

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

CASE NO.: 3D23-370

L.T. CASE NO.: 2020-015485-CA-01 (13)

ASCENDANT COMMERCIAL INSURANCE, INC.,

Respondent/Appellant/Defendant,

v.

CHARLES VERES, as Guardian of
MATILDE HERNANDEZ-NIEVES, and
KEVIN ALEXIS FLORES HERNANDEZ and
SHARON ISABEL FLORES HERNANDEZ, minors,
by and through their parent and Natural Guardian,
JORGE FLORES ESTRADA,

Petitioners/Appellees/Plaintiffs,

**NOTICE TO INVOKE DISCRETIONARY
JURISDICTION OF THE FLORIDA SUPREME COURT**

NOTICE IS GIVEN that Petitioners, Charles Veres, as Guardian of Matilde Hernandez-Nieves, and Kevin Alexis Flores Hernandez and Sharon Isabel Flores Hernandez, minors, by and through their parent and Natural Guardian, Jorge Flores Estrada, invoke the discretionary jurisdiction of the Florida Supreme Court to review the April 10, 2024 decision of this Court (Exhibit A) and the May 16, 2024 Order denying Appellees' Motion for Rehearing (Exhibit B).

RECEIVED 06/17/2024 2:28 pm FLORIDA SUPREME COURT

The decisions expressly and directly conflict with decisions of Florida District Courts of Appeal or of the Florida Supreme Court on the same matters of law. Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv), the Florida Supreme Court has jurisdiction. See Art. V, § 3(b)(3), Fla. Const.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email through the Florida Courts E-Filing Portal on June 14, 2024 to:

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/s/ Stephen A. Marino, Jr.
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EXHIBIT A

Third District Court of Appeal

State of Florida

Opinion filed April 10, 2024.
Not final until disposition of timely filed motion for rehearing.

No. 3D23-370
Lower Tribunal No. 20-15485

Ascendant Commercial Insurance, Inc.,
Appellant,

vs.

Charles Veres, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Gina Beovides, Judge.

Kiernan Trebach LLP and Wendy Stein Fulton (Ft. Lauderdale); Koleos Rosenberg Dioniso and Alan S. Rosenberg (Ft. Lauderdale), for appellant.

Ver Ploeg & Marino, P.A., and Stephen A. Marino, Jr., and Rochelle N. Wimbush, for appellees.

Before EMAS, MILLER and LOBREE, JJ.

LOBREE, J.

Ascendant Commercial Insurance Inc. ("Ascendant"), appeals from a

final judgment entered in favor of Charles Veres, as guardian of Matilde Hernandez–Nieves, and Kevin Alexis Flores Hernandez and Sharon Isabel Flores Hernandez, minors, by and through their parent and natural guardian, Jorge Flores Estrada (collectively, “Veres”), on their claim that Ascendant breached a commercial automobile policy issued to its insured, Michael Zill. We hold that the trial court erred in finding that Zill’s June 30, 2017 notice of cancellation of his policy was not effective until Ascendant received it on July 5, 2017, and that consequently, Ascendant’s policy was in effect on July 4, 2017, the day Zill struck and injured Hernandez–Nieves. Accordingly, we reverse the order granting summary judgment in favor of Veres and remand for further proceedings.

BACKGROUND

Ascendant issued a commercial automobile insurance policy to Zill for a policy period from September 16, 2016 to September 16, 2017, and with liability limits of \$10,000.00. During the policy period, Zill, who was a landscaper, was working a job that required higher liability limits than the Ascendant policy provided. For that reason, Zill obtained a commercial automobile policy for Zill Tree Services, Inc., from Granada Insurance Company (“GIC”), with an effective date of June 29, 2017, and a \$1,000,000.00 liability limit. In his deposition, Zill testified that once he knew

that the GIC policy was in place, he wanted to cancel the Ascendant policy so that his previously paid premium would be refunded to him.

Concerning the insured's cancellation of the policy, Ascendant's policy provided: "The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation." For this purpose, on June 30, 2017, Zill electronically signed a Cancellation Request/Policy Release form (the "cancellation notice") for the Ascendant policy. On this form, the box for "CANCELLATION REQUEST" was checked, and June 29, 2017, was indicated as the cancellation date. The reason for cancellation was marked as "REWRITTEN," and the GIC policy number was identified. The parties agree that Ascendant did not receive Zill's cancellation notice until July 5, 2017. On July 4, 2017, the day prior to Ascendant's receipt of the cancellation notice, Zill struck Hernandez–Nieves while driving the insured vehicle.

