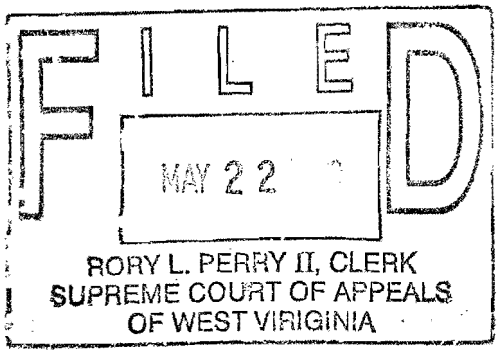
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



PUTNAM BANCSHARES, INC.,
a West Virginia corporation
d/b/a PUTNAM COUNTY BANK and
T.C.'S USED CARS, LLC, a West
Virginia limited liability company,

Appellees,

v. No. 34769

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Appellant.

REPLY BRIEF ON BEHALF OF PROGRESSIVE CLASSIC INSURANCE COMPANY

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DISCUSSION

I. W. Va. Code §33-6A-1(e)(7), which requires advance notice of cancellation if there is failure of consideration upon the initial issuance of the policy, does not apply when the policy has expired due to the insured's failure to pay the renewal premium.

T.C.'s Used Cars' position rests upon the erroneous premise that offering to renew an existing automobile liability insurance policy constitutes the issuance of an entirely new policy, thereby triggering the requirements of W. Va. Code §33-6A-1(e)(7) and invoking the principles discussed by this Court in *Dairyland Insurance Company v. Conley*, 218 W. Va. 252, 624 S.E.2d 599 (2005). The fatal flaw in T.C.'s Used Cars argument is the inability to recognize that W. Va. Code §33-6A-1(e)(7) and *Conley* apply only to the initial issuance of a **new** policy, not to an offer to renew an existing policy.

Although T.C.'s Used Cars maintains that the instant case is identical to and therefore controlled by the Court's decision in *Conley*, it neglects to explain how an offer to renew an automobile liability insurance policy and the insured's failure to accept that offer, which is what occurred in this case, is the same as issuing a new policy and the insured's failure to pay the initial premium. The explanation for this omission is simple -- an offer to renew an existing policy does not result in the creation of a new policy with the concomitant requirement to provide ten days notice of cancellation.

W. Va. Code §33-6A-1 contains the statutory requirements for cancellation of an automobile liability insurance policy. If a policy has been "in effect for sixty days, or in case of renewal effective immediately," the policy may only be cancelled for certain specified reasons. W. Va. Code §33-6A-1(e)(7) sets forth the time frame for providing advance notice of cancellation to the insured:

> 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. [Emphasis supplied.]

In *Conley*, this Court concluded that W. Va. Code §33-6A-1(e)(7) applied to require a ten day notice of cancellation when the insurer attempted to rescind a policy after the insured's check was returned for non-sufficient funds. *Id.* at 254-55, 624 S.E.2d 601-02. The Court was quite clear, however, that W. Va. Code §33-6A-1(e)(7)'s requirement of ten days notice prior to cancellation of an automobile liability insurance policy applied only to newly issued policies:

> [I]f an insurance company chooses to issue a new policy of automobile liability insurance to an insured, and the insured fails to pay the initial premium or otherwise provide necessary consideration for the new policy, the insurance company may cancel the policy. However the cancellation of the policy can take effect

> no earlier than ten days after notice of the cancellation is provided to the insured.

Id. at 265, 624 S.E.2d at 612.

For the circumstances of the instant case to fit within the framework of W. Va. Code §33-6A-1(e)(7), as well as the Court's discussion in *Conley*, one must ignore that both *Conley* and W. Va. Code §33-6A-1(e)(7) apply to the "initial" issuance of a new policy. One also must pay no heed to the fact that in this case, Progressive Classic offered to renew an existing policy and Mr. Daniel failed to accept that offer. In order to twist W. Va. Code §33-6A-1(e)(7) to fit the present situation one must also ignore all statutory references to **renewal** of an existing automobile liability insurance policy.

An offer to renew an existing policy does not create a new policy. If it did, the legislative guidelines and mandates relating to renewal of automobile liability insurance would be meaningless. Tellingly, T.C.'s Used Cars does not attempt to explain why the Legislature included statutory regulation of policy renewals if, as T.C.'s Used Cars argues, a new policy is created for each subsequent policy period.

