

**IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA**

KAREN CHONGAG HAN,
Petitioner,
v.

HANKOOK TIRE CO., LTD.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record pursuant to Rule 29.6, Hankook Tire Co., Ltd. submits the following disclosure statement:

Hankook Tire Worldwide Co., Ltd. is a publicly held company and owns 25.16% of the stock of Hankook Tire Co. Ltd.

Hankook Tire Co., Ltd. is a publicly held company and a parent corporation of the companies listed below:

a. DAEHWA ENG & MACIDNERY CO., Ltd, 1-11 DAEHW A-DONG, DAEDEOKGU, DAEJEON 306-020, KOREA

b. Hankook Tire America Corp, 333 Commerce Street, Suite 600, Nashville, Tennessee 37201, U.S.A

c. Hankook Tire Canada Corp, 30 Resolution Drive, Brampton, ON, L6W 0A3, Canada

d. Hankook Tyre U.K. Ltd, Fawsley Drive, Heartlands Business Park Daventry, Northamptonshire NN11 8UG, UK

e. Hankook Tire Japan Corp, 9th Fl, Naniwasuji Hanmachi Mid Bldg.2-3-2, UtsuboHanmachi, Nishi-Ku, Osaka, Japan

f. Hankook Tire Europe Holdings B.V, Siemensstrasse 14,63263, Neu-Isenburg, Germany

g. Hankook Reifen Deutschland GmbH, Siemensstrasse 14, 63263, Neu-Isenburg, Germany

- h.** Hankook France S.A.R.L, immeuble Le Patio, 35-37 Rue Louis Gerin, 69100 Villeurbanne, France
- i.** Hankook Tire Netherlands B.V, Siriusdreef 35-37, 2132 WT Hoofddorp, The Netherlands
- j.** Hankook Espana S. A, Avenida de la Industria No4, Edificio 3,2-D, 28108 Alcobendas, Madrid, Spain
- k.** Hankook Tyre Australia Pty., LTD, Building A Level 3, 11, Talavera Road, Macquarie Park NSW 2113, Australia
- l.** Hankook Tire China Co., Ltd, 10th Floor, Guangqi Tower, 12th Building, No. 1001 Qinzhoubei Road, Xuhui District, Shanghai, China
- m.** Chongqing Hankooktire Co., Ltd, No.149 Dong Feng, Jiang Bei, Chongqing, China
- n.** Hankook Tire de Mexico, S.A. DE C.V, Av Paseo de las Palmas 735, 7 Piso col. Lomas de Chapultepec III section, c.p 11000, CD MX, Mexico
- o.** PT. HANKOOKTIRE INDONESIA, Jl Kenari Raya Blok G3-01 Delta Silicon 5 Lippo Cikarang Bekasi 17550 Jabar Indonesia
- p.** MK Technology Inc, 45 Munpyeongseo-ro, Daedeok-gu, Daejeon 34303, Korea
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- t. Hankook Tire de Colombia Ltda.Calle 100 No. 19-54 Ofic. 301, Bogota, Colombia
- u. Hankook Donggeurami Partners Co., Ltd, 100 Moksang-dong, Daedeok-gu, Daejeon, Korea
- v. Hankook Tyre Australia Retail Pty.,Ltd, Building A Level 3, 11, Talavera Road, Macquarie Park NSW 2113, Australia
- w. Hankook Tires India LLP, The Unit number 703-705 Palm Spring Paiza, Golf Course Road, Sector-54, Gurgaon Haryana, India
- x. Hankook Tire Latam, S.A, Oceania Business Plaza, Torre 1000, Oficina 30C, Punta Pacifica, Panama, Republica de Panama
- y. Hankook Tire Latin America Distribution Center, S.A, Oceania Business Plaza, Torre 1000, Oficina 30C, Punta Pacifica, Panama, Republica de Panama.

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INTRODUCTION

This case is the second attempt in Ohio by Petitioner to bring breach of contract claims for certain financial services provided in Malaysia in 1998. In the first lawsuit filed in 2004, Respondent obtained a summary judgment on the merits which was subsequently overturned by the Sixth Circuit Court of Appeals who, *sua sponte*, found a lack of subject matter jurisdiction due to the presence of foreign corporations on each side of the lawsuit. Upon remand to the Northern District Court of Ohio, Petitioner argued that her corporation was an indispensable party to the suit and obtained a dismissal for lack of subject matter jurisdiction, which allowed her to avoid the summary judgment that was entered. In the current lawsuit, Petitioner has asserted that her corporation is not an indispensable party, and she should be able to maintain the claims in her individual capacity and as the real party in interest for the now defunct corporation. The District Court found that Petitioner was “playing fast and loose” with the Courts and dismissed her case under the theory of judicial estoppel. Notably, the Sixth Circuit Court of Appeals explained that the District Court’s dismissal was not based on subject matter jurisdiction, so Petitioner’s basis for a writ of certiorari is not an issue that was ruled upon by the Courts below. Petitioner’s request should be denied.

