

# Trial Briefs

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

## A lie or a slip of the tongue? The basics of judicial estoppel after *Seymour v. Collins*

BY ALLISON M. HUNTLEY

For many practitioners, judicial estoppel is a lesser-known equitable doctrine that can potentially derail an otherwise solid case. It applies when a party, typically the plaintiff, takes a position in a pending case that contradicts his or her factual position in a prior proceeding. When a party has been involved in more than one case surrounding the same underlying facts or has filed for bankruptcy or for divorce for example, judicial estoppel may be grounds to dismiss the current action. This article is intended to provide a summary of the doctrine and a few tips

concerning its use in court.

At its core, the doctrine of judicial estoppel prevents litigants from playing fast and loose with the court system.<sup>1</sup> The doctrine has five prerequisites.

The party to be estopped must have (1) 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)

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## Revisiting long-arm jurisdiction: *Kowal v. Westchester Wheels, Inc.*

BY SARA M. DAVIS

In *Kowal v. Westchester Wheels, 2017 IL App (1st) 152293*, the First District Appellate Court reviews the evolution of the jurisprudence of long-arm jurisdiction in products liability cases. While discussions of long-arm jurisdiction may take many of us back to law school

the concept of specific jurisdiction over a foreign defendant will impact many practices, particularly with the emergence of global markets.

Janet Kowal was seriously injured during a bicycle race in Iowa when the

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## A lie or a slip of the tongue?

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have [sic] succeeded in the first proceeding and received some benefit from it.<sup>2</sup>

Like other equitable doctrines, courts are not required to apply judicial estoppel to dismiss a case or claim. That decision is entirely within the court's discretion.<sup>3</sup>

In *Seymour v. Collins*, the Illinois Supreme Court dealt with a misapplication of judicial estoppel. In that case, Defendants alleged that Plaintiffs should be judicially estopped from pursuing their state law personal injury case because they failed to report the existence of that cause of action to the Chapter 13 Trustee during the pendency of their bankruptcy case.<sup>4</sup> The trial court agreed, finding that all five prerequisites of judicial estoppel were met, and the Second District Appellate Court affirmed.<sup>5</sup>

The Illinois Supreme Court reversed. The Court first outlined the correct method for determining whether a party should be judicially estopped from bringing a cause of action. The Court instructed trial courts to determine at the outset if each of the five prerequisites for judicial estoppel are present in the case.<sup>6</sup> Only then must it exercise its discretion to apply the doctrine if justice so requires.<sup>7</sup> There are many factors that should inform that decision. Most importantly, "the significance or impact of the party's action in the first proceeding...and... whether there was an intent to deceive or mislead [the first judicial forum], as opposed to the prior position having been the result of inadvertence or mistake."<sup>8</sup>

The Court found that the trial court ultimately failed to exercise its discretion when it granted Defendants' motion for summary judgment because it only considered whether the five elements of judicial estoppel were present without also determining whether justice was served by dismissing the case.<sup>9</sup> In coming to this conclusion, the Supreme Court assumed that the five prerequisites for the application of judicial estoppel were satisfied.<sup>10</sup> Despite this, the Court found no evidence that the Seymours' failure to report their cause of action to the bankruptcy court was an act

of deception.<sup>11</sup> Thus, dismissal did not serve the purpose of judicial estoppel: to protect the integrity of the court system by preventing litigants from changing positions as it suits them.<sup>12</sup>

As a practical matter, the case of *Seymour v. Collins* highlights the factual analysis that goes into the decision to apply judicial estoppel, and there are lessons here for both defendants bringing dispositive motions and plaintiffs responding to them. For defendant's counsel, when bringing a dispositive motion based upon judicial estoppel, it will probably be insufficient to show merely that the five requirements of the doctrine are met; instead, consider arguing (if possible) that the plaintiff acted in bad faith when making the offending statements. For plaintiff's counsel, before responding to such a motion, consider whether discovery will aid you in showing that your client was not acting in bad faith in the previous proceeding. On both sides, carefully outlining the facts and circumstances of the prior proceeding as well as the statements made therein will go a long way towards convincing the court to exercise its discretion in a favorable way.

In summary, judicial estoppel is an equitable doctrine that a court may apply to summarily adjudicate a case when it is clear that a litigant is playing fast and loose with the judicial process. When arguing whether a court should dismiss a case on the basis of judicial estoppel, the successful party will likely be the one that grapples not just with the five requirements of the doctrine but also argues that justice militates a favorable result for his or her client. ■

1. *Seymour v. Collins*, 2015 IL 118432, ¶¶ 26, 28, 36.

2. *Id.* at ¶¶ 37.

3. *Id.* at ¶ 36.

