No. 92780-4

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

Benjamin C. Arp,

Respondent,

v.

JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO., INC., a Washington State Corporation,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court of Appeals correctly applied existing precedent in reversing the trial court's summary judgment ruling dismissing Ben Arp's claim against Sierra Construction Co., Inc. and the Rileys (collectively, "Sierra"), holding (1) genuine issues of material fact precluded summary judgment on judicial estoppel; (2) the confirmation order expressly vested this claim (an 11 U.S.C. 1306(a) post-confirmation asset) in Arp, so he had standing to pursue it; and (3) the trial court failed to exercise its discretion on whether equity permits dismissing this claim, where (a) Arp had paid over $150,000 to his creditors when John Riley, traveling at 60 m.p.h. and talking on his cellphone, struck Arp's car stopped in traffic, causing Arp to suffer severe brain trauma and to forget to make his final payments; (b) Arp fully disclosed his cause of action (the facts giving rise to his claim) to the Chapter 13 Trustee; and (c) the Trustee permitted him to pay off the last $2,875 due to his creditors under a wage-earner plan. There are no conflicts, and no important issues this Court need decide. The Court should deny review.

If, but only if, the Court grants review, then it should accept Arp's contingent cross petition. The Court of Appeals improperly read the bankruptcy court's confirmation order as self-contradictory.

STATEMENT OF THE CASE

A. Prior to the collision that gave rise to these proceedings, Benjamin Arp and his wife divorced, and he filed for Chapter 13 bankruptcy to forestall the wife's Chapter 7.

Benjamin Arp and his wife separated in January 2008. CP 273. The divorce proceedings took a financial toll, as did a lawsuit involving an easement on Arp's property. CP 360. When Arp learned that his wife planned to file a Chapter 7 bankruptcy (without consulting Arp), he filed a petition for Chapter 13 bankruptcy protection to avoid a Chapter 7. CP 67, 273, 373.

The bankruptcy court confirmed Arp's wage-earner plan on December 17, 2009. CP 102, 373. The confirmation order required Arp to inform the Trustee of any change in circumstances and any additional income. CP 114,[1] 373. But "during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. 1306(a), shall remain vested in the debtor." App. A.

B. Almost a year after Arp's Chapter 13 plan was confirmed, James Riley (while in the course and scope of his employment with Sierra) rear-ended Arp's car at about 60 miles-per-hour while Arp was at a complete stop.

On October 5, 2010 – almost a year after his bankruptcy plan was confirmed – Arp sustained a traumatic brain injury and other

[1] A copy of this confirmation order is attached as Appendix A.

serious physical injuries when he was rear-ended by a large SUV traveling at about 60 m.p.h. or more. CP 353, 354-55. Arp was driving his older model Honda Accord along Interstate 405 in the Kennydale Hill area, which is known for congested and dangerous traffic conditions. CP 353-54. On the day of the collision, Arp came to a complete stop along with the traffic ahead of him. *Id.*

James Riley, a construction project manager for Sierra Construction Company, was traveling Southbound on I-405 from his employer's home office in Woodinville to an 11:00 business meeting in Tacoma. CP 352. It is undisputed that Riley was in the course and scope of his employment. CP 351 n.1. Riley was running late. CP 352. He drove his Yukon Denali SUV at 60 m.p.h. or more, focused on getting to his meeting on time. CP 352, 354-55.

Riley made two Bluetooth phone calls while driving, one starting at 10:10 and the next at 10:21. CP 353. The second call ended no earlier than 10:31. *Id.* The collision occurred at approximately 10:30 a.m. CP 352.

Arp saw Riley's SUV approaching from behind, traveling at high speed. CP 353. Arp was boxed in by other cars on all sides, unable to escape. *Id.* Without ever braking, Riley slammed into Arp traveling 60 m.p.h. or more. CP 353, 354-55. The impact was so

great that Riley's SUV pushed Arp's car into the car in front of him, severely damaging both cars. CP 354.

