MARC FEDER DMD, PC and MARC FEDER, Plaintiffs, v. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2538-23 Civil Action On Appeal of the Orders dated March 15, 2024 of the Honorable Michael Beukas in Docket No. BER-L-1485-22 Granting Defendant's Summary Judgment Motion and Denying Plaintiffs' Cross-Motion for Partial Summary Judgment

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AMENDED BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

This case arises out of an automobile accident. The details of the accident itself are beyond the scope of this appeal, which deals with a single issue: whether or not New Jersey Manufacturers, which at one point insured the plaintiffs' vehicle, had effectively cancelled his policy prior to the date of the accident. The plaintiff is asserting three points of error on this appeal:

(1) The insurance company failed to present legally sufficient proof of mailing a Cancellation Notice in the manner required by statute, given that the proper use of a Certificate of Mailing has not been certified to by anyone with personal knowledge;

(2) The insurance did not comply with the requirement of the statute that it maintain a contemporaneously certified copy of the Cancellation Notice in its files;

(3) Assuming, *arguendo*, that the insurance company's proofs are deemed to be legally sufficient, the court below should have required proof of the insured's actual receipt of the notice, not merely the insurance company's mailing of it; satisfying the statutory requirements should create, at most, a rebuttable presumption of receipt, creating an issue of disputed fact for a jury.

PROCEDURAL HISTORY

Marc Feder ("Feder") and his company ("Feder PC") filed a Complaint in the Bergen County Law Division against New Jersey Manufacturers Insurance Company ("NJM") on March 14, 2022. (Pa21). The Complaint sought a declaratory judgment that on the date Feder was involved in an accident, his car was covered under a policy issued by NJM, and that NJM's purported cancellation of that policy had been ineffective. Plaintiff also sought monetary damages arising from the coverage denial.

At the close of discovery, on December 18, 2023, NJM moved for summary judgment. (Pa9). On January 26, 2024, Plaintiffs filed opposition with a cross-motion for partial summary judgment, limited to the issue of liability. (Pa114). NJM filed its opposition and reply on March 5, 2024. (Pa123). On March 3, 2024, Plaintiffs filed the final motion papers consisting of the reply brief on their cross-motion.

On March 15, 2024, following oral argument, the Honorable Michael Beukas granted NJM's summary judgment motion (Pa5) and denied Plaintiffs' cross-motion (Pa7). Plaintiffs subsequently filed a Notice of Appeal on April 22, 2024 (Pa1).

STATEMENT OF FACTS

Marc Feder is the owner of Marc Feder DMD, PC. On July 23, 2020, Feder was driving a car owned by the company, and was involved in an accident. (Pa60). Although it is undisputed that at one point the car had been insured under a policy issued by NJM (Pa15), Defendant NJM maintains that on December 13, 2019, it had issued a Cancellation Notice, and that the cancellation had gone into effect prior to the accident. (Pa16). Feder, for his part, maintained that he had never received the Cancellation Notice, and that on the date of the accident he was unaware of the purported cancellation of the policy. (Pa12)

The details of the legal requirement for cancelling an automobile insurance policy are discussed later in this brief. On its summary judgment motion, in an effort to demonstrate compliance with those requirements, NJM submitted a certification of its counsel which was not based on personal knowledge (Pa18), and which Plaintiff therefore argued was legally insufficient. The certification attached two pages from a much larger document that purported to be a proof of mailing of all notices sent on a specific day. (Pa40). Plaintiff maintained that these pages actually demonstrated that the statute had *not* been complied with.

On reply NJM attempted to cure these deficiencies. It filed another certification from its trial counsel (Pa123), which attached the full Certificate of Mailing (Pa125).

It also filed a certification from an in-house attorney for NJM (Pa141), and a certification from an NJM employee in its mailing division (Pa144). However, not one of the persons submitting certifications actually had personal knowledge of the actual purported mailing of the Cancellation Notice. Plaintiff maintained that the evidence of compliance that was presented to the Court below continued to be legally deficient to support summary judgment or to deny the plaintiffs' cross-motion. The court below disagreed, however, and granted summary judgment to NJM. (1T38)

POINT I

BECAUSE NJM FAILED TO PRESENT SUFFICIENT EVIDENCE OF MAILING A CANCELLATION NOTICE, SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED AND PLAINTIFFS' CROSS-MOTION SHOULD HAVE BEEN GRANTED (1T, pp. 17-38)

NJM maintains that it had effectively cancelled Feder's policy prior to the date of his accident by mailing him a Cancellation Notice. Feder maintains that he never received the notice, and was unaware of the purported cancellation. The procedure for cancelling an auto insurance policy is set out in N.J.S.A. 17:29C-10

> 17:29C-10. Written notice of cancellation or intention not to renew; effectiveness
>
> No written notice of cancellation or of intention not to renew sent by an insurer to an insured in accordance with the provisions of an automobile insurance policy shall be effective unless
>
> a. (1) it is sent by certified mail or (2) at the time of the mailing of said notice, by regular mail, the insurer has obtained from the Post Office Department a date stamped proof of mailing showing the name and address of the insured and
>
> b. the insurer has retained a duplicate copy of the mailed notice which is certified to be a true copy.

An insured whose policy is cancelled without his knowledge becomes subject to enormous potential liability; that is exactly what happened here, where Feder had to pay hundreds of thousands of dollars to litigate and settle a personal injury action brought by the occupants of the other vehicle involved in the accident. For this

reason, "In order to be effective, notices of cancellation must be sent in strict compliance with the provisions of N.J.S.A. 17:29C-10." *Hodges v. Pennsylvania Nat. Ins. Co.*, 260 N.J.Super. 217, 223-23 (App. Div. 1992), *citing Lopez v. New Jersey Automobile Full Underwriting Association*, 239 N.J.Super. 13 (App. Div.), *certif. den*. 122 N.J. (1990).

NJM acknowledges that it did not sent Feder a Cancellation Notice by certified mail. It maintains that it satisfied the statute by sending the notice via regular mail, and obtaining from the Post Office a "date stamped proof of mailing showing the name and address of the insured." Because of the use of that option, NJM was also required to retain "a duplicate copy of the mailed notice which is certified to be a true copy." The issue on the summary judgment motions was whether or not NJM had proven its compliance with those provisions.

