

13-0215

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION II

JOHNNIE FLUKER, JR.,

Plaintiff,

vs.

Civil Action No. 09-C-110

DAN CAVA, STEVEN HALL, SONNY NICHOLSON,
AND DAN'S CAR WORLD, LLC, d/b/a
DAN CAVA'S TOYOTA WORLD,

Defendants,

DAN CAVA, STEVEN HALL, AND
DAN'S CAR WORLD, LLC, d/b/a
DAN CAVA'S TOYOTA WORLD,

Third-Party Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, Pa.,

Third-Party Defendant.

**ORDER DENYING THE THIRD-PARTY DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING JUDGMENT IN FAVOR OF THE
THIRD-PARTY PLAINTIFFS AS A MATTER OF LAW**

On the 13th day of November, 2012, came the third-party defendant, National Union Fire Insurance Company of Pittsburgh, Pa., by counsel, Glen A. Murphy; the defendants and third-party plaintiffs, Dan Cava, Steven Hall and Dan's Carworld, LLC, d/b/a Dan Cava's Toyota World, by counsel, Gregory H. Schillace; and the defendant, Sonny Nicholson, by counsel, Carol A. Marunich. The plaintiff, Johnnie Fluker, Jr., being previously notified of said hearing, did not appear by counsel or otherwise.

The parties came for the purpose of argument with respect to the third-party defendant's motion for summary judgment. After reviewing the motion, the response of the

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third-party plaintiffs, and the third-party defendant's replies, the Court has determined that it is appropriate to **DENY** the motion for summary judgment. Further, the Court hereby **GRANTS** a judgment as a matter of law in favor of the third-party plaintiffs with respect to the coverage pursuant to the insurance policy sold by National Union Fire Insurance Company of Pittsburgh, Pa. to Dan's Carworld, LLC, regarding the claims asserted against the third-party plaintiffs in this action.

The Court specifically **FINDS** as follows:

- (a) The exclusionary language of the insurance policy in question must be strictly construed against the third-party defendant, National Union Fire Insurance Company of Pittsburgh, Pa., in order that the purpose of indemnity not be defeated;
- (b) The third-party defendant suffered no prejudice as a result of a prior Federal Equal Employment Opportunity Commission claim filed by the plaintiff under Title VII of the Human Rights Act, which was dismissed in favor of Dan's Carworld, LLC;
- (c) Although the Equal Employment Opportunity Commission claim and the above-styled civil action arise from the same transaction or occurrence, they constitute separate and distinct claims;
- (d) The insurance policy purchased by Dan's Carworld, LLC is ambiguous and must be strictly construed in favor of coverage; and
- (e) The reasonable expectations of Dan's Carworld, LLC mandate the existence of insurance coverage with respect to the claims asserted by the plaintiff.

The Court **FINDS** that each of these reasons is sufficient justification to deny the motion for summary judgment, and that, taken collectively they mandate a judgment as a matter of law in favor of the third-party plaintiffs with respect to insurance coverage under the applicable policy. In reaching this decision, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Beginning in September of 2006, Dan's Carworld, LLC contacted Mark Pallotta of Bond Insurance Agency regarding the purchase of directors and officers liability insurance and employment practices liability insurance.

2. On or about September 6, 2006, acting on the request from Dan's Carworld, LLC, Westfield Specialty Brokerage Services provided an offer to Mr. Pallotta from National Union Fire Insurance Company of Pittsburgh, Pa. (hereinafter, National Union), with respect to liability coverage. This correspondence did not disclaim a duty to defend on the part of the insurance carrier.

3. Ultimately, Dan's Carworld, LLC purchased directors and officers insurance and employment practices liability insurance from National Union.

4. The date of the initial policy was November 22, 2006. Dan's Carworld, LLC continued to purchase renewal policies through 2010. At all times within this period, Dan's Carworld, LLC had an existing insurance policy with National Union, with the exception of a lapse of coverage between November 2008 and February 2009, for reasons discussed herein.

5. The policies purchased from National Union by Dan's Carworld, LLC were the type of policies intended to provide insurance for the claims asserted by the plaintiff in his complaint.