4. *Id.* at ¶¶ 3-19.

5. *Id.* at ¶ 20.

6. *Id.* at ¶47.

7. *Id.*

8. *Id.*

9. *Id.* at ¶50.

10. *Id.* at ¶53.

11. *Id.* at ¶ 54.

12. *Id.* at ¶36.

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## Revisiting long-arm jurisdiction

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front fiber glass fork of her Giant brand bicycle broke sending her flying over her handlebars and onto the ground. Kowal sued Westchester Wheels, Inc. where she purchased the bike. She also sued Hartley's Cycle Shoppe, where she had the bike serviced. Both shops were authorized retailers of Giant Bicycles. Kowal sued Giant Bicycle, Inc. who authorized and distributed to retailers. Kowal also sued Giant Manufacturing, a Taiwanese bicycle manufacturer who made the subject bike. Giant Bicycle and Giant Manufacturing were served through the Illinois Secretary of State.

Giant Manufacturing moved to quash service relying on an affidavit from the company's CFO. The trial court allowed limited discovery on the issue of jurisdiction. The trial court denied the Motion to Quash finding that Giant Manufacturing had sufficient minimum contacts with Illinois to establish specific jurisdiction under Illinois' long-arm statute and thus service was proper. The appeal stemmed from that decision. Interestingly, the Appellate court initially denied the Rule 306(a)(3) request subsequently the Illinois Supreme Court entered a supervisory order directing the Appellate Court to vacate the denial and grant Giant Manufacturing's leave to appeal.

Giant Manufacturing argued that it only had offices in Taiwan; that it was not licensed in the State of Illinois; that it never entered into any contracts in Illinois; that it never filed tax returns or paid taxes in Illinois; that it never advertised in Illinois; that it never transacted business with any Illinois residents; and that it does not license retailers that is done by Giant Bicycles, and it does not give Giant Bicycles any direction on whom to license. Giant Manufacturing did not have a written agreement with Giant Bicycles.

In its answers to interrogatories and supplemental answers to interrogatories, Giant Manufacturing admitted that Giant Bicycles, Inc. was a wholly owned subsidiary of Gaiwan B.V. and Gaiwan B.V. is a wholly owned subsidiary of Giant

Manufacturing. The CFO that signed the affidavit accompanying the motion to quash on behalf of Giant Manufacturing is also a Director at Giant Bicycles. Giant Manufacturing admitted it was informed by Giant Bicycles at certain points that it entered into agreements with certain retailers for the sale of Giant bikes in Illinois.

Kowal argued that Giant Bicycle is owned and controlled by Giant Manufacturing that is why there is no written agreement; that Giant Bicycle maintained a distribution warehouse in Elgin, Illinois; that there were forty Giant Bicycle authorized dealers in Illinois; that Giant brand bikes are sold exclusively through authorized retailers; that Giant Bicycles advertised in Illinois; and that Giant accounted for 13% of the specialty bike market in the United States.

Illinois' long arm statute holds that an Illinois court can exercise personal jurisdiction over a nonresident defendant when the contacts between the defendant and Illinois are sufficient to satisfy both state and federal due process concerns. *Cardenas Marketing Network, Inc. v. Pabon*, 2012 Ill. App. (1st) 111645. The Appellate Court noted that it is generally true that Illinois due process concerns are satisfied when federal due process is met.

Federal due process requires that (1) the nonresident defendant have minimum contacts with the forum state such that the defendant was fairly warned it may be hauled into court there; (2) the action arose out of or is related to the defendant's contacts in the forum state, and (3) it is reasonable to require the defendant to litigate in the forum state. *Kowal* at 17. In determining whether the non-resident defendant satisfies the minimum contacts the reviewing court first determines whether there is general or specific jurisdiction. General jurisdiction is when the contacts are so regular and systemic that the defendant is essentially at home in the foreign state. *Kowal* at 21. Specific jurisdiction is when the nonresident defendant "delivers its products into the

stream of commerce with the expectation that they will be purchased by the consumer in the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

The Appellate Court in *Kowal* provides a useful summary concerning the prudence of specific jurisdiction. The US Supreme Court was divided on an interpretation of "stream of commerce" in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). Justice O'Connor joined by three other justices accepted a narrow interpretation of "stream of commerce" finding there must be minimum contacts and "additional conduct" beyond merely placing products into the stream of commerce that ultimately make their way to the forum state. The additional conduct could include designing the product for the market and advertising in the forum state but knowledge alone was not sufficient. Justice Brennan and three other justices adopted a broader interpretation of stream of commerce finding there was jurisdiction over a non-resident as long as the defendant is "involved in the regular and anticipated flow of products from manufacture to distribution to retail sale and aware the product is being marketed in the forum state." While the *Ashai* Court was divided on what "stream of commerce" included they were unanimous in finding it was met in that case.