Initially, NJM submitted a certification in support of summary judgment signed by its trial counsel, who had no personal knowledge whatsoever as to its factual substance. An exhibit to the certification was two pages from a "proof of mailing", a much larger document that purportedly listed all of the notices mailed out together from the Post Office. This document was offered as proof of compliance with N.J.S.A. 17:29C-10(a)(2), that is, that the insurer had obtained from the Post Office a "date stamped proof of mailing showing the name and address of the insured,"

together with all of the other insureds who were sent notices as part of the mass mailing purportedly made on that date.

Plaintiff's opposition brief took issue with the lack of personal knowledge of the person signing the certification, and with the proof document itself. The issue raised as to the document was the same issue successfully raised in *Hodges* - - the total amount of postage paid appeared to be less than what the total should have been by adding up each individual mailing. However, NJM's reply provided the full document together with an explanation of the postage which, Plaintiffs were forced to concede, cleared up the issue.[1] But Plaintiffs still maintained, as they do now on this appeal, that the evidence was inadequate.

In order to supplement the previous certifications submitted without personal knowledge by NJM's attorneys, the defendant added a certification from Judy D'Orazio, a "Mail and Imaging Service" employee of NJM. Confusingly, she identified and "verified" the authenticity of the Proof of Mailing Document, but it is unclear whether it was even the same document that had been submitted to the Court. D'Orzio did not attach the document to her own certification, and stated simply that she "understood" that the document had been submitted to the court as part of the

[1] Plaintiff will not describe here the details of the postage issue, given that it was rendered moot by NJM's supplemental submission and hence is not part of this appeal.

certification of an attorney. One might be tempted to assume that the document she is talking about was the same one proffered to the court by someone else, but it is odd on its face that such a roundabout method of "identification" was employed.

In any event, it turned out the D'Orzio was *not* the person with personal knowledge as to the key facts. She is the person who *prepared* the proof of mailing list - - but that is all that she can say. She is not the person who brought it to the Post Office, nor is she the person who can testify that all of the envelopes listed in the document were really given over to the Post Office for mailing. Indeed, she was forced to admit that she does not even remember her own actions on the date of the purported mailing.

The many things that D'Orzio did not have personal knowledge of all beg the question: why did NJM not simply get a certification from the person or persons who did have that personal knowledge? The answer is a mystery that NJM made no attempt to solve. It simply submitted certifications that were inadequate on their face.

The court rules are quite clear about certifications, and leave no room for interpretation. R. 1:6-6 states:

> If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein . . . .

Taking together every certification submitted by NJM, the best that can be said on personal knowledge it that the Proof of Mailing form had been prepared. Without the certification of another person with actual knowledge, the document does not "speak for itself," and therefore could not support NJM's motion. In fact, absent further certifications, the document was proof of nothing. For the same reason, NJM failed to overcome Plaintiffs' proofs as to liability, and the cross-motion for partial summary judgment should have been granted.

POINT II

BECAUSE NJM FAILED TO COMPLY WITH PARAGRAPH (b) OF STATUTE, PLAINTIFFS WERE ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY (1T24)

Assuming, *arguendo*, that the Court upholds the finding of the court below that NJM presented adequate proof of sending the Cancellation Notice through its reliance on the Certification of Mailing, then NJM will have satisfied the condition precedent contained in N.J.S.A. 17:29C-10(a)(2). *But the statute has an entirely separate condition which must also be satisfied, and in that regard NJM has failed.*

The current version of N.J.S.A. 17:29C-10 is not what was originally enacted by the Legislature in 1968. As originally formulated, it stated the following:

> Proof of mailing of notice of cancellation, or of intention not to renew or of reasons for cancellation to the named insured at the address shown in the policy, shall be sufficient proof of notice.

Indeed, that was the full text of the statute in 1978, when the New Jersey Supreme Court decided *Weathers v. Hartford Ins. Group*, 77 N.J. 228 (1978).[2]

In *Weathers*, the insurer relied, as it does here, on a Certificate of Mailing and on evidence of the usual and customary procedure of the insurance company, not on the basis of an employee with any actual personal knowledge of the act of mailing

[2] In Point III of this brief, Plaintiff will be arguing that the *Hodges* panel misinterpreted *Weathers* in holding that evidence of an insured's *non-receipt* of a Cancellation Notice is irrelevant.

itself. The Supreme Court held that this evidence was insufficient to meet the then-existing requirement of "proof of mailing." The court noted, for example, that there was no one proffered by the insurer, including the postal clerk, who could testify as to what was *inside* the envelope that was mailed. The insured could have received nothing more than an empty envelope, which of course would not satisfy the statute.

The Supreme Court acknowledged that the insurer's evidence of the Certificate of Mailing was relevant, in that it seemed to *support* the insurer's argument that it sent the insured the Cancellation Notice. But it went on to hold that the evidence "did not compel a finding of mailing as a matter of law." 77 N.J. 235. All the evidence did was create an issue of fact, to be determined by a jury in the context of the totality of the evidence. Accordingly, the court reversed summary judgment in favor of the insurance company.

In what may have been a direct result of the *Weathers* decision, in 1980 the Legislature entirely rewrote N.J.S.A. 17:29C-10, converting it to its present form. On the one hand the rewrite was a benefit to the insurance companies, in that Paragraph (a)(2) is a more formal recognition of the sufficiency of the Certificate of Mailing, a form that is in wide use in the insurance industry. On the other hand, however, the new language also provided a benefit to insureds, inasmuch as strict compliance with its provisions is required. See *Hodges*, *supra.*

What is most significant to this discussion is that the new version of the statute, although codifying the use of a Certificate of Mailing, also created a brand new requirement as to the Cancellation Notice itself. A notice, even if properly mailed as per Paragraph (a)(2) of the statute, will still not be effective unless "(b) the insurer has retained a duplicate copy of the mailed notice which is certified to be a true copy." NJM has failed to comply with that requirement, and Plaintiffs are therefore entitled as a matter of law to be the prevailing party.

