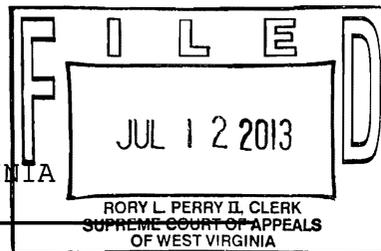


NO. 13-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

JOHNNIE FLUKER, JR.,

Plaintiff,

v.

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,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, Pa.,

Third-Party Defendant.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE DAVID R. JANES, JUDGE

**BRIEF OF THE APPELLEES, DAN CAVA, STEVEN HALL
AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

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TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW 2

ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 12

STATEMENT REGARDING ORAL ARGUMENT 12

POINTS AND AUTHORITIES 13

DISCUSSION 14

 A. Standard of Review 14

 B. The Circuit Court Correctly Determined That the Appellees Are Entitled to Coverage Pursuant to the Policy Sold by the Appellant.. 14

 C. As the Appellant Alleges That the February 27, 2009 Through February 27, 2010 Policy Was a New Policy as Opposed to a Replacement Policy There Were No Pending or Potential Claims about Which Dan’s Carworld, LLC, Should Have Advised the Appellant . 19

 D. The Insurance Policy Purchased by Dan’s Carworld, LLC, Is Ambiguous and must Be Construed Strictly in Favor of Coverage 19

 E. The Reasonable Expectations of Dan’s Carworld, LLC, Mandate the Existence of Insurance Coverage with Respect to the Claims Asserted by the Plaintiff . . 21

 F. The Conduct of the Appellant in Allowing a Default Judgment with Respect to Liability to Be Entered Against the Appellees Estoppes the Appellant from Now Attempting to Disclaim Coverage 22

CONCLUSION 23

TABLE OF CITATIONS

Federal Cases

Westfield Insurance Company v. Paugh, 390 F.Supp.2d 511
(N.D. W.Va. 2005) 13, 23

State Cases

American Justice Insurance Reciprocal v. Hutchison,
15 S.W.3d 811 (Tenn.Sup.Ct. 2000) 13, 16

American States Insurance Company v. Tanner,
211 W.Va. 160, 563 S.E.2d 825 (2002) 13, 14

Arrowood Indemnity Company v. King, 304 Conn.
179, 39 A.3d 712 (2012) 13, 16

Dover Mills Partnership v. Commercial Union
Insurance Company, 144 N.H. 336, 740 A.2d 1064 (1999) . . 13, 16

Friedland v. The Travelers Indemnity
Company, 105 P.3d 639 (Co.Sup.Ct. 2005) 13, 16

Krigsman v. Progressive Northern Insurance Company,
151 N.H. 643, 864 A.2d 330 (2005) 13, 16

Lindsay v. Attorneys Liability Protection Society, Inc.,
2013 WL 1776465 (W.Va. Sup.Ct. April 25, 2013)
(memorandum decision) 13, 17, 18

Marlin v. Wetzel County Board of Education,
212 W.Va. 215, 569 S.E.2d 462 (2002) 13, 22

Moore v. CNA Insurance Company, 215 W.Va. 286,
599 S.E.2d 709 (2004) 13, 15

National Mutual Insurance Company v. McMahon &
Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987) . . 13, 14, 21

Potesta v. United States Fidelity and Guarantee
Company, 202 W.Va. 308, 504 S.E.2d 135 (1998) 14, 23

Progressive Specialty Insurance Company v.
Steele, 985 S.2d 932 (Ala.Sup.Ct. 2007) 14, 16

Russell v. Bush & Buchett, Inc., 210 W.Va.
699, 559 S.E.2d 36 (2001) 14, 15

<u>Tackett v. American Motorist Insurance Company,</u> 213 W.Va. 524, 584 S.E.2d 158 (2003)	14, 15, 19
<u>Traders Bank v. Dils,</u> 228 W.Va. 692, 704 S.E.2d 691 (2010)	14

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 19(a) . . .	12, 14
West Virginia Rules of Appellate Procedure Rule 21 . . .	14, 17

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OF PITTSBURGH, Pa.,

Third-Party Defendant.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE DAVID R. JANES, JUDGE

**BRIEF OF THE APPELLEES, DAN CAVA, STEVEN HALL
AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

On April 3, 2009, Johnnie Fluker, Jr. instituted a civil action against the appellees and a former employee of the appellee, Sonny Nicholson. That civil action which is currently scheduled for trial on September 11, 2013 alleges that the appellees as well as Mr. Nicholson created a racially hostile work environment and wrongfully terminated Mr. Fluker based upon his race.

The appellee, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, promptly provided a copy of the April 3, 2009 complaint to its insurance agent who promptly forwarded it to the appellant. The appellant taking no action, permitted Mr. Fluker to obtain a judgment by default with respect to liability against the appellees. The appellees were required through their own counsel to have this default judgment as to liability set aside.

The appellant has refused to provide insurance coverage because Mr. Fluker filed a 2007 complaint with the Equal Employment Opportunity Commission. This EEOC complaint was decided in favor of the appellees. Mr. Fluker did not pursue the claims asserted before the EEOC based upon his failure to file them within ninety (90) days of the EEOC notification of dismissal.

On January 24, 2013 the Circuit Court determined that the appellant had a duty to provide coverage pursuant to the insurance policy purchased by the appellees. The appellant requests that this Court reverse the Circuit Court's correct conclusion with

respect to insurance coverage solely based upon the 2007 Equal Employment Opportunities Commission complaint which was successfully defended by the appellees.

II. Assignments of Error

The appellees, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, respectfully assert that the Circuit Court of Marion County, West Virginia, was correct in granting summary judgment in favor of the appellees, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Accordingly, this Court should affirm the Circuit Court's January 24, 2013 Order.

The assignments of error raised by the appellant allege that the Circuit Court incorrectly determined that there was insurance coverage for the appellees. As provided further herein each of these assignments of error are without merit and based upon the facts and circumstances of this matter the January 24, 2013 Order should be affirmed.

III. Statement of Facts

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., with respect to these liability coverages. Appendix at 046.

3. The September 6, 2006 correspondence does not contain any statement that the policies to be issued would not contain a "duty to defend" on the part of the insurance carrier.

4. A duty to defend is an important part of an insurance contract and is a significant reason why employer's liability insurance is purchased. Appendix at 50. (Pallotta Deposition at 28).

5. Ultimately, Dan's Carworld, LLC, purchased directors and officers insurance and employment practices liability insurance from the appellant.

6. The date of the initial policy was November 22, 2006. Dan's Carworld, LLC, continued to purchase renewal policies through 2010.

7. At all times relevant to the claims asserted by the plaintiff in his complaint against the appellees an insurance policy from the appellant had been purchased by Dan's Carworld, LLC. Appendix at 48 (Pallotta Deposition at 20).

8. The policies purchased from the appellant by Dan's Carworld, LLC, were the type of policies intended to provide insurance for the claims asserted by the plaintiff in his complaint. Appendix at 51 (Pallotta Deposition at 30).

9. On or about December 2, 2008, Dan's Carworld, LLC, was advised by the appellant that the directors and officers insurance policy and the employment practices liability policy purchased from National Union Fire Insurance Company was terminated as of November 22, 2008. Appendix at 463.

10. This termination was unrelated to the allegations of Mr. Fluker's claim against the appellees and was through no fault of any representative of Dan's Carworld, LLC. Appendix at 48 (Pallotta Deposition at 19-20).

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

12. 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. Appendix at 465.

13. Accordingly, the February 27, 2009, policy was treated by the appellant as a newly issued policy. This policy was based upon application which was prepared by Mr. Pallotta and Bond Insurance Agency.

14. However, there is no application with respect to the policy with the inception date of February 27, 2009. An application was prepared with respect to a policy which should have been issued covering the period November 22, 2008 through November 22, 2009, however, that policy was terminated.

15. With respect to the November 2008, application and the allegation by the appellant that Dan's Carworld, LLC, failed to notify it with respect to the Equal Employment Opportunity Claim submitted by Mr. Fluker this information was not required for the February 27, 2009 policy.

16. 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". Accordingly, 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. Appendix at 526.¹

¹ As discussed in greater detail, herein, in February of 2009, there was no existing claim with respect to Mr. Fluker to report. The Equal Employment Opportunity Commission charge had

17. 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 some type of dispute and/or altercation.

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

19. 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.

20. 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. Appendix at 543.

21. 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. Appendix at 546.

been dismissed and Mr. Fluker missed his statute of limitations to file a lawsuit based upon the application of federal law to Mr. Fluker's allegations.

22. Pursuant to the employment practices liability policy issued by the appellant, Dan's Carworld, LLC, had a self retention of \$5,000.00. This means that the first \$5,000.00 of costs and/or loss payments are borne solely by Dan's Carworld, LLC. Appendix at 553.

23. Additionally, with respect to the November 22, 2006 through November 22, 2007 policy, Dan's Carworld, LLC, was obligated to defend and contest the Equal Employment Opportunity Commission claim made against them by Mr. Fluker. Appendix at 577. Further, Dan's Carworld, LLC, had the right to tender the defense of the claim to the appellant.

24. 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 the insurance company, and if not tendered, any later claims are not precluded from coverage. Appendix at 62 (Pallotta Deposition at 75).

25. However, with respect to the February 27, 2009 through February 27, 2010, policy purchased by Dan's Carworld, LLC, from the appellant, 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.

Appendix at 62 (Pallotta Deposition at 73).

26. 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. Appendix at 583.

27. There were no adverse inferences, findings or evidence introduced with respect to the Equal Employment Opportunity Commission investigation. Accordingly, Dan's Carworld, LLC, making the decision under the appellant's policy to defend and prevail on the Equal Employment Opportunity Commission claim within its retention did not prejudice or effect the appellant with respect to the defense of this action.

28. 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. Appendix at 583.

29. The above-styled civil action was not instituted by Mr. Fluker until on or about April 3, 2009, approximately eleven (11) months later. Accordingly, the claims asserted by Mr. Fluker in

this complaint are not the same claims as alleged in the Equal Employment Opportunity Commission claim otherwise they would be time barred.

30. As stated the above-styled civil action was instituted on or about April 3, 2009. Upon receipt of the complaint the appellees 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 the appellant. Appendix at 51 (Pallotta Deposition at 29-30).

31. 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 the appellant. Appendix at 51 (Pallotta Deposition at 30).

32. On or about April 7, 2009, representatives of the appellant advised Mr. Cava that they acknowledge 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 date of February 27, 2009 to February 27, 2010 and, that an analyst was assigned to further handle this matter.

33. 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. Appendix at 586.

34. The April 7, 2009, correspondence from the appellant to Mr. Cava was copied to Mr. Pallotta and Ms. Wilson of the Bond Insurance Agency, Inc. Mr. Pallotta confirmed that no one from the appellant 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.

35. Further, no one from the appellant contacted Mr. Pallotta with respect to any questions, inquiries or directions, with respect to Mr. Fluker's lawsuit or the defense of that claim. Appendix at 51 (Pallotta Deposition at 32)

36. Unbeknownst to Dan's Carworld, LLC, and its employees, on June 10, 2009, a motion for default against the appellees and Mr. Nicholson was filed by the plaintiff.

37. On June 10, 2009, the Court granted the plaintiff's motion for a default judgment as to liability regarding the grounds alleged in the initial complaint. Appendix at 145.

38. On June 9, 2009, the appellant sent Mr. Cava a correspondence advising that there was "potential coverage for the insured submitting the claim under the policy, subject to a reservation of rights". Appendix at 588.

39. Unfortunately, Mr. Cava nor any other representative of Dan's Carworld, LLC, received the June 9, 2009 correspondence until after this Court had entered a default against the appellees and Mr. Nicholson with respect to liability.

40. Accordingly, from April 7, 2009 up through and including June 9, 2009, the appellant took no action whatsoever with respect to the defense of the claims asserted against its insureds by Mr. Fluker.

