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Party's Intent to Deceive Is Crucial Factor in Application of Judicial Estoppel

"If you tell the truth, you don't have to remember anything."
– Mark Twain

Despite the requirement for parties to tell the truth in their filings, often it is the case that through inadvertence or intention, they fail to do so. Judicial estoppel has long been the means by which courts have prevented parties from taking advantage of their intention to hide the truth or be less than forthcoming. Prior to the Illinois Supreme Court decision of *Seymour v. Collins*, 2015 IL 118432 the leading case on judicial estoppel was *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1st Dist. 1996). In the run up to *Seymour*, a series of cases, *Berge v. Kuno Mader*, 2011 IL App (1st) 103778, *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, and *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, seemed to signal a move in the direction of enforcing the doctrine. See *A Re-sharpened Tool in the Shed: The Value of Judicial Estoppel*, *IDC Quarterly*, Vol. 23, No. 2, Starr M. Rayford and Donald Patrick Eckler. Since *Seymour*, the doctrine has been nuanced as courts have struggled with applying the doctrine.

Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *Seymour v. Collins*, 2015 IL 118432, ¶ 36. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from "deliberately changing positions" according to the exigencies of the moment. *Id.* Judicial estoppel applies in a judicial proceeding when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 460 (1st Dist. 2003). The elements of judicial estoppel apply where (1) the same party has taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. *Seymour*, 2015 IL 118432, ¶ 37. Notably, while at times the court included the additional requirement that the inconsistent statement be made "under oath," (see, *e.g. People v. Caballero*, 206 Ill.2d 65, 80 (2002)), in *Seymour* the supreme court explicitly held that a statement under oath is not required for the doctrine to apply, and the primary concern is whether the party "intends that the trier of fact accept the truth of the facts alleged." *Seymour*, 2015 IL 118432, ¶ 37. The five general requirements must be proven by "clear and convincing evidence" before the doctrine applies. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 20.

The *Seymour* court made clear that application of the doctrine of judicial estoppel requires a two-part analysis: first, the five general prerequisites are met; and second, the court must exercise its discretion by taking into consideration whether the party's inconsistent positions were based on an intent to deceive or mislead rather than mere inadvertence or mistake. *Seymour*, 2015 IL 118432, ¶ 47. Thus, the formulaic application of the five requirements is not sufficient and practitioners must be prepared to show evidence of the party's intent to deceive. What amounts to "clear and convincing evidence" of an intent to deceive, and the proper exercise of the court's discretion, is explored in the cases below.

Seymour v. Collins

The circuit court granted the defendant's motion for summary judgment pursuant to the doctrine of judicial estoppel. *Id.* ¶ 1. The decision was upheld by the appellate court, only to be reversed and remanded by the Illinois Supreme Court. *Id.* The plaintiffs, Terry and Monica Seymour, filed personal injury claims after Mr. Seymour was injured in an automobile accident while being transported in an ambulance. *Id.* ¶ 3. Prior to the personal injury lawsuit, the Seymours had filed for Chapter 13 bankruptcy, and it eventually came to light that the plaintiffs had failed to disclose their personal injury action in the bankruptcy proceeding. Given this failure, the defendants argued that the plaintiffs should be judicial estopped from proceeding with their claims. *Id.* ¶¶ 8-9. The circuit court agreed finding that since the plaintiffs had failed to disclose the case as a potential asset in their bankruptcy case, they were judicially estopped from seeking a monetary judgment against the defendants. *Id.* ¶ 18.

The Illinois Supreme Court reversed and held the doctrine did not apply. The court first noted that even if all five elements are technically met that does not mean an intent to deceive or mislead is necessarily present because "inadvertence or mistake may account for positions taken and facts asserted." *Id.* ¶ 47. Further, whether or not to apply the doctrine is still within the court's discretion and the court can consider several additional factors such as "the significance or impact of the party's action in the first proceeding and, as noted, whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.*

The supreme court defined the dispositive issue to be "whether plaintiffs 'deliberately' changed positions according to the exigencies of the moment, whether they used 'intentional self-contradiction as a means of obtaining unfair advantage.'" *Id.* ¶ 50. It is worth noting that for purposes of analyzing the intention of plaintiffs, the court assumed (rather than wading into the weeds of bankruptcy law) that the plaintiffs were under a continuing duty to disclose their personal injury lawsuit during the bankruptcy proceeding. *Id.* ¶ 52. The court equally assumed that the five general requirements of judicial estoppel were met, thus limiting its inquiry to whether the plaintiffs *intended to deceive or mislead the court*, which it described as a "critical factor" in the application of judicial estoppel. *Id.* ¶ 53.

Significantly, in determining the plaintiffs "intention to deceive or mislead" the court also assumed that the plaintiffs did intend for the bankruptcy court to accept the truth of their position, *i.e.* that they had no "assets" - as the plaintiffs understood the term - other than those disclosed. *Id.* ¶ 54. In holding there was no evidence of such an intent, the court rejected the argument that since the plaintiffs had disclosed other assets (such as a workers' compensation claim that arose during the bankruptcy) they knew to disclose the personal injury lawsuit. *Id.* ¶ 55. However, the court reasoned there was no justification to extrapolate such an inference because the injury and workers' compensation claim were relevant, and submitted, in the motion to modify only because they explained the plaintiffs' decrease in income. *Id.* ¶ 58.

Moreover, the court noted the evidence showed that the plaintiffs had been advised by their bankruptcy attorney that they had to report any lump sum funds received in excess of $2,000 during the pendency of the bankruptcy. *Id.* ¶ 61. The court found it was reasonable for a layman to infer that smaller sums, including unliquidated claims for money such as the pending personal injury lawsuit, did not have to disclosed. *Id.* The court held that it would not "penalize, via presumption, the truly inadvertent omissions of good-faith debtors in order to protect the dubious, practical interests of bankruptcy creditors." *Id.* ¶ 63. Thus, *Seymour* not only makes clear that application of the doctrine requires clear and convincing evidence of an intent to deceive, but shows there is no such evidence in the bankruptcy context where it is reasonable to infer the layman plaintiff did not know of his duty to disclose a personal injury lawsuit.

Higginbotham v. Fintel

In another similar case, the Illinois Appellate Court First District affirmed the circuit court granting defendant's motion for summary judgment based on the application of judicial estoppel. Like the plaintiffs in *Seymour,* the plaintiff first filed chapter 13 bankruptcy. Thereafter he filed a medical malpractice lawsuit but never amended the bankruptcy petition to include the lawsuit as a potential asset. The plaintiff argued that while most of the prerequisites of the doctrine of judicial estoppel were met, he received no benefit from the inadvertent failure to disclose his medical malpractice lawsuit because all of his creditors that had "perfected" their claims had been paid in full. *Higginbotham v. Fintel*, 2019 IL App (1st), 181420-U, ¶ 14. The circuit court disagreed and ruled that he had received a benefit from the nondisclosure "because some of his debts were discharged without his creditors' knowledge of his potential to recover a monetary judgment from the lawsuit." *Id.* ¶ 15.

On appeal, the first issue was whether the plaintiff received a benefit from the nondisclosure of his lawsuit in the bankruptcy proceedings. *Id.* ¶ 24. The defendants argued that he did receive a benefit because he obtained a discharge of his unsecured debt (he paid off all his secured debt) and the termination of his bankruptcy case without the Chapter 13 trustee, his creditors, or the bankruptcy court having any knowledge about his medical malpractice lawsuit. *Id.* ¶ 26. The plaintiff argued that there was no benefit, because the unsecured creditors failed to file proof of their claims, and under bankruptcy law, they would not have received any money, even if he had disclosed the lawsuit. *Id.* The court rejected this argument and held that the "plaintiff here has clearly and convincingly received a benefit from his nondisclosure, namely his ability to proceed in the bankruptcy case without the bankruptcy court, his trustee and his creditors being aware of this potential asset." *Id.* ¶ 30. The court explained that "our focus is on the benefit received by plaintiff not the lack of harm felt by his creditors." *Id.*

The court also held there were "undisputed facts" showing that the plaintiff's failure to disclose the lawsuit in bankruptcy was not accidental. In support thereof, the court relied on the fact that when the plaintiff filed bankruptcy, he signed an agreement stating that he would notify his bankruptcy attorney if he wished to file a lawsuit, thus affirming he was on notice that he needed to disclose. *Id.* ¶ 37. The court also rejected the argument that the plaintiff was relying on his bankruptcy attorneys because there was no evidence in the record that he ever told the bankruptcy attorneys about the medical malpractice lawsuit. *Id.* The court also found persuasive the fact that the plaintiff answered in written discovery that a bankruptcy case was filed in 2016, when it was really filed in 2013. *Id.* Thus, the court held it was reasonable to infer that the plaintiff's failure to disclose the medical malpractice case was intentional rather than inadvertent. *Id.* ¶ 38. The court also made this telling observation, "…plaintiff describes himself as a 'blundering laymen,' who did not know he needed to disclose the lawsuit in bankruptcy court. But in same breath, he argues he could not have had a motive to conceal the lawsuit because the disclosure of it would not have affected his repayment plan. This argument is a microcosm of what the doctrine of judicial estoppel is intended to prevent: changing positions according to the exigencies of the moment." *Id.* ¶ 40.