NJM will certainly counter this argument by referring to Pa39, a document that it submitted to the court below as an exhibit to a certification. The document is, indeed, a copy the purported Cancellation Notice, and it does bear the following stamped phrase: "Certified to be a true copy, original mailed December 13, 2019." Although Plaintiffs argued in the court below that this did not satisfy the certification requirement, the court disagreed. But that decision must now be reversed.

What is conspicuously missing from Pa39 is any indication as to *who* certified the Notice, and *when* they did so. The document, in addition to the quoted certification language, does also contain each of the following notations by stamp or by handwriting on the top left portion of the form: "Underwriting"; "cancelled Dec 31"; "S/O 1/10 DS"; and "Process Cancellation". No explanation of any of the notations is apparent from the face of the form.

In the middle of the page (far from the "certification" language) is what appears to be an illegible signature, with no identification of the signatory. Under the signature is the handwritten notation date, 1/23/2020. Finally in the lower left portion of the document, there appears what may or may not be someone's initials. The placing of this notation appears random, and it is impossible to tell when it was made or what, if anything, it is intended to convey.

Taking the document as a whole, and giving every benefit to NJM, it appears that the very *earliest* that the document was certified was on "1/10", presumably a reference to January 10, 2021, by someone with the initials "DS", who may or may not be part of NJM's underwriting department. Who DS actually is, how they would know anything about the document, or why they did not make an entry until 30 days after the purported mailing is a mystery.

Another possibility is that NJM was attempting to certify the document by having some person, whose identity cannot be determined from the form, sign it in the middle of the page on January 23, 2020, 43 days after the purported mailing. Given the requirement of strict compliance with the statute, NJM is not entitled to the benefit of any doubt; but even giving it such benefit, the court does not and cannot know who certified the document or when. An unsigned typed statement of "certification" does not comply with the statute.

An important case in point is *Celino v. General Acci. Ins.*, 211 N.J.Super. 538 (App. Div. 1986). This was the first published decision addressing the application of N.J.S.A. 17:29C-10 since the 1980 revision. In that case, the insurance company acknowledged that it did not have in its file a certified copy of the cancellation notice. It argued, however that based on the evidence that it complied with the Certificate of Mailing requirement, the lack of a certified copy was not significant. The Appellate Division strongly disagreed:

> The statute clearly prescribes two conjunctive conditions for effective notice of cancellation, which it separately designates as "a" and "b." . . . . We do not regard the failure of compliance with this second condition as inconsequential but rather take the view that compliance is a *sine qua non* of an effective cancellation. Our conclusion is based not only on the plain language of the statute but on its history and evident intention.

Celino, 211 N.J.Super. at 541.

Although it is true that in *Celino* there was no certified copy, whereas here Plaintiffs maintain the "certified copy" NJM is relying upon is facially defective, the Appellate Division did go on to discuss the requirement in a way that has direct impact on this case, and which will therefore be quoted at some length:

> As we therefore construe the statutory condition of a retained certified duplicate copy, it is designed to ease the carrier's proof of mailing burden imposed by *Weathers* by providing it with a simple, expedient and effective alternative to reliance on standard practice in sending notices. This alternative is its retention of a duplicate copy of the notice, certified to be a true copy.

> But as we understand the intent of the statute, this mechanism requires that the duplicate be certified as a true copy contemporaneously with preparation and mailing of the original. The whole point of the requirement is to permit a clerical employee or other custodian of the business record to testify that the file copy is known to be a true copy of the mailed document because the person mailing it so certified at that time. The added weight of the evidence thus afforded to the file copy is therefore clearly dependent on a contemporaneous certification. A certification made later would be hardly more than an in-house version of standard-practice proof.

Id. at 543 [emphasis added].

NJM failed to provide any evidence as to when the copy of the Cancellation Notice was certified. As detailed above, the *earliest* appears to be 30 days after the notice was purportedly sent, hardly the "contemporaneous" certification required by *Celino*. This complete failure of proof on an essential aspect of N.J.S.A. 17:29C-10, with which strict compliance was required, should have resulted in the denial of NJM's summary judgment motion, and the entry of summary judgment as to liability in favor of the plaintiffs.

POINT III

SUMMARY JUDGMENT SHOULD BE REVERSED BECAUSE OF THE ABSENCE OF PROOF OF PLAINTIFFS' ACTUAL RECEIPT OF THE NOTICE OF CANCELLATION (1T, p. 22)

In Point I Plaintiffs argued that NJM failed to provide proof of compliance with N.J.S.A. 17:29C-10(a)(2) from anyone with personal knowledge. In Point II, they argued that NJM failed to comply with of N.J.S.A. 17:29C-10(b). If the Court agrees with either or both of those arguments, it must vacate summary judgment in favor of NJM and grant summary judgment to the plaintiffs on the issue of liability.

If the Court rejects the arguments in Points I and II, it must then go on to address an additional argument. The argument made here, however, would result in a different outcome if successful. The Court would vacate summary judgment in favor of NJM, but would not enter summary judgment in favor of the plaintiffs. Instead, it would remand the case to the court below for a jury trial.

The question to be discussed here is whether it is sufficient for NJM to prove that it *sent* the Cancellation Notice, or whether it must also prove that the plaintiffs actually *received* it. Under the first scenario, the plaintiff's testimony that he never received the notice would be irrelevant. Under the second, it would raise a disputed issue of material fact, precluding summary judgment.

There is no statutory answer to the question; N.J.S.A. 17:29C-10, at least in its present form, is silent on the issue. Plaintiffs maintain that as a matter of public policy, proof of receipt by the insured should be required. However, as plaintiffs acknowledged in the court below, case law from the Appellate Division appears to hold otherwise. Therefore, as the court noted, Plaintiffs raised the issue below simply for the purpose of preserving it for this appeal.

