Judicial Estoppel and Its Application (Or Misapplication?) in South Carolina

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Among the rarest of equitable defenses, the doctrine of judicial estoppel appears to be the red-headed step-child of the estoppel family in South Carolina jurisprudence. Only having been mentioned twenty-five times in published South Carolina state court opinions, it is likely that many lawyers have never even heard of the doctrine. The authors believe this doctrine could be put to better use, and through this short note, hope to shed some light on the possibly very powerful defense.

Judicial estoppel is a doctrine that may be invoked by the courts to "preclude[] a party from adopting a position in conflict with one previously taken in the same or related litigation." [1] In 2004, the South Carolina Supreme Court expressly adopted the elements necessary for the doctrine's application:

> [T]wo inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.[2]

As with every equitable claim or defense, however, the ultimate consideration an attorney must make before praying for relief under the court's equitable powers is to articulate the purpose behind the rule. Is judicial estoppel simply a method of keeping lawyers and their clients from changing their factual stories to whatever scenario best fits the law? The South Carolina Supreme

[1] Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475 (Ct. App. 2000).
[2] Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

noting that they had not received the money from the debtor, and then claiming they were owed that debt. Richardson's use of the term in *Bellinger* seems to differ from our current use of the term. In *Upson*, Judge Richardson used the term once again, this time as a way to stop litigation attempting to set aside former proceedings regarding the same matter. This use of the term is more on track with what we know as judicial estoppel today. However, it would not be until nearly one hundred years after Judge Richardson's opinions that South Carolina courts would recognize the doctrine again.

In 1940 in *Zimmerman v. Central Union Bank*, the South Carolina Supreme Court first mentioned, without using the exact phrase, what we know as judicial estoppel today, holding that conservators of a bank in state-ordered liquidation could not first submit to the jurisdiction of the State Board of Bank Control and thereafter change their position to claim the Board lacked jurisdiction because the Board had taken control of all the company's winding up.[7] "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."[8] From this point, the doctrine gained popularity, and eventually was expressly adopted by our Supreme Court, with its current 5-element test.

In 1997, the South Carolina Supreme Court decided a case that is a perfect example of the application of judicial estoppel.[9] In that case, Harold Bailey, the appellee, purchased a house in Sumter County on Pumpkin Lane, paid in cash, and had the deed put in his son's name. The father initially said that he put the house in his son's name because of business troubles, but later admitted the real reason he put the house in his son's name was "to keep [his] wife from getting

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[7] Zimmerman v. Cent. Union Bank, 194 S.C. 518, 8 S.E.2d 359, 365 (1940).
[8] *Id.*
[9] Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997)

had organized.[12] In 1976 Joseph Quinn organized a corporation and conveyed most of his land and wealth to it. Ten thousand shares in the corporation were issued to Joseph, who in accordance with his estate plan, transferred the shares to his daughter with the understanding that her control of the corporation would not start until Joseph's death. In 1996, Joseph attempted to terminate Sharon's husband from his position at the company, at which point Sharon assumed control over the corporation. On November 19, 1996, Joseph sued his daughter and his corporation, claiming that he was the real owner of the Sharon Corporation.

The defendants claimed Joseph should be judicially estopped from claiming ownership of the corporation based on a 1992 case of *Charles H. Smith v. Joe L Quinn & The Sharon Corporation.* In that case, Joseph had claimed that Sharon owned and operated the Corporation and that he had no authority to bind the corporation. In yet another case, *State of South Carolina v. Joe Quinn*, Joseph again stated that Sharon owned the Corporation and he did not own any real estate, stocks, bonds, notes, or other valuable property. Citing back to the *Bailey* case, the Court said that, were it to allow Joseph to claim to be the owner of Sharon Corporation when he had previously and successfully convinced courts that he was not, "the truth-seeking function of the judicial process [would be] undermined."[13]

In 2006, the Court of Appeals decided a case in which judicial estoppel was inapplicable, based upon the five-element test they had previously adopted in *Quinn.*[14] In that case, the plaintiff, Danny Wright, filed an action against Ralph Craft, d/b/a Craft Auto Mart, Inc. Wright had purchased a truck from Craft Auto in July of 2002. When he purchased the truck, Wright was told that the truck had only one previous owner, but he was not told that the truck had been

[12] *Quinn*, 540 S.E.2d at 476-78.
[13] *Id.* at 476.
[14] Wright v. Craft, 372 S.C. 1 (Ct. App. 2006).

change in position."[15] Under those elements Wright could not seek estoppel as he had as much, if not more, information on the value of the truck. Furthermore judicial estoppel prevents one party "*in the same or related proceeding*" from asserting facts inconsistent with a previous statement, and Wright had only made the claims on the loan application.

Only a few weeks ago, our Supreme Court decided a very important property case dating back to a 1963 agreement between landowners and the City of North Myrtle Beach and the State, and decided that judicial estoppel did not prevent the State from claiming ownership of certain canals in the city.[16] The Court ruled that the quitclaim deeds, which the appellant claimed were proof that the State did not own the property, could not constitute a contrary position as to title, and that allowing the state to argue ownership of title did not in any way threaten the judicial process. Without going through the five elements previously adopted, the Court cursorily concluded that the elements were not met, and thus judicial estoppel would not be applied.[17]

Possible Problems with the Fixed Elements Test

"In its original formulation [in 1857], a litigant seeking to judicially estop his opponent from asserting a position need only have shown that his opponent had asserted an inconsistent position under oath in a prior judicial proceeding."[18] Judicial estoppel has greatly evolved, across many jurisdictions, since its inception. Judicial estoppel was first expressly adopted in South Carolina in 1997.[19] It wasn't until 2004 when the South Carolina Supreme Court expressly adopted the five requisite elements for judicial estoppel to apply.[20] As previously stated, judicial estoppel is a rarely used equitable defense; however, "[I]t still contains very

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[15] *Id.* at 37
[16] City of N. Myrtle Beach v. E. Cherry Grove Realty Co., No. 27113, 2012 WL 1194440 (S.C. Apr. 11, 2012).
[17] *Id.*
[18] Douglas W. Henkin, *Judicial Estoppel—Beating Shields Into Swords And Back Again*, 139 U. PA. L. REV. 1711 (1991).
[19] Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997).
[20] Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

> because there was never any court proceeding. Thus, there must be some form of litigation before there can be any fear of inconsistent results, which makes the protection of judicial estoppel necessary.
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> The second prong is similar to the majority's adoption theory. The majority position appears to best fulfill the policy goals of judicial estoppel by requiring the first court to adopt a statement as true. However, to avoid confusion as to what was adopted, the court should be "unequivocally clear" that it actually adopted the purported factual position as true. Should a court be faced with a situation where it is unclear whether the prior court adopted a statement in question, the second court should decline to apply the potentially harsh results of judicial estoppel, unless it is clear that the litigant is attempting to advance a position that is truly inconsistent with the prior adopted position. However, once a court has clearly adopted a litigant's position, the classic case of judicial estoppel arises. This is the type of case where all of the policies of judicial estoppel come into play and judicial estoppel should be applied.
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> Even if a court has adopted a prior inconsistent statement, it seems unfair to apply the harsh and damaging remedy of judicial estoppel unless the litigant has intentionally taken an inconsistent position. Thus, before a court either raises judicial estoppel on its own motion or accepts a litigant's motion for dismissal on judicial estoppel grounds, the court must ensure that the party is truly attempting to persuade the court to accept two inconsistent positions. This prong of the test would prevent innocent litigants from suffering the Draconian results of judicial estoppel, yet would still protect the integrity of the courts from unscrupulous litigants who attempt to abuse the judicial process through intentional self-contradiction.[25]

This three-pronged test is accompanied by a balancing test that suggests that the judge use discretion in balancing the policies behind judicial estoppel against the consequences to be suffered if judicial estoppel were to be applied.[26] Another suggested set of elements includes: (1) Prior inconsistent position; (2) success and adoption in prior proceeding; (3) intent; and (4) reliance and privity.[27]

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[25] Eric A. Shreiber, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine*, 30 Loy. L.A. L. Rev. 323 (1996).
[26] *Id.*
[27] The Honorable William Houston Brown, Lundy Carpenter, Donna T. Snow, *Debtors' Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197 (2001).