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STATE OF WASHINGTON

No. 70735-3-I
(King County No. 12-2-17371-1 SEA)

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

LINDSEY HAYES and MATT ROSSTON, husband and wife;
JAMES W. BEASLEY II; and all others similarly situated,

Plaintiffs – Petitioners,

v.

USAA CASUALTY INSURANCE COMPANY, a foreign insurance
company doing business in the State of Washington; UNITED SERVICES
AUTOMOBILE ASSOCIATION, a foreign intransurance exchange
doing business in the State of Washington; USAA GENERAL
INDEMNITY COMPANY, a foreign insurance company doing business
in the State of Washington; GARRISON PROPERTY AND CASUALTY
INSURANCE COMPANY, a foreign insurance company doing business
in the State of Washington; JOHN DOES I-XX,

Defendants - Respondents,

APPELLANTS' REPLY BRIEF

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I. REPLY

A. Introduction There are three key bases for the Court to grant the relief sought by the Plaintiffs in this appeal:

1. The law in Washington regarding the application of the doctrine of judicial estoppel was not followed by the trial court, which was the basis for the granting of defendants' motion for summary judgment.
2. Federal Judge Robart, in his order granting of Plaintiffs' motion to remand this case back to State, either did not have authority or jurisdiction to issue a ruling about what claims can be considered by the state trial, or while he defined Plaintiffs' claims correctly, he used incorrect examples that the state trial court should not have used.
3. Under the Knowles decision, a case involving a similar removal under CAFA and subsequent remand to state court, the decision of trial court here should be reversed.

B. Lack of Evidence or Findings to support Application of the doctrine of judicial estoppel by the trial court.

As Respondents USAA Casualty Insurance Company et. al. ("USAA") concede in their Response, the orders granting dismissal and summary judgment of Plaintiffs' individual claims rests on the trial court's acceptance of USAA's assertion that Plaintiffs voluntarily admitted and represented to the federal court on their motion for remand that Plaintiffs' claims were based solely and exclusively on an computerized denial of their claims without human involvement and further limited the claim to only and exclusively a "DOC 55" reduction.

However, it is noteworthy that nowhere in any pleading did Plaintiffs limit their individual claims in that manner or any other claim. As is made apparent by the record, there is no a single pleading, signed, endorsed or filed by Plaintiffs in which Plaintiffs ever stated their claims were limited solely and exclusively to either: (1) a computer generated denial without any further step or involvement by a human being; or (2) a “DOC 55” reduction.

To the contrary, in their motion for remand, Plaintiffs affirmatively state their claim is that USAA first submits PIP claims to a computerized review that either authorizes payment or denies payment and when the payment is denied, it is sent to review by a nurse or third-party “professional” review. Indeed, contrary to Defendants’ assertion, Judge Robart in his remand order describes Plaintiffs’ claim in precisely the same terms.

The law in Washington requires that prior to the entry of an order by a trial court that a party is judicially estopped from taking a particular legal position there must be entered findings of fact to support such a ruling.

USAA’s arguments regarding judicial estoppel are misplaced and is inapplicable. Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc*, 160 Wn.2d 535,538, 160 P.3d 13 (2007) (citations omitted and

emphasis added). A court focuses on three factors when deciding to apply the doctrine of judicial estoppel.

- (1) Whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Mavis v. King County Pub Hosp. No. 2, 159 Wn.App. 639, 650, 248 P.3d 558, 563 (2011) (quoting *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352(2008)); see *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 61, 244 P.3d 32 (2010); *aff'd*, 174 Wn.851, 281 P.3d 289 (2012).

Judicial estoppel is not applicable here for the following reasons, in light of the three-prong test governing the issue:

1. The first required factor of clearly inconsistent positions is not present. Here, the Plaintiffs never limited their claims to a DOC 55 review by USAA, as discussed below.
2. There should not be the perception that either the federal court nor the state trial court was misled by the Plaintiffs' position and claims. The federal court here was ruling on the application, or not, of CAFA to the claims brought by the Plaintiffs and could not have been misled by the actually filed complaint..

3. The Plaintiffs did not gain any “unfair advantage” nor was there “unfair detriment” suffered by the Defendants by the remand back to King County Superior Court. There was certainly no “unfair advantage” to the Plaintiffs as a result of the trial court’s ruling in this case, because the Defendants were on notice from the outset of this lawsuit that the Plaintiffs’ claims were much broader than just limited to DOC 55 reviews. Further, there would be no unfair detriment to Defendants since they had a ready and oft-used remedy of removing the case, once again, back to federal court.

