

Feature Article

By: Donald G. Peterson
Hughes Socol Piers Resnick & Dym, Ltd., Chicago

Judicial Estoppel Based on a Judicial Admission Should be Decided on a Dispositive Motion

What is judicial estoppel? Judicial estoppel is a lawsuit terminator. It is the box of no escape for a cause of action or defense inside it. Unwittingly, a party can build its own judicial estoppel box. Trapped inside, the cause of action or defense is extinguished.

In cases of judicial estoppel, when properly applied, equities and interests of the parties are not weighed. Judicial estoppel is applied and it is ultimately reviewed in the exercise of judicial discretion. Case law may confuse judicial estoppel with other estoppel from which there is an escape. That escape can occur in cases of collateral and equitable estoppel, when the equities and rights are weighed. Judicial estoppel serves the integrity of the judicial process, not the equities and rights of the parties.

Unfortunately, judicial estoppel is not always applied consistently in case law. For example, the Workers' Compensation Act's Section 5 exclusive remedy defense has not always prevailed, even though judicial estoppel was pleaded against a plaintiff, who applied for and received workers' compensation benefits from the defendant.

Judicial Estoppel is Distinct from Other Estoppel

At its heart, the doctrine of judicial estoppel prevents chameleonic litigants from shifting positions to suit the exigencies of the moment. *Ceres Terminals v. Chicago City Bank and Trust Co.*, 259 Ill. App. 3d 836, 635 N.E.2d 485 (1st Dist. 1994), quoting *Cashmore v. Builders Square, Inc.*, 211 Ill. App. 3d 13, 18, 569 N.E.2d 1353 (2nd Dist. 1991). Judicial estoppel prohibits parties from "blowing hot and cold." *Finley v. Kesling*, 105 Ill. App. 3d 1, 9, 433 N.E.2d 1112, 1118 (1st Dist. 1982). Judicial estoppel promotes truth and protects judicial integrity by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Bidani v. Lewis*, 285 Ill. App. 3d 545, 675 N.E.2d 647, 650 (1st Dist., 1996); *Ceres Terminals*, 259 Ill. App. 3d at 857; *Cashmore*, 211 Ill. App. 3d at 18.

Finding judicial estoppel did apply, the court in *Dailey v. Smith*, 292 Ill. App. 3d 22, at 29, 684 N.E.2d 991 (1st Dist. 1997), cites a 1986 Comment that presents a multi-state perspective of judicial estoppel. *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244 (Spring 1986). The 1986 Comment analyzes judicial estoppel and distinguishes it from both collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated, and equitable estoppel, which assures fairness between the parties. Comment, 80 Nw. U.L.Rev 1244, 1248-9. This 1986 Comment also is cited and discussed in a leading Illinois case, *Ceres Terminals*, 259 Ill. App. 3d at 851 (finding judicial estoppel not to apply).

The *Dailey* case, having cited the 1986 Comment, *supra*, is in turn cited in a 1998 Comment. *Civil Procedure Intent and the Application of Judicial Estoppel*, 22 Am. J. Trial Advoc. 481, 485-6 (Fall 1998). The 1998 Comment concludes that Illinois, in the application of judicial estoppel, is categorized as a jurisdiction which considers the good faith or non-fraudulent intentions of the litigant. That characterization, if correct, says that Illinois judicial estoppel policy is to protect the integrity of the court, since it does not suggest that equity between parties is to be weighed.

Judicial estoppel is distinct from collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated and from equitable estoppel, which is to assure fairness between the parties. Comment 80 Nw. U. L.Rev. 1244, 1248-9. The difficulty courts have in applying judicial estoppel is evinced by the annotations on judicial estoppel in the citing references from *Matter of Cassidy*, 892 F.2d 637 (7th Cir. 1990). Westlaw had 768 citing references as of mid-2007 from *Matter of Cassidy*, including a number of journal articles. Both the 80 Nw. U. L. Rev. Comment and *Matter of Cassidy* provide valuable insight into the policy reason for a judicial estoppel doctrine. A more patent recognition of that policy, the vindication of the integrity of the judicial process, might bring more consistency to the application of judicial estoppel and also less confusion with equitable and collateral estoppel.

