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ILLINOIS STATE BAR ASSOCIATION

TORT TRENDS

The newsletter of the Illinois State Bar Association's Section on Tort Law

Editor's note

By John L. Nisivaco, Boudreau & Nisivaco, Chicago

The first article of this edition, written by Brett Swanson, discusses the First District Appellate Court's opinion in *Berge v. Kuno Mader and DMG America, Inc.*, where the doctrine of judicial estoppel was applied to bar a plaintiff from proceeding with a cause of action in state court where the plaintiff failed to disclose the action as an asset in a bankruptcy petition.

The second article is written by John Bailen and provides the defense perspective on engaging in a pre-trial settlement conference. Mr. Bailen provides a thoughtful approach to an issue that trial lawyers are confronted with in the majority of cases they handle.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful. ■

Bankruptcy issues relating to personal injury cases

By Brett J. Swanson, Patton & Ryan, Chicago

Despite difficult economic times, the American Bankruptcy Institute has noted the number of bankruptcy filings has dropped across the country. However, a recent opinion from the Illinois Appellate Court confirms that trial lawyers from both sides of the bar should be aware that bankruptcy filings can, and will, impact your case. In *Berge*, the First District found that the doctrine of judicial estoppel bars a plaintiff from proceeding with a cause of action in state court where the plaintiff fails to disclose the action as an asset in a bankruptcy petition. *Berge v. Kuno Mader and DMG America, Inc.*, 354 Ill. Dec. 374, 957 N.E.2d 968 (1st Dist. 2011).

Plaintiff, Shirley Berge, was involved in a car accident in May 2006 with a car owned by DMG America (DMG) and driven by DMG's employee. She filed a negligence complaint for the accident in state court in November 2007. One month prior to the accident, Berge filed for chapter 13 bankruptcy and later converted the chapter 13 bankruptcy petition to a chapter 7 petition. In October 2009, Berge received a "no assets" discharge of her debts in bankruptcy court and her chapter 7 petition was closed and fully resolved.

DMG independently discovered that the plaintiff had filed bankruptcy and filed a motion for summary judgment based on judicial estoppel for Berge's failure to disclose her negligence claim in bankruptcy court. It was undisputed plaintiff never disclosed the state court action to the bankruptcy court while her bankruptcy petition was pending. The trial court applied the doctrine of judicial estoppel and plaintiff appealed.

The plaintiff initially argued that the state court did not have jurisdiction because only the bankruptcy court can decide issues stemming from her bankruptcy filing. She additionally argued that a finding of bad faith surrounding her failure to disclose her case was required to apply judicial estoppel. While rejecting her arguments, the court noted that the state court decides whether it has or does not have jurisdiction in a particular case. *Berge*, 2011 IL App (1st) 103778 ¶5. The court further noted that a finding of bad faith is not an element that must exist for courts to impose judicial estoppel. If it was, the court mentioned that her concealment of the state

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Bankruptcy issues relating to personal injury cases

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court case was sufficient for a court to infer bad faith because she had the potential to realize financial gain and had a duty to disclose the claim. *Id.* ¶6-7.

The law of judicial estoppel prevents a party who makes a representation in one case from taking a contrary position in another case. Judicial estoppel has five elements: (1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position and received some benefit thereby; and (5) the two positions must be totally inconsistent. *Id.* ¶12-13

The court found all five elements present in Berge's case. First, her pursuit of the state court action was contrary to her position in the bankruptcy court that she had no pending lawsuits. Second, plaintiff made the conflicting positions in separate judicial proceedings. Third, the positions were made under oath through her complaint and the representations made in her bankruptcy case filings. Fourth, the plaintiff's failure to disclose her case provided her the opportunity to recover a money judgment while permanently avoiding her debts. Lastly, the plaintiff did not disclose her lawsuit to the bankruptcy court while actively pursuing that claim in state court. *Id.* ¶14.

The plaintiff claimed it was her bankruptcy attorney's fault for failing to include it on her list of assets, but the court held she was bound by her attorney's actions. The court went on to note that it was the plaintiff who gave numerous submissions to the bankruptcy court under oath which listed other legal actions she was involved in. Furthermore, it was the plaintiff that testified before the bankruptcy trustee that her disclosures were complete and correct. *Id.* ¶17.

