2011 IL App (2d) 100586-U
No. 2—10—0586
Order filed August 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES R. JOHNSON, Individually and as Assignee of the Estate of Robert Struck, Deceased, Plaintiff-Appellee and Cross-Appellant, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant-Appellant and Cross-Appellee.	)	Appeal from the Circuit Court of DeKalb County. No. 05—MR—153 Honorable William P. Brady, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

Held: Regarding defendant's appeal, where there was a dispute over the effectiveness of the notice of cancellation, the insurer could not refuse to defend its insured because the policy no longer existed; rather, it should have defended with a reservation of rights or filed a declaratory judgment action.
Regarding plaintiff's cross-appeal, State Farm's proof of mailing its notice of cancellation to the insured complied with state and federal requirements and was sufficient under the Insurance Code so the trial court did not err in denying plaintiff's motion for summary judgment on this issue.

¶ 1 Defendant, State Farm Fire and Casualty Company (defendant or State Farm), appeals the judgment of the circuit court of DeKalb County in favor of plaintiff, James R. Johnson, individually and as the assignee of the Estate of Robert Struck, finding it liable for a $300,000 default judgment against its insured, Robert Struck. On appeal, State Farm contends that the trial court erred in determining that it was liable for the default judgment against its insured because it had cancelled the insured's policy for nonpayment before the accident occurred. State Farm argues that, because the policy was no longer in effect, it had no duty to defend its insured. Plaintiff cross-appeals, arguing that the trial court erred in not granting plaintiff summary judgment because State Farm did not maintain a proper proof of mailing for the cancellation document to the insured. We affirm.

¶ 2 On February 28, 2003, plaintiff was injured at Struck's property. Struck owned a mobile home. When plaintiff visited Struck on that date, the wooden platform leading to the door gave way, and plaintiff broke his ankle. Struck had previously obtained insurance from State Farm for his vehicle and for his mobile home. The policy on the home had effective dates of April 3, 2002, to April 3, 2003, with policy limits of $300,000.

¶ 3 Plaintiff filed a complaint against Struck, alleging that Struck was negligent in maintaining his mobile home. Struck notified State Farm of the claim, but State Farm refused to provide a defense for Struck. Plaintiff was able to obtain a default judgment against Struck for the $300,000 policy limit.

¶ 4 On September 26, 2005, Struck died. On November 28, 2007, Struck's estate assigned its interest against State Farm to plaintiff.

¶ 5 Plaintiff filed a complaint against State Farm. In count I, defendant sought a declaratory judgment against State Farm, seeking to determine that State Farm was liable for the $300,000

default judgment. In count II, plaintiff alleged that State Farm had acted in bad faith in handling the claim.

¶ 6 State Farm answered and denied liability for the judgment. State Farm also included an allegation stating that, on February 12, 2003, 16 days before the accident, the policy had been canceled and had not been reinstated. On June 16, 2008, the trial court dismissed count II as time-barred.

¶ 7 Thereafter, the parties filed cross-motions for summary judgment. Plaintiff requested summary judgment on the grounds that State Farm had not kept proof of mailing on the statutory proof-of-mailing form, so it could not show that the mobile home policy was properly canceled for nonpayment of premiums.

¶ 8 The evidence showed that Struck had not paid his premiums for his auto and home policies in December 2002, January 2003, and February 2003. Struck had written a check for his insurance in December 2002, but the check was dishonored for insufficient funds. Struck wrote a check in January 2003, to cover the December and January payments, but this, too, was dishonored for insufficient funds. On January 20, 2003, State Farm informed Struck that he owed $236.01 for three insurance payments: December, January, and February.

¶ 9 On January 28, 2003, State Farm mailed a cancellation notice to Struck. State farm noted that the amount due was $236.01, and that payment was due before February 11, 2003, to reinstate the policies. Struck's cancellation was one of nearly 2,700 cancellation notices that were processed at State Farm's mailing operations facility in Texas on that date. The envelope with the notice showing Struck's mailing address was videotaped at 7:17 a.m. that date, pursuant to State Farm's procedures. State Farm attached to its summary judgment motion a proof of mailing that showed

Struck's account number, his address, the signature of Ruby Alexander, a State Farm employee, and the initials of a post office employee who processed the batch.

¶ 10 Struck's insurance agent, John Godde, received a copy of the cancellation notice. On March 24, 2003, Godde's employee, Maria Bennett, wrote out a new application for insurance, including mobile home coverage. The "new" policy was bound by a $276.01 check signed by plaintiff's mother, Dianna Aylward. Plaintiff notes that the amount due for the purportedly new insurance coverage was $246.00, and that State Farm claimed that the amount due for the unpaid months of the old policy was $236.01. Additionally, plaintiff notes that the "new" policy application used the old policy number. Plaintiff avers that there was no explanation about why $276.00 was seemingly charged for a $246.00 policy or why the original amount had been crossed off.

¶ 11 Plaintiff also notes that prior to March 24, plaintiff's then-attorney, David Monteleone, contacted Godde and inquired whether coverage under the insurance policies could be reinstated. According to Monteleone, he told Godde that plaintiff had been injured on Struck's property. Further, according to Monteleone, Godde told him that, if a payment were made by March 26, 2003, there would be no gap in the coverage.

¶ 12 About three weeks after the application for the "new" policy was complete, on April 15,2003, State Farm declined the application and issued a refund check to Struck. The refund check was for the full amount of $276.00.

¶ 13 On May 19, 2003, Monteleone, wrote a letter to State Farm. In the letter, Monteleone confirmed the details of his conversation with Godde. In his discovery deposition, Godde disputed that he made statement to Monteleone, asserting that he would never tell anyone that coverage would be retroactively reinstated after a policy had been canceled. Godde further denied having

conversations with Monteleone or anyone representing plaintiff. Plaintiff asserts that there is nothing documentary in the record that refutes Monteleone's May 19 letter. Further, plaintiff asserts that no one at State Farm talked to Godde about the contents of Monteleone's May 19 letter, until at least four years after it was written and at the time that Godde began preparing for his deposition.