The undisputed facts reveal that Progressive Classic initially issued the policy to Mr. Daniel on August 23, 2006, for the six month policy period of August 23, 2006 to February

23, 2007. (See Ex. D, Burton Aff.).[1] The policy expired on February 23, 2007, because Mr. Daniel failed to pay the renewal premium, despite being advised by Progressive Classic on two separate occasions that the policy would expire absent payment of the renewal premium. Pursuant to W. Va. Code §33-6A-4, Progressive Classic offered to renew his policy for the policy period of February 23, 2007 to August 23, 2007, but Mr. Daniel failed to accept that offer.

By characterizing Progressive Classic's offer to renew Mr. Daniel's policy as the issuance of an entirely new policy and applying W. Va. Code §33-6A-1(e)(7), both T.C.'s Used Cars and the lower court obviated W. Va. Code §33-6A-4. T.C.'s Used Cars even goes so far as to claim there is no distinction between renewal of an existing policy and the initial issuance of a new policy.[2] (Br. of Appellee, p. 14.) That position is

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[1]References to exhibits are to those exhibits attached to Progressive Classic's Motion for Summary Judgment.

[2]Confusingly, T.C.'s Used Cars contends that if the policy was renewed, then 30 days notice of cancellation would be required. Progressive Classic is well aware of the requirements of W. Va. Code §33-6-1(e)(7) regarding the cancellation of existing policies. On February 4, 2007, it cancelled Mr. Daniel's policy for failure to pay the balance due premium during the August 23, 2006 to February 23, 2007 policy period. Prior to doing so, it provided Mr. Daniel with the requisite 30 days notice required under W. Va. Code §33-6A-1(7)(e). (See Ex. D, Burton Aff.) The policy was reinstated on February 8, 2007, and remained in effect until February 23, 2007, when Mr. Daniel simply let the policy expire. Because the policy expired and was not cancelled, Progressive Classic was not required to give notice of cancellation under W. Va. Code §33-6A-1(e)(7).

unavailing.

Contrary to T.C.'s Used Cars' assertion, the *Conley* Court correctly interpreted W. Va. Code §33-6A-1(e)(7)'s use of the phrase "upon initial issuance" of the policy to mean the issuance of a new policy, not the renewal of an existing policy. *Conley*, 218 W. Va. at 265-66, 624 S.E.2d 612-13. To do otherwise distorts not only the plain meaning of "initial issuance," but ignores the statutory provisions relating to renewal of an existing policy.

The Legislature chose to provide certain protections to policyholders who renew their existing policies, thereby evidencing legislative recognition of the distinction between renewal of a policy and the "initial issuance" of a policy. As part of that protection, W. Va. Code §33-6A-4(a) prohibits an insurer from failing "to renew an outstanding automobile or physical damage insurance policy" unless the insured is provided with forty-five days advance notice of the decision not to renew.[3]

Moreover, additional protection is provided to an

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[3]In fact, T.C.'s Used Cars' initial position was that Progressive Classic failed to provide forty-five days notice of its intent not to renew Mr. Daniel's policy. (Compl., ¶ 7.) By the time summary judgment motions were filed, T.C.'s Used Cars apparently realized that Progressive Classic had offered to renew Mr. Daniel's policy, but he had not accepted that offer. T.C.'s Used Cars then changed tactics, arguing that the offer to renew created a new policy and Progressive Classic was required to give ten days notice prior to cancelling the "new" policy.

insured who has had a policy in existence for two years or more. In such instances, "[a]n insurer may not fail to renew an outstanding automobile liability or physical damage insurance policy which has been in existence for two consecutive years or longer" except for certain specified reasons. W. Va. Code §33-6A-4(b). If, as T.C.'s Used Cars urges, a policy renewal results in the "initial issuance" of a policy, the protections afforded to insureds by W. Va. Code §§33-6A-4(a) and (b) would be meaningless. There would never be renewal of an existing policy and the security afforded to an insured under W. Va. Code §33-6A-4 would never be available.

