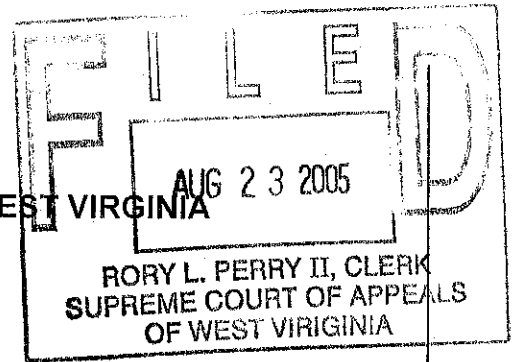


No. 32704

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DAIRYLAND INSURANCE COMPANY,

Plaintiff,

vs.

CIVIL ACTION NO.: 03-C-0586
Honorable David M. Pancake, Judge

STEPHANIE MICHELLE CONLEY,

Defendant/Third Party Plaintiff/Appellee,

vs.

WEST VIRGINIA NATIONAL AUTO
INSURANCE COMPANY,

Third Party Defendant/Appellant.

BRIEF OF APPELLEE STEPHANIE MICHELLE CONLEY

Amy C. Crossan (SB # 7150)
BOUCHILLON, CROSSAN & COLBURN, L.C.
731 FIFTH AVENUE
HUNTINGTON, WV 25701
(304) 523-8451

TABLE OF CONTENTS

Kind of Proceeding and Nature of Ruling Below	1
Statement of Fact and Procedural History	2
Discussion of Law	
A. Standard of Review	4
B. Argument	5
1. A Policy Was Issued to Ms. Conley	
Conclusion	16

TABLE OF POINTS AND AUTHORITIES

Cases:

<i>Bailey v. Kentucky National Insurance Co.</i> , 201 W.Va. 220, 496 S.E.2d 170 (1997) . . .	13
<i>Conn v. Motorist Mutual Insurance Co.</i> , 439 S.E.2d 418 (W.Va. 1993)	12
<i>Hare v. Connecticut Life Ins. Co.</i> , 173 S.E.2d 772 (1934)	9, 11
<i>Nationwide Mutual Ins. Co. v. Smith</i> , 172 S.E.2d 708 (1970)	9, 10, 11, 12
<i>Painter v. Peavy</i> , 558 S.E.2d 336 (W.Va. 2001)	4
<i>Perry v. Twentieth Street Bank</i> , 157 W.Va. 963, 206 S.E.2d 421 (1974)	8
<i>Williams v. Precision Coil, Inc.</i> , 194 W.Va. 52, 459 S.E.2d 329 (1995)	4

Statutes:

West Virginia Code § 2-1-1	8
West Virginia Code § 33-6A-1	3, 9, 12, 14
West Virginia Code § 33-6A-1(e)(7)	3, 7, 12, 13

**KIND OF PROCEEDINGS AND
NATURE OF RULING BELOW**

This is a civil action initially filed by Plaintiff Dairyland Insurance Company against Appellee Stephanie Michelle Conley, wherein Dairyland was seeking subrogation against Ms. Conley for damages paid as a result of an automobile accident between Ms. Conley and Dairyland's insured. Ms. Conley filed a third party declaratory judgment complaint against her insurer, Appellant West Virginia National Auto Insurance Company, alleging that it had issued a policy of insurance that was in force at the time of the accident, and that it hence had a duty to provide coverage for the loss. The third-party plaintiff and third-party defendant briefed the coverage issue presented in the complaint for declaratory relief. The circuit court found that a policy had been issued by West Virginia National Auto to Ms. Conley, and not properly canceled, and, hence, there was insurance coverage for Ms. Conley on the date of the accident. It is from this ruling the Appellant appeals. The Appellee contends that the circuit court ruling was proper, and that the ruling should be affirmed.

