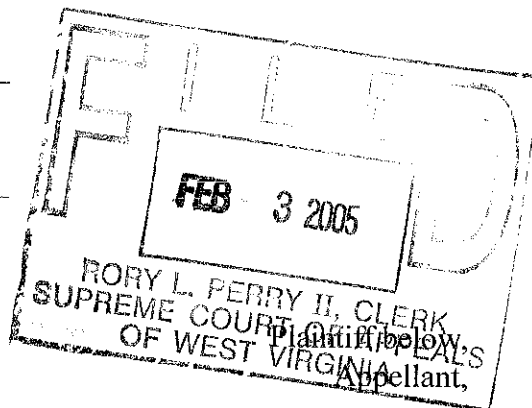


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
AT CHARLESTON

No. 32286



JENNIFER HOLLOMAN,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant below.  
Appellee.

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Appeal from the Circuit Court of Greenbrier County  
Honorable Frank E. Jolliffe, Judge  
Civil Action No. 02-C-115(J)

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**BRIEF OF APPELLEE**  
**NATIONWIDE MUTUAL INSURANCE COMPANY**  
**ON CERTIFIED QUESTION**

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## STATEMENT OF FACTS

Appellant was involved in a two-car accident with an Appellee 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 Appellant filed suit in the Greenbrier County Circuit Court styled as *Holloman v. Walter & McCormick*, Civil Action No. 01-C-05. Appellant alleges in this action that Appellee violated W.Va. Code §33-11-4(f) (sic) 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 Appellee has violated W.Va. Code §33-11-4(f) (sic) with such frequency as to indicate a general business practice. Appellee denies any liability under W.Va. Code §33-11-4(9)(f).

Appellant moved for partial summary judgment, urging that Appellee 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. Appellee opposed the motion, relying on the Affidavit of Danny D. Carpenter, copy attached to Certification Order as Exhibit 2 and incorporated herein by reference.

## APPELLEE'S STATEMENT TO MEET ALLEGED ERRORS

Appellant seeks to collaterally estop Appellee, by partial summary judgment, from litigating the issue of whether or not Appellee has violated the UTPA with such frequency as to constitute a general business, based upon the adjudication in *Dodrill v Nationwide Mutual Insurance Company*, 201 W.Va. 1, 491 S.E.2d 1 (1997). The denial of partial summary judgment by the Circuit Court was proper because:

1. The issue which Appellant seeks to establish by collateral estoppel in this action is different from the issue adjudicated in *Dodrill v. Nationwide Mutual Insurance Company*, and, therefore, Appellant has not been afforded the opportunity to fully and fairly litigate that issue;
2. The application of collateral estoppel is contrary to public policy;

### ARGUMENT

#### **I. APPLICATION OF 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 NOT APPROPRIATE IN THE PRESENT ACTION.**

Appellant asserts that Appellee is collaterally estopped from litigating the issue of whether or not Appellee violated the UTPA with such regularity as to constitute a general business practice in the present action because of this Court's affirmation of a judgment, based on a jury verdict, finding Appellee guilty of a violation of West Virginia Code §33-11-4(9)(f), in *Dodrill, supra*. Appellant's theory is that once an insurance company is found to be guilty of violation of the UTPA with such frequency as to indicate a general business practice, then any subsequent violation of the UTPA constitutes a continuation of that general business practice, regardless of any remedial actions taken by an insurance company between the original adjudication and any subsequent violation.

Appellee agrees that the four conditions which must be met before collateral estoppel may be applied are set forth in *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983). These conditions were recently referred to by this Court in *Neiswonger v. Hennessey*, 215 W.Va. 749, 601 S.E.2d 69 (2004).

However, Appellee asserts that two of the four conditions which must be met for the proper

application of collateral estoppel have not been established in the present action. First, the issue decided in *Dodrill*, supra, is not identical to the issue presented in the present action. Second, Appellee did not have the opportunity to fully and fairly litigate the issue in the present action in the *Dodrill* action, supra. Therefore, Appellant must present evidence that Appellee violated the UTPA in the present action and that Appellee has violated the UTPA with such frequency as to indicate a general business practice.