It is W. Va. Code §33-6A-4(e) which governs in this case, not W. Va. Code §33-6A-1(e)(7). W. Va. Code §33-6A-4(e) controls situations, such as in the instant case, where the insured did not accept the offer to renew, but instead allowed the policy to expire:

> (e) Notwithstanding the provisions of subsection (a) of this section, the insurer shall reinstate any automobile liability or physical damage insurance policy that has not been renewed due to the insured's failure to pay the renewal premium when due if:
> (1) None of the other grounds for nonrenewal as set forth in this section exist; and
> (2) The insured makes an application for reinstatement within forty-five days of the original expiration date of the policy. If a policy is reinstated as provided for in this paragraph, then the coverage afforded shall not be retroactive to the original expiration date of the policy: *Provided*, That such policy shall be effective on the reinstatement date at the current premium levels offered by the company and shall not be afforded the protections of this section relating to

> renewal of an outstanding automobile liability or physical damage insurance policy that has been in existence for at least two consecutive years.

In this case, after Mr. Daniel failed to accept Progressive Classic's offer to renew his policy, his policy expired. Thereafter, within forty-five days of the "original expiration date," the policy was reinstated with a lapse in coverage from February 23, 2007, the date of expiration, to March 1, 2007, the date of reinstatement. (See Ex. D, Burton Aff.) *See Pennington v. Allstate Ins. Co.*, 202 W. Va. 178, 180, 503 S.E.2d 267, 269 (1998) (W. Va. Code §33-6A-4 "makes mandatory that once an initial policy has lapsed, any renewal policy begins coverage on the renewal date.")

Tellingly, not only does W. Va. Code §33-6A-4(e) explicitly reference the protections provided to insureds by W. Va. Code §33-6A-4, this Court also has recognized the benefits conveyed by renewing an automobile liability insurance instead of applying for a new policy at the end of each policy period. In *Horace Mann Insurance Company v. Shaw*, 175 W. Va. 671, 337 S.E.2d 908 (1985), this Court emphasized that W. Va. Code §33-6A-4 provides "renewal protection" to insureds. In *Horace Mann*, the insurer had a practice of issuing a new policy when an insured acquired an additional or replacement vehicle. *Id.* at 672, 337 S.E.2d at 910. As a result, the insurer argued that

the protections of W. Va. Code §33-6A-4 did not apply to the new policies until they had been in effect for two years.

This Court disagreed, noting that the provisions of W. Va. Code §33-6A-4 "evidence an obvious Legislative intent to afford an insured protection, under certain circumstances, from an insurer's nonrenewal of an automobile liability or physical damage insurance policy." [Footnote omitted.] *Id.* at 674-75, 337 S.E.2d at 912. Likewise, in *Burrows v. Nationwide Mutual Insurance Company*, 215 W. Va. 668, 600 S.E.2d 565 (2004), this Court rejected the insured's argument that she was a new applicant for a policy when she advised Nationwide that her mother was to be removed as an insured from the existing policy.

Instead, the *Burrows* Court continued the Court's practice of recognizing the protections and benefits afforded by renewal of an existing policy:

> Although the terms of the Nationwide policy clearly allow any insured to request the issuance of a new policy at any time, we cannot equate the removal of a named insured from a policy with an actual request that a new policy be issued. Moreover, there are specific monetary and contractual reasons why it is preferable for insureds in many situations to continue their insurance coverage under an existing policy rather than to apply for a new policy. These factors include premium discounts and a policy of first-time accident forgiveness that are extended to long-term insureds, as well as a prohibition against cancellation and nonrenewal. Consequently, in many circumstances it may not be prudent for a policy holder to request or come under the terms of a separate policy. [Footnote omitted.]

Id. at 676, 600 S.E.2d at 573.

The specific statutory provisions guaranteeing certain protection to insureds who renew their automobile liability insurance policies, together with this Court's decisions reinforcing those statutory safeguards, refutes T.C.'s Used Cars' unconvincing argument that no distinction exists between the "initial issuance" of a policy and the renewal of an existing policy. The distinction is real, recognized both by the Legislature and by this Court. The lower court overlooked these principles when it erroneously held that Progressive Classic's offer to renew an existing policy resulted in the issuance of a new policy, thereby triggering the requirements enunciated in *Conley* relating to new policies and the requirement of W. Va. Code §33-6A-1(e)(7) relating to cancellation of policies for failure of consideration upon initial issuance of the policy.