¶ 14 On October 20, 2008, the trial court ruled that State Farm had complied with the statutory requirements for the proof of mailing form as set forth in section 143.14 of the Insurance Code (215 ILCS 5/143.14 (West 2002)). Subsequently, the trial court denied the remainder of the cross-motions for summary judgment. The matter proceeded to a bench trial.

¶ 15 At the bench trial, Monteleone, a Rockford attorney, testified that plaintiff came to him within a few days of his accident. On March 3, 2003, Monteleone sent a letter to Struck identifying himself. On March 6, 2003, Monteleone had plaintiff call Struck's State Farm agent to ascertain Struck's insurance coverage. Monteleone testified that his only chance of receiving compensation for his services and for his client was if Struck maintained insurance coverage on the mobile home. Monteleone did not believe that Struck had the financial resources to pay a judgment in the absence of insurance coverage.

¶ 16 Monteleone testified that he first came into contact with plaintiff when plaintiff offered to perform some paralegal work for him. Monteleone testified that the first time he had any contact with State Farm was sometime after plaintiff had learned that Struck's insurance had been canceled due to nonpayment. Monteleone testified that he had two or three conversations with Godde during the time period of March 3 to March 21, 2003. Over the course of those conversations, Godde told Monteleone that the policy would be reinstated and his client's injury claim would be covered if, by March 26, 2003, a $276 premium payment was brought to his office. Monteleone testified that,

while he would not make the payment himself, he told Johnson that it had to be made. Monteleone testified that he believed the payment had been made.

¶ 17 Monteleone admitted that he never obtained a written confirmation to document that State Farm agreed to provide coverage for plaintiff's claim. In fact, on April 16, 2003, and May 21 2003, mail he received from Dawn Rhein stated that plaintiff's claim would not be covered due to the February 12, 2003, cancellations of Struck's insurance policies due to the nonpayment of premiums. On May 19, 2003, Monteleone wrote to State Farm to memorialize his conversations with Godde in which Godde agreed that the insurance would be reinstated if the policy payments were made current by March 26, 2003, and to assert that State Farm had a duty to defend its insured based on the possibility of coverage. Monteleone conceded that he did not receive anything from State Farm advising him that Godde was authorized to make the oral representations that Monteleone had testified about. Monteleone testified that, on May 21, 2003, he received a letter from State Farm denying coverage.

¶ 18 Monteleone testified that he was aware that Struck had missed two premium payments before he contacted Godde's office to ask about the status of Struck's policy. Monteleone testified that he was aware that he was dealing with the agent's office, and he had not reviewed the actual policy of insurance to discern its terms. However, his understanding of insurance law was that there would be a grace period following a missed payment. Monteleone testified that he did not know if there was any particular meaning to the March 26 deadline to bring the premium payments current.

¶ 19 John Godde testified that, at the time of trial, he had been a State Farm agent. He testified that, according to his understanding of State Farm's policies and procedures, he did not have authority to reinstate Struck's coverage or to reinstate that coverage in such a manner as to cover a

loss occurring while the policy had lapsed due to nonpayment. Godde testified that, once there was no longer a contract of insurance between State Farm and an insured, such as after a cancellation, he had no authority to act. Godde denied that, by accepting the $276.01 check, he had agreed to reinstate Struck's insurance coverages.

¶ 20 Godde testified that he had no recollection that he had ever spoken to Monteleone. Godde testified that it was his habit then (and now) to make notes of all of the telephone calls in which he participated. According to Godde, his phone log for 2003 included no calls from either Monteleone or plaintiff. Godde also denied telling Monteleone, Struck, or plaintiff that the policy would be reinstated with no time out of force if he received sufficient premium payments to bring them current by March 26, 2003.

¶ 21 Godde testified that Struck had a "balance-due" account that required a two-month down payment, and monthly payments thereafter. Godde testified that the extra monthly payment was in reserve in case the insured did not timely pay or missed payment of his monthly premium. Struck was required each month to pay a one-time $2 setup fee, a $3 monthly processing fee, 1/12 of his mobile home insurance policy, and 1/6 of his auto policy (which had an effective period of six months). Godde testified that there was no grace period after the reserve month premium was fully earned. The total balance due was required to be fully paid by the dates specified in the cancellation notice. Godde testified that Struck did not pay the amounts due on the mobile home policy from the January 28, 2003, mailing date of the cancellation notice. Godde testified that he received his copies of the cancellation notices for both policies under Struck's account number.

¶ 22 Godde testified that the March 24, 2003, application was for new policies with different coverage than Struck had previously held. For example, the deductible had been reduced from $500

to $250, and the medical payment coverage had been increased from $1,000 to $5,000. Godde testified that he had no say in the disposition of an application. Godde's commission was 10% of the premium. Godde testified that, on April 15, 2003, State Farm declined to write the new policy and refunded $276.01 premium because it was no longer writing policies for mobile homes.

¶ 23 Maria Bennett testified that she is the office manager and an insurance producer in Godde's State Farm agency. Bennett testified that she was aware that Struck's policies were canceled on February 11, 2003 (for the auto policy), and February 12, 2003 (for the mobile home policy). Bennett testified that she did not receive any information that Struck paid any premiums toward his canceled policies following the notice of cancellation; similarly, Struck did not come into the office to pay the amount he owed on his original policies.

¶ 24 Bennett testified that, on Saturday, March 22, 2003, plaintiff left a phone message on the office's answering machine regarding Struck's policy. Bennett called the State Farm home office regarding the status of Struck's mobile home policy. She learned that the policy had been canceled effective February 12, 2003. Bennett thereafter returned plaintiff's call or Monteleone's call and passed along the information about the cancellation. Bennett testified that, sometime after March 24, 2003, she had telephone discussions with Monteleone, who called the office looking for the declaration page of Struck's policy. Bennett testified that she did not send a copy of the declaration page to Monteleone. She also testified that she made no representation regarding reinstating the coverage or bringing the premiums current. Bennet also testified that she never advised Monteleone to bring a check to the office by March 26, 2003.