After the accident, attorneys representing Hernandez–Nieves and the minor children sent Ascendant a request for insurance information. Ascendant responded on July 13, 2017, stating that it was starting a coverage investigation, and, that same day, Ascendant processed Zill's cancellation notice. The next day, July 14, Ascendant mailed Zill a notice of cancellation or non-renewal stating a cancellation effective date of June 30,

2017. Ascendant then issued Zill a check in the amount of the policy's refund, which Zill deposited.

Hernandez–Nieves subsequently filed a complaint for damages against Zill and Zill's Tree Services, Inc., alleging a claim for negligence against Zill and a claim for vicarious liability against Zill's Tree Services (the "underlying lawsuit"). Shortly thereafter, Ascendant notified Zill that it denied "any and all liability and obligation to provide coverage to you and to others" for the July 4 accident because the policy was canceled before the date of loss. GIC provided a defense in the underlying lawsuit.¹ In March 2020, Zill entered into an agreement with Veres to submit to binding arbitration in the underlying lawsuit and assign his right to indemnification from Ascendant to Veres. As a result, a final judgment on arbitration award was entered in favor of Veres and against Zill and Zill's Tree Services.

Having obtained an assignment from Zill and Zill's Tree Services via the March 2020 agreement, Veres filed the case at hand against Ascendant. Veres stated one count for breach of contract, claiming that Ascendant had breached its duties under the policy by refusing to defend or indemnify Zill against Veres' claim while the policy was in full force and effect and no

¹ Zill testified that he never asked Ascendant to provide a defense to the underlying lawsuit.

exclusions or conditions barred coverage. Ascendant filed an answer and amended affirmative defenses—including that prior to the July 5 accident, Zill canceled his policy with it by executing the cancellation notice dated June 30—and also filed a counterclaim seeking a declaratory judgment that its policy did not cover claims made against it in the instant case and the underlying litigation.

Veres then moved for summary judgment on his breach of contract claim, arguing that under the policy's language requiring an insured to provide "advance written notice" of cancellation to the insured, the earliest an insured's cancellation notice can take effect is the date upon which it is received by the insurer. Ascendant opposed the motion. The trial court ultimately granted summary judgment in favor of Veres, finding that based on the policy's requirement that the insured provide Ascendant with "advance written notice" and Southern Group Indemnity, Inc. v. Cullen, 831 So. 2d 681 (Fla. 4th DCA 2002), "the cancellation could not have taken effect prior to July 5, 2017 at 3:57 p.m. when Ascendant received Mr. Zill's cancellation request. The Policy was therefore in full force and effect at the time of the accident on July 4, 2017." Thereafter, the trial court entered a final judgment in favor of Veres in the amount of \$10,000.00. Ascendant's appeal followed.

STANDARD OF REVIEW

“The standard of review is *de novo*, as the granting of a motion for summary judgment involves a question of law arising from undisputed facts.” Rivera v. State Farm Mut. Auto. Ins. Co., 317 So. 3d 197, 202 (Fla. 3d DCA 2021). Additionally, this court applies a *de novo* standard of review to issues of insurance policy construction and interpretation. Arguelles v. Citizens Prop. Ins. Corp., 278 So. 3d 108, 111 (Fla. 3d DCA 2019).

ANALYSIS

On appeal, Ascendant maintains that the trial court erred in determining that the policy’s “advance written notice” requirement means that Zill’s request to cancel his policy could not have taken effect prior to the date on which Ascendant received his cancellation notice. Given the undisputed facts in this case, we agree with Ascendant.

“In the absence of a statutory requirement to effect cancellation, the terms of the policy govern.” Spielberg v. Progressive Select Ins. Co., 315 So. 3d 1, 5 (Fla. 4th DCA 2021). Concerning an insured’s method of cancellation, this court long-ago made clear that an insurer may waive its policy’s requirement that an insured’s notice of cancellation state when thereafter it shall be effective, because such a provision inures to the insurer’s benefit. In Allstate Insurance Co. v. Doody, 193 So. 2d 687, 690

(Fla. 3d DCA 1967), this court considered whether testimony that the insured called the insurer's agent and requested that the relevant coverage be cancelled was material to the insurer's coverage defense, where the policy provided that "the named insured may cancel this policy by mailing to Allstate written notice stating when thereafter such cancellation shall be effective." In finding that the proffered evidence was material to the issue of whether the insurer waived the requirement of written notice and consented to an oral, rather than written, cancellation, this court explained, "a policy of insurance may be cancelled by mutual consent of the contracting parties notwithstanding a provision in the policy specifying a method of cancellation." Id. (citing Merchs. & Bankers Guar. Co. v. Downs, 175 So. 704 (Fla. 1937)).