Looking first at the statute, N.J.S.A. 17:29C-10 states that no notice cancelling an automobile insurance policy "shall be effective" unless sent in a certain manner. However, that is not the same as saying that compliance with the statute is sufficient if the insured does not *receive* the notice. In this regard, it is significant to note that in 1980, the Legislature entirely rewrote the statute (*supra*). In its original form, it stated that "Proof of mailing of notice of cancellation . . . shall be sufficient proof of notice." This language was unambiguous - - proof of mailing would suffice; proof of receipt was not required. Hence, the issue of actual receipt by the insured would be irrelevant on the issue of the validity of the cancellation.

The 1980 revision of the statute *eliminated* that language entirely. One of the purposes of the revision was indisputably to codify the insurance industry's use of the Certificate of Mailing as proof of mailing; but the Legislature could just as easily have done that and still retained the "sufficient proof of notice" language. Its

elimination of that language appears to speak to a conscious intention to abrogate the former rule that proof of mailing alone would be sufficient, and that the issue of actual receipt would be irrelevant.

In *Celino*, supra, the court recognized that the revision of the statute raised this very issue. However, because the insurance company had so definitively failed to comply with the statute, the court chose not to decide the issue:

> We need not address the question of whether a proof of mailing which meets both conditions of the statute can be regarded as conclusive proof of mailing in terms. We are certain, however, that the statute, by its express terms, denies effectiveness to a proof of mailing which does not meet both conditions and, as a quid pro quo accords at the very least a strong presumption of effectiveness to a proof of mailing which does comply.

211 N.J. Super. at 543.

In 1992, in *Hodges*, a panel of the Appellate Division finally did address the question, and decided it in favor of the insurance industry, stating: "An insured need not actually receive a cancellation notice in order for it to be effective, provided that the statutory proof of mailing has been satisfied." 260 N.J.Super. at 222-23. That holding would render proof on non-receipt by the insured irrelevant. Importantly, the court supported that proposition by citing *Weathers v. Hartford Ins. Group*, 77 N.J. 228 (1978), a case mentioned earlier in this brief. But in relying on *Weathers* the court misinterpreted its holding, and also failed to take into account the impact of the post-*Weathers* revision to the statute.

First and foremost, *Weathers* expressly based its decision on statutory language that no longer existed when *Hodges* was decided:

> We read the statutory language "[p]roof of mailing of notice of cancellation * * * shall be sufficient proof of notice," to mean that actual mailing of the cancellation notice suffices to establish notice. In other words, the statutory prerequisite to a valid cancellation is the mailing to the insured of a notice of cancellation providing the insured with the minimum notice specified in N.J.S.A. 17:29C-8 ....

Weathers, 77 N.J. at 235. But by 1992 the Legislature had eliminated that language. Rather then mechanistically applying the Supreme Court's prior interpretation of language that no longer existed, the *Hodges* court should have been approaching the question as one of first impression, reaching its own decision as to how the new statutory language should be interpreted. To this very day, no panel of this Court has yet to consider the issue through the interpretation of the language that now exists, rather than on the basis of language that *once* existed.

Importantly, even *Weathers* tacitly acknowledged that the key issue is the insured's receipt of the notice. In stating that proof of mailing would constitute proof of notice, the Legislature was effectively codifying that "the inference of non-mailing provided by evidence of non-receipt" would be overcome by the inference that one receives a notice that is effectively mailed. An insured can never conclusively prove that he did not receive a Cancellation Notice; it would require proof of a negative. Under *Weathers*, an insured's mere denial of receipt would be insufficient to

overcome the inference that a proper mailing is presumed to be received. Moreover, as noted above, the statute in its original form created an **irrebuttable** presumption of receipt arising from adequate proof of mailing. The change in the statute eliminated the irrebuttable nature of such a presumption.

Because of the defects in *Hodges,* especially its failure to consider the changes in the statute, this Court writes on a clean slate, and must now address the basic question: for a Cancellation Notice to be effective must the insurance company merely prove that it was *sent*, or must it also prove (through either direct evidence, inferences, or both) that it was *received*? Public policy as well as considerations of fundamental fairness dictate that proof of receipt should be required.

A significant policy consideration is the impact on the public, namely, on innocent drivers who are seriously injured in accidents. Here, Feder had the financial ability to pay a substantial settlement to those injured in the accident out of his own pocket. But what if that had not been the case? What happens to a victim who perhaps loses a limb in a car crash caused by a driver who has no financial resources? His recovery would be limited to such funds as would be available as uninsured motorist coverage. Hundreds of thousands of dollars that the victim might theoretically be awarded to redress his devastating physical and emotional suffering would be lost. The very principals on which automobile insurance law is based would be subverted.

The plaintiffs recognize that insurance companies are businesses, not charities. Plaintiffs do not contend that because an insurer once insured a vehicle, it should forever be obligated to compensate someone struck by that vehicle even if the policy was no longer in effect. But that is not the issue.

The scenario presented here is of an insurance company that tries, in all good faith, to cancel a policy by mailing the cancellation notice, and of an insured who through no fault of his own never received the notice and got behind the wheel of his car believing, in all good faith, that he was insured. There is nothing in the jurisprudence of this State that indicates that public policy would, in such a circumstance, come down on the side of the insurance company, thereby possibly denying an innocent victim the right to compensation.

It also bears noting that this public policy consideration is bolstered by looking at which party - - the insurer or the insured - - had the best opportunity to prevent the potential harm to the victim of being unable to collect on a judgment for his injuries. The "insured," believing that he had insurance in place, could not have prevented the situation; surely not even the insurance industry would argue that an insured has some obligation from time to time to inquire whether or not his policy was still in effect.

The insurance company, on the other hand, had a simple option: it could have sent the Cancellation Notice by certified mail, an option that the statute specifically

allows it to exercise. This is not to say that the insurance company was *obligated* to send the notice by certified mail; the statute itself gives the insurer the alternative of using a Certificate of Mailing. But had the insurer simply chosen to spend a few extra dollars to send the notice by certified mail, it would known with certainty whether or not it had been received, and this entire situation would be avoided. Given the insurer's ability to choose to give up a few dollars of its profit to buy that certainty, and its decision not to do so, public policy weighs heavily in favor of finding that it is the receipt of the notice, rather than the mere act of its mailing, that should be determinative on the issue of coverage.

