

37
12-1500

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

KIMBERLY LUCAS,

Plaintiff,

v.

CIVIL ACTION NO. 08-C-528
JUDGE HUSTEAD

THE SHERIFF OF CABELL COUNTY, WEST VIRGINIA,
as ADMINISTRATOR OF ESTATE OF FRANCIS McCOMAS, JR.,
and UNITED SERVICES AUTOMOBILE ASSOC.

Defendants.

**ORDER DENYING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND ORDER GRANTING
PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT**

Came the Plaintiff, Kimberly Lucas, by counsel, Neil R. Bouchillon and *Bouchillon, Crossan & Colburn, L.L.C.*, and came the Defendant, the United States Automobile Association, hereinafter, "USAA", by counsel, Daniel J. Konrad and *Huddleston & Bolen LLP* and pursuant to the Defendant, USAA's *Motion for Summary Judgment*.

Mrs. Lucas' declaratory judgment action

Kimberly Lucas, hereinafter, "Mrs. Lucas" filed an Amended Complaint seeking a declaration that USAA is obligated to provide liability insurance coverage to Francis McComas, Jr. hereinafter, "Mr. McComas" related to a two car automobile accident that occurred on October 23, 2007 in Cabell County, West Virginia. The parties exchanged discovery. USAA has filed a Motion for Summary Judgment asserting that as a matter of law, the declaratory judgment action should be denied.

Mrs. Lucas asserts in her Amended Complaint that Francis McComas, Jr., hereinafter, "Mr. McComas", caused the October 23, 2007 head on collision. She asserts that within a few months prior to the collision, Mr. McComas was married, but separated from his wife, Felicity McComas, hereinafter, "Mrs. McComas". She asserts that during the McComas' marriage, USAA provided automobile liability insurance for both. She asserts that during the time of the McComas' separation, Mrs. McComas caused Mr. McComas to be removed from the McComas insurance policy. Mrs. Lucas asserts that USAA failed to give Mr. McComas notice of the removal. This unnoticed removal, Mrs. Lucas maintains, is a violation of *West Virginia Code §33-6-36 (2010)*¹.

USAA denies that Mr. McComas was removed in violation of this statute. USAA asserts that Mr. McComas was not eligible for the protections under the statute. Specifically, USAA maintains in its motion for summary judgment that Mr. McComas was not an insured under the policy for two years as required by said statute, and as such, Mrs. Lucas declaratory judgment action should be denied.

The parties are not in dispute over the facts of the case. The parties are in dispute as to the Court's application of the facts to *West Virginia Code §33-6-36 (2010)*.

Procedural background, findings of fact, conclusions of law, and Orders of the Court

The Court sets out the case's procedural background and makes the following findings of fact, conclusions of law, and Orders of the Court:

¹ *West Virginia Code 33-6-36 (1993)* was amended in 2010. The changes are stylistic.

Procedural background

1. On or about the 13th day of June 2008, the Plaintiff, Kim Lucas, filed her original Complaint in the Circuit Court of Cabell County. That Complaint named the Sheriff of Cabell County, hereinafter, "Sheriff" as the Defendant. The Sheriff was named as a party only in his capacity as the Administrator of the Estate of Francis McComas, Jr.;

2. By agreement made between the Plaintiff and the Sheriff, as Administrator of the Estate of Francis McComas, Jr., an order was entered on the 6th day of May, 2009, dismissing the claims against the Sheriff as being resolved. The order ordered that this action remain on the active docket of the Court with the Sheriff continuing as a nominal party so as to allow the Plaintiff to bring a claim against other parties or explore possible insurance coverage;

3. On or about the 23rd day of July, 2009, the Plaintiff filed her Motion to Amend her Complaint. This motion moved the Court to allow the Plaintiff to add a cause of action against the Defendant, USAA, in order to bring a declaratory judgment action. By Order entered the 13th day of October, 2009, this Court granted said Motion to Amend. On or about the 22nd day of October, 2009, the Plaintiff filed her Amended Complaint. On or about the 3rd day of December, 2009, the Defendant, United States Automobile Association, hereinafter, "USAA" filed its *Answer*;

