Judgment rendered January 25, 2013.

No. 47,320-CA

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

RHONDA PITTMAN — Plaintiff-Appellee

versus

LAWRENCE E. METZ — Defendant-Appellee

* * * * *

Originally Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court No. 130108

Honorable Michael O. Craig, Judge

* * * * *

TRACY L. OAKLEY — Counsel for Third Party-Appellant Safeway Ins. Co. of La.

DAYE, BOWIE & BERESKO
By: David P. Daye — Counsel for Third Party-Appellee Lawrence E. Metts and Sena Metts

DAVID H. NELSON — Counsel for Third Party-Appellee American Quality Ins. Agency, Inc.

RHONDA PUTMAN — In Proper Person

* * * * *

Before BROWN, STEWART, DREW,
MOORE AND HARRISON (*Ad Hoc),* JJ.

STEWART, J., dissents with written reasons.

MOORE, J., dissents for reasons assigned by Stewart, J.

HARRISON, J. (*Ad Hoc*)[1]

We granted rehearing to reconsider our earlier opinion in this case. Finding that there was no coverage on the insured's vehicle at the time of the accident because the insurer properly cancelled its insured's entire policy for nonpayment of a premium, we now reverse the trial court judgment finding that Lawrence E. Metz[2] was covered under the policy issued by Safeway Insurance Company of Louisiana.

Although the facts of the matter were set forth in detail in the original opinion, we will briefly recap the details of greatest importance to our decision on rehearing.[3] At the outset of the policy period beginning November 16, 2008, Metz's policy with Safeway covered only his 2003 Chevrolet Avalanche. A final payment for the policy period in the amount of $110.28[4] was due on April 10, 2009, and Metz paid it on April 7, 2009. However, at that time, he also added a second vehicle, a 2008 Chevrolet Uplander, to the same policy. On April 8, 2009, Safeway sent Metz a bill for the additional premium for covering the Uplander. Metz denied receiving this bill. On April 23, 2009, Safeway issued a notice of cancellation to Metz for nonpayment of the premium. Metz also denied receiving this notice. The policy was cancelled on May 3, 2009. On May 5, 2009, there was a two-car accident involving the Avalanche. The following

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[1]Retired Judge John R. Harrison, assigned as judge *ad hoc*, participated in the decision following the retirement of Judge Gay Gaskins, who sat on the original panel.

[2]In the appellate record, the defendant's last name is also spelled "Metts." To be consistent with this court's original opinion, we will spell it "Metz" in this opinion on rehearing.

[3]Although Safeway urged reversal of the trial court's denial of its motion for summary judgment, given the fuller development of the facts at trial, we consider the matter on the merits.

[4]Although Metz testified that he paid $110.32, the documentary evidence suggests that the amount was $110.28.

day, Metz paid to reinstate the policy; the reinstatement was effective on May 6, 2009.

In relevant part the Safeway policy reads as follows:

> **PART I—LIABILITY**
>
> . . . To pay on behalf of the insured . . . all sums which the insured shall become legally obligated to pay as damages . . .
>
> **PART II — UNINSURED/UNDERINSURED MOTORISTS COVERAGE**
>
> . . . To pay all sums which the insured or legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured/underinsured automobile . . . .
>
> **PART III—EXPENSES FOR MEDICAL SERVICES**
>
> . . . To pay all reasonable expenses incurred as a result of injuries caused by a covered accident . . .
>
> **PART IV—PHYSICAL DAMAGE**
>
> . . . to have repaired or to pay for loss caused other than by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto . . .
>
> **CONDITIONS**
> **(Unless otherwise noted, conditions apply to all Parts.)**
>
> **1. Policy Period, Territory.** . . . If such premium is not paid when due the policy shall terminate as of that date and such date shall be the end of the policy period. . . .
>
> 2. **Premium.** . . . If the named insured acquires ownership of an additional private passenger . . . automobile, he shall inform the Company in writing within 30 days following the date of its delivery of his election to make this policy applicable to such owned automobile. Any premium adjustment necessary shall be made as of the date of such change or acquisition in accordance with the manuals in use by the Company. . . .

. . . .

> **4. Two or More Automobiles–Parts I, III, and IV.**
> When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each. . . .

