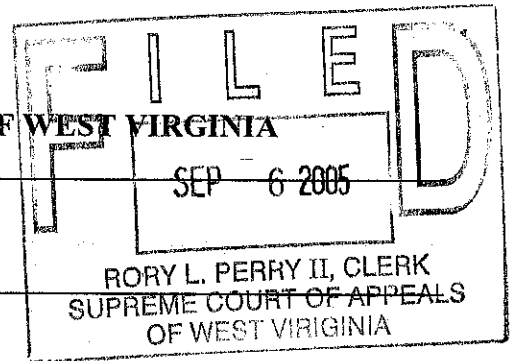


No. 32704

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



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.

FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

REPLY BRIEF OF THE APPELLANT, WEST VIRGINIA
NATIONAL AUTO INSURANCE COMPANY

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FROM THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

REPLY BRIEF OF THE APPELLANT, WEST VIRGINIA
NATIONAL AUTO INSURANCE COMPANY

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

West Virginia National Auto Insurance Company (hereinafter "West Virginia National"), by and through its counsel, James A. Varner, Sr., Debra T. Herron, and Dana N. Bonnell, respectfully submits the following as its reply to the Brief of Appellee Stephanie Michelle Conley, which was filed herein and served on West Virginia National on August 22, 2005. For the Court's convenience, a summary of the pertinent facts and procedural history follows.

On July 24, 2003, Dairyland Insurance Company (hereinafter "Dairyland") filed a complaint seeking to enforce its subrogation rights, alleging that its insureds had sustained bodily injuries as a result of an August 31, 2001 automobile accident and that it had paid to its insureds at least Twenty-Five Thousand Nine Hundred Six Dollars and Sixty-Six Cents (\$25,906.66). Conley filed an answer on September 12, 2003 denying any negligent conduct, and also filed a third party complaint for declaratory relief against West Virginia National, claiming West Virginia National issued a policy of insurance to Conley and failed to cancel said policy properly. West Virginia National filed an answer to the third party complaint on November 7, 2003, generally denying all of the allegations set forth therein.

Conley filed a motion for summary judgment, along with a supporting memorandum of law, on May 28, 2004, asserting that West Virginia Code § 33-6A-1(e)(7) requires ten (10) days notice of cancellation and that the same notice is required by the policy which Conley claims was issued to her. On July 15, 2004, West Virginia National filed a response, explaining that Conley was not entitled to any notice of cancellation because no policy had ever been formed, due to a lack of consideration. On November 22, 2004 the Circuit Court of Cabell County, West Virginia, granted summary judgment in favor of Conley, finding that West Virginia National issued a policy to Conley and failed to properly cancel said policy in accordance with West Virginia Code § 33-6A-1(e)(7).

West Virginia National filed the instant appeal, requesting that this Court reverse the lower court's decision. West Virginia National filed its brief on July 28, 2005, and Conley served her brief on West Virginia National on August 22, 2005. As discussed at length in the brief which West Virginia National previously filed herein, the check tendered by Conley in an attempt to pay her initial premium was dishonored prior to issuance of any policy and, therefore, no consideration

existed to support the creation of a contract of insurance, and no notice of cancellation was necessary or appropriate.

The policy of insurance which Conley alleges was in effect on the date of her accident, in the section entitled "Cancellation," expressly provides that written notice is required to cancel a policy which is "in effect." Moreover, the application completed by Conley expressly indicated that if the premium remittance was not honored by the bank, then no coverage would be bound. Similarly, West Virginia Code § 33-6A-1(e)(7) provides that the cancellation of an *existing* insurance policy by an insurer for failure of consideration to be paid upon the initial issuance of the policy requires ten (10) days notice of cancellation. Thus, while notice of cancellation is clearly required where a policy has been formed and some consideration other than a premium payment, such as the promise to pay, has been given, no notice is required where no policy exists.