4. The parties exchanged discovery;

5. On the 4th day of May, 2011, USAA filed its Motion for Summary Judgment. On the 18th day of October, 2011, the Plaintiff filed her response to the USAA's Motion for Summary Judgment. On or about the 16th day of November, 2011, USAA filed its

Supplemental Memorandum in Support of Motion for Summary Judgment. On or about the 2nd day of December, 2011, the Plaintiff filed her response thereto;

6. By letter dated January 25, 2012, and by hearing had on the 5th day of February, 2012, the court advised of its decision on this matter. The Court ordered Plaintiff's counsel to prepare an Order denying USAA's motion for summary judgment and to incorporate the reasoning of the Court as found in its letter and the arguments advanced by the Plaintiff in her memorandums of law. The Court suspended the remaining part of the scheduling order;

Findings of fact

7. Prior Mrs. McComas marriage with Mr. McComas, she was known as "Felicity Pucket". The then Miss Pucket was insured under an automobile liability insurance policy with USAA, policy number 01427 95 91U 7104 3, hereinafter, "policy" beginning from, at least, December 24, 2004. This policy and/or renewals thereof were continuously in existence from then and until the time of the October 23, 2007 accident;

8. On February 18th, 2006, Miss Pucket married Francis McComas, Jr., hereinafter, collectively as "Mr. and Mrs. McComas". Mr. and Mrs. McComas lived together in Lincoln County, West Virginia;

9. On March 1, 2006, Francis McComas, Jr., was added to Mrs. McComas' policy as an "operator";

10. On May 7, 2007, Mr. and Mrs. McComas separated;

11. On August 17, 2007, Mrs. McComas contacted USAA by phone and advised that she and Mr. McComas had separated. She requested that he be removed

from the policy. USAA removed Mr. McComas from the policy effective that day;

12. On August 17, 2007, Mrs. McComas had been an insured on the USAA policy for at least two years. Mr. McComas had not;

13. On October 16, 2007, the parties were divorced by the Lincoln County, West Virginia Family Court;

14. On October 23, 2007, the Plaintiff, Mrs. Lucas, was involved in a two car accident with Mr. McComas on U.S. Route 10 in the Salt Rock area of Cabell County. The accident was a head on collision;

15. At the time of the accident, Mrs. Lucas was operating her Chevrolet GMC *Jimmy*. Mr. McComas was operating his parent's Chevrolet truck. This truck being operated by Mr. McComas was never insured by USAA;

16. Mrs. Lucas suffered multiple broken bones throughout her body. She incurred trauma to the head, neck, back, chest, lungs, hip, knees, wrist and ankles, etc. Mr. McComas did not survive;

17. By letter dated March 14, 2008, the Plaintiff, through counsel, gave notice to USAA of her claim for the October 23, 2007 accident and that Mrs. Lucas was making a claim against any insurance policies that were in effect at the time;

18. During the discovery of the declaratory judgment action, USAA disclosed that USAA had attempted to send to Mr. McComas two documents². The first document is a letter dated August 20, 2007. This letter acknowledges Mr. McComas' separation from Mrs. McComas. It offered USAA's contact information. USAA's second document

² These letters were produced pursuant to USAA's answer to Request Number 4 of USAA's Answers to Plaintiff's request for Production of Documents, which, in short, asked USAA to produce a copy of all notices sent to Mr. McComas which advised him of the cancellation.

dated August 30, 2007 included an endorsement page showing that the policy was cancelled as of August 18, 2007 and advised Mr. McComas that he should refer to his declarations page and endorsements to verify that his coverage, limits, and deductibles were correct;

19. Neither of the two documents that USAA sent Mr. McComas advised him that that had the right, if eligible, to have his own policy. Neither of the documents had a notice in form or substance to that as referred to as *Appendix A* of the Insurance Commissioner's Regulations codified at *CSR title §114-38-4.1 & 4.2*.