6. On or about December 2, 2008, Dan's Carworld, LLC was advised by National Union that the directors and officers insurance policy and the employment practices liability policy purchased from National Union was terminated as of November 22,

2008.

7. This termination was unrelated to the allegations of Mr. Fluker's claim against the third-party plaintiffs and was through no fault of any representative of Dan's Carworld, LLC.

8. Despite Mr. Pallotta testifying there should have been no lapse in coverage from November 22, 2006, up through 2010, it appears that National Union did not reverse its December 6, 2008 termination but instead issued a new policy with an inception date of February 27, 2009.

9. The issuance of a completely new policy is evidenced by a new inception date of February 27, 2009, and expiration date of February 27, 2010, as well as the absence of any policy number being replaced on the declarations page of the policy from February 27, 2009 to February 27, 2010.

10. The February 27, 2009 policy was treated by National Union as a newly issued policy, and was based upon an application prepared by Mr. Pallotta and Bond Insurance Agency with respect to a policy which should have been issued covering the period from November, 22, 2008 through November 22, 2009. There is no application with respect to the policy with the inception date of February 27, 2009.

11. With respect to the November 2008 application and the allegation by National Union that Dan's Carworld, LLC failed to notify it of the Equal Employment Opportunity Claim submitted by Mr. Fluker, Dan's Carworld, LLC contends that this information was not required for the February 27, 2009 policy to be effective.

12. In the November 2008 application completed by Mr. Pallotta with respect to

Dan's Carworld, LLC, questions regarding claims history are only required to be answered for "those coverage types the applicant does not currently maintain and is now applying under this section". As such, Dan's Carworld, LLC asserts that those sections did not apply to the employment practices liability section, as in November of 2008, Dan's Carworld, LLC, maintained that type of coverage.

13. The plaintiff, Johnnie Fluker, was an employee of Dan's Carworld, LLC on or about April 14, 2007. At that time Mr. Fluker and another employee, Sonny Nicholson, became involved in a dispute and/or altercation.

14. As a result of this dispute and/or altercation, Mr. Fluker resigned from his employment with Dan's Carworld, LLC.

15. Contemporaneous with Mr. Fluker's resignation, the general manager of Dan's Carworld, LLC, Steve Hall, placed both Mr. Fluker and Mr. Nicholson on suspension.

16. On or about July 20, 2007, Mr. Fluker filed a charge of discrimination with the Equal Employment Opportunity Commission. Mr. Fluker alleged that he had been discriminated against based upon his race and that he had been the subject of retaliation.

17. On or about August 7, 2007, a Notice of Charge of Discrimination was sent to Dan Cava as the owner of Dan Cava's Toyota World by the U.S. Equal Employment Opportunity Commission. This Notice of Charge of Discrimination asserted that a charge of employment discrimination was filed against Dan Cava's Toyota World under Title VII of the Civil Rights Act. Dan Cava's Toyota World was required to respond with a statement of its position on or before August 28, 2007.

18. Pursuant to the employment practices liability policy issued by National

Union, Dan's Carworld, LLC had a retention in the amount of \$5,000.00. Pursuant to the retention provision, the first \$5,000.00 of costs and/or loss payments are borne solely by Dan's Carworld, LLC.

19. With respect to the November 22, 2006 through November 22, 2007 policy, Dan's Carworld, LLC claims that it was obligated to defend and contest the Equal Employment Opportunity Commission claim made against them by Mr. Fluker. Further, Dan's Carworld, LLC asserts that it had the right to tender the defense of the claim to National Union.

20. As explained by Mr. Pallotta, this section means that Dan's Carworld, LLC has the right as its sole option to tender the defense of a claim to National Union, and if not tendered, any later claims are not precluded from coverage.

21. However, with respect to the February 27, 2009 through February 27, 2010 policy purchased by Dan's Carworld, LLC from National Union, Mr. Pallotta testified as follows:

Question: Is that language inconsistent with your understanding of how this policy worked?

Answer: I've read that twenty times and I'm still not sure what it means.