Thus, *Higginbotham* serves as a good example of "clear and convincing" of a party's intent to deceive. The court at the time found particularly persuasive the fact the plaintiff signed an agreement in the bankruptcy proceeding agreeing to notify bankruptcy counsel if he wished to file a lawsuit.

Adrenaline v. Greenlayer

This matter involved a breach of contract claim. First, Adrenaline, an event management company, filed a breach of contract claim in Illinois against Greenlayer, a sports apparel company. *Adrenaline Sports Management, Inc. v. Greenlayer, LLC*, 2019 IL App (1st) 180802-U, ¶¶ 2-4. One day later, Greenlayer filed its own complaint against Adrenaline in Oregon, which included claims not only for breach of contract but also alleged that Adrenaline breached a settlement agreement by filing the Illinois lawsuit and conversion. *Id.* Adrenaline moved to dismiss the Oregon complaint arguing it was not subject to personal jurisdiction in Oregon and its earlier-filed Illinois complaint involved the same cause for the same parties. *Id.* ¶ 8. In response to the motion, Greenlayer argued that the Oregon complaint was not the same because it included claims of breach of settlement agreement and conversion, which were factually and legally distinct from the breach of contract claim filed in Illinois. *Id.* The Oregon court denied the motion to dismiss and the matter continued to be litigated in Oregon. *Id.*

Thereafter in the Illinois case, Greenlayer moved to dismiss Adrenaline's complaint pursuant to §2-619(a)(3) because it involved the same cause and the same parties as the Oregon action. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 9. Adrenaline responded that Greenlayer should be judicially estopped from arguing that the Illinois and Oregon suits involved the same cause because it took the opposite position in response to Adrenaline's motion to dismiss the Oregon complaint. *Id.* ¶ 10. The Illinois court dismissed Adrenaline's complaint and Adrenaline appealed. *Id.* ¶ 12.

Prior to engaging in the §2-619(a)(3) analysis, the appellate court reviewed whether Greenlayer should be judicially estopped from arguing that the Illinois and Oregon actions involved the same cause because it previously argued in the Oregon case that the two actions did not involve the same cause. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 15. The appellate court held the circuit court did not abuse its discretion in declining to apply the doctrine. The court explained that the doctrine of judicial estoppel "applies only to a party's statements of fact and not to legal opinions or conclusions." *Id.*, citing *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st), 142754, ¶ 66. The court held that whether two actions involve the same cause within the meaning of §2-619(a)(3) is a legal conclusion, not a factual assertion, thus while Greenlayer may have taken a different legal position, it had not made any factually inconsistent statements in the Oregon and Illinois proceedings. *Adrenaline,* 2019 IL App (1st) 180802-U, ¶ 16.

Stumeier v. Janis

This matter involved the allegation that the defendants negligently removed timber from the plaintiffs' property. Specifically, that the defendant Janis entered into a timber purchase agreement with Langford, which required Janis to stake and mark the boundary lines of the property where the timber was located and for Langford to remove the timber. *Stumeier v. Janis*, 2020 IL App (5th) 190405-U, ¶ 3. The agreement also stated that Janis would indemnify Langford for any claims of third parties for damages resulting from errors in the location of the boundary lines. *Id.* ¶ 4. The plaintiffs alleged that Langford negligently removed some timber from their property and sought to hold both Janis and Langford liable. Janis filed a motion for summary judgment arguing that he could not be liable for the negligence of Langford because he did not control Langford's work, who was an independent contractor. *Id.* ¶ 6. The plaintiffs ultimately "confessed judgment" on the motion for summary judgment in Janis's favor. *Id.* The matter continued against Langford who was ultimately defaulted and ordered to pay the plaintiffs' damages. *Id.* After the default judgment was entered, Langford executed an assignment to the plaintiffs for his claim of indemnity against Janis based on the agreement between Janis and Langford. *Id.* ¶ 7. One of the underlying plaintiffs, as the assignee of Langford, filed the complaint against Janis

seeking indemnity under Janis's agreement with Langford. *Id.* ¶ 8. Janis filed a motion to dismiss arguing that the plaintiff confessed to entry of summary judgment in Janis's favor in the original action, based on the argument that Janis could not be liable for Langford as an independent contractor, and the plaintiff was therefore judicially estopped from arguing as such in the indemnity action. *Id.* ¶ 11. The court in the indemnity action agreed and dismissed the matter.