C. Arp sustained serious physical injuries, including a traumatic brain injury that affected his memory and dramatically changed his life.

As the appellate court put it, from the collision "Arp sustained physical injuries as well as mental and emotional problems, including difficulty with memory. He cannot engage in the physical activities he previously enjoyed." Opinion at 2; *See also* BA 5-9.

D. Due to the extensive injuries and memory loss he sustained, and after paying over $150,000 on his Chapter 13 wage-earner plan, Arp forgot to make some payments, and the Trustee moved to dismiss his bankruptcy; but Arp successfully obtained permission to pay off the remaining $2,875, and obtained a discharge.

As a result of the memory loss the collision caused, Arp forgot to make some of his bankruptcy payments. CP 116, 118. In November 2011, the bankruptcy Trustee moved to dismiss Arp's bankruptcy based on his failure to make payments. CP 109, 373. In January 2012, Arp responded to the motion to dismiss, explaining that he forgot to make some bankruptcy payments because he suffered from short-term memory loss caused by a traumatic brain injury resulting from the October collision. CP 116-18. Arp disclosed

the date of the collision, stated that he was not at fault, and briefly explained his brain injuries. *Id.*[2]

By this time, Arp already had paid over $154,336.42 to his creditors under his Chapter 13 plan, owing only $2,875. App. B, CP 116-17, 121. Arp informed the Trustee that he had made arrangements to borrow money from his sister so that he could pay the balance owing in one payment. App. B., CP 116-17, 118. He asked for permission to do so, explaining that his brain injury caused his recent lack of payment. App. B, CP 118.

The Trustee struck his motion to dismiss just over a week after receiving Arp's response. CP 109-10. In March 2012, the bankruptcy court granted Arp a discharge. CP 111. In April, Arp's Chapter 13 bankruptcy was paid off and closed. CP 111-12.

E. Procedural History: the trial court granted summary judgment to the defendants, but the appellate court reversed based on several legal errors.

Arp filed suit against Riley in November 2012, later amending his complaint to add Riley's employer, Sierra Construction. CP 1-4, 9-12, 374. Sixteen months later (April 23, 2014) Sierra amended its

[2] A copy of Arp's response to the motion to dismiss is in Appendix B.

affirmative defenses to include judicial estoppel and lack of standing. CP 22, 24-26, 374. Riley did the same in June. CP 246-49, 327, 374.

1. Summary judgment on judicial estoppel.

In May 2014, Arp moved for summary judgment to dismiss defendants Sierra's and Riley's affirmative defenses on judicial estoppel and standing. CP 28-35. Defendants cross-moved for summary judgment that Arp's claims were judicially estopped, and/or that Arp lacked standing to sue. CP 126-42, 251-59.

The trial court granted the defendants' motions, ruling as a matter of law that Arp's personal injury claim, which had not then been filed, was an asset of the bankruptcy estate as defined by 11 U.S.C. 1306(a)(1). CP 374. The court ruled that Arp had a duty to disclose this post-petition asset in his bankruptcy action and that Arp's response to the Trustee's motion to dismiss disclosing the collision and his injuries was not sufficient notice. CP 374-75. Thus, the court dismissed Arp's personal injury claims with prejudice, ruling that he was judicially estopped and lacked standing. CP 375.

Arp moved for reconsideration. CP 377-88. The court denied Arp's motion. CP 437-38. Arp timely appealed. CP 439-49.

2. Reversal based on four legal errors.

The Court of Appeals reversed for four reasons. First, the trial court erred to the extent that it ruled that Arp had a duty to amend his bankruptcy schedules post-confirmation, where the bankruptcy code required no such thing. Opinion at 6-13. Second, as a result, "the trial court also erred when it decided that [Arp] lacked standing to assert" his personal injury claim. Opinion at 13.