Judicial estoppel applies when: (1) the party being estopped has taken two positions; (2) the positions have been in separate judicial or quasi-judicial administrative proceedings; (3) the party intended the trier of fact to accept the truth of the facts in support of the position; (4) the party succeeded in asserting the first position and received some benefit from it; and (5) the two positions are inconsistent. *People v. Coffin*, 305 Ill. App. 3d 595, 598, 712 N.E.2d 909, 911 (1st Dist. 1999); *Giannini v. First National Bank of Des Plaines*, 136 Ill. App. 3d 971, 982-4, 483 N.E.2d 924, 934-5 (1st Dist. 1983).

Collateral estoppel, sometimes described as issue preclusion, is an equitable doctrine that precludes a party from relitigating an issue decided in a prior proceeding. *Herzog v. Lexington Township*, 167 Ill.2d 288, 295, 212, 657 N.E.2d 926 (1995); *Kessinger v. Grefco, Inc.*, 173 Ill.2d 447, 672 N.E.2d 1149 (1996). Collateral estoppel requires: (1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final determination on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *Herzog*, 167 Ill.2d at 295.

Equitable estoppel may arise without the estopped party intending to relinquish a right. *Vaughn v. Speaker*, 126 Ill. 2d 150, 533 N.E.2d 885 (1988). Equitable estoppel can arise from conduct, such as misrepresentation of an intent to settle, *Griffin v. Willoughby*, 369 Ill. App. 3d 405, 867 N.E.2d 1007 (4th Dist. 2006), or of the existence of agency. *Oliveira-Brooks v. Re/Max Intern., Inc.*, 372 Ill. App. 3d 127, 865 N.E.2d 252 (1st Dist. 2007). Prejudice to the other party is one of the essential elements of equitable estoppel. Waiver, from which it is distinguished, does not imply the party asserting it has been misled to his detriment. *Vaughn*, 126 Ill. 2d at 161-162.

Equitable estoppel first requires misrepresentation or concealment of material fact. Second, the estopped party must have knowledge that the representation was untrue. Third, the truth of the representation must be unknown to the party claiming estoppel. Fourth, the party estopped must intend or expect that his representation will be acted upon. Fifth, the party claiming estoppel must in good faith reasonably rely upon the misrepresentation and not be improvident in the reliance. Sixth, the party claiming estoppel would be prejudiced, if the estopped party is permitted to deny the truth of his misrepresentation. *Vaughn*, 126 Ill.2d at 162-163.

The purpose of judicial estoppel is to protect the integrity of the judicial process and is distinct from equitable estoppel, which is to protect the litigants. *Bidani v. Lewis*, 285 Ill. App. 3d at 550, 675 N.E.2d at 651 (1st Dist. 1996). Judicial estoppel also is distinct from equitable estoppel and from collateral estoppel, since judicial estoppel has no requirement of privity. 1986 Comment, 80 Nw. U. L. Rev. 1224, 1250; *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 510, 445 N.E.2d 506, 508 (4th Dist. 1983). This conclusion is consistent with the judicial integrity policy of judicial estoppel.

Judicial estoppel is equally applicable when the prior proceeding was a quasi-judicial, administrative proceeding. *Coe*, 112 Ill. App. 3d at 510. Judicial estoppel applies whether or not the party prevails in the earlier proceeding, so long as it receives some benefit from taking the contrary position, *Giannini*, 136 Ill. App. 3d at 982-4, or whether or not a judgment was entered, *Kale v. Obuchowski*, 985 F.2d 360, 362 (7th Cir. 1993) (ruling that a settlement which represents capitulation means that the party has prevailed).

Since judicial estoppel is applied to preclude a later contradictory position without the court examining the truth of either the prior or later statement, judicial estoppel eliminates the trial court's role as a fact finder.

Bidani, 285 Ill. App. 3d at 550. It follows that the exercise of discretion in applying judicial estoppel should be a question of law, decided by dispositive motion.

Judicial Estoppel Raises a Dispositive Issue of Law

A question of the integrity of the judicial process should be decided as a matter of law and not by a fact finder. Judicial estoppel has been raised by various dispositive motions, such as motions for dismissal under Section 2-619 (735 ILCS 5/2-619), and motions for summary judgment.