41. On or about June 22, 2009, a motion on behalf of the third-party plaintiffs was filed to vacate the default judgment order as to liability. That motion was granted by the Circuit Court in its Order of June 30, 2009. Appendix at 724.

IV. Summary of Argument

The circuit court correctly concluded that coverage exists pursuant to the policy sold to the appellees by the appellant. The April 3, 2009 complaint is a claim different from the Equal Employment Opportunity Commission complaint filed in 2007 as all of those claims would be barred by the appropriate statute of limitations. Accordingly, the decision of the Circuit Court of Marion County, West Virginia, with respect insurance coverage must be affirmed.

V. Statement Regarding Oral Argument

Pursuant to Rule 19(a), the appellees, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, believe that a memorandum opinion affirming the Circuit Court of Marion

County, West Virginia is warranted in this action. To the extent that this Court determines that a memorandum opinion is not appropriate, the appellees believe oral argument would be beneficial.

VI. Points and Authorities

Federal Cases

Westfield Insurance Company v. Paugh, 390 F.Supp.2d 511
(N.D. W.Va. 2005)

State Cases

American Justice Insurance Reciprocal v. Hutchison,
15 S.W.3d 811 (Tenn.Sup.Ct. 2000)

American States Insurance Company v. Tanner,
211 W.Va. 160, 563 S.E.2d 825 (2002)

Arrowood Indemnity Company v. King, 304 Conn.
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Dover Mills Partnership v. Commercial Union
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Company, 105 P.3d 639 (Co.Sup.Ct. 2005)

Krigsman v. Progressive Northern Insurance Company,
151 N.H. 643, 864 A.2d 330 (2005)

Lindsay v. Attorneys Liability Protection
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National Mutual Insurance Company v. McMahon &
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Tackett v. American Motorist Insurance Company, 213 W.Va. 524, 584 S.E.2d 158 (2003)

Traders Bank v. Dils, 228 W.Va. 692, 704 S.E.2d 691 (2010)

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 19(a)

West Virginia Rules of Appellate Procedure Rule 21

VII. Discussion

A. Standard of Review

The appellees, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, assert that the standard of review is de novo. Traders Bank v. Dils, 228 W.Va. 692, 704 S.E.2d 691 (2010).

B. The Circuit Court Correctly Determined That the Appellees Are Entitled to Coverage Pursuant to the Policy Sold by the Appellant.

This Court 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. National Mutual Insurance Company v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987); American States Insurance Company 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 Insurance Company, 215 W.Va. 286, 599 S.E.2d 709 (2004). 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 Insurance Company, 215 W.Va. 286, 599 S.E.2d 709 (2004).

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. American Motorist Insurance Company, 213 W.Va. 524, 584 S.E.2d 158 (2003). Generally, the duty of an insurance company to defend its insured is generally broader than the obligation to pay a third-party or to indemnify the insured. Tackett v. American Motorist Insurance Company, 213 W.Va. 524, 584 S.E.2d 158 (2003).

In this instance, the appellant seeks to exclude coverage based upon the July 20, 2008 Equal Employment Opportunity Commission claim filed by Mr. Fluker. In seeking to deny coverage, however, the appellant does not identify any prejudice it suffered as a result of Dan's Carworld, LLC, defending the Equal Employment Opportunity Commission claim itself pursuant to the express policy provisions. As provided herein, the Equal Employment Opportunity Commission claim was dismissed on May 30, 2008 with Mr. Fluker

failing to initiate a civil action on or before August 30, 2008, therefore any claim asserted in the Equal Employment Opportunity Commission claim is time barred.

This Court 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 Indemnity Company v. King, 304 Conn. 179, 39 A.3d 712 (2012); Krigsman v. Progressive Northern Insurance Company, 151 N.H. 643, 864 A.2d 330 (2005); Dover Mills Partnership v. Commercial Union Insurance Company, 144 N.H. 336, 740 A.2d 1064 (1999); Progressive Specialty Insurance Company v. Steele, 985 S.2d 932 (Ala.Sup.Ct. 2007); Friedland v. The Travelers Indemnity Company, 105 P.3d 639 (Co.Sup.Ct. 2005); American Justice Insurance Reciprocal v. Hutchison, 15 S.W.3d 811 (Tenn.Sup.Ct. 2000).

In this instance the appellant was unable to establish to the Circuit Court any prejudice from not being advised that Mr. Fluker had filed a claim with the Equal Employment Opportunity Commission. That claim through the action and defense of Dan's Carworld, LLC, and within its \$5,000.00 retention, was defended, resulting in the claim being dismissed.

The appellant discusses at length that this Court's unpublished memorandum decision in Lindsay v. Attorneys Liability Protection Society, Inc., 2013 WL 1776465 (W.Va. Sup.Ct. April 25, 2013) (memorandum decision) however, that memorandum decision does not support the appellants effort to deny coverage to the appellees. Initially, Rule 21 of the West Virginia Rules of Appellate Procedure provides that memorandum decisions may be cited in any court or administrative tribunal, however, the citation must clearly denote that a memorandum decision is being cited. Although the appellant describes the Lindsay matter as a memorandum decision citation does not so indicate.

In any event, this Court's memorandum decision in Lindsay is unresponsive of the appellants efforts to deny the appellees insurance coverage. In Lindsay the policy holder waited two (2) years after the initiation of a lawsuit to notify the insurance carrier. In this action the appellant was notified immediately of the filing of the April 3, 2009 complaint.

Further, in Lindsay the insured sought coverage for a lawsuit filed against the insured two (2) years before the notice. In this action the appellees do not seek coverage with respect to the Equal Employment Opportunities Commission claim which was favorably resolved in favor the appellees. Instead, the appellees seek coverage with respect to the civil action instituted on April 3, 2009.

Footnote 12 of the memorandum decision in Lindsay states as follows:

This case does not present a factual scenario where a complaint was amended to join an entirely separate claim against the defendant, such as where an original suit was filed to allege malpractice against a lawyer in relation to the drafting of a will, and the complaint subsequently amended to add a claim of malpractice involving the lawyer's representation of the same person in an unrelated civil lawsuit. In the instant case, we need not decide whether such a scenario would render the new cause of action asserted in the amended complaint a "new claim" for purposes of providing notice to the insurer.

In this action based upon the victory of the appellees in the EEOC complaint and the subsequent running of the statute of limitations with respect to all claims and remedies available pursuant to the Equal Employment Opportunities Commission matter the Circuit Court correctly determined that the April 3, 2009 lawsuit was a new claim.

As the appellant has suffered no prejudice as a result and 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. Accordingly, the Circuit Court was correct in declaring that insurance coverage pursuant to the policy sold by the appellant exists for the claims asserted against the appellees by the plaintiff.

C. As the Appellant Alleges That the February 27, 2009 Through February 27, 2010 Policy Was a New Policy as Opposed to a Replacement Policy There Were No Pending or Potential Claims about Which Dan's Carworld, LLC, Should Have Advised the Appellant.

As provided by the statement of facts, through no fault of Dan's Carworld, LLC, the policies which were issued beginning on November 22, 2006 were terminated in December of 2008. Although the Bond Insurance Agency, Inc., and Mr. Pallotta believed this issue had been corrected a new policy was issued with an inception date of February 27, 2009.

There is no application for the February 27, 2009 policy, however, as the Equal Employment Opportunity Commission claim filed by Mr. Fluker was dismissed on May 30, 2008 and Mr. Fluker forfeited his right to file a lawsuit based upon that claim by not filing on or before August 30, 2008. Accordingly, there were no pending or potential claims about which Dan's Carworld, LLC, had any duty to advise the appellant.

D. The Insurance Policy Purchased by Dan's Carworld, LLC, Is Ambiguous and must Be Construed Strictly in Favor of Coverage.

The interpretation of an insurance contract, including, the question of whether the contract is ambiguous is a legal determination. Tackett v. American Motorist Insurance Company, 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.

Mark Pallotta who is the insurance agent primarily responsible for the sale of the subject policy to Dan's Carworld, LLC, very directly testified that the policy in question is difficult to understand; is confusing; and, ambiguous. Appendix at 65 (Pallotta Deposition at 85 and 94).

Mr. Pallotta testified that one section which was particularly confusing involved the responsibility of the insurance company to provide a defense. 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.

As recognized by Mr. Pallotta, it appears that the appellant 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. This is but one example of the confusing and ambiguous nature of the language of this policy.

As the language of this policy is ambiguous as a matter of law, it must be construed in favor of the insured. The Circuit Court determined that construing this policy in favor of the insured requires the appellant to provide coverage for the claims asserted by Mr. Fluker.

E. The Reasonable Expectations of Dan's Carworld, LLC, Mandate the Existence of Insurance Coverage with Respect to the Claims Asserted by the Plaintiff.

Once the language of an insurance policy is determined to be ambiguous a doctrine of reasonable expectations must then be applied by the court. National Mutual Insurance Company v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987). Pursuant to the doctrine of reasonable expectations the court adopts the 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. National Mutual Insurance Company v. McMahon & Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987).

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

The appellees 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.

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. There is no provision of that policy considering the reasonable expectations of Dan's Carworld, LLC, which would preclude coverage for the allegations of this civil action. Accordingly, the determination by the Circuit Court that coverage exists under this policy is correct.

F. The Conduct of the Appellant in Allowing a Default Judgment with Respect to Liability to Be Entered Against the Appellees Estoppes the Appellant from Now Attempting to Disclaim Coverage.

Dan's Carworld, LLC, properly notified its agent of the April 3, 2009 institution of the above-styled action. Mr. Pallotta immediately forwarded the summons and complaint to representatives of the appellant. The appellant acknowledged its receipt of the matter on April 7, 2009 and apparently took no further action until a judgment by default with respect to liability was entered against the appellees and Mr. Nicholson.

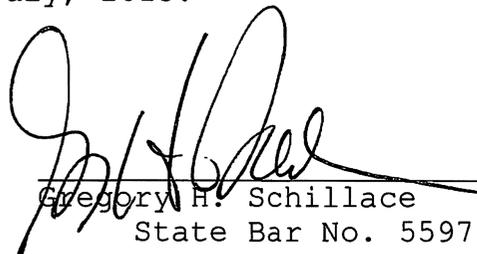
The doctrine of estoppel is properly invoked to prevent a litigant from asserting a claim or defense against a party who has detrimentally changed its position or reliance upon the litigants misrepresentation or failure to disclose a material fact. Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462

(2002). Although this doctrine generally does not apply to extend insurance coverage beyond the terms of an insurance policy, there are numerous exceptions to this rule, including cases where an insured has been prejudiced as a result of the conduct of the insurance carrier. Westfield Insurance Company v. Paugh, 390 F.Supp.2d 511 (N.D. W.Va. 2005). Accordingly, the appellant should be estopped from denying coverage when it allowed a default to be entered against the appellees and Mr. Nicholson. Potesta v. United States Fidelity and Guarantee Company, 202 W.Va. 308, 504 S.E.2d 135 (1998).

VIII. Conclusion

Based upon the foregoing, the appellees, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, respectfully request that the decision of the Circuit Court of Marion County, West Virginia, in its Order of January 24, 2013 be affirmed.

Dated this 11th day of July, 2013.



Gregory H. Schillace
State Bar No. 5597

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NO. 13-0215

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

JOHNNIE FLUKER, JR.,

Plaintiff,

v.

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,

v.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, Pa.,

Third-Party Defendant.

FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
HONORABLE DAVID R. JANES, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 2013, I served the foregoing **BRIEF OF THE APPELLEES, DAN CAVA, STEVEN HALL AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Katherine L. Dooley, Esquire
The Dooley Law Firm, P.L.L.C.
Post Office Box 11270
Charleston, West Virginia 25339-1270

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A handwritten signature in black ink, appearing to read "D. C. Parker", is written over a horizontal line. The signature is fluid and cursive.