DISCUSSION

The Court finds that West Virginia Code statute §33-6-36 (2010) is to be read in conjunction with West Virginia Code of State Regulations §114-38-4.1 & 4.2 and 5.1 and 5.2. The statute is made up of three paragraphs. It reads, in its entirety, as follows:

§ 33-6-36. Continuation of coverage under automobile liability policy; selection of coverage; exclusions; notice

(a) In the event of death, legal separation or termination of the marital relationship of the named insured, the named insured or spouse covered by a motor vehicle liability policy for a period of two or more years shall, upon request of the named insured or spouse within thirty days of the expiration of said policy, be issued his or her own individual motor vehicle liability insurance policy providing the same coverage as the original policy through the same insurer, without any lapse in coverage: Provided, That any such named insured or spouse may elect to increase or decrease the amount of coverage in his or her respective policies without affecting any privilege provided by this section. Any named insured or spouse requesting an individual policy pursuant to this section shall be entitled to the continuation of all rights and privileges afforded by section one-a and section four of article six-a of this chapter which were accrued under the original policy: Provided, however, That this section

shall not apply to any motor vehicle liability insurance policy canceled, nonrenewed or terminated pursuant to the provisions of section one or section four, article six-a of this chapter.

(b) Insurers shall notify all named insureds at policy issuance or the first renewal after the effective date of this section and upon any change or termination of the policy for reasons other than those provided in sections one and four of article six-a of this chapter of the right of the named insured or spouse to continue coverage as provided by this section.

(c) The commissioner shall promulgate rules in accordance with the provisions of chapter twenty-nine-a of this code regarding the form of such notice and procedures required by this section.

The gravamen of the parties' dispute comes from an interpretation of the subsection (a) of the statute. Subsection (a) reads, in part, that "In the event of death, legal separation or termination of the marital relationship of the named insured, *the named insured or spouse* covered by a motor vehicle liability policy for a period of two or more years shall,..." *Id.* (emphasis added). Mrs. Lucas reads this language to conclude that Mr. McComas is afforded the protections of this statute because *Mrs. McComas* was insured for at least two years. To the contrary, USAA reads this statute to conclude that Mr. McComas does not qualify for the protections because *Mr. McComas* was not insured for at least two years. Question: To whom is the two year time period tied?

The Court finds that in subsection (a) of this statute, the legislature used the connector "or" instead of "and". Our Court has discussed the meaning of the term "or". It has said, "[A]gain, we note the legislative use of the word "or" throughout this definition, which, under our rules of statutory construction, is clearly designed to separate the

various acts that may constitute "sexual contact." As we stated in *State v. Taylor*, 176 W.Va. 671, 346 S.E.2d 822 (1986) (a case involving our stolen property statute, *W.Va. Code, 61-3-18 [1923]*): "Each of the forbidden acts set forth in the statute is separated by the disjunctive 'or,' i.e., 'buy or receive' or 'aid in concealing' or 'transfer.' We have customarily stated 'that where the disjunctive "or" is used, it ordinarily connotes an alternative between the two clauses it connects.' *Albrecht v. State*, 173 W.Va. 268, 271, 314 S.E.2d 859, 862 (1984), citing, *State v. Rummer* 432 S.E.2d 39, 47 (WV 1993). (Emphasis added). See also, *State v. Elder*, 152 W.Va. 571, 577, 165 S.E.2d 108, 112 (1968)." 176 W.Va. at 675, 346 S.E.2d at 825-26.

This Court finds *Rummer* instructive. That is, when the disjunctive term "or" is used, it ordinarily connotes an alternative between two causes it connects. *Supra*, at 47. Here, on the policy, the named insured is Mrs. McComas. Mr. McComas is the alternative to Mr. McComas. Ms. McComas is an alternate choice for determining whether USAA had an obligation to give notice and offer a new policy, without lapse. The Court declares that Mr. McComas qualifies for the protections afforded under subsection (a) of §33-6-36 and as such, USAA had a duty to send him notice that he had the right to have his own policy.

The Court considers here, too, the language found in Regulation 114 C.S.R. 38-5.1, *et seq.* Subsection 5.1 says, "As to *all* policies which have been existence for a continuous period of two years the insurer must issue a separate policy to any named

insured or spouse of a named insured when:... {5.1.2} The named insured has become legally separated from their spouse; or...” Here, the Insurance Commissioner clearly promulgates that the two year rule is tied to the policy, not to the individual. Because Ms. McComas’ policy was in effective for well over two years, USAA had mandatory obligation to offer coverage for this incident.