On appeal, the Illinois Appellate Court Fifth District cursorily stated that the trial court had found that the five general requirements of judicial estoppel had been met. However, the court reversed and remanded the trial court's order dismissing the plaintiff's complaint based on judicial estoppel. The only basis for reversing and remanding was that "there was nothing in the record to indicate that the trial court engaged in the second step of the judicial-estoppel analysis, *i.e.* exercising its discretion in deciding whether to apply judicial estoppel." *Id.* ¶ 17. The trial court's order "never mentioned the equitable factors, such as the intent to deceive, that are set forth in *Seymour*." *Id.* Given this, the appellate court remanded the matter back to the trial court to consider these factors. *Id.* ¶ 17.

Stevenson v. Sharma

In the most recent decision, and contrary to its earlier decision in *Higginbotham v. Fintel*, the Illinois Appellate Court First District reversed the order of the circuit court granting summary judgment in favor of the defendants based on judicial estoppel. The court held there was a genuine issue of material fact whether the plaintiff's failure to disclose his cause of action to the bankruptcy court was inadvertent or an intentional act of deception. *Stevenson v. Sharma*, 2020 IL App (1st), 192430-U, ¶ 1. The action involved a dental malpractice claim against the defendants. Three years before filing the malpractice lawsuit, the plaintiff had filed for Chapter 13 bankruptcy. *Id.* ¶ 6. Like the plaintiffs in *Higginbotham*, as part of the bankruptcy proceeding the plaintiff signed an agreement stating that he would notify the attorney if he wished to file a lawsuit. *Id.* ¶ 8. While the dental malpractice action was still pending, the plaintiff's debt was discharged, including $136,399 in unsecured debt. The plaintiff never disclosed the dental malpractice claim in the bankruptcy proceeding. *Id* ¶ 9. After learning of the bankruptcy proceeding, the malpractice defendants filed an emergency motion to dismiss. The court continued the motion and ordered the plaintiff to reopen the bankruptcy case and amend the schedules to include his malpractice claim against the defendants. *Id.* ¶ 15. The defendants then filed a motion for summary judgment again arguing that plaintiff's claim was barred under the doctrine of judicial estoppel. *Id.* ¶ 18. The court granted the motion, holding that all five elements had been met and the evidence established the plaintiff intended to deceive or mislead the bankruptcy court. *Id.* ¶ 21. In support of that finding, the court pointed to the following evidence: the agreement between the plaintiff and his bankruptcy counsel that required him to inform his counsel if he wished to file a lawsuit; the plaintiff's disclosure of two cases against him while failing to disclose two lawsuits he was prosecuting; and the plaintiff's financial motive for concealment of money judgment to his creditors. *Id.* ¶ 21. On appeal, the plaintiff argued that the first and fourth elements had not been met (that plaintiff had taken two positions and intended the trier of fact to accept the truth of the facts alleged) because under federal bankruptcy law he was not required to disclose the malpractice action, citing to various provisions of the bankruptcy code. *Id.* ¶¶ 26-28. The court summarily rejected this argument finding the vast weight of authority holds that a debtor has a continuing obligation to disclose post-petition causes of action. *Id.* ¶ 30. Thus, the primary issue was the second part of the judicial estoppel two-part analysis: whether the circuit court properly exercised its discretion, taking into consideration such factors as (1) the impact of the plaintiff's action in the first proceeding, and (2) whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake. *Id.* ¶ 33. In support of his argument that his failure to disclose was inadvertent, the plaintiff relied on his own affidavit averring that he was not aware he needed to disclose the claim and did not intent to deceive the court. *Id.* ¶ 34. The defendants argued there was evidence of intent: the agreement the plaintiff signed that required him to inform counsel if he wished to file a

lawsuit; the bankruptcy schedule indicating he had no income compared to his deposition testimony in the malpractice case stating that he earned up to $1200 a day as a boat captain; and his application to proceed as an indigent plaintiff in a 2014 case based on his purported unemployment even though he was working as a boat captain. *Id.* ¶ 36. The defendants argued this showed a pattern of changing his position based on what benefitted him most given the proceeding. While such evidence was seemingly sufficient in *Higginbotham* to find intent, the court held that the evidence raised a credibility issue which was properly left to the trier of fact and reversed the grant of summary judgment. *Id.* ¶ 38.

Conclusion

As the above cases show, the court must engage in a two-part analysis before the doctrine of judicial estoppel applies: (1) are the five prerequisites satisfied; and (2) exercising its discretion is it proper for the court to apply the doctrine taking into consideration whether the inconsistent positions were taken with an intent to deceive the court. As *Seymour* and is progeny show, it is the second step, focused on discretion and the party's intent, that seems to be the most crucial factor in the court's analysis. This highlights the equitable nature of the doctrine. Practitioners seeking to have the doctrine applied must be prepared to show evidence of the plaintiff's intent to deceive.

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