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Feature Article

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A Re-sharpened Tool in the Shed: The Value of Judicial Estoppel

Three recent cases illustrate the use and the limitations of the doctrine of judicial estoppel in combating inconsistent positions that plaintiffs might take. Understanding the subtleties of the doctrine as set forth in these most recent cases can allow practitioners to appropriately and effectively use judicial estoppel as a tool to shave off arguments and positions available to parties.

Judicial Estoppel: The Basics

Judicial estoppel is a tool most often used in combination with a motion to dismiss under Section 2-619(a)(9) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(9). The elements of judicial estoppel assert that (1) the same party in separate actions (2) may not maintain totally inconsistent positions (3) in those separate judicial proceedings (4) when the positions are presented under oath and (5) the party successfully maintained the first position, receiving some benefit thereby. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 20; *Berge v. Kuno Mader*, 2011 IL App (1st) 103778, ¶ 13.

Despite these seemingly strict elements, judicial estoppel is a flexible doctrine. *Smeilis*, 2012 IL App (1st) 103385, ¶ 19 (quoting *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1st Dist. 1996)). Although these five elements generally are required, application of the doctrine will not be precluded by an omission of one or two elements. *United Auto. Ins. Co. v. Buckley*, 2011 IL App (1st) 103666, ¶ 35. As demonstrated by the cases below, courts are most willing to apply judicial estoppel when presented with compelling public policy arguments. See *Berge*, 2011 IL App (1st) 103778, ¶ 18 ("The primary focus of judicial estoppel in Illinois is . . . its effect on the judicial system."). Keeping these public policy arguments in mind might allow a shrewd practitioner to seek to apply the doctrine where it might not otherwise be appropriate because not all of the elements are met.

The public policy aim underlying judicial estoppel is to protect the integrity of the justice system. *Smeilis*, 2012 IL App (1st) 103385, ¶ 19, 967 N.E.2d at 898. Judicial estoppel accomplishes this goal by preventing litigants from shifting legal positions merely to capitalize on the exigencies of a particular proceeding. *Buckley*, 2011 IL App (1st) 103666, ¶ 35. A party may not advance a legal theory in an initial judicial proceeding, receive a benefit thereby, only to attempt to advance a contrary legal theory at a subsequent proceeding. *Smeilis*, 2012 IL App (1st) 103385, ¶ 19 (citing *Barack Ferrazzano Kirschbaum Perlman & Nadelberg v. Loffredi*, 342 Ill. App. 3d 453 (1st Dist. 2003)). Once a plaintiff has introduced sworn testimony in a legal proceeding, that plaintiff is bound by that testimony in all subsequent legal proceedings. Any future evidence or declarations of fact contrary to

the previous testimony must be barred in all succeeding actions. Notably, the later evidence and statements must be barred regardless of the reliability of the evidence or the veracity of the subsequent position. *Id.* ¶ 53 ("The court's concern under the doctrine of judicial estoppel is with inconsistent positions taken by the plaintiffs, not with the truthfulness of either position."). See also *Bidani*, 285 Ill. App. 3d at 550 ("[J]udicial estoppel precludes a contradictory position without examining the truth of either statement . . . .").

The Leading Case on Judicial Estoppel: *Bidani v. Lewis*

The leading, and most often cited, case on judicial estoppel is the Illinois appellate court's decision in *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1st Dist. 1996). The importance of *Bidani* is the finding by the court that a settlement was sufficient to support the fifth element of the doctrine: benefit by the previous, now inconsistent, position. In *Bidani*, 285 Ill. App. 3d at 547, Dr. Anil K. Bidani filed a complaint for breach of contract and constructive trust against an alleged former business partner and various medical services companies, claiming a financial interest in the companies. Approximately five years prior to filing the lawsuit, Dr. Bidani filed a dissolution of marriage action against his wife. *Id.* at 548. During the divorce proceedings, Dr. Bidani submitted sworn testimony to the court, in which he declared that he held no interest in any business, except a real estate venture. *Id.* In his subsequent lawsuit, however, Dr. Bidani claimed that he owned a percentage of each of the defendant companies, in connection with his former partner. Consequently, Dr. Bidani claimed that he was entitled to a share of the profits from the sale or dissolution of each company. *Id.* at 547. Relying on the doctrine of judicial estoppel, the trial court dismissed the action. *Id.* Noting the importance of the public policy underlying the doctrine, the appellate court affirmed the dismissal. *Id.* at 554 ("Although applying judicial estoppel sometimes leads to harsh results, it is often necessary to protect the sanctity of the oath and preserve the integrity of the courts and the judicial process.").

