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"[f]rom outside sources."[34] K.B.'s testimony regarding the basis for her opinion about her mother's truthfulness was not from an outside source, and the State was not prohibited by rule 608(2) from conducting this inquiry on redirect examination.[35] The district court did not abuse its discretion in receiving this testimony over Baker's objection.

V. CONCLUSION

For the reasons discussed, we find no merit in any of Baker's assignments of error and therefore affirm the judgment of the district court.

AFFIRMED.

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[34] Black's Law Dictionary 666 (9th ed. 2009).

[35] See, generally, Mangrum, *supra* note 30, 434-35.

TFF, INC., A NEBRASKA CORPORATION, APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 59 OF SARPY COUNTY AND BROOK VALLEY LIMITED PARTNERSHIP, APPELLEES.

790 N.W.2d 427

Filed November 5, 2010. No. S-09-843.

1. **Equity: Estoppel.** Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.
2. **Judgments: Estoppel: Appeal and Error.** An appellate court reviews a court's application of judicial estoppel to the facts of a case for abuse of discretion and reviews its underlying factual findings for clear error.
3. **Estoppel.** When a party has unequivocally asserted a position in a proceeding and a court accepts that position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.
4. ____. Judicial estoppel applies to bar an inconsistent claim against a different party because the doctrine protects the integrity of the judicial process, not the parties' interests.
5. ____. Within a single action, a court should apply judicial estoppel with caution to avoid imputing bad faith to a party that has made a strategic decision to plead alternative claims, particularly against separate parties.
6. **Actions: Pleadings.** Although parties can plead inconsistent claims, once they have obtained a judgment on one claim by asserting a legal or factual position,

they cannot obtain another judgment for the same injury based on a theory inconsistent with the previous position.

7. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
8. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.
9. **Attorney Fees: Appeal and Error.** An appellate court may award attorney fees on appeal regardless of whether a party asked for attorney fees from the trial court.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Kristopher J. Covi and Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Scott D. Jochim, Robert J. Huck, and Elizabeth A. Elwell, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Sanitary and Improvement District No. 59 of Sarpy County.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, TFF, Inc., sued Brook Valley Limited Partnership (Brook Valley) for breach of contract because it failed to pay special assessments on the real estate it purchased. In the same lawsuit, TFF sued the Sanitary and Improvement District No. 59 of Sarpy County (SID) to void the assessments or, in the alternative, for damages that equaled the amount of the assessments. The district court granted TFF a default judgment against Brook Valley for $51,177.67, the amount of special assessments. After obtaining the default judgment, TFF pursued SID. Applying judicial estoppel, the district court granted SID's motion for summary judgment. We affirm.

BACKGROUND

In 1992, Brook Valley purchased 130 acres of property that it planned to sell as individual commercial lots. At the time

of Brook Valley's purchase, the SID had not made public improvements. The SID completed the first phase of roads and sewers about 1994 and the second phase by 1998. The SID did not levy special assessments after completing the first phase because the SID and Brook Valley disagreed over the formula to be used in calculating the assessments.

In 1996, TFF purchased a commercial lot from Brook Valley. In the purchase agreement, Brook Valley agreed to "pay any assessments for public improvements previously constructed, or ordered or required to be constructed by the public authority, but not yet assessed." Brook Valley's managing partner also submitted an affidavit with the purchase agreement. The affidavit declared that "[t]here are no public improvement[s] in the vicinity of the premises under construction, completed but not assessed, or contemplated, which could be a basis for any special assessment being levied after closing against the premises. All current assessments have been paid."

In February 2000, the SID's board voted to levy assessments, without giving notice to property owners that it would consider the assessments at the meeting. TFF alleged that it did not learn of the assessments until 2004, when it received a delinquency notice.

In April 2006, TFF sued Brook Valley and the SID. In its complaint, TFF alleged that Brook Valley breached its contract by failing to pay the special assessments levied against TFF's lot by the SID. In the same complaint, TFF also asserted claims against the SID, seeking to void the assessments or, in the alternative, $51,177.67 in damages for the assessments.