¶ 25 Bennet testified that, on March 24, 2003, she helped with the application to write a similar coverage for Struck's mobile home, and that application was submitted to State Farm's home office.

Bennet testified that Struck came to the office with a friend to deliver a check written on Dianna Aylward's account to pay the annual premium of $276 for the new coverage. Bennett stapled the check to the application and submitted all of the paperwork.

¶ 26 Judy Awe testified that she was the manager of deposit operations at the Resource Bank in DeKalb, Illinois. Awe testified that Struck maintained a checking account at the bank. Her testimony laid the foundation to admit several of Struck's checks, namely, the ones returned for insufficient funds in December 2002, January 2003, and February 2003. Awe testified that, from February 7, 2003, to March 3, 2003, Struck was overdrawn on his checking account. Plaintiff also notes that, through Awe's testimony, he proved that Struck had made payments to State Farm totaling $596.07 during the applicable period, including the subtraction for the returned checks. Plaintiff further notes that State farm admitted that the annual premium for the mobile home insurance totaled $190.00. Plaintiff concludes that this proves he paid more than the total premiums due for the mobile home insurance. We note that the $596 figure may have included moneys for the auto premiums, and plaintiff failed to indicate the six-month premium for the auto insurance. Thus, while $596 is certainly greater than $196, we cannot necessarily conclude, as plaintiff attempts to insinuate, that the evidence demonstrated that his mobile home policy should have remained in effect because the amounts proved paid were greater than the amounts owed. We further note that the trial court made no finding with respect to this insinuated issue.

¶ 27 Plaintiff testified that, as of February 12, 2003, he did not know how much money Struck may have owed to State Farm. March 31, 2003, was the first date on which plaintiff communicated about the accident to anyone at State Farm, and he telephoned in the claim. Before that date, plaintiff believed that he might have left a phone message with the State Farm agent's office in Genoa.

Plaintiff testified that the only person he spoke to in the Genoa office was Bennett. After plaintiff called the Genoa office, he was informed that Struck's policy had been canceled just before his accident.

¶ 28 Plaintiff also testified that Dianna Aylward was his mother. According to plaintiff, she had authorized the $276.01 check because he was going through a divorce at the time.

¶ 29 Following closing arguments, the trial court determined that Stated Farm was estopped to deny coverage and entered judgment in plaintiff's favor and against State Farm in the amount of $300,000 plus interest of nearly $170,000. The trial court ruled:

> "[T]he case of [*American Standard Insurance Co. v. Gnojewski*, 319 Ill. App. 3d 970 (2001), presents] a lot of similarities to this case.
>
> I think the way I approach this is trying to figure out just exactly what is this lawsuit all about. The action perhaps is entitled or as we talk about it being a declaratory judgment action and I think that's accurate, although it probably isn't really as descriptive as other words could be, to talk about what it really is.
>
> And as I indicated before, after reading the case of [*Clemmons v. Travelers Insurance Co.*, 88 Ill. 2d 469 (1981)], what I'm being asked to declare is that State Farm owed money to the plaintiff and that this is really akin to a garnishment action and it's not a declaratory action to see if coverage existed. There was a policy. I got a judgment. They're required to indemnify. Give me my money. This isn't I got a judgment. I think there's coverage. They don't think there's coverage. Decide if there's coverage.
>
> I think that type of declaratory action where we get into was it properly cancelled, was it reinstated or not, whether or not the payments were made or not, we're past that stage.

General rule as stated in the cases cited by both parties is, 'The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured.

'Rather, the insurer has two options. One, defend the suit under a reservation of rights, or, two, seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage.

'Although the doctrine has roots in the principle of equitable estoppel, a review of the case law reveals that it has since developed into a distinct doctrine that stands on its own', and that from–those words are from [*Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127 (1999)].

I do believe that case law further states that if no policy was in existence, the estoppel argument isn't applicable, and again looking at [*Ehlco*] as I indicated earlier, 'Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend or if the insurer's duty to defend was not properly triggered. These circumstances include where the insurer was given no opportunity to defend'–in other words, no notice of a suit or not–no notice of a suit, and then going on they say, 'Where there was no insurance policy in existence and when the policy and the complaint are compared, there clearly was no coverage or potential for coverage.'

And the argument here made by State Farm is there was no insurance policy in existence. Therefore, we don't have to say–we don't have to file [a] declaratory action. We don't have to defend with reservation of rights.

And if that's where we stopped, I would be in agreement because I think it's arguable that those cases don't take it the next step saying what if the issue that whether or not a policy is in existence is the reason–or is in dispute, and that's where we get to [*Gnojewski*].

In [*Gnojewski*], as we've discussed, in that case there's a statute that says send out notice of cancellation to the insured as well as any lien holder if known. The injured parties similar to [plaintiff] here say if known means could they have found out by just checking the state records and insurance company says, well, it has to be actual knowledge. Did we actually know, and the Court in [*Gnojewski*] says there's a dispute there. You should have defended. You should have filed a declaratory.

The fact that there's a dispute over whether or not the cancellation was effective is an issue that is a triggering event requiring them to either defend with reservation of rights or file a declaratory.

I'm finding that in this particular case there were several disputed issues that would have raised a requirement to either defend with reservation of rights or to file [a] declaratory [judgment action], one of which was whether or not there was a proper cancellation.

Previously in the case was raised by the plaintiff that the cancellation was not effective because there was a requirement that the insurance company maintained proof of mailing of such notice of cancellation 'on a recognized U.S. Post Office form or a form acceptable to the post office or other commercial mail delivery service'.

In this particular case the argument was made they didn't use the post office form. Therefore, the cancellation was ineffective. In reviewing that I found that the form that they used was acceptable to the U.S. Post Office but it was a disputed issue, and I don't think it was a frivolous disputed issue.

In applying what we learned from [*Gnojewski*] to that part of the case I think that if you're not going to use the post office form, that creates an issue and so whether or not the cancellation took effect would be enough to trigger the duty to defend or the filing of a declaratory action.