The application of collateral estoppel is discretionary with the trial court and rests upon a number of factual predicates. *Laney v. State Farm Mut. Auto. Ins. Co.*, 198 W.Va. 241, 479 S.E.2d 902 (1996). In *Laney*, the Court stated that, "Because the right to utilize collateral estoppel depends on the particular facts of each case, we have refused to recognize that a stranger to the first action has an automatic right to collateral estoppel." *Id.* at 907. The Appellant in this action is a stranger to the *Dodrill* action. Therefore, Appellant has no automatic right to the application of collateral estoppel in the present action.

In the present action, the Appellant is attempting to use collateral estoppel in an offensive manner to avoid having to prove that Appellee violated the UTPA with such frequency as to constitute a regular business practice. The offensive use of collateral estoppel is discussed in *Conley v. Spillers*, supra. In *Conley*, the Court held that the offensive use of collateral estoppel is generally disfavored in West Virginia and that the trial court has broad discretion in determining when to apply collateral estoppel. *Id.* at 224. Citing *Parklane Hosiery Co. v. Shore*, 439 U.S. at 331, 99 S.Ct. at 651, 58 L.Ed.2d at 562.

In *Pitsenbarger v. Gainer*, 175 W.Va. 31, 330 S.E.2d 840 (1985), this Court stated in the second Syllabus Point:

Whether 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. Syl. Pt. 6, *Conley v. Spillers*, 301 S.E.2d 216 (W.Va. 1983).

Although this Court, in both *Conley* and *Pitsenbarger* found that the application of collateral estoppel was appropriate because the underlying facts and legal standards had not substantially changed, these cases are persuasive in the instant matter because of the standard established by this Court. In the present matter, underlying facts have substantially changed. Appellant no longer handles claims in the same manner as it did in *Dodrill*. The actions of Appellee which form the basis of the adjudication in *Dodrill* that Appellee violated the UTPA with such frequency as to constitute a general practice, began in 1987 and continued into 1990. The alleged acts of Appellee, of which Appellant complains, began in 1999 and continued into 2001. In her Brief, Appellant states: "Appellant anticipates that Appellee will contend that the passage of time or time lapse between *Dodrill* and the instant case somehow militates against the application of collateral estoppel in this matter."<sup>1</sup> Appellee contends that the passage of time and the intervening implementation of remedial policies between 1990 and 1999, preclude the application of collateral estoppel. Appellee took actions to correct the violations of the UTPA found in *Dodrill* and to comply with the UTPA.<sup>2</sup> Appellant filed no affidavit nor presented any evidence to contradict the affidavit of Danny D. Carpenter. The remedial actions by Appellee create different controlling facts in the present action

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<sup>1</sup>See Brief of Appellant On Certified Questions at page 5.

<sup>2</sup>See Affidavit of Danny D. Carpenter.

from those in *Dodrill, supra*, and Appellant's remedial actions create special circumstances that warrant the conclusion that the application of collateral estoppel would be unfair.

Appellant's reliance on *Duquesne Slag Products Company v. Lench*, 490 Pa. 102, 415 A.2d 53 (1980) is not appropriate. The parties in that action were identical to the parties in the preceding action and the issues in each action were identical. The same is not true in the present action. The Pennsylvania Court recognized in *Duquesne Slag Products Company* that a change in circumstances could preclude the application of res judicata. *Id.* at 55, citing *Long v. Parker*, 390 F.2d 816 (3d Cir. 1968). Appellant also refers to *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979), to support the application of collateral estoppel in the present action. However, that case does not involve an issue of changed facts or circumstances.

Because Appellant implemented remedial measures after the *Dodrill, supra*, adjudication, the issue decided in *Dodrill, supra*, is different than the issue presented in this action, and, therefore, Appellant has not had the opportunity to full and fairly litigate the issue of whether or not it violated the UTPA in 1999, 2000 and 2001 with such frequency to constitute a general business practice. The *Dodrill* adjudication may be admissible at trial as evidence of a general business practice, but it should not estop Appellee from litigating that issue.

**II. THE PUBLIC POLICY TO ENCOURAGE REMEDIAL ACTION BARS 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 second certified question, "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 Mutual Insurance Company*, 201 W.Va. 1, 491 S.E.2d 1 (1997)?"

was answered by the Circuit Court in the affirmative. The Circuit Court's decision on this issue is correct. Appellant states in her Brief: "Neither Appellee nor the Circuit Court to date have identified the precise source of the putative public policy."<sup>3</sup>

Public policy may be expressed by federal and state constitutions, statutes, prior judicial decisions, common law and regulations, *Birthisel v. Tri-Cities Health Services*, 188 W.Va. 371, 424 S.E.2d 606 (1992). Certainly the due process clauses of the Fifth and Fourteenth Amendments set forth a public policy of not depriving any person "of life, liberty, or property without due process of law." U.S. Const. Amend V; Amend. XIV.