On July 13, 2006, TFF moved for default judgment against Brook Valley, which was, by this time, bankrupt. The district court granted default judgment against Brook Valley on August 22, awarding TFF $51,177.67 plus interest and costs.

In March 2009, the SID moved for summary judgment on the remainder of TFF's claims. After a hearing on the SID's motion, at which time evidence was offered and received, TFF filed its own cross-motion for summary judgment. Later, the district court granted summary judgment for SID on judicial estoppel grounds.

ASSIGNMENTS OF ERROR

TFF assigns that the district court erred in (1) determining that the doctrine of judicial estoppel bars TFF's claims against the SID, (2) sustaining the SID's motion for summary judgment, and (3) overruling TFF's motion for summary judgment.

The SID is now seeking litigation costs under Neb. Rev. Stat. § 25-824 (Reissue 2008).

STANDARD OF REVIEW

[1,2] Judicial estoppel is an equitable doctrine that a court invokes at its discretion to protect the integrity of the judicial process.[1] So we review a court's application of judicial estoppel to the facts of a case for abuse of discretion and review its underlying factual findings for clear error.[2]

ANALYSIS

The SID argues that judicial estoppel bars TFF's claims against the SID. The district court determined that judicial estoppel barred both TFF's claim that the levied assessments against TFF's property were invalid and its negligence claim against the SID. TFF argues that judicial estoppel should not bar its declaratory action for two reasons: Judicial estoppel does not apply to positions taken in the same proceedings; and the district court had the power to vacate its earlier default judgment against Brook Valley. Additionally, TFF argues that success of its negligence claim does not rely on the validity of the assessments.

Judicial Estoppel

[3,4] We have held that when a party has unequivocally asserted a position in a proceeding and a court accepts that

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[1] See *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

[2] See, e.g., *Perry v. Blum*, 629 F.3d 1 (1st Cir. 2010); *Reed v. City of Arlington*, 620 F.3d 477 (5th Cir. 2010); *Capella University v. Executive Risk Specialty Ins. Co.*, 617 F.3d 1040 (8th Cir. 2010); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010); *Wagner v. Professional Eng'rs in Cal. Gov't*, 354 F.3d 1036 (9th Cir. 2004).

position, judicial estoppel can bar that party's inconsistent claim against the same or a different party in a later proceeding.[3] Judicial estoppel applies to bar an inconsistent claim against a different party because the doctrine protects the integrity of the judicial process, not the parties' interests.[4] In adopting the doctrine of judicial estoppel, we have set forth principles for its application:

> The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. . . . The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. . . . It has been said that unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. . . . However, the doctrine is to be applied with caution so as to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement. . . . Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists.[5]

TFF argues that judicial estoppel should not apply to inconsistent positions in the same proceeding. It argues that the court granted a default judgment against Brook Valley for breach of contract as part of the same proceeding. And it argues that this court has previously only applied judicial estoppel to preclude a party's inconsistent positions in different proceedings.

Contrary to TFF's argument, we agree with the court that TFF's claims against Brook Valley and the SID were

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[3] See, *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009); *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998).

[4] See, e.g., *Lang v. Hougan*, 136 Wash. App. 708, 150 P.3d 622 (2007).

[5] *Melcher v. Bank of Madison*, 248 Neb. 793, 798, 539 N.W.2d 837, 842 (1995) (citations omitted). Accord, *Jardine, supra* note 3; *Vowers & Sons, Inc., supra* note 3.

inconsistent. TFF premised its breach of contract claim against Brook Valley on its theory that the SID's assessments were valid. In contrast, in its declaratory judgment claim against the SID, it alleged that the assessments were invalid for lack of notice. Similarly, in its negligence claim against the SID, TFF alleged that it could not contest the assessments because the SID failed to give notice. So, TFF's negligence claim also depended upon its ability to show that the assessments were invalid.

