

No. 1-16-0091

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MELBA WATSON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 10 L 4537
)	
NORTHWESTERN MEMORIAL HOSPITAL, a)	
corporation,)	Honorable
)	Daniel T. Gillespie
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court correctly granted summary judgment in favor of the defendant based upon the doctrine of judicial estoppel.
- ¶ 2 The plaintiff, Melba Watson, appeals from an order of the circuit court granting summary judgment in favor of the defendant, Northwestern Memorial Hospital (Northwestern), on her refiled complaint alleging medical negligence. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 On April 29, 2003, the plaintiff underwent a right hip arthroplasty which was performed by Dr. Lalit Puri, at Northwestern. Following the surgery, the plaintiff was taken to a recovery room where a nurse performed a neurological assessment. Thereafter, the plaintiff was transferred from the recovery room to the surgical floor. Following her arrival on the floor, it was noted that the plaintiff's right foot plantarflexion and dorsiflexion were absent, and Dr. Puri was notified. After his examination of the plaintiff, Dr. Puri suspected a neuropraxia secondary to nerve compression and elected to return the plaintiff to surgery where he and Dr. Dumanian explored her surgical site and discovered a hematoma in continuity with the plaintiff's sciatic nerve. Dr. Puri evacuated the hematoma, and Dr. Dumanian, a plastic surgeon, examined the sciatic nerve and found it intact with no visible injury. However, the plaintiff never regained total functioning of her right leg and has a permanent condition of "drop foot."

¶ 4 On April 11, 2005, the plaintiff filed a single-count *pro se* complaint alleging medical negligence against Lalit Puri, M.D.; Gregory A. Dumanian, M.D.; Northwestern Medical Faculty Foundation; and Northwestern. According to that complaint, the plaintiff's sciatic nerve was injured during hip replacement surgery performed by Dr. Puri. The complaint also alleged that that a second surgery performed by Dr. Dumanian contributed to the injury to her sciatic nerve. That complaint was docketed in the circuit court of Cook County as case No. 05 L 3996 (hereinafter referred to as Watson I). On September 25, 2005, the plaintiff voluntarily dismissed Dr. Dumanian as a defendant pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2004)). On October 4, 2005, the plaintiff, through counsel, filed her first amended complaint in Watson I. Count I alleged, *inter alia*, medical negligence in the performance of the plaintiff's August 29, 2003, surgery on the part of Dr. Puri. Count II of that

complaint asserted claims against Northwestern and Northwestern Medical Faculty Foundation based upon the doctrine of *respondeat superior*.

¶ 5 In Watson I, the plaintiff took the position that her injuries were caused solely by the negligence of Dr. Puri when, during the course of her hip surgery, he misplaced a retractor on her sciatic nerve. In that case, the plaintiff disclosed Dr. Robert Erickson as her expert witness on causation and standard of care. When deposed in Watson I, Dr. Erickson testified unequivocally that the plaintiff's sciatic nerve injury was caused by retraction during surgery. Other than the retraction process, Dr. Erickson ruled out every other cause of the plaintiff's injury, including the hematoma. According to Dr. Erickson, the outcome was a "done deal" when the injury occurred.

¶ 6 On April 16, 2009, the plaintiff voluntarily dismissed Northwestern as a defendant in Watson I pursuant to section 2-1009 of the Code. On September 11, 2009, following a settlement arrived at with Dr. Puri and Northwestern Medical Faculty Foundation, the plaintiff dismissed the remaining claims in Watson I with prejudice.

¶ 7 On August 16, 2010, the plaintiff filed the instant action against Northwestern only. In her complaint in this case, the plaintiff predicated Northwestern's liability upon the negligence of its agents at the time she was in the recovery room following her surgery on April 29, 2003.

¶ 8 During the course of discovery in the instant action, Jennifer Swaw, the recovery room nurse, was deposed. She was never deposed in Watson I. Nurse Swaw's deposition is not contained in the record before us. However, Dr. Erickson, who was again retained by the plaintiff as an expert witness, testified when deposed that he read Nurse Swaw's deposition and that she described the neurological evaluation she conducted on the plaintiff in the recovery room following surgery.

