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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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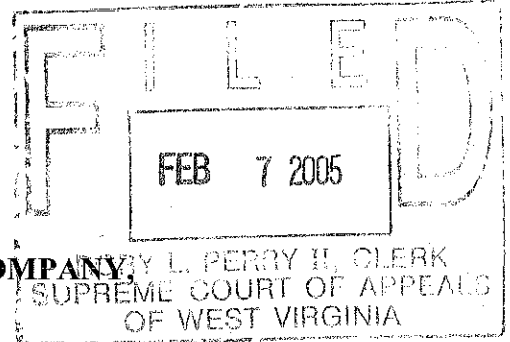
JENNIFER HOLLOMAN,

Appellant,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee.



*From Proceedings in the Circuit Court of
Greenbrier County, West Virginia
Civil Action No. 02-C-115*

**BRIEF OF *AMICI CURIAE*
PROGRESSIVE CLASSIC INSURANCE COMPANY,
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
STATE AUTO MUTUAL INSURANCE COMPANY,
WESTFIELD INSURANCE COMPANY AND HARTFORD INSURANCE
COMPANY OF THE MIDWEST
ON CERTIFIED QUESTIONS**

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I. INTRODUCTION

Your *amici*, Progressive Classic Insurance Company, State Farm Mutual Automobile Insurance Company, State Auto Mutual Insurance Company, Westfield Insurance Company and Hartford Insurance Company of the Midwest, are insurers who provide insurance to the citizens of West Virginia. Each have a strong interest in the application of legal principles which control the insurance industry in West Virginia. This Court's decision on the certified questions will have broad public significance on the insurance industry in this State and will directly impact litigation involving these insurers.

On July 9, 2004, the Circuit Court of Greenbrier County (Judge Frank E. Jolliffe, presiding) certified the following two questions to this Court:

- 1) Is application of the doctrine of collateral estoppel appropriate in the present action based upon the adjudication in *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996), upholding the finding that Nationwide Mutual Insurance Company violated West Virginia Code § 33-11-4(9)? and
- 2) Do public policy concerns, i.e., the desire to encourage remedial action(s) by defendants, bar application of the doctrine of collateral estoppel in this matter, based on *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996)?

The lower Court answered "no" to the first question and "yes" to the second question. The Circuit Court did not commit error in either ruling and the decisions of the lower Court should be affirmed.

II. FACTUAL BACKGROUND

The facts pertaining to this appeal have been fully set forth in the Stipulated Statement of Facts contained in the Petition for Appeal. Accordingly, your *amici* will not restate the facts, but hereby adopt and incorporate the facts as set forth in the Petition for Appeal. Because of the significance and public policy concerns implicated by Judge Jolliffe's rulings, your *amici* submit this brief on the certified questions.

III. NON-ASSIGNMENT OF ERROR

Any findings of an insurance company's general business practice should be limited to the unique facts of a particular case and one jury's findings without having a preclusive effect on future cases and other juries. Thus, collateral estoppel should not be applied and the rulings of the lower Court on both certified questions should be affirmed.

IV. STANDARD OF REVIEW

"The appellate standard of review of questions of law which are answered by a circuit court and which are certified by a circuit court is *de novo*." Syl. Pt. 2, *Charter Communications VI, PLLC v. Community Antenna Service, Inc.*, 211 W.Va. 71, 561 S.E.2d 793 (2002)(citing Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996) and Syl. Pt. 2, *Keplinger v. Virginia Elec. & Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000)).

V. ARGUMENT

The present case includes allegations that the insurance company violated West Virginia Code § 33-11-4(9)(f). This section states in pertinent part:

(9) Unfair claims settlement practices. - No person shall commit or perform with such frequency as to indicate a general business practice any of the following: . . .

(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.