It is true that we have never applied the doctrine of judicial estoppel when a party asserted inconsistent positions in the same proceeding. But neither have we held that its application is inappropriate in that circumstance.[6] And other courts, including the U.S. Supreme Court,[7] have held that a court can apply judicial estoppel to preclude a party from asserting a position inconsistent with the party's previous position in the same or a subsequent proceeding.[8]

[5] We recognize that rule 8(e) of the Nebraska Court Rules of Pleading in Civil Cases[9] permits a party to plead "as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds." Legal commentators have noted that there is a tension between modern pleading rules and the doctrine of judicial estoppel.[10] And we agree that within a single action, a court should apply judicial estoppel with caution to avoid imputing bad faith to a party that has made a strategic

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[6] See *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[7] See, *New Hampshire, supra* note 1; *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000).

[8] See, e.g., *Farmers High Line Canal v. City of Golden*, 975 P.2d 189 (Colo. 1999); *Bank of Wichitas v. Ledford*, 151 P.3d 103 (Okla. 2006); *Philadelphia Suburban Water v. PUC*, 808 A.2d 1044 (Pa. Commw. 2002); *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004); *Riggs v. University Hospitals*, 221 W. Va. 646, 656 S.E.2d 91 (2007).

[9] See Neb. Ct. R. Pldg. § 6-1108(e)(2).

[10] See, e.g., *Bates v. Long Island R. Co.*, 997 F.2d 1028 (2d Cir. 1993); 18B Charles Alan Wright et al., Federal Practice and Procedure § 4477 (2d ed. 2002).

decision to plead alternative claims, particularly against separate parties. Usually, courts apply judicial estoppel within a single action only when a party has misled a court through cynical gamesmanship.[11]

[6] Nonetheless, although parties can plead inconsistent claims, once they have obtained a judgment on one claim by asserting a legal or factual position, they cannot obtain another judgment for the same injury based on a theory inconsistent with the previous position.[12] Because TFF had already obtained a judgment against Brook Valley on its theory that the assessments were valid, it could not obtain an inconsistent judgment against the SID on theories that required it to show that the assessments were invalid.

Bad Faith and Frivolous Claim

The SID argues that it is entitled to litigation costs. It argues that TFF has continued to pursue its claims against the SID even after the district court's "clear admonishment that [TFF's] present inconsistent position against [the SID] both 'defies reason' and 'makes a mockery of the judicial process.'"[13]

[7-9] Section 25-824(2) provides that

> in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.

A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the

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[11] See, *New Hampshire, supra* note 1; *Longaberger Co. v. Kolt*, 586 F.3d 459 (6th Cir. 2009).

[12] See, e.g., *U.S. v. Newell*, 239 F.3d 917 (7th Cir. 2001); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982).

[13] Brief for appellee at 47 (quoting opinion and order of Sarpy County District Court).

litigant's position.[14] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[15] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[16] An appellate court may award attorney fees on appeal regardless of whether a party asked for attorney fees from the trial court.[17]

Because this court has never applied judicial estoppel in the same proceeding, TFF made a valid, although unpersuasive, argument. We reject SID's bad faith argument.

CONCLUSION

The district court did not err in granting the SID's motion for summary judgment. TFF is judicially estopped from pursuing its claims against the SID because such claims are inconsistent with the district court's award of default judgment against Brook Valley for the assessments levied by the SID. But TFF's claim was not frivolous or brought in bad faith.

AFFIRMED.

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[14] See, *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003); *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[15] See, *Cornett, supra* note 14; *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002).

[16] *Cornett, supra* note 14; *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000).

[17] See, *Cox, supra* note 16; *Schuelke, supra* note 14.

STATE OF NEBRASKA, APPELLEE, V.
JEFF BOPPRE, APPELLANT.
790 N.W.2d 417

Filed November 5, 2010. No. S-09-906.

1. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the