

Estoppel by Inconsistent Positions or Judicial Estoppel:

What's in a Name?

by Robert E. Scully Jr.

The Open and Obvious Elevator Shaft

In 1935 a man named E.H. Burch was employed to move the Veterans Bureau out of an office building in Richmond. On a bright January day, Burch, whose eyesight was good, was moving an ordinary three-drawer file cabinet measuring two and one-half feet long by one and one-half foot wide, using a hand truck. The file cabinet was located in the first floor vestibule adjacent to the building's freight elevator. The vestibule was tiny, measuring only about six feet square. Burch claimed that he brought several file cabinets down the freight elevator and left



them in the vestibule. He then returned and began to move those file cabinets to a van parked on the loading dock across the vestibule from the freight elevator. While loading the file cabinet onto the hand truck, Burch lost his balance, stepped backward, and fell down the open elevator shaft to the basement. There were no other witnesses to the event. A lawsuit ensued.

Burch's cross-examination at his first trial did not go well. He admitted that there was plenty of room to turn the hand truck around in the vestibule and that if he had looked he would have seen that the elevator door was open. The trial judge got Burch to admit that there was nothing between Burch and the elevator shaft to obscure his view: "No sir, couldn't have been because I fell in there." Burch's

counsel saw the contributory negligence handwriting on the wall and promptly nonsuited the case.

At his second trial, Burch was “better prepared.” He testified that he was unaware of the existence of the open elevator shaft. He claimed he had never used the elevator and only moved furniture left in the vestibule by others. He stated that the furniture in the vestibule obscured his view of the elevator shaft which he did not see prior to falling. There is no record of whether Burch was confronted with his prior inconsistent testimony on cross-examination at the second trial. If so, it had little effect on the jury, which found the building owner negligent and awarded Burch damages. The trial judge set the verdict aside. He found that Burch was bound by his prior trial testimony and entered final judgment for the building owner defendant. The Supreme Court of Virginia heartily affirmed in *Burch v. Grace St. Bldg. Corp.*, 168 Va. 329, 191 S.E. 672 (1937). The doctrine of estoppel by inconsistent positions was firmly established in Virginia.

The Bus Lift Gone Haywire

Forty-five years later, on April 28, 1980, the Greater Lynchburg Transit Company unveiled its new bus wheelchair lift before a Lynchburg television station film crew. Warren Cunningham, a paraplegic, participated in the demonstration. Walter Apperson, the supervisor of bus drivers, climbed into the driver’s seat to operate the controls. The first demonstration went perfectly. Apperson converted the front steps into a platform, lowered the platform to the ground, Cunningham rolled on, and the platform was raised up to the floor level of the bus and then back to the ground. The second demonstration went poorly. As Cunningham was being raised on the platform it began to fold back into its stair configuration and unceremoniously dumped Cunningham out of his wheelchair onto the pavement. Undaunted, Cunningham agreed to a third try. This time, Stan Smith, the general manager of the Lynchburg Transit Company took the controls. However, the standard controls located on the dashboard would

not work so he used the override controls on the floor of the bus near the right front wheel well. The third time the lift worked like a charm.

Cunningham subsequently sued the Lynchburg Transit Company; TransiLift Equipment Ltd., the manufacturer of the lift; and Muncie Reclamation & Supply, the distributor of the lift, to recover damages for his injuries. However, he took a nonsuit against everyone but TransiLift prior to trial.

Cunningham had a strong case against TransiLift. TransiLift’s general manager, Robert West had inspected the lift after the accident. He observed that the dash-mounted controls would not raise the platform or allow it to be stored back into the steps configuration. Those functions only could be performed using the override controls. West then opened a sealed electric control box and found that an electrical terminal connection had become disengaged. He replaced the connection and the dash-mounted controls worked correctly. West concluded that the disengaged wire caused the lift to malfunction when operated from the dash-mounted controls. Bernard Cooper, an expert consulting mechanical and electrical engineer, testified at trial that the disengaged wire caused the lift malfunction.