The *Kowal* Court did not take a position on which interpretation of stream of commerce for specific jurisdiction applies in Illinois but rather found that Giant Manufacturing met both the broader and narrower interpretation. The trial court decision denying the motion to quash service was affirmed.

The *Kowal* decision provides litigants with a concise overview of specific jurisdiction in the context of a products liability case. It is a useful opinion providing direction on the elements necessary to meet or defeat specific jurisdiction. ■

# A “deadline” is the date or time before which a task must be completed

BY ROBERT HANDLEY, BURKE & HANDLEY, P.C., GLEN ELLYN

*Vines v. Village of Flossmoor*  
2017 IL App (1st) 163339\*; 2017 Ill. App. LEXIS 680 Appellate Court of Illinois, First District, Second Division

“When it comes to Appellate Court Jurisdiction, missing a deadline can plunge an otherwise promising appeal into a nightmare.”—Justice Michael B. Hyman.

After school, 14-year-old Sellars Vines and his friend went to the Flossmoor Library to do their homework. It was a chilly night. While Sellars and his friend were waiting outside for a ride home, they stood atop a ventilation shaft that was covered by metal grates. The air coming up from the grates was keeping them warm. Unfortunately, the grate gave away and Sellars fell 20 feet onto the concrete at the bottom of the shaft. He suffered severe injuries as a result of the fall.

For reasons unstated in the Opinion, summary Judgment was granted in favor of the Defendants and the Plaintiff appealed. The Notice of Appeal was due on December 14, 2016. However, Plaintiff did not file until December 21, 2016. Further, Plaintiff did not file an *Illinois Supreme Court Rule 303(d)* “Motion for Leave to File a Late Notice of Appeal.”

*Rule 303(d)* provides: “On motions supported by a reasonable excuse for failure to file a notice of appeal on time, accompanied by a proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after the expiration of the time for filing the notice of appeal, the reviewing court may grant leave to appeal and order the Clerk to transmit the Notice of Appeal to the trial court for filing.”

On January 17, 2017, Defendant rightfully took advantage of the situation and moved to dismiss the Appeal for lack

of jurisdiction. Three days later Plaintiff filed a “Motion to Amend” the December 21, 2016 Notice of Appeal. Sadly, Plaintiff did not file the letter of *Rule 303(d)*

Justice Hyman, writing for the Panel, analyzed the case and concluded that the Appeal had to be dismissed. He found that the Court has an independent duty to review its jurisdiction over Appeals and to dismiss Appeals over which it has none. Jurisdiction is a *de novo* question. Filing a timely Notice of Appeal is both mandatory and jurisdictional.

Under *Illinois Supreme Court Rule 303(d)*, when a party fails to file a timely Notice of Appeal, the Appellate Court can grant the Party leave to appeal if, within 30 days after the expiration of time to file the Notice of Appeal, the Party has filed a Motion providing a reasonable excuse for its failure to file a timely Notice, accompanied by the proposed Notice of Appeal. The Notice of Appeal may be amended without leave of court within the original 30-day period to file the notice as set forth in paragraph (a) of *Illinois Supreme Court Rule 303*.

Instead of filing the required *Illinois Supreme Court Rule 303(d)* Motion, Plaintiff filed a “Motion to Amend” asking that the December 21, 2016 Notice of Appeal stand or, alternatively, amending the December 21, 2016 filing to, “Incorporate a request for leave to file a late notice of appeal.” The basis for the Motion was an inadvertent docketing mistake. But, the requested amendment fell outside the 30-day *Illinois Supreme Court Rule 303(d)* grace period.

In its analysis, the *Vines* Court noted a “split in authority” as to whether an *Illinois Supreme Court Rule 303(d)* Motion must be filed simultaneously with the Notice of Appeal to confer jurisdiction. Two cases,

*in dicta*, have stated that, based on *Rule 303(d)*’s language, the Motion must be “accompanied by the proposed Notice of Appeal.”

In *Tunca v. Painter*, 2012 IL App (1st) 093384, the Court suggested that even if the proper documents were included in the Record on Appeal, the Appellate Court would lack jurisdiction for two reasons: 1. The Notice of Appeal was untimely and filed without leave of court; and 2. The Motion for Leave was filed after the submission of the Notice of Appeal and well-after the *Illinois Supreme Court Rule 303(d)* limitation period had expired. Based on that, the *Tunca* Court concluded that this was insufficient to establish Appellate Court Jurisdiction because the motion was not accompanied by the proposed Notice of Appeal even though filed within the 30-day grace period.

