

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
SECOND DISTRICT

KIM M. OECHSLE,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 15-L-12
)	
TEGAN THIMESCH and)	
FOOTCARE CLINIC, P.C.,)	Honorable
)	Margaret J. Mullen,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing plaintiff's complaint as barred by judicial estoppel: although the court properly found the existence of the legal prerequisites for applying the doctrine, it did not appear to weigh any equitable factors to determine whether applying the doctrine was appropriate; thus, we vacated the dismissal and remanded for consideration of those factors.

¶ 2 Plaintiff, Kim M. Oeschle, appeals from the judgment of the circuit court of Lake County imposing judicial estoppel and dismissing her claims against defendants, Dr. Tegan Thimesch, D.P.M., and Footcare Clinic, P.C. Because the record does not establish that the trial court exercised its discretion in applying judicial estoppel, we vacate and remand.

¶ 3

I. BACKGROUND

¶ 4 On December 16, 2011, plaintiff filed a medical-malpractice action against defendants. In December 2013 and January 2014, plaintiff consulted with a bankruptcy attorney. On January 1, 2014, she paid a credit-counseling service for pre-bankruptcy counseling. On January 21, 2014, she voluntarily dismissed her medical-malpractice case.

¶ 5 On February 20, 2014, plaintiff filed a voluntary petition for chapter 7 bankruptcy. See 11 U.S.C. § 701 *et seq.* (2012). The petition valued plaintiff's personal assets at \$1,807 and claimed those as exempt. It disclosed monthly social security benefits of \$1,014. The petition reported unsecured primary debt of \$5,037 and unsecured nonprimary debt of \$20,387.

¶ 6 The bankruptcy petition did not disclose plaintiff's prior medical-malpractice lawsuit. In the statement of financial affairs, which directed plaintiff to list "all suits and administrative proceedings to which [she] is or was a party within one year immediately preceding the filing of this bankruptcy," plaintiff answered "none." On schedule B, pertaining to personal property, plaintiff stated that she had no contingent and unliquidated claims of any nature, including tax refunds, counterclaims, or rights to set off, and that she had no "other property of any kind not already listed." Plaintiff declared under the penalty of perjury that schedule B, the statement of financial affairs, and the petition overall were accurate. On May 20, 2014, plaintiff received a discharge in bankruptcy.

¶ 7 On January 7, 2015, plaintiff refiled her medical-malpractice action against defendants. On April 15, 2015, defendants moved to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)), contending, in part, that plaintiff should be judicially estopped, because she failed to report her prior lawsuit in her bankruptcy case. On

June 19, 2015, the bankruptcy court granted plaintiff's motion to reopen the bankruptcy case to allow her to disclose this lawsuit.

¶ 8 On July 7, 2015, the trial court granted defendants' motion to dismiss based on judicial estoppel. In doing so, the court relied, in part, on *Seymour v. Collins*, 2014 IL App (2d) 140100. The court found that all of the "elements of judicial estoppel" were present in this case. Therefore, the court found that "it would be unjust to allow the suit to proceed."

¶ 9 On August 3, 2015, plaintiff filed a motion to reconsider. On September 24, 2016, while the motion to reconsider was pending, the Illinois Supreme Court reversed the decision in *Seymour*. See *Seymour v. Collins*, 2015 IL 118432.

¶ 10 On October 15, 2015, the trial court denied the motion to reconsider. Its written order stated, in pertinent part, that the record indicated that plaintiff voluntarily dismissed her cause of action within approximately one month of filing her bankruptcy petition and that plaintiff had asserted under oath in the statement of financial affairs that she had not been a party to any lawsuits within the preceding year. The court further found that "all elements of judicial estoppel [were] present, and in the exercise of [its] discretion, *** it [was] appropriate to impose estoppel to prevent the plaintiff from taking inconsistent positions." Plaintiff, in turn, filed her notice of appeal.¹

¹ On January 28, 2016, plaintiff filed in the trial court a motion to supplement and clarify the record on appeal. In denying the motion in part, the trial court stated that it had considered the supreme court's opinion in *Seymour*. Plaintiff subsequently moved in this court to supplement the record to include the July 7, 2015, transcript, plaintiff's January 28, 2016, motion to supplement and clarify the record, and the trial court's January 28, 2016, order. We granted plaintiff leave to supplement the record with only the July 7 transcript. Plaintiff, in turn, filed a

¶ 11

II. ANALYSIS

¶ 12 On appeal, plaintiff contends that: (1) the issue of judicial estoppel is moot, because she reopened her bankruptcy case and disclosed this cause of action; (2) the standard of review is *de novo*, because the trial court dismissed her case under section 2-619; and (3) the court, in applying judicial estoppel, failed to exercise its discretion as required by *Seymour*.

¶ 13 Defendant responds that: (1) the issue is not moot, because there remains an actual controversy as to whether judicial estoppel applies because of her earlier conduct in the bankruptcy proceeding; (2) the standard of review is abuse of discretion, because judicial estoppel required the trial court to exercise its discretion; and (3) the court properly exercised its discretion in applying judicial estoppel.