A recent State Supreme Court decision provides a good example of how reviewing courts look at a trial court’s consideration of the argument of judicial estoppel.

In *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.851, 281 P.,3d 289 (2012), the Court discussed the above three factors, finding that the trial court properly ruled that the judicial estoppel doctrine did **not** apply because two of the three above tests were not met by the proponent of the doctrine. (Citing *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974) (stating that the purpose of judicial estoppel applies to evidence that is inconsistent with “sworn testimony the party has given in the same or prior judicial proceedings”); *cf. Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000) (identifying the relevant periods of inconsistency as “phase[s] of a case”); *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted) (quoting *Scarano v. Cent. R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir.

1953)); *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011); *CHD, Inc. v. Taggart*, 153 Wn. App. 94, 102, 220 P.3d 229 (2009); *King*, 10 Wn. App. at 519. *But see In re Estates of Smaldino*, 151 Wn. App. 356, 363, 212 P.3d 579 (2009), *review denied*, 168 Wn.2d 1033 (2010).

C. Judge Robart’s order granting remand to state court was without authority to limit the claims of Plaintiffs, but even if he had such authority and correctly defined the Plaintiffs’ claims, he used incorrect examples in doing so that should not have been relied upon by the state trial court.

Nowhere in the Complaint do Plaintiffs mention a “DOC 55” reduction and Defendants have not cited to a single pleading where Plaintiffs state their claim is limited to a “DOC 55” reduction. Indeed, the issue of the Plaintiffs’ individual claims was not even before Judge Robart because the issue before him was the amount of damages at issue on the class claims for purposes of federal jurisdiction under the Class Action Fairness Act (“CAFA”), which requires more than \$5 million at issue on the class claims alleged in the action. Judge Robart used a “DOC 55” reduction as one example only of the type of reduction at issue on the class claims, not the only one. But he defined the claim much broader stating at (CP 9), *emphasis added*:

Set forth below is the exact language from the Plaintiffs' complaint that set forth the factual allegations relating to their claims against USAA:

- 2.1 The USAA adjuster or claims representative will make no determination to deny the claim or not pay the bill before it is sent to AIS to be processed.
- 2.2 AIS will input the information on the HCFA or similar form submitted by the provider into a computer that is loaded with a software program supplied by a database and/or third party software supplier, such as Ingenix, United Health Group or Mitchell Corporation.
- 2.3 On information and belief, the software program will automatically flag or tag bills for certain CPT treatment procedures as subject to review for whether the CPT procedure provided was "necessary" or "reasonably necessary."
- 2.4 On information and belief, the software program will automatically flag or tag certain bills for certain CPT treatment procedures as subject to review for whether the documentation submitted by the provider is adequate to demonstrate that the CPT procedure provided was "necessary" or "reasonably necessary."
- 2.5 On information and belief, before the software program flags or tags a bill for a CPT procedure for review as described above, AIS will not undertake any investigation into whether the CPT procedure provided was necessary or reasonably necessary.
- 2.6 On information and belief, after the software program flags or tags a service for review as described above, AIS will not undertake any investigation itself into whether the service provided was necessary or reasonably necessary. Instead, AIS will send the claim and patient treatment records submitted by the provider to a health care provider retained by AIS to perform a review of the bill.
- 2.7 On information and belief, the decision to send a bill to a reviewer as described above is based solely on whether the computer software system flags or tags the bill for review. AIS does not independently decide that the service provided as reflected on the provider's bill is not necessary or reasonably necessary. AIS uses no judgment in sending the bill to a reviewer for review as described above. Bills flagged or tagged by the computer system are sent to reviewers to be reviewed for whether they are necessary

- or reasonably necessary.
- 2.8 On information and belief, before the software program flags or tags a bill for a CPT procedure for review for lack of adequate documentation as described above, AIS will not undertake any investigation into whether the documentation supplied by the provider is adequate to show that the CPT procedure provided was necessary or reasonably necessary.
 - 2.9 On information and belief, after the software program flags or tags a bill for review for lack of adequate documentation, AIS will send the claim and patient treatment records submitted by the provider to a health care provider retained by AIS to perform a review of the bill.
 - 2.10 On information and belief, the decision to send a bill to a reviewer as described above is based solely on whether the computer software system flags or tags the bill for review. AIS does not independently decide that the documentation supplied by the provider is not adequate to show that the CPT procedure provided was necessary or reasonably necessary. AIS uses no judgment in sending the bill to a reviewer for review as described above. Bills flagged or tagged by the computer system are sent to reviewers to be reviewed for whether the documentation supplied is adequate to show that the service provided was necessary or reasonably necessary.
 - 2.11 On information and belief, the reviewers retained by AIS to perform the bill reviews described above are limited by AIS in the amount of time they have to review the bill.
 - 2.12 On information and belief, the reviews performed by the reviewers retained by AIS are not genuine, meaningful or substantive reviews of whether the CPT procedure provided was necessary or reasonably necessary.
 - 2.13 On information and belief, the reviews performed by the reviewers retained by AIS are not genuine, meaningful or substantive reviews of whether the documentation provided by the Washington health care provider is adequate to show that the CPT procedure provided was necessary or reasonably necessary.
 - 2.14 On information and belief, the health care providers retained by AIS to perform the review do not have the same background, training or area of discipline as the Washington provider whose bill is being reviewed.
 - 2.15 On information and belief, the reviews described above are not always actually performed by the reviewer retained by AIS to