The statute does not define “frequency,” nor does it define “general business practice.” In the instant case, the appellant would have this Court adopt her argument that because the jury in *Dodrill* found that the insurer had committed violations of the Act, the appellant can now use that fact-based holding to preclude Nationwide from ever again litigating allegations of violating the Act as to “frequency” and/or “general business practice.” This argument is illogical.

It is well settled that “[m]ore than a single violation of W. Va. Code § 33-11-4(9) must be shown in order to meet the statutory requirement of an indication of ‘a general business practice,’ which requirement must be shown in order to maintain the statutory implied cause of action.” Syl. Pt. 3, *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), *overruled on other grounds*, *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994)).

The certified questions before this Court relate directly to the evidence required to establish a “general business practice,” specifically, whether a prior finding that an insurance company has violated the Act should thereafter preclude that insurance company from relitigating violations of the Act in other actions which are based upon unique sets of facts. Your *amici* submit that it should not. Such facts must be determined by a fact-finder, not by the doctrine of collateral estoppel.

**A. COLLATERAL ESTOPPEL SHOULD NOT BE APPLIED TO INSURANCE
“BAD FAITH” LITIGATION**

“Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause

of action between parties of the first and second suit.” Syl. Pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983).

To successfully assert the doctrine of collateral estoppel, the asserting party must establish that four conditions have been met: 1) the issue decided in the first action must be identical to the one presented in the subsequent action; 2) there must have been a final adjudication on the merits in the first action; 3) the party against whom the doctrine is invoked was a party or in privity with a party to the first action; and 4) the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issue in the first action. *Haba v. Big Arm Bar and Grill, Inc.*, 196 W.Va. 129, 133, 468 S.E.2d 915, 919 (1996)(citing Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). While a stranger or non-party to the first action may invoke the doctrine in a subsequent action, that stranger to the prior action does **not** have an automatic right to collateral estoppel, “[b]ecause the right to utilize collateral estoppel depends on the **peculiar facts** of each case.” *Laney v. State Farm Mut. Auto. Ins. Co.*, 198 W.Va. 241, 246, 479 S.E.2d 902, 907 (1996)(citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *Conley*, 301 S.E.2d at 224 (emphasis added)). This Court has established that when a stranger to the prior action invokes the doctrine of collateral estoppel, the trial Court must first make several inquiries as to the appropriateness of such attempts. Specifically, the Court must consider:

- (1) whether the issues presented in the present case are the same as presented in the earlier case;
- (2) whether the controlling facts or legal principles have changed substantially since the earlier case; and
- (3) whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.

It should be noted that the trial court is vested with broad discretion in determining when to prevent relitigation of an issue by enforcing collateral estoppel and rests upon a number of factual predicates. *Id.* (citing *Parklane*, 439 U.S. at 331).

The *Conley* Court also delineated as to whether the plaintiff is asserting the issue of collateral estoppel against a defendant (“offensive” use of collateral estoppel) or whether the defendant is asserting the issue against the plaintiff (“defensive” use of collateral estoppel). The case at bar is an attempt at offensive use of collateral estoppel. In West Virginia, offensive use of collateral estoppel is generally disfavored. *Tri-State Asphalt Products, Inc. v. Dravo Corp.*, 186 W.Va. 227, 412 S.E.2d 225 (1991)(citing *Conley*, 301 S.E.2d at 223-24). Offensive collateral estoppel is disfavored, especially when the party asserting the doctrine is a stranger to the first action, due to the fact that the defending party’s constitutional due process rights might be ignored. *Braxton v. Matthews*, 883 F.Supp. 1068, 1070 (S.D. W.Va. 1995).

