

IN THE SUPREME COURT OF OHIO

WESTFIELD INSURANCE COMPANY,)
)
 Petitioner)
)
 v.)
)
 CUSTOM AGRI SYSTEMS, INC.)
)
 Respondent)

CASE NO. 2011-1486
 On Consideration of Certified Questions
 from the United States Court of Appeals
 for the Sixth Circuit, Case No. 11-3213

**MOTION TO REQUEST TRANSMITTAL OF THE RECORD OF
 PETITIONER WESTFIELD INSURANCE COMPANY**

JIM MILLER (0002013)
jimmiller@maumeelaw.com
 DANIEL G. HAZARD (0074412)
dhazard@hazardlaw.com
 MILLER, HOCH & CARR, LLP
 1446 Reynolds Road, Suite 220
 Maumee, OH 43537
 (419) 865-8021
 Fax: (419) 865-9105
Counsel for Respondent
Custom Agri Systems, Inc.

RICHARD M. GARNER (0061734)
rgarner@davisyoung.com
 DAVIS & YOUNG
 1200 Fifth Third Center
 600 Superior Avenue, East
 Cleveland, OH 44114
 (216) 348-1700
 Fax: (216) 621-0602
Counsel for Petitioner
Westfield Insurance Company

RECEIVED
 DEC 06 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 DEC 06 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

MOTION

Petitioner Westfield Insurance Company (“Westfield”) respectfully moves this Court, pursuant to S.Ct.Prac.R. 5.1, 5.2, 5.3, 5.8 and 18.4, to request transmittal of the record in *Younglove Constr., LLC v. PSD Dev., LLC*, et al., Case No. 2011-3213, in the United States Court of Appeals for the Sixth Circuit (“Underlying Action”).

On November 2, 2011, this Court agreed to answer two questions certified from the United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”) critical to the Underlying Action. That order simply stated that Westfield was to file its merit brief within 40 days without reference to the record on appeal. S.Ct.Prac.R. 18.4 provides that upon agreeing to answer such questions, this Court “may request that copies of all or any portion of the record before the certifying court be transmitted” to this Court. Westfield submits that the certified questions are best answered in the context of the facts and law in the Underlying Action, and therefore transmission of the record would aid this Court in properly resolving the certified questions.

This Motion is further warranted by this Court’s Rules of Practice. S.Ct.Prac.R.5.1 describes the composition of the record in all appeals (presumably including appeals under S.Ct.Prac.R. 18.1 et seq). However, S.Ct.Prac.R.5.2 prohibits transmission of the record to this Court “unless and until the Supreme Court issues an order to the custodian to transmit the record.” Once ordered, S.Ct.Prac.R.5.3 describes the manner and time in which the record is to be transmitted. If any part of the record is not transmitted to this Court, but is necessary for consideration of the questions presented on appeal, this Court or the parties may seek transmission of additional record materials pursuant to S.Ct.Prac.R.5.8. Westfield submits that transmission of the record from the Underlying Action is necessary for consideration of the questions presented on appeal in order to properly understand and address the nature of the insurance coverage issues presented.

The interaction between the state and federal appellate systems warrants additional explanation. As this Court is aware, the record in the Underlying Action consists of the original papers and exhibits filed in the district court and the docket entries (no trial transcripts from a part of the record). Fed. R. App. P. 10(a). All such documents were electronically filed in the district court in the Underlying Action. The Sixth Circuit's local rules and practices further provide that:

- (1) "The record on appeal is comprised of the items specified in FRAP 10" (Cir. R. 10(a));
- (2) "All exhibits filed with the district court are part of the record on appeal, as provided by FRAP 10. As a general matter the district court does not send non-electronic records to the Court of Appeals unless and until the circuit clerk requests them." (Cir. R. 10(c));
- (3) "When there is an electronic record, the district clerk will not transmit the portions of the record that are filed electronically to the Court of Appeals. The Court of Appeals will electronically access the district court record." (Cir. I.O.P. 11(a)).

Thus, in the Underlying Action, the Sixth Circuit would normally simply access the electronic docket in *Younglove Constr., LLC v. PSD Dev., LLC*, et al., Case No. 3:080cv091447-JGC, in the United States District Court of the Northern District of Ohio available through that court's CM/ECF system unless some unusual need existed for hard copies of the electronic documents. This Court could probably do the same, but presumably, in compliance with S.Ct.Prac.R.5.1, would require hard copies of the documents filed electronically in the Underlying Action.

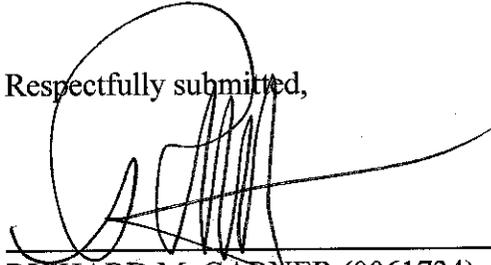
Based upon the foregoing, Westfield requests this Court to issue one of two orders:

- (1) to issue an order providing that the electronic docket in *Younglove Constr., LLC v. PSD Dev., LLC*, et al., Case No. 3:080cv091447-JGC, in the United States District Court of the Northern District of Ohio available through that court's CM/ECF system shall serve as the official record in this appeal; or
- (2) to request manual transmission of the record from the Underlying Action to this Court.

Westfield's counsel has already discussed the foregoing transmission issues with both the Clerk of this Court and the Sixth Circuit Case Manager and been informally advised that neither approach should present logistical problems and that both offices will comply with the order of this Court.

The entire record is being requested under either approach. Under either approach, the merit briefs of the parties should not be delayed.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. Garner', written over a horizontal line.

RICHARD M. GARNER (0061734)

rgarner@davisyoung.com

DAVIS & YOUNG

1200 Fifth Third Center

600 Superior Avenue, East

Cleveland, OH 44114

(216) 621-0602

Fax: (216) 621-05602

Counsel for Petitioner

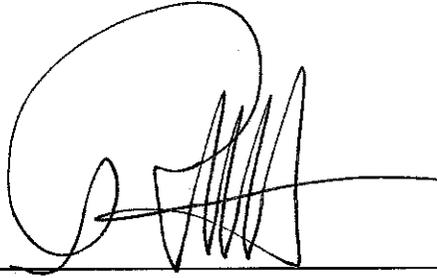
Westfield Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that the forgoing was served by ordinary U.S. Mail, on this 5th day of

December, 2011 upon:

JIM MILLER
DANIEL G. HAZARD (0074412)
MILLER, HOCH & CARR, LLP
1446 Reynolds Road, Suite 220
Maumee, OH 43537
*Counsel for Respondent
Custom Agri Systems, Inc.*

A handwritten signature in black ink, appearing to read 'R. M. Garner', is written over a horizontal line. The signature is stylized with a large loop at the beginning and several vertical strokes.

RICHARD M. GARNER (0061734)
*Counsel for Petitioner
Westfield Insurance Company*