Public policy considerations are *arguably* somewhat less compelling when it comes to the insured's own damages, such as the fact that in this case NJM has denied payment to fix Plaintiffs' car because of the Cancellation Notice. This, at least, does not implicate the ability of an innocent member of the public to receive compensation for injuries that he suffered. But although the policy considerations may be less compelling, they are not entirely absent.

Furthermore, the equities and the interests of justice weigh heavily in favor of the insured, who through no fault of his own could suffer a heavy financial loss that could have been avoided had the insurance company used certified mail. As noted, in this scenario both the insurance company and the insured may be acting in

complete good faith. Neither may be "guilty" of anything. But at the very least the insured is surely "more innocent," having had no control over the process whereby the insurance company chose to attempt to notify him of an impending cancellation.

Although the Plaintiffs are by no means advocating the following, one could also imagine a hybrid scenario whereby under the circumstances of a case such as the present on the cancellation would be deemed effective as to the insured himself - - denying him the ability to collect on such claims as vehicle damage - - but deemed to be ineffective as to third persons. There is nothing in the case law to date to suggest such a dichotomy, but given that public policy is the central aspect of the discussion, there is no reason why a hybrid ruling as to the effect of the Cancellation Notice should not be open to consideration.

CONCLUSION

Based upon the arguments made in Points I and II above, the Plaintiffs ask the Court to vacate summary judgment in favor of NJM, and to grant them summary judgment on the issue of liability. Should the Court deny them that relief, Plaintiffs go on to request that the Court remand the case for a jury trial, at which they would have the right to offer evidence to rebut any presumption of receipt of the cancellation notice that might arise from NJM's proofs of mailing.

Respectfully submitted,

/s/ *Jeffrey A. Bronster*

JEFFREY A. BRONSTER

Dated: July 28, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-002538-23

MARC FEDER DMD, PC and MARC FEDER, *Plaintiffs-Appellants,* vs. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, *Defendant-Respondent.*	:	CIVIL ACTION ON APPEAL FROM THE ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY Docket No. BER-L-1485-22 Sat Below: HON. MICHAEL BEUKAS, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

This lawsuit involves the post-accident challenge of plaintiffs Marc Feder and Marc Feder, DMD, PC, to defendant New Jersey Manufacturers Insurance Company's cancellation of a business auto policy for nonpayment of premiums more than six (6) months prior to the accident.

The factual record in this matter provides no basis upon which to determine, as plaintiffs urge, that the cancellation was not properly made and thus the policy should be declared to have been in force on the date of the accident. Yet plaintiffs continue to advance their arguments in that regard, alleging technical flaws in the proofs submitted to the lower court and urging this Court to reverse the orders below and enter summary judgment in their favor.

Alternatively, plaintiffs argue that even if this Court agrees with the lower court that the evidence established that the cancellation notice was prepared and mailed in compliance with the governing statute, a trial should nevertheless be held on the issue of whether or not plaintiffs actually received the mailed cancellation notice. This suggestion represents an absolute and unprecedented departure from the standard that has been applied to carriers' transmittals of cancellation notices for decades – a standard that is plainly evidenced by the language of the statute itself. Moreover, it would needlessly burden the courts,

carriers and litigants with many additional trial proceedings without, we submit, any greater likelihood that the outcome will accurately reflect what actually occurred. Plaintiffs' perception that "this Court writes on a clean slate" (Pb20) is incorrect – any change such as that suggested by plaintiffs is purely the province of the Legislature.

PROCEDURAL HISTORY

Plaintiffs commenced this lawsuit by filing a complaint on March 14, 2022 (Pa[1]22-Pa25). New Jersey Manufacturers Insurance Company ("NJM") was the sole defendant, and the complaint alleged that NJM improperly cancelled an auto insurance policy, and thus declined to provide first- and third-party coverage for an accident in July of 2020 (Pa22-Pa25). NJM timely answered (Pa29-Pa33), and the matter proceeded through pre-trial discovery.

At the conclusion of discovery, NJM filed a motion for summary judgment (Pa9-Pa113). The motion reflected that the business auto policy at issue was validly and properly cancelled for nonpayment of premiums nearly seven months prior to the accident, on December 31, 2019 (Pa39).

Plaintiffs filed opposition to NJM's summary judgment motion, and cross-

[1] Numbers in parentheses preceded by "Pa" refer to pages of the appendix to the plaintiffs' brief.

moved for partial summary judgment on liability, making several technical arguments with respect to NJM's proofs supporting cancellation of the business auto policy (Pa114-Pa122). In opposition to plaintiffs' cross-motion, and in further support of its own motion for summary judgment, NJM submitted additional documents and certifications of NJM employees that demonstrated more specifically the procedures NJM utilized to transmit cancellation notices to policyholders who failed to pay their premiums, and provided more definitive proof that those procedures occurred in this instance (Pa123-Pa145; Da[2]1-Da3).

The motions came before Honorable Michael N. Beukas, J.S.C., on March 15, 2024. 1T[3]. Judge Beukas heard oral argument that day, and ruled from the bench, granting NJM's motion for summary judgment and denying plaintiffs' cross-motion for partial summary judgment. After conducting a careful review of the arguments of the parties and the documentary evidence presented, the lower court unequivocally concluded that NJM met its burden of proof under N.J.S.A. 17:29C-10 as to proper cancellation of the applicable insurance policy. 1T.17-38. The Court entered orders memorializing the rulings that same day, March 15, 2024 (Pa5-Pa6, Pa7-Pa8).

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[2] Numbers in parentheses preceded by "Da" refer to pages of the appendix to this brief.

[3] The designation "1T." will refer to the transcript of the motion proceedings held before the Honorable Michael N. Beukas, J.S.C., on March 15, 2024.