1. The *Conley* factors dictate against application of collateral estoppel.

Considering the *Conley* factors leads to the conclusion that collateral estoppel is not to be applied in the manner now sought by the appellant. The appellant is seeking to utilize the prior *Dodrill* verdict against Nationwide to lessen her evidentiary burden. First, the issues presented in *Dodrill* are not the same as those presented herein. *Dodrill* involved a third-party lawsuit against a policyholder and his insurance company which stemmed from an automobile accident. The similarity of *Dodrill* with the case *sub judice* ends there. Upon review of the *Dodrill* decision, it is very apparent that this Court placed emphasis on the underlying facts and claims handling of Mr. *Dodrill*’s claim. Of additional importance to this Court was the instruction given to the *Dodrill* jury. The *Dodrill* Court very narrowly concluded:

The foregoing is not intended to state exhaustively the factors which may have been considered or which should have been considered or the full range of inferences the jury might properly have drawn from the facts before it. However, from our review of the entire record, we do believe that the evidence would support a conclusion that, during the **negotiation process** outlined above, Nationwide violated W. Va. Code § 31-11-4(9) by failing in good faith, and on numerous, separate occasions, to effectuate a prompt, fair and equitable settlement of the Dodrill claim on which liability had become reasonably clear. We also believe that the evidence would support the conclusion that such violations occurred with such frequency during the negotiation process in the Dodrill claim that a general business practice was indicated. In reaching this conclusion, we rely, as did the trial court below, on the applicable decisional and statutory law which we have here reviewed, the instruction given by the trial court, and the evidence in the record . . .

Id., 491 S.E.2d at 12 (emphasis added).

It was the **negotiation process** of the Dodrill claim which lead to the jury's result. Negotiation of Mr. Dodrill's claim could only have been based upon the peculiar facts and circumstances of his automobile accident and the claim he was presenting against the Nationwide insured. Mr. Dodrill's claim is in no way implicated in Ms. Holloman's claim and a jury in this matter will be required to consider Nationwide's negotiation of Ms. Holloman's claim. Likewise, any jury in a "bad faith" case against an insurer will be required to consider, *inter alia*, the negotiation of any particular claimant's claim. That negotiation, however, will be based upon individual facts and circumstances. Thus, the doctrine of collateral estoppel should not be applied to make a blanket finding of a general business practice of an insurer when the finding is based upon a factual predicate not presented in the subsequent claim.

The second *Conley* factor is also missing in that the controlling facts differ from case to case against an insurance carrier. Moreover, legal principles and claim handling activities change from case to case. To adopt the appellant's position is to deprive an insurance carrier of any

benefit of improving its claim handling practices which is contrary to the letter and intent of the Unfair Claims Settlement Practices Act.

In addition, the third *Conley* factor dictates against the application of collateral estoppel. The *Conley* Court vested trial courts with broad discretion when considering the application of collateral estoppel and specifically instructed that special circumstances can warrant the enforcement of a prior judgment unfair. Special circumstances were broadly defined by the *Conley* Court citing Section 28 of the Restatement (Second) of Judgments (1982). The Restatement identified a series of special circumstances, not the least of which is public policy. The Restatement identifies as a special circumstance instances in which there is a “clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action. . .”¹

A closer inspection of cases in which the doctrine has been applied is helpful to understanding the circumstances in which collateral estoppel ought to be applied. For example, in *Haba*, collateral estoppel was applied to two separate lawsuits arising from one set of facts. Andrew Haba, a college student, became intoxicated at a bar. Upon leaving the first bar, he parked his car on the side of the road and attempted to walk across the road to a second bar. Unfortunately, while crossing the road, Haba was struck by a vehicle and killed. A passenger in

¹ A specific special circumstance may now exist based upon this Court’s recent holding in *Taylor v Nationwide Mut. Ins. Co.*, 214 W.Va 324, 589 S.E.2d 55 (2003), which held that adjusters could be individually liable in a “bad faith” action. If collateral estoppel is applied, any adjuster named in a future suit would be deprived of the right to due process to his or her day in court to litigate issues concerning the general business practice of the company which could arguably be imputed if the adjuster was not a party to the prior case in which plaintiffs are attempting to apply collateral estoppel. For example, no adjuster was a named defendant in *Dodrill*. If this Court were to adopt appellant’s argument, all adjusters of Nationwide could now be foreclosed from their day in court.