West Virginia Code §33-6-36(b) and (c)

The Court is not quick to make this determination from a simple glance at subsection (a) of West Virginia Code §33-6-36. It considers the whole statute. Subsections (b) and (c) lend support to Mrs. Lucas’ interpretation of subsection (a) of West Virginia Code §33-6-36, and, in interpreting this statute, the Court considers all three subsections together. *West Virginia Code §33-6-36(b)* says that “Insurers shall notify all named insureds at policy issuance or the first renewal after the effective date of this section and upon any change or termination of the policy ... of the right of the named insured or spouse to continue coverage as provided by this section.” *Id.* (emphasis added).

Question. Is Mr. McComas a “named insured”? The Court answers this as “yes”. Here is why. Subsection (c) of *West Virginia Code §33-6-36* directs insurers to *West Virginia State Code of Regulations*. These regulations are the regulations that created by the West Virginia Insurance Commissioner. They are found *at CSR title §114-38-1, et seq.* The Commissioner’s regulations define the term “named insured”. A “named insured” “means any natural person who appears on the records of the insurer as an insured under a motor vehicle policy”. *Id. at CSR Rule §114-38-3.2.* Here, Mr.

McComas appeared on USAA's records from March 1, 2006 to August 17, 2007. As such, the Court declares that Mr. McComas is a "named insured" for purposes of this statute.

Having determined that Mr. McComas is a "named insured", subsection (b) then puts a duty on USAA to send Mr. McComas notice that there has been a change in the policy. And this is no ordinary notice. This notice is statute specific. Subsection (c) of *West Virginia Code §33-6-36* directs the Commissioner to promulgate the form of notice and the procedures for noticing a separated spouse of a change or termination. The Commissioner has done that at *CSR title §114-38-4.1 & 4.2*. Those regulations read, in pertinent part as follows:

4.1 Insurers *must* provide to all *named insured's* a notice in the form of *Appendix A* to this rule: (Emphasis added here).

4.2 Upon the occurrence of any change in the policy or termination of the policy for any reason other than those set forth in *West Virginia Code §33-6A-1 and 4*.

Regulation, subsection 4.1, *supra*, uses the term "must". This regulation places a mandatory duty on USAA to provide Mr. McComas a notice in the form and substance of *Appendix A*. Regulation, subsection 4.2, *supra*, says that the notice is to be sent to the named insureds upon a change or termination of policy.

In contrast to USAA's two letters that it sent Mr. McComas, *Appendix A* sets out a detailed explanation of an insured's rights. These rights are displayed in three paragraphs. The paragraphs are separately titled in large font as follows: "RIGHT TO

REQUEST SEPARATE POLICY”, “MUST ACT WITHIN THIRTY DAYS OF END OF YOUR COVERAGE”, AND “IMPORTANT TWO-YEAR POLICY HOLDER PROTECTION”. (Emphasis original). It is readily apparent that USAA’s letters dated August 20 and 30th, 2007 do not meet muster with Appendix A. Neither of the USAA’s letters comply form or substance with Appendix A. Its failure to comply with West Virginia Code and the Commissioners’ regulations causes USAA to be obligated to provide coverage for this accident:

The Court considers the arguments made in *Horace Mann Ins. Co. v. Shaw*, 337 S.E.2d 908, 175 W.Va. 671 (W.Va., 1985). Although this case considered a different statute, the Court finds *Syllabus Point 4* helpful. There our Court said, [W]here an insurer has issued to its insured an automobile liability or physical damage insurance policy, which policy has been in existence for two consecutive years or longer, the insured is entitled to the renewal protection of *W. Va. Code, 33-6A-4* [1980], i.e., that an insurer ‘may not fail to renew an outstanding automobile liability or physical damage insurance policy which has been in existence for two consecutive years or longer’ except for the reasons enumerated in that statute; furthermore, an insured’s existing renewal protection under *W.Va. Code, 33-6A-4* [1980], applies with regard to additional policies issued by the insurer for additional or replacement automobiles acquired by the insured, and for such renewal protection the additional policies need not have been in existence for “two consecutive years or longer.” The *Horace Mann* Court indicated: “The commissioner reasoned that *W.Va. Code, 33-6A-4* [1980] is for the protection of policyholders with established relationships with insurers, and that an insurer may not

use the fact that its particular methods of transacting insurance appear to avoid an application of the statute to deny a policyholder the protection afforded by Code 33-6A-4. To hold that the statute applies only to particular policies and not to the insured-insurer relationship would remove the 'tenured' status of long-term policyholders... Id.

Our Court has said in construing statutes, " 'The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Citing, *Mitchell v Broadnax* 537 S.E.2d 882, 892 (W.Va. 2000). The Court believes that the legislature's intent here was to ensure that a separated insured is not caught off guard that his or her insurance coverage has been terminated. The Court believes the Commissioner's creation of the form Appendix A prevents this. Appendix A alarms a separate insured that his or her spouse has sought to terminate the marital insurance coverage. Appendix A, gives the insured notice that he or she needs to effectuate, timely, a new or different policy. USAA failed to give the proper notice to Mr. McComas.

CONCLUSION

USAA's motion for summary judgment is denied and the Plaintiff's motion for a declaratory judgment is granted. The two year time period set out in West Virginia Code §33-6-36(a) is tied to *either* Mrs. McComas or Mr. McComas. As Mrs. McComas was an insured for two years, USAA had an obligation to offer a new policy, without lapse to Mr. McComas even though they were divorced and he had not been insured under the policy for two (2) years. No matter how the parties interpret the language in subsection (a), this is not the end of the consideration here. West Virginia Code §33-6-36 sections (b) and (c) must be also considered. In doing so, Mr. McComas is, according to the definitions of

the Insurance Commissioner, a "named insured". Because he is a named insured, USAA then had a mandatory duty to send Mr. McComas a notice in form and substance with that of the Commissioner's *Appendix A*. None of USAA's letters, either individually or collectively, come close to the form or substance of Appendix A. USAA's cancellation of Mr. McComas from the policy did not comply with the terms of *West Virginia Code §33-6-36*. As such, USAA's cancellation was improper.

ORDER

Based upon the above findings of fact and conclusions of law, the Court does hereby, ORDER, ADJUDGE and DECREE as follows:

1. The Defendant' motion for summary judgment is denied;
2. The Plaintiff's complaint for declaratory judgment is granted. The Court declares that USAA is obligated to provide liability insurance coverage for the October 23, 2007 accident;
3. This declaration is limited to the issues litigated herein as USAA preserves the right to deny coverage, for example, that coverage is excluded because the truck was available for Mr. McComas regular use; and
4. The Scheduling Order is suspended until further order of the Court.
5. Pursuant to Rule 54 of the West Virginia Rules of Civil Procedure, this is a final appealable Order and there is no just reason for delay.

The Clerk is directed to place one copy of this Order in Courthouse Box Number 1 for Neil Bouchillon and place one copy of this Order in Courthouse Box Number 37 for

Daniel Konrad.

WHEREFORE IT IS SO ORDERED.

ENTER:

ORDER: J. Husted 11/2/12
JUDGE HUSTEAD

PREPARED FOR ENTRY BY:

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STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON _____
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 11/02/12
Adell Chandler CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

APPROVED FOR ENTRY BY:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO.

ORIGINALLY in the Circuit Court of Cabell County, West Virginia:

KIMBERLY LUCAS,

Plaintiff,

v.

Civil Action No.: 08-C-528
Judge F. Jane Husted

THE SHERIFF OF CABELL COUNTY, WEST VIRGINIA,
as ADMINISTRATOR OF ESTATE OF FRANCIS McCOMAS, JR.,
and UNITED SERVICES AUTOMOBILE ASSOC.,

Defendants.

CERTIFICATE OF SERVICE

The undersigned attorney certifies that "Notice of Appeal" was served upon the following individuals by depositing true copies thereof in the regular manner in the United States mail, postage prepaid, at Huntington, West Virginia, the 4th day of December, 2012, to:

Kimberly Lucas
c/o Neil R. Bouchillon
Bouchillon, Corssan & Colburn, L.C.
731 Fifth Avenue
Huntington, WV 25701

Sheriff of Cabell County, West Virginia,
as Administrator of the Estate of Francis McComas, Jr.
Cabell County Courthouse

750 Fifth Ave., Suite 101
Huntington, WV 25701

Adell Chandler
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John Berkhouse, Court Reporter
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