TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT MEMPHIS

Francisco Martinez,	)	
Employee,	)	**Docket No.: 2021-08-0059**
v.	)	
	)	
ACG Roofing, Inc., Moises Garcia, Bryan	)	
Elder Roofing, and Nava Roofing,	)	**State File No.: 47716-2020**
	)	**800503-2021**
Employers,	)	**800502-2021**
	)	
v.	)	
	)	
Technology Assigned Risk,	)	**Judge Robert Durham**
Insurance Carrier.	)	

BRIEF OF APPELLANT, TECHNOLOGY ASSIGNED RISK

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

1. Whether the trial court erred by finding there was a genuine issue of material fact as to Technology Assigned Risk's potential liability for Employee's alleged January 17, 2020 workplace injury after Technology Assigned Risk lawfully cancelled ACG Roofing's Workers' Compensation policy due to ACG Roofing's failure to timely satisfy a non-sufficient funds payment issue, which ultimately led to the policy lapsing from January 16, 2020 to February 14, 2020.

2. Whether the trial court erred by finding that there were genuine issues of material fact regarding whether Technology Assigned Risk provided proper notice of the intent to cancel ACG Roofing's workers' compensation policy.

3. Whether the trial court erred by finding that there was genuine issues of material facts when ACG Roofing's use of a third-party agent to assist in making premium payments and Technology Assigned Risk's requirement for certified funds being expressly stated in the written contract are irrelevant and immaterial.

SUMMARY OF THE ARGUMENT

This appeal arises from the trial court's denial of Employer's Motion for Summary Judgment regarding Technology Assigned Risk lawfully cancelling ACG Roofing's worker's compensation insurance policy after receiving non-sufficient funds and ACG Roofing failing to satisfy the non-sufficient funds issue prior to the cancellation date of the policy. Mr. Moises Garcia, owner of ACG Roofing, applied for workers compensation coverage on October 17, 2019. The policy effective date was October 18, 2019 and would be effective through October 18, 2020. Mr. Garcia had a history of making late premium payments, but the one at issue is a non-sufficient funds check received by Technology Assigned Risk on December 23, 20219.

Technology Assigned Risk's accounting team received notice of the non-sufficient funds payment from their bank on December 31, 2019. A direct Notice of Cancellation was mailed to the insured, Mr. Garcia on December 31, 2019 with an effective cancellation date of January 16, 2020. Within this Notice of Cancellation, it was expressly stated that the check had been returned as non-sufficient funds and that certified funds were required to replace the non-sufficient funds payment, which was company policy. Technology Assigned Risk also filed a Notice of Intent to cancel the insured's policy with the National Council on Compensation Insurance (NCCI), as required, on January 2, 2020. NCCI is the data reporting service used by the Tennessee Bureau of Workers' Compensation to allow employers to verify workers' compensation coverage. Upon Technology Assigned Risk's filing of a Notice of Intent to cancel the insured's policy with NCCI, NCCI then reports said information to the Bureau.

The insured failed to make a certified funds payment to satisfy the non-sufficient funds issue on or before the January 16, 2020 cancellation date. Thus, the insured's workers' compensation policy was lawfully cancelled on January 16, 2020. Certified funds to reinstate the policy were not received until February 19, 2020. The certified funds check had a post-marked date of February 13, 2020. Therefore, Technology Assigned Risk reinstated the insured's policy on February 14, 2020. Ultimately, the insured had a lapse in workers' compensation coverage from January 16, 2020 through February 14, 2020. The

insured was not charged a premium payment for the period of the lapse, notably January 16, 2020 to February 14, 2020.

Employee alleged a work-related injury on January 17, 2020, a date within the policy lapse period. As such, Technology Assigned Risk relied on *Kinser v. Thomas Jefferson Ins. Co.*, 1989 Tenn. App. LEXIS 303, which expressly states that an insurance carrier need only show that the policy lapsed to prevail on a Motion for Summary Judgment, and *Robinson v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d 559 (Tenn. Ct. App. 1993), which notes that the insurance carrier is not liable for losses that occur during the period of lapse, and subsequent payment of the missed premium does not retroactively extend coverage to the lapsed period. Thus, Technology Assigned Risk bears no responsibility or liability for any benefits Employee may be entitled to under Workers' Compensation since the insured's policy lapsed and the Employee's injury occurred during the lapsed period. Further, the insured's payment to reinstate the policy does not retroactively extend coverage to the lapsed period of January 16, 2020 to February 14, 2020.

Technology Assigned Risk respectfully submits that for the reasons that will be outlined in the argument below, the trial court has misapplied this precedent in denying Technology Assigned Risk's Motion. This appeal presents a chance for the Board to reaffirm insurance carriers are not liable for losses that occur during a period of a lapse in coverage and that a premium payment to reinstate the policy does not retroactively extend coverage to the lapsed period.

STATEMENT OF THE CASE

The Employee/Appellee, Francisco Martinez, filed a Petition for Determination of Workers' Compensation Benefits on September 13, 2021 seeking medical and temporary total disability benefits. Within the filed Petition for Benefit Determination, Employee indicated that, through investigation, it was determined that Brian Elder Roofing, also an Appellee, was the general contractor on the job site that Employee sustained his alleged work-related injury. as the statutory employer, Brian Elder Roofing did not accept responsibility of the claim. Brian Elder Roofing advised Employee that Nava Roofing, a third Appellee, may have some involvement in this case. A Dispute Certification Notice was ultimately filed on December 9, 2021 after the parties were unable to successfully reach a resolution of the disputed issues.