In her appeal brief, as in earlier filing in this civil action, Conley asserts that a policy was issued and notice of cancellation was required. However, Conley's assertions directly conflict with controlling legal precedent. Indeed, this Court has already determined that attempted payment of an insurance premium by tender of a check which is subsequently dishonored due to insufficient funds does not constitute payment sufficient to serve as consideration for a policy of insurance. Hare v. Connecticut Mutual Life Ins. Co., 114 W.Va. 679, 173 S.E. 772 (W.Va. 1934); Nationwide Mutual Ins. Co. v. Smith, 153 W.Va. 817, 172 S.E.2d 708 (1970). In Nationwide, this Court concluded, "[i]n the absence of the payment of the premium which was to have been paid when the policy was delivered the policy was invalid from its inception and because of the nonpayment of the premium, which constituted lack of consideration, the policy did not at any time afford the assureds any coverage and, of course, was not in effect at the time of the automobile collision[.]" *Id.*, 153

W.Va. at 827, 172 S.E.2d at 713. More recently, in the case of American Hardware Mutual Ins. Co. v. BIM, Inc., 885 F.2d 132 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit, applying West Virginia law, concluded that under West Virginia law, "where the insurer has required a premium as consideration, the insured's tender of a worthless check in satisfaction of the resulting 'condition precedent' would render any apparent coverage void ab initio." *Id.*, 885 F.2d at 137.

As discussed more fully in West Virginia National's earlier brief, other jurisdictions have uniformly reached the same conclusion as West Virginia's courts.¹ Moreover, those cases from other jurisdictions which at first blush appear to support Conley's position are easily distinguishable on their facts from the instant case because they involve situations in which the insurance carrier conducted itself so as to effectuate a waiver of its right to timely premium payments as a prerequisite to coverage, and, therefore, actually accord with West Virginia law recognizing waiver situations as an exception to the general rule that a dishonored check cannot support formation of a contract

¹See, e.g., Johnson v. Dairyland Ins. Co., 398 So. 2d 317 (Ala. Civ. App. 1981); Statewide Ins. Corp. v. Dewar, 143 Ariz. 576, 694 P.2d 1190 (Ariz. App. 1983); Bolz v. Security Mutual Life Ins. Co., 721 P. 2d 1216 (Colo. App. 1986); Burns v. Prudence Life Ins. Co., 243 S.C. 515, 134 S.E.2d 769 (S.C. 1964); Tallent v. Tennessee Farmers Mut. Ins. Co., 785 S.W. 2d 339 (Tenn. 1990) (insured's check was not good when issued or anytime thereafter and, thus, insurer was not liable, regardless of unconditional receipt issued to the insured and a notice that coverage was reinstated when the check was received); Progressive Preferred Ins. Co. v. Brown, 261 Ga. 837, 413 S.E. 2d 430 (Ga. 1992) (holding an insurer did not accept a dishonored check as a premium payment when it presented the check a second time for collection and, therefore, insurer had a valid ground for cancellation of the policy because of the worthless check); National Union Fire Ins. Co. v. Want, 181 Ark. 824, 827-28, 28 S.W.2d 63, 64 (Ark. 1930) (holding that a policy of fire insurance suspending liability thereunder while the premium remains unpaid is valid, and a dishonored check offered as payment of the premium is not sufficient consideration, absent actual acceptance of the check itself as consideration, to give rise to coverage); Abdel-Rahman v. Ludas, 266 N.J. Super. 46, A. 2d 778 (N.J. Super. 1993) (holding that an insurance policy was void because the applicant's check for payment of the initial automobile insurance premium was dishonored due to insufficient funds); Cauley v. General American Life Ins. Co., 219 N.C. 398, 400, 14 S.E. 2d 39, 40 (N.C. 1941) (holding that "[n]onpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance," and that applicant's "giving of a worthless check is not payment."); Stager v. Federal Life Ins. Co., 125 Pa. Super. 68, 189 A. 776 (Pa. Super. 1937) (insurance policy lapsed where the evidence showed that the beneficiary had sent a personal check for the premiums that was returned for insufficient funds).

of insurance.² While a small minority of courts have found that an insurer was required to provide statutory notice of cancellation following the dishonor of a premium check, those cases differ in important respects from the instant case. Specifically, in those cases, the premiums for which the worthless checks were given were not the initial payments required as consideration for issuance of a new policy of insurance but, instead, were premiums for *existing* policies, thus subjecting the insurer to statutory notice of cancellation requirements.³ Taken as a whole, the body of foreign cases addressing the issue involved in this appeal strongly supports the conclusion that a worthless premium check does *not* constitute payment of an insurance premium sufficient to serve as consideration for the creation of a contract of insurance.