OBJECTIONS TO FACTUAL STATEMENTS

Respondent objects to Petitioner’s statement that “[u]pon remand from the Sixth Circuit, simply agreeing with the Sixth Circuit with regard to the jurisdictional

defect, the district court dismissed the First Action for lack of subject matter jurisdiction without considering or accepting any positions of the parties.”¹ Pet. for Cert. 3. Respondent denies that the District Court denied Han’s motion for reconsideration on the basis that judicial estoppel can be applied to defeat subject matter jurisdiction. Pet. for Cert. 5.

ARGUMENT

A. No Compelling Reason for Writ to be Granted

Rule 10 of this Court provides the considerations governing review of certiorari and provides it is not a matter of right, but of judicial discretion. Compelling reasons must be advanced for a petition for writ of certiorari to be granted. Petitioner fails to advance any compelling reason, and instead raises an issue that was not the basis for the dismissal of her claims in the Courts below.

B. Judicial Estoppel Was Not Used to Destroy Subject Matter Jurisdiction

As noted by the Sixth Circuit’s Opinion, the District Court did not dismiss the case for lack of jurisdiction, but only discussed judicial estoppel being applied to questions of subject-matter jurisdiction to distinguish the cases cited by Petitioner on that issue. App. 006a. The District Court applied judicial estoppel to the merits of Petitioner’s claims. *Id.* The District Court stated that it was not exploring whether it had jurisdiction over the matter and instead was considering with Petitioner could rely on an inconsistent position to create jurisdiction in the face of

¹ Judge Lioi previously found Petitioner to be misrepresenting the Record with this statement. App. 013A.

jurisdiction defect that Petitioner had previously brought to the Court's attention. App. 015a. There was no finding of a lack of subject matter jurisdiction by the District Court; rather, the Court dismissed Petitioner's claims to protect the integrity of the judicial system. App. 012a. Therefore, Petitioner's issue on appeal is not one which was used to dismiss her claims by the District Court and the Petition should be denied.

C. Petitioner's Alleged Split in the Circuit Court of Appeals is not at Issue

There is no decision in conflict with another United States Court of Appeals on the same important matter and no far departure from the accepted and usual course of judicial proceedings. S.Ct. Rule 10. As discussed above, the rulings from the District Court and the Sixth Circuit were not based on lack of subject matter jurisdiction. Petitioner sought to create jurisdiction by taking the inconsistent position that her company is not an indispensable party such that it need not be joined in the lawsuit and thereby establishing diversity jurisdiction. Petitioner's argument that the rulings below applied judicial estoppel to destroy jurisdiction is simply incorrect. The District Court did not dismiss the case for a lack of jurisdiction but to avoid an unfair result and unseemliness. App. 006a, 022a.

There is no split within the Federal Circuit as the cases cited by Petitioner do not support her arguments. Petitioner's reliance on *In re Southwestern Bell Tel. Co.* is misplaced as the Court held that if a party met the requirements for federal jurisdiction, then a Court cannot negate that right based on an inconsistency in

pleading. *Id.* 535 F.2d 859, 860-61 (5th Cir. 1976), opinion modified on reh'g, 542 F.2d 297 (5th Cir. 1976) and vacated, 556 F.2d 370 (5th Cir. 1977) and cert. granted, judgment rev'd *sub nom.* *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 97 S. Ct. 1439, 52 L. Ed. 2d 1 (1977) and vacated, 556 F.2d 370 (5th Cir. 1977). Here, there was no dismissal for lack of jurisdiction and Petitioner could not meet the requirements to maintain her suit because her company is an indispensable party to the proceedings, as previously argued by Petitioner and accepted by the District Court in the first lawsuit. Petitioner was merely being held to her prior position that was accepted by the Court, which allowed Petitioner to avoid summary judgment on the merits in the first lawsuit.

The *Bonzel* Court stated that they were not relying primarily on the theory of estoppel to negate federal jurisdiction, did not make a ruling as to whether or not judicial estoppel could be applied to jurisdictional matters, and found that the amended complaint was different enough to require a new review by the District Court. *Bonzel v. Pfizer, Inc.*, 439 F.3d 1358, 1363 (Fed. Cir. 2006). The *Prati* Court held a representation that a pending case should be dispositive would not deprive the party of the right to argue that the decision failed to settle all the issues in their current case so estoppel would not apply. *Prati v. United States*, 603 F.3d 1301, 1304-05 (Fed. Cir. 2010).