Recent Cases Applying Judicial Estoppel: *Berge, Smeilis,* and *Buckley*

Illinois courts have relied on the doctrine to warrant the dismissal of lawsuits in a variety of matters. In *Berge v. Kuno Mader*, 2011 IL App (1st) 103778, personal injury defendants successfully dismissed a plaintiff's suit for her failure to identify the tort action in a bankruptcy filing. In a matter of first impression, the court in *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, dismissed a medical malpractice action when the plaintiff attempted to advance two conflicting theories of liability. Finally, the court in *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, limited the application of the doctrine of judicial estoppel to inconsistent statements made under oath.

Berge v. Kuno Mader

The *Berge* plaintiff, Shirley Berge, was injured in an accident with a car owned by a corporate defendant, DMG America, Inc., and driven by an employee of the corporation, Kuno Mader. *Berge*, 2011 IL App (1st) 103778, ¶ 3. As a result of the accident, the plaintiff filed a negligence action, seeking damages. *Id.* Prior to the accident, the plaintiff had filed a Chapter 13 bankruptcy petition. *Id.* Approximately eighteen months after filing her tort action, the plaintiff converted her Chapter 13 bankruptcy petition to a Chapter 7 petition. *Id.* The plaintiff chose not to identify her pending personal injury lawsuit in either her Chapter 13 filing or her Chapter 7 filing. *Id.* The plaintiff eventually received a "no assets" discharge of all her debts and her Chapter 7 petition was closed. *Id.*

Once defendants Mader and DMG America, Inc. learned of the plaintiff's bankruptcy case, they filed a motion for summary judgment, claiming the instant suit was barred by judicial estoppel. *Berge*, 2011 IL App (1st) 103778, ¶ 9. The trial court granted the defendants' motion, holding that the

doctrine of judicial estoppel precluded the plaintiff from pursuing the tort action against defendants. *Id.* ¶ 14. The appellate court affirmed the trial court's holding, explaining how the plaintiff's lawsuit violated the doctrine of judicial estoppel. *Id.* ¶ 13. First, the plaintiff presented two inconsistent positions in subsequent proceedings. *Id.* ¶ 14. When the plaintiff failed to disclose her pending lawsuit against defendants in her bankruptcy filing, she was essentially claiming the lawsuit was worthless. In maintaining the suit against the defendants, however, she was arguing that her claim was valuable. Second, these two contrasting positions were offered in separate legal proceedings: before the bankruptcy court and before the trial court. *Id.* Third, both the plaintiff's bankruptcy petition and her complaint were filings offered under oath. *Id.* Finally, the plaintiff received a substantial benefit from her first position: she received a "no assets" discharge of her debts, despite the fact that her personal injury lawsuit was a substantial asset. *Id.*

Smeilis v. Lipkis

The *Smeilis* decision is important because it is the first time an Illinois court applied the judicial estoppel doctrine to a case involving medical malpractice. The *Smeilis* case is also important because it squarely held that a party could not, without serious consequence, change its theory of the case upon changing its expert.

The trial court in *Smeilis* dismissed the plaintiffs' refiled medical malpractice complaint, with prejudice, when the complaint sought recovery based on a legal theory completely incompatible with the plaintiffs' previously filed complaint. *Smeilis*, 2012 Ill App (1st) 103385, ¶ 1. The appellate court upheld the dismissal, finding the second complaint barred by judicial estoppel. *Id.* In August 1999, Kathleen Smeilis, was admitted to the emergency room of Glenbrook Hospital, for extreme lower back pain. *Id.* ¶ 4. After a few days of treatment and observation, Smeilis was discharged from Glenbrook and admitted to Abington Nursing Home, on August 12, 1999. *Id.* ¶¶ 4-6. While a patient at Abington, Smeilis was treated by Dr. Evan Lipkis. *Id.* ¶¶ 6-9. On August 18, 1999, Smeilis was transferred to Evanston Hospital, where she underwent immediate surgery to correct a medical condition known as CES (cauda equina syndrome). *Id.* ¶ 9. None of the doctors or nurses of either Glenbrook Hospital or Abington Nursing Home, including Dr. Lipkis, diagnosed Smeilis with CES prior to her admission to Evanston Hospital.