When two, contradictory judicial admissions both trigger judicial estoppel, one judicial admission may trump the other. *Moy v. Ng*, 371 Ill. App. 3d 957, 864 N.E.2d 752 (1st Dist. 2007) (affirming the denial both of summary judgment and judgment on the pleadings). In *Moy*, the plaintiffs brought suit against an attorney who had agreed to serve as an escrowee for the plaintiffs and the contractor the plaintiffs had hired to work on their building. They alleged that the attorney had breached her fiduciary duty owed to them by improperly disbursing funds from the escrow account without verifying that the work had been done under the contract and that distribution was proper. In disciplinary proceedings resulting from the matter, the attorney had entered into a consent decree, and had submitted an affidavit in which she agreed that: she had served as an escrowee for the insurance proceeds to be used to restore the plaintiffs' building; she accepted a deposit of the funds; she distributed some of the funds to the contractors who repaired the building; and she had used \$38,800 of the funds for her personal use and had deposited another \$34,000 to her personal checking account. *Moy*, 371 Ill. App. 3d at 961.

At the same time, the plaintiffs failed to properly respond to requests to admit, which resulted in the judicial admission that, among other things, the defendant never had any agreements with the plaintiffs, and that all of the monies deposited were properly distributed. *Id.* Since these admissions contradicted the attorney's statements in connection with the consent decree, the question became whether "the plaintiffs' judicial admissions may be overborne by the application of the doctrine of judicial estoppel." *Id.* at 962.

The *Moy* court affirmed the application of judicial estoppel against the defendant lawyer. By virtue of her ARDC judicial admissions, the lawyer was judicially estopped to use *Moy's* failure to respond to her requests to admit. The requests, if admitted, would establish the lawyer *properly* disbursed *Moy's* insurance funds. The court ruled that the use by the lawyer of *Moy's* admitted facts was barred by the lawyer's ARDC admissions. The court explained that the use of judicial estoppel did not serve to contradict the facts established by the plaintiffs' admissions, but it barred the defendant from using those facts to prevail in the case. *Id.* at 963.

In the case of another dispositive motion, JNOV was affirmed on the basis of judicial estoppel. *Dailey v. Smith*, 292 Ill. App. 3d 22, 684 N.E.2d 991 (1st Dist. 1997) (affirming the exercise of discretion in applying judicial estoppel). In *Dailey*, the plaintiff was found judicially estopped from making claims that he had not disclosed in his earlier bankruptcy petition. The judicial admission was by conduct, not words.

Judicial estoppel has been applied for a dispositive summary judgment motion and reviewed on the standard of sound exercise of discretion. *Barrack Ferrazzano Kirschbaum Perleman and Nagelman v. Lofreddi*, 342 Ill. App. 3d 453, 459, 795 N.E.2d 775, 784 (1st Dist. 2003) (application of judicial estoppel was affirmed to bar the client's defense to the lawyer's claim for fees).

Judicial Estoppel is Applied to Judicial Admissions

Judicial admission is applied to intentional self-contradiction that is being used to obtain unfair advantage. *Moy*, 371 Ill. App. 3d 957; *Barack Ferrazzano*, 342 Ill.App.3d at 465; *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953). Judicial estoppel prevents litigants from "playing fast and loose with the courts." *Scarano*, 203 F.2d at 513.

Judicial estoppel is not limited to fact questions. *Matter of Cassidy*, 892 F.2d at 641-2. In *Matter of Cassidy*, the court observed a trend away from strict limitation of the doctrine to positions on matters of fact. But more recently, judicial estoppel was viewed not to apply to purely legal positions. *Cress v. Recreation Services*, 341 Ill. App. 3d 149, 795 N.E.2d 817, 840-1 (2nd Dist. 2003) (finding an ERISA claim a legal position, not a fact position which would bar the plaintiff's contract and tort claims).

Judicial estoppel is flexible and not reducible to a pat formula. *Ceres Terminals*, 259 Ill. App. 3d at 850 (affirming the exercise of judicial discretion in not applying judicial estoppel). Similarly, Judge Flaum stated, “It may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts.” *Matter of Cassidy*, 892 F.2d at 641-2. Judicial estoppel is not reducible to a formula for the “same reasons that the courts are cautious in attempting to exactly define fraud – the fear that unscrupulous persons may use strictures on use of the doctrine to subvert the purposes of the rule.” *Id.*

A judicial admission requires a record that clearly reflects that the party intended the truth of his position be accepted. *Coe*, 112 Ill. App. 3d at 510. Examining the party’s intent carries out the policy for judicial estoppel without unduly restricting it. *Id.* at 510; see also, *Barack Ferrazzano*, 342 Ill. App. 3d 465.