The *Da Silva* Court did not discuss judicial estoppel and it does not appear that the issue was raised by either party in that case. *Da Silva v. Kinsho Int'l Corp.*, 229

F.3d 358 (2d Cir. 2000). Moreover, the Second Circuit has never held that judicial estoppel can never apply to matters affecting subject matter jurisdiction. *Intellivision v. Microsoft Corp.*, 484 Fed. Appx. 616, 621 (2d Cir. 2012) In the *E-Pass Techs* case, the Court only expressed doubt that judicial estoppel would apply to inconsistent statements regarding jurisdiction, but found, assuming judicial estoppel did apply, it was not applicable in the case because there was no reliance by the Court on the plaintiff's statement that would give the perception that either the first or second Court was misled. *E-Pass Techs. v. Moses & Singer, LLP*, C-09-5967 EMC, 2011 WL 5357912, at *7-8 (N.D. Cal. Nov. 4, 2011). Since the dismissal of Petitioner's claims were not based upon a lack of subject matter jurisdiction, the issue of a split in the Circuit Courts as to whether judicial estoppel can be used to destroy jurisdiction is not properly before this Court.

D. The Court Properly Found Judicial Estoppel Applied

“[W]here 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, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.’ *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 39 L.Ed. 578 (1895). This rule, known as judicial estoppel, ‘generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.’ *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164

(2000); see 18 Moore's Federal Practice § 134.30, p. 134–62 (3d ed. 2000) (“The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding”); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (hereinafter Wright) (“absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory”). *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001).

The elements of judicial estoppel have been summarized as (1) a party’s position must clearly be inconsistent with its earlier position, (2) the earlier position was accepted by the court, and (3) whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Mirando v. U.S. Dept. of Treasury*, 766 F.3d 540, 545 (6th Cir.2014).

In this case, Petitioner clearly took an inconsistent position by first arguing that her company was an indispensable party in the first lawsuit to obtain a dismissal for lack of subject matter jurisdiction to avoid the summary judgment that was granted to Respondent, and now arguing in this case that the company is not an indispensable party. *Peninsula Asset Mgmt. v. Hankook Tire*, 2008 WL 302370, *3 (N.D. Ohio); App. 020a-021a. The earlier position was accepted by the Court when it dismissed the case for a lack of subject matter jurisdiction as the presence of foreign

corporations on each side of the litigation destroyed diversity jurisdiction. App. 021a, 026a-027a. Petitioner would receive an unfair advantage and it would impose an unfair detriment on Respondent by allowing Petitioner to avoid Respondent's summary judgment in the first lawsuit and allow Petitioner to take the exact opposite position in order to maintain this lawsuit. The District Court properly dismissed Petitioner's claims by applying judicial estoppel.

E. Dismissal with Prejudice was Proper

Petitioner cites to *Klien v. Stahl GMBH Co. Maschinefabrik*, 185 F.3d 98 (3rd Cir. 1999) for support that the claims should have been dismissed without prejudice, however, the Sixth Circuit found that dismissal with prejudice was the only adequate sanction because Petitioner previously disavowed the capacity to bring the claims she set out in her Petition to avoid a summary judgment loss. App. 005a-006a. The District Court, recognizing that judicial estoppel must be exercised with restraint, found that "no lesser sanction would address Han's clear abuse of the judicial system or avoid permitting Han to benefit from the advancement of clearly inconsistent positions." App. 017a citing to *Joy Tech. Inc. v. N. Am. Rebuild Co., Inc.*, No. 12-0144, 2012 WL 1802023, *8 (W.D. Pa. May 15, 2012 (not reported) (the harm done by Plaintiff's playing fast and loose with the courts and the harm of an inconsistent, duplicative second lawsuit filed in bad faith can only be avoided by dismissal, with prejudice, of that second action.) The District Court also held that dismissal with prejudice was proper otherwise Han would unfairly be allowed to

refile the claims in state court. *Id.* Petitioner's claims were properly dismissed with prejudice. Petitioner also cites to *Pegram v. Hedrich*, 530 U.S. 211 (2000) and asserts that a sanction of refusing remand after removal would be an adequate sanction; however, this is not a removal case and there was no request for remand. Therefore, the case cited by Petitioner is inapposite to the matters before this Court.

CONCLUSION


For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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