¶ 9 According to Dr. Erickson's deposition testimony in the instant case, he reviewed the plaintiff's medical records and a number of depositions, including the deposition of Nurse Swaw, and concluded that the examination of the plaintiff in the recovery room described by Nurse Swaw was inadequate to properly assess the plaintiff's right leg for signs of nerve compression. Dr. Erickson testified that, when he opined in Watson I that the plaintiff's injury was caused by the retraction process during her surgery, he was operating under the assumption that the plaintiff lacked neurological function at the time that she arrived in the recovery room. However, after reviewing Nurse Swaw's deposition, he became convinced that the plaintiff had neurological function when she came to the recovery room, shifting "the etiology or the cause [of the plaintiff's injury] from a retractor damaging the sciatic nerve during surgery to an ongoing process." Dr. Erickson stated that his review of Nurse Swaw's deposition testimony convinced him that the plaintiff's "nerve was working" when she arrived in the recovery room and "got progressively worse" thereafter. It was his opinion that the hematoma which Dr. Puri evacuated was "the most likely thing that caused the neuropraxia." Dr. Erickson testified that he now has a completely different opinion as to the cause of the plaintiff's sciatic nerve problem. The plaintiff's Rule 213 (Ill. S. Ct. R. 213 (eff. Jan. 1, 2007)) disclosure of Dr. Erickson's opinions in this case states that he is no longer of the opinion that Dr. Puri deviated from the standard of care; rather, he is now of the opinion that Nurse Swaw's examination of the plaintiff was inadequate, causing the plaintiff to articulate at the ankle. According to the disclosure, Dr. Erickson is currently of the belief that no physician was called to assess the plaintiff in the recovery room due to Nurse Swaw's improper examination and, had the plaintiff's neurological status been properly evaluated in the recovery room, "she would not have progressed to a permanent injury to her sciatic nerve with resulting foot drop."

¶ 10 On August 25, 2015, Northwestern filed a motion for summary judgment, alleging its entitlement to judgment as a matter of law based upon the doctrine of judicial estoppel. According to the motion, the plaintiff has asserted a basis of liability and causation in the instant action which is in "diametric opposition" to the basis of liability and causation asserted in Watson I. On October 1, 2015, the circuit court granted Northwestern's motion for summary judgment, and this appeal followed.

¶ 11 In urging reversal of the summary judgment entered in favor of Northwestern, the plaintiff argues that the doctrine of judicial estoppel is not applicable under the circumstances present in this case because the basis of liability as testified to by her expert in Watson I is not "completely opposite" to the basis of liability to which he testified in the instant case. Relying upon this court's decision in *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, Northwestern argues that the factual underpinning of the plaintiff's theory of liability in Watson I is at odds with the theory of liability which she advanced in the instant case, and as a consequence, the circuit court correctly granted its motion for summary judgment based upon the doctrine of judicial estoppel.

¶ 12 Prior to addressing the merits of the plaintiff's assignment of error and Northwestern's response, we must first determine our standard of review. Judicial estoppel is an equitable doctrine, the application of which is committed to the sound discretion of the trial court. *Seymour v. Collins*, 2015 IL 118432, ¶ 36. The trial court's exercise of that discretion is reviewed under an abuse-of-discretion standard. *Id.* ¶ 48. When, as in this case, the exercise of the trial court's discretion results in the entry of a summary judgment in favor of the defendant, we review that ruling *de novo*. *Id.* ¶ 49.

¶ 13 Under the doctrine of judicial estoppel, a party who has taken a particular position in one legal proceeding, and benefited from that position, is estopped from taking a contrary position in

a subsequent legal proceeding. *Id.* ¶ 36. Five factors must be present before the doctrine of judicial estoppel may be invoked. *Id.* ¶ 37. "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) have succeeded in the first proceeding and received some benefit from it." *Id.* ¶ 37.

¶ 14 In her brief before this court, the plaintiff has only addressed her arguments to the second factor; namely, whether the position which she took in Watson I is factually inconsistent with her position in this case. According to the plaintiff, Dr. Erickson's causation opinion in this case is "not completely opposite" to his causation opinion in Watson I, but rather, is merely a modification of his earlier opinion based upon new information. She appears to argue that, because Dr. Erickson arrived at his causation opinion in this case only after he reviewed Nurse Swaw's deposition, testimony which was not available to him before he rendered his opinion in Watson I, the causation opinion which he rendered in this case is merely a modification of the causation opinion which he rendered in Watson I.

¶ 15 In its argument in support of the summary judgment entered in its favor, Northwestern contends that this case is factually indistinguishable from *Smeilis*. *Smeilis*, like the instant case, was a medical negligence action. *Smeilis*, 2012 IL App (1st) 103385, ¶¶ 10, 13. In *Smeilis*, the plaintiffs declared an expert witness in their original action who opined that Kathleen Smeilis's injuries were proximately caused by the defendants' negligence in failing to diagnose cauda equina syndrome and that she suffered permanent and irreversible injuries prior to coming under the care of Dr. Lipkis. *Id.* ¶ 27. Following discovery in the original action, all of the defendants, with the exception of Dr. Lipkis, settled with the plaintiffs. *Id.* ¶ 12. The plaintiffs voluntarily

No. 1-16-0091

dismissed their action against Dr. Lipkis, presumptively pursuant to section 2-1009 of the Code, and dismissed their action against the other defendants, with prejudice. *Id.* Ten days later, the plaintiffs refilled their action against Dr. Lipkis and his corporation. *Id.* ¶ 13. In their refiled action, the plaintiffs declared an expert witness other than the expert they had retained in their original action. The plaintiffs' new expert witness, when deposed, testified that Kathleen Smeilis's injuries were not caused by the defendants who had settled with the plaintiffs in their original action, but were sustained after she came under the care of Dr. Lipkis and that it was Dr. Lipkis's treatment which was the proximate cause of her injuries. *Id.* ¶¶ 1, 14. The circuit court converted the defendants' affirmative defense of judicial estoppel into a motion to dismiss the plaintiffs' complaint. After entertaining argument, the circuit court concluded that the plaintiffs' claims in their refiled action were barred by judicial estoppel, and it dismissed their complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). *Id.* ¶ 15. On appeal, this court affirmed the circuit court's application of the doctrine of judicial estoppel and dismissal of the plaintiffs' refiled action against Dr. Lipkis and his corporation. *Id.* ¶ 62.