Third, the trial court erred in granting summary judgment, where no undisputed evidence showed (a) that the bankruptcy court accepted any inconsistent position that Arp is alleged to have taken,[3] or (b) that "Arp benefitted from making any in consistent claim." *Id.* at 13-15. Genuine issues of fact precluded summary judgment.

Finally, the trial court failed to exercise its independent "discretion to decide if allowing Arp to pursue his claim would affront the integrity of the judicial process." This is particularly true where, as here, "the record leaves unanswered serious questions about the equity of applying judicial estoppel to bar his claim." Opinion at 16-17. The trial court's failure to exercise independent judgment on the central question of the case required reversal.

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[3] The appellate court's finding that Arp took inconsistent positions is in error, and is the subject of his contingent cross-petition, *infra*.

REASONS WHY THIS COURT SHOULD DENY REVIEW

A. Sierra fails to challenge the legally sufficient bases for the appellate court's reversal, rendering review moot.

As noted immediately above, the appellate court stated four independently sufficient grounds for reversal. Sierra challenges none of them. Thus, even if this Court were to accept review, it would have to affirm based on these unchallenged, independently sufficient grounds. The Court should therefore deny review.

The most important of these unaddressed grounds is the appellate court's "unanswered serious questions about the equity of applying judicial estoppel to bar his claim." Opinion at 15. The record "does not show that the trial court exercised discretion to decide if allowing Arp to pursue his claim would affront the integrity of the judicial process." *Id.* at 16. Sierra never "offered any persuasive reason to believe the bankruptcy court would have change the relief it granted Arp" if – in addition to fully disclosing to the Trustee that he was seriously injured in an accident that was not his fault – he had also said, "that is a cause of action." *Id.* "The trial court erred in resolving the application of judicial estoppel as a matter of law on summary judgment." *Id.* And even if the trial court were to find no disputed facts, it must still exercise its discretion on whether allowing Arp to pursue his claim affronts the integrity of the judicial process.

B. There is no conflict with this Court's precedent.

Although Sierra claims there is a conflict with this Court's precedent, it cites no cases. Petition for Review (PFR) at 15-18. The appellate court cited this Court's relevant precedent, and applied the existing elements of judicial estoppel. Opinion at 4-14 (citing, *inter alia*, ***Arkinson v. Ethan Allen, Inc.***,160 Wn.2d 535, 160 P.3d 13 (2007)). It also noted that – as this Court has repeatedly held – those elements are not exclusive. *Id.* at 5 (citing ***New Hampshire v. Maine***, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)). There is no conflict with this Court's precedent.

Sierra argues the appellate decision increases the "burden" on defendants asserting judicial estoppel to avoid liability for their indisputable negligence. PFR at 16. On the contrary, the appellate court simply notes that no *undisputed* evidence establishes the elements of judicial estoppel. Opinion at 15-16. This issue was improperly decided on summary judgment. *Id.* This Court should deny review to permit a proper evidentiary hearing so that the relevant elements can be properly examined.

C. There is no conflict with other appellate decisions.

Sierra also asserts a conflict with other Court of Appeals decisions. PFR at 18-19 (citing ***Harris v. Fortin***, 183 Wn. App. 522,

530, 333 P.3d 556 (2014); ***Skinner v. Holgate***, 141 Wn. App. 840 850, 173 P.3d 300 (2007)). Sierra asserts that a discharge of any sort constitutes acceptance of a contrary position taken by the debtor. Sierra is incorrect.

As the appellate court notes, "Sierra identifies no evidence showing that the bankruptcy court accepted any inconsistent claim asserted by Arp when it granted him relief," allowing him to pay the last remaining $2,875.00 on his $154,336.42 wage-earners plan. Opinion at 16. Since the "bankruptcy court had already entered a confirmation order vesting in Arp ownership of assets he acquired after entry of the order, including his claim against Sierra" (Opinion at 16) there is no evidence – and no reason to believe – that anything different would have happened if, beyond telling the Trustee that he had been in an accident that was not his fault and injured him, he had also said, "that is a cause of action."[4] Arp never asserted that he had no cause of action. Sierra presented no undisputed evidence that the court accepted an inconsistent position; rather, it merely

[4] Arp explained in his appellate briefing that by the common definition of "cause of action" – the facts giving rise to a claim – Arp disclosed his cause of action to the Trustee. *See, e.g.*, BA at 26-27; Reply at 1, 5, 8 & n.2, 10-12, 16-20. This issue is discussed *infra*, in Arp's contingent cross petition.

accepted the truth: a collision had caused Arp to lose his memory and forget to make the last few payments through no fault of his own.

In ***Skinner***, Skinner held interests in (1) a company and a building; (2) claims against several people; and (3) income and loans; but he disclosed none of this when he filed for bankruptcy. 141 Wn. App. at 845. Unlike in this case (where Arp's claim was acquired post-confirmation, and where the confirmation order expressly vested all post-confirmation assets in Arp) Skinner had to list pre-filing assets on his initial bankruptcy schedules as assets of the bankruptcy estate. *Id.* at 848-49 (citing ***Cunningham v. Reliable Concrete Pumping, Inc.***, 126 Wn. App. 222, 230, 108 P.3d 147 (2005)). Unsurprisingly, the court held that Skinner was judicially estopped from pursuing his undisclosed claims. *Id.* at 849-56.

In ***Harris***, the debtor affirmatively asserted to the bankruptcy court that a $400,000 promissory note had no value and was uncollectable. 183 Wn. App. at 524. Naturally, when the debtor tried to collect on the note nine months after his discharge, the courts held that he was estopped from pursuing the debt. *Id.* at 525, 530. Again, ***Harris*** is inapposite, where the bankruptcy code and confirmation order unequivocally vested Arp's claim in him, so he was not required to schedule a post-confirmation asset. Opinion at 10-13.

But the ***Harris*** analysis is interesting and supports Arp. That court addressed three scenarios involving pre-petition assets: (1) the debtor has the asset and fails to disclose it (*see, e.g.*, ***Skinner***); (2) the debtor has the asset and discloses it, but its value is speculative (*e.g.*, a personal injury claim) and the debtor later claims a higher value than he disclosed (*see, e.g.*, ***Ingram v. Thompson***, 141 Wn. App. 287, 169 P.3d 832 (2007)); and (3) the debtor has the asset and discloses it, but claims it has no value (*see, e.g.*, ***Harris***). 183 Wn. App. at 528-29. In the first and third scenarios, the courts held that the debtor was judicially estopped.

But this case is more like the ***Ingram*** scenario. While even ***Ingram*** is inapposite because the asset was vested in Arp post-confirmation so he had no duty to disclose it under the bankruptcy code, here (as in ***Ingram***) the asset was a personal injury suit of speculative value. 141 Wn. App. at 288. Arp disclosed his cause of action – the facts giving rise to his claim – but did not assert its value one way or the other. If a debtor is not estopped when he makes an affirmative assertion that a claim is worth $X in bankruptcy, but later asserts it is worth $XXX, then a debtor who discloses an asset and says nothing about its value certainly should not be estopped.

In sum, there is no conflict with any appellate decision.

D. There is no important issue that this Court should decide.

As fully explained above, the Court of Appeals simply found that genuine issues of material fact precluded summary judgment and that the trial court had failed to exercise its discretion to consider whether it is equitable to apply judicial estoppel to bar this innocent victim's tort claim. It applied the appropriate precedents, considered the appropriate factors, and remanded for a proper hearing on the disputed issues. Review is unnecessary.