Cunningham had just one problem. He testified at deposition that Sam Smith operated the lift during the third demonstration from the dash-mounted controls. He stated that during the third demonstration the lift functioned correctly when lifting him up but could not lower him. Cunningham recalled Smith lowered him using the override controls. Unfortunately, this testimony was directly contrary to Smith’s recollection. It also undermined Cooper’s expert testimony that the lift could not have been raised using the dash-mounted controls because of the faulty connector. TransiLift’s counsel eagerly sent requests for admissions and interrogatories to Cunningham. Cunningham responded that the foregoing admissions of fact in his deposition testimony were accurate in all respects. At trial Cunningham recovered a

jury verdict for \$255,000. TransiLift appealed on the grounds, among others, that Cunningham should have been estopped at trial from testifying contrary to his deposition testimony.

The Supreme Court of Virginia rejected TransiLift’s estoppel argument for two reasons. First, the Court held that discovery deposition testimony and answers to interrogatories are not judicial admissions and, thus, do not conclusively bind a party. Second, the Court held that TransiLift waived any binding admissions in Cunningham’s responses to requests for admissions by failing to introduce them into evidence at trial. *TransiLift Equip. Ltd. v. Cunningham*, 234 Va. 84, 360 S.E.2d 183 (1987). The orthodox doctrine of estoppel by inconsistent positions appeared to have been disestablished.

How could Cunningham change his prior deposition testimony and win, yet when Burch changed his prior trial testimony he lost? Have we become more tolerant of waffling witnesses since 1937? Does deposition testimony really not matter? Or does a comparison of the two cases reveal that an essential element of estoppel by inconsistent positions was missing in Cunningham’s case?

The Difference Between Deceit and Mistake

Burch was the only witness to his fall down the elevator shaft. Conversely, Cunningham’s fall was filmed by a television crew. Two different bus lift operators testified about how they operated the lift that dumped Cunningham. Their testimony was consistent with Cunningham’s trial testimony; it was consistent with the testimony of Robert West, TransiLift’s general manager, who concluded that the faulty connector caused the lift malfunction; and it was consistent with Cooper’s expert engineering testimony. All of the other witnesses corroborated Cunningham’s trial testimony, which suggested that his recollection of events at deposition—not his trial testimony—was incorrect. The judge at Burch’s second trial was convinced he was lying, because Burch’s testimony that he never saw the

open elevator shaft while working in the tiny vestibule was incredible. On the other hand, the judge at Cunningham's trial believed Cunningham gave mistaken testimony at deposition that he should be allowed to "clarify or explain" at trial. Indeed, TransiLift's own witnesses' testi-

monies corroborated Cunningham's trial testimony. Burch's judge saw deceit; Cunningham's judge saw a mistake of recollection. Since it is a cardinal rule of judicial estoppel that the doctrine should not be applied when a party's prior inconsistent position was based on inadvertence or mistake, *John S. Clark Co. v. Faggert & Frieden PC*, 65 F. 3d 26, 29 (4th Cir. 1995), Cunningham should have won and Burch should have lost.

Was the Court Misled?

There are few modern cases in which the Virginia Supreme Court has applied judicial estoppel, as in *Burch*, to completely bar a trial on the merits of a claim. Those cases involved parties who misled a trial court to adopt a prior inconsistent statement or position in a prior action. See, e.g. *Winslow Inc. v. Scaife*, 224 Va. 647, 299 S.E.2d 354 (1983); *Thrasher v. Thrasher*, 210 Va. 624, 172 S.E.2d 771 (1970).

In *Winslow Inc. v. Scaife*, 224 Va. 647; 299 S.E.2d 354 (1983), the Virginia Supreme Court barred William M. Scaife Jr., a real estate settlement attorney, from defending a legal malpractice case against him by Winslow Inc. He claimed the plaintiff had suffered no damages because their deed of trust, which was second in time due to Scaife's recording instructions, was really a purchase money deed of trust with first priority. In a prior chancery action brought by Winslow Inc., for reformation of the order of recordation of the trusts due to mutual mistake of the parties, Scaife alleged there was no mistake and that his recording instructions were explicitly

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authorized by both parties. Winslow Inc. apparently was denied relief in that action. The trustees of the first recorded deed of trust subsequently foreclosed on the property, wiping out Winslow Inc.'s deed of trust. The court held that Scaife could not later claim that the Winslow Inc. deed of

trust was superior to all liens regardless of their order of recordation because the foreclosure and conveyance of the real estate had already occurred pursuant to the first recorded deed of trust. *Winslow Inc.*, 224 Va. at 653; 299 S.E.2d at 357-58.

In *Thrasher v. Thrasher*, 210 Va. 624, 172 S.E.2d 771 (1970), the Supreme Court of Virginia barred the estate of Herbert M. Thrasher Sr. and his surviving son, "Mackey," from challenging the validity of a corporate voting trust agreement. The voting trust agreement and shares had never been delivered to the voting trustees as required by *Va. Code Ann.* § 13.1-34 (now *Va. Code Ann.* § 13.1-670). However, the parties had settled a prior dissolution and accounting suit by agreeing to share voting power through the creation of a voting trust of the securities of the corporation. Both the father and son had signed settlement agreements in the prior action individually and as "trustees" of the supposed voting trust. Indeed, the entire settlement was premised on the existence of a valid voting trust that would control voting power in the company. Their counsel endorsed a decree in the prior action approving the settlement agreements which was entered by the trial court. On those facts, the Supreme Court concluded that the parties had represented to the court that the voting trust was valid, the court had entered the decree in reliance on that representation, and the parties could not contend otherwise in subsequent litigation. *Thrasher*, 210 Va. at 628, 172 S.E.2d at 774.

The United States Supreme Court Spanks New Hampshire

The U.S. Supreme Court reached the same result on similar facts applying the federal common law of judicial estoppel in *New Hampshire v. Maine*, 532 U.S. 742; 121 S. Ct. 1808 (2001). In the 1970s, New Hampshire and Maine fought over their lateral marine boundary at the southwestern corner of Maine. In 1976, that dispute was settled by the entry of a decree in which they agreed that the words "middle of the river" in a 1740 decree by King George II, referred to the middle of the Piscataqua River's main channel of navigation and, therefore, established the border between the states at the coastline as the middle of the navigable channel, rather than the geographic middle of the river. See, *New Hampshire v. Maine*, 434 U.S. 1, 2, 98 S. Ct. 42 (1977).

New Hampshire and Maine apparently are litigious neighbors. Subsequent litigation broke out over the "upstream" or "inland" Piscataqua River boundary. In that later action, New Hampshire contended that the inland river boundary ran along the low water mark on the Maine shore and gave New Hampshire sovereignty over the entire river and all of Portsmouth Harbor, including the Portsmouth Naval Shipyard. Maine filed a motion to dismiss on the grounds that the 1977 consent decree divided the Piscataqua River at the middle of the main channel of navigation and precluded a low water mark boundary claim to the "upstream" portions of the Piscataqua River. The United States Supreme Court agreed and held that New Hampshire was barred from asserting a position contrary to the position it agreed to in the 1977 consent decree. *New Hampshire*, 532 U.S. at 749, 121 S. Ct. at 1814.

The Supreme Court's unanimous opinion stated that the purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from changing their positions according to the exigencies of the moment. The Court observed that the circumstances under which judicial estoppel should be invoked by the federal courts are not

reducible to any precise formulation. Nevertheless, the Court cited several facts that typically should be considered in any decision whether to apply the doctrine in a particular case. First, a party's later position must be clearly inconsistent with its earlier position. Second, courts should inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled. Third, courts should consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. 532 U.S. at 750-51; 121 S. Ct. at 1815.

New Hampshire v. Maine in Virginia

The United States Supreme Court's opinion in *New Hampshire v. Maine* has been highly influential. It has been cited and followed by Virginia federal and state trial courts. See, e.g., *R.M.S. Titanic Inc. v. Wrecked & Abandoned Vessel*, 323 F. Supp. 2d 724 (E.D. Va. 2004) (Applying judicial estoppel to preclude an award of title to the wreckage of the Titanic under the Law of Finds because the district court had relied upon, and was persuaded by, the claimant's prior representation of lack of intent to acquire title in the artifacts from the wreck, when it appointed it Salvor-in-possession.); *Cordova v. Alper*, 64 Va. Cir. 87, 98-101 (Va. Cir. Ct. Fairfax 2004) (Refusing to apply judicial estoppel because the court never relied upon or ruled on the merits of Alper's claim that he had no potential avenue of legal relief when he asserted an equitable claim for relief from a judgment under *Va. Code Ann.* § 8.01-428(D)).

What lasting impact, if any, will *New Hampshire v. Maine* and its progeny have on judicial estoppel in Virginia? Will the assertion of a prior inconsistent position become a necessary but not sufficient condition to trigger application of judicial estoppel in Virginia state courts? Will the Virginia Supreme Court hold that the party to be estopped must have actually induced a court or other quasi-judicial or

administrative body to adopt the prior inconsistent position?¹ The Fourth Circuit U.S. Court of Appeals almost invariably requires some element of actual judicial reliance on the prior inconsistent position to trigger the application of the doctrine. See *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) ("Though perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, it is obviously more appropriate in that situation."); *Lamonds v. General Motors Corp.*, 34 F. Supp. 2d 391, 395 (W. D. Va. 1999) (Some judicial reliance must be found to justify applying judicial estoppel.).

What's in a Name?

Virginia trial and appellate courts have recently stopped using the term "estoppel by inconsistent position" and started to refer to the rule as the doctrine of "judicial estoppel." Is there something significant about the adoption of the "judicial estoppel" moniker by Virginia state court judges? Is Virginia law beginning to converge with Fourth Circuit precedent which generally requires detrimental judicial reliance induced by intentional misconduct before estoppel is deemed appropriate?

In *Lofton Ridge LLC v. Norfolk S. Ry. Co.*, 601 S.E.2d 648, 2004 Va. LEXIS 122 (Sept. 17, 2004), the Virginia Supreme Court referred to the doctrine as the doctrine of "judicial estoppel." Unfortunately, the Court decided the case on the narrow grounds that judicial estoppel does not apply in a subsequent proceeding in which the parties are not the same or do not have a derivative liability relationship. Thus, the Court passed up the opportunity to explicitly adopt the federal common law rules as restated in *New Hampshire v. Maine*, and did not need to decide whether judicial reliance was the key to its own prior decisions in *Winslow Inc.* and *Thrasher*. The opinion for the Court did not cite those cases in its discussion of the general contours of "judicial estoppel." The Court did not address whether judicial estoppel exists primarily to protect the courts and only secondarily to protect the parties against unfairness. Indeed, some statements in the opinion may suggest the

contrary to trial judges and future litigants. For example, in distinguishing judicial estoppel from *res judicata* and collateral estoppel the Court correctly observed: "Unlike *res judicata* and collateral estoppel, the doctrine of judicial estoppel does not require a prior final judgment to be invoked. The doctrine of judicial estoppel may bar a party from taking inconsistent positions within a single action." 2004 Va. LEXIS 122, at *5-6. This statement should not be misread to suggest that a prior inconsistent factual assertion that the trial court was not persuaded to rely upon or adopt in making a ruling should create a plea of judicial estoppel under ordinary circumstances. Recent Virginia trial court decisions have rejected that idea, see, e.g., *Cordova v. Alper*, 64 Va. Cir. at 98-101; *Post Apartment Homes L.P. v. RTKL Assocs. Inc.*, 63 Va. Cir. 355 (Va. Cir. Ct. Arlington 2003), and it is doubtful the Virginia Supreme Court meant to suggest otherwise.

Conclusion

While the essential elements of Virginia's version of "judicial estoppel" (other than mutuality of parties) may not be crystal clear in the aftermath of *Lofton Ridge LLC*, at least two things are clear about the law of judicial estoppel in Virginia.

First, judicial estoppel is not a favored defense. In recent years, the Virginia Supreme Court has repeatedly refused to apply the principle to pleadings and parties asserting inconsistent legal positions. See *Scales v. Lewis*, 261 Va. 379, 541 S.E.2d 899 (2001) (Suit against one alleged joint tortfeasor does not judicially estop plaintiff from suing another alleged joint tortfeasor in a later case in light of *Va. Code Ann.* § 8.01-443.); *Hoar v. Great E. Resort Mgmt. Inc.*, 256 Va. 374, 506 S.E.2d 777 (1998) (Presenting expert testimony in a negligence case does not estop a party from alleging that expert testimony was unnecessary to establish the standard care in light of Va. Sup. Ct. Rule 1:4(k) and *Va. Code Ann.* § 8.01-281(A).); *Gentry v. Toyota Motor Corp.*, 252 Va. 30, 471 S.E.2d 485 (1996) (Changing experts and theories of liability in the middle of the case does not raise a judicial estoppel.); *Cascades N. Venture Ltd. P'ship. v. PRC Inc.*, 249 Va.

574, 457 S.E.2d 370 (1995) (Changing positions on whether a lease is ambiguous does not create an estoppel.); *TransiLift Equipment Ltd. v. Cunningham*, 234 Va. 84, 360 S.E.2d 183 (1987). Virginia trial courts have not been any more hospitable to the assertion of judicial estoppel as a

later seeking specific performance of an alleged oral agreement with his deceased brother for a one-half interest in the same company.)². The Fourth Circuit also applies the doctrine with “caution.” *John S. Clark Co. v. Faggert & Frieden PC*, 65 F. 3d 26, 29 (4th Cir. 1995).

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defense. See *Cordoba v. Alper*, 64 Va. Cir. 87 (Va. Cir. Ct. Fairfax 2004) (Allegation in a prior chancery case that complainant had no adequate remedy at law does not judicially estop pursuit of subsequent motion for judgment in a law action.); *Post Apartment Homes LP v. RTKL Associates Inc.*, 63 Va. Cir. 355 (Arlington 2003) (Inconsistent claims made in discovery in a prior case that never went to trial do not bar subsequent inconsistent positions in a later action against a different defendant.); *Data Techs. of Va. Inc. v. Morter*, 1997 Va. Cir. LEXIS 579 (Va. Cir. Ct. Richmond 1997) (Pleading alternative legal theories is permitted by Va. Sup. Ct. Rule 1:4(k)); *Patel v. Keiper*, 41 Va. Cir. 324 (Va. Cir. Ct. Richmond 1997) (Change in pleadings that does not involve a factual situation within the plaintiff’s personal knowledge and was made sufficiently before trial to avoid prejudice to the defendants does not raise an estoppel.). *Compare Williams v. Long*, 49 Va. Cir. 368 (Va. Cir. Ct. Smyth Co. 1999) (Plaintiff who testified in his divorce case that he had no ownership in the family company was judicially estopped from

It is also clear that in Virginia the federal courts in the Fourth Circuit will apply their own federal doctrine of “judicial estoppel” in diversity cases because it is “sufficiently important to the integrity of the federal courts” that it trumps any conflicting Virginia state law rule. *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 n.4 (4th Cir. 1982).

Only time will tell whether the Supreme Court of Virginia will follow the federal formula of *New Hampshire v. Maine* and whether there was talismanic significance to the Supreme Court of Virginia’s adoption, in *Lofton Ridge LLC*, of the appellation “judicial estoppel.” ☺

Endnotes:

- 1 See, T. Scott Belden, J.D., “Judicial Estoppel In Civil Action Arising from Representation or Conduct in Prior Administrative Proceeding,” 99 A.L.R. 5th 65 (2002)
- 2 The holding of *Lofton Ridge LLC*, that judicial estoppel does not apply when the second action is between different parties, probably ended the persuasive value of this Circuit Court opinion.



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