However, filing the Notice of Appeal and the Motion separately, was not held to be fatal in *LaGrange Memorial Hospital v. St. Paul Insurance Co.* 317 Ill. App. 3rd 863 (2000). In this case, the Defendant inadvertently filed its Notice of Appeal one business date late. When it discovered its mistake, a timely *Illinois Supreme Court Rule 303(d)* Motion was filed. The Court granted the Motion because the grace period had not expired. The *LaGrange Memorial Court* held that “the rule permits the reviewing court to preserve a party’s right to appeal if counsel’s mistake is discovered and a motion is filed within the additional 30 days, and the authority granted should be liberally exercised” even though it was not accompanied by the Notice of Appeal.

In this case the Plaintiff also urged the *Vines* Court to extend the holding of a more liberal criminal case to civil cases. In the similar criminal case it was held

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that the Court should emphasize substance over formality under circumstances like this. However, the criminal case was distinguished by the *Vines* Court. This Court concluded that, although they were sensitive to the injuries suffered by Plaintiff, they did not have authority to excuse the filing requirements governing Appeals. Strict deadlines for jurisdiction in civil cases must be followed in order to ensure fairness, efficiency, and predictability.

However, there is an interesting twist on this decision. This case was originally assigned to a different Panel of the Appellate Court. That Panel *denied the Defendant's Motion to Dismiss and granted the Plaintiff's Motion to Amend*. For unstated reasons, the case must have been transferred to a different Panel. Apparently, the first Panel's decision was vacated when the matter was transferred. Unfortunately for the Plaintiff, the outcome before this Panel was quite different.

The "takeaway?" Different Panels, different results. And, as always, follow all Appellate Rules scrupulously. ■

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**Friday, 12-08-17 - The Palmer House—**A Whole New Electronic World: Do's and Don'ts for Judges (and Lawyers Too). Presented by the Illinois Judges Association and the ISBA. 9:00-10:15 AM.

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**Friday, 12-08-17 - The Palmer House—**The Hero's Journey: Honor, Integrity and Your Legal Career through the Lens of History. Master Series Presented by the ISBA. 1:00-3:15 PM.

**Friday, 12-08-17 - The Palmer House—**Diversity and Inclusion in the Legal Profession. Presented by LOME and the Diversity Leadership Council. 3:30-4:30 PM.

**Tuesday, 12-12-17 - Webinar—**Driving Profitability in your Firm. Practice Toolbox Series. 12:00 -1:00 p.m.

**Wednesday, 12-13-17— Chicago, ISBA Regional Office.** Children and Mental Health Law. Presented by Mental Health. 9-12:15.

**Wednesday, 12-13-17 - LIVE Webcast—**Children and Mental Health Law. Presented by Mental Health. 9-12:15.

**Thursday, 12-14-17 - Chicago, ISBA Regional Office—**Vulnerable Students: A Review of Student Rights. Presented by Education Law. 9:00 am - 12:30 pm.

**Friday, 12-15-17 - Chicago, ISBA Regional Office—**Guardianship Boot Camp. Presented by Trusts and Estates. 8:30 - 4:30.

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## January

**Tuesday, 01-09-18 Webinar—**Fight the Paper. Practice Toolbox Series. 12:00-1:00 PM.

**Wednesday, 01-10-18 - LIVE Webcast—**On My Own: Starting Your Solo Practice as a Female Attorney. Presented by WATL. 12-2 PM.

**Thursday, 01-11-18 - ISBA Chicago Regional Office—**Six Months to GDPR - Ready or Not? Presented by Intellectual Property. 8:45 AM - 12:30 PM.

**Wednesday, 01-17-18 - LIVE Webcast—**Clearing the Skies: How to Fly with the Mandatory Initial Pilot Program. Presented by Intellectual Property. 12-1 PM.

**Thursday, 01-18-18 - ISBA Chicago Regional Office—**Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

**Tuesday, 01-23-18 Webinar—**Before the Technology Buy, Understand the Why. Practice Toolbox Series. 12:00-1:00 PM.

**Thursday, 01-25-18 - ISBA Chicago Regional Office—**Starting Your Law

Practice. Presented by General Practice. 8:50 AM - 4:45 PM.

**Tuesday, 01-30-18 LIVE Webcast—**Concerted Activity in the Age of Social Media and Online Systems: Employee Rights, Employer Pitfalls, Remedies and Penalties. Presented by Labor and Employment. 2-4 PM.

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**Tuesday, 02-13-18 Webinar—**Cloud Services. Practice Toolbox Series. 12:00-1:00 PM.

**Monday, 02-19-18 - Chicago, ISBA Regional Office—**Workers' Compensation Update - Spring 2018. Presented by Workers' Compensation. Time: 9:00 am - 4:00 pm.

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