Rule 407 of the West Virginia Rules of Evidence expresses the public policy of promoting remedial action. Rule 407 provides:

When after an **event** (emphasis added), measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent measures is not admissible to prove negligence or **culpable conduct** (emphasis added) in connection with the event.

Justice Cleckley, in commenting on Rule 407 in *Handbook on Evidence for West Virginia Lawyers*, §4-7a, footnote 957, states:

As a matter of policy, it is thought wise to avoid discouraging efforts to make things better or safe (hence furthering an aim completely "extrinsic to the conduct of litigation").

Justice Starcher states in his concurring opinion in *Neiswonger v. Hennessey, supra*:

I write separately to briefly suggest a somewhat different approach to the legal issues in the instant case. Imposing legal liability can encourage public officials to demand training for law enforcement, to reduce the risk of negligence, injury and liability.

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<sup>3</sup>See Brief of Appellant On Certified Questions at page 10.

While the facts in *Neiswonger, supra*, are different from the facts in the present case, the goal suggested by Justice Starcher is the same. That goal is education of individuals to avoid harm to third parties. In *Neiswonger, supra*, Justice Starcher suggests training for police officers to avoid harm to the general public. After the *Dodrill* adjudication, Appellee implemented improved supervision and training of its claims handlers to avoid harm to claimants resulting from violation of the UTPA.

It is undisputed that there is an adjudication that Appellee committed violations of the UTPA, nine years before the actions in question, with such frequency as to constitute a general business practice. Under Appellant's theory, Appellee is collaterally estopped from litigating, at any time in the future, whether or not it violated the UTPA with such frequency as to constitute a general business practice, no matter how many years pass and no matter how many remedial measures Appellee may implement. This is contrary to the policy of encouraging "efforts to make things better" and the policy of "education of individuals to avoid harm to third parties."

### CONCLUSION

The certified questions presented arise out of the Circuit Court's denial of Appellant's Motion for Partial Summary Judgment. The partial summary judgment requested by Appellant was that Nationwide be estopped from denying in the present action that it has violated the UTPA with such frequency as to constitute a general practice. In denying that motion, the Circuit Court stated in its Conclusions of Law as follows:

5. Based on the affidavit of Danny D. Carpenter and because of the remoteness of acts forming the basis for the *Dodrill*

decision from the alleged acts in violation of the Unfair Trade Practices Act in the present action, a material issue of fact exists as to whether or not the issue decided in *Dodrill, supra*, is identical to the issue presented in the present action.

By its ruling on Appellant's motion for summary judgment and by its answers to the certified questions, the Circuit Court did not preclude Appellant from introducing the *Dodrill* adjudication into evidence at the trial of this matter, it only declined to enter partial summary judgment on the issue of Appellee's general business practices because, based on the evidence presented, the Circuit Court, in exercise of its broad discretion, found that a material issue of fact existed, which precludes the entry of summary judgment.

The application of collateral estoppel, pursuant to *Dodrill, supra*, on the issue of whether Appellee violated the UTPA with such frequency as to indicate a general business practice is inappropriate in this matter because all of the requirements of collateral estoppel have not been established and because the application of collateral estoppel on that issue will violate the public policy of encouraging remedial acts. Therefore, this Court should answer the first certified question in the negative and the second certified question in the affirmative.

Respectfully submitted this 2nd day of February, 2005.



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CERTIFICATE OF SERVICE

I, C. William Davis, counsel for Defendant/Appellee, hereby certify that on the 2nd day of February, 2005, I served the foregoing Brief of Appellee Nationwide Mutual Insurance Company On Certified Question upon William D. Turner, counsel for Plaintiff/Appellant, by depositing a true copy thereof in the United States Mail, in an envelope, postage paid, addressed to him at Crandall Pyles Haviland & Turner, LLP, 206 W. Randolph Street Lewisburg, West Virginia 24901, the last address of said attorney known to me.



\_\_\_\_\_  
C. William Davis

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