The decision not to issue a policy of insurance following an application and subsequent dishonor of the check tendered in payment of the initial payment does not amount to a policy cancellation, but merely a decision not to issue a policy in the first place. Because no cancellation occurs in such a situation, the provisions relating to cancellation, W. Va. Code §§ 33-6A-1, *et seq.*, are not implicated, Conley's assertions to the contrary notwithstanding. The language of W. Va. Code § 33-6A-1 supports this conclusion: "No insurance *once having issued or delivered a policy . . . may, after the policy has been in effect* for sixty days, or in case of renewal effective

²See, e.g., John Hancock Mut. Life Ins. Co., 86 F.2d 783 (7th Cir. 1936); Kansas City Life Ins. Co. v. Davis, 95 F.2d 952 (9th Cir. 1938); Wiles v. Nationwide Life Ins. Co., 334 F.2d 296 (4th Cir. 1964) (holding that evidence of insurer's practices as to late premiums, prior-to-lapse notice, and easy reinstatement amounted to waiver of right to timely premium payment as condition precedent to coverage); Soso Trucking, Inc. v. Central Ins. Agency, Inc., 236 So. 2d 398 (Miss. 1970) (local agent's acceptance of check and advance from local agent through general agent to defendant waived defendant's right to forfeit coverage for the time period for which the check had been tendered); Katinsky v. Auto Club Ins. Assoc., 201 Mich. App. 167, 505 N.W. 2d 895 (Mich. App. 1993) (insurer had no right to void policy because of cancelled premium check when insurer had issued a billing notice which stated the policy would be cancelled unless payment was received by a specified date, which date was subsequent to the accident giving rise to the claim for coverage).

³See, e.g., Yacko v. Curtis, 339 Ill. App. 3d 299, 789 N.E.2d 1274 (Ill. App. 2003); Automobile Club Ins. Co. v. Jackson, 124 Idaho 874, 865 P.2d 965 (Ida. 1993).

immediately, issue or cause to issue a notice of cancellation *during the term of the policy* except for one or more of the reasons specified in this section.” W. Va. Code § 33-6A-1 (emphasis added).

Along the same lines, the particular code provision upon which Conley relies, W.Va. Code § 33-6A-1(e)(7), regarding notice of cancellation when an initial premium is not paid but a policy has nonetheless already been issued, requires ten days’ notice of cancellation, provides as follows:

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 expiration of ten days’ notice of cancellation to the insured.

Id. This statutory provision applies when the insured makes a promise to pay the premium on the initial issuance of a policy but later fails to make the promised payment. In such instances, the consideration for issuance of the policy is the applicant’s *promise* to pay the premium rather than the actual payment of the premium. This section coincides with the waiver exception to the case law in that it permits an insurer to waive its right to demand actual premium payment as consideration, and prevents an insurer that has waived this right from later contending the policy which it issued is invalid due to a worthless premium check.

Public policy considerations support the majority rule requiring that applicants make effective payments of initial insurance premiums as consideration for the issuance of policies of insurance. The most basic concepts of insurance presuppose the payment of a premium in exchange for purchasing insurance against certain risks. While an insurer can affirmatively waive its right to actual payment of a premium in exchange for the policy of insurance by accepting as an alternative form of consideration the *promise* to pay a premium, such a waiver occurs only in unusual

circumstances when the insurer has made a decision to depart from the usual practice of requiring payment. The rule proposed by Conley, which would require insurers to provide coverage to applicants under alleged policies of insurance in circumstances in which payment of a premium was expressly required as consideration for coverage but was never made, would undermine the very foundation of insurance risk distribution, leaving responsible insureds who make premium payments to bear the burden of paying increased premiums. Also, Conley's proposed rule would confer upon those applicants who fail to pay premiums a significant windfall which would exceed any objectively reasonable expectation of coverage, as any belief on the part of Conley or a similarly situated individual that coverage would be provided despite the non-payment of the mandatory initial

WHEREFORE, for those reasons set forth above and discussed more fully in the brief previously filed herein, West Virginia National Auto Insurance Company hereby requests that this Honorable Court reverse the order of the circuit court granting summary judgment in favor of Stephanie Michelle Conley. Moreover, West Virginia National requests that this Honorable Court find that no policy of insurance exists and no duty to provide notice of cancellation arises where the check tendered in payment of the initial premium expressly required prior to issuance of the policy is dishonored, thus West Virginia National to summary judgment.

Respectfully submitted this the 2nd day of September, 2005.

Third Party Defendant, West Virginia National Auto
Insurance Company, By Counsel:



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