STATEMENT OF FACTS

On July 23, 2020, plaintiff Marc Feder ("Feder") was operating a BMW registered to his business, plaintiff Marc Feder, DMD, PC ("Feder PC"), when he was involved in an accident in which he rear-ended another vehicle (Pa22-Pa25, Pa35-Pa37). Although the police report of the accident indicated that the vehicle operated by Feder was insured by NJM (with the New Jersey Department of Motor Vehicles Insurance Code "426" noted in box 25 of the report) (Pa35-Pa37), the NJM policy was not in force at the time of the accident (Pa39). In fact, the policy had been cancelled for nonpayment of premium nearly seven months earlier, on December 31, 2019, and during those nearly seven months, coverage had not been reinstated nor replaced (Pa22-Pa23, Pa39).

Feder's failure to pay premiums owed to NJM, leading to cancellation

The NJM business auto policy had been issued to Feder PC, covering the 2012 BMW, for the policy period of August 13, 2019 to August 13, 2020 (Pa47-Pa52). The policy address on the NJM business auto policy was 288 Broad Ave, Englewood NJ 07631 (Pa47), which Feder confirmed was his residence address (Pa59, Pa60). Pretrial discovery established that Feder alone handled all the bills as well as all insurance matters for the household (Pa94, Pa95, Pa96, Pa97).

Feder testified at a deposition that the NJM business auto policy was billed

by NJM on an installment basis, with the bills sent by mail to his residence address (Pa60, Pa62). He admitted, however, that he had no recollection of paying any such bills in October or November of 2019 (Pa62-Pa63). In fact, premiums for the NJM business auto policy were in arrears in the fall of 2019. Accordingly, on November 30, 2019, NJM sent a document addressed to plaintiff Marc Feder DMD PC at the policy address of 288 Broad Ave, Englewood NJ 07631, entitled "FINAL REQUEST FOR PAYMENT BEFORE NOTICE OF CANCELLATION" (Pa45). That document reflected that no premium payments for the business auto policy had been made since October 14, 2019, and advised that unless payment of the past due amount was made within one week, a Notice of Cancellation would be sent (Pa45). No further premium payments were ever made on the Feder PC business auto policy.

On December 13, 2019, NJM issued a cancellation notice to Feder PC (Pa39). The document was addressed to the policy address of 288 Broad Ave, Englewood, and was entitled "CANCELLATION NOTICE" (Pa39). The cancellation notice clearly stated that "CANCELLATION of the policy or policies described above will become effective on December 31, 2019 at 12:01 a.m., E.S.T." (Pa39), and informed Feder PC that payment of the past due amount of $378.00 prior to the cancellation effective date could keep the policy current (Pa39). Payment of the past due amount was not made, and the Feder

PC NJM business auto policy was cancelled effective December 31, 2019 (Pa39). The policy was thus not in effect at the time of the July 23, 2020 accident nearly seven (7) months later (Pa22-Pa23, Pa39).

NJM's extensive evidence of its mailing of the cancellation notice

In support of its motion for summary judgment, and in opposition to plaintiffs' cross-motion, NJM submitted a comprehensive record detailing the steps it undertook to mail the cancellation notice of the Feder PC business auto policy to plaintiffs in a manner that complied with the statutory requirements for carriers cancelling auto insurance policies. The cancellation notice mailed to Feder PC at the policy address/Feder residence on December 13, 2019 was one of 147 cancellation notices pertaining to personal and commercial auto insurance policies that NJM generated and mailed that day (Pa126-Pa140; see Pa130). NJM followed a specific procedure to ensure that the cancellation notices were properly delivered to the West Trenton Post Office, where it obtained a date-stamped proof of mailing from the United States Postal Service documenting the mailing of 147 such notices (Pa140, Pa141-Pa143, Pa144-Pa145).

NJM employee Judy D'Orazio provided a certification that detailed her actions on December 13, 2019, the date the business auto policy cancellation

notice was mailed to Feder PC (Pa144-Pa145). Ms. D'Orazio's certification made clear that she had reviewed the proof of mailing register for December 13, 2019 (Pa126-Pa140) and was thus able to certify that on that date, she followed the established internal procedure of NJM to ensure that each piece of mail was contained within the group to be taken to the Post Office (Pa144-Pa145). Specifically, Ms. D'Orazio verified, one by one, that each piece of mail listed on the proof of mailing register was there, and as she verified each she put a corresponding slash mark in the left hand column of the proof of mailing register next to each policyholder's listing (Pa126-Pa140, Pa144-Pa145). NJM also presented the certification of a claims attorney employed by NJM that provided additional verification of the authenticity of the proof of mailing register and additional information regarding NJM's procedures for mailing cancellation notices (Pa141-Pa143).

Ms. D'Orazio's certification made clear that she confirmed that the envelope addressed to Feder PC was within the December 13, 2019 mailing group, and that she knew she had done so because she noted that by placing a slash mark in the left hand column next to the Feder PC listing (Pa130, Pa144-Pa145). After verifying that each of the 147 envelopes listed on the proof of mailing register were within the assemblage of cancellation notices to be taken to the Post Office, Ms. D'Orazio initialed the proof of mailing register on the

extreme right hand side of the signature line, marking it with her initials, "JD" (Pa140, Pa141-Pa143, Pa144-Pa145). The mailing was then taken to the Post Office by Daniel Johnston, an employee in NJM's stockroom who also signed the proof of mailing register (Pa140, Pa141-Pa143, Pa144-Pa145).

The proof of mailing register bears a stamped receipt reflecting payment of $60.27 (Pa140). That stamp reflects receipt by the Post Office of 147 pieces of mail (individually verified by Ms. D'Orazio), and payment by NJM of the .41 "fee" for each of the 147 pieces of mail (Pa140, Pa141-Pa143, Pa144-Pa145). The "Postage" is paid separately (Pa141-Pa143).

ARGUMENT

POINT I

THE LOWER COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO NJM, DENYING PLAINTIFFS' CROSS-MOTION, BECAUSE THE BUSINESS AUTO INSURANCE POLICY WAS PROPERLY CANCELLED PRIOR TO THE DATE OF THE ACCIDENT, AND THUS WAS NOT IN EFFECT ON THAT DATE.