On August 1, 2021, Technology Assigned Risk filed its first Motion for Summary Judgment. Within its Motion, Technology Assigned Risk asserted that it was not liable or responsible for Employee's alleged workplace injury because the insured had a lapse in his workers' compensation coverage and that a retroactive payment to reinstate the policy did not extend coverage to the lapsed period. The trial court denied Technology Assigned Risk's first Motion for Summary Judgment on the premise that there were genuine issues of material fact surrounding whether the insured made a timely payment in December of 2019, whether Technology Assigned Risk was justified in requiring certified funds to satisfy the non-sufficient funds issue, and whether notification of the policy cancellation had been provided to the Bureau.

Technology Assigned Risk filed a second Motion for Summary Judgment on January 5, 2023 upon obtaining evidence to resolve the genuine issues of material fact from the first Motion for Summary Judgment. The trial court ultimately denied Technology Assigned Risk's second Motion for Summary Judgment on February 14, 2023 opining that there were still genuine issues of material fact. Technology Assigned Risk has timely appealed.

STATEMENT OF THE FACTS

This matter arises from an alleged work-related injury occurring on January 17, 2020, a date within the timeframe the insured had a lapse in his workers' compensation coverage, notably the lapse in coverage was from January 16, 2020 to February 14, 2020. Claimant, Francisco Martinez, worked for Mr. Moises Garcia, the owner and operator of ACG Roofing, Inc. On January 17, 2020, Mr. Martinez slipped and fell off of a ladder and injured his right foot and right leg[1]. (See Exhibit 5 of Technology Assigned Risk's Memorandum of Law in Support of Technology Ins.'s Motion for Summary Judgment, T.R., page 1,292).

Mr. Garcia, the insured, applied for workers compensation coverage on October 17, 2019. (*Id.* at Exhibit 6). The applied for policy coverage was effective on October 18, 2019 and would be effective through October 18, 2020 should there be no reason the policy was cancelled. *Id.* After initial inception of Mr. Garcia's policy, Mr. Garcia was late making an installment payment for the policy on December 17, 2019. (*Id.* at Exhibit 7, Page 42, Lines 16-22). Due to the late payment, Mr. Garcia was sent a notice of cancellation on December 19, 2019. *Id.* However, after this late payment, Mr. Garcia's policy was not cancelled. (*Id.* at Exhibit 7, Page 43, Lines 2-13). Technology Assigned Risk received a check from Mr. Garcia on December 23, 2019 to satisfy the missed payment. (*Id.; Id.* at Exhibit 20). Therefore, Mr. Garcia's policy was reinstated without a lapse in coverage. (*Id.* at Exhibit 7, Page 43, Lines 2-13). The postmark date of the December 23, 2019 check satisfying the late payment was received by Technology Assigned Risk prior to the cancellation date, which is why there was no cancellation of the policy or a lapse. *Id.*

On December 23, 2019, Technology Assigned Risk received a non-sufficient funds check from Mr. Garcia. (*Id.* at Exhibit 7, Page 43-44, Lines 24-5; Pages 48-49, Lines 24-7; *Id.* at Exhibit 1). The bounced check warranted Mr. Garcia being sent a second notice of cancellation. (*Id.* at Exhibit 7, Page 43-44, Lines

[1] References to the Technical Record, as provided to the parties by Penny Patterson-Shrum on February 21, 2023, will be denoted as "T.R." followed by the PDF page number. Technology Assigned Risk references the electronic PDF page number in the technical record, which consisted of a total of 1,742 pages.

24-5; Pages 48-49, Lines 24-7). Essentially, Mr. Garcia's check bounced. (*Id.* at Exhibit 7, Page 25, Lines 12-14). It is Technology Assigned Risk's policy and requirement that any time a non-sufficient funds check is received, a certified check must be received to satisfy the non-sufficient funds payment. (*Id. at* Exhibit 7, Page 44, Lines 9-14). Additionally, the Notice of Cancellation expressly asserted that certified funds were required to satisfy the non-sufficient funds issue. (*Id.* at Exhibit 1).

Technology Assigned Risk's accounting team received notice of Mr. Garcia's non-sufficient funds payment from their bank on December 31, 2019. (*Id.* at Exhibit 7, Page 44, Lines 9-14). Therefore, the accounting team notified Technology Assigned Risk's underwriting team of the non-sufficient funds payment. (*Id.* at Exhibit 7, Page 49, Lines 8-15). After notice from the bank was received regarding the non-sufficient funds payment, a direct notice of cancellation was mailed out to Mr. Garcia on December 31, 2019 with an effective cancellation date of January 16, 2020. (*Id.* at Exhibit 7, Pages 49-50, Lines 19-9; *Id.* at Exhibit 1). Within the notice of cancellation, it was noted that the check had been returned as non-sufficient funds and that certified funds were required to replace the non-sufficient funds payment. *Id.* A phone call from Technology Assigned Risk's accounting team was also placed to the insured on December 31, 2019 regarding the non-sufficient funds payment, but a voicemail was left. *Id.*

The December 31, 2019 notice of cancellation gave Mr. Garcia, the insured, until January 16, 2020 to make a certified payment to satisfy the issue. (*Id.* at Exhibit 7, Pages 50-51, Lines 10-6; *Id.* at Exhibit 1). Technology Assigned Risk gave Mr. Garcia sixteen (16) days to make a certified payment and avoid his workers compensation policy from lapsing. *Id.* As required, Technology Assigned Risk electronically filed a Notice of Intent to cancel Mr. Garcia's policy on January 16, 2020 with NCCI, a third party administrator that administers the Tennessee assigned risk plan. (*Id.* at Exhibit 21). Technology Assigned Risk filed its Notice of Intent with NCCI on January 2, 2020. (*Id.* at Exhibit 21).

