

Utilizing the Doctrine of Judicial Estoppel to Defeat Legal Malpractice Claims

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I. INTRODUCTION

Judicial estoppel precludes a party from assuming inconsistent positions in separate legal actions. If a party took one position in a prior legal action, he or she cannot take a different position on the same issue in a subsequent action. While the doctrine of judicial estoppel is intended to guard the judicial system against improper use, it also serves as a potential weapon that can be used to completely defeat a wide variety of legal malpractice claims and lawsuits as well.

II. OVERVIEW OF THE DOCTRINE OF JUDICIAL ESTOPPEL

Judicial estoppel is an equitable doctrine governed by equitable principles. It “protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.” Judicial estoppel is applied in order to “preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing suit an exigency of the moment.” While similar to collateral estoppel, the two are not identical. Collateral estoppel prevents a party from re-litigating a position he took and lost. The doctrine of judicial estoppel prohibits a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party and advanced under oath in a prior court proceeding. Judicial estoppel may only be applied where the party making the inconsistent assertion was successful with the prior assertion. In Ohio, judicial estoppel applies

where a plaintiff: (1) asserted a contrary position; (2) under oath in a prior proceeding; and where (3) the prior position was accepted by the court. However, judicial estoppel does not apply when the party’s prior inconsistent position was a result of mistake or inadvertence.

III. APPLICATIONS OF THE DOCTRINE BY OHIO COURTS

Judicial estoppel has been applied by Ohio courts in a variety of contexts. It is frequently applied to bar a plaintiff from pursuing a lawsuit that he or she failed to disclose as an asset in a prior bankruptcy proceeding. In this respect, where a plaintiff fails to list a cause of action in sworn bankruptcy filings and then files a lawsuit to recover money damages in connection with that cause of action, courts will invoke the doctrine of judicial estoppel to prevent the plaintiff from taking inconsistent positions in two court proceedings.

Importantly, however, judicial estoppel may also be applied to foreclose a plaintiff from litigating a legal malpractice claim where that plaintiff has taken an inconsistent position in a prior court proceeding. Judicial estoppel is frequently invoked in the legal malpractice context in “settle and sue” cases. With this type of claim, a client will agree to the settlement of a prior action, which he or she later feels is inadequate. The subsequent legal malpractice claim can then be defended on judicial estoppel grounds, based on the argument that the client voluntarily agreed to settle the matter, and as a result must be barred from asserting a position that disregards that prior course of conduct.

With that said, the doctrine is invoked to dispose of an assortment of other types of legal malpractice claims as well.

For example, in *Advanced Analytics Labs, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App.3d 440 (10th Dist. 2002), the court ruled that a corporation was judicially estopped from asserting in a legal malpractice lawsuit that a law firm and two of its attorneys breached their duty of care by negligently preparing a financing statement. In prior litigation the company had twice successfully asserted the validity and sufficiency of the financing statements in perfecting the company's security interest, once before a bankruptcy court and again before a federal district court. The legal malpractice claim in that case arose out of the law firm's preparation and filing of UCC financing statements on behalf of Advanced Analytics Laboratories, Inc. Importantly, the Kegler Brown attorneys inadvertently omitted "of North Carolina" from the debtor's name in the first box on the financing statements' coversheet. Approximately two years later, EAI and its subsidiaries filed voluntary Chapter 11 bankruptcy petitions. In its bankruptcy filings, EAI declared Advanced Analytics an unsecured creditor and SouthTrust Bank a secured creditor. Advanced Analytics filed a complaint in bankruptcy court for declaratory judgment against EAI and the bank to determine the priority of the security interests held by Advanced Analytics and the bank. Advanced Analytics prevailed in the bankruptcy court litigation, resulting in an appeal by EAI to federal district court. Advanced Analytics again prevailed, and the bankruptcy court decision was affirmed. In both cases, Advanced Analytics successfully argued that the company's financing statements adequately described the debtor to perfect the company's security interest where the correct name was not listed on the coversheet.