Significantly, we further expounded:

[T]he requirement for notice in writing and that the notice shall state when thereafter the cancellation shall be effective are for the benefit of the insurer and may be waived by the insurer. The word 'thereafter' means no more than that the insured may not select a cancellation date prior to the date of the notice.

Id. (footnote omitted); see also, e.g., Allstate Ins. Co. v. Cipriani, 629 So. 2d 183, 184 (Fla. 4th DCA 1993) (holding that automobile was removed from insurance policy by oral cancellation even though policy provided insured "may cancel by writing," because "[i]nsurance policy provisions permitting written cancellation generally are considered to be for the benefit of the

insurer, and subject to waiver by the insurer” (citing Dooddy, 193 So. 2d at 687)). Indeed, where the relevant policy provision states, like here, that an insured may cancel by providing “advance written notice of the cancellation,” the insurer is at liberty to honor the insured’s requested date of cancellation. See Federated Mut. Ins. Co. v. Germany, 712 So. 2d 1245, 1248–49 (Fla. 5th DCA 1998) (holding under cancellation provision requiring “advance written notice of cancellation” that cancellation became effective on September 12, 1989, in accordance with insured’s October 6, 1989 letter requesting September 12 cancellation date).

We find that the principles set forth in Dooddy apply here. The policy’s provision stating that the insured may cancel the policy by mailing or delivering to Ascendant “advance written notice of cancellation” is analogous to the provision requiring “written notice stating when thereafter such cancellation shall be effective” construed by this court in Dooddy. Cf. Spielberg, 315 So. 3d at 5–6 (holding that use of “future date” in policy provision stating that insured may cancel policy “by calling or writing **us** and stating the future date **you** wish the cancellation to be effective,” was “akin to ‘thereafter’ in Dooddy,” and therefore parties could (1) mutually consent to cancel policy on day insured called and requested cancellation or (2) insurer was free to waive the requirement of a “future date” because such a provision

was for its benefit). Here, as in Doody, the policy's limitation on the insured's ability to name a retroactive cancellation date was "for the benefit of the insurer," 193 So. 2d at 690, ensuring that an insured may not retroactively cancel the entire policy at the end of its term after having obtained the benefit of coverage. Thus, consistent with Doody, Ascendant canceled the policy effective June 30, the date Zill executed his cancellation notice.

Veres' contrary argument that Cullen controls here is unavailing, as that case addressed the intersection of the then-applicable statute dictating the procedures for a premium finance company's cancellation of an insurance contract and the relevant insurance policy. In Cullen, the insured financed the premiums of an automobile insurance policy through a premium finance company. Cullen, 831 So. 2d at 682. The policy contained a cancellation clause similar to the one here, providing that "[t]he named insured shown in the Declarations may cancel by . . . giving us *advance* written notice of the date cancellation is to take effect." Id. (emphasis in original). On appeal, the case concerned whether there was coverage for a January 6 accident where the premium finance company's January 5 request for cancellation was not received by the insurer until January 9. In affirming the trial court's finding that the policy was in effect on January 6, the Fourth District Court of Appeal held that under section 627.848, Florida Statutes

(1995), the policy's cancellation requirement applied to the premium finance company. The court interpreted the policy's "advance written notice requirement" to mean that the finance company could not make cancellation effective prior to the insurer receiving the notice of cancellation. 831 So. 2d at 682. In reaching its conclusion, the court relied, in part, on section 627.848(1)(c), which provided that "upon receipt of a copy of the cancellation notice by the insurer or insurers, the insurance contract shall be canceled with the same force and effect as if the notice of cancellation had been submitted by the insured himself." Unlike in Cullen, here, we are not concerned with the statutory requirements unique to premium finance companies, and even if we were, Cullen's assistance would be limited by the fact that in 1996, section 627.848(1)(c) was amended to provide that "upon receipt of a copy of the cancellation notice by the insurer or insurers, the insurance contract *shall be canceled as of the date specified in the cancellation notice* with the same force and effect as if the notice of cancellation had been submitted by the insured himself." Ch. 96-377, § 11, Laws of Fla. (emphasis added). Thus, Cullen is not dispositive of the issues raised here, and the trial court's reliance on Cullen was misplaced.