Mr. Garcia did not make a payment to Technology Assigned Risk within the provided sixteen days nor prior to January 16, 2020 in order to avoid the policy lapse. (*Id.* at Exhibit 7, *Pages 50-51, Lines 10-6;*

Id. at Exhibit 1). Due to Mr. Garcia's failure to make a payment satisfying the non-sufficient funds issue, the policy was cancelled on January 16, 2020 and had a lapse from January 16, 2020 to February 14, 2020. (*Id.* at Exhibit 7, Page 48, Lines 2-6; *Id.* at Exhibit 2). The policy was not reinstated until February 14, 2020. *Id.*

On January 6, 2020, Mr. Garcia's agent called into Technology Assigned Risk's customer service department requesting a status and the agent was advised of the pending cancellation of the policy on January 16, 2020 due to the non-sufficient funds payment. (*Id.* at Exhibit 7, Page 26, Lines 7-25). Again on January 21, 2020, Mr. Garcia's agent called requesting the status and again was advised that Technology Assigned Risk had not received certified funds. *Id.* The agent was reminded of the need for certified funds to satisfy the non-sufficient funds issue. *Id.*

The first time that Technology Assigned Risk received a check from Mr. Garcia in an effort to reinstate the policy after the January 16, 2020 policy lapse was January 22, 2020. (*Id.* at Exhibit 7, Page 51, Lines 7-12). This check was post-marked for January 15, 2020. (*Id.* at Exhibit 22). However, the January 15, 2020 check, received by Technology Assigned Risk on January 22, 2020, was a regular check and not certified funds, so the check was returned to the insured. (*Id.* at Exhibit 7, Page 51, Lines 7-12). Technology Assigned Risk did not receive a certified check from Mr. Garcia until February 19, 2020 to satisfy the non-sufficient funds payment. (*Id.* at Exhibit 7, Page 51, Lines 17-25; *Id.* at Exhibit 2). The postmarked date on the envelope enclosing this check was February 13, 2020. *Id.* Therefore, that date was used as the "received date" in order to reinstate Mr. Garcia's policy on February 14, 2020. *Id.* At the time of Mr. Garcia's policy being reinstated, Mr. Martinez's claim was already active. (*Id.* at Exhibit 7, Page 52, Lines 8-11). However, when there is an active claim on a policy, that claim has no weight or bearing on whether a policy is reinstated. *Id.*

Technology Assigned Risk conducted a final audit of Mr. Garcia's policy once the policy period had ended on October 18, 2020. (*Id.* at Exhibit 23). The final audit demonstrates three premium periods,

notably from October 18, 2019 through January 16, 2020, February 14, 2020 through March 12, 2020, and March 12, 2020 through October 18, 2020. *Id.* Therefore, Mr. Garcia was not charged during the lapsed period of January 16, 2020 through February 14, 2020, which is inclusive of Mr. Martinez's date of alleged injury on January 17, 2020. *Id.*

Technology Assigned Risk used these facts to argue its position that it is not liable for any benefits alleged by Employee because the insured did not maintain workers' compensation coverage on the date of Employee's alleged incident and retroactive payments to reinstate the policy do not extend coverage to the lapsed period. (T.R. at page 1,292). Brian Elder Roofing filed a response to Technology Assigned Risk's Statement of Undisputed Facts, in which it was expressly stated that, "Defendants do not dispute the contents of the December 31, 2019 notice of cancellation," which is the Notice of Cancellation that was mailed to the insured to notify him of the non-sufficient funds payment and that certified funds were required to satisfy the issue. (T.R. at page 1,471). Employee also filed a response to Technology Assigned Risk's Statement of Undisputed Facts, notably number 13, Employee also indicated that "the offered statement of undisputed fact notes a policy lapse from January 16, 2020 to February 14, 2020." (T.R. at page 1,522). Nava Roofing did not file a response to Technology Assigned Risk's Motion.

At the hearing, Technology Assigned Risk argued the facts of the case and timeline for those pertinent facts as noted above. (Transcript of Proceedings, Pages 4-10). Employee responded summary judgment was not appropriate because the case law cited by Technology Assigned Risk was not "fully applicable to this case. It is not a workers' compensation case." (Transcript, page 13, Lines 12-16). It was Employee's position that Karstens v. Wheeler Millwork, Cabinet and Supply Company was the applicable case law. (Transcript, Page 13, Lines 21-23). It was Employee's position that Technology Assigned Risk did not provide proper notice of its intent to cancel the policy because NCCI is not the Tennessee Bureau of Workers' Compensation, so there was no proof that the Bureau actually received notice. (Transcript, page 15, Lines 8-13). Employee also responded that the involvement of Mr. Garcia's agent, Premier

Seguranza, LLC, was a material issue. (Transcript, Page 17, Lines 18-20). Lastly, Employee opined that the requirement of certified funds was not expressly stated within the four corners of the policy. (Transcript, Page 22, Lines 14-23).