¶ 14 We begin by deciding whether this appeal is moot. It is not. An appeal is moot when it involves no actual controversy or the reviewing court cannot grant the complaining party effective relief. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 522-23 (2001). Judicial estoppel is designed to promote truth-seeking, rather than gamesmanship, and to protect the integrity of the judicial system. *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 19. Here, although plaintiff contends that the reopening of her bankruptcy case makes the issue of judicial estoppel moot, there remains an actual controversy as to whether plaintiff should be judicially estopped because of her previous conduct in the bankruptcy proceeding. To conclude otherwise would create the opportunity for a plaintiff to deceive the bankruptcy court in the hope of that deception going

motion to modify our order regarding her motion to supplement the record, requesting that we allow her to add the January 28 order. We ordered the motion to modify taken with the case. We now grant the motion to modify and allow the record to be supplemented with the January 28 order.

undetected and then, only after being caught, to escape the consequences by asking for a do-over. Such a rule would promote dishonesty in the courts and confound the purpose of judicial estoppel. Thus, this appeal is not moot because of the subsequent reopening of the bankruptcy proceeding.

¶ 15 We next address the standard of review. A ruling on a motion to dismiss under section 2-619 is subject to *de novo* review.² *Seymour*, 2015 IL 118432, ¶ 42. However, when a court exercises its discretion in applying judicial estoppel, we review for an abuse of discretion. *Seymour*, 2015 IL 118432, 48. Further, when the court is required to exercise its discretion, the failure to do so in itself constitutes an abuse of discretion. *Seymour*, 2015 IL 118432, ¶ 50. Thus, if we conclude that the trial court here did not exercise its discretion as required, then an abuse of discretion occurred and we must vacate the court's judgment.

¶ 16 Next, we turn to whether the trial court properly applied judicial estoppel. The analytical framework for determining whether judicial estoppel should bar a claim is a two-step process. *Seymour*, 2015 IL 118432, ¶ 47. First, the trial court must determine whether the party to be estopped has: (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) has succeeded in the first proceeding and received some benefit. *Seymour*, 2015 IL 118432, ¶ 47.

² Although the defendants in *Seymour* raised judicial estoppel via a motion for summary judgment, the supreme court stated that, because judicial estoppel is an affirmative matter that seeks to defeat a claim, it is best brought in a motion under section 2-619. *Seymour*, 2015 IL 118432, ¶ 42 n.4. That is what defendants did in this case.

¶ 17 Second, even if the trial court finds that all five factors are present, it must exercise its discretion in deciding whether to apply judicial estoppel. *Seymour*, 2015 IL 118432, ¶ 47. In doing so, “multiple factors” may inform the court’s decision, including the significance or impact of the party’s action on the first proceeding and whether the party intended to deceive or mislead, as opposed to inadvertently or mistakenly taking the prior position. *Seymour*, 2015 IL 118432, ¶ 47. Notably, the question of whether there was an intent to deceive or mislead is a “critical factor” in deciding whether to apply judicial estoppel.³ *Seymour*, 2015 IL 118432, ¶ 54.

¶ 18 In this case, the trial court found all five prerequisites for judicial estoppel. Plaintiff clearly took factually inconsistent positions in separate judicial proceedings by omitting the existence of her lawsuit in the bankruptcy petition and by pursuing it in the trial court. She also intended that the bankruptcy court accept the truth of the omission, by declaring under penalty of perjury that the petition, including the statement of financial affairs, was accurate. Finally, she succeeded and obtained a benefit by having her debts discharged and receiving bankruptcy protection. Thus, the court correctly found to be present all of the prerequisites for judicial estoppel.

¶ 19 However, the record does not establish that the trial court engaged in the second step of the judicial-estoppel analysis by exercising its discretion in imposing judicial estoppel. In its oral ruling granting defendants’ motion to dismiss, the court, after finding that the “elements of judicial estoppel” were present, never mentioned its discretion or discussed any equitable factors, such as the significance or impact of plaintiff’s action in the bankruptcy proceeding or whether

³ As the supreme court noted, even if all five prerequisites are found, the intent to deceive or mislead is not necessarily present, as inadvertence or mistake may account for positions taken or facts asserted in the prior proceeding. *Seymour*, 2015 IL 118432, ¶ 47.

she intended to deceive or mislead the bankruptcy court. Similarly, its written order granting the motion to dismiss is silent as to any consideration of the second-step factors or whether the court otherwise exercised its discretion.

¶ 20 Nor does the October 15, 2015, order denying plaintiff's motion to reconsider, issued after the supreme court's opinion in *Seymour*, show that the court exercised its discretion. Rather, it merely reiterated that "all elements of judicial estoppel [were] present" and stated that "in the exercise of the court's discretion" it was proper to impose judicial estoppel "to prevent the plaintiff from taking inconsistent positions." Although that order expressly referred to the exercise of discretion, a mere recitation that judicial estoppel is an equitable doctrine invoked by the court in its discretion does not suffice to show that the court actually exercised its discretion when the record does not otherwise show that it did. *Seymour*, 2015 IL 118432, ¶ 50. Moreover, the trial court's statement that it was imposing judicial estoppel in the "exercise of [its] discretion" was immediately followed by its reference to its having done so to prevent plaintiff from taking inconsistent positions. That statement indicates that the court limited its exercise of discretion to the prerequisites for judicial estoppel, rather than any equitable considerations, such as the impact on the prior proceeding or any intent to deceive or mislead. Thus, based on the record before us, we cannot conclude that the court exercised its discretion under step two of the *Seymour* analysis.

¶ 21 Accordingly, we vacate and remand so that the trial court may consider any equitable factors, such as whether there was a significant impact on the bankruptcy proceeding and whether plaintiff intended to deceive or mislead the bankruptcy court when she failed to disclose her prior lawsuit. After doing so, the court should decide whether, in its discretion, judicial estoppel applies.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we vacate the judgment of the circuit court of Lake County and remand for further proceedings.

¶ 24 Vacated and remanded.