**STATEMENT OF FACTS
AND PROCEDURAL HISTORY**

The Appellee herein, Stephanie Michelle Conley, applied for automobile insurance with Kenneth Adkins & Son Insurance Agency on August 15, 2001. Thereafter, she was issued a personal automobile policy by West Virginia National Auto Insurance Company, Inc., (hereinafter "National Auto") bearing Policy No. WV1032724. On August 30, 2001, a Declarations Page setting forth the date, time and extent of coverage was sent to Ms. Conley. The Declarations Page stated that the policy period was effective as of August 15, 2001 and would expire on February 15, 2002. At this same time, Ms. Conley was also provided with a Certificate of Insurance from National Auto, which set forth the effective dates of coverage being from August 15, 2001 to February 15, 2001. On August 30, 2001, National Auto mailed a Personal Automobile Premium Billing Statement to Ms. Conley. This billing statement defined the policy period as being from August 15, 2001 to February 15, 2001, and set forth the above stated policy number. This statement requested an installment payment in the amount of Eighty Eight Dollars and 55/100 (\$88.55) to be made on September 9, 2001.

On August 31, 2001, Ms. Conley was involved in an automobile accident. On September 10, 2001, she was notified by National Auto that her policy had been **rescinded** effective August 15, 2001, and that no insurance coverage would be provided for the accident of August 31, 2001. Ms Conley was sent another letter on the following day, September 11, 2001 advising her that the check sent in with her application for insurance had been returned for insufficient funds, and hence the insurance would be rescinded as of August 15, 2001, and no coverage would be provided.

West Virginia Code § 33-6A-1, provides, in pertinent part, as follows:

Cancellation prohibited except for specified reasons; notice

Notwithstanding any of the provisions of this section to the contrary, no insurer may cancel a policy of automobile liability insurance without first giving the insured thirty days' notice of its intention to cancel: **Provided, That cancellation of the insurance policy by the insurer for failure of consideration to be paid by the insured upon initial issuance of the insurance policy is effective upon the expiration of ten days' notice of cancellation to the insured.**

West Virginia Code § 33-6A-1(e)(7)(emphasis added).

Furthermore, the West Virginia National Auto Insurance Company, Inc., policy in regard to cancellation provides, in pertinent part, as follows:

15. Cancellation

- (b) **Cancellation by the Company of a policy which has been in effect for less than sixty (60) days:** This policy may be canceled by the Company by mailing to the insured named in Item 1 of the declarations at the address shown in this policy, written notice stating when, not less than ten days thereafter, such cancellation shall be effective, provided that the policy has been in effect less than sixty (60) days and this is not a renewal policy. The policy may be canceled by the Company upon actual notice to the insured or by mailing notice of such cancellation.

This Section of the policy was amended by an *Explanatory Endorsement* to comply with West Virginia Code § 33-6A-1, with that Code Section being set forth verbatim in the Explanatory Endorsement. A policy was issued, as National Auto sent a Declarations Page, Certificate of Insurance and billing statement that all referenced Ms. Conley's policy

number and dates of coverage. Under the National Auto policy language and the plain language of the West Virginia statute governing cancellation or non-renewal of automobile liability policies, National Auto did not effectively cancel Ms. Conley's policy and, hence, coverage must be afforded her for the August 31, 2001, accident.

DISCUSSION OF LAW

A. Standard of Review

This Declaratory Judgment action involves the question as to whether there was a proper cancellation of an insurance policy. A circuit court's award of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 558 S.E.2d 336 (W.Va. 2001). An award of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). A motion for summary judgment should be granted when 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. *Id.*

B. ARGUMENT

I. A Policy Was Issued To Ms. Conley.

National Auto asserts that payment of an insurance premium by a check which is dishonored does not serve as consideration for a policy of insurance policy. Hence, Appellant asserts that a policy of insurance was never issued to Ms. Conley, and, thus there was never an obligation to provide any notice of cancellation. However, an examination of the documents in this case indicate that in fact a policy was issued, and thus must have been canceled in accordance with West Virginia Code §33-6A, *et. seq.*