Technology Assigned Response was then given the opportunity to respond to Employee's arguments, in which it first addressed the applicability of the cited case law, namely, *Robinson* and *Kinser*. (Transcript, Page 24, Lines 23-25; Page 25, Lines 1-16). Technology Assigned Risk asserted that questions of lapsed coverage is a contract question, Tennessee Rules of Civil Procedure 56.04 notes that summary judgement is a common device used to dispose of claims arising during lapsed periods, and the Tennessee Rules of Civil Procedure apply to workers' compensation cases, so Robinson and Kinser also apply. (Transcript, Page 25, Lines 1-16). Technology Assigned Risk conceded to the opinion given from *Karstens*, but offered evidence of Technology Assigned Risk reporting its intent to cancel the policy with NCCI on January 2, 2020, 14 days prior to the date the policy was to lapse. (Transcript, Page 25, Lines 17-25; Page 26, Lines 1-8). Technology Assigned Risk also identified that the Tennessee Bureau of Workers' Compensation website expressly states that employer's track policies using NCCI and stated that on the Tennessee Bureau's website there is a sub-link directly to the NCCI website, which states, "information provided from this database is a representative reflection of selected information maintained by the Tennessee Bureau of Workers' Compensation and is used for specific workers' compensation coverage verification." (Transcript, Page 26, Lines 9-21). The exact website address was provided to the trial court by Technology Assigned Risk. (Transcript, Page 40, Lines 10-25; Page 41, Lines 1-18). Regarding Mr. Garcia's use of an agent to assist in making premium payments, Technology Assigned Risk evidenced that there is no requirement to use an agent as other payment avenues were available and there is only a contractual obligation to make timely payments between the insured and insurance carrier, which is Mr. Garcia and Technology Assigned Risk. (Transcript, Page 27, Lines 15-24; Page 28, Lines 17-24). The issue of providing notice of the requirement of certified funds was addressed by Technology Assigned Risk by

asserting that Mr. Garcia was provided notice of this requirement on at least 3 separate occasions, namely the first being with the Notice of Cancellation and the other two notices being given by phone. (Transcript, Page 29, Lines 22-25; Page 30, Lines 1-4).

Brian Elder Roofing, at the hearing, alleged that there were genuine issues of material fact regarding "whether or not the alleged lapsed policy period, actually premiums were paid for that." (Transcript, Page 31, Lines 13-16). Technology Assigned Risk addressed this issue by evidencing that the final audit expressly shows that there was no charge for any premium during the lapsed period of January 16, 2020 to February 14, 2020. (Transcript, Page 34, Lines 13-19). Technology Assigned Risk also pointed out that during Mr. Garcia's deposition, Mr. Garcia had no objection nor denied that his policy lapsed from January 16, 2020 to February 14, 2020, but instead acknowledged that there was a lapse in coverage during that time. (Transcript, Page 36, Lines 24-25; Page 37, Lines 1-7). Nava Roofing opted to not attend the hearing.

DISPOSITION OF THE TRIAL COURT

In addressing Technology Assigned Risk's motion the trial court issued a written order entitled "Order Denying Motion for Summary Judgment" ("Summary Judgment Order") with a filed date of February 14, 2023. In this order the trial court stated that "To prevail, Technology must show that it lawfully canceled its policy with ACG before Mr. Martinez's accident. As with Technology's first motion for summary judgment, the Court holds that there are still several material questions of fact as to this issue." (See Summary Judgment Order at page 4.)

The trial court noted that the first question was whether ACG Roofing timely paid its premium in December. *Id.* The trial court opined that if Technology Assigned Risk and ACG Roofing considered Premier as the agent of ACG Roofing to pay premiums and ACG Roofing made a cash payment to Premier in December, then by Technology Assigned Risk's "own admission," the payment would have been timely, as shown by its reinstatement with no lapse in coverage after receiving the December check. (Id. at page 4 and 5). However, the trial court conceded and noted that Mr. Garcia, owner of ACG Roofing, testified that "he was in Mexico when the premium was overdue, and his nephew was supposed to pay, but he did not." (*Id.* at page 3). The trial court opined that "[a]lthough this statement appears to resolve the question of whether ACG made a timely December payment, Mr. Garcia did not testify which payment he meant." (*Id.* at page 5).

The trial court also opined that there were questions surrounding the requirement of certified funds upon receipt of the non-sufficient funds payment. *Id.* The trial court indicated that there was no proof that this term was accepted by ACG Roofing when entering into the contract for workers' compensation coverage. (Id. at page 6). The trial court also asserted that whether notification to the Bureau regarding cancellation of the policy was proper. *Id.* The trial court opined that Technology Assigned Risk "provided a print-out from NCCI showing that NCCI received notice on December 31 that the policy would be canceled on January 16. However, it did not offer evidence that NCCI then notified the Bureau." *Id.* It was

conceded that this information tends to support Technology Assigned Risk's proposition, but using the summary judgment standard, the Court found that a question of material fact remained as to whether Technology Assigned Risk gave adequate notice to the Bureau, assuming a valid policy cancelation. *Id.*

STANDARD OF REVIEW

The standard of review applied by the Appeals Board "presumes that the court's factual findings are correct unless the preponderance of the evidence is otherwise." See Tenn. Code Ann. § 50-6-239(c)(7) (2017) ("There shall be a presumption that the findings and conclusions of the workers' compensation judge are correct, unless the preponderance of the evidence is otherwise."). However, the Board reviews questions of law de novo with no presumption of correctness. *See Br Mining Ins. Co. v. Campbell*, No. M2015-01478-SC-R3-WC, 2016 Tenn. LEXIS 907, at *18 (Tenn. Workers' Comp. Panel Dec. 9, 2016) ("A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. "). Moreover, the interpretation and application of statutes and regulations concerns issues of law, which the Appeals Board reviews de novo with no presumption of correctness afforded to the trial court's findings. *See Seiber v. Reeves Logging*, 284 S.W.3d 294, 298 (Tenn. 2009); *Hadzic v. Averitt Express*, No. 2014-02-0064, 2015 TN Wrk. Comp. App Bd. LEXIS 14, at *9 (Tenn. Workers' Comp. App. Bd. May 18, 2015).

