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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Sherree Birtciel, et al.,**  
**Plaintiffs,**  
**vs.**  
**XL Specialty Insurance, a property**  
**and casualty insurer, a foreign**  
**company, et al.,**  
**Defendants.**

**2:13-cv-02511 JWS**  
**ORDER AND OPINION**  
**[Re: Motion at Docket 44]**

**I. MOTION PRESENTED**

At docket 44, Defendant XL Specialty Insurance (“Defendant” or “XL Specialty”) filed a motion to disqualify and strike the testimony of Plaintiffs’ expert Dr. Joshua McConkey. Defendant argues that its motion should be granted because Dr. McConkey’s proposed testimony contradicts the position Plaintiffs took when securing a default judgment in the underlying wrongful death action against XL Specialty’s insured, JetArizona, Inc. (“JetArizona”). Plaintiffs oppose the motion at docket 46. Defendant replies at docket 48. Oral argument was requested but would not be of additional assistance to the court.

1 **II. BACKGROUND**

2 The declaratory judgment action here stems from the death of Plaintiffs'  
3 decedent, Steven Birtciel. In April of 2005, Mr. Birtciel was admitted to Navapache  
4 Regional Medical Center in Show Low, Arizona, for pneumonia and hypomangesemia.  
5 When his condition worsened, he was transported to Phoenix for treatment via a  
6 JetArizona air ambulance. Upon arrival in Phoenix, Mr. Birtciel was moved from the air  
7 ambulance to a ground ambulance operated by Southwest Ambulance and then  
8 transferred to the nearest Phoenix hospital. At some point during the transfer,  
9 Mr. Birtciel's breathing tube became dislodged and his airway lost. He went into cardiac  
10 arrest. Upon arrival at the hospital, the paramedics were performing CPR. Mr. Birtciel  
11 never regained consciousness and died three days later.

12 Shortly thereafter, Plaintiffs filed a wrongful death suit in state court against the  
13 ground ambulance company, Southwest Ambulance, and JetArizona, among others  
14 ("Underlying Action"). JetArizona had an aviation insurance policy and commercial  
15 liability policy through XL Specialty, but it had ceased doing business a few months  
16 after Mr. Birtciel's death. Thus, when Plaintiffs initiated the Underlying Action against  
17 JetArizona no party tendered the case for coverage under the XL Specialty policies.  
18 Plaintiffs reached a settlement with the Southwest Ambulance in 2011. XL Specialties  
19 first learned of the case in October 2012 when it received notice from Plaintiffs that they  
20 were seeking default judgment against JetArizona and that default judgment had been  
21 entered against one of JetArizona's employees.

22 XL Specialty retained counsel to review the claim and make a coverage  
23 determination. Plaintiffs and the other defendants in the wrongful death action provided  
24 XL Specialty with the "relevant pleadings, testimony, and expert opinions regarding  
25 [Mr. Birtciel's] death that the parties had developed over the five-year litigation."<sup>1</sup>  
26 Specifically, from Plaintiffs XL Specialty received copies of their answers to

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<sup>1</sup>Doc. 44 at p. 5.

1 interrogatories, their responses to requests for admissions, their Rule 26.1 disclosures,  
2 and one of the named defendant's answers to interrogatories and disclosures.<sup>2</sup>  
3 Plaintiffs' sixth supplemental disclosure statement identified Dr. Haskell as an expert  
4 who would provide an expert opinion about the standard of care provided to Mr. Birtciel  
5 during the ground transport. Plaintiffs' eleventh, thirteenth, and seventeenth  
6 supplemental disclosure statement identified Dr. Repsher as someone who would  
7 provide an expert opinion about the cause of Mr. Birtciel's death and the standard of  
8 care provided to Mr. Birtciel.<sup>3</sup> "[A]fter carefully reviewing the evidence in the Underlying  
9 Action and after relying on plaintiffs' position and disclosures . . . [XL Specialty] denied  
10 coverage and did not seek to oppose or set aside any default judgments in the  
11 Underlying Action."<sup>4</sup> According to XL Specialty, they made such a determination  
12 because the Underlying Action did not allege claims arising out of the ownership,  
13 maintenance, or use of the aircraft as is required for coverage under the aviation  
14 insurance policy nor did it allege claims arising from any occurrence on JetArizona's  
15 premises as is required for coverage under the commercial liability policy.<sup>5</sup> Plaintiffs  
16 subsequently obtained a default judgment against JetArizona for just over \$4 million.

17 Plaintiffs now bring the current action against XL Specialty seeking a declaration  
18 of coverage under Jet Arizona's insurance policies with XL Specialty. As part of this  
19 action, Plaintiffs have disclosed Dr. Joshua McConkey as an expert witness. He was  
20 not a witness in the Underlying Action. Dr. McConkey opines, based on his review of  
21 the medical records, transportation records, and depositions in this case, that  
22 Mr. Birtciel's breathing tube was dislodged while on the JetArizona aircraft or just as he  
23 was being offloaded from the aircraft to the ambulance. Defendant asks the court to

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25 <sup>2</sup>Doc. 46-12.