Shortly thereafter, Advanced Analytics turned around and filed a complaint for legal

malpractice against Kegler Brown and its two attorneys, alleging the defendants breached the duty of care owed to the company when, among other things, they omitted the words "of North Carolina" in the debtor's name on the coversheet of the financing statements. The court found that the doctrine of judicial estoppel applied to bar the company's legal malpractice claim. Because the company successfully asserted its position that its financing statements comported with established case law and statutory requirements, and validly perfected plaintiff's security interest in the prior proceedings, it was precluded by judicial estoppel from later arguing that the firm and its attorneys breached their duty to ensure all such documents comported with the requirements of the law, or that the defendants were negligent in their "effort to perfect the security interest" of the company. In addition, the court also found that because the company twice successfully asserted its position that the financing statements were not misleading, the doctrine of judicial estoppel precluded Advanced Analytics from later asserting that the financing statements were confusing or misleading to a third party.

A similar result was seen in *Wloszek v. Weston, Hurd, Fallon, Paisley & Howley, LLP*, 2004-Ohio-146 (8th Dist.), when the court invoked judicial estoppel to bar a legal malpractice claim grounded on statements made in a prior court proceeding. In that case, the plaintiff chiropractor, Monica Wloszek, entered into an agreement with a diagnostic testing company and referred patients to that company. Many patients were Medicare enrollees. The chiropractor pled guilty to violating a federal anti-kickback statute. She later sued her prior law firm for malpractice, asserting the firm provided her with faulty advice. The court found the claim was barred by the judicial estoppel doctrine. In making that determination, the court highlighted the fact that Wloszek took a contrary position under

oath in a prior proceeding which was accepted by the court. Wloszek pled guilty to conspiracy to violate the federal anti-kickback statute, and to soliciting and receiving Medicare and Medicaid kickbacks. She admitted under oath that she knowingly, willfully, and intentionally solicited and received remuneration, despite knowing it was unlawful. In addition, she failed to dispute anything in the factual basis for her pleas of guilt to the charged crimes. Most importantly, she never asserted innocent reliance on the advice of counsel as a basis for her conduct. Having asserted under oath, in a prior proceeding, she knowingly engaged in criminal conduct, which position was adopted by the court, Wloszek was estopped in the subsequent proceeding from asserting she lacked knowledge her business arrangement violated the law. As such, the judicial estoppel doctrine applied to foreclose Wloszek in the civil legal malpractice action from asserting innocent reliance on the advice of counsel, mandating summary judgment in favor of the law firm.

IV. CONCLUSION

Attorneys who do not inquire into the potential applicability of judicial estoppel are overlooking a very valuable, potent defense that can be wielded to completely defeat lawsuits altogether. Defense lawyers in particular must remain cognizant of judicial estoppel's possible application in legal malpractice litigation, as the doctrine presents an extremely powerful device that can be employed to prevent the disposition of otherwise meritorious lawsuits. Judicial estoppel is an often under-utilized but effective

tool in defending legal malpractice claims, and can serve as grounds for a successful dispositive motion where the plaintiff took a position in a prior legal proceeding that conflicts with the position taken in subsequent litigation. Oftentimes, judicial estoppel can just as easily preclude a plaintiff from maintaining a claim against his or her former attorney as the doctrine's more well-known relatives, res judicata (claim preclusion) and collateral estoppel (issue preclusion). Armed with the right evidence, the successful assertion of judicial estoppel via summary judgment can pay huge dividends for defense practitioners and their clients, allowing both to avoid the time and expense of trial and, ideally, the costly and laborious discovery process. Moreover, in addition to dispensing of a lawsuit completely, judicial estoppel can also be strategically employed to alter the playing field and significantly reduce the overall value of a claim during settlement negotiations. As such, legal malpractice defense litigators are well advised to add judicial estoppel to their litigation tool belts, and should seek to utilize this overpowering defense whenever possible



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