In *Deborah Syph v. Choice Food Grp.*, Inc., 2015-06-0288, 2016 WL 1626171, at *6 (Apr. 21, 2016), the Workers' Compensation Appeals Board held that "the Tennessee Rules of Civil Procedure and the Tennessee Rules of Evidence apply to any action taken in, or pleading filed with, the Court of Workers' Compensation Claims." Thus, this court should analyze Technology Assigned Risk's Motion for Summary Judgment under the recently revised summary judgment standard outlined in *Rye v. Women's Care Ctr. of Memphis*, 477 S.W.3d 235, 264 (Tenn. 2015).

A court should grant a party's motion for summary judgment only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015), cert. denied, No. 15-1168, 2016 WL 1077577 (U.S. May 23, 2016). The movant bears the ultimate burden of persuading the court "that there are no disputed, material facts creating a genuine issue for trial . . . and that he is entitled to judgment as a matter of law." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993). In *Rye* the Tennessee Supreme Court amended the *Hannan* summary judgment standard to fall in line with the federal system:

> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense."

477 S.W.3d at 264 (emphasis in original).

Furthermore, "[W]hen a motion for summary judgment is made [and] ... supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." *Id.* at 265 (citing Tenn. R. Civ. P. 56). The nonmoving party **"must do more than simply show that there is some metaphysical doubt as to the material facts."** *Id.* (internal citations omitted). "The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Id.*

LAW AND ARGUMENT

It is first Technology Assigned Risk's position that there are no disputed *material* facts and that the trial court erred by finding that Technology Assigned Risk should not be dismissed from the case. The trial court erred by failing to follow the precedent set in *Kinser* and *Robinson* and the trial court's attempt to assert disputed issues that are not *material* facts to prevent Technology Assigned Risk from being dismissed from a claim where it has no liability is unjustified. These arguments will be addressed in turn.

1. The trial court erred by not following precedent set forth in both *Kinser* and *Robinson* regarding lapses in coverage and liability of an insurance carrier when a lapse in coverage occurs.

The question of lapsed coverage is principally a question of contract. *See Robinson v. Tennessee Farmers Mut. Ins. Co.*, 857 S.W.2d 559 (Tenn. Ct. App. 1993). The terms of the policy will govern payment procedures and should define what events will create a lapse in coverage. *Id.* Grace periods are an item to be aware of in defining lapse; most policies will allow for minor variations in payment to avoid the difficulty of policies continuously lapsing for minor missed payments. *See Id.*; *Buchholz v. Tenn. Farmers Life Reassurance Co.*, 145 S.W.3d 80 (Tenn. Ct. App. 2003). In the event of a lapse in coverage, as defined by the specific policy at issue, the insurance carrier is not liable for losses that occur during the period of lapse, and subsequent payment of the missed premium does not retroactively extend coverage to the lapsed period. *Robinson*, 857 S.W.2d 559. Furthermore, the insurer is under no obligation to inform the insured that the policy has lapsed, unless an agreement to the contrary exists. *Kinser v. Thomas Jefferson Ins. Co.*, 1989 Tenn. App. LEXIS 303; *Davidson v. Davidson*, 2006 Tenn. App. LEXIS 615.

Summary judgement under Tenn. R. Civ. P. 56.04 is a common device used to dispose of claims arising during periods of lapse. Rule 56.04 permits summary judgment "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 any material fact and that the moving party is entitled to a judgment as a matter of law."

To prevail on a motion for summary judgment, the Insurance Carrier **need only** show that the policy lapsed. *See Kinser*, 1989 Tenn. App. LEXIS 303. (Emphasis added).

A common defense raised to avoid summary judgment is equitable estoppel, but this is a "Hail Mary" defense and is unfavored in Tennessee. *Robinson*, 857 S.W.2d 559. The party raising the defense must prove every element, which includes:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
>
> (2) Intention, or at least expectation that such conduct shall be acted upon by the other party;
>
> (3) Knowledge, actual or constructive of the real facts.

The party claiming estoppel must prove:

> (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;
>
> (2) Reliance upon the conduct of the party estopped; and
>
> (3) Action based thereon of such a character as to change his position prejudicially.

Robinson, 857 S.W.2d 559.

In *Robinson*, the plaintiffs initially prevailed but lost on appeal in arguing equitable estoppel. *Id.* Plaintiffs contended that the insurer failed to inform the insured that the office would be closed the following day, a Saturday, and plaintiff paid the premium on Monday. *Id.* On appeal, the court held that the policy had lapsed and that the insurer had not taken any action to make the insured believe that the policy would not lapse upon nonpayment. *Id.*

In the case at hand, Mr. Garcia, owner of ACG Roofing, applied for workers compensation coverage on October 17, 2019, in which the policy was to be effective from October 18, 2019 until October 18, 2020. (T.R., page 1,292 at Exhibit 6). Mr. Garcia sent Technology Assigned Risk a non-sufficient funds payment on December 23, 2019 that warranted a notice of cancellation. (*Id.* at Exhibit 7, Page 43-44, Lines 24-5;

Pages 48-49, Lines 24-7, Exhibit 7; *Id.* at Exhibit 1). The Insurance Carrier received notice of the non-sufficient funds payment from their bank on December 31, 2020. (*Id.* at Exhibit 7, Page 49, Lines 8-15). Due to receipt of a non-sufficient funds payment, it was company policy that certified funds be sent to Technology Assigned Risk to satisfy the non-sufficient funds payment. (*Id.* at Exhibit 7, Page 44, Lines 9-14). The Notice of Cancellation mailed to Mr. Garcia expressly stated that certified funds were required to satisfy the non-sufficient funds issue. (*Id.* at Exhibit 1). Mr. Garcia, the insured, was given until January 16, 2020 to make a certified payment to satisfy the issue. (*Id.* at Exhibit 7, Pages 50-51, Lines 10-6, *Id.* at Exhibit 1). Technology Assigned Risk gave Mr. Garcia sixteen (16) days to make a certified payment to avoid his policy from lapsing. (*Id.* at Exhibit 7, Pages 50-51, Lines 10-6, Exhibit 7; *Id.* at Exhibit 1). Technology Assigned Risk timely filed its Notice of Intent to cancel Mr. Garcia's policy with NCCI on January 2, 2020. (*Id.* at Exhibit 21). Mr. Garcia did not make a certified payment to Technology Assigned Risk within the provided sixteen days nor prior to January 16, 2020. (*Id.* at Exhibit 7, Pages 50-51, Lines 10-6, Exhibit 7; *Id.* at Exhibit 1).

Technology Assigned Risk did not receive a certified check from Mr. Garcia until February 19, 2020. (*Id.* at Exhibit 7, Page 51, Lines 17-25, Exhibit 7; *Id.* at Exhibit 2.). The postmarked date on the envelope was February 13, 2020, so this date was used as the "received date" to reinstate Mr. Garcia's policy beginning on February 14, 2020. (*Id.* at Exhibit 7, Page 51, Lines 17-25; *Id.* at Exhibit 2.) Therefore, the policy lapsed from January 16, 2020 to February 14, 2020. (*Id.* at Exhibit 7, Page 48, Lines 2-6, Exhibit 7; *Id.* at Exhibit 2.). Mr. Garcia was not charged a premium payment for the period of the lapse, notably January 16, 2020 to February 14, 2020. (*Id.* at Exhibit 23).

The policy was not reinstated until February 14, 2020. (*Id.* at Exhibit 7, Page 48, Lines 2-6; *Id.* at Exhibit 2). Mr. Garcia attempted to satisfy the non-sufficient funds issue with a check post-marked on January 15, 2020, but received by Technology Assigned Risk on January 22, 2020. (*Id.* at Exhibit 7, Page 51, Lines 7-12). However, the January 15, 2020 post-marked check was a regular check and not certified

funds, so the check was returned to the insured. *Id.* The post-marked January 15, 2020 check was not certified funds and, therefore, could not be accepted to cure the issue of the non-sufficient funds check that was received on December 23, 2019. *(Id.* at Exhibit 1).

Technology Assigned Risk did not receive a certified check from Mr. Garcia until February 19, 2020 to satisfy the non-sufficient funds payment. (*Id.* at Exhibit 7, Page 51, Lines 17-25; *Id.* at Exhibit 2). The postmarked date on the envelope enclosing this check was February 13, 2020. *Id.* Therefore, that February 13, 2020 date was used as the "received date" in order to reinstate Mr. Garcia's policy on February 14, 2020. *Id.*

Technology Assigned Risk need only show that Mr. Garcia had a lapse in his workers' compensation policy. *See Kinser*, 1989 Tenn. App. LEXIS 303. Technology Assigned Risk sent Mr. Garcia a Policy Reinstatement Notice with an issue date of February 24, 2020. Within this Policy Reinstatement Notice it expressly indicates that Mr. Garcia had a lapse in his policy from January 16, 2020 to February 14, 2020. Further, Mr. Steven Cooper, an assigned risk manager, provided testimony that Mr. Garcia had a lapse in his workers compensation policy from January 16, 2020 to February 14, 2020 due to receipt of a non-sufficient funds payment and Mr. Garcia's failure to satisfy the issue before the January 16, 2020 cancellation date of the policy. Mr. Garcia, during his deposition, also made no denial regarding the lapse in coverage and actually acknowledged that there was a lapse in his coverage from January 16, 2020 to February 14, 2020. As such, Technology Assigned Risk has shown, proven, and evidenced that Mr. Garcia had a lapse in his workers compensation policy and the period of the lapse was from January 16, 2020 to February 14, 2020. However, the trial court failed to address these facts and failed to implement the standard set forth in *Kinser*. Instead, the trial court admitted that Mr. Garcia testified that the premium payment was not made although Mr. Garcia believed his nephew was going to make the payment, but then opined there were genuine issues regarding which payment Mr. Garcia was referring to. (Summary Judgment Order, Page 5). The trial court blatantly overlooked the fact that Mr. Garcia admitted that a payment was missed

and admitted that there was a lapse in his coverage from January 16, 2020 to February 14, 2020. To prevail on a motion for summary judgment, Technology Assigned Risk need only show that there was a lapse in coverage, which it did. Thus, the trial court's decision should be reversed, and Technology Assigned Risk should be dismissed from the claim as it has met its burden of showing a lapse in coverage.

