IN THE SUPREME COURT OF OHIO

KEVIN R. FLYNN, *et al.*,	:	
	:	**CASE NO. 2006-1619**
Plaintiffs/Appellants/Cross-Appellees,	:	
	:	
-vs-	:	On Appeal from the Hamilton County Court
	:	of Appeals, First Appellate District
WESTFIELD INSURANCE COMPANY, *et al.*,	:	Court of Appeals Case No. C-050909
	:	
Defendants/Appellees/Cross-Appellants.	:	

MEMORANDUM OF CROSS-APPELLANT
WESTFIELD INSURANCE COMPANY
CONTRA FLYNN'S SECOND MOTION TO DISMISS

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SUMMARY OF ARGUMENT

In response to Cross-Appellee Flynn's second Motion to Dismiss, Cross-Appellant Westfield Insurance Company ("Westfield") asserts the following:

I. The timing and form of Flynn's motion to dismiss is improper and unfair;

II. Judicial estoppel is not intended to be used as Flynn urges herein;

III. The prior cases which Flynn urges should judicially estop this appeal from proceeding are totally different, in that those prior cases involve:

- Different policies
- Different facts
- Different issues
- Different controlling case law; and
- Lower court rulings which do not address or resolve the issue in this case.

Rather than burden this Court with hundreds of more pages from these prior cases, Westfield supports its argument and opposes Attorney McLaughlin's affidavit with affidavits of the attorneys actually involved in those cases. (See Affidavits of David W. Doerner and Julie A. Geiser, counsel in the cases referenced by Flynn, attached hereto.) Further, a close reading of the voluminous materials Flynn now submits reveals the tenuous and meritless grounds for Flynn's newest motion.

I. The Timing And Form Of Flynn's Motion Is Improper And Unfair.

The instant appeal involves whether or not the parties to a business insurance policy can limit uninsured coverage to vehicles owned by the corporation, or whether *Pontzer*[1] mandates that all employees' personal vehicles must also be covered.

The Court accepted this case because of the widely divergent opinions being issued by the lower courts on this issue, the importance of giving direction to the lower courts about how to

[1] *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116.

resolve this issue, and presumably because of the lingering unfairness still resulting from the continued application of the *Scott-Pontzer* line of cases.

Flynn has already filed one motion to dismiss with this Court, and this Court properly dismissed that motion.[2] Flynn now files hundreds of pages of new documents with this Court, most of which appear nowhere in the record, to argue estoppel based upon two cases that originated years ago. Flynn gives no reasonable explanation why he did not raise this issue in his prior motion to dismiss; nor why he did not raise this in his brief filed with this Court; nor why he did not raise this in either Court below.

Tactically, Flynn has asked (less than 30 days before oral argument) that both this Court and opposing counsel be required to devote valuable oral argument time and consideration to distinguishing cases which originated years ago and which could have been raised and argued previously, and which are wholly different from the instant case.

Flynn's delay in raising this issue, and his reliance on documents not in the record, should be grounds alone to deny his motion.

II. Judicial Estoppel Is Not Intended To Be Used As Flynn Urges Herein.

The doctrine of judicial estoppel is a rarely-applied doctrine that is not even followed in many jurisdictions. As one court has noted, judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of the court. *Teledyne Industries v. National Labor Relations Board* (6th Cir. 1990), 911 F.2d 1214. The doctrine is rarely applied because it precludes a contradictory position without examining the truth of either statement, and is therefore a concept to be applied with restraint, in egregious cases only, and with clear regard for the facts of the particular case. *Vowers & Sons, Inc. v. Strasheim* (S. Ct. Nebraska, 1998), 254

[2] That Motion was filed on February 23, 2007 and denied by this Court on April 18, 2007.

Neb. 506, 576 N.W.2d 817; *Cloud v. Nortrop Grumman Corp.* (2d App. Dist. Calif., 1998), 67 Cal. App.4th 995, 79 Cal. Rptr. 2544; *John S. Clark v. Faggert & Frieder* (4th Cir. 1993), 65 F.3d 26, 29. Stated another way:

> [U]tilization of the judicial estoppel theory "would be out of harmony with (the modern rules of pleading) and would discourage the determination of cases on the basis of the true facts as they might be established ultimately" (citation omitted). We also believe that "(e)ven in the case of false statements in pleadings, public policy can be vindicated otherwise and more practically and fairly in most instances than through suppression of truth in the future."

Konstantidinidis v. Chen (D.C. Cir. 1980), 626 F.2d 933, 938.

Judicial estoppel exists to protect from a party's attempt to take advantage of both sides of a factual issue at different stages of proceedings. (*Teledyne, supra.*) In fact, in order to evoke judicial estoppel, a party must show that the opponent took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court. *Reynolds v. Commission of Internal Revenue* (6th Cir. 1988), 861 F.2d 469, 472-73. Ohio Courts have similarly required that estoppel is limited to an assertion inconsistent with evidence "taken under oath." *Smith v. Dillard Department Stores, Inc.* (Apr. 13, 2000), 8th App. Dist. No. 74782, 13 Ohio App.3d 525, 744 N.E.2d 1198, cert. denied at 90 Ohio St. 39 1417. See also *American Insurance Company v. Cuyahoga Community College*, Ohio Ct. Claims No. 2001-02911-PR, 774 N.E.2d 802, 2002-Ohio-3513. The reasons for requiring a factual dispute concerning evidence under oath is that the doctrine is meant to bar changes in factual positions, and the doctrine does not extend to inconsistent opinions on legal positions. 28 Am. Jur. 2d 75, Estoppel and Waiver (2007) (and multiple cases cited therein). Also, judicial estoppel is inappropriate when a party is merely changing its position to respond to a change in the law. *Maui Land & Pineapple Co. v. Occidental Chemical Corp.* (D. Haw. 1998), 24 F.Supp.2d 1083. As one court noted:

> The court declines to extend the doctrine of judicial estoppel to include seemingly inconsistent legal positions. There is no legal authority for such a broadening of the doctrine.

Seneca Nation of Indians v. State of New York (W.D.N.Y. 1998), 26 F.Supp.2d 555, 565. And if the allegedly inconsistent statements can be reconciled, estoppel cannot apply. *Simon v. Safelite Glass Corp.* (2d. Cir. 1997), 128 F.3d 68.

In the instant case, Flynn relies upon two prior cases involving Westfield, both of which involved different facts, different policies, and different issues. Further, none of the Courts in those cases ruled on the specific issue before this Court. The arguments in those prior cases were made under different controlling case law (*Pontzer*, supra, which this Court overruled in part; and *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, (1999), 86 Ohio St.3d 557, 715 N.E. 2d 1142, which was overruled in total). And the arguments of Westfield therein were merely arguments, not assertions based on facts or testimony under oath, and those arguments were made in accordance with controlling law from this Court which existed back at that time.

Not one of the cases cited by Flynn held that when different issues were addressed in factually different cases under case law that was later overturned by the highest court in the state (*Galatis*),[3] that a party would be judicially estopped forever from seeking further relief.

In fact, were a Court to scrutinize the unusual arguments and positions which all parties were forced to take in the pleadings attached to Flynn's newest motion, the need for this Court to remove the last vestiges of *Pontzer*, through the instant case, becomes even more evident.

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[3] *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

III. The Cases Upon Which Flynn Relies Are Totally Different.

A. Flynn v. Westfield

The instant case involves a policy issued to a corporation (not a partnership as Flynn suggests),[4] wherein that policy expressly limits UM/UIM coverage to vehicles owned by the corporation.[5] In fact, the corporate-owned vehicles to be covered were all expressly scheduled for UM/UIM coverage and premiums specifically charged for each.[6]

Not only does the policy clearly limit coverage to corporate owned vehicles that are scheduled and paid for, but the insurer and insured have both acknowledged under oath that the corporation's employees all knew they were to retain their own policies and coverage for any personal vehicles, as Flynn did here.[7]

Flynn argues that the sole test for coverage in this situation, based on *Pontzer*, is "scope of employment" and that nothing else matters. Flynn makes this argument despite the fact that the policy nowhere references "scope of employment" as a determining factor in coverage.

Thus, the question which needs determination by this Court is whether the contract between the parties controls, or whether the last vestiges of the wrongfully-decided *Scott-Pontzer* line of cases controls. *Galatis* corrected only half the problem. The instant case can correct the rest.

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[4] Merit Brief of Westfield, page 1, footnote 1, and record cited therein.

[5] Merit Brief of Westfield, p.5.

[6] Merit Brief of Westfield, pp.7-8.

[7] Merit Brief of Westfield, pp.6-7.

B. Westfield v. Farmers

This case originated in Hancock County from an auto accident in 2000. It is factually inapposite to the Flynn case. (See Affidavit of David W. Doerner, attached hereto).

In *Westfield v. Farmers*, Mrs. Grose was driving her father-in-law's car, ran a stop sign, and killed her one-year-old son. Westfield National, which insured Mrs. Grose's own parents, stepped up and paid for the loss, then sued Farmers Insurance Exchange for contribution. Farmers insured Tony Grose.

Neither Westfield's policy nor Farmers' policy was a business auto policy, and therefore scope of employment was not an issue. In fact, the sole issue was whether or not Westfield National had paid as a "volunteer." The trial court ruled that it was a volunteer; the appellate court reversed and ruled that it was not. While Farmers (not Westfield National) raised the issue that the accident did not occur in a covered auto, neither Court specifically addressed or resolved that issue. What the appellate court held was that characterizing Westfield National as a "volunteer" would be against public policy, as it would discourage other companies from stepping up (as Westfield had done) and paying benefits before all other carriers and all other coverage issues were decided.

Not only did Westfield <u>not</u> argue the covered auto issue, but it was not necessary to argue or decide it. At that point in time, *Pontzer* and *Ezawa* imposed coverage upon all insurance carriers any time the injured party was related to an employee of a company. The injured party (like the minor in this case) did not have to be an actual employee, did not have to be in the scope of employment, did not have to be in a covered auto, and did not even have to be an insured.

More importantly, the policy in *Farmers* was not issued to a corporation, it was issued to an individual (i.e., Tony Grose, see Exhibit D to Flynn's Motion). Thus, the issue of whether "you" means every employee in the scope of employment, regardless of who owns the car, was not an issue because the minor child who was killed was a relative living with the named insured, Tony Grose.

Therefore, not only was the policy different, but the facts were different, the issue was different, the controlling law (at the time) was different, and there was no ruling on the specific issue being addressed in the instant case involving Mr. Flynn.

C. Westfield v. Wausau

This case arose in 2000 in Stark County. (See Affidavit of Julie A. Geiser, attached hereto).

This case involved the death of a minor and was a claim based upon *Ezawa*. This case exemplifies why *Pontzer* and *Ezawa* were bad law, and why the remnants of *Pontzer* continue to be bad law.

In this case, the estate of the minor child sought coverage against:

-Progressive – (insurer of the minor's parents)
-Motorists – (insurer of the owner of the vehicle)
-National Union – (insurer of the brother's employer, Wal-Mart)
-Wausau – (insurer of the father's employer Alliance City Schools)
-Westfield – (insurer of the mother's employer, Coastal Pet Products).

The irony was that, even though the minor's death had no connection to the businesses involved, the law at the time required each of these carriers to be liable for UM/UIM coverage. (This was obviously before this Court's decision in *Galatis*.)

Westfield, under the case law existing at the time, stepped up once again and paid $1.4 million dollars to settle all claims of the minor child. Westfield did so only because it was obligated to follow existing Ohio State Supreme Court law on this subject at the time.

In so doing, Westfield expressly noted in its pleadings:

> By acknowledging its liability under existing law, Westfield does not mean to imply that it agrees with such law; in fact, Westfield strongly disagrees with the law of Ohio as set forth in the recent decisions of *Scott-Pontzer*, *Ezawa*, and *Linko*, and believes that such decisions unfairly and unconstitutionally impair the right to freely contract and also impermissibly interfere with existing contracts, ...nonetheless, unless and until these cases are legislatively overturned or struck down by higher courts, they do remain the law of Ohio and must be abided by.

(Flynn's Motion, Exhibit G, p. 2, footnote 2.)

In fact, what Westfield argued in this case was that the controlling law was wrong; but that if it was going to be applied to Westfield, it should be applied equally to all insurance companies. Westfield specifically noted, "As indicated previously, Westfield disagrees with the reasoning set forth in these Supreme Court decisions but has nevertheless complied with its obligations created by such decision in adherence to the Supreme Court mandates. Wausau and National Union must now be required to do the same." (Flynn's Motion to Dismiss, Exhibit G, p.13, footnote 8.)

Thus, what Westfield argued was that the existing law must be applied to all parties the same, unless and until that bad law was reversed. And as the Court now knows, this bad law ultimately was reversed in *Galatis*.

The appeal in this *Flynn* case will allow this Court to now reverse the remaining vestiges of bad law existing solely based upon *Scott-Pontzer*.

Both the trial court and appellate court in *Westfield v. Wausau* ruled Westfield was correct about coverage under all policies because the existing law at the time allowed a minor to such coverage, even though he was not an employee, not in a covered auto, and not in the scope of employment. Westfield should not, and cannot, now be punished or "estopped" because it was following the law existing at the time. Westfield consistently asserted that the old law was wrong, and that law was later determined to be wrong by this very Court through *Galatis*.

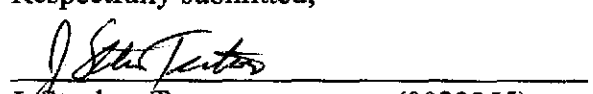
CONCLUSION

The Court took this case for a good reason. It recognized the importance of this issue to the general public, so that both insurers and insureds know what coverages they are buying, and so insureds get what they paid for and no more.

The motion of Flynn is untimely, improper, based on cases that are factually distinguishable, and without merit.

Flynn's newest motion should be overruled promptly, so that both this Court and the parties can focus the oral argument on the sole issue which this Court correctly decided to accept.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 1st day of October, 2007, upon the following:

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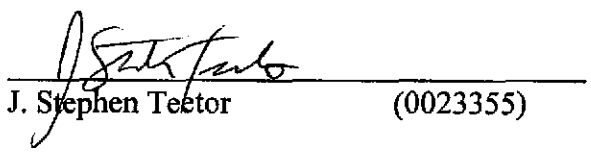

J. Stephen Teetor (0023355)

IN THE SUPREME COURT OF OHIO

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	:	**CASE NO. 2006-1619**
Plaintiffs/Appellants/Cross-Appellees,	:	
	:	
-vs-	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-050909
WESTFIELD INSURANCE COMPANY, *et al.*,	:	
	:	
Defendants/Appellees/Cross-Appellants.	:	

AFFIDAVIT

STATE OF OHIO)
) ss
COUNTY OF LUCAS,)

Now comes David W. Doerner and, being duly cautioned and sworn, deposes and says:

1. I am an attorney licensed to practice law in the State of Ohio. I have reviewed the motion to dismiss of Mr. Flynn filed in the above-captioned case. I was counsel of record in the case of *Westfield National Ins. Co. v. Farmers Insurance Exchange* (the "*Farmers*" case), relied upon by Flynn, and I make this Affidavit based on personal knowledge.

2. In the *Farmers* case, the issue being addressed by the Court was not whether a corporate employee was or was not covered when operating his personal automobile for a corporate insured. The issue was whether or not Westfield National Insurance Company was entitled to seek contribution for its settlement from another insurance carrier or whether Westfield National had paid as a volunteer.

3. The policies being litigated (for both Westfield National and Farmers) were policies issued to <u>individuals</u>, not to corporations, and therefore *Scott-Pontzer* was not an issue.

4. Since the Farmers policy was issued to an individual (Tony Grose), that individual was "you" and decedent was a family member residing with him. Therefore there was

no need for the Court to address or resolve issues involving scope of employment, covered verses non-covered autos, nor application of *Scott-Pontzer* or *Ezawa*.

5. Westfield National did not address or argue *Scott-Pontzer* or "covered autos" in its brief, nor did the trial court or appellate court address that specific issue in either decision.

6. In fact, the trial court brief (Exhibit A, page 5 to Flynn's motion), states that:

> "The only issue in this case is whether Westfield was a volunteer in making a settlement which settled all the potential underinsured motorist claims against all potential underinsured motorist carriers, when, despite the best efforts of Westfield to identify all potential underinsured motorist carriers, the identity of one potential carrier and the nature of its coverage had not been identified at the time of mediation."

(Emphasis added.)

7. The trial court never addressed the "covered auto" issue, finding that Westfield was a volunteer and therefore specifically noting that "Thus, although the defendant (Farmers) proceeds with additional arguments against contribution, the Court had addressed the first issue, i.e., whether Westfield is a volunteer... (Flynn's Motion, Exhibit E, p.7.) Thus, the trial court found Westfield to be a volunteer and never specifically addressed the issue of covered autos. On appeal, the Third Appellate District reversed and determined that Westfield was not a "volunteer," and the issue of "covered auto" was never briefed, argued or decided on appeal. (Flynn's Motion, Exhibit F.)

8. Further, affiant sayeth not.

David W. Doerner

Sworn to before me and subscribed in my presence this 28th day of September, 2007.

Notary Public

KELLY J. ARKENBRANDT
Notary Public, State of Ohio
My Commission Expires 1-4-12

IN THE SUPREME COURT OF OHIO

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	:	**CASE NO. 2006-1619**
Plaintiffs/Appellants/Cross-Appellees,	:	
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-vs-	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-050909
	:	
WESTFIELD INSURANCE COMPANY, *et al.*,	:	
	:	
Defendants/Appellees/Cross-Appellants.	:	

AFFIDAVIT

STATE OF OHIO)
) ss
COUNTY OF STARK,)

Now comes Julie A. Geiser and, being duly cautioned and sworn, deposes and says:

1. I am an attorney licensed to practice law in the State of Ohio. I have reviewed the motion to dismiss of Mr. Flynn filed in the above-captioned case. I was counsel of record in the case of *Westfield Insurance Company v. Wausau Business Insurance* (the "*Wausau*" case), relied upon by Flynn, and I make this Affidavit based on personal knowledge.

2. In the *Wausau* case, a minor was killed in 1998 riding in a vehicle driven by a friend and owned by the friend's grandmother.

3. At that time, based on Ohio Supreme Court cases of *Scott-Pontzer* and *Ezawa*, uninsured/underinsured coverage was deemed to be available to every resident family member of the employees of the named insured. This was true even though the decedent or injured party

was not an employee of the named insured; not in the scope of employment for a named insured; and not in a car owned by the named insured.

4. The decedent's brother and decedent worked at Wal-Mart (insured by National Union); the father worked for the Alliance City Schools (insured by Wausau); and the mother worked for Coastal Pet Products (insured by Westfield).

5. Since *Pontzer/Ezawa* clearly provided coverage under all these policies, Westfield paid $1.4 million for the entire claim, then pursued contribution from the other carriers.

6. Westfield expressly noted in its pleadings that, while it disagreed with *Pontzer/Ezawa*, it was bound to follow existing Ohio Supreme Court law, and the other carriers should therefore be bound by the same law. (Flynn's Brief, Exhibit G, page 2, footnote 2 and p.13, footnote 8.) In other words, Westfield was <u>not</u> arguing that there <u>should</u> be coverage; Westfield was acknowledging that under *Pontzer/Ezawa* there was coverage and therefore all carriers should be treated equally.

7. To my recollection, no issue regarding any covered auto provision was even briefed or argued by the parties, nor specifically addressed in this case, because the controlling *Ezawa* case at the time made this a non-issue. Westfield ultimately did not prevail in this case because the *Galatis* decision overruled the controlling law in *Ezawa* before any recovery by Westfield.

8. Westfield's argument in the *Wausau* case was not that there <u>should</u> be coverage for non-owned autos under a business policy, only that the law as it existed at that time should be equally applied to all insurance companies.

Further, affiant sayeth not.

Julie A. Geiser

Sworn to before me and subscribed in my presence this 28 day of September 2007.

Bonnie L Bowman
Notary Public

BONNIE L. BOWMAN
Notary Public, State of Ohio
My Commission Expires 12-19-2010