Sierra's first argument for review (under RAP 13.4(b)(4)) is that the Court of Appeals misinterpreted or misstated the bankruptcy code. PFR at 7-15. Sierra is incorrect. It cites numerous inapposite bankruptcy decisions.[5] Under the relevant code provisions and precedents, Arp had no duty to amend his schedules or to otherwise to bring this claim into the estate. Opinion at 6-13; BA 12-17. Specifically,

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[5] *See, e.g.*, ***Kimberlin v. Dollar Gen. Corp.***, 520 Fed. Appx. 312 (6th Cir. 2013) (debtor conceded duty to disclose); ***In re Barbosa***, 235 F.3d 31 (1st Cir. 2000) (property was originally part of the bankruptcy estate); and ***In re Waldron***, 536 F.3d 1239, 1246 (11th Cir. 2008) (court expressly did "not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty . . . and our precedents . . . do not address that issue").

- 11 USC § 541 captures all debtor assets at the time of filing, with a few exceptions, so does not capture Arp's personal-injury claim, which arose years after filing; and
- 11 USC § 1327 provides that confirmation vested all estate property in Arp, unless the confirmation order provided otherwise; and
- 11 USC § 1306(a) captures all post-confirmation property interests, including Arp's potential claims against Sierra; but
- the confirmation order specifically provides that all § 1306(a) property – including Arp's post-confirmation property interest in this potential claim – "shall remain vested in" Arp, so it never became property of the estate. CP 114.

Since the potential claim was not property of the estate, but rather property of the debtor, the trial court erred in applying judicial estoppel on the theory that Arp failed to disclose estate property – Arp fully disclosed his cause of action,[6] but he had no further duties.

Sierra misstates the Court of Appeals' analysis, and then attacks its own misconstruction, simply missing the point. PFR at 7-10. As noted above, the confirmation order specifically says that all § 1306(a) assets – that is, all assets acquired post-confirmation – shall *remain vested* in Arp. App. A (CP 114). His claim thus never became a part of the bankruptcy estate, and the bankruptcy code

[6] A "cause of action" is the "ground on which the plaintiff's case is based." WEBSTER'S THIRD NEW INT'L DICTIONARY 356 (1993). That is, a "group of operative facts giving rise to one or more bases for suing." BLACK'S LAW DICTIONARY 251 (9th Ed. 2009). Arp thus disclosed his cause of action by stating that he was seriously injured in an accident that was not his fault.

thus could not – and did not – require its disclosure. That is, "Arp's plan and the confirmation order vested the Sierra claim in Arp." Opinion at 10. The Court of Appeals did not even err, which is not a ground for review in any event.

Also missing the point is Sierra's complete failure to address a key Washington case upon which the Court of Appeals rested its rejection of Sierra's analysis: ***Castellano v. Charter Communications, Inc.***, 2013 U.S. Dist. LEXIS 164636 (citing and discussing ***Johnson v. Si-Cor, Inc.***, 107 Wn. App. 902, 28 P.3d 832 (2001)). Opinion at 10-12. Judge Bryant ruled that a debtor has no duty to schedule post-confirmation assets. ***Castellano***, at *16-*19. As the Court of Appeals noted in this case, this analysis is consistent with ***Johnson*** and ***Cunningham***, which both held that no duty exists to schedule post-confirmation assets. Opinion at 10-12.

Consistent with its frequent misconstruction of precedents, Sierra asserts that ***Johnson*** and ***Cunningham*** are inconsistent with "virtually every other jurisdiction that hold [*sic*] Chapter 13 debtors have a duty to disclose post-confirmation assets." PFR at 11 (citing, *inter alia*, ***In re Flugence***, 738 F.3d 126, 129-30 (5th Cir. 2013); ***Kimberlin***, *supra*; ***Barbosa***, *supra*; ***In re Wheeler***, 503 B.R. 694, 697 (Bankr. N.D. Ind. 2013)). It so argues despite both Arp and the

