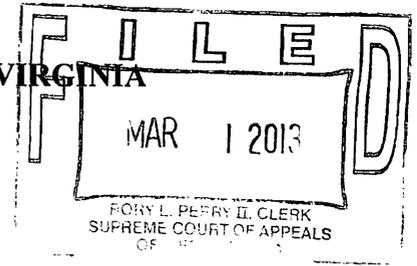


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1500



UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant Below,
Petitioner,

v.

KIMBERLY LUCAS,
Plaintiff Below,
Respondent.

BRIEF OF PETITIONER

Submitted by:

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ASSIGNMENTS OF ERROR

The Circuit Court of Cabell County, West Virginia, erred in requiring United Services Automobile Association to offer coverage to a former spouse who was covered under a policy for less than two (2) years prior to his divorce under W. Va. Code § 33-6-36(a). The Court has not previously undertaken a review of the statutory provision of W. Va. Code § 33-6-36.

STATEMENT OF THE CASE

A. Statement of Relevant Facts

Petitioner, United Services Automobile Association (“USAA”), seeks to appeal a summary judgment order granted in favor of Respondent, Kimberly Lucas. Respondent was injured in a car accident as the result of the alleged negligence of another driver, Francis McComas, Jr. (“Mr. McComas”), who is now deceased. *See* Petitioner’s Appendix Volume 1 at 4, 39-44. At the time of the accident, Mr. McComas was driving a 1998 Chevrolet Silverado that was covered under an insurance policy issued by State Farm Insurance Company. *See* Petitioner’s Appendix Volume 2 at 593, and Petitioner’s Appendix Volume 1 at 39. Mr. McComas was previously married to Felecity N. Cooper (also previously known as Felecity N. Puckett) (“Ms. Cooper”) from February 18, 2006 to October 16, 2007. *See* Petitioner’s Appendix Volume 2 at 592. On March 1, 2006, Mr. McComas, at the request of Ms. Cooper, was added as an Operator to Ms. Cooper’s USAA insurance policy. *See* Petitioner’s Appendix Volume 1 at 35. Mr. McComas was later, again at the request of Ms. Cooper, removed as an Operator under Ms. Cooper’s policy. *See* Petitioner’s Appendix Volume 2 at 592.

B. Statement of Procedural History

Petitioner filed a Motion for Summary Judgment based on W. Va. Code §33-6-36, arguing that said West Virginia Code section plainly states that an insurer is not required to offer

automobile insurance coverage to a former spouse unless the former spouse has been covered by the policy for a period of two (2) or more years. *See* Petitioner's Appendix Volume 1 at 34. It is undisputed in this matter that Mr. McComas was only covered under Ms. Cooper's United Services policy from March 1, 2006 to August 17, 2007, a period well short of two (2) years.

In its "Order Denying Defendant's Motion for Summary Judgment and Order Granting Plaintiff's Complaint for Declaratory Judgment," the Circuit Court of Cabell County, West Virginia, ordered that USAA's Motion for Summary Judgment be denied and Kimberly Lucas's Complaint for Declaratory Judgment be granted. *See* Petitioner's Appendix Volume 2 at 589-602. The declaratory judgment was that, under W. Va. Code § 33-6-36, an insurer is required to send notice to a spouse of an insured and offer coverage to that spouse, even if the spouse was not covered for two (2) or more years if the other spouse had in fact been of the right of the named insured or spouse to an insured for at least two (2) years. *See* Petitioner's Appendix Volume 2 at 589-602. Thus, the Court ruled that because Ms. Cooper was an insured for two (2) years, USAA had a statutory obligation to follow statutory guidelines in offering a new policy to Mr. McComas, even though he was not an insured for two (2) more years. *See* Petitioner's Appendix Volume 2 at 589-602.

SUMMARY OF ARGUMENT

The Circuit Court of Cabell County, West Virginia erred in requiring USAA to offer coverage to a former spouse who was not an insured for more than two (2) or more years. W. Va. Code § 33-6-36(a) and (b) states:

(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 [§ 33-6A-1] and four [§ 33-6A-4] of article six-a of this chapter of the right of the named insured or spouse to continue coverage as provided by this section.

Here, Mr. McComas, the former spouse, was only covered under his former wife's, Ms. Cooper's, USAA policy from March 1, 2006 until August 17, 2007, a period that was well short of two (2) years. *See* Petitioner's Appendix Volume 1 at 35, 53-57. Thus, under W. Va. Code § 33-6-36, USAA was not required to offer Mr. McComas coverage under this statute.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral argument under Revised Rules of Appellate Procedure Rules 20(a)(1) and 20(a)(2). None of the criteria articulated in Revised Rule 18(a) that would preclude the need for oral argument is present. The matter before this Court implicates issues of first impression – specifically the construction of W. Va. Code § 33-6-36. Oral argument under Revised Rule 20, as well as a precedential disposition of the issue presently before the Court, is necessary.

ARGUMENT

I. Standard of Review

Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate “when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (W. Va. 1963). Summary judgment under Rule 56 is “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial if in essence there is no real dispute as to salient facts or if only a question of law is involved.” *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, 758 (W. Va. 1994). Summary judgment is one of the few safeguards in existence that prevent frivolous lawsuits from being tried. In fact, its principal purpose is to isolate and dispose of meritless litigation. *See Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329, 337 (W. Va. 1995) (“Permissible inferences must still be within the range of reasonable probability, ... and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.”).

