

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

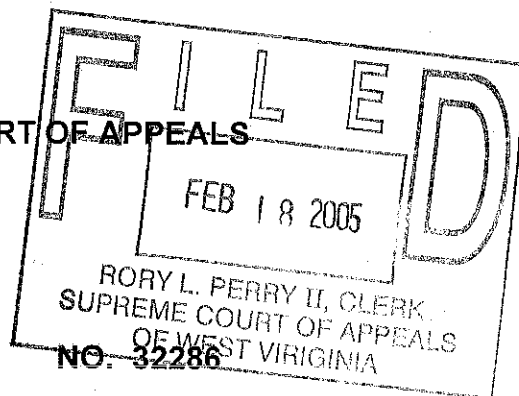
JENNIFER HOLLOMAN,

Appellant/Plaintiff,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee/Defendant.



FROM THE CIRCUIT COURT OF
GREENBRIER COUNTY, WEST VIRGINIA

REPLY BRIEF OF APPELLANT
ON CERTIFIED QUESTIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

I. INTRODUCTION 1

II. LEGAL ARGUMENT 1-6

 A. THE REASONS OFFENSIVE USE OF COLLATERAL
 ESTOPPEL IS "DISFAVORED" ARE NOT
 APPLICABLE TO THIS MATTER 1-2

 B. AMICI'S EXTREMIST AND "PARADE OF HORRIBLES"
 THEORIES SHOULD BE REJECTED 3-4

 C. APPELLEE HAS NOT DEMONSTRATED A
 SUBSTANTIAL CHANGE IN THE FACTS
 SINCE DODRILL 4-5

 D. APPELLEE HAS NO LEGITIMATE PUBLIC POLICY HERE;
 PUBLIC POLICY FAVORS APPELLANT 5-6

III. CONCLUSION 6-7

TABLE OF AUTHORITIES

Cases

| | |
|---|---------------|
| <u>Tri-State Asphalt Products, Inc. v. Dravo Corp.</u> , 186 W.Va. 227, 412 S.E.2d 225 (1991) | 1 |
| <u>Conley v. Spillers</u> , 171 W.Va. 584, 301 S.E.2d 216 (1983) | 1, 4-5, 6 |
| <u>Parklane Hosiery Company, Inc. v. Shore</u> , 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed. 552 (1979) | 2 |
| <u>Dodrill v. Nationwide Mutual Insurance Company</u> , 201 W.Va. 1, 491 S.E.2d 1 (1997) | 2, 3, 4, 5, 6 |
| <u>Haba v. Big Arm Bar & Grill, Inc.</u> , 468 S.E.2d 915 (W.Va. 1996) | 3 |
| <u>Birthisel v. Tri-Cities Health Services</u> , 188 W.Va. 371, 424 S.E.2d 606 (1992) | 5 |
| <u>Harless v. First Nat'l Bank</u> , 162 W.Va. 116, 246 S.E.2d 270 (1978) | 5 |

Statutes

| | |
|--|---|
| <u>W.Va. Code §33-11-4(9)(f)</u> | 4 |
| <u>W.Va. Code §33-11-1</u> | 6 |
| <u>W.Va. Code §33-11-4(9)</u> | 6 |

Other

| | |
|--|---|
| <u>Rule 407, W.Va.R.Evid.</u> | 5 |
| Cady, <i>et al.</i> , "The Law of Insurance Company Claim Misconduct in West Virginia," 101 W.Va.L.Rev. 1, 77-92 (1998) | 6 |

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JENNIFER HOLLOMAN,

Appellant/Plaintiff,

v.

NO. 32286

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee/Defendant.

REPLY BRIEF OF APPELLANT ON CERTIFIED QUESTIONS

I. INTRODUCTION

Appellant/Plaintiff submits this brief to respond to the theories discussed by Appellee Nationwide Mutual Insurance Company ("Nationwide"), and Amici, Progressive Classic Insurance Company, et al., ("Amici"), in their briefs.

II. LEGAL ARGUMENT

A. THE REASONS OFFENSIVE USE OF COLLATERAL ESTOPPEL IS "DISFAVORED" ARE NOT APPLICABLE TO THIS MATTER.

Appellee and Amici invoke the well-worn mantra that the offensive use of collateral estoppel is "disfavored" in West Virginia, citing Tri-State Asphalt Products, Inc. v. Dravo Corp., 186 W.Va. 227, 412 S.E.2d 225 (1991), and Conley v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (1983). However, a close examination of the authorities cited by Appellee and Amici indicates that the reasons offensive collateral estoppel is disfavored simply are not applicable here.

The notion that offensive collateral estoppel is "disfavored" has its origin in

language contained in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the U.S. Supreme Court's seminal decision first authorizing offensive collateral estoppel. The Supreme Court explained:

...defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel...creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. [internal citations omitted] Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. at 329-30. Obviously, Appellant in this case adopted no such "wait and see" approach (her case did not arise until after Dodrill). Instead, she merely seeks to invoke, by way of *partial* summary judgment, the benefit of a definitive judgment by this Court in Dodrill v. Nationwide Mutual Insurance Company, 201 W.Va. 1, 491 S.E.2d 1 (1997), that Appellee Nationwide has violated the UTPA with such frequency as to indicate a general business practice. Ironically, Appellant's effort to invoke offensive collateral estoppel here would conserve scarce judicial resources, by eliminating from trial of this case one of the essential elements of her claim which otherwise undoubtedly will consume several days' time in discovery, discovery disputes, and trial to prove. By contrast, Appellee's position would burden judicial resources in discovery; resolving discovery disputes; and trying an issue that was put to rest recently in Dodrill.