- perform the review.
- 2.16 On information and belief, AIS will receive a report or some form of written communication from the reviewer showing the results of the review described above with the signature of the reviewer on the communication (“the report.”).
 - 2.17 On information and belief, while the report may have the signature of the reviewer on it, the reviewer does not always in fact sign the report. On certain reports, the reviewer’s signature has been stamped on the report by someone else without the reviewer’s knowledge.
 - 2.18 On information and belief, AIS will send Washington providers and an Explanation of Benefit (“EOB”) or Explanation of Review (“EOR”) form on behalf of USAA advising the provider that his or her PIP claim for payment of the insured’s bill for treatment has been denied based on the explanation that the treatment was not necessary or reasonably necessary. For each CPT procedure provided, the EOB or EOR will set out the date of service, the CPT procedure number, a description of the service, the amount billed, the amount “allowed” or “authorized” or “approved” as the amount being paid, and where the amount paid is different than the amount billed an explanation code as the reason for the difference. When the payment is denied on this basis, the EOB or EOR will give a specific “explanation code” number as the reason. (CP 1).

To the extent that USAA attempts to take Judge Robart’s remarks concerning a “DOC 55” reduction out of the context of the broader claim described by Judge Robart above, it demonstrates precisely what the trial court did wrong: it wrongly limited Plaintiffs’ individual claims to solely and exclusively a “DOC 55” reduction when Plaintiff never pled such a limitation and never represented such a limitation. Indeed, to the extent that Judge Robart’s example of a “DOC 55” is used by USAA as a limitation on the claim asserted, Judge Robart’s comment is simply wrong. Again, there is no pleading in which Plaintiffs assert their individual claims are limited to solely a “DOC 55” reduction.

As USAA's Response makes clear, its argument to the trial court was that Plaintiffs were judicially estopped from asserting that their individual claims were broader than a "DOC 55" denial based on their representations to Judge Robart that there was not more than \$5 million at issue on the class claims because the class claims were limited to solely and exclusively a "DOC 55" reduction. But the trial court never made any factual or legal conclusions sufficient under Washington law to establish judicial estoppel. Indeed, USAA in its Response appears to concede as much and instead focuses on dicta from Judge Robart about what might happen in the state court if Plaintiffs attempted to expand their claim. But, with due respect to Judge Robart, first he is wrong as a matter of federal law that any statement attempting to limit the class claims by Plaintiff's counsel on a remand motion is binding on the class; and wrong as a matter of Washington law on the procedures following remand. The federal court cannot dictate to the state court what claims will be permitted because **the remand order establishes that the federal court lacked jurisdiction in the first place to adjudicate the claims.** Additionally, even if USAA baseless expansion of Judge Robart's comments into a false limitation on Plaintiff's claims to a DOC 55 denial were to be considered, Judge Robart was simply wrong. He did not accurately state what was in the pleadings filed by Plaintiffs.

The entire pleadings on the remand motion are in the clerk's pages. Plaintiffs defy USAA to point to this Court a single statement by Plaintiffs in any pleading where the Plaintiffs, themselves, and not USAA, not the

state trial court, not the federal trial court, state that their claims are limited solely and exclusively to a “DOC 55” denial. It is axiomatic that for there to be judicial estoppel, there must be a statement by the litigant that the estoppel rests on, not an interpretation by the adverse party or a misinterpretation by a prior court ruling.