The dispute underlying this lawsuit arose as a result of an automobile accident that occurred on July 23, 2020. On that date, Feder's operation of the car he was driving caused it to strike another vehicle from the rear. Occupants of the other vehicle were allegedly injured, and commenced suit against Feder. Plaintiffs claim that they only became aware subsequent to the accident that the NJM business auto policy covering the vehicle had been cancelled for nonpayment of premium nearly seven (7) months earlier, on December 31, 2019. Plaintiffs thus commenced this lawsuit to challenge the validity of NJM's cancellation.

The lower court correctly determined that NJM's policy cancellation was validly effected in accordance with the statutory requirements.

N.J.S.A. 17:29C-10, entitled "Written notice of cancellation or intention not to renew; effectiveness," sets forth the steps a carrier must take to issue a

notice of cancellation that will be effective. The statute provides

> No written notice of cancellation or of intention not to renew sent by an insurer to an insured in accordance with the provisions of an automobile insurance policy shall be effective unless a. (1) it is sent by certified mail or (2) at the time of the mailing of said notice, by regular mail, the insurer has obtained from the Post Office Department a date stamped proof of mailing showing the name and address of the insured and b. the insurer has retained a duplicate copy of the mailed notice which is certified to be a true copy.

In this instance, NJM produced a documentary record establishing that NJM validly cancelled the business auto policy by issuing a cancellation notice and obtaining a date-stamped proof of mailing to Feder PC, in full compliance with all statutory requirements (Pa39, Pa130, Pa140). In addition to producing those documents for the consideration of the motion judge, NJM provided a certification of the NJM mailroom employee who actually individually verified that each envelope of the 147 pieces comprising NJM's December 13, 2019 mailing was contained in the group of 147 notices being taken to the post office that day, including the envelope containing the Feder PC cancellation notice (Pa144-Pa145). The proof of mailing register itself (Pa126-Pa140) reflected that the post office received 147 pieces of mail encompassing NJM's December 13, 2019 mailing, for which NJM paid a fee of $60.27, representing the .41 fee for each piece, paid for 147 pieces (Pa140). NJM further provided the certification of a staff attorney authenticating the proof of mailing register (Pa126-Pa140)

and providing additional information regarding NJM's mailing processes for cancellation notices (Pa141-Pa143). Based on this record, the lower court properly granted NJM's motion for summary judgment, dismissing all claims against it, and denied plaintiffs' cross-motion for partial summary judgment.

The statute makes clear that when a carrier can demonstrate that it strictly complied with the statutory requirements for mailing notices of cancellation to the insured, the cancellation will be effective on the date set forth in the notice and the policy will have no further effect. New Jersey courts that have published decisions relating to cancellations of insurance policies have typically been faced with instances where the cancellation was not effective because the insurer did not follow the procedures set forth in N.J.S.A. 17:29C-10. See Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n, 145 N.J. 377 (1996); Ward v. Merced, 277 N.J. Super. 590 (App. Div. 1994); Hodges v. Pennsylvania Nat. Ins. Co. on Behalf of NJAFIUA, 260 N.J. Super. 217 (App. Div. 1992).

N.J.S.A. 17:29C-10 provides that a cancellation notice will not be effective unless the carrier has sent the notice in accordance with the requirements therein. The statute would have little meaning without the converse holding true – if a carrier has sent the notice in accordance with the provisions of N.J.S.A. 17:29C-10, the notice will be effective. Indeed, the Court in Hodges v. Pennsylvania Nat. Ins. Co. on Behalf of NJAFIUA, supra, made

clear that if the insurer has produced the requisite statutory proof of mailing, the insured need not even have received the notice of cancellation for it to be effective. 260 N.J. Super. at 222-23.

Here, the lower court reviewed NJM's evidence and determined that it sufficed to demonstrate compliance with N.J.S.A. 17:29C-10, resulting in an effective cancellation of the Feder PC business auto policy covering the car Feder was driving in the accident of July 23, 2020. There is no genuine basis upon which to dispute the effectiveness of NJM's cancellation in this matter, other than the representation of Feder that he does not recall receiving the cancellation notice.

Plaintiffs' arguments on appeal provide no grounds for reversal.

Despite the lower court's careful review of NJM's extensive proof of mailing record and its conclusion that NJM "met its burden of proof under N.J.S.A. 17:29C-10 as to proper cancellation" (1T.35), plaintiffs continue to dispute on appeal that NJM's cancellation documents are sufficient to demonstrate compliance with the statute. Plaintiffs' brief raises several objections to NJM's proofs that are based on their perception that NJM's proofs and NJM's presentation of those proofs violated procedural requirements. In each instance, plaintiffs' arguments are entirely unfounded.

Plaintiffs first take issue with the certification of Ms. D'Orazio (Pa144-Pa145), the NJM mailroom employee who individually verified that each of the 147 envelopes listed on the December 13, 2019 proof of mailing register, including the envelope containing the Feder PC cancellation notice, were actually present and accounted for, confirming each with her own handwritten slash mark on the register itself. Pb7-9. Plaintiffs argue that the annexation of the proof of mailing register to counsel's certification somehow makes it less reliable than if Ms. D'Orazio herself "attached" it to her certification. Pb7-8. The realities of efiling render this argument a bit disingenuous – only counsel is able to physically attach and file documents on behalf of a litigant. Further, Ms. D'Orazio's certification unambiguously described in painstaking detail the document that she certified she understood was annexed to counsel's reply certification as Exhibit J (Pa144-Pa145). Further, a claims attorney employed by NJM provided an additional certification authenticating the document (Pa141-Pa143).

Equally unavailing is plaintiffs' argument that Ms. D'Orazio's certification lacked requisite personal knowledge because she herself did not drive the 147 envelopes to the West Trenton Post Office and thus she is not "the person who can testify that all of the envelopes listed in the document were really given over to the Post Office for mailing." Pb8. Again, N.J.S.A. 17:29C-

10 requires that the stamped proof of mailing be obtained. There is no requirement that every individual who may have participated in the process of generating, enveloping and actually mailing the envelopes stand ready forever to demonstrate that those things actually occurred on a given day years earlier. Here, the assurance that all of the envelopes listed on the proof of mailing register "were really given over to the Post Office for mailing" is the stamp on the last page of the register, documenting that the Post Office was paid the .41 fee for each of 147 pieces of mail listed, totaling $60.27 (Pa140).