Court of Appeals explaining that these distinguishable cases do not so hold. *See, e.g.*, Reply at 12-13 (***Flugence*** debtor sought post-confirmation schedule amendment, but failed to disclose new assets as the code requires); 14 (***Wheeler*** debtors affirmatively represented that they would not receive SSI benefits, but then failed to disclose tens of thousands of dollars in SSI income); 17-18 (***Barbosa*** property was originally part of the bankruptcy estate and subject to confirmation modification); 17 n.3 (***Kimberlin*** debtor conceded duty to disclose); Opinion at 12-13 (***Kimberlin*** does not support Sierra's claims). Sierra simply has no authority that requires disclosure by a debtor (like Arp) whose plan and confirmation order vest post-confirmation assets in the debtor.

Similarly, in ***In re Waldron***, the debtors effectively conceded that their post-confirmation cause of action was property of the estate by seeking Trustee permission to settle. 536 F.3d 1239, 1241 (11th Cir. 2008). ***Waldron*** – like every other case Sierra cites – fails to address a confirmation order that says § 1306(a) post-confirmation assets remain vested in the debtor.[7] ***Waldron*** does not help Sierra.

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[7] The ***Waldron*** also noted that "'Congress . . . intended . . . that the debtor repay his creditors . . . ***during the Chapter 13 period.***'" 536 F.3d at 1246 (emphasis added; citations omitted). That period has long-since passed.

Sierra's final claim – never before raised – is that, "[b]ecause this cause of action is property of Arp's bankruptcy estate, Arp only had standing *if he was acting on behalf of the estate*." PFR at 14 (emphasis in original). Sierra's major premise – that this claim (which was a § 1306(a) post-confirmation asset) was estate property – is simply false. Sierra ignores the confirmation order's plain language (App. A, CP 114):

> 6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor . . . .

Sierra continues to assign significance to the next phrase ("under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property"). But this language does not modify the plain meaning of the first clause. Rather, it simply says that the bankruptcy court retains jurisdiction over leasing, selling, transferring, encumbering, or otherwise disposing of § 1306(a) assets. Note that it does not say *acquiring*.

Since the confirmation order plainly vests all § 1306(a) post-confirmation assets in Arp, nothing in the bankruptcy code required him to schedule this claim. The Court of Appeals is correct. This Court should deny review.

CONTINGENT CROSS-PETITION

A. Identity of petitioner & relief requested.

Ben Arp asks this Court to deny review. If, but only if, the Court grants review to Sierra, Arp asks the Court to also accept an issue.

B. Issue presented for review & introduction.

The Court of Appeals properly recognized that the confirmation order unequivocally vested all §1306(a) assets in Arp, so he was under no duty to disclose it. Opinion at 10 ("Arp's plan and the confirmation order vested the Sierra claim in Arp"); 13 ("The bankruptcy code [therefore] did not require that Arp amend his schedules to disclose his claim"). Yet it also held that *the very same order* required Arp to disclose his claim. *Id.* at 14.

Courts do not issue Catch-22 orders. Rather, our courts must attempt to harmonize conflicting provisions. The appellate court read ¶ 6 correctly (it plainly vested this claim in Arp, so required no disclosure), but then unnecessarily read the vague phrase "any change in circumstances" in ¶ 4 to contradict paragraph six, confusingly requiring Arp to disclose a post-confirmation asset that did not belong to the estate. It is a simple matter to harmonize these provisions, but the Court of Appeals did not even attempt to do so. This Court should reverse on this issue.

C. Argument why review should be granted.

This Court has long held that court orders are interpreted (like statutes) under the usual rules of construction[8] and that conflicting provisions should be harmonized whenever possible.[9]

Yet the Court of Appeals held that the same confirmation order provides that Arp did not have a duty to disclose his claim to the bankruptcy court and that he did have a duty to disclose it. Opinion at 10-13, 14. Courts do not issue self-contradictory orders. Yet the Court of Appeals did not cite the relevant rules of construction or attempt to reconcile these