Indeed, once Judge Robart remanded the case, Plaintiffs would have had no mechanism under the federal rules of civil procedure to seek a correction of anything in Judge Robart’s remand order. Their only ability to point out the error was to the trial court by citing to the pleadings with Plaintiffs actually filed. The trial court never considered those pleadings as evidenced in the trial court’s recitation of materials considered on the subject motions. The trial court does not point to a single statement made by the Plaintiffs that limited their claims to a “DOC 55” reduction and USAA does not dispute in its Response that Plaintiffs presented evidence to the trial court that they did, in fact, have reductions meeting the description of their claim in the Complaint and in Judge Robart’s order of a denial that had two salient components: (1) a computer generated denial without human involvement, followed by (2) a sham nurse or “professional” review. (CP 37-45; Fed.Doc 1.)¹

As USAA’s Response makes clear, without limiting Plaintiffs’ individual claims to solely a “DOC 55” reduction, there was no basis for the trial court to dismiss the claims or enter summary judgment on the

¹ Portions of the federal court record are contained in a CD-Rom, which is also part of the record before this Court as Exhibit FE9. (CP 434-435). Citations to the federal docket are to “Fed. Doc. __”).

claims. The trial court erred by limiting Plaintiffs' individual claims to solely and exclusively a "DOC 55" denial where such limitation never came from the mouths of the Plaintiffs.

The Defendants' recourse if the Plaintiffs asserted a more expansive claim that now brought the Class claim under CAFA jurisdiction was to remove the case again. Nothing prevented them from doing so if the facts or statement of the claim changed

D. The *Knowles* opinion supports this Court's reversal of the trial court's granting of USAA's motion for summary judgment dismissal of Plaintiffs' complaint.

As it did on its motion to dismiss, USAA has consistently taken out of context excerpts from the Federal Court's remand order, which has nothing do with the issues presented in Plaintiffs' claims against USAA. The rules governing removal to federal court and remand do not apply to claims prosecuted in state court and have no bearing on Plaintiffs' rights to assert their claims in state court. Plaintiffs' rights to state their claims in state court are governed by the substantive and procedural laws of Washington, not federal law relating to matters that are removed. For example, on remand, it was USAA's burden, not Plaintiffs' burden, to show to a legal certainty that the amount of damages at issue exceeded \$5 million on the class claims. Judge Robart ruled that USAA failed to do so because it overstated the amount of damages by not taking into consideration a variety of factors including for example, reductions later paid by USAA or compromised by the provider. But Plaintiffs never stated

that the sole measure of damages was based on the amounts paid by Plaintiffs or class members because it was not Plaintiffs' duty to come forward and prove that every type of damage alleged failed to meet CAFA's \$5 million jurisdictional requirement. USAA had the burden to take into consideration Plaintiffs' claim that by denying PIP payments in the improper way alleged in the Complaint, it had denied Plaintiffs and the Class of insureds the full benefit of their PIP coverage and their PIP premiums.

USAA chose not to do so, even though ¶11.1 of the Complaint clearly states that two ways in which Plaintiffs and the class suffered "injury" was denial of their full PIP coverage and the full benefit of the PIP premiums they paid. Again, as the Complaint alleges, other competing insurers from whom Plaintiffs and the Class could have purchased PIP coverage, like PEMCO, do not do computer reviews, do not have a computer assign an explanation code for denying payment and do not follow such denials up with a sham professional review.

Finally, USAA's argument that the description or stipulation of the Plaintiffs' counsel of the class claims on a motion for remand is binding on what claims may be pursued in state court is baseless. The US Supreme Court recently held that such a statement by Plaintiffs' counsel is **not** binding on the class claims that may be pursued and irrelevant even in the remand proceedings in federal court. See *Std. Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345; 185 L. Ed. 2d 439 (2013).

CONCLUSION

Defendants failed to point to a single pleading filed by Plaintiffs where the Plaintiffs stated that their individual claims were limited solely and exclusively to a Code 55 explanation denial.

The State trial court never required Defendants to identify any such pleading.

A review of the Plaintiffs' specific pleadings (i.e. the ones actually filed), shows that nowhere did the Plaintiffs state that their personal claims were limited solely and exclusively to a Doc 55 explanation denial. To the contrary, Plaintiffs repeatedly stated a much broader claim. See, Plaintiffs' Complaint. (CP 1); see also Plaintiffs' response to Defendants' summary judgment motion, (CP 146).

Defendants did not dispute at the trial court level, and do not dispute in this Court, that: (1) Plaintiffs had denials that were in fact based on a computer generated denial without human involvement followed by a nurse or professional review; (2) the Complaint itself describes this very claim; (3) Judge Robart's remand order describes this very claim; (4) Plaintiffs presented evidence that they in fact paid the bills that USAA refused to pay based on these denials; and (5) Plaintiffs were in fact out of pocket the amount paid to their providers that USAA failed to pay under their PIP coverage because of the denials.

The orders granting dismissal and summary judgment should be reversed.

DATED 9th day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on May 9, 2014, I caused the foregoing to be filed via legal messenger with:

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