that vehicle was also killed. Two lawsuits were filed as a result of the one accident. The first suit was filed on behalf of the estate of the deceased passenger. The second suit was filed on behalf of the Haba estate. The two lawsuits stemming from the single accident were not consolidated. The case filed on behalf of the estate of the deceased passenger was tried first. Prior to trial, the personal representatives of the Haba estate were named defendants in the first suit. The jury determined that Haba had been 80% at fault. The defendants in the Haba lawsuit immediately filed motions for summary judgment invoking the doctrine of collateral estoppel. Finding that the parties had a full and fair opportunity to litigate all relevant issues, this court found that Haba's claim was barred by collateral estoppel. *Id.*, 468 S.E.2d at 919.

The case *sub judice* is inapposite of the *Haba* case because the two lawsuits in *Haba* involved one set of facts. In the present case, the appellant is asking the court to apply collateral estoppel based upon a suit which was adjudicated more than a decade ago and, more importantly, which was tried upon distinct and separate facts. In addition to the uniqueness of the facts of the present case, there are special circumstances that would warrant the conclusion that application of collateral estoppel is prejudicial and unfair.

2. Special circumstances and due process requires that collateral estoppel not be applied.

To permit a finding by one jury based upon the particular facts of one case to have a preclusive effect on future cases would constitute a clear violation of due process. It would deny the carrier its opportunity to be heard upon its rights. Likewise, this would apply to all other carriers once one verdict against a carrier in one jurisdiction based upon one set of facts is returned. In addition, any remedial measures taken by an insurance company in its claims

handling procedures would be for naught if the doctrine of collateral estoppel precludes the company from offering evidence of remedial measures at a subsequent hearing on the merits.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Unfair Claims Settlement Practices Act (UCSPA) is founded on protecting the public and encouraging fairness in the insurance industry, and it is patently unfair and prejudicial to forever preclude an insurance company from litigating UCSPA claims and whether or not its conduct constitutes a general business practice simple because of one finding. This is a particular situation that demands the procedural protection afforded by due process. To accept appellant’s argument deprives every insurance carrier of the right to try cases filed against it in West Virginia - regardless of merit or the lack thereof - for fear that any one verdict shall forever define the business practices of the company.

An insurance carrier is no different than any other litigant and should be afforded its day in court with the right to a full and fair trial on the merits of any individual claim before the Court or jury. Blanket application of collateral estoppel, however, prohibits this fundamental right and seems to apply only to insurance carriers because of the inclusion of “general business practice” language in W. Va. Code § 33-11-4(9). Thus, a closer inspection of what should be deemed to constitute a general business practice of an insurer is necessary. The *Jenkins* and *Dodrill* Courts both held that more than a single violation of the Act is necessary. However, this Court has never definitively defined what is necessary to establish a general business practice qualitatively or quantitatively. The *Dodrill* Court held that the “focus” would consider acts that would “tend to show frequent and rather general” violations of the Act. *Id.*, 491 S.E.2d at 13.

Likewise, the *Dodrill* Court held that the alleged misdeeds of a single adjuster in a single claim would not, standing alone, define the business practices of an insurer. Rather, the *Dodrill* Court called for evidence that would demonstrate multiple violations of the statute that are “sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a ‘general business practice...’” *Id.*, 491 SE.2d at 13.

Ultimately, the *Dodrill* Court reviewed evidence of a single claim and upheld the jury’s finding of multiple violations sufficient to establish a general business practice. The ruling, however, is inconsistent with the Court’s own definition of what constitutes a “general business practice.” Such term connotes violations with sufficient frequency as to be of statistical relevance. A few violations in a single claim file can not rise to such statistical relevance. Moreover, as literally hundreds of thousands of claims are adjusted in West Virginia annually, the handling of but one claim cannot demonstrate the general business practice of any one company. To that extent, *Dodrill* should be overruled.

