

IN THE SUPREME COURT OF OHIO

Kevin R. Flynn	:	Ohio Supreme Court
and	:	Case No. 06-1619
Margaret M. Flynn,	:	
	:	On Appeal from the Hamilton County
Cross-Appellees	:	Court of Appeals, First Appellate District
	:	
vs.	:	Court of Appeals
	:	Case No. C-050909
Westfield Insurance Company,	:	
	:	
Cross-Appellant.	:	

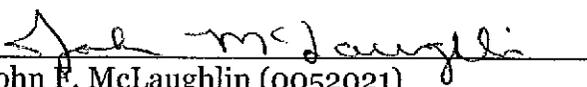
**MOTION OF KEVIN R. FLYNN AND MARGARET M. FLYNN TO DISMISS
CROSS-APPEAL OF WESTFIELD INSURANCE COMPANY**

The Flynns have discovered that Westfield Insurance Company and Westfield National Insurance Company, fellow Westfield Group companies, have taken positions contrary to the position taken by Westfield in this case. Here, Westfield claims its policy limits UIM coverage to those occupying a "covered auto." In other cases, however, Westfield and Westfield National took the opposite position - that the same policy language does not restrict UIM coverage to those occupying a covered auto. To preserve the integrity of the judicial process, Westfield should be judicially estopped from asserting conflicting positions as to what its policy means.

The Flynns only recently discovered that Westfield has taken positions contrary to the position it is taking in this case. A Motion to Dismiss is the only mechanism available to bring this to the Court's attention. Oral argument on the merits of this case is scheduled for October 10, 2007. If the Flynns prevail, this motion would be rendered moot. The Flynns do not wish to delay this Court's consideration of this case on the merits. The Flynns respectfully request this Court to consider this motion at the same time it considers the merits of the appeal and rule on this motion only if the Court deems necessary.

This motion is supported by the attached Memorandum of Law and the separately filed Affidavit of John F. McLaughlin.

Respectfully submitted,


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MEMORANDUM

I. Introduction

Westfield Insurance Company ("Westfield"), a member of the Westfield Group of property and liability insurers, denied UIM benefits to the Flynns, insisting that its policy only provides UIM benefits to those occupying a "covered auto" as defined by the policy.

But, in the prior case of *Westfield Nat'l Ins. Co. v. Farmers Insurance Exchange*,¹ out of Hancock County, Ohio, Westfield National Insurance Company, another Westfield Group Company, took the opposite position. In that case, Westfield National was seeking to recover contribution from another carrier. Westfield National represented to the Court that the same policy language at issue in this case does not restrict UIM coverage to those occupying a covered auto.

¹ Hancock County Common Pleas Case No. 2003-CV-391.

Likewise, in *Westfield Ins. Co. v. Wausau Bus. Ins. Co.*,² after making UIM payments, Westfield sought contribution from Wausau and National Union. The Wausau and National Union policy language is identical to the Westfield policy language at issue in this case. Westfield took the position that Wausau and National Union owed UIM coverage, even though the claimant was not occupying a covered auto at the time of the accident.

The policy language in all three cases is the same. The only distinguishing factor is Westfield's financial interest in the litigation. When attempting to recover funds from another carrier, Westfield represented that the policy did not require the claimant to occupy a covered auto to recover benefits. But in this case, in an effort to deny benefits to the Flynns, Westfield represents that the same policy language means a person must occupy a covered auto to qualify for benefits. Judicial estoppel prohibits this type of gamesmanship. Westfield should not be allowed to change the meaning of its policy based on its financial interest at the moment. Accordingly, the Flynns request this Court to dismiss Westfield's Cross-Appeal.

II. Westfield's policy and denial of coverage to the Flynns

Kevin Flynn was severely injured in an automobile accident. At the time of the accident, Kevin was a real estate attorney and a partner in the law firm of Griffin-Fletcher, L.L.P. ("Griffin-Fletcher"). He was also an employee of Lawyers Title of Cincinnati, Inc. ("LTOC"), a real estate title company. Griffin-Fletcher and LTOC are related businesses and share office space. The accident occurred while Kevin was in the course and scope of his employment for both Griffin-Fletcher and LTOC.

² Starke County Common Pleas Case No. 2000-CVO-2634.

Westfield issued a commercial automobile policy to Griffin-Fletcher and LTOC. The policy includes an uninsured/underinsured motorist endorsement (Westfield UM/UIM Endorsement).