22. After the investigation by the U.S. Equal Employment Opportunity Commission a determination was made by the Area Office Director that the Equal Employment Opportunity Commission was unable to conclude that the information obtained establishes any violation of any statute. Accordingly, the Equal Employment Opportunity Commission claim filed by Mr. Fluker was dismissed on May 30, 2008.

23. There were no adverse inferences, findings or evidence introduced with respect to the Equal Employment Opportunity Commission investigation. Further, Dan's Carworld, LLC defended and prevailed on the Equal Employment Opportunity Commission claim within its retention.

24. Contained within the Equal Employment Opportunity Commission dismissal, was a notice to Mr. Fluker that under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and/or the Age Discrimination Employment Act, Mr. Fluker had the right to file a lawsuit against Dan's Carworld, LLC under federal law based upon the charges in his claim. However, Mr. Fluker's lawsuit must have been filed within ninety (90) days of his receipt of the May 30, 2008 dismissal.

25. The above-styled civil action was not instituted by Mr. Fluker until on or about April 3, 2009, approximately eleven (11) months later. Accordingly, if the claims asserted by Mr. Fluker in this complaint are the same claims as alleged in the Equal Employment Opportunity Commission claim they are time barred.

26. The above-styled civil action was instituted on or about April 3, 2009. Upon receipt of the complaint, the third-party plaintiffs contacted Mr. Pallotta by telephone, advised him of the summons and complaint, and Mr. Pallotta personally picked up the summons and complaint from Mr. Cava and delivered it to National Union.

27. Mr. Pallotta testified that based upon his review of the complaint, the types of claims asserted by Mr. Fluker are those types of claims covered by the insurance policy purchased by Dan's Carworld, LLC from National Union.

28. On or about April 7, 2009, a National Union representative advised Mr. Cava

that National Union acknowledged the receipt of the complaint filed by Mr. Fluker. The letter informed Mr. Cava that a file had been established under the insurance policy with effective dates of February 27, 2009 to February 27, 2010 and that an analyst was assigned to further handle the matter.

29. Mr. Cava was not advised that he or other representatives of Dan's Carworld, LLC needed to take any actions to prevent a default or to in anyway defend the allegations of the complaint filed by Mr. Fluker.

30. The April 7, 2009, correspondence from National Union to Mr. Cava was copied to Mr. Pallotta and Ms. Wilson of the Bond Insurance Agency, Inc. Mr. Pallotta confirmed that no one from National Union (from April 7, 2009, up through and including June 10, 2009) advised Mr. Pallotta or anyone from his company that a defense was not going to be provided to Dan's Carworld, LLC and its employees with respect to the allegations of the lawsuit filed by Mr. Fluker.

31. Further, no one from National Union contacted Mr. Pallotta with questions, inquiries or directions with respect to Mr. Fluker's lawsuit or the defense of that claim.

32. Unbeknownst to Dan's Carworld, LLC, and its employees, on June 10, 2009, a motion for default judgment was filed by Mr. Fluker against the third-party plaintiffs and Mr. Nicholson. On June 10, 2009, the Court granted the plaintiff's motion as to liability regarding the grounds alleged in the initial complaint.

33. On or about June 22, 2009, a motion on behalf of Dan's Carworld, LLC was filed to vacate the default judgment order. Finding cause to vacate, that motion was granted by this Court by order entered June 30, 2009.

34. National Union now seeks a determination from this Court that due to the Equal Employment Opportunity Commission claim, which was dismissed on May 30, 2008, there is no coverage pursuant to the purchased insurance policy for the lawsuit filed by Mr. Fluker on April 3, 2009.

CONCLUSIONS OF LAW

1. The West Virginia Supreme Court of Appeals has consistently held where the language of an insurance policy involved is exclusionary, such language is strictly construed against the insurer in order that the purpose of providing indemnity not be defeated. Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987); Am. States Ins. Co. v. Tanner, 211 W. Va. 160, 563 S.E.2d 825 (2002); Russell v. Bush & Buchett, Inc., 210 W. Va. 699, 559 S.E.2d 36 (2001); Moore v. CNA Ins. Co., 215 W. Va. 286, 599 S.E.2d 709 (2004).