On August 30, 2001, a *Personal Automobile Policy Declarations* was generated by National Auto and sent to Ms. Conley. This Declarations Page set forth a description of the coverages, as well as defining the policy period for Ms. Conley as being from August 15, 2001 to February 15, 2002. This Declarations Page also contained the policy number for Ms. Conley, being West Virginia 1032724. National Auto also mailed a *Certificate of Insurance* to Ms. Conley, which stated the policy number and the effective dates of the coverage. The *Certificate of Insurance* advised Ms. Conley that she was being provided a Certificate of Insurance for "the above referenced automobile," and provided two **proof of insurance** cards for the insured vehicle. The Certificate of Insurance also advised Ms. Conley that her policy was recorded under the name and policy number shown on the card. The Certificate set forth an effective date of August 15, 2001. The Certificate of Insurance stated that an authorized West Virginia insurer certified that there was insurance in effect on Ms. Conley's 1995 Plymouth Neon, **effective as of August 15, 2001**. This Certificate of insurance would have sufficed to prove to any law enforcement officer or

official requesting proof of insurance that Ms. Conley's vehicle was insured and a policy had been issued as of August 15, 2001. The Certificate of Insurance was an unconditional binding of coverage which did not condition the provision of coverage or issuance of a policy on the actual receipt of payment of the premium. By issuing the certificate of insurance, National Auto extended coverage to Ms. Conley, that had to be canceled in accordance with the policy and West Virginia statute.

As further verification that an insurance policy was issued and coverage extended to Ms. Conley, National Auto sent to her a *Personal Automobile Premium Billing Statement*, again setting forth the above stated policy term and policy number. This billing statement advised Ms. Conley that in order to "avoid the termination of your coverages, your premium must be received in our Morgantown office prior to the due date." (emphasis added). This billing statement further advised Ms. Conley that if she would remit her premium payments in a timely basis, continuous coverage would be ensured. (emphasis added). This billing statement required payment to be received by September 9, 2001. By the use of language such as *termination of coverage* and *continuous coverage*, it is clear that National Auto had issued a policy and extended coverage to Ms. Conley. Certainly, to the ordinary person reading the documents, National Auto was not conditioning the provision of coverage on the happening of any event, such as eventual receipt of satisfactory payment.

The Declarations Page, Certificate of Insurance, and Premium Billing Statement establish that, in fact, a policy of insurance was issued by National Auto to Ms. Conley which was not contingent upon her check clearing the bank. Over two weeks after applying for insurance and giving the National Auto agent a check, National Auto provided

to Ms. Conley a policy number, effective coverage dates and a certificate of insurance as proof that she was insured. National Auto apparently did not present the check for payment prior to issuing the policy. It was only after the policy was issued, and upon learning of Ms. Conley's accident, that National Auto apparently learned that the check was dishonored. A reasonable assumption would be that had Ms. Conley not had an accident, National Auto would have simply required that Ms. Conley pay the premium to keep her insurance in force, effective as of August 15. National Auto had more than ample opportunity and time between Ms. Conley's application and its provision of documents verifying the issuance of a policy and coverage within which to verify that the check would be honored. Instead, National Auto chose to extend coverage to Ms. Conley, apparently before the check was ever presented for payment, and cannot, after the fact, rescind the coverage it extended.

The fact that National Auto issued a policy is also supported by its September 10, 2001 letter. In this letter, National Auto advised Ms. Conley that they had **rescinded** her policy. National Auto did not state that it declined to issue coverage, rather, it stated that the policy was being rescinded. By letter dated September 11, 2001, National Auto again informed Ms. Conley that her policy had been **rescinded**. "Rescind" is defined in Merriam-Webster's as "to cancel, take back." *Merriam-Webster Online Dictionary*, 2005, <http://Merriam-Webster.com> (April 18, 2005). The statutory provision in West Virginia for a policy to be rescinded, *i.e.* canceled, is found at West Virginia Code §33-6A-1(e)(7). Having issued a policy, National Auto was obligated to cancel the coverage pursuant to statutory requirements. It undisputedly did not do so.

National Auto asserts that its application form expressly provides that if the premium remittance is not honored by the bank, no coverage would be bound. However, National Auto cannot contractually defeat the application of West Virginia Code §33-6A. National Auto chose to issue a policy to Ms. Conley, providing proof of insurance to her and a declaration of the coverages. Fifteen days elapsed between the application for insurance and the provision of documents by National Auto evidencing the issuance by it of a policy to Ms. Conley. Twenty-six days after the application was received, and after receiving notice of the accident, National Auto attempted to rescind its issuance of coverage. National Auto, after choosing to issue a policy and extend coverage, was obligated to provide ten (10) days notice of cancellation to the insured. As it failed to do so, coverage was in effect on the date of the accident.

II. West Virginia Code §33-6A Controls.

The Legislature is possessed with the power to alter the common law. *Perry v. Twentieth Street Bank*, 157 W.Va. 963, 206 S.E.2d 421 (1974). By virtue of the authority of Article VIII, Section 21 of the Constitution of West Virginia and West Virginia Code § 2-1-1, it is within the province of the legislature to enact statutes which abrogate the common law. *Id.* In 1967, our Legislature enacted West Virginia Code §33-6A, providing in pertinent part as follows:

Cancellation prohibited except for specified reasons; notice

Notwithstanding any of the provisions of this section to the contrary, no insurer may cancel a policy of automobile liability insurance without first giving the insured thirty days' notice of its intention to cancel:

Provided, That cancellation of the insurance policy by the insurer for failure of consideration to be paid by the insured upon initial issuance of the insurance policy is effective upon the expiration of ten days' notice of cancellation to the insured.

West Virginia Code § 33-6A-1(e)(7) (emphasis added).

Prior to the enactment of this Code Section, *Hare v. Connecticut Life Ins. Co.*, 173 S.E.2d 772 (1934) may have provided guidance on the issue presented in this case. *Hare* held that the premium was the price of the insurance, and if there was no payment, there was no insurance. *Hare v. Connecticut Life Ins. Co.*, 173 S.E.2d 772 (1934). However, *Hare* applied Pennsylvania law to the cancellation of a life insurance policy, and, hence, the guidance that it may have provided was minimal. Upon the enactment of West Virginia Code § 33-6A-1, *et. seq.*, *Hare* would have no relevance or application to the issue presented in this case. This Code section alters the application of common and/or contract law to the provision and cancellation of automobile insurance. In enacting this statute, the Legislature clearly contemplated that an automobile insurance company would issue an insurance policy to a new customer and subsequently there would be a failure of consideration, *i.e.* the check would be dishonored. In such instance, the insurer is required to provide ten (10) days' notice of cancellation to the insured, less than the thirty days required otherwise.

The Petitioner relies on *Nationwide Mutual Ins. Co. v. Smith*, 172 S.E.2d 708 (1970), to support its position that West Virginia law holds that attempted payment of an insurance premium by a subsequently dishonored check does not constitute payment sufficient to serve as consideration for a policy of insurance. The facts in *Nationwide* arose

prior to the enactment of the statute cited herein. When this Court decided *Nationwide*, West Virginia Code §33-6A-1(e)(7) did not govern the outcome. In fact, the Code section was not even mentioned in the opinion. Were the facts of the *Nationwide* case to be before this Court today, application of this statute would mandate that a different result be reached.

In *Nationwide*, a declaratory judgment action was filed in which the plaintiff, Nationwide, sought a determination of the rights and duties of the plaintiff and defendants, Glenn and Carolyn Smith. *Nationwide Mutual Ins. Co. v. Smith*, 172 S.E.2d 708, 709 (1970). Nationwide issued a policy to the Smiths on December 30, 1964, bearing policy number 91 290-872. *Id.* This policy afforded automobile liability coverage for a period of six months, from December 30, 1964 to June 30, 1965. *Id.* at 709-10. At the time the policy was issued, the Smiths made a payment by check in the amount of \$35.00. *Id.* at 710. The payment was refused by the bank for lack of sufficient funds. *Id.* On February 2, 1965, Nationwide informed the Smiths that the check had been returned, and advised them that it was keeping the insurance in force a few more days in order for the Smiths to send a valid payment. *Id.* Nationwide also informed the Smiths that the policy would be canceled as of February 18, 1965, unless payment was made before said date. *Id.* The check was submitted again to the bank, and again refused. *Id.* On March 18, 1965, Nationwide again informed the Smiths that the check had been returned, and again advised them that it was continuing the insurance in force in order for the Smiths to send a valid payment. *Id.* Nationwide finally gave notice to the Smiths that the policy would be canceled as of April 2, 1965, but if payment was received before that time, the cancellation would be withdrawn. *Id.*

On or about April 1, 1965, the Smiths were issued and delivered a second policy by Nationwide which was characterized as a transfer policy, bearing policy number 91 290-800. *Nationwide*, 172 S.E.2d at 710. That policy was to replace the original policy and be in force from April 1, 1965, to June 30, 1965, the termination date of the original policy. *Id.* at 710-11. No money was collected on this policy. *Id.* at 710. The Smiths were in an automobile accident on April 17, 1965. *Id.* at 711. Nationwide denied coverage under either policy. *Id.* The circuit court found that the second policy was valid and effective from the date of issuance and supported by valid consideration and not effectively canceled prior to the collision. *Id.* at 709. On appeal, Nationwide argued that the second policy was induced by fraud, came into existence by mutual mistake, that its validity was contingent upon the validity of the first policy which was canceled and became null and void, and that the first policy was canceled as of April 2, 1965, and not based upon valid consideration. *Id.* at 711. It was undisputed that no part of the premium for either policy had ever been paid. *Id.*

On appeal, this Court applied general common law regarding the delivery of a check in payment of indebtedness, and found that coverage was not in effect as the policy was invalid from its inception. *Id.* at 711-713. While *Nationwide* was not decided until 1970, the insurance issue arose in 1965, prior to the enactment of the statute on cancellation of insurance. As the issue in *Nationwide* arose before the enactment of West Virginia Code §33-6A, that Code Section did not govern the outcome and was not applied to the facts of the case. Had that Code section been applied, a different result would have been reached. Today, the application of common law as in *Nationwide* has been abrogated by the

enactment of West Virginia Code §33-6A, which clearly controls this situation. Clearly, in *Nationwide*, two different automobile insurance policies were issued, despite the fact that there was no consideration. In fact, Nationwide informed the Smiths on at least two occasions that they were keeping the insurance in force in order for the Smiths to send a valid payment. Were the facts of Nationwide to be presented to this Court today, this Court would apply West Virginia Code §33-6A, and find that while there was a failure of consideration, a policy was issued and there was not a proper cancellation.

A different result in *Nationwide* would also be reached not only due to the statutory enactments, but also with the application of *Conn v. Motorist Mutual Insurance Co.*, 439 S.E.2d 418 (W.Va. 1993), regarding notice of cancellation. In *Conn*, this Court found that notice which permits an insured an opportunity to keep the policy current by paying the premium is insufficient notice to cancel a policy. *Conn*, 439 S.E.2d at 423. This decision was based on the rule of law that a notice of cancellation of insurance must be clear, definite and certain. *Id.* at 421. Hence, this Court in *Conn* found that the notice of cancellation did not comply with West Virginia Code §33-6A-3, as it implied that upon the happening of a future event, that being the insured's failure to pay the premium by a date certain in the future, the policy would be canceled. *Id.* at 420-421.

Were the facts of *Nationwide* to be presented today, the application of West Virginia Code §33-6A-1 and 3, as well as *Conn*, would mandate the finding that the insurance company did not properly and effectively cancel the insurance. As *Nationwide* was not governed by Chapter Thirty-Three, Section Six A, and this case is, National Auto's reliance on this case is misplaced. *Hare* is inapplicable as it dealt with a life insurance

policy, not automobile insurance, applied Pennsylvania common law, and any application that it might arguably have been abrogated by the enactment of Chapter Thirty-Three Section Six A. The numerous out-of-jurisdiction cases cited by the Petitioner are irrelevant, as this matter is governed by and clearly answered by West Virginia Code § 33-6A-1.

Even if *Nationwide* were to govern the outcome of this case, the facts still establish that National Auto extended coverage and was bound to properly cancel it. In *Nationwide*, thus Court stated that in order for a worthless check to constitute valid payment, it must have been unconditionally accepted as such by the insurer. *Nationwide*, 172 S.E.2d at 712. In this case, National Auto accepted the Ms. Conley check as payment, and extended a policy and coverage apparently without requiring the check to be honored first. Hence, while the fine print in the application may have said that coverage would not be bound if the premium remittance was not honored by the bank, National Auto waived this provision by extending coverage and issuing certificates of insurance and a policy without receiving payment.

III. National Auto Did Not Provide Ten Days Notice of Cancellation.

West Virginia Code §33-6A-1 governs the cancellation of a policy by an insurer upon the initial issuance of the policy. This Code section quite clearly requires that the insurer provide ten days notice of a cancellation to the insured, even when there has been a failure of consideration to be paid by the insured upon the initial issuance of the policy. West Virginia Code §33-6A-1(e)(7). The National Auto insurance policy language tracks this statutory language, and in fact was amended to contain verbatim the cancellation language found in West Virginia Code §33-6A-1. Hence, under the plain language of the

statute and the National Auto Insurance policy, the cancellation of Ms. Conley's policy could only have been effective upon the expiration of ten days notice of cancellation, even if she failed to tender the initial consideration. Our Legislature apparently envisioned a scenario such as this, and permitted an insurer to be relieved of insuring the individual upon ten days notice if the initial premium is not paid, for any reason.

This Court held in *Bailey v. Kentucky National Insurance Co.*, 201 W.Va. 220, 496 S.E.2d 170 (1997) that where there has been an invalid cancellation, the automobile liability insurance policy remains in effect until the end of its term or until valid cancellation notice is perfected, whichever event occurs first. *Bailey*, 201 W.Va. at 228, 496 S.E.2d at 178. In *Bailey*, the estate of a high risk motorist who was killed in an automobile accident sued the insurer after the insurer denied the estate's claim for underinsured motorist benefits. *Id.*, at 172, 73, 222-223. After the Circuit Court of McDowell County granted summary judgment to the insurer, the estate appealed. *Id.*, at 174, 224.

This Court first determined that an assigned risk automobile insurance policy, also referred to as a substandard risk motor vehicle insurance policy, would be subject to the provisions governing cancellations contained in West Virginia Code §33-6A-1. *Bailey*, 201 W.Va. at 227, 496 S.E.2d at 177. The specific time periods within which an insurer must notify an insured of a cancellation was then addressed. *Id.* In addressing the time periods, this Court noted an exception to the thirty days requirement exists when an insured fails to pay consideration upon the initial issuance of the insurance policy; in this scenario, an insurer must only provide the insured with ten days notice of its intention to cancel. *Id.* As the language of West Virginia Code §33-6A-1 was clearly unambiguous, this Court needed only to apply its directives to the facts presented. *Id.*, at 178, 228. In so doing, this

Court found that the insurer had issued the assigned risk automobile insurance policy on May 25, 1993, with the policy going into effect upon its issuance. *Id.* After the policy had been in effect for more than sixty days, the insurer, by letter dated August 2, 1993, notified the insured that it intended to cancel the policy due to non-payment of premium, with cancellation to be effective on August 19, 1993. This Court found that although the stated reason for cancellation was proper, the insurer's purported cancellation was not valid as it failed to provide the insured with the requisite thirty days notice. *Id.* It was further noted that where there has been an invalid cancellation, the automobile liability insurance policy remains in effect until the end of its term or until a valid cancellation notice is perfected, whichever event occurs first. *Id. (citations omitted).* Since the insurer failed to perfect a valid notice of cancellation, its purported cancellation was determined to be void, and the insured's automobile insurance policy was found to be in effect at the time of the accident on September 16, 1993. *Id.*