The Westfield UM/UIM Endorsement defines an insured as follows:

B. Who is an insured

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

"You" is defined by the Westfield Policy as the Named Insured. The policy's Declarations page contains a Schedule of Coverages and Covered Autos. The Declarations provides that "Each of These Coverages Will Apply Only to Those Autos Shown As Covered Autos." The Symbols "02" and "08" are placed in the box associated with UIM coverage. Symbol 2 is defined as "only those 'autos' you own." Symbol 8 is defined as "only those 'autos' you lease, hire, rent or borrow."

Westfield claims that the sentence, "Each of These Coverages Will Apply Only to Those Autos Shown as Covered Autos," means that only those occupying a covered auto are entitled to UIM coverage. It is, and always has been, the Flynn's position that "you", and if "you" is an individual, any "family member", are entitled to UIM coverage whether or not they are occupying a covered auto at the time of the accident. These insureds can recover UIM benefits whenever they are entitled to recover from an uninsured or underinsured motorist, regardless of whether they are occupying a covered auto. For purposes of UIM coverage, whether a person is occupying a covered auto is significant only if the person does

not qualify as "you" or as a "family member" and is seeking coverage under Category 3 of the definition of Who Is An Insured.

III. Westfield Nat'l. Ins. Co. v. Farmers Insurance Exchange

Westfield Nat'l. Ins. Co. v. Farmers Insurance Exchange involved the availability of UIM benefits to the estate of Isaac Grose, a minor, who was killed in an automobile accident.³ Westfield National issued a personal automobile policy covering Isaac and his family.⁴ Westfield National paid \$225,000 in settlement to the estate of Isaac Grose under the UIM coverage of the policy.⁵

Farmers Insurance Exchange issued a business policy to an auto repair shop owned by Isaac's father.⁶ After Westfield National settled with the estate of Isaac Grose, Westfield sued Farmers, claiming that the Farmers policy afforded UIM coverage to the estate and that Westfield National was entitled to contribution from Farmers.⁷ The Farmers policy contained the same definition of insured as the Westfield policy in this case:

B. Who is an insured

1. You.
2. If you are an individual, any "family member."
3. Anyone else "occupying" a covered "auto" or temporary substitute for a covered auto. The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained to another "insured."⁸

³ McLaughlin Affidavit, Exhibit "A", p. 2.

⁴ McLaughlin Affidavit, Exhibit "A", pp. 2, 3.

⁵ McLaughlin Affidavit, Exhibit "A", p. 19.

⁶ McLaughlin Affidavit, Exhibit "A", pp. 3, 4.

⁷ Id.

⁸ McLaughlin Affidavit, Exhibit "D".

As with the Westfield policy in this case, the Farmers policy Declarations provided:

Each of These Coverages Will Apply Only To Those "Autos" Shown As Covered "Autos."⁹

The Farmers policy identified covered autos as owned autos subject to a compulsory uninsured motorist law.¹⁰

Westfield National filed a motion for summary judgment with the court, asserting that Farmers was obligated to provide UIM coverage.¹¹ In response, Farmers claimed that Isaac wasn't an insured because he wasn't occupying a covered auto at the time of the accident.¹² In reply, Westfield National insisted that Isaac was entitled to UIM benefits under the Farmers policy even though he wasn't occupying a covered auto at the time of the accident:¹³

The restriction which Farmers wishes to use to limit insureds under its policy to those persons in covered vehicles relates to the third paragraph of "Who Is An Insured", under the Farmers policy. There, the coverage is expanded to "anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto'." This not a case involving "anyone else". It is a case which involves people covered by the first two paragraphs of the definition of Who Is An Insured.

Describing various categories of individuals who are insureds is in keeping with the principle that uninsured (underinsured) motorist coverage is designed to protect people, not covered vehicles. *Martin v. Midwestern Group Ins. Co.* (1994) 70 Ohio St.3d 478.