***

Secondly, there was a disputed issue as to whether or not the contract of insurance was in effect retroactively by the payment of a premium, and State Farm certainly was aware there was a dispute as to whether or not it was in effect because Mr. Monteleone in his May 19th letter laid out the whole scenario for them. They may not have agreed with it. They may have said, 'Our agent couldn't have done that', but I don't think they get to make that choice.

I mean, I find that Mr. Monteleone's testimony was very credible on this issue and that Mr. Godde's testimony was the opposite of very credible on this issue, and so the dispute was we were told the policy–or the date the injury would be covered if this payment was made. The payment was made. The check was cashed and we had every reason to believe that the injury would be covered.

From a legal point of view if this was a declaratory action where I was trying to figure out whether or not there would be coverage, the plaintiff would have a difficult row to hoe

here in trying to create the backward coverage in a lot of part because the language in the policy, but I didn't get that opportunity to weigh in on those issues and I'm not making any ruling about whether or not the policy, the reinstatement arguments whether or not the policy was in effect at that time because of my belief that the [*Gnojewski*] case prohibits the defendant from raising the issues of cancellation.

And the third issue was raised was whether or not there was proper cancellation because there was some argument that, well, he might have made all the payments. I'm not making any ruling on that, either, because, well, I don't have to. Suffice to say the arguments could be made both ways that if they had credited in a certain fashion they policy may have been improperly cancelled and yet I think State Farm's argument also has just as much, if not more weight on that issue, but I'm not going to decide on that issue because I'm deciding it on the first issue, which is whether or not State Farm at this stage of proceeding can raise as a defense that no policy was in existence when the issue–one of the issues in dispute was whether or not a policy was in effect.

On the face of the policy, on the face of the policy you look at it, it's Exhibit No. 2, I believe, filed in the defendant's case and it says there's coverage from April 3rd of 2002 to April 2nd of 2003. This [accident] occurred in February of 2003. You're just looking at that policy, that policy covers this. There's no reason why that's raised as to why it shouldn't have covered it other than, well, he didn't pay all his premiums.

This may seem like a harsh ruling, but I'm not the one that created this argument and the Supreme Court has in many cases as the [*Ehlco*] case cited has been moved from its roots in the principle of equitable estoppel to its own distinct doctrine that stands on its own.

***

Anyway, you wanted to say, counsel?

MS. ROBINSON [Defense Counsel]: I just had a question ***, but my question then is so you are not–you believe you're not being asked to determine whether there was a policy in existence.

THE COURT: That is true.

***

MS. ROBINSON: But you said you didn't have to get there because you're determining that there was–

THE COURT: Well, see, the thing is the reason why I did–in determining whether or not there was a disputed issue, it was helpful to me that I believed Mr. Monteleone. I don't know that it was necessary for me to do that [make a finding of fact], but it was helpful because in determining whether or not it was a disputed issue, the fact that his testimony was this is what I was told gives credence to why it would be in dispute because if I'm a lawyer and I'm told something by the agent for the company, I have reason to believe that that's true.

MS. ROBINSON: But you did not get there is my understanding. You're finding that there was–that State Farm cannot even raise these issues because they're estopped; correct?

THE COURT: Well, I did not get to the issues and–the reinstatement portion of it, the reinstatement claim I did not get to that issue, you're right, because I found estoppel applied, but in finding that estoppel applied I did take in consideration the fact that I found Mr. Monteleone's testimony to be very credible because that was something I relied on in determining that there was a disputed issue of fact and–

MS. ROBINSON: Under the–

THE COURT: –you know, there were three different disputes that I'm looking at here. One, was the policy properly cancelled; two, was it reinstated retroactively; and three, what was three? Oh, whether or not the payments were actually made. They raised the issue that we actually paid more than the policy would have required.

I didn't get to whether the policy was reinstated. I didn't get to whether or not the payments were actually made because of the fact that I found that there was a disputed issue and that, therefore, State Farm had a duty to either defend or file a declaratory, and in making that decision I found that the dispute was not a frivolous dispute.

I don't know that that's stated anywhere in [*Gnojewski*] that I have to make that finding, but I did because if I had felt even though there's some talk about defending even if there's something fraudulent, if I had felt that it was not true, I guess I probably would have looked at it differently, but I didn't.

I'm not–it doesn't say I agree with his assessment that the policy actually was reinstated retroactively. I'm just saying I believe he was told that and I believe they acted in accordance with that and I believe that there's enough of an issue raised by that that State Farm couldn't stand on the sidelines.

MS. ROBINSON: Okay. And then, therefore, you're not making any finding as to whether there was a policy in existence?

THE COURT: That is true.

MS. ROBINSON: Okay.

> THE COURT: All right. And so judgment will be entered for the $300,000. I think the [*Clemmons*] case also included interest, and I think the amount prayed for in the trial brief is accurate, at least according to my math, as well as the per diem. That will be the order of the Court."

State Farm timely appeals; plaintiff timely cross-appeals.

¶ 30 On appeal, State Farm argues that the trial court's ruling was erroneous because it was entitled to assert that Struck's policy was canceled and was not in existence at the time of the accident. State Farm reasons that the trial court should not have found that it was estopped to deny coverage because the trial court expressly declined to rule on the issue of whether the policy was in effect at the time of the accident. State Farm further reasons that it had not waived or forfeited the defense of cancellation and that it could rely on the cancellation of the policy to deny coverage because plaintiff did not properly plead estoppel so as to be able to raise it preemptively. We disagree.

¶ 31 Before turning to State Farm's argument, we first consider a motion that we ordered taken with the case. During the pendency of this case, State Farm moved to cite *American Family Insurance Co. v. Albers*, 407 Ill. App. 3d 569 (2011), as additional authority, and we granted the motion over plaintiff's objection. Later, plaintiff moved to strike portions of State Farm's briefs containing argument without authority (and related to the *Albers* case). State Farm filed an objection. After consideration of the parties' submissions, we deny plaintiff's motion to strike portions of State Farm's briefs.