Furthermore, in the event of a lapse in coverage, an insurance carrier is not liable for losses that occur during the period of lapse, and subsequent payment of the missed premium does not retroactively extend coverage to the lapsed period. *Robinson*, 857 S.W.2d 559. Given that Mr. Martinez's alleged work injury occurred on January 17, 2020, a date during the lapsed coverage time, Technology Assigned Risk is not liable or responsible for any benefits Mr. Martinez may be owed under workers compensation. Further, Mr. Garcia making a payment to have his workers compensation policy reinstated subsequently after Mr. Martinez's alleged work injury does not make Technology Assigned Risk responsible or liable for Mr. Martinez's workers compensation claim because Mr. Garcia's payment to reinstate the policy does not retroactively extend coverage to the lapsed period of January 16, 2020 to February 14, 2020. Additionally, the final audit conducted by Technology Assigned Risk proves that Mr. Garcia was not charged a premium payment during the lapsed period of January 16, 2020 to February 14, 2020. The final audit demonstrates three premium periods of October 18, 2019 through January 16, 2020, February 14, 2020 through March 12, 2020, and March 12, 2020 through October 18, 2020. Therefore, Mr. Garcia was not charged a premium for the lapsed period, which was inclusive of Mr. Martinez's alleged date of injury. Again, the trial court overlooked this fact, which is material in showing that Mr. Garcia did not have workers' compensation coverage on the date of Mr. Martinez's alleged workplace injury. Technology Assigned Risk has shown and proven that there was a lapse in Mr. Garcia's workers' compensation insurance by various methods, inclusive of the Notice of Cancellation, Reinstatement Notice, Mr. Steven Cooper's deposition testimony, Mr. Cooper's Rule 72 Declaration, Mr. Garcia's deposition testimony, and the final audit. However, the trial court ignored this evidence that clearly proves a lapse in coverage and failed to apply the correct

standards set out in *Kinser* and *Robinson*, which would have led to Technology Assigned Risk's Motion being granted and Technology Assigned Risk rightfully being dismissed from the claim.

2. The trial court erred in opining that there was a genuine issue of material fact regarding whether Technology Assigned Risk provided adequate notice of the policy cancellation to the Bureau.

Technology Assigned Risk timely filed its Notice of Intent to cancel Mr. Garcia's policy with NCCI on January 2, 2020. (T.R. at Page 1,292 at Exhibit 21). NCCI stands for National Council on Compensation Insurance. NCCI is the data reporting service used by the Tennessee Bureau of Workers' Compensation to allow employers to verify workers' compensation coverage.

Mr. Cooper indicated that insurance companies are required to report changes in coverage to NCCI. Thus, Technology Assigned Risk was required to notify NCCI that Mr. Garcia's coverage would lapse effective January 16, 2020. Technology Assigned Risk notified NCCI of this intent to cancel the policy on January 2, 2020, 14 days prior to the date the policy would lapse. The Tennessee Bureau of Workers' Compensation expressly states that employers track coverages of insurance policies by visiting NCCI. The Bureau's website also includes a hyperlink that visitors of the webpage can click on to go directly to the NCCI website. The Bureau's website identifying this information and hyperlink to NCCI was provided to the trial court by Technology Assigned Risk. Notably, the specific web address provided to the trial court was https://www.tn.gov/workforce/injuries-at-work/employers/employers/compliance/coi-workers-comp.html. Upon visiting this website, visitors of the site can scroll down to "How to Comply" and underneath the Employers heading there is a link to the NCCI site, specifically https://www.ewccv.com/cvs/?ref=http%3A%2F%2Ftn.gov%2Fworkforce.

When visiting the NCCI webpage, it provides the purpose of the website, namely "to assist you in determining whether an employer has workers compensation insurance in the state" and the titled heading is "Tennessee Department of Labor and Workforce Development – Bureau of Workers' Compensation." Furthermore, upon accepting the terms of use to begin the search, visitors are directed to the next page that

expressly states, "Information contained in/provided from this database is a representative reflection of selected information maintained by the Tennessee Bureau of Workers' Compensation and is used for specific workers compensation coverage verification." Technology Assigned Risk provided this information to the trial court during the Motion for Summary Judgment hearing. However, the trial court, in its Order, stated "Technology cited no authority for the proposition that notifying NCCI serves to also notify the Bureau of cancelation, although its counsel pointed out that the Bureau's website has an NCCI link for parties to check coverage status." (Summary Judgment Order, Page 6). This is faulty as Technology Assigned Risk provided specific web addresses and contents/statements on those web addresses that expressly identify that notifying NCCI of a change in coverage also serves to notify the Tennessee Bureau of Workers' Compensation. Technology Assigned Risk notifying NCCI of its intent to cancel Mr. Garcia's policy served as notice to the Bureau. As a result, the trial court decision should be reversed, and Technology Assigned Risk's Motion should be granted.

3. Mr. Garcia's, owner of ACG Roofing, use of an agent, Premier Serguranza, to assist in making premium payments and Technology Assigned Risk's requirement of certified funds not specifically being addressed in the written contract are immaterial to the court.

Bouvier Law Dictionary defines a material fact as "[a] fact that might alter the outcome of a dispute." In the instant case, Mr. Garcia's use of an agent and the written contract being absent of an expressed provision regarding certified funds is irrelevant and immaterial. Mr. Garcia was not obligated or required to use an agent. (T.R. at Page 1,292 at Exhibit 24). Mr. Garcia had other options of making premium payments, including sending cash directly to Technology Assigned Risk. *Id.* Although Mr. Garcia voluntarily chose to use an agent, the only party that has any contractual obligation or relationship with Technology Assigned Risk with regard to making premium payments is the insured, which is Mr. Garcia. *Id.* Additionally, Technology Assigned Risk directly bills the insured, Mr. Garcia, and not an agent as there is no contractual relationship with the agent. *Id.* Thus, Technology Assigned Risk sent the premium bill to Mr. Garcia only and Mr. Garcia was the only

party with any obligation to pay the premium on time in order to avoid a lapse or cancellation in his policy. *Id.* The fact that Mr. Garcia voluntarily elected to use an agent to assist him in making premium payments has no bearing or weight on whether or not his policy lapses or is cancelled as a result of failing to timely make a premium payment. *Id.* Regardless of Mr. Garcia using an agent, Mr. Garcia was contractually obligated to ensure that timely payments were made to Technology Assigned Risk in order to avoid any lapse or cancellation in his policy. *Id.* Mr. Garcia was on the only individual bearing responsibility to make timely premium payments and failure to do so resulted in his policy lapsing from January 16, 2020 to February 14, 2020, which he admitted. However, the trial court erroneously made Mr. Garcia's use of an agent a material fact when Mr. Garcia was the only responsible party for making timely premium payments.