Plaintiffs note that N.J.S.A. 17:29C-10 requires that the carrier retain a duplicate copy of the cancellation notice that is "certified to be a true copy." NJM produced a duplicate copy of the cancellation notice mailed to Feder PC on December 13, 2019, and the notice reflects that it is "certified to be a true copy, original mailed December 13, 2019" (Pa39). That verbiage, appearing near the top right of the cancellation notice (Pa39), is sufficient to comply with N.J.S.A. 17:29C-10. N.J.S.A. 17:29C-10 does not require a signed certification directly on the copy of the cancellation notice to verify that the cancellation notice produced is certified to be a true copy of the notice mailed to the policyholder. Plaintiffs' assertion that "[a]n unsigned typed statement of 'certification' does not comply with the statute" (Pb13) is unsupported and cannot be credited. Plaintiffs' citation to Celino v. General Accident Ins., 211

N.J. Super. 538 (App. Div. 1986), a case in which the carrier was entirely unable to produce a duplicate copy of the cancellation notice, neither stands for this proposition nor presents an analogous situation.

Plaintiffs argue that the specific requirements set forth in N.J.S.A. 17:29C-10 to establish proof of mailing should not suffice, and proof of receipt should be the standard, urging the Court to reverse the lower court's ruling because of "the absence of proof of plaintiffs' actual receipt of the notice of cancellation" Pb16. Yet plaintiffs acknowledge, as they must, that the statute "is silent on the issue." Pb17. Plaintiffs further acknowledge that New Jersey courts have held that mailing of the cancellation notice, rather than its receipt, is the determinative factor as to whether cancellation is effective. Weathers v. Hartford Ins. Group, 77 N.J. 228, 234 (1978); Needham v. New Jersey Ins. Underwriting Ass'n, 230 N.J. Super. 358, 369 (App. Div. 1989).

To bolster their argument that this Court should declare that actual receipt of a properly-mailed cancellation notice must be proven, rather than simply compliance with the actual requirements set forth by the Legislature in N.J.S.A. 17:29C-10, plaintiffs attempt to make much of a change in the wording of the statute that occurred more than forty (40) years ago. Plaintiffs assert that, prior to 1980, N.J.S.A. 17:29C-10 reflected less stringent requirements, and included the statement that "Proof of mailing…shall be sufficient proof of notice." Pb10,

Pb17-Pb19. Noting that the Supreme Court's opinion in Weathers v. Hartford Ins. Group, supra, was governed by that earlier version of the statute, plaintiffs seem to intimate that the courts that have cited Weathers v. Hartford Ins. Group, supra, particularly Hodges v. Pennsylvania Nat. Ins. Co. on Behalf of NJAFIUA, supra, have mistakenly relied on an outdated standard and failed to consider the current version of the N.J.S.A. 17:29C-10. Pb18-Pb19. This is not accurate. The Appellate Division in Hodges v. Pennsylvania Nat. Ins. Co. on Behalf of NJAFIUA, supra, 260 N.J. Super. at 223, specifically acknowledged that Weathers v. Hartford Ins. Group, supra, applied a standard set forth in "the former N.J.S.A. 17:29C-10 which required only 'Proof of mailing'" and noted the stricter standard of the revised statute.

N.J.S.A. 17:29C-10 sets forth specific requirements with which a carrier can comply, and a carrier can produce evidence within its control to demonstrate that it did, in fact, comply with the requirements to effectively cancel a policy. Plaintiffs' suggestion that the carrier be required to demonstrate proof of receipt by the policyholder is not achievable. Short of staking out each policyholder's address and intercepting the mail carrier, there would be no manner in which a carrier could demonstrate that a mailing was received in an instance where the policyholder denies receipt. In exactly the same way that plaintiffs note a policyholder "can never conclusively prove that he did not receive" a

cancellation notice (Pb19), a carrier cannot conclusively prove that he did receive it. While plaintiffs contend that a carrier sending the notices by certified mail would have a return receipt, and it would know "with certainty whether or not it had been received" (Pb22), that assertion is founded on a fallacy. That mechanism only works when the policyholder picks up and signs for the certified letter[4].

We note that there are currently two bills before the New Jersey Legislature (Senate Bill 2894 and its identical counterpart, Assembly Bill 3303) that, if passed, would amend N.J.S.A. 17:29C-10 to require that carriers send cancellation notices by certified mail and to also obtain a date-stamped proof of mailing and retain a duplicate copy. The proposed amendment would thus add one more layer of assurance that the notice has been properly sent. But very glaringly absent from the proposed amendment is any suggestion that proof of receipt by the policyholder will be required. Moreover, the pending legislation to amend N.J.S.A. 17:29C-10 starkly points up that a complete overhaul of the

[4] We are compelled to note that plaintiffs urge the Court to consider the plight of injured victims of policyholders whose policies were cancelled for nonpayment of premiums. Pb22-23. That is, of course, what uninsured motorist coverage is for. But instead, plaintiffs suggest a "hybrid scenario" (Pb23) where the policyholder's first-party claims (for instance, property damage) are not covered, but where the cancellation would be deemed ineffective as to injured third parties. Plaintiffs admit "There is nothing in the case law…to suggest a dichotomy" (Pb23). Indeed, a cancellation is equally effective for both first- and third-party claims.

standards for effectively cancelling an auto insurance policy as suggested by plaintiffs here is a matter that can only be addressed by our Legislature. This is to say nothing of the burden the trial courts would face if a trial on the issue of whether a policyholder actually received a cancellation notice is required in every instance where a carrier seeks to cancel a policy, and the impracticality and difficulty for carriers to make such a showing. Plaintiffs' arguments in favor of requiring proof of receipt must be rejected.

CONCLUSION

For all the reasons of fact and law as stated herein, we respectfully request that this Court affirm the orders of the lower court in all respects.

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