26 <sup>3</sup>Doc. 44-1 at pp. 2-13.

27 <sup>4</sup>Doc. 44 at p. 6.

28 <sup>5</sup>Doc. 44 at p. 6.

1 disqualify or strike this opinion, arguing that it is contrary to the position taken by  
2 Plaintiffs and their experts in the Underlying Action, which was that the tube became  
3 dislodged outside the airplane.

### 4 III. DISCUSSION

5 Defendant asks this court to strike the testimony of Dr. McConkey based on  
6 equitable, judicial, or quasi estoppel. Under all three of these estoppel doctrines, an  
7 inconsistent act or position on the part of Plaintiffs is required. For equitable estoppel to  
8 apply, the party to be estopped must have committed acts inconsistent with a position  
9 or claim it later adopts and the opposing party must then rely on those acts and suffer  
10 an injury as a result of the repudiation of such acts.<sup>6</sup> Quasi-estoppel is essentially the  
11 same but it does not require a showing of reliance and instead is applied by the court to  
12 prevent an unjust or unconscionable result.<sup>7</sup> Judicial estoppel is only applicable if a  
13 party asserts a position that is clearly inconsistent with its original position and has  
14 persuaded the court of the earlier position, thereby gaining an unfair advantage or  
15 imposing an unfair detriment on the opposing party.<sup>8</sup> Thus, striking Dr. McConkey's  
16 testimony is warranted only if it constitutes a position taken by Plaintiffs that is  
17 inconsistent with their positions or actions taken in the Underlying Action.

18 Defendant argues that "Plaintiffs undisputedly took the position in the Underlying  
19 Action that no actions in the JetArizona aircraft led to [Birtciel's] death."<sup>9</sup> Defendant  
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21 <sup>6</sup>*Valencia Energy Co. v. Arizona Dep't of Revenue*, 959 P.2d 1256, 1267-68 (Ariz. 1998).

22 <sup>7</sup>*Donaldson v. LeNore*, 112 Ariz. 199, 202, 540 P.2d 671, 674 (Ariz. 1975);

23 <sup>8</sup>*United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). The parties cite state  
24 law, but federal law governs the application of judicial estoppel in federal courts. *Rissetto v.*  
25 *Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996). Regardless, Arizona  
26 law is essentially the same in that judicial estoppel prevents a party from asserting or offering  
27 proof to support one position and then later in another action between the parties take a  
contrary position on the same issue. *State Farm Auto Ins. Co. v. Civil Serv. Emps. Ins. Co.*,  
509 P.2d 725, 730 (Ariz Ct. App. 1973).

28 <sup>9</sup>Doc. 48 at p. 3.

1 argues that by putting forth Dr. McConkey to establish that the tube became dislodged  
2 around the time the paramedics were moving Birtciel from the air ambulance to the  
3 ground ambulance necessarily means that they are taking a different factual position in  
4 this litigation than in the previous litigation. Defendants point to the proposed testimony  
5 of Drs. Haskell and Repsher, two experts Plaintiffs planned to use in the Underlying  
6 Action, as proof of this prior position.

7 One of Plaintiffs' supplemental disclosure statements in the Underlying Action  
8 indicates that Dr. Haskell planned to testify that the failure of the ground ambulance  
9 crew to apply a four-point harness on Mr. Birtciel's harness was below the applicable  
10 standard of care and that had a harness been used, the tube would not have become  
11 dislodged.<sup>10</sup> This expert testimony, however, does not set Plaintiffs' factual position in  
12 the Underlying Action. In the Underlying Action, Plaintiffs' theory was that Mr. Birtciel  
13 died due to a prolonged lack of oxygen after his breathing tube was dislodged and that  
14 the defendants had been negligent in a variety of different ways that led to the  
15 prolonged lack of oxygen. There was contradicting deposition testimony in the case.  
16 One paramedic, Gordon Mustin, testified that during the ground transport the  
17 ambulance made a sudden movement which caused Mr. Birtciel to slide off the gurney,  
18 dislodging his breathing tube.<sup>11</sup> Mr. Mustin's testimony was not supported by the other  
19 witnesses present in the ambulance, none of whom recall Mr. Birtciel sliding off the  
20 gurney or exactly when the tube became dislodged.<sup>12</sup> The fact section of Plaintiffs'  
21 initial Rule 26.1 disclosure statement indicates it may have been dislodged before  
22 Mr. Birtciel was loaded into the ground ambulance.<sup>13</sup> Presumably, Plaintiffs asserted  
23 negligence on the part of all the defendants regardless of the exact sequence of events.

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25 <sup>10</sup>Doc. 44-1 at p. 2.

26 <sup>11</sup>Doc. 44-1 at p. 9; Doc. 46-8 at p. 4.

27 <sup>12</sup>Doc. 46-5 at p. 2; Doc. 46-6 at p. 4; Doc. 46-7 at p. 4; Doc. 46-9 at p.4.

28 <sup>13</sup>Doc. 46-4 at p. 2.