The client’s law firm in *Barack* triggered judicial estoppel by its earlier use of its fee agreement to support the client’s fee statement submitted for the client’s benefit in a non-judicial proceeding. The *Barack* court decided, when a subsequent attorney fee dispute arose, that the client was judicially estopped to deny the terms of the fee agreement. The court did not wish to “encourage or condone mendacity or disingenuousness in submitting fee petitions by officers of the court to a tribunal of justice, whether under oath, or not.” *Barrack*, 342 Ill. App. 3d 453 at 465 (affirming summary judgment based on judicial estoppel).

When fact and law issues are not the same in the prior and subsequent proceedings, judicial estoppel should not apply. *Boelkes v. Harlem Consolidate School Dist.* 122, 363 Ill. App. 3d 561, 842 N.E.2d 790 (2nd Dist. 2006). Judicial estoppel did not apply in *Boelkes*, since plaintiff’s rate of pay stated in her employment contract and her average weekly wage stated in the workers’ compensation settlement contract for workers’ compensation benefits procedurally were not the same issue. *Boelkes*, 363 Ill. App. 3d at 554. Similarly, the Illinois Appellate Court Second District declined to apply judicial estoppel in a later Jones Act proceeding, since the issue of coverage for an engineer on a casino riverboat under the Workers’ Compensation Act is procedurally different than under the Jones Act. *Grobe v. Hollywood Casino-Aurora Inc.*, 325 Ill. App. 3d 710, 719, 759 N.E.2d 154 (2nd Dist. 2001).

Using a party’s own judicial admission to dispense with the need to prove a fact is not a proper use of judicial admission. *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 844 N.E.2d 447 (2nd Dist. 2006) (reversed on appeal). Judicial admission was turned on its head by a trial court in *Feret* in dismissing a law suit as moot, after defendant’s lawyer admitted that the subject of the litigation, a 2003 Board resolution, had been abandoned. Resisting dismissal of his suit, plaintiff disputed the assertion that DuPage County’s resolution, which plaintiff wished to litigate, had been abandoned. *Feret*, 363 Ill. App. 3d 534.

A party cannot be allowed to affirm the contrary is true, after affirming a fact under oath. *Ceres Terminals*, 259 Ill. App. 3d at 854; *Finley v. Kesling*, 105 Ill. App. 3d 1, 9, 433 N.E.2d 1112 (1st Dist. 1982). Judicial estoppel can even apply in instances where the party is not under oath. *Coe*, 112 Ill. App.3d at 510. A party with earlier success in the prior proceeding is judicially estopped from harming the court’s integrity by later self-contradicting conduct. *Id.* at 509.

“It would be totally illogical to allow parties to take one position in an agency proceeding and then allow them to take an inconsistent position in subsequent court proceedings, simply because the first position was not taken under formal oath.” *Id.* at 510-11. This statement evinces the policy of judicial estoppel to be the integrity of the judicial process. *Department of Transportation v. Coe* reversed the Civil Service Commission and found a formal oath was not required for a judicial admission. *Id.* at 510.

While finding that a notary seal might not be needed for judicial admission, the *Ceres Terminals* court was “not yet” willing to abandon the formal oath requirement for judicial estoppel and held that the oath should remain at least an “element” to consider for judicial estoppel. *Ceres Terminals*, 256 Ill. App. 3d 836. If the party against whom estoppel is to apply did not have prior success, the sanctity-of-oath policy may be reason enough to apply judicial estoppel. Comment, 80 Nw. U. L. Rev. 1244, 1253. Under the sanctity-of-oath policy, the party cannot be permitted to state a fact that is not true and contradict his early sworn testimony, stating the fact was true. *Finley*, 105 Ill. App. 3d at 9.