A circuit court’s entry of summary judgment is reviewed by the Supreme Court of Appeals of West Virginia using a *de novo* standard. *Estate of Helmick ex rel. Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (W. Va. 1994); *Cunningham v. West Virginia-American Water Co.*, 193 W. Va. 450, 457 S.E.2d 127 (W. Va. 1995); *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (W. Va. 1995); *HN Corp. v. Cyprus Kanawha Corp.*, 195 W. Va. 289, 465 S.E.2d 391 (W. Va. 1995); *Gooch v. West Virginia Department of Public Safety*, 195 W. Va. 357, 465 S.E.2d 628 (W. Va. 1995); *Greenfield v. Schmidt Baking Co.*, 199 W. Va. 447, 485 S.E.2d 391 (W. Va. 1997).

II. **Under W. Va. Code § 33-6-36, An Insurer Is Not Required to Offer Coverage to a Former Spouse Who Was Covered Under A Policy For Less Than Two Years In The Event Of A Legal Separation Or Divorce.**

According to W. Va. Code § 33-6-36, United Services was not under any obligation to offer coverage to Mr. McComas as a result of his previous coverage under Ms. Cooper's policy for less than two (2) years. Respondent has alleged that USAA failed to send a statutorily required notice to Mr. McComas and, because no notice was sent, Mr. McComas was entitled to continued coverage under his former wife's policy of insurance even though Mr. McComas was removed from that policy. *See* Petitioner's Appendix Volume 1 at 6. Despite Respondent's argument, she has misread the applicable statute, which states, in its entirety:

(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 [§ 33-6A-1a] and section four [§ 33-6A-4] 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 [§ 33-6A-1] or section four [§ 33-6A-4], 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 [§ 33-6A-1] and four [§ 33-6A-4] 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 [§§ 29A-1-1 et seq.] of this code regarding the form of such notice and procedures required by this section.

W. Va. Code § 33-6-36 (2012) (emphasis added).

West Virginia courts have long held that statutes are to be taken at their plain and ordinary meaning. “It is basic in our law and universally accepted that where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.” *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (W. Va. 1970). *See also Mingo County Redevelopment Auth. v. Green*, 207 W. Va. 486, 534 S.E.2d 40 (W. Va. 2000); *Lavender v. McDowell County Bd. of Educ.*, 174 W. Va. 513, 327 S.E.2d 691 (W. Va. 1984); *UMW v. Miller*, 170 W. Va. 177, 291 S.E.2d 673 (W. Va. 1982); *State ex rel. Fox v. Board of Trustees of the Policemen’s Pension or Relief Fund of the City of Bluefield*, 148 W. Va. 369, 135 S.E.2d 262 (W. Va. 1964); *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (W. Va. 1951). Further, statutes are to remain free from interpretation. “When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *State ex rel. Dotson v. Van Meter*, 151 W. Va. 56, 150 S.E.2d 604 (W. Va. 1966). Ambiguity must be obvious. “Where language is unambiguous, no ambiguity can be authorized by interpretation.” *McClain Adm’r. v. Davis*, 37 W. Va. 330, 16 S.E. 629 (W. Va. 1892).

This statute, W. Va. Code § 33-6-36, plainly states that an insurer is not required to offer such coverage to the former spouse unless that spouse had been covered by the policy for a period of two (2) or more years. *Id.* Here, it is also clear that Mr. McComas was only covered under Ms. Cooper’s United Services policy from March 1, 2006 to August 17, 2007, a period that was well short of two (2) years. USAA could not possibly have been required to send Mr.

McComas notice of his right to continue coverage under this statute because no such right to coverage existed.

Finally, USAA's position is identical to that of the West Virginia Insurance Commissioner's office. Regulations of the Insurance Commissioner's office have the effect of statutory law and may not be waived or set aside by state officers as though they are contracts between parties. *Simon v. American Casualty Co. of Reading, PA*, 146 F.2d 208 (4th Cir. 1944). The Insurance Commissioner's office promulgated 114 C.S.R. 38 (the provision of the State Code of Regulations which set forth the form of notice for § 36-6-30). See Petitioner's Appendix Volume 2 at 587. Appendix A of 114 C.S.R. 38 provides that:

If you have had your auto policy two full years and the named insured either dies, becomes legally separated, or the marital relationship ends (eg. Divorce), then each named insured and the named insured's spouse has the right to request their own separate policy with this company. (underlining added)

This provision unequivocally provides that only if you (in this case Frances N. McComas) had the policy for two (2) years, would you be entitled to continued coverage.

CONCLUSION

In Conclusion, The Circuit Court of Cabell County erred in denying Petitioner's Summary Judgment and granting Respondent's Declaratory Judgment when it misapplied W. Va. Code § 33-6-36. Because Mr. McComas had only been covered under Ms. Cooper's policy for a period of less than two (2) years, USAA had no obligation to provide notice or offer Mr. McComas coverage after his divorce from Ms. Cooper. Thus, the Circuit Court's Order should be reversed, and Petitioner's Motion for Summary Judgment should be granted.

Respectfully Submitted:

A handwritten signature in cursive script, appearing to read "Anna M. Price". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on this 1ST day of
March 2013, the foregoing "*Brief of Petitioner*" and was served upon counsel
of record by mailing a true and correct copy thereof by United States mail, postage prepaid and
properly addressed, as follows:

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