Secondly, the trial court inaccurately made the aspect of certified funds not being expressed within the written contractual agreement between Mr. Garcia and Technology Assigned Risk a material issue because of questions regarding whether Technology Assigned Risk was justified in requiring certified funds. (Summary Judgment Order, Page 6). This is irrelevant and immaterial because the written policy also does not expressly identify the methods of payment that can be made, such as cash payments, use of an agent, check, in-person, etc. These too are absent from the written policy, but Mr. Garcia could use any of these various methods to make premium payments. Therefore, whether Technology Assigned Risk was justified in requiring certified funds after receipt of a non-sufficient funds payment being absent from the written policy is irrelevant and immaterial. However, what the policy does expressly assert is that the insured is the one that is required to make timely payments, which in this case is Mr. Garcia. Mr. Garcia failed to do so, which ultimately resulted in the policy lapsing from January 16, 2020 to February 14, 2020.

Lastly, Technology Assigned Risk requiring certified funds upon receipt of a non-sufficient funds payment is more than reasonable. Mr. Garcia had already provided a bounced check, meaning the payment was not good or valid. Technology Assigned Risk requiring certified funds upon receipt of a bounced check was a reasonable way to assure that the funds were good and valid. This is common practice amongst

businesses and Technology Assigned Risk is no different. However, this is not a material issue bearing a decision for summary judgment. The true material issue is whether there was a lapse in coverage and Technology Assigned Risk has proven and demonstrated such, which warrants the trial court's decision being reversed and Technology Assigned Risk's Motion being granted.

CONCLUSION

In conclusion, the trial court's order denying summary judgment must be reversed for several reasons. First, the trial court erred by not applying the standards set forth in *Kinser* and *Robinson*. The trial court failed to even consider or address these standards within its summary Judgment Order. *Kinser* expressly states that an insurance carrier need only show that there was a lapse in coverage to prevail on a Motion for Summary Judgment. Here, Technology Assigned Risk has done just that. Technology Assigned Risk has proven that Mr. Garcia, owner of ACG Roofing, failed to maintain workers' compensation coverage. Mr. Garcia had a non-sufficient funds payment that required certified funds to satisfy. Mr. Garcia failed to provide certified funds prior to the policy canceling on January 16, 2020, which was an expressed requirement within the Notice of Cancellation. Certified funds were not received until February 19, 2020, with a postmarked date of February 13, 2020. Thus, Mr. Garcia's policy was not reinstated until February 14, 2020, and there was a lapse in coverage from January 16, 2020 until February 14, 2020, evidenced by the Reinstatement Notice. Mr. Garcia's payment in February of 2020 to reinstate the policy does not retroactively apply to the lapsed period. *Robinson* expressly notes that payments to reinstate policy are not applied retroactively to apply coverage to a lapsed period.

The trial court erred in opining that proper notice was not provided to the Bureau regarding the intent to cancel Mr. Garcia's workers' compensation policy. As required, Technology Assigned Risk filed an Intent to Cancel with NCCI on January 2, 2020. Within the Intent to Cancel, the intended cancellation date was January 16, 2020. Thus, Technology Assigned Risk provided timely notice to NCCI regarding its intent to cancel the policy. Upon providing notice to NCCI, NCCI then conveys or relays such information to the Bureau as NCCI is the third-party Tennessee uses to allow employers to verify workers' compensation coverage.

Further, Mr. Garcia's use of an agent to assist in making premium payments is immaterial. The Workers' Compensation contract was between Mr. Garcia and Technology Assigned Risk. There was no

contractual obligation for any third-party agent. Technology Assigned Risk had no contractual relationship or otherwise with Mr. Garcia's agent. Instead, the contract was with Mr. Garcia alone and Mr. Garcia was the only party obligated to make timely premium payments. Timely premiums payments could have been made in a variety of ways, including mailing cash directly to Technology Assigned Risk, in-person payments, checks, etc. Thus, Mr. Garcia could have made payments directly to Technology Assigned Risk, having no obligation or requirement to use an agent. Mr. Garcia's voluntary choice to use an agent to assist in premium payments is irrelevant and immaterial as Mr. Garcia was the only party contractually obligated to make timely premium payments.

Lastly, Technology Assigned Risk's requirement of certified funds after Mr. Garcia made a non-sufficient funds payment is immaterial. When a non-sufficient funds payment is received, it is reasonable for any business to require certified funds. Certified funds is a way to ensure payment. Technology Assigned Risk applied this reasonableness when Mr. Garcia made a non-sufficient funds payment. However, this is irrelevant and immaterial because the standard applicable to the case is that of *Kinser* and *Robinson*. Specifically, an insurance carrier need only show a lapse in coverage and payments to reinstate the policy do not apply retroactively to lapsed periods. For these reasons, the trial court's Summary Judgment Order should be reversed and Technology Assigned Risk should be dismissed from the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that a true and correct copy of the foregoing was duly served upon the Employer, Employee's counsel, Nava Roofing's counsel, and Brian Elder Roofing's counsel by electronic mail and mailing a copy of same, postage pre-paid, via First Class U.S. Mail, addressed as follows:

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This 8th day of March, 2023.

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