IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD R. WILD and DIANA H. WILD,
Individually and as representatives of the Estate
of Joseph Donald Wild,

Plaintiff,

v.

KARLEEN HILLERY; PROGRESSIVE
NORTHERN INSURANCE COMPANY;
SCOTTSDALE INSURANCE COMPANY;
ACCEPTANCE INSURANCE COMPANIES;
CHOAN A. LANE, JEREMY HOLMES;
and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

OPINION AND ORDER

01-C-0461-C

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DONALD R. WILD and DIANA H. WILD,
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01-C-0463-C

KARLEEN HILLERY;
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ACCEPTANCE INSURANCE COMPANIES;
CHOAN A. LANE, JEREMY HOLMES;
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Defendants.

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These are civil actions brought by the parents of a young man killed in a van accident while he was working as a magazine subscription salesman. The actions duplicate in large part an action filed by plaintiffs in 2000 and closed in 2001, Wild v. Subscriptions, Plus, Inc., 00-C-0067-C. For that reason, most of the defendants moved for dismissal from the actions on the ground that principles of claim preclusion barred any further litigation against them. In an opinion and order entered on May 13, 2002, I dismissed certain defendants from the suits after finding that they were correct in asserting that claim preclusion barred new suits against them but I concluded that the doctrine would not bar suits against the remaining defendants for various reasons. As to defendant Karleen Hillery, she had been dismissed from plaintiffs' original suit, not on the merits but because the court lacked personal jurisdiction over her. Her insurers, defendants Acceptance and Scottsdale, remained potentially liable as long as she might still have some liability. Defendants Choan A. Lane and Jeremy Holmes had been dismissed on the basis of a settlement; no judgment had been entered as to them. Defendant National Publishers Exchange was not a party to the original action; obviously no judgment on the merits had been issued as to it. I noted that although claim preclusion was not applicable to the claims against these defendants, issue preclusion might bar further litigation of the suits and I invited the parties to submit supplemental briefs on the subject. All except defendants Lane and Holmes responded to the invitation.

As a general rule, claim preclusion refers to the effect that a prior judgment has in foreclosing successive litigation of the same claim or cause of action against the same party; issue preclusion refers "'to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.'" New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (citing Restatement (Second) of Judgments §§ 17, 27 (1980)). Issue preclusion requires a showing that the same issue has been actually litigated and necessarily decided in a prior action and that the party against whom preclusion is asserted was a party to the prior action. Garza v. Henderson, 779 F.2d 390, 393 (7th Cir. 1985). It is not necessary that the person asserting preclusion have been a party to the previous action. If a party can be barred from re-litigating the issue with its opposing party, it can be barred from litigating the issue against a third party, unless the party to be precluded deserves an additional opportunity to litigate the issue because of particular circumstances, such as the lack of a full and fair opportunity to litigate in the first action. Restatement (Second) of Judgments § 29. See also Adair v. Sherman, 230 F.3d 890, 893 (7th Cir. 2000) ("'Under collateral estoppel [currently referred to as issue preclusion], once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'") (quoting Montana v. United States, 440 U.S. 147,

153 (1979)).

It is undisputed that the earlier case was decided by a court of competent jurisdiction. Although plaintiffs argued strenuously to the contrary, both in that case and in these two, the Court of Appeals for the Seventh Circuit has confirmed that this court did have jurisdiction to decide the first case. Wild v. Subscription [sic] Plus, Inc., 292 F.3d 526 (7th Cir. 2001). I turn then to the question whether the issues raised by plaintiffs in these two new cases are ones that were "actually and necessarily determined" in plaintiffs' previous case, 00-C-0067-C, as to each of the remaining defendants.

A. Karleen Hillery

In their pleadings in these cases, plaintiffs have added new causes of action against defendant Hillery and incorporated some of their earlier ones. The vast majority of them do not raise any new issues in the sense that they relate to matters not previously litigated. Plaintiffs assert defendant Hillery's alleged responsibility for providing plaintiffs' son with safe transportation, her alleged relationship to the driver of the van or the head of the crew in which plaintiffs' son was working, her alleged negligent hiring, her alleged negligent entrustment of the van to the head of the crew, her alleged supplying of drugs and alcohol to the crew members, her alleged false representations about the nature of the magazine selling jobs, her alleged fraudulent advertising for labor (which appears to overlap the alleged

false representations), her involvement in a joint enterprise with others, including defendant National Publishers Exchange and her breach of her contract with plaintiffs' son to provide him safe transportation. Despite the new packaging, most of plaintiffs' claims are simply rehashed versions of the allegations they made against Subscriptions Plus and Hillery the first time around.