Based upon its wording and its placement in the policy, we find that the contested provision in paragraph 4 – upon which the trial court and the majority in the original opinion relied – does not apply to the payment of premiums. This paragraph, which states that the terms of the policy apply separately to each automobile when two or more automobiles are insured, specifically applies only to Parts I, III and IV; these are the parts of the policy addressing issues of liability, expenses for medical services, and physical damages. It appears that the primary relevance of a provision like paragraph 4 involves issues of "stacking" of coverages. See *Jones v. Allstate Insurance Company*, 429 So. 2d 241 (La. App. 3rd Cir. 1983); *Easley v. Firemen's Insurance Company of Newark, New Jersey*, 372 So. 2d 1067 (La. App. 3rd Cir. 1979); *Lane v. Fireman's Fund Insurance Company*, 344 So. 2d 702 (La. App. 4th Cir. 1977). Therefore, paragraph 4 has no bearing upon the issue of partial payment of premiums presented in the instant case.

We find nothing in the policy which obligates the insurance company to second-guess its insured's desires as to how to apply a partial payment in a situation such as the instant one. Should the insurer apply all of the partial payment to one vehicle and none to the other for the full policy term? Or perhaps it should apply some of the partial payment to each vehicle but for a shorter period of time? The possible scenarios are numerous and varied.

Different insureds will desire different applications according to a myriad of different factual situations.

The facts proven at trial demonstrate that Metz's premium increased upon his addition of a second vehicle. Evidence was introduced that Metz was billed for the increased premium. Subsequently, the bill was not paid, and Safeway took appropriate action to cancel the policy as it was entitled to under the terms of the policy. Safeway presented evidence that the ensuing notice of cancellation was properly mailed to Metz. (In the original opinion, the majority likewise agreed that the insurer proved that sufficient notice of cancellation was given.) Consequently, at the time of the accident involving the Avalanche, Metz no longer had insurance coverage with Safeway on either vehicle.

Accordingly, we reverse the district court judgment insofar as it held that Metz had coverage on the Avalanche under the Safeway policy and awarded damages in favor of Metz and his wife and against Safeway. In all other respects, the judgment is affirmed. Costs of this appeal are assessed against Lawrence and Sena Metts/Metz.

REVERSED IN PART AND AFFIRMED IN PART.

STEWART, J., dissenting.

The majority determined that Metz did not have valid insurance at the time of the May 5, 2009, accident. More specifically, the majority determined that contested provision in paragraph 4 does not apply to the payment of premiums. For the following reasons, I respectfully dissent from the majority's opinion.

The language in the Safeway policy states "when two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each." Arguably, this policy provision may be viewed as ambiguous. Jurisprudence suggests that we construe ambiguous policy provisions against the insurer in favor of coverage. Further, while interpreting Safeway's insurance contract, jurisprudence requires that we attempt to discern the common intent of the insured and the insurer. After a careful review of the record, I come to the conclusion that Safeway intended for the terms of its policy to apply separately to Metz's Avalanche and the Outlander. The wording in the policy clearly expresses that intent.

Further, the record supports Metz's assertion that he completed his payments for insurance coverage on the Avalanche through the remainder of the policy term. As stated in the original opinion, Ms. Rhonda Marshall, a senior underwriter for Safeway, testified that Metz's April 7, 2009, payment of $110.32 completed payment for coverage for the Avalanche for the period between November 16, 2008, and May 16, 2009.

The majority identified the $110.32 payment as a "partial payment." I disagree. On April 8, 2009, Safeway sent Metz a bill for the additional premium, intended for the Uplander. Metz denied receiving this bill, and

consequently failed to pay it. However, as stated in the previous paragraph, Metz did complete his payments for insurance coverage on the Avalanche through the remained of the policy term, on the day before Safeway allegedly mailed the bill for the additional premium to cover the Uplander.

We note that the record is void of any evidence indicating that Metz's April 7, 2009, payment of $110.32 was refunded, nor was there a pro-rata refunded for the days of noninsurance. We cannot ignore this important fact. This information, coupled with the language in the policy, support our finding that Safeway's policy issuing coverage on the Avalanche was in effect at the time of the May 5, 2009, accident.

For these reasons, I cannot agree with the majority in their determination that the trial court was manifestly erroneous in finding that there was coverage on the Avalanche at the time of the May 5, 2009, accident. Therefore, I respectfully dissent.