Mr. Daniel did not pay the renewal premium. Thus, his policy expired at the end of the policy period. *See* W. Va. Code §33-6A-4(e). Because the policy expired, there was no policy in effect which could be cancelled and the statutory provisions relating to cancellation simply cannot and do not apply.

II. An offer to renew an existing automobile liability insurance policy does not result in the formation of a new contract of insurance.

T.C.'s Used Cars' theory that a new policy of insurance was created when, on January 29, 2007, Progressive Classic provided Mr. Daniel with a renewal bill, a Renewal Declarations

Page and a certificate of insurance for a new policy period, is patently incorrect. There is no authority to support the proposition that providing an insured with an offer to renew his policy, including providing a premium notice and documents reflecting what the new policy period will be in the event the policy is renewed, creates a new contract of insurance.

In an attempt to bolster its argument that providing documents relating to renewal, including the certificate of coverage which the insured is required to carry in the insured vehicle, pursuant to W. Va. Code §17D-2A-4, results in the formation of a new contract of insurance, T.C.'s Used Cars relies heavily on *Dairyland Insurance Company v. Conley*. *Conley* is, however, readily distinguishable from the circumstances of the instant case.

First, in *Conley*, the insured completed and signed an application for insurance on August 15, 2001. *Id.* at 254, 624 S.E.2d at 601. Coverage was bound at that time, for the application stated "'[c]overage will be bound no earlier than the date and time you sign below[.]'" *Id.* Thereafter, the insurer advised the insured that her policy had been rescinded due to the fact her check for the initial premium had been dishonored by the bank. *Id.* at 254-54, 624 S.E.2d at 601-02.

Thus, two major distinctions readily are apparent between *Conley* and the instant case. Although in the instant

case, Mr. Daniel had coverage for the policy period of August 23, 2006, to February 23, 2007, Progressive Classic did not bind coverage for the next policy period. Likewise, unlike the insurer in *Conley*, Progressive Classic did not attempt to retroactively rescind a policy that was in force. Inasmuch as the policy expired there was no contract in effect for Progressive Classic to rescind.

Second, the *Conley* Court observed that the insurer, unlike Progressive Classic in this case, had:

> [M]ade repeated representations to Ms. Conley that automobile liability coverage was binding upon the company on August 15, 2001. The insurance application, the declarations page, the certificate of insurance, and the insurance cards issued by West Virginia National, all indicated that coverage started on August 15, 2001. These representations made to Ms. Conley would be construed by any reasonable, prudent insurance consumer to mean that a policy had been issued and was effective on that date.

Id. at 266, 624 S.E.2d at 613.

The distinctions again are readily apparent. Not only did Progressive Classic not bind coverage, but Progressive Classic informed Mr. Daniel, **on two separate** occasions, that if he desired to renew his policy for the next policy period of February 23, 2007 to August 23, 2007, he needed to pay the renewal premium before the renewal policy would be in effect. (See Ex. D, Burton Aff.)[4]

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[4]Progressive Classic sent Mr. Daniel a renewal notice on January 29, 2007 and a Renewal Reminder on February 9, 2007.

These repeated and unequivocal warnings to Mr. Daniel that payment of the renewal premium was necessary in order to continue the policy for the new policy period would be "construed by any reasonable, prudent insurance consumer to mean that" the renewal policy would only be effective if the renewal premium was paid. No "reasonable, prudent insurance consumer" could believe that coverage existed absent the payment of the renewal premium and Progressive Classic made no such representation, through a binder or otherwise. Simply providing, as a matter of convenience, the certificate of insurance pursuant to W. Va. Code §17D-2A-4 does not create an insurance contract.

T.C.'s Used Cars' attempt to distinguish decisions from other jurisdictions wherein the respective courts held that providing renewal documents to an insured did not result in the renewal of the policy and, therefore, did not trigger statutory cancellation requirements is unpersuasive. For example, T.C.'s Used Cars' assertion that the Court's decision in *Adamson v. State Farm Mutual Automobile Insurance Co.*, 676 So.2d 227 (La. Ct. App. 1996), is of no moment because Louisiana law does not require insurers to issue certificates of insurance does not withstand scrutiny.