B. AMICI'S EXTREMIST AND "PARADE OF HORRIBLES" THEORIES SHOULD BE REJECTED.

Amici urge that "[t]o 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." Amici Brief, p. 8. However, Amici's extremist theory effectively would nullify the doctrine of collateral estoppel. As noted in Appellant's opening Brief, there simply is no due process problem with collaterally estopping Nationwide here--the Dodrill litigation gave Nationwide every opportunity to contest the "general business practice" finding, and this Court conclusively rejected Nationwide's appeal. Nationwide certainly had a strong incentive to develop and litigate the issue in Dodrill.

Advancing a "parade of horrors" theory, Amici urge that "...this would apply to all other carriers once one verdict against a carrier in one jurisdiction based upon one set of facts is returned." Amici Brief, p. 8. Simply stated, this theory is nonsense. In order for collateral estoppel to apply, the third element recognized in Haba v. Big Arm Bar & Grill, Inc., 468 S.E.2d 915 (W.Va. 1996), is that the party against whom the doctrine is invoked must have been a party (or in privity with a party) in the prior action. Here, the Appellee, Nationwide Mutual Insurance Company, is exactly the same company as in Dodrill, and other insurance companies are not bound by the "general business practice" finding against Nationwide in Dodrill.¹

So extreme is the position of Amici that they contend that the "...the issues

¹Amici go so far as to urge this Court to overrule Dodrill. Amici Brief, p. 10. The issue urged by Amici however, has not been briefed and is not properly before this Court in this appeal on certified questions.

presented in Dodrill are not the same as those presented herein.” Amici Brief, p. 5. This theory is completely devoid of merit. The issue on which Appellant seeks to collaterally estop Appellee here is narrow—whether Nationwide has violated the UTPA with such frequency as to indicate a general business practice.² If the issue of general business practice is not “identical” in this litigation as in Dodrill, there simply is no such thing as identity of issues.

C. APPELLEE HAS NOT DEMONSTRATED A SUBSTANTIAL CHANGE IN THE FACTS SINCE DODRILL.

Appellee continues to urge that the “...underlying facts have substantially changed,” Appellee’s Brief, p. 4, and therefore, collateral estoppel does not apply. Under Appellee’s theory, the mere passage of a calendar year presumably would provide insurance companies (or any institution or individual capable of change) with a bullet-proof defense to application of collateral estoppel. Here, Nationwide simply has failed to demonstrate that it has *substantially changed* its business practices since Dodrill was decided; under Syll. Pt. 6, Conley v. Spillers, *supra*, Nationwide must demonstrate “...the controlling facts or legal principles have changed *substantially* since the earlier case...,” (italics added for emphasis). Moreover, the conclusory allegations in the Affidavit of Danny D. Carpenter (attached to Certification Order as Exhibit 2), simply are 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.

²Also, as noted in Appellant’s opening Brief, 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,” is alleged to have been violated here.

Spillers. The Carpenter Affidavit wholly fails to detail, in any specifics or particulars, how Nationwide changed its claims adjusting practices after Dodrill.

D. APPELLEE HAS NO LEGITIMATE PUBLIC POLICY HERE; PUBLIC POLICY FAVORS APPELLANT.

In a strained effort to identify a “public policy” that is implicated by applying collateral estoppel here, Appellee has cited Birthisel v. Tri-Cities Health Services, 188 W.Va. 371, 424 S.E.2d 606 (1992). Birthisel, however, is a wrongful discharge case specifying the sources of public policy in Harless-type³ claims, and of little use to Appellee here. Undaunted, Appellee suggests that its due process rights constitute a “public policy” that would be violated by applying collateral estoppel here. However, Appellee received all the process it was due in Dodrill and had every opportunity and incentive to litigate the “general business practice” issue there. There simply is no due process problem with barring it from re-litigating precisely the same issue in this matter. Appellee also suggests that Rule 407, W.Va.R.Evid., qualifies as a “public policy.” This is a monumental and strained analytical leap however because Appellant does not seek to introduce evidence of subsequent remedial measures in this case.⁴ Rather, Appellant merely seeks to foreclose Appellee from re-litigating one of the elements of her claim--when this Court adjudicated conclusively in Dodrill that Nationwide committed the misconduct in question.

³Harless v. First Nat'l Bank, 162 W.Va. 116, 246 S.E.2d 270 (1978).

⁴Perversely, Appellee seeks to trump the adjudication in Dodrill with its own evidence of “subsequent remedial measures” in Nationwide’s claims adjusting practices. Rule 407 thus is transformed from a defendant’s shield to a sword under Appellee’s logic.

Contrary to the theory of Appellee and Amici, strong public policy considerations weigh in favor of Appellant here. The stated 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 protest in conclusory fashion they have mended their ways, now comply with the UTPA, and thereby evade the application of collateral estoppel. Id.

III. CONCLUSION

In summary, Appellee suggests that Appellant's application of collateral estoppel here would bar Nationwide from re-litigating the general business practice issue "at any time in future...no matter how many years pass and no matter how many remedial measures Appellee may implement." This is not Appellant's position. Rather, Appellant's position is that (a) the mere lapse of time (regardless of whether it is calculated as 3 or 10 years) is no bar to applying collateral estoppel against Nationwide on the narrow issue of general business practice under the circumstances of this case, and (b) Nationwide has failed to show the requisite *substantial* change in the controlling facts between Dodrill and this case. Syll. Pt. 6, Conley v. Spillers, supra. Accordingly, Appellant respectfully requests that this Court reverse the rulings below on the certified

questions.

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CERTIFICATE OF SERVICE

I, William D. Turner, counsel for Appellant/Plaintiff, do hereby certify that I have served the foregoing *Reply 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 17th day of February, 2005, and addressed as follows:

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