In the previous case, I found that Subscriptions Plus could not be held liable for any of plaintiffs' claims of negligence in hiring or in supervising plaintiffs' son. Wisconsin's worker's compensation law barred any court action against Subscriptions Plus if it were Joseph Wild's employer or if Joseph Wild were working as an independent contractor in relation to Subscriptions Plus; plaintiffs had failed to produce evidence to support a finding of liability arising out of the negligent acts of an independent contractor of theirs who employed Joseph Wild; plaintiffs had adduced no evidence to support a finding that Subscriptions Plus had committed a negligent act that resulted in Joseph Wild's death. In drawing these conclusions, I found necessarily that defendant Hillery could not be liable for any of these claims because corporations act only through their officers, employees or agents. If plaintiffs had produced any evidence that defendant Hillery (or any other employee of Subscriptions Plus) had acted in a way that would have made the corporation liable to plaintiffs, I could not have found the corporation free from liability. This implicit finding has as much preclusive effect as an explicit finding. Cook County v. MidCon Corp., 773 F.

2d 892, 902 n.2 (7th Cir. 1985) ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect.") (quoting 1B. Moore's Federal Practice ¶ 0.443[2] at 761). In fact, I made the finding explicit when I noted that if defendant Hillery had not been dismissed for lack of personal jurisdiction, the findings as to Subscriptions Plus would apply to her.

In the earlier suit, I found also that Subscriptions Plus could not be held liable for breach of contract because plaintiffs had failed to adduce any evidence that this defendant had ever entered into an agreement with Joseph Wild. The doctrine of issue preclusion bars plaintiffs from pursuing this issue with respect to defendant Hillery.

Plaintiffs repeat reflexively their old argument that they never had a chance to be heard because of the court's refusal to entertain their untimely filed proposed findings of fact and brief in opposition to defendants' motion for summary judgment. As I explained in the May 13 order, the *opportunity to be heard* is not the same as *being heard*, which is something that can be forfeited or waived. Plaintiffs had the required opportunity but forfeited it by missing the deadline. Moreover, their submissions were deficient; even if they had been timely, they would not have advanced plaintiffs' case. For example, plaintiffs responded to a fact proposed by defendants Hillery and Subscriptions Plus to the effect that neither defendant owned the vehicles that Choan Lane used in his business by saying: "Denied.

Subscriptions Plus and Hillery provided vehicles used by the independent distributors and the independent contractors to sell magazines. See Plaintiffs' brief and evidence submitted therein in support of the argument." This response does not comply with the court's rules on summary judgment, which specify that the response is to be supported by citations to admissible evidence in the record. Merely telling the court to look at unspecified evidence in the brief is not compliance, particularly when the brief refers the court to "attached exhibits" that are not attached. Plaintiffs describe their "evidence" as Subscriptions Plus's web site pages, showing that Subscriptions Plus offered transportation for its independent contractors. Assuming there is such evidence, it does not shed light on the legal relationships among Joseph Wild and Subscriptions Plus and Hillery. In any event, plaintiffs failed to convince the court of appeals that they were denied the right to be heard. That should be an end to the issue.

Plaintiffs argue that the court never determined whether Joseph Wild was an employee of Subscriptions Plus. They are correct. I did not make the determination because there was no reason to. Whatever relationship Subscriptions Plus and Hillery had to Joseph Wild, they could not be held liable to him on the facts in the summary judgment record.

Plaintiffs argue that the court did not decide what Hillery's liability would be under the third assumption, that Wild was an employee of Y.E.S./Lane and Y.E.S./Lane was an independent contractor. I determined that Subscriptions Plus would have no liability for the

torts of the independent contractor because I found that plaintiffs had not shown that the company had a non-delegable duty to the employees of Y.E.S./Lane. Implicit in that finding was the related finding that Hillery had no duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. Obviously, if plaintiffs had been able to show that Subscriptions Plus's president, defendant Hillery, had assumed such a duty, I would not have reached the conclusion I did about Subscriptions Plus's liability. The same conclusion follows from plaintiffs' failure in the earlier case to show that Joseph Wild believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus and relied upon that belief or to show that defendant Subscriptions Plus engaged in an "affirmative act" of negligence that increased the danger Joseph Wild or to show that the company's own negligence caused Joseph Wild's death.