¶ 32 We now turn to the parties' arguments on appeal. State Farm's basic argument in this case is that Struck's mobile home insurance policy was canceled as of February 12, 2003. On February

28, 2003, plaintiff's accident occurred. At the time of the occurrence of the accident, Struck's policy was no longer in existence because it had been canceled. Because there was no policy in existence at the time of the accident, State Farm was under no duty to defend its former insured. State Farm concludes that it should not be liable for the default judgment against Struck because it was under no duty to defend him.

¶ 33 State Farm bases this argument on *Ehlco* and *State Farm Insurance Co. v. American Service Insurance Co.*, 332 Ill. App. 3d 31, (2002). State Farm points to the following passage in *Ehlco* as the foundation of its contention:

> "The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured. Rather, the insurer has two options: (1) defend the suit under a reservation of rights or (2) seek a declaratory judgment that there is no coverage. If the insurer fails to take either of these steps and is later found to have wrongfully denied coverage, the insurer is estopped from raising policy defenses to coverage. (Citations.)
>
> The estoppel doctrine has deep roots in Illinois jurisprudence. It arose out of the recognition that an insurer's duty to defend under a liability insurance policy is so fundamental an obligation that a breach of that duty constitutes a repudiation of the contract. (Citation.) Although the doctrine also has roots in the principle of equitable estoppel, a review of the case law reveals that it has since developed into a distinct doctrine that stands on its own. (Citations.)

> This estoppel doctrine applies only where an insurer has breached its duty to defend. Thus, a court inquires whether the insurer had a duty to defend and whether it breached that duty. (Citation.) Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered. These circumstances include where the insurer was given no opportunity to defend; where there was no insurance policy in existence; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage. (Citations.)" *Ehlco*, 186 Ill. 2d at 150-51.

State Farm relies particularly on the last sentence of the above-quoted passage, "where there was no insurance policy in existence." From this phrase, State Farm reasons that, because it canceled Struck's mobile home insurance, "there was no insurance policy in existence," and it therefore owed no duty to Struck to defend him in plaintiff's action against Struck.

¶ 34 State Farm then turns to the nearly eponymous *State Farm*, 332 Ill. App. 3d 31, to establish that cancellation is not a policy defense precluded by the type of estoppel identified in *Ehlco*. In particular, State Farm points to the following passage:

> "[The defendant's] argument that the insurance policy was not in existence at the time of the accident is not a 'policy defense' simply because [the defendant] relies on provisions of the insurance policy in order to support its argument. [The defendant's] rescission defense does not involve a question of policy coverage. Rather, the affirmative defense of rescission raises the issue of whether an insurance policy was in existence. (Citations.)
>
> [*Ehlco*] states that the doctrine of estoppel is inapplicable in cases where there was no insurance policy in existence at the time of the loss. (Citation.) Thus, the trial court erred

> as a matter of law in invoking the estoppel doctrine prior to determining whether [the insured's] insurance policy was in existence at the time of the accident. Under the law, because the trial court determined that [the defendant] breached its duty to defend under part B of the insurance policy prior to determining whether the insurance policy indeed even existed, the trial court's conclusion that [the defendant] breached its duty to defend was premature." *State Farm*, 332 Ill. App. 3d at 37-38.

State Farm urges the same conclusion here: that the trial court's determination of estoppel due to the breach of its duty to defend was premature; instead, the trial court should have first determined whether Struck's policy even existed at the time of the accident. State Farm thus rejects the trial court's ruling that it did not need to determine whether the policy was canceled because there was a dispute over the efficacy of State Farm's efforts to cancel the policy, thereby triggering State Farm's obligation to defend with a reservation of rights or file a declaratory judgment action, or absent these actions, be subject to estoppel pursuant to *Ehlco*.

¶ 35 Plaintiff and the trial court offer a different analysis. Relying on *Gnojewski*, 319 Ill. App. 3d 970, the trial court reasoned that there was a dispute about whether State Farm's cancellation of Struck's policy was effective. The trial court noted that plaintiff attacked the purported cancellation in three ways: first, that State Farm did not use a proper form to maintain proof of mailing of the notice of cancellation; second, that the policy was reinstated retroactively via the March 24, 2003 payment; and third, that Struck actually paid sufficient funds to State Farm to maintain the mobile home policy in effect at the time of the accident. The trial court further held that the three claims were nonfrivolous and evidenced a real dispute over the propriety of the purported cancellation. Because there was a dispute over the effectiveness of the cancellation, State Farm was obligated to

defend Struck with a reservation of rights or to file a declaratory action to settle the three claims against the propriety of the cancellation. State Farm did not pursue either of its options to preserve its ability to raise a policy defense and, therefore, it was estopped from raising a policy defense. The trial court thus held that State Farm was liable for the amount of the default judgment against Struck.

¶ 36 We agree with plaintiff and the trial court on this issue. *Gnojewski* is both directly on point and on all fours with our case. In *Gnojewski*, the insured submitted an application for auto insurance along with about one-third of the total premium for the policy as a down payment. The insured did not make any more payments, so the insurance company issued a notice of cancellation to the insured, but did not also send the notice to the lienholder (as arguably required by statute). *Gnojewski*, 319 Ill. App. 3d at 971-72. About seven weeks after the effective date of the purported cancellation, the insured was involved in a fatal accident, in which she and her passenger were killed, and the other driver was injured but survived. *Gnojewski*, 319 Ill. App. 3d at 972. The other driver and the estate of the passenger both sued the insured; the insurer refused to defend the insured based upon the cancellation for nonpayment of premium on the insured's auto policy. *Gnojewski*, 319 Ill. App. 3d at 972. The insurer argued that it had canceled the policy before the date of the accident, so it was under no obligation to defend its insured; the estate and the other driver both argued that the cancellation was ineffective because the insurer had not also sent a notice of cancellation to the lienholder, as required by the Insurance Code. See 215 ILCS 5/143.14(a) (West 1994). The insurer argued that the statute only required notice of cancellation to those lienholders of whom it had actual knowledge; the other driver and the passenger's estate argued that the obligation extended to lienholders of whom the insurer also had constructive knowledge, such as the lienholder in that case,

who had a perfected lien interest under the Illinois Vehicle Code. *Gnojewski*, 319 Ill. App. 3d at 973.

¶ 37 Based on these facts, the court held that, because there was a dispute over the effectiveness of the insurer's attempt to cancel the insured's policy, the insurer could not ignore the underlying complaint and should have either defended with a reservation of rights, or sought a declaratory judgment. *Gnojewski*, 319 Ill. App. 3d at 977. Because it did neither, the insurer was estopped from asserting policy defenses, such as cancellation, to coverage. *Gnojewski*, 319 Ill. App. 3d at 978.

¶ 38 *Gnojewski*'s application to this case is manifest. Here, State Farm attempted to cancel Struck's mobile home insurance for nonpayment of premium. Plaintiff contends that the cancellation was ineffective because the proof of mailing of the notice of cancellation was not maintained on the proper form, because the agreement between Monteleone and Godde reinstated the coverage with no gap in coverage (and the trial court expressly noted that it found Monteleone's account credible while Godde's denial of the agreement was not credible), and because Struck had paid to State Farm more than the entire annual premium amount for the mobile home insurance policy so that the policy could not be canceled for nonpayment of premium. Plaintiff's contentions here, about the ineffectiveness of the cancellation, mirror the *Gnojewski* contention that the failure to notify the lienholder invalidated the attempted cancellation there. As in *Gnojewski*, the dispute over whether the policy was canceled triggered the potential for coverage. See *Gnojewski*, 319 Ill. App. 3d at 978. Where there is a potential for coverage, the insurer should either file a declaratory judgment action to determine its liability, or defend the insured with a reservation of rights. *Ehlco*, 186 Ill. 2d at 150-51; *Gnojewski*, 319 Ill. App. 3d at 978. Because State Farm did neither option, it

is estopped from raising policy defenses to coverage. *Gnojewski*, 319 Ill. App. 3d at 978. Accordingly, we hold that the trial court did not err.

¶ 39 State Farm attempts to distinguish *Gnojewski*. According to State Farm, the decision in *Gnojewski* was based on whether the cancellation had complied with a provision of the Insurance Code, an aspect that was lacking in this case, because the trial court had already decided that State Farm had complied with the requirements of the Insurance Code pertaining to the proof of mailing of the notice of cancellation. While this is true, this overlooks the other two disputes, namely reinstatement and sufficient premium, that were not resolved before the trial. In addition, in our view, the rule in *Gnojewski* is based on the existence of a dispute, not the resolution of the dispute. Thus, because there was a dispute over the effect of the proof of mailing form, the efficacy of the cancellation was thrown into doubt and State Farm was obligated to resolve that doubt, not by refusing to defend Struck, but by either defending with a reservation of rights or by seeking a declaratory judgment. We reject State Farm's attempt to distinguish *Gnojewski*.

¶ 40 Relatedly, State Farm argues that *State Farm* provides a better fit and should be followed rather than *Gnojewski*. We find that *State Farm* is distinguishable. In that case, the analysis turned on whether the insurer was arguing a policy defense (like cancellation (see *Gnojewski*, 319 Ill. App. 3d at 978)) or whether the policy was void. *State Farm*, 332 Ill. App. 3d at 37-38 (the insurer's argument that the insurance policy was not in existence at the time of the accident is not a 'policy defense' simply because [the insurer] relies on provisions of the insurance policy in order to support its argument. [The insurer's] rescission defense does not involve a question of policy coverage. Rather, the affirmative defense of rescission raises the issue of whether an insurance policy was in existence"). By contrast, *Gnojewski* recognizes that cancellation is a policy defense. *Gnojewski*, 319

Ill. App. 3d at 978 (dispute over whether the cancellation was proper gave rise to the potential for coverage; because the insurer did not preserve its policy defenses it was estopped from asserting them, which implies that cancellation is a policy defense). See also *Insurance Co. of Illinois v. Brown*, 315 Ill. App. 3d 1168, 1175 (2000) (by retaining instead of refunding premium on purportedly canceled policy, the insurer acknowledged that the policy was in effect on the date of the accident and "waived any policy defense concerning cancellation of the [insured's] policy"). Thus, while *State Farm* deals with a question regarding the existence of the insurance policy, which renders estoppel pursuant to *Ehlco* inappropriate, that situation is not present here. Instead the situation is exactly like that in *Gnojewski*, where the insurer's failure to defend with a reservation of rights or file a declaratory judgment action estopped it from raising policy defenses, like cancellation. Accordingly, we distinguish *State Farm* and maintain that *Gnojewski* is directly on point and provides authoritative guidance.

¶ 41 State Farm argues that plaintiff did not plead estoppel in his complaint and cannot now be heard to rely on it on appeal. In support, State Farm cites *Lake in the Hills v. Illinois Emasco Insurance Co.*, 153 Ill. App. 3d 815, 818 (1987), *Florsheim v. Travelers Indemnity Co.*, 75 Ill. App. 3d 298, 303 (1979), and *Hartford Accident & Indemnity Co. v. D.F. Bast, Inc.*, 56 Ill. App. 3d 960, 962 (1978), for the proposition that, where waiver or estoppel has not been specifically raised in the pleadings, they cannot be relied on as theories of recovery. State Farm's argument is misplaced.

¶ 42 *Lake in the Hills*, *Florsheim*, and *D.F. Bast* all were discussing estoppel as usually defined, namely, a good faith reliance on the other party's conduct leading to a detrimental change in position. *Lake in the Hills*, 153 Ill. App. 3d at 817-18; *Florsheim*, 75 Ill. App. 3d at 304; *D.F. Bast*, 56 Ill. App. 3d at 962. The estoppel in this case, however, while related to equitable estoppel, has

developed throughout the case law "into a distinct doctrine that stands on its own." *Ehlco*, 186 Ill. 2d at 151. Estoppel pursuant to *Ehlco* "applies only where an insurer has breached its duty to defend." *Ehlco*, 186 Ill. 2d at 151. "Once the insurer breaches its duty to defend, *** the estoppel doctrine has broad application and operates to bar the insurer from raising policy defenses to coverage." *Ehlco*, 186 Ill. 2d at 152. The estoppel doctrine in *Ehlco* is different from equitable estoppel as noted in *Lake in the Hills*, *Florsheim*, and *D.F. Bast*, and it operates whenever the insurer has breached its duty to defend. Plaintiff pleaded that State Farm had a duty to defend Struck but did not provide Struck with any defense. We believe that plaintiff sufficiently invoked the estoppel doctrine of *Ehlco* to be able to rely upon it both in the trial court and on appeal. Accordingly, we reject State Farm's argument.

¶ 43 State Farm also argues that it did not waive or forfeit its defense of cancellation even though it cashed the check Struck brought to reinstate the coverage (plaintiff's contention) or to rewrite the coverage (State Farm's contention). This argument would only be successful if we had rejected the guidance of *Gnojewski*, and were looking to plaintiff's claim that the conversations between Monteleone and Godde evidenced an agreement to reinstate the mobile home policy with no gap in coverage. State Farm's argument is directed at refuting that claim on the merits. Unfortunately for State Farm, the resolution of the merits does not matter under *Gnojewski*; it is the existence of a legitimate dispute regarding the effectiveness of the attempted cancellation that triggers the potential for coverage and the insurer's ensuing duty to defend. *Gnojewski*, 319 Ill. App. 3d at 977. The fact that State Farm did not preserve its defenses through mounting a defense with a reservation of rights or filing a declaratory judgment action works to estop it from raising those defenses to coverage.

Ehlco, 186 Ill. 2d at 150-51; *Gnojewski*, 319 Ill. App. 3d at 977. We reject State Farm's argument on this point.

¶ 44 To summarize our view of State Farm's appeal, the doctrine of estoppel described by *Ehlco* arises when the insurer fails to preserve its defenses by defending with a reservation of rights or filing a declaratory judgment action. Further, where the applicability of a defense is in dispute, there still exists the potentiality of coverage, which obligates the insurer to defend or otherwise act to preserve its defenses. In this case, plaintiff challenged the efficacy of State Farm's cancellation of Struck's mobile home policy. The existence of the dispute over the policy defense of cancellation meant that State Farm should have filed a declaratory judgment action to resolve the issue or to provide Struck with a defense while reserving its rights. State Farm did neither, but only asserted that Struck's policy had been canceled and did not provide a defense. Accordingly, the estoppel doctrine described in *Ehlco* was activated and prevents State Farm from now raising cancellation as a defense to preclude its responsibility to pay the amount of the default judgment. We also rejected State Farm's contentions that *Gnojewski* was distinguishable and *State Farm* was more directly on point than *Gnojewski*, as well as its contentions that plaintiff was required to plead the *Ehlco* estoppel (plaintiff did) and that State Farm did not waive its defenses (the argument was inapposite). Accordingly, we hold that the trial court properly entered judgment in favor of plaintiff and against State Farm at trial.

¶ 45 We next turn to the issues raised by plaintiff on cross-appeal. As an initial matter, we consider whether the issues on cross-appeal are properly before us. Usually, the denial of a motion for summary judgment is not reviewable because any error in that judgment merges into the final judgment after trial. *Valentino v. Hilquist*, 337 Ill. Ap0p. 3d 461, 467 (2003). However, an

exception to this general rule exists where the issue of the summary judgment is not presented at trial, so any error in the denial of summary judgment does not merge into the subsequent trial. *Valentino*, 337 Ill. App. 3d at 467. Here, plaintiff's motion for summary judgment sought to determine that State Farm's proof of mailing was invalid because it did not use a proper postal form or a form acceptable to the post office. This issue was not addressed at the trial. Accordingly, the issue did not merge into the final judgment after the trial and we may address it now. *Valentino*, 337 Ill. App. 3d at 467; see also *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 280 (2007) ("where a summary-judgment motion presented a legal issue rather than a factual one, review of the denial of summary judgment is appropriate").

¶ 46 Plaintiff contends that the trial court erred in denying his motion for summary judgment, finding that State Farm's proof of mailing the notice of cancellation complied with the requirements of section 143.14(a) of the Insurance Code (215 ILCS 5/143.14(a) (West 2002)). Summary judgment is appropriate if the pleadings, depositions, admissions, and affidavits in the record show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/1005© (West 2008); *Torf v. Chicago Transit Authority*, 405 Ill. App. 3d 379, 384 (2010). We review *de novo* the trial court's decision to grant or deny a motion for summary judgment. *Torf*, 405 Ill. App. 3d at 384.

¶ 47 Plaintiff makes several arguments in support of his contention. First, plaintiff argues that State Farm did not maintain the proof of mailing on a United States Post Office form or on a form acceptable to the Post Office. Second, plaintiff contends that State Farm should be collaterally estopped from using other evidence than the approved U.S. Post Office form to prove mailing of the notice of cancellation. Last, plaintiff argues that the letter of Randy Davis should not be considered

because it does not comply with Supreme Court Rule 191 (eff. July 1, 2002). We consider each contention in turn.

¶ 48 Plaintiff first contends that the Insurance Code requires State Farm to "maintain proof of mailing of [the] notice [of cancellation] on a recognized U.S. Post Office form or a form acceptable to the U.S. Post Office or other commercial mail delivery service." 215 ILCS 5/143.14(a) (West 2002). Plaintiff asserts that federal law mandates that State Farm use Form 3877 or a facsimile of Form 3877 to maintain the proof of mailing. Plaintiff contends that State Farm created its own form for the proof of mailing, and that this does not comply with the requirements.

¶ 49 Section 143.14(a) of the Insurance Code provides:

> "No notice of cancellation of any policy of insurance, to which section 143.11 applies, shall be effective unless mailed by the company to the named insured and the mortgage or lien holder, at the last mailing address known by the company. The company shall maintain proof of mailing of such notice on a recognized U.S. Post Office form or a form acceptable to the U.S. Post Office or other commercial mail delivery service. A copy of all such notices shall be sent to the insured's broker if known, or the agent of record, and to the mortgagee or lienholder, if known, at the last mailing address known to the company." 215 ILCS 5/143.14(a) (West 2002).