2. An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. Moore v. CNA Ins. Co., 215 W. Va. 286, 599 S.E.2d 709 (2004).

3. With respect to an insurance carrier's duty to defend under an insurance policy, that duty must be construed liberally in favor of an insured where there is any question about an insurance company's obligations. Tackett v. Am. Motorist Ins. Co., 213 W. Va. 524, 584 S.E.2d 158 (2003).

4. Generally, the duty of an insurance company to defend its insured may be broader than the obligation to pay a third-party or to indemnify the insured. Tackett v. Am. Motorist Ins. Co., 213 W. Va. 524, 584 S.E.2d 158 (2003).

5. In this instance, National Union seeks to exclude coverage based upon the July 20, 2008 Equal Employment Opportunity Commission claim filed by Mr. Fluker. In seeking to deny coverage, National Union asserts that it has been prejudiced as a result of Dan's Carworld, LLC defending the Equal Employment Opportunity Commission claim itself. In support, National Union claims that notice of the underlying claim was necessary for underwriting purposes and to potentially eliminate the lawsuit by settlement.

6. The Equal Employment Opportunity Commission claim was dismissed on May 30, 2008. Mr. Fluker did not initiate a civil action on or before August 30, 2008, therefore, any claim asserted in the Equal Employment Opportunity Commission claim is time barred.

7. The West Virginia Supreme Court of Appeals has not addressed the issue of prejudice to an insurer where there is an alleged failure to notify the insurance carrier of a potential claim. However, numerous jurisdictions place the burden of proving that the insurance carrier has been prejudiced by an insured's alleged failure to comply with the notice provisions on the insurance carrier. Arrowood Indem. Co. v. King, 304 Conn. 179, 39 A.3d 712 (2012); Krigsman v. Progressive N. Ins. Co., 151 N.H. 643, 864 A.2d 330 (2005); Dover Mills Partnership v. Commercial Union Ins. Co., 144 N.H. 336, 740 A.2d 1064 (1999); Progressive Specialty Ins. Co. v. Steele, 985 S.2d 932 (Ala.Sup.Ct. 2007).

8. In this case, National Union has not established any prejudice to this Court's satisfaction from not being advised that Mr. Fluker had filed a claim with the Equal Employment Opportunity Commission.

9. The EEOC claim, through the action and defense of Dan's Carworld, LLC,

and within its \$5,000.00 retention, was successfully defended, resulting in the claim being dismissed.

10. As the Court is not persuaded by National Union's assertions that it has been prejudiced as a consequence of not being informed of the claim filed with the Equal Employment Opportunity Commission which was ultimately dismissed, this claimed lack of notice cannot support a basis for the denial of insurance coverage.

11. Although the Equal Employment Opportunity Commission claim filed by the plaintiff, Johnnie Fluker, and this civil action arise from the same transaction or occurrence, the Court is of the opinion that the Equal Employment Opportunity Commission claim and this civil action constitute separate and distinct claims. Further, the Court is of the opinion that the third-party plaintiffs properly and appropriately notified the third-party defendant of the filing of this civil action.

12. The interpretation of an insurance contract, including, the question of whether the contract is ambiguous, is a legal determination. Tackett v. Am. Motorist Ins. Co., 213 W. Va. 524, 584 S.E.2d 158 (2003). Where the insurance policy language under consideration is ambiguous, such ambiguities are resolved in favor the insured. Id. S.E.2d at 164.

13. Mark Pallotta, the insurance agent primarily responsible for the sale of the subject policy to Dan's Carworld, LLC, testified that the policy in question is difficult to understand, confusing and ambiguous.

14. Further, Mr. Pallotta testified that one particularly confusing section involved the responsibility of the insurance company to provide a defense ("duty to defend"). The

section in question states as follows:

The **Insurer** does not assume any duty to defend; provided, however, the **Named Entity** may at its sole option tender to the **Insurer** the defense of a **Claim** for which coverage is provided by this **EPL Coverage Section** in accordance with Clause Six of this **EPL Coverage Section**. Regardless of whether the defense is so tendered, the **Insurer** shall advance **Defense Costs** of such **Claim**, excess of the applicable Retention amount, prior to its final disposition.