A Workers Compensation Applicant Should be Judicially Estopped From Filing a Lawsuit Against the Respondent

Applying for and accepting workers' compensation benefits judicially estops a plaintiff's claim without finding the plaintiff was an employee of the defendant. *Wren v Reddick Community Fire Protection District*, 337 Ill. App. 3d 262, 267, 785 N.E.2d 1052, 1057 (3rd Dist. 2003). Two cases, *Gray v. National Restoration*, 354 Ill. App. 3d 345, 820 N.E.2d 943 (1st Dist. 2004, a death case, and *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 866 N.E.2d 631 (2nd Dist. 2007), a catastrophic injury case, have majority opinions that disregard *Wren* and refuse to apply judicial estoppel. The dissents in both in *Gray* and in *Townsend* argued that judicial estoppel should have barred the plaintiffs' personal injury claims against their own "employer." The plaintiffs in *Gray* and *Townsend* were applicants for and recipients of workers' compensation benefits from the defendants. Section 5 of the Workers' Compensation Act gives the employer the exclusive remedy defense to lawsuits as the *quid pro quo* for no-fault workers compensation liability.

The majority in *Gray* acknowledged the conduct of applying for and accepting workers' compensation benefits should trigger judicial estoppel and the Section 5 defense and conceded that a party should be prevented from taking inconsistent positions that harm judicial integrity. However, the *Gray* majority applied the *Laffoon* doctrine to reject judicial estoppel for Section 2-619 dismissals. The *Laffoon* doctrine forecloses the Section 5 defense to a general contractor, whose subcontractor is the plaintiff's employer. *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 359 N.E.2d 125 (1976). The earlier conduct as a judicial admission of plaintiff *Gray* did not make *Gray* an "employee" for the Section 5 defense. *Gray*, 354 Ill. App. 3d 345

Laffoon is judicial "gloss" applied to Section 5. Since the obligation under the Workers' Compensation Act to pay benefits can be placed on the general contractor in addition to the "immediate employer," who is a subcontractor, *Laffoon* forecloses the Section 5 defense for a general contractor, notwithstanding payment by the general of benefits to the plaintiff.

The *Gray* majority reasoned that the plaintiff "in this situation" is not judicially estopped to sue that party from whom he is receiving workers' compensation. Justice Reid for the majority said, "Gray is not judicially estopped from maintaining this cause of action against National Restoration because it is allowed by the provisions of the Act." *Gray*, 354 Ill. App. 3d at 356. *Gray* holds that under the Act, the employer was liable to the plaintiff for the injuries, "regardless of the stance that Gray took in those proceeding." *Id.* at 356.

The *Gray* dissent would find *Laffoon* inapposite and judicial estoppel a bar to the suit. *Townsend*, like *Gray*, used *Laffoon* to avoid judicial estoppel. The *Townsend* dissent by Justice Kapala, like the *Gray* dissent by Justice Campbell, would find the *Laffoon* doctrine inapposite. Justice Kapala would have applied judicial estoppel, following the precedent of *Wren*, 337 Ill. App. 3d at 267, to hold, without making the plaintiff an employee of the defendant, that the plaintiff's personal injury claim is judicially estopped.

The *Townsend* majority, in affirming the denial of JNOV, implicitly misapplied judicial estoppel. The *Townsend* majority, by weighing equities, confused judicial estoppel with collateral or equitable estoppel. An equity maxim, "clean hands," negated plaintiff's judicial admission.

Conclusion

Judicial estoppel, when applicable, should be dispositive in all cases, irrespective of equities and rights. If it is to vindicate the integrity of the judicial process, judicial estoppel cannot weigh equities. Not all estoppel will be dispositive. Collateral estoppel, which bars a party from re-litigating an ultimate fact a court has already adjudicated, and equitable estoppel, which is to assure fairness between the parties, may not be dispositive, since equities and rights must be weighed.

About the Author

Donald G. Peterson, a partner in *Hughes Socol Piers Resnick & Dym, Ltd.*, represents design professionals, lawyers and accountants. He has appeared and argued civil cases before both the U.S. Supreme Court and the Illinois Supreme Court and before state and federal appellate courts. He served the Illinois Supreme Court for 9 years upon its appointment to the Court's Rules Committee. He has over 100 jury verdicts and a depth of civil trial experience in state and federal courts. He has served on the Board of the Association of Illinois Defense Trial Counsel. He is the former Editor-in-Chief of the Illinois Bar Journal and also of the Trial Briefs Newsletter and is published on legal professional liability by the Chicago Bar Association, 20-JUL CBA Rec. 38 (2006, Westlaw).