As a result of the endorsement, coverage is not "limited to only those autos you own". It covers the individuals described in the definitions of "Who Is An Insured" and if a person does not fit within the first two categories, these being the named insured and if he is an individual, members of his family, then a person may be insured if that person is occupying a covered vehicle. However, everyone pertinent to this discussion of who is an insured under Farmers policy, was covered by the first two paragraphs of the definitions of "Who Is An Insured" and, the fourth paragraph, which includes as an insured

9 Id.

10 Id.

11 McLaughlin Affidavit, Exhibit "A".

12 McLaughlin Affidavit, Exhibit "B", pp. 8-10.

13 McLaughlin Affidavit, Exhibit "C", pp. 3-6.

anyone who is entitled to recover damages because of bodily injury sustained by another insured.¹⁴

In other words, Westfield National's position was opposite the position taken by Westfield in this case, arguing that anyone who qualified as "you" or as a "family member," and is injured by an underinsured motorist, is entitled to UIM coverage regardless of whether they are occupying a covered auto.

The trial court granted judgment in favor of Farmers, finding Westfield National was a volunteer.¹⁵ But in reaching this decision, the court made the predicate finding that "the insurers are proportionately liable."¹⁶ In other words, for the trial court to determine that Farmers was liable, it necessarily had to reject Farmers' coverage interpretation and accept the arguments advanced by Westfield National. Westfield National successfully appealed the trial court decision. The Court of Appeals found Westfield was entitled to contribution from Farmers and remanded the case to the trial court to determine the amount of contribution.¹⁷

IV. *Westfield Ins. Co. v. Wausau Bus. Ins. Co.*

In *Westfield Ins. Co. v. Wausau Bus. Ins. Co.*,¹⁸ Christal Webb was killed in an automobile accident caused by an underinsured motorist. Westfield, Wausau, and National Union issued automobile policies to the employers of Christal Webb and her family members.¹⁹ Each policy afforded UIM coverage. Each policy included the same definition of insured as the Westfield policy in this case:

- (1) You.

¹⁴ McLaughlin Affidavit, Exhibit "C", pp. 5, 6.

¹⁵ McLaughlin Affidavit, Exhibit "E".

¹⁶ McLaughlin Affidavit, Exhibit "E", p. 7.

¹⁷ See *Westfield Nat'l Ins. v. Farmers Ins. Exchange*, 169 Ohio App.3d 785, 2006-Ohio-6849, 865 N.E.2d 81.

¹⁸ Starke County Common Pleas Case No. 2000-CVO-2634.

¹⁹ McLaughlin Affidavit, Exhibit "G", pp. 3, 4.

(2) If you are an individual, any "family member."

(3) Anyone else "occupying" a covered "auto" or temporary substitute for covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

(4) Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."²⁰

The Declarations page of each policy provided that "Each Of These Coverages Will Apply Only To Those 'Autos' Shown As Covered 'Autos'."²¹

At the time of the accident, Christal Webb was not occupying a covered auto as defined by any of the policies.²²

Westfield acknowledged Christal Webb and her family were entitled to UIM coverage under the Westfield policy and paid \$1,400,000.00 to resolve the claim.²³ Westfield pursued contribution from Wausau and National Union. Westfield took the position that Wausau and National Union owed Christal Webb and her family UIM coverage even though Christal Webb was not occupying a covered auto at the time of the accident.²⁴ Again, this is contrary to the position taken by Westfield in this case.

V. Judicial Estoppel

Simply stated, Westfield has taken inconsistent positions as to what its policy language means, depending on its financial interest at the time. When Westfield sought to recover funds from another carrier, it represented that this policy language provided coverage, regardless of whether the insured was occupying a covered auto. But in this case, in rationalizing its denial of coverage, Westfield insists that the identical language restricts coverage to those occupying a covered auto.

²⁰ McLaughlin Affidavit, Exhibits "I", "J" and "K".

²¹ McLaughlin Affidavit, Exhibits "I", "J" and "K".

²² McLaughlin Affidavit, Exhibit "G", pp. 2, 3.

²³ McLaughlin Affidavit, Exhibit "G", p. 4.

²⁴ McLaughlin Affidavit, Exhibit "G".

Judicial estoppel prevents a litigant who has successfully taken a position in one action from taking a contradictory position in a subsequent action.²⁵ "Judicial estoppel 'preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment.'²⁶ The rationale behind this doctrine is to prevent a party from convincing one judicial body to adopt certain factual contentions and then subsequently unconscionably assert in another judicial body that these contentions were inaccurate and a different set of facts should be found.²⁷ "Judicial estoppel operates to prevent a party from insulting a court through improper use of judicial machinery."²⁸

Under Ohio law, the party being estopped must have "prior success" on the issue on which it is sought to be bound.²⁹ In *Westfield Nat'l. Ins. Co. v. Farmers Insurance Exchange*, Westfield National was successful in its construction of the Farmers policy. The trial court found Farmers proportionately liable. The Court of Appeals determined that Westfield was entitled to contribution from Farmers. This necessarily required both courts to accept Westfield National's position that the Farmers policy provided coverage for the loss.

Likewise, in *Westfield Ins. Co. v. Wausau Bus. Ins. Co.*, the Court of Appeals determined that Westfield was entitled to contribution from Wausau and National Union. This necessarily required the court to accept Westfield's position that these policies provided coverage even though the insured was not occupying a covered auto at the time of the accident. This Court ultimately reversed the decision based on *Westfield Ins. Co. v.*

²⁵ *Roberts v. Republic Storage Systems, Inc.*, 2006-Ohio-4069.

²⁶ *Id.*, citing *Teledyne Indus., Inc. v. NLRB* (6th Cir., 1990), 911 F.2d 1214, 1218.

²⁷ *Scioto Memorial Hosp. Assoc., Inc. v. Price Waterhouse & Co.*, Case No. 90AP-1124, Dec. 21, 1003, 10th App. Dist., 1993 WL 531298.

²⁸ *Id.*, citing *Konstantinidis v. Chen* (D.C. Cir., 1989), 625 F.2d 933, 938-939.

²⁹ See *Id.*

Galatis.³⁰ Christal Webb did not qualify as "you", because she was not acting within the scope of her employment at the time of the accident. Nevertheless, this did not disturb Westfield's success in its position that the Wausau and National Union policies provided coverage even though the claimant was not occupying a covered auto at the time of the accident.

Judicial estoppel applies to the party taking inconsistent positions and those in privity with that party.³¹ Westfield Insurance Company and Westfield National Insurance Company are related companies.³² They do business under the same fictitious names -- Westfield Companies and Westfield Group. They share the same offices, Officers and Board of Directors. A party is in privity with another if the parties are successively related or bear a sufficiently close relationship to the original party to justify preclusion.³³ In the context of *res judicata*, this Court has said, "In certain situations ... a broader definition of 'privity' is warranted. As a general matter, privity is 'merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*'."³⁴ The Court found that a mutuality of interest, including an identity of desired result, creates privity in such circumstances.³⁵

³⁰ 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256; See *In re Uninsured and Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888, 798 N.E.2d 1077.

³¹ See *Maitland v. University of Minnesota* (Minn., 1994), 43 F.3d 357.

³² *McLaughlin Affidavit*, ¶¶ 8, 9.

³³ *Musa v. Gillett Communications, Inc.* (1997), 119 Ohio App.3d 673, 696 N.E.2d 227.

³⁴ *Brown v. City of Dayton*, 89 Ohio St.3d 245, 2000-Ohio-148, 730 N.E.2d 958 (quoting *Bruszewski v. United States* (C.A. 3, 1950) 181 F.2d 419, 423 (*Goodrich, J.*, concurring)).

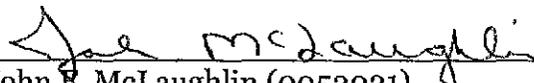
³⁵ *Id.* at 962.

Apparently, Westfield takes the position that its policy means what Westfield says it means, depending on Westfield's financial interest at the moment. This isn't a lawyer making alternative legal arguments. This is an insurance company representing to different courts that its policy means two different things. Such conduct is egregious and cannot be justified. By taking one position to obtain contribution from other insurers, and then taking the opposite position to deny benefits to the Flynns in this case, Westfield engages in the very type of unconscionable gamesmanship that judicial estoppel was meant to prevent. The Flynns request this Court to reject Westfield's attempt to play "fast and loose with the court,"³⁶ and to hold Westfield to the position it has already taken in *Westfield Nat'l. Ins. Co. v. Farmers Insurance Exchange* and *Westfield Insurance Company v. Wausau Bus. Ins. Co.* as to what its policy means.

VI. Conclusion

For the reasons expressed, the Flynns request this Court to dismiss Westfield's Cross-Appeal.

Respectfully submitted,


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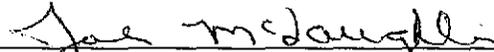
³⁶ See *Edwards v. Aetna Life Ins. Co.* (6th Cir., 1982), 690 F.2d 595.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered, by ordinary U.S. mail, postage prepaid, to the following counsel this 19th day of September, 2007:

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