¶ 16 Northwestern argues that the circumstances present in the instant case are, in all relevant respects, identical to those present in *Smeilis*. According to the plaintiff, however, there is a critical distinction between the facts of this case and the facts in *Smeilis*. She contends that in *Smeilis* the causation opinion rendered by the plaintiffs' retained expert in their refiled action was based upon the same facts that their expert in the original action had relied upon in rendering his causation opinion; whereas, in this case, Dr. Erickson relied upon new information in arriving at his current causation opinion that was not available to him when he rendered his causation opinion in Watson I; namely, Nurse Swaw's deposition.

¶ 17 We are not persuaded by the plaintiff's attempt to distinguish the facts in this case from those present in *Smeilis*. In *Watson I*, Dr. Erickson rendered an opinion fixing Dr. Puri's negligence during the plaintiff's hip surgery as the proximate cause of her injuries. Based upon that theory, the plaintiff entered into a \$550,000 settlement with Dr. Puri and Northwestern Medical Faculty Foundation. Approximately eleven months later, the plaintiff filed the instant action against Northwestern, alleging that her injuries were proximately caused by the negligence of Northwestern's agents after she arrived in the recovery room; allegations which she made before Nurse Swaw was ever deposed. Dr. Erickson rendered a causation opinion in this case supporting the plaintiff's theory of liability. Just as the plaintiffs in *Smeilis*, the plaintiff in this case asserted a claim based upon a theory of causation which is completely contrary to the theory of causation which she relied upon in the prosecution and later settlement of her claims for the very same injuries in *Watson I*. As Northwestern argues, the reason for the change in Dr. Erickson's causation opinion has no effect upon the judicial estoppel analysis as the doctrine is based upon the taking of inconsistent positions, not which position is truthful. See *id.* ¶ 45.

¶ 18 The facts of this case clearly establish that the plaintiff has taken a position on the proximate cause of her injuries which is factually inconsistent with the position that she took in *Watson I*. Having failed to raise any arguments addressed to the factors for consideration in a judicial estoppel analysis other than the question of the inconsistency of her positions, the plaintiff has waived any argument that the other factors for consideration in the application of the doctrine have not been satisfied. Ill. S. Ct. R 341(h)(7) (eff. Jan. 1, 2016). Waiver aside, the record reflects that: the inconsistent positions taken by the plaintiff on the issue of causation were advanced in separate judicial proceedings, both positions were taken with the intent that the

No. 1-16-0091

trier of fact accept their truth, and the plaintiff derived a benefit from the position on causation which she asserted in *Watson I*.

¶ 19 Having concluded that the all five factors for consideration in a judicial estoppel analysis have been satisfied, we must next address the issue of whether the circuit court abused its discretion in applying the doctrine. The circuit court abuses its discretion when its decision is "arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour*, 2015 IL 118432, ¶ 41.

¶ 20 It was the plaintiff's burden to supply a sufficient record to enable this court to conduct a meaningful review of the issues presented. *Doe v. Township High School District 211*, 2015 IL App (1st) 140857, ¶ 80. Unfortunately, the plaintiff has failed to provide this court with a report of the proceedings before the circuit court on the date that it applied the doctrine of judicial estoppel or a bystander's report of those proceedings as provided in Rule 323(c) (Ill. S. Ct. R 323(c) (eff. Dec. 13, 2005). As a consequence, we must presume that the circuit court acted in conformity with established legal principles and that its determination was supported by competent evidence. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). We conclude, therefore, that there is no basis in the record before us which could support the conclusion that the circuit court abused its discretion in applying the doctrine of judicial estoppel.

¶ 21 As the circuit court's application of the doctrine of judicial estoppel resulted in the termination of this litigation via the procedural mechanism of a motion for summary judgment, we must still determine whether there exists a genuine issue of material fact and whether Northwestern is entitled to judgment as a matter of law. *Seymour*, 2015 IL 118432, ¶ 49. Our review of this issue is *de novo*. *Id.*

No. 1-16-0091

¶ 22 Strictly construing the facts before us against Northwestern and liberally in favor of the plaintiff (*Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)), we find that there are no genuine issues of material fact on any of the factors necessary to the application of the doctrine of judicial estoppel and Northwestern is, therefore, entitled to judgment as a matter of law.

¶ 23 Affirmed.