15. As recognized by Mr. Pallotta, it appears that National Union denies it has a duty to defend but then acknowledges that it can be compelled to provide a defense at the option of the entity buying the insurance. The Court finds that the duty to defend provision, as well as the retention provision and the issue of whether the insured was mandated to tender all claims within its retention to National Union, are ambiguous.

16. As the language of this policy is ambiguous as a matter of law, it must be construed in favor of the insured. Construing this policy in favor of the insured requires National Union to provide coverage for the claims asserted by Mr. Fluker.

17. Once the language of an insurance policy is determined to be ambiguous, a doctrine of reasonable expectations must then be applied by the Court. Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987).

18. Pursuant to the doctrine of reasonable expectations, the Court adopts the objectively reasonable expectations of an insured and intended beneficiaries regarding the terms of an insurance contract, even if a painstaking study of these policy provisions would negate those terms. Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987).

19. In this instance it was the reasonable expectation of Dan's Carworld, LLC to

believe that there would be coverage in excess of its \$5,000.00 retention for the allegations of the lawsuit filed by Mr. Fluker on April 3, 2009.

20. In reviewing the policy in question, it appears that Dan's Carworld, LLC has the option to tender a claim such as the Equal Employment Opportunity Commission claim to the insurance company. However, that option is within the discretion of Dan's Carworld, LLC.

21. The third-party plaintiffs herein have never sought insurance coverage for the claim Mr. Fluker filed with the Equal Employment Opportunity Commission. That claim was defended well within the \$5,000.00 retention and Dan's Carworld, LLC prevailed at the investigation stage, with the claim being dismissed. Mr. Fluker did not further pursue that claim as he did not institute a lawsuit within 90 days as required by Equal Employment Opportunity Commission notice.

22. The civil action filed on April 3, 2009 is a new claim which was properly submitted to the insurance company on behalf of Dan's Carworld, LLC by Mr. Pallotta.

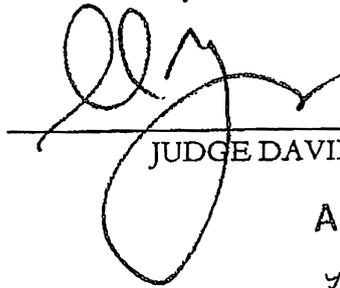
23. Considering the reasonable expectations of Dan's Carworld, LLC, there is no provision of that policy which would preclude coverage for the allegations of this civil action.

Based upon the findings of fact and conclusions of law herein, the Court **DENIES** the third-party defendant's motion for summary judgment and **GRANTS** a judgment as a matter of law in favor of the third-party plaintiffs with respect to coverage for the allegations asserted by the plaintiff in this action pursuant to the insurance policy purchased by Dan's Carworld, LLC from the third-party defendant.

The objections and exceptions of the third-party defendant are hereby preserved for the record.

The Circuit Clerk of Marion County is directed to prepare and distribute certified copies to: Gregory H. Schillace, Esquire, at his address: Schillace Law Office, Post Office Box 1526, Clarksburg, West Virginia 26302-1526; to Glen A. Murphy, Esquire, at his address: Spilman Thomas & Battle, PLLC, 300 Kanawha Boulevard, East, Post Office Box 273, Charleston, West Virginia 25321-0273; to Katherine L. Dooley, Esquire, at her address: The Dooley Law Firm, PLLC, Post Office Box 11720, Charleston, West Virginia 25339-1270; to Carol A. Marunich, Esquire, at her address: Dinsmore & Shohl, LLP, 215 Don Knotts Boulevard, Suite 310, Morgantown, West Virginia 26501; and to Sonny Nicholson, at his address: 2200 Fairmont Avenue, Fairmont, West Virginia 26554.

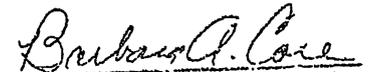
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JUDGE DAVID R. JANES

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