,323 (La. App. 2nd Cir. 12/7/94), 647 So.2d 1215, 1216-17 (in which the appellate court affirmed the trial court's finding that a notice mailed to the insured was a timely-mailed and valid notice of cancellation based on language stating "[y]our car insurance policy # ... is cancelled effective 09/21/86 at 12:01 a.m."). (Emphasis added).

For the above reasons, I firmly believe Cornerstone's notice of cancellation constituted a valid notice of cancellation under LSA-R.S. 22:1266(D)(1), because it gave its insured notice of cancellation for nonpayment of premium more than ten days prior to the effective date of cancellation. Further, the validity of Cornerstone's notice of

² The Jenkins court interpreted LSA-R.S. 22:636.1, the substance of which is now embodied in LSA-R.S. 22:1266, the statute at issue in this appeal.

cancellation is not affected by the fact that the notice was sent when there was no outstanding premium due and before nonpayment occurred, because occurrence of these conditions is not required by the clear wording of LSA-R.S. 22:1266. For these reasons, I would affirm the trial court's judgment, which granted summary judgment in favor of Cornerstone.

Accordingly, I respectfully dissent.