The foregoing passage is clear and unambiguous. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 351 (1998). It imposes two requirements on the insurance company: first, to mail the notice of cancellation to the insured and, if applicable, to certain other parties; and second, to maintain proof of mailing. *Ragan*, 183 Ill. 2d at 351. Maintaining proof of mailing is the only way to comply with the mailing requirements set forth in section 143.14(a). Allowing other methods of

proving compliance would "circumvent the language and purpose of the statute." *Ragan*, 183 Ill. 2d at 351.

¶ 50 The purpose of section 143.14(a) is to protect the insured from having his or her insurance canceled without his or her knowledge. *Ragan*, 183 Ill. 2d at 351. To accomplish this purpose, the legislature balanced the interest of the insured in being informed of the cancellation of his or her insurance policy and the interest of the insurer in proving that it sent such notice (the insurer could have been required to prove the insured's receipt of the notice, which would have been much more onerous). *Ragan*, 183 Ill. 2d at 351. The balance chosen in the statute requires proof of mailing rather than proof of receipt, but the legislature specified the types of proof of mailing that were sufficiently reliable to provide the insured the necessary protection. *Ragan*, 183 Ill. 2d at 351.

¶ 51 The section 143.14(a) scheme presents a low threshold of proof for the insurer. The insurer must only show proof "on a recognized U.S. Post Office form or a form acceptable to the U.S. Post Office or other commercial mail delivery service." *Ragan*, 183 Ill. 2d at 351-52. Other evidence, therefore, cannot be used to show proof of mailing because to allow this would upset the balance struck by the legislature in the Insurance Code. *Ragan*, 183 Ill. 2d at 352.

¶ 52 Plaintiff argues that *Ragan* means that the insurer can only maintain proof of mailing on a certain form, Form 3877, or a facsimile, meaning exact copy, of that form. Plaintiff reaches this conclusion by considering the provisions of the Domestic Mail Manual. Specifically, plaintiff points to section S914, paragraph 1.4 of the Domestic Mail Manual, which provides:

> "When requesting a certificate of mailing for three or more pieces of single-piece rate mail presented at one time, a mailer may use Form 3877 (firm mailing book) or a privately

printed facsimile, subject to payment of the applicable fee for each item listed. Privately printed Forms 3877 must contain the same information as the postal-provided form."

From this passage, plaintiff argues that State Farm could only use a Form 3877 or a facsimile of Form 3877 to show proof of mailing the notice of cancellation of Struck's insurance.

¶ 53 State Farm argues that its proof of mailing form used in this case contains exactly the same information as Form 3877. State Farm further argues that the post office accepted its form and that this satisfies the insurance code. We agree. We note that plaintiff does not argue that the form State Farm used does not contain the same information that Form 3877 contains. We further note that the section of the Domestic Mail Manual provides for three types of form: the postal-provided Form 3877, a privately printed facsimile, or a privately printed Form 3877 that contains the same information as the postal printed form. State Farm appears to have chosen the latter course and used a privately printed Form 3877 that contains the same information as the postal-printed form on which to maintain its proof of mailing. As this third option satisfies the requirement in section 143.14(a) that the insurer use a form acceptable to the Post Office, we determine that State Farm has also complied with the Insurance Code.

¶ 54 Further, to accept plaintiff's argument truly exalts form over substance. State Farm provided a frame from a video recording of the mailing in which Struck's cancellation notice was included. Additionally, it provided the name and address of the recipient of the notice, Struck, the name and address of the sender, State Farm, the postage, date stamp, initials of the Post Office employee who processed the mailing, and the signature of the State Farm employee who mailed the notice. This comports with the proof of notice requirements of the Insurance Code, along with satisfying the

"very low threshold of proof" described in *Ragan*. *Ragan*, 183 Ill. 2d 351-52. Accordingly, we discern no error in the trial court's judgment.

¶ 55 Plaintiff next argues that State Farm should have been collaterally estopped pursuant to *Great West Casualty Co. v. State Farm Mutual Automobile Insurance Co.*, No. 1—05—1300 (August 4, 2006) (unpublished order under Ill. S. Ct. R. 23 (eff. July 1, 1994)). Generally, a case unpublished pursuant to Supreme Court Rule 23 cannot be cited as authority. Ill. S. Ct. R. 23(e)(1) (eff. May 30, 2008). One exception to this rule is when the case is cited to support a contention of collateral estoppel. Ill. S. Ct. R. 23(e)(1). Collateral estoppel is an appropriate contention here because the issue regarding the proper proof of mailing form and the party against whom estoppel is asserted are the same, and there was a final judgment on the merits in the previous case. See *Bajwa v. Metro Life Insurance Co.*, 208 Ill. 2d 414, 433 (2004) (setting forth the elements of collateral estoppel). *Great West*, however, is distinguishable. In *Great West*, the insurer presented no proof of mailing, only a log sheet showing the insured's address. Here, by contrast, State Farm presented a proof of mailing that contained all of the information required in Form 3877. Because of this factual difference, *Great West* is nonetheless inapposite and does not govern this issue. Instead, our analysis of the form above controls and we reject plaintiff's contention.

¶ 56 Last, plaintiff argues that the Randy Davis letter did not fulfill the requirements of an affidavit pursuant to Supreme Court Rule 191 and cannot be used to support or prove that the mailing took place. Regardless of the effect of the Randy Davis letter, we concluded above that State Farm's proof of mailing comported with both the Domestic Mail Manual and the Insurance Code. Thus, the Davis letter is extraneous to any resolution of this issue and would have no effect on the

outcome of plaintiff's argument. Accordingly, we decline to address this issue further because it can have no effect on the outcome of plaintiff's cross-appellate contentions.

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of DeKalb County.

¶ 58 Affirmed.