CONCLUSION

Ascendant complied with the terms of its policy when it honored Zill's

cancellation notice as of the date of its execution, June 30. See Doody, 193 So. 2d at 690; Spielberg, 315 So. 3d at 6. Thus, the trial court erred in finding that under the policy and Cullen, Zill's requested cancellation could not have taken effect prior to Ascendant's July 5 receipt of Zill's cancellation notice and in concluding that as a result, Ascendant's policy was in effect at the time of the July 4 accident. Accordingly, we reverse the final judgment in favor of Veres, and remand for further proceedings consistent with this opinion.

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EXHIBIT B

IN THE DISTRICT COURT OF

APPEAL

OF FLORIDA

THIRD DISTRICT

May 16, 2024

Ascendant Commercial Insurance,
Inc.,

3D2023-0370

Trial Court Case No. 20-15485

Appellant(s),

v.

Charles Veres, et al.,

Appellee(s).

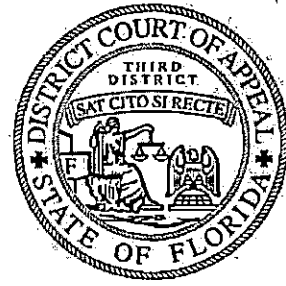
Appellant's Response in Opposition to Appellees' Motion for Rehearing, filed on May 10, 2024, is noted.

Upon consideration, Appellees' Motion for Rehearing is hereby denied.

EMAS, MILLER and LOBREE, JJ., concur.

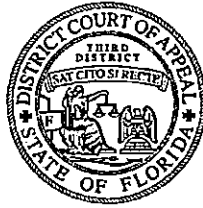
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ATTEST

3D 2023-0370 5/16/24 Prieto
Mercedes M. Prieto, Clerk
District Court of Appeal
Third District



CC: Stephen A. Marino, Jr.
Alan S. Rosenberg
Wendy Stein Fulton
Rochelle Wimbush

LA



THOMAS LOGUE
CHIEF JUDGE
KEVIN EMAS
IVAN F. FERNANDEZ
EDWIN A. SCALES, III
NORMA LINDSEY
ERIC WM. HENDON
BRONWYN C. MILLER
MONICA GORDO
FLEUR J. LOBREE
ALEXANDER S. BOKOR
JUDGES

MERCEDES M. PRIETO
CLERK
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MIAMI, FLORIDA 33175-1716

TELEPHONE (305) 229-3200

June 17, 2024

Re: Ascendant Commercial Insurance, Inc.,
v.
Charles Verses, et al.,
Appeal No.: 3D23-370
Trial Court No.: 20-15485
Trial Court Judge: Gina Beovides

Dear Mr. Tomasino:

Attached is a certified copy of the Notice invoking the discretionary jurisdiction of the Supreme Court pursuant to Rule 9.120, Florida Rules of Appellate Procedure. Attached also is this Court's opinion or decision relevant to this case.

_____ The filing fee prescribed by Section 25.241(2), Florida Statutes, was received by this Court and is also attached.

X The filing fee prescribed by Section 25.241(2), Florida Statutes, was not received by this Court.

_____ Petitioner/Appellant has previously been determined insolvent by the circuit court or our court in the underlying case.

_____ Petitioner/Appellant has already filed, and this court has granted, petitioner/appellant's motion to proceed without payment of costs in this case.

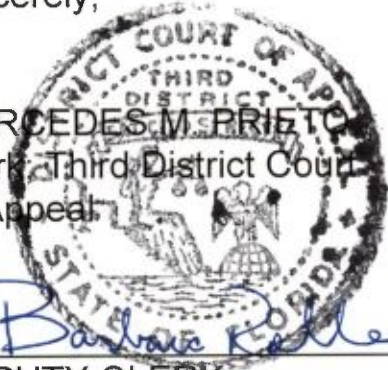
No filing fee is required because this is a(an):

_____ Summary Appeal (Rule 9.141)
_____ Unemployment Appeal Commission
_____ Habeas Corpus
_____ Juvenile Case
_____ Other:

If there are any questions regarding this matter, please do not hesitate to contact this Office.

Sincerely,

MERCEDES M. PRIETO
Clerk, Third District Court
of Appeal



By: Barbara Kelle
DEPUTY CLERK