Both documents informed Mr. Daniel that without payment of the renewal premium, his policy would expire on February 23, 2007. (See Ex. D, Burton Aff.)

In *Adamson*, the Court noted that simply because the insurer issued an insurance card to the insured, in anticipation of renewal of the policy, did not mean that a policy was in effect when the insured failed to pay the renewal premiums. According to T.C.'s Used Cars, Louisiana's statute requiring an identification card is so different from W. Va. Code §17D-2A-4, that *Adamson* provides no guidance.

In actuality, La. Rev. Stat. §32:863.1 is remarkably similar to W. Va. Code §17D-2A-4, as it requires that insureds carry certificates of insurance in their vehicle and requires much of the same information be provided:

> A. No owner or lessee of a self-propelled motor vehicle registered in this state, ... shall operate or allow the operation of such vehicle upon any public road, street, or highway in this state unless there is contained within the vehicle one of the following documents evidencing that the motor vehicle is in compliance with R.S. 32:861 relative to compulsory motor vehicle liability security:
> (1) A certificate of insurance. "Certificate" means the written evidence of motor vehicle liability insurance as defined in R.S. 32:900 that is in the form of one of the following:
> (a) An identification card issued by an insurer to its insured which shall contain the following information:
> (i) The name and address of the insurance company.
> (ii) The insurance policy number.
> (iii) A description of the motor vehicle insured under the policy.
> (iv) The effective date and the expiration date of the policy.
> (v) The name of any person who is excluded from coverage as authorized by R.S. 32:900(L).
> (b) A motor vehicle liability insurance policy or a duplicate original thereof.
> (c) A motor vehicle liability insurance policy binder or a duplicate original thereof.

La. Rev. Stat. §32:863.1.

Comparison with W. Va. Code §17D-2A-4 reveals that both statutes require proof of financial responsibility through certificates of insurance, which the Louisiana statute defines to include an identification card from the insurer containing virtually the same information required under W. Va. Code §17D-2A-4. Given the similarities between the statutes, the *Adamson* Court's conclusion that the furnishing of an insurance card did not provide proof that the policy was renewed is instructive. *Id.* at 233. The Court observed "identification cards are provided to the insured to fulfill his obligation under LSA-R.S. 32:863.1, not to acknowledge actual renewal of the policy. Generally, identification cards are issued in anticipation of renewal and are sent to the insured with the renewal notice or sometime shortly after the notice is sent." *Id.*

The *Adamson* Court reached the conclusion that this Court should reach -- when a policy expires by its very terms due to the insured's failure to pay the renewal premium, the statutory requirements relating to cancellation do not apply:

> However, when a policy expires from the running of its term, it is not being disrupted, but is instead dying a natural death. *Green v. McCollum,* 535 So.2d at 9. As a result, the issue presented is one which deals with the **renewal** of a policy rather than the **cancellation** of one. In such instances, the statutory provisions regarding renewal are applicable. ...The jurisprudence is clear that, when an insured purchases a policy, he is or should be aware of the term of that policy. He has no right to expect that that policy

> will continue in effect until he decides to pay another premium. *Green v. McCollum*, 535 So.2d at 9. In the instant case, by its own terms, plaintiffs' insurance policy was to remain in effect until July 15, 1992. By sending a renewal notice to plaintiffs on June 11, 1992, with a due date of July 15, 1992, State Farm manifested to plaintiffs a willingness to renew their policy and continue coverage through January 15, 1993, *if* plaintiffs paid the renewal premium by July 15, 1992. The renewal notice sent to plaintiffs states that, if the renewal premium was not paid by the due date of July 15, 1992, the policy would expire on that date. Thus, plaintiffs were given the option of continuing or terminating coverage. At that point, State Farm was obligated to renew the policy *only if* plaintiffs indicated their desire to renew the coverage and made payment of the premium on or before July 15, 1992. Plaintiffs' failure to make timely payment caused the policy to lapse by its own terms on July 15, 1992. [Emphasis in original.]

Id. at 233.

The same factual scenario is present in this case. Mr. Daniel's policy was to remain in effect until February 23, 2007. Progressive Classic sent a renewal notice to him, manifesting its willingness to renew his policy if he paid the renewal premium. He did not do so, his policy lapsed and no new policy was created simply because Progressive Classic expressed its willingness to renew his policy **if** he paid the renewal premium.

In attempting to distinguish *Kane v. American Insurance Company*, 52 Conn. App. 497, 725 A.2d 1000 (1999), *aff'd*, 252 Conn. 113, 743 A.2d 612 (2000), T.C.'s Used Cars simply claims that Progressive Classic provided a certificate of insurance as part of the renewal offer, whereas the insurer in

Kane only provided a copy of the policy summary, declaration page and a premium billing statement. There is no meaningful distinction and each document reflects the renewal policy period, even though the insured had not yet renewed (and in fact never renewed) the policy.

In fact, the *Kane* Court rejected the same argument posited by T.C.'s Used Cars that providing renewal documents created a new policy:

> In this case, the contract between the parties, i.e., the underlying policy of insurance, expired on July 8, 1995. Prior to that expiration date, the defendant sent Kane a letter, along with a personal automobile policy summary, declaration sheets and a policy premium billing statement. We have examined those exhibits and conclude that, absent an automatic renewal clause in the contract of insurance, what Kane received from the defendant was an offer to renew the contract of insurance, which was to be automatically terminated on July 8, 1995, unless Kane paid the required premium.

Id. at 502, 725 A.2d at 1002.

Because the policy had not been renewed by the insured, the *Kane* Court held that the statutorily mandated written notice of cancellation was not required as there was no policy in force to be cancelled. *Id.* at 503, 725 A.2d at 1003. The Court noted that the Connecticut statute requiring written notice of cancellation, like W. Va. Code §33-6A-1, was designed to assure that the insured had clear and unambiguous notice that his or her policy was being cancelled by the insurer, but that furnishing renewal documents to the insured did not create a new

policy and trigger the statutory cancellation requirements as no policy was in effect due to the insured's failure to pay the renewal premium. *Id.* at 502, 725 A.2d at 1002-03.[5]

In this case, however, not only was there no policy in force to be cancelled, but Mr. Daniel had been notified on two separate occasions that his policy would expire on February 23, 2007, if he did not pay the renewal premium. He chose not do so, even though he had been alerted by Progressive Classic that the policy would expire. Therefore, the policy expired. Progressive Classic could not have cancelled the policy for it expired on February 23, 2007, and there was nothing to cancel.

Contrary to T.C.'s Used Cars' argument, Progressive Classic does not seek to have *Conley* overturned. Instead, Progressive Classic requests that the Court correct the lower court's misinterpretation of *Conley* and hold that when an automobile liability insurance policy expires at the end of the policy period due to the insured's failure to accept the offer

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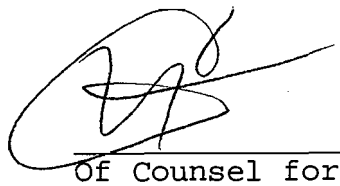
[5]In West Virginia, the same public policy is advanced by the statutory requirements for notice of cancellation -- the insured is informed the policy will terminate, giving him or her the opportunity to correct "any mistakes or pay a missed premium" or obtain a other insurance from a different company. *Conley* at 270-71, 624 S.E.2d 617-18 (Albright, J., concurring.) *See Gandee v. Allstate Indem. Co.*, 208 W. Va. 697, 542 S.E.2d 860 (2000); *Conn v. Motorist Mut. Ins. Co.*, 190 W. Va. 553, 439 S.E.2d 418 (1993). If an insurer opts not to renew a policy, then W. Va. Code §33-6A-4 addresses the public policy considerations of affording the insured time to obtain other insurance.

to renew the policy, W. Va. Code §33-6A-1 does not apply because there is no policy in existence which can be cancelled.

REQUEST FOR RELIEF

Your appellant, Progressive Classic Insurance Company, respectfully requests that this Court reverse the lower court's ruling granting summary judgment in favor of T.C.'s Used Cars, LLC and direct the lower court to enter judgment in favor of Progressive Classic Insurance Company and against T.C.'s Used Cars, LLC.

Respectfully submitted,



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v. NO.: 34769

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, of counsel for appellant, Progressive Classic Insurance Company, does hereby certify that the foregoing Reply Brief on Behalf of Progressive Classic Insurance Company was this day served upon the following by mailing a true copy of the same this date, postage prepaid, to:

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Done this 21st day of May, 2009.

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