In addition to the lack of any statistical relevance, the Act is designed to protect consumers in a blanket fashion. To permit the potential mishandling of a single claim to define the business practices of a company with future application also deprives the company of ever successfully applying its claim handling practices on a company-wide basis. It is the company’s philosophy of handling claims and the overall manner in which it handles claims that the statute is designed to regulate. To permit the handling of a single claim to be used against an insurer in perpetuity is detrimental to the real intent of the statute.

Insurance carriers strive daily to properly train and manage adjusters to comply with the Act and the regulations promulgated thereunder. Insurers put into place claim handling criteria

designed to comply with the Act and regulations overall. If, however, a single claim or a finding of a single jury under an isolated set of facts can be used offensively when future claim handling is challenged, such actually deprives insurers from ever changing or attempting to improve claim handling practices. The trial Court recognized this inequity when it considered the affidavit of Nationwide's director of casualty claims for West Virginia which discussed changes after the *Dodrill* decision. Nationwide is not unique in that regard, as all insurers change claim handling procedures in an ever evolving legal landscape so as to comply with the law and to improve customer service to the public. Insurance carriers constantly monitor claim handling procedures and strive to improve the quality of claim handling for the benefit of insureds and claimants. If one verdict is to be used against a carrier going forward there is no incentive to ever change or improve upon the claim handling activity. Moreover, there is no incentive to continue in expensive training and monitoring of claim representatives because the carriers will have been pre-judged on their claim handling. This is again contrary to the letter and intent of the statute.

It appears that only in the realm of insurance "bad faith" litigation is the specter of the offensive use of collateral estoppel so daunting. To permit the application of collateral estoppel to vastly different fact scenarios clearly violates West Virginia public policy. It is the stated intent of the Legislature and has been repeatedly set forth by this Court that the intent of W. Va. Code § 33-11-4 is to protect insurance consumers - whether it be insureds against whom claims are made or claimants asserting claims for damages allegedly caused. Both have a vested interest in the prompt and fair resolution of claims. Both have a vested interest in fair claim handling and in the constant monitoring and improvement of such activities by insurance carriers. If carriers, however, are deprived of the right to test the validity of their claim handling activities, such

interests would be undermined to the detriment of all insurance consumers in the State of West Virginia.

VI. CONCLUSION

The Unfair Claims Settlement Practices Act was designed to insure good claim handling. It was designed to protect those who make claims and those against whom claims are made. It was not designed to punish an insurance carrier when one jury under an isolated set of facts finds violations in the handling of a single claim. Such punitive application of the Act should be prohibited by this Court.

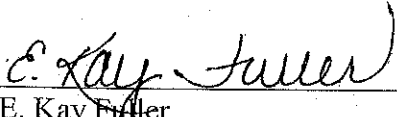
WHEREFORE, your *amici*, Progressive Classic Insurance Company, State Farm Mutual Automobile Insurance Company, State Auto Mutual Insurance Company, Westfield Insurance Company and Hartford Insurance Company of the Midwest, respectfully request that this Court affirm the rulings of the Circuit Court of Greenbrier County in its answers to the two certified questions presented.

Respectfully submitted,

**PROGRESSIVE CLASSIC INSURANCE
COMPANY, STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,
STATE AUTO MUTUAL INSURANCE
COMPANY, WESTFIELD INSURANCE
COMPANY and HARTFORD INSURANCE
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CERTIFICATE OF SERVICE

I, E. Kay Fuller, Counsel for *Amici Curiae*, Progressive Classic Insurance Company, State Farm Mutual Automobile Insurance Company, State Auto Mutual Insurance Company, Westfield Insurance Company and Hartford Insurance Company of the Midwest, hereby certify that I served a true copy of the foregoing *Brief of Amici Curiae on Certified Questions* upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 4th day of February, 2005:

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