

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JENNIFER HOLLOMAN,

Appellant/Plaintiff,

v.

NO. 32286

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee/Defendant.

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FROM THE CIRCUIT COURT OF  
GREENBRIER COUNTY, WEST VIRGINIA

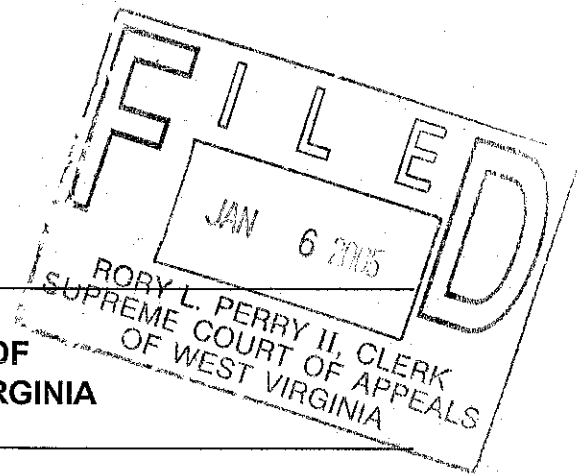
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BRIEF OF APPELLANT ON CERTIFIED QUESTIONS

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BRIEF OF APPELLANT ON CERTIFIED QUESTIONS

I. INTRODUCTION

Appellant/Plaintiff brought this third-party bad faith claim in the Circuit Court of Greenbrier County (Hon. Frank E. Jolliffe, presiding). Appellant moved for partial summary judgment, urging that Appellee is collaterally estopped, by virtue of this Court's decision in Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997), from re-litigating whether it has violated W.Va. Code §33-11-4(f) with such frequency as to indicate a general business practice. By Order entered July 9, 2004, Judge Jolliffe certified 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 Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997), upholding the finding that Nationwide Mutual Insurance Company violated W.Va. Code §33-11-4(9); and (2) do public policy concerns, i.e., the desire to encourage remedial action(s) by insurance companies, bar application of the doctrine of collateral estoppel in this matter, based on

Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997). The Circuit Court answered the first question "No," and the second "Yes." Because the Circuit Court erred in answering each question, your Appellant is aggrieved by the July 9, 2004 Order of the Circuit Court of Greenbrier County and seeks reversal of the decision below and a remand of this matter with instructions to grant Plaintiff's partial summary judgement motion and schedule the remaining issues for trial.

## II. STIPULATED STATEMENT OF FACTS

Plaintiff was involved in a two-car accident with a Nationwide insured on May 4, 1999, in Greenbrier County, West Virginia. The underlying claim ultimately was settled for the applicable policy limits of \$25,000, shortly after Plaintiff filed suit in the Greenbrier County Circuit Court styled as Holloman v. Walton & McCormick, Civil Action No. 01-C-05. Plaintiff alleges in this action that Defendant, Nationwide, has violated W.Va. Code §33-11-4(f) by not attempting in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability was reasonably clear, and that Nationwide has violated W.Va. Code §33-11-4(f) with such frequency as to indicate a general business practice. Defendant, Nationwide, denies any liability under W.Va. Code §33-11-4(f).

Plaintiff moved for partial summary judgment, urging that Nationwide is precluded, by application of collateral estoppel (issue preclusion) pursuant to Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997), from re-litigating the issue of whether it has violated the Unfair Trade Practices Act ("UTPA") with such frequency as to indicate a general business practice. Nationwide opposed the motion, relying on the Affidavit of Danny D. Carpenter, copy attached to Certification Order as Exhibit 2 and

incorporated herein by reference.

### III. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by concluding that application of the doctrine of collateral estoppel based upon the adjudication in Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997), is inappropriate in this case.

2. The Circuit Court erred by concluding that public policy concerns, i.e., the desire to encourage remedial action(s) by insurance companies, bar application of the doctrine of collateral estoppel in this matter.

### IV. STANDARD OF REVIEW

The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*. Syll. Pt. 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996).

### V. LEGAL ARGUMENT

#### A. THE CIRCUIT COURT ERRED BY CONCLUDING THAT APPLICATION OF COLLATERAL ESTOPPEL BASED ON DODRILL V. NATIONWIDE MUTUAL INSURANCE COMPANY IS INAPPROPRIATE.

##### 1. General Principles of Collateral Estoppel.

This Court's leading decision on the issue of collateral estoppel is Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983). Conley established that the use of non-mutual collateral estoppel is permissible in West Virginia. In Syllabus Point 6 of Conley, this Court further explained that:

[w]hether a stranger to the first action can assert collateral estoppel in the second action depends on several general inquiries: Whether the issues

presented in the present case are the same as presented in the earlier case; whether the controlling facts or legal principles have changed *substantially* since the earlier case; and, whether there are special circumstances that would warrant the conclusion that enforcement of the judgment would be unfair.

(italics added for emphasis). See also, Syll. Pt. 2, Walden v. Hoke, 189 W.Va. 222, 429 S.E.2d 504 (1993); Syll. Pt. 2, Pitsenbarger v. Gainer, 175 W.Va. 31, 330 S.E.2d 840 (1985). As the following discussion will demonstrate, the application of non-mutual collateral estoppel is appropriate under the circumstances of this case.

## **2. General Principles of Third-Party Bad Faith Claim Under the UTPA.**

Pursuant to Jenkins v. J.C. Penney Cas. Ins. Co., 167 W.Va. 597, 280 S.E.2d 252 (1981), and its progeny, a plaintiff in a third-party bad faith case must prove, inter alia, that an insurance company has committed violations of the UTPA with such frequency as to indicate a general business practice. Appellee, Nationwide, was conclusively adjudicated to have violated the UTPA with such frequency as to indicate a general business practice by this Court in Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997). In Dodrill, this Court upheld a jury verdict on a third-party bad faith claim, including an award of punitive damages. Interestingly, one of the sections of the UTPA at issue in Dodrill, W.Va. Code §33-11-4(9)(f), "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," also is alleged to have been violated here.

## **3. Application of Collateral Estoppel to this Case.**

By virtue of the doctrine of collateral estoppel, Appellee, Nationwide, is barred from re-litigating the issue of whether it has violated the UTPA with such frequency as to

indicate a general business practice in the instant action. Under Haba v. Big Arm Bar & Grill, Inc., 468 S.E.2d 915 (W.Va. 1996), four conditions must be met for application of collateral estoppel. First, the issue previously decided has to be identical to the one presented in the subsequent action; clearly this requirement is met here. Second, there must have been a final adjudication on the merits in the prior action. Certainly the final adjudication by this Court in Dodrill qualifies. Third, the party against whom the doctrine is invoked must have been a party (or in privity with a party) in the prior action. The Appellee, Nationwide Mutual Insurance Company, is exactly the same company as in Dodrill. Fourth, the party against whom collateral estoppel is invoked must have had a full and fair opportunity to litigate the issue in the prior action. While Nationwide undoubtedly disagrees with the adjudication in Dodrill, it had every opportunity to fully and fairly litigate the same issue there. Consequently, collateral estoppel precludes Nationwide from contesting the issue of whether it has committed violations of the UTPA with such frequency as to indicate a general business practice. Haba, supra. See also, Liller v. Human Rights Commission, 376 S.E.2d 639 (W.Va. 1988); Mellon-Stuart Co. v. Hall, 359 W.Va. 124 (W.Va. 1987); and Conley v. Spillers, 301 S.E.2d 216 (W.Va. 1983).

#### **4. The Passage of Time is No Bar to Applying Collateral Estoppel.**

Appellant anticipates that Appellee will contend that the passage of time or time lapse between Dodrill and the instant case somehow militates against application of collateral estoppel in this matter. Appellee contended in the Circuit Court that its adjusting conduct in Dodrill was "9 to 11 years" earlier than the conduct at issue here. Disregarding for the moment that the final judgment in Dodrill (this Court's decision) pre-dated the instant

dispute by only 3 years, the mere passage of time is no basis for denying application of collateral estoppel. In Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), the U.S. Supreme Court applied collateral estoppel to bar a government contractor from collaterally attacking in federal court litigation a final adjudication on the constitutionality of a gross receipts tax by the Montana Supreme Court. In that litigation, the first decision by the Montana Supreme Court had been issued in 1973.<sup>1</sup> Thereafter, the government contractor litigated a second suit in the Montana courts, losing again in the Montana Supreme Court on collateral estoppel.<sup>2</sup> The United States then brought suit in federal District Court,<sup>3</sup> challenging the tax as unconstitutional.

The U.S. Supreme Court squarely rejected the United States' effort to re-litigate the constitutionality of the gross receipts tax, noting that applying collateral estoppel serves important public policy considerations by "protect[ing] adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." 440 U.S. at 153-54. These considerations have been recognized by this Court in Conley v. Spillers, *supra*, and certainly are applicable to the question presented here. If collateral estoppel is not applied to bar Nationwide from re-litigating the issue of having violated W.Va. Code §33-11-4(f) with such frequency as to indicate a general business practice, Appellant likewise

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<sup>1</sup>Peter Kiewit Sons' Co. v. State Board of Education, 161 Mont. 140, 505 P.2d 102 (1973) ("Kiewit I").

<sup>2</sup>Peter Kiewit Sons' Co. v. Department of Revenue, 166 Mont. 260, 531 P.2d 1327 (1975) ("Kiewit II").

<sup>3</sup>United States v. Montana, 437 F.Supp. 354 (D. Mont. 1977).

will face the expense and vexation of having to re-prove what already has been conclusively established; judicial resources will be wasted; and inconsistent decisions may be issued where no substantial change in the law or facts has been demonstrated.

Similarly in Riddick v. School Board of the City of Norfolk, 784 F.2d 521 (4<sup>th</sup> Cir.), cert. denied 479 U.S. 938 (1986), the Fourth Circuit applied collateral estoppel in a school desegregation suit, despite the passage of considerable time (10+ years) between the first and second litigations. In the first litigation, a group known as the "Beckett plaintiff class" (representing black students in the Norfolk, VA school system) had contested whether city schools had achieved "unitary" status, such as to exempt them from further federal court oversight. A U.S. District Court had concluded and found in 1975, after some 20 years of litigation, that Norfolk city schools had achieved unitary status. The Fourth Circuit ruled that a new class of black plaintiffs in 1985 was barred from re-litigating the unitary finding from 1975. Riddick v. School Board of the City of Norfolk, 784 F.2d at 531-32. Similarly in this case, the mere passage of time between the Dodrill decision and Nationwide's conduct at issue here does not exempt it from application of collateral estoppel. Also informative on the "passage of time" theory advanced by Appellee is Duquesne Slag Products Co. v. Lench, 490 Pa. 102, 415 A.2d 53 (1980). In that case, the Supreme Court of Pennsylvania held that a lapse of 28 years did not bar the application of collateral estoppel.<sup>4</sup> In Duquesne Slag Products Co., the Pennsylvania Court barred a

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<sup>4</sup>Although the Court's discussion is framed in terms of "res judicata," it is readily apparent that it was applying collateral estoppel to bar re-litigation of the same issue decided 28 years earlier.

would-be contractor from re-litigating the issue of whether bids for stone, gravel, and slag, could be required by the Commonwealth on a per ton basis, rather than a volume basis. The contractor had sought injunctive relief on the issue in 1951, and its effort to require a change in the bidding process to a volume basis had been rejected. When the same contractor sought to bring a new suit 28 years later to re-challenge the same issue regarding the bid process, the Supreme Court of Pennsylvania held that the passage of 28 years did not bar the application of collateral estoppel. 490 Pa. at 105-06, 415 A.2d at 55.

**5. Appellee Has Not Demonstrated a Substantial Change in the Facts Since Dodrill.**

Another flaw in Nationwide's analysis is that it has failed to demonstrate that it has *substantially changed* its business practices since Dodrill was decided, as contemplated by Conley v. Spillers, supra. In this regard, Appellant submits that the conclusory allegations in the Affidavit of Danny D. Carpenter (attached to Certification Order as Exhibit 2), are insufficient as a matter of law to show that "...the controlling facts or legal principles have changed *substantially* since the earlier case..." as required by Syll. Pt. 6, Conley v. Spillers, supra (italics added for emphasis). The Carpenter Affidavit fails to explain, in any specifics or particulars, how Nationwide has changed its claims adjusting practices after Dodrill. Thus, it is insufficient as a matter of law to show that the controlling facts have changed substantially since the 1997 adjudication in Dodrill. Syll. Pt. 6, Conley v. Spillers. Interestingly, Duquesne Slag Products Co. v. Lench, 490 Pa. 102, 415 A.2d 53 (1980), also is instructive on Appellee's theory that collateral estoppel should not be applied here because of "changed circumstances." Appellee contended in the Circuit

Court that "...corporations are fluid entities which are constantly changing their business practices to conform to ever changing regulations and laws. After Nationwide was found to have violated the UTPA in Dodrill, it changed its business practices in regard to claims handling to avoid future violations of the statute." Response to Plaintiff's Motion for Partial Summary Judgment, p. 9. Similarly in Duquesne Slag Products Co., supra, the plaintiff alleged that "developments in science and technology since 1951, as well as changes in government practice since 1951, demonstrate the validity of [its] present claim and its entitlement to proceed to litigate that claim [in 1979-80]." 490 Pa. at 108, 415 A.2d at 56. Appellee's theory that "corporations are fluid entities" effectively would carve out an enormous exception to the application of collateral estoppel for corporations, and many other interests and individuals. The flaw in the analysis is that precisely the same can be said for any institution—a school, a non-profit, a labor union—or for that matter any individual person--and the mere circumstance that institutions (and people) are capable of change over time does not bar the application of collateral estoppel.

**B. THE CIRCUIT COURT ERRED BY CONCLUDING THAT PUBLIC POLICY CONCERNS BAR APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL IN THIS MATTER.**

**1. The Circuit Court's Public Policy Theory is Flawed.**

The Circuit Court erred by concluding that public policy concerns, i.e., the desire to encourage remedial action(s) by insurance companies, bar application of the doctrine of collateral estoppel in this matter. Initially, it is worth noting that this "public policy" theory

advanced by Nationwide lacks any substantive legal basis.<sup>5</sup> Neither Appellee nor the Circuit Court to date have identified the precise source of the putative public policy. More importantly, this theory effectively ignores the strong public policy considerations which weigh in favor of Appellant. The purpose of the UTPA is to define "...all such practices in this State which constitute...unfair or deceptive acts or practices and...prohibit...the trade practices so defined or determined." W.Va. Code §33-11-1. See also, Cady, *et al.*, "The Law of Insurance Company Claim Misconduct in West Virginia," 101 *W.Va.L.Rev.* 1, 77-92 (1998). Insurance companies' incentive to comply in the first instance with the UTPA will be undermined considerably if, having already been adjudicated to have violated W.Va. Code §33-11-4(9) with such frequency as to indicate a general business practice, they thereafter can claim in conclusory fashion they have changed their ways, now comply with the UTPA, and thereby exempt themselves from the application of collateral estoppel. *Id.*

## **2. Appellee's Due Process Theories Lack Merit.**

Appellee advanced several "due process" theories in the Circuit Court as to why collateral estoppel is inapplicable to this case. However, these concerns are amply addressed by Syll. Pt. 8, Conley v. Spillers: "[a] fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim." Clearly, the Dodrill litigation gave Nationwide every opportunity to contest the "general business practice" finding, and this Court conclusively rejected Nationwide's appeal. Appellee's other "due

process" theories simply lack merit. Appellee suggested in the Circuit Court that the UTPA is "silent as to the application of punitive damages." However, this Court's judgment in Dodrill upheld a punitive damages verdict. Appellee further suggested that Nationwide would be subjected to "...a penalty for which they do not have any notice," Response to Plaintiff's Motion for Partial Summary Judgment, p. 15, and that such would be a "fundamental due process violation." However, Nationwide had full notice and an opportunity to defend the Dodrill case; it availed itself of that opportunity and lost. This is all the due process that is required under Syll. Pt. 8, Conley v. Spillers. Moreover, Nationwide presumably does not disavow "notice" of its claims adjusting conduct in subsequent claims.<sup>6</sup> As noted supra, Nationwide cannot now claim to be exempt from the application of collateral estoppel simply because some time has passed and it claims to have mended its ways.

## VI. CONCLUSION

In summary, the application of collateral estoppel to Appellee pursuant to Dodrill v. Nationwide Mutual Insurance Company, supra, on the issue of whether it has violated W.Va. Code §33-11-4(9) with such frequency as to indicate a general business practice is entirely appropriate under the circumstances of this case. Appellee received all the process it was due when it had a full and fair opportunity to contest the general business

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<sup>6</sup>Nor is Nationwide entitled to "...prior notice as to the...severity of punitive damages based on repetitive punishment for the same conduct." Response to Plaintiff's Motion for Partial Summary Judgment, p. 15. The severity of the punitive damages to which Nationwide may be subjected is regulated by the punitive damages jurisprudence of this Court and the U.S. Supreme Court. That is all the notice to which Nationwide (or any other defendant in any context) is entitled.

practice issue in Dodrill. Neither the passage of time since Dodrill, nor Appellee's vague and conclusory assertion it has changed its ways, militate against the application of collateral estoppel. In fact, public policy considerations militate in favor of Appellant's position. Accordingly, Appellant respectfully requests that this Court grant review of the certified questions from the Circuit Court of Greenbrier County, and reverse that Court's ruling thereon.

Jennifer Holloman,  
By Counsel



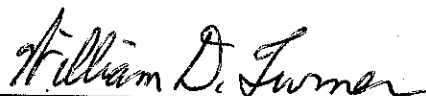
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**CERTIFICATE OF SERVICE**

I, William D. Turner, counsel for Appellant/Plaintiff, do hereby certify that I have served the foregoing Brief of Appellant on certified Questions, upon all parties by mailing a true and exact copy thereof via United States First Class Mail, postage paid, on this the 5<sup>th</sup> day of January, 2005, and addressed as follows:

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