In 2001, Smeilis and her husband filed a medical malpractice action against Glenbrook Hospital, Smeilis' treating physicians at Glenbrook Hospital, Abington Nursing Home, and Dr. Lipkis. *Smeilis*, 2012 IL App (1st) 103385, ¶ 10. The crux of the Smeilis claim was that Kathleen suffered severe neurological damages as a result of the defendants' failure to timely diagnose and treat her CES. *Id.* ¶ 10. The primary support for this claim was provided by the plaintiffs' expert, Dr. Gary Skaletsky, a neurosurgeon, who testified that had surgery been performed on or before August 10, 1999, Kathleen's neurological function would have been significantly improved. *Id.* ¶ 11. Dr. Skaletsky further testified that, if the surgery would have been performed on or after August 11, 1999, it would have been too late, because Kathleen's neurological condition likely would not be any better than her present condition. *Id.* Following Dr. Skaletsky's deposition, all the defendants, except Dr. Lipkis, settled with the plaintiffs, for a total recovery of $3,200,000. *Id.* ¶ 12. The plaintiffs subsequently dismissed their remaining claims against Dr. Lipkis. *Id.*

In 2007, the plaintiffs filed a new complaint against Dr. Lipkis, claiming Dr. Lipkis alone caused Kathleen's injuries. *Smeilis*, 2012 Ill App (1st) 103385, ¶ 13. In support of this claim, the plaintiffs gave notice of a new expert witness, Dr. Andrew Chenelle, a neurologist. *Id.* At his discovery deposition, Dr. Chenelle offered testimony in direct opposition to that previously offered by Dr. Skaletsky. Dr. Chenelle claimed that if surgery had been performed on August 14, 1999 or even a few days later, Kathleen would not have suffered such severe injuries. *Id.* ¶ 14. Consequently, Dr. Chenelle opined, the Glenbrook defendants had not deviated from the standard of care by failing to

diagnose and treat Kathleen's CES; Dr. Lipsky should have diagnosed Kathleen's illness and ordered surgery. *Id.* Both the trial court and the appellate court found the theory of liability advanced in the second lawsuit contrary to the theory advanced in the first and, thus, barred by judicial estoppel. *Id.* ¶ 39.

On appeal, the plaintiffs acknowledged that the two theories were inconsistent, but argued that judicial estoppel was inapplicable in medical malpractice cases. *Smeilis*, 2012 IL App (1st) 103385, ¶ 25. The court acknowledged the question as one of first impression, and even went so far as to assert that "medical negligence cases [may] compel greater flexibility in the doctrine of judicial estoppel than has been recognized to date in other contexts." *Id.*, ¶ 29. Ultimately, however, the appellate court held medical negligence actions subject to judicial estoppel and affirmed the trial court's dismissal. *Id.* ¶¶ 41, 63.

United Automobile Insurance Co. v. Buckley

In *United Automobile Insurance Co. v. Buckley*, the Illinois appellate court upheld the ruling of the trial court that an insured had not breached the cooperation clause of his automobile insurance policy and that the insurer owed indemnity to the insured for a judgment entered after the insured failed to appear at an arbitration hearing and was debarred from rejecting the arbitration award. *Buckley*, 2011 IL App (1st) 103666, ¶ 1. The court held that, although the insurer and its retained defense counsel had taken the appropriate steps to obtain the attendance of the insured at the arbitration hearing, the insured's failure to appear was not willful, but rather was the product of a mistake. *Id*. ¶¶ 29-36. Relevant for the issue addressed here, the court further held that the underlying plaintiff was not judicially estopped in the coverage action from arguing that the insured did not act in bad faith despite obtaining such a ruling in the underlying matter that led to the insured being debarred from rejecting the arbitration award. *Id*. ¶ 36. The basis of the court's decision was that the underlying plaintiff had not stated anything under oath that was now being contradicted by this allegedly new position. *Id*. Accordingly, the court held that the doctrine of judicial estoppel did not apply.

Conclusion

The judicial estoppel doctrine has been further defined by the recent decisions in Berge, Smeilis, and Buckley by not only expanding it to include medical malpractice cases, but also by limiting it to cases in which the party against whom the doctrine is to be used must have made a statement under oath. Understanding the parameters of the doctrine will allow practitioners to use it as a tool to limit the arguments and positions available to their opponents or to expand their own.

About the Authors

Donald Patrick Eckler is an associate at *Pretzel & Stouffer, Chartered*. He practices in both Illinois and Indiana in the areas of commercial litigation, professional malpractice defense, tort defense, and insurance coverage. He earned his undergraduate degree from the University of Chicago and his law degree from the University of Florida. He is a member of the Illinois Association Defense Trial Counsel, the Risk Management Association, and the Chicago Bar Association. He is the co-chair of the CBA YLS Tort Litigation Committee.

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