The same result as reached in *Bailey* is mandated here. National Auto issued an automobile insurance policy to Ms. Conley, which policy took effect on August 15, 2003. The Declarations page, billing statement and Certificate of Insurance conclusively establish that National Auto issued a policy to Ms. Conley. Once the policy was issued, and National Auto elected to provide insurance coverage to Ms. Conley, National Auto was obligated to comply with West Virginia law and its own policy conditions. West Virginia law and the National Auto policy require ten days notice in order to cancel the initial issuance of a policy when there is a failure of consideration. The only action National Auto could take after issuing the policy was to properly cancel the policy in compliance with West Virginia law and its policy. That was not done.

The check to National Auto was written by Ms. Conley on August 15, 2001. Fifteen days later, more than ample time for a check to be presented and clear the bank, National Auto provided a Declarations Page and Billing Statement to Ms. Conley. National Auto apparently chose to issue the policy, provide a Declarations Page and Certificate of Insurance to Ms. Conley, and send her a billing statement, prior to presenting her check for payment. It was not until September 10, 2001, twenty-six (26) days later, and after Ms. Conley's accident, that National Auto sent a letter advising Ms. Conley that her check had been returned for insufficient funds, and that her policy would be rescinded for failure of consideration. At a minimum, National Auto's actions result in a waiver of its right to demand actual full payment prior to issuing a policy.


National Auto argues that public policy supports a finding that the policy was never issued because there was not valid consideration. This argument wholly ignores the statutory requirements contained in §33-6A-1. It also ignores the fact that National Auto apparently chose to risk providing coverage when there could be a lack of consideration after a policy is initially issued, rather than require some other form of cash payment. The situation presented in this case could have been entirely avoided had National Auto simply required a form of payment for the initial issuance that is immediately valid, such as cash, money order or certified check. Ms. Conley did not purposefully try to cheat insurance coverage out of National Auto. Rather, she mistakenly overdrew her account, and the check to National Auto was dishonored. West Virginia Code §33-6A-1 gives National Auto the opportunity to decide that it would prefer not to do business with a new customer when that occurs, and allows them to cancel coverage with the provision of ten days notice. However, having chosen to extend coverage to Ms. Conley on the basis of her presenting

a personal check, National Auto risked having to provide coverage in an instant such as this. In all likelihood, the majority of the time the insurer either allows the customer to make the check good, or decides not to continue to cover the individual and provides the requisite ten day notice of cancellation. In this case, the issuance of the policy coincided with an accident, and hence, causes National Auto to regret its decision to extend coverage and seek to avoid the implication of its extension of coverage. Nonetheless, National Auto cannot avoid the application of §33-6A-1, and must provide coverage for the August 31, 2001 accident.

CONCLUSION

Based upon the record in this case, the Circuit Court did not err in granting summary judgment to Ms. Conley. Hence, the Order should be upheld.

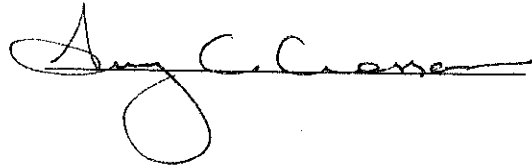
Respectfully,


Amy C. Crossan (SB 7150)

CERTIFICATE OF SERVICE

I, AMY C. CROSSAN, counsel for STEPHANIE CONLEY, do hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE STEPHANIE CONLEY'S was served by United States mail, postage prepaid, in an envelope addressed to the following, on the 19TH day of August, 2005:

DEBRA T. HERRON, ESQUIRE
JAMES A. VARNER, SR., ESQUIRE
DANA N. BONNELL
MCNEER, HIGHLAND, MCMUNN & VARNER, L.C.
P O DRAWER 2040
CLARKSBURG, WV 26302-2040

A handwritten signature in black ink, appearing to read "Amy C. Crossan". The signature is written in a cursive style with a large loop at the end.