1 Thus, Dr. Haskell's testimony is just one piece of evidence Plaintiffs planned to use to  
2 demonstrate negligence on the part of the ambulance employees in the event  
3 Mr. Mustin's version of the facts were to be given credence.

4 Plaintiffs' later supplemental disclosure statements involving Dr. Repsher make  
5 clear that Plaintiffs left open the possibility that the tube became dislodged at the time  
6 Mr. Birtciel was being unloaded from the air ambulance. The statements indicate that  
7 Dr. Repsher planned to testify that the prolonged lack of oxygen to Mr. Birtciel's brain  
8 after his breathing tube had been dislodged caused Mr. Birtciel's death. One of the  
9 statements specifically points out the contradicting evidence as to when the tube  
10 became dislodged and states that Dr. Repsher would nonetheless conclude that the  
11 ground ambulance employees contributed to that prolonged oxygen deprivation  
12 whether the dislodgement occurred as part of the unloading process or during the  
13 subsequent drive.<sup>14</sup> Another statement indicates that Dr. Repsher would testify that  
14 improper ventilation occurred after the flight, not during the flight,<sup>15</sup> but such testimony  
15 only rules oxygen deprivation during the flight; it does not rule out the possibility that the  
16 tube became dislodged after the plane landed and around the time Mr. Birtciel was  
17 being offloaded from the air ambulance and then the prolonged reduced ventilation  
18 occurred after that. Therefore, Dr. Repsher's opinion in the Underlying Action does not  
19 directly contradict Dr. McConkey's proposed opinion.

20 Moreover, there was other information in Plaintiffs' disclosures to notify  
21 Defendant of the possibility that dislodgement of the tube could have occurred after the  
22 flight itself but while Mr. Birtciel was still in, partially in, or just immediately outside the  
23 air ambulance. Plaintiffs' first Rule 26.1 disclosure statement notes that one of the  
24 emergency room doctors stated that the transport crew advised her that after they had  
25 unloaded Mr. Birtciel from the airplane and as the ground ambulance started to leave

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27 <sup>14</sup>Doc. 44-1 at pp. 9-10.

28 <sup>15</sup>Doc. 44-1 at pp. 12-13.

1 the airport, Mr. Birtciel suffered cardiac arrest and that is when they noticed the tube  
2 had become dislodged, suggesting that the breathing tube became dislodged around  
3 the time of transfer while still at the airport.<sup>16</sup>

4 It is not clear to the court what other information Defendant had in its possession  
5 when it made its initial coverage review. Defendant states that it had information from  
6 not only the Plaintiffs but also the other defendants, and it states that it had all relevant  
7 deposition testimony. The deposition testimony provided to the court by Plaintiffs  
8 demonstrate that both Dr. Haskell and Dr. Repsher clarified during their depositions that  
9 the witness accounts of what happened varied and that they could not say for sure  
10 when the dislodgement occurred.<sup>17</sup> Their testimony was being used to establish  
11 negligence, not coverage. Such testimony further strengthens the court's conclusion  
12 that Plaintiffs' use of Dr. Haskell and Dr. Repsher as expert witnesses in the Underlying  
13 Action fails to demonstrate that they committed to a position as to where exactly the  
14 breathing tube became dislodged. Defendant points to no other communication, court  
15 filing, evidentiary basis, or action on the part of Plaintiffs to show otherwise.

16 The fact that Southwest Ambulance settled with Plaintiffs does not demonstrate  
17 that Plaintiffs took a position as to when and where dislodgement occurred. Based on  
18 the materials provided, Plaintiffs' position as to Southwest Ambulance in the Underlying  
19 Action was that the Southwest Ambulance employees involved in Mr. Birtciel's transport  
20 were negligent—whether from contributing to dislodgement during unloading, causing  
21 dislodgement by failure to secure Mr. Birtciel on the gurney, delaying arrival at the  
22 hospital, or failing to reestablish his airway—and their negligence at least partially  
23 caused Mr. Birtciel's death. By settling with Southwest Ambulance, Plaintiffs did not  
24 necessarily lock themselves into a position. Indeed, as noted by Plaintiffs, coverage  
25 under the policies was not an issue in the Underlying Action. The legal theory in that

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27 <sup>16</sup>Doc. 46-4 at p. 2.

28 <sup>17</sup>Doc. 46-10 at pp. 3-4; Doc. 46-11 at pp. 2, 7.

1 action was focused on negligence resulting in prolonged oxygen deprivation, and  
2 Plaintiffs' disclosure statements focused on all facts that could support such a finding.

3 Plaintiffs' factual position in the Underlying Action was not clearly inconsistent  
4 with the factual position proposed here and, thus, the application of the various  
5 estoppel doctrines to bar Dr. McConkey's testimony is unwarranted.

6 **IV. CONCLUSION**

7 Based on the preceding discussion, Defendant's motion at docket 44 is DENIED.

8 DATED this 9<sup>th</sup> day of January 2015.

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11 /s/ JOHN W. SEDWICK  
12 SENIOR UNITED STATES DISTRICT JUDGE  
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