The court was also not impressed with the plaintiff's effort to amend her bankruptcy petition after being faced with the defendant's motion for summary judgment. The court noted it typically encourages remedial actions, even those belatedly taken, but held that a belated amendment to the plaintiff's list of assets to remedy her situation would be a disservice to the doctrine of judicial estoppel. *Id.* ¶18. The primary focus of judicial estoppel in Illinois is purely on the actions of the litigant and its effect on the judicial system. *Bidani v. Lewis,* 285 Ill.App.3d 545, 551 (1996). Allowing the plaintiff to easily remedy her situation would only serve to promote less than truthful asset disclosures with a hope of not getting caught and may have the effect of encouraging concealment of assets in bankruptcy. *Berge*, 2011 IL App (1st) 103778 ¶18.

Lastly, the court was not persuaded with plaintiff's argument that her filings under oath were made inadvertently or by mistake. The court noted that a debtor's failure to satisfy her statutory duty to disclose is only inadvertent when the debtor either lacks knowledge of the undisclosed claim or has no motive for the concealment. In her case, the plaintiff had motive to conceal the state claim and her failure to disclose it was not inadvertent. ¶18. This was especially true since federal courts have not shown much forgiveness when a party fails to disclose assets in a bankruptcy case. ¶20. As a result, the court affirmed the trial court's decision to dismiss the plaintiff's claim based on judicial estoppel.

When representing individuals in a personal injury case, make it a habit to ask your client about bankruptcy or conduct a brief search on PACER prior to meeting any potential client. You should also be certain to make sure your client understands the importance of disclosing your lawsuit if he or she intends on filing bankruptcy subsequent to your representation. Likewise, take the time to conduct some online research when defending a client or simply add the question to your interrogatories to the plaintiff. ■

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Pre-trial conference—A defense perspective

By John R. Bailen, Bruce Farrell Dorn & Associates, Chicago

I. Do you want a pre-trial?

What are the factors which may influence your interest and that of your opponent?

Liability issues not in dispute?

Treatment appears reasonable?

Policy limits modest?

II. Purpose of a pre-trial

The purpose of a pre-trial is to promote the disposition of cases by cooperation and agreement.

III. Authority for pre-trials

Code of Civil Procedure: 735 ILCS 5/2-1004.

See also Supreme Court Rules 218 and 219.

IV. Selecting a judge

The success of a pre-trial can be a function of the judge selected. Except when assigned out for trial, the judge will be someone agreed upon by the parties. As a result you may need to consider agreeing to someone who may not have all of the tendencies you would prefer. If your opponent suggests a judge whose perspective is not well known to you, check with other attorneys who may have had experience with him/her. An effective pre-trial judge does not necessarily need to share your perspective on the case but generally will have the ability to engender confidence from the attorneys and will respect the confidentiality of any information you may relate during the pre-trial.

V. The conference

A Plaintiff's Pre-Trial Memorandum will include a summary of medical treatment and bills. Be prepared to discuss reasonableness/necessity of the treatment and bills. Copies of reports of diagnostic tests can be helpful especially if results are "negative." If relevant, the area of expertise of Plaintiff's healthcare providers should be analyzed. If you are not considering certain of Plaintiff's medical care in your evaluation, be prepared to tell the Judge why. Any relevant information concerning Plaintiff's medical history should be discussed. Carefully review claims for lost earnings. Did a doctor order time off of work? Was the job sedentary in nature? If photos exist which are probative of issues in the case, provide them to the Judge. Also provide the Court with pertinent deposition testimony of which you want the Judge to be aware.

In larger, more complicated cases, more than one setting may be required in order to reach a settlement. Clients' expectations may be influenced by a Judge's thoughts at an initial pre-trial conference. At a subsequent setting a case may be more readily settled when clients have had an opportunity to consider the Judge's evaluation or range of values. Be sure to keep your client informed as to all developments as required by Rule 1.4.

If the pre-trial occurs after Defendant has identified a Rule 2/3(f)(3) witness, be sure to provide the Court with a copy of the witness' report in advance of the pre-trial.

VI. Good faith

Some cases do not settle at pre-trial notwithstanding the efforts of both sides. It is presumed the parties wish to explore settlement and have reasonable authority to do so. In many cases common ground will be found and an Order of Dismissal will be entered. However, regardless of the eventual outcome, good faith must be exercised. That is how confidence and respect is maintained between the parties and the Court. ■

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