Citing the state court's ruling in a related action, plaintiffs contend that this court could have found that Hillery had sufficient control to defeat the argument that Y.E.S. was an independent contractor, that in fact she furnished the vehicles to the crews, provided transportation, paid their expenses and issued quotas to the sales force. They quote the state judge's finding that "Hillery gave orders on who was to drive which car because one of them was her luxury van." They argue, incorrectly, that this court has never decided Hillery's role. I did decide Hillery's role, by implication, as I have explained. That decision might have been different had plaintiffs supplied to this court the evidence that was before the state

court. They did not do so when they had the opportunity. They cannot reopen issues now that have been decided in case 00-C-0067-C simply because another judge has reached a different decision in another case involving defendant Hillery.

As for plaintiffs' claim that Hillery's involvement is supported by the affidavit of Choan Lane, they neglect to mention that at the time they responded to defendants' motion for summary judgment in the original case they had not taken Lane's deposition and had no affidavit from him. They leave out the additional fact that the magistrate judge subsequently ruled Lane's affidavit and testimony inadmissible because Lane refused to testify at his deposition on most matters. Plaintiffs cannot avoid the effect of adverse rulings in Case No. 00-C-0067-C by filing a new suit raising the same issues.

All this discussion may well be extraneous, as well as redundant. The Court of Appeals for the Seventh Circuit dealt with the whole matter far more succinctly in its decision affirming the dismissal of Subscriptions Plus in the earlier case. It observed that if defendant Hillery had been properly found subject to personal jurisdiction in Wisconsin, she "would be a party to the present case and the claim against her, which is indistinguishable from that against her company, Subscription Plus, would have gone down the drain with that claim." Wild, 292 F.3d at 530. I conclude that the doctrine of issue preclusion bars plaintiffs' negligence and contract claims.

This leaves only the allegations that defendant Hillery made false representations

about the nature of the magazine selling jobs and her alleged fraudulent advertising for labor. Although plaintiffs do not make it entirely clear, it appears that they are alleging intentional acts rather than negligent ones. Their claims of intentional wrongdoing were not litigated in the previous suit and therefore, are not barred by issue preclusion. I have serious doubts whether plaintiffs can prove either that defendant Hillery made false representations to Joseph Wild that he relied upon or that his reliance was a legal cause of his death, but at this point, I cannot say that plaintiffs cannot go forward on these two allegations.

B. Scottsdale and Acceptance

Scottsdale Insurance Company and Acceptance Insurance Companies remain in this suit only because of their possible duty to insure or defend defendant Karleen Hillery. So long as she remains a party, they do too.

C. National Publishers Exchange

Plaintiff alleges that defendant National Publishers is liable for misrepresentation and fraudulent advertising, as a joint venturer with Subscriptions Plus. These allegations are new as to this defendant, which was not a party to the previous litigation. I have serious doubts whether any of them can be proven, but at this stage of the litigation, I cannot say that they are barred by issue preclusion, which is the only ground that I am considering on this motion

for summary judgment. If defendant National Publishers has reason to believe that plaintiffs lack evidentiary support for their allegations and will not secure such evidence after they have had a reasonable time for discovery, defendant can follow the procedures in Fed. R. Civ. P. 11 for seeking sanctions against plaintiffs.

Plaintiffs name National Publishers in four counts. Only three could be considered actual causes of action. In count 8, plaintiffs allege that National Publishers, along with defendants Subscriptions Plus, Hillery, Y.E.S. and Lane are equitably estopped from raising the defense that Joseph Wild was an employee of any of the defendants (in which case, plaintiffs' only remedy would be under Wisconsin's Worker's Compensation Act). As National Publishers points out, this is not a cause of action but the anticipation of an affirmative defense that defendants might raise. In count 9, plaintiffs allege that defendant National Publishers participated in a common scheme or plan with Subscriptions Plus, Hillery, Y.E.S. and Lane, which involved the making of false representations or the failure to prevent the making of false representations in order to lure young adults such as Joseph Wild into magazine sales work. In count 11, plaintiffs allege that defendants National Publishers, Subscriptions Plus, Y.E.S., Lane and Hillery were involved in a joint venture, thus making each of them liable for the negligence of the others. In count 12, plaintiffs allege that defendant National Publishers participated with one or more of Subscriptions Plus, Hillery, Y.E.S. and Lane in the development of various magazine marketing and selling schemes and

that they lured Joseph Donald Wild "from his home by false or deceptive representations and/or false pretenses regarding the kind and character of the work to be done, the amount and character of the compensation to be paid for work, the providing of safe transportation, and the conditions of employment relating to his streets trades activities as a seller of magazines." Cpt., dkt. #1, at 19.

Conceding that they cannot pursue the claim that National Publishers is vicariously liable as a joint venturer for the negligence of Subscriptions Plus, as alleged in the eleventh cause of action, now that Subscriptions Plus has been dismissed from the action on the grounds of claim preclusion, plaintiffs suggest that they can proceed on the theory that National Publishers was part of an enterprise that included Y.E.S./Lane. This is true only if plaintiffs have grounds for showing that any of the alleged joint venturers was negligent. As a matter of law, defendants Subscriptions Plus and Hillery could not be held liable under a theory of negligence but no such finding has been made as to defendants Y.E.S. and Lane. Y.E.S. is no longer a party to this case but that does not mean that plaintiffs could not prove it was negligent and that it was engaged in a joint venture with National Publishers. (Y.E.S. was dismissed from these cases in the same May 13, 2002 order in which Subscriptions Plus was dismissed.)

Defendant National Publishers argues that it cannot be held vicariously liable for Lane's negligence because Lane has been released from the case by settlement. However, a

review of the release shows that plaintiffs released Lane from the prior case only as to claims for which he and Jeremy Holmes had liability coverage provided by Allstate Insurance Company and Allstate Indemnity Company. Plaintiffs made an express reservation of any claims for which Lane and Holmes might have insurance coverage provided by a different insurer. It seems unlikely that Lane and Holmes have any such additional coverage, given plaintiffs' inability to ferret out any in the first case, but I cannot say that they do not. Moreover, plaintiffs' allegations are not limited to negligence; they allege a scheme to make or authorize the making of false representations, which is an intentional tort.

Defendant argues that issue preclusion bars the allegations of false representations and false advertising made in the ninth and twelfth causes of action because this court found previously as undisputed the fact that defendant Subscriptions Plus had no involvement in the selection of employees for the Y.E.S. sales crew. Defendant mischaracterizes the finding. I did find that defendants Holmes and Lane did the selecting and hiring but I never found that Subscriptions Plus had no involvement in the selection or that the company never made any misrepresentations or engaged in false advertising. Although plaintiffs are barred from asserting these claims against defendants Subscriptions Plus and Y.E.S.!, they are not barred from asserting them against defendant National Publishers, Hillery and Lane (to the extent that the claims against Lane are covered by insurance issued from a company other than Allstate). However, before plaintiffs can continue to prosecute the case, they will be required

to amend their pleadings against the remaining defendants to conform with the requirements of Fed. R. Civ. P. 9(b), that the circumstances underlying allegations of fraud must be stated with particularity. Plaintiffs will have to identify the exact representations and advertisements they contend were false, who made them, when and to whom and in what circumstances.

ORDER

IT IS ORDERED that

(1) Defendant Karleen Hillery's motion for dismissal on the ground of issue preclusion is DENIED with respect to plaintiffs Donald R. Wild and Diana H. Wild's claim that she made false representations, engaged in false advertising upon which plaintiffs' son relied to his detriment and engaged in a scheme to do these things; in all other respects, it is GRANTED;

(2) The motions for dismissal filed by defendants Acceptance Insurance Companies and Scottsdale Insurance Company are DENIED;

(3) The motion for dismissal on the ground of issue preclusion filed by defendant National Publishers Exchange is DENIED; and

(4) Plaintiffs may have until October 15, 2002, in which to amend their complaints in these cases to set forth their allegations of fraud with the particularity required by Fed. R.

Civ. P. 9(b). Failure to file timely amended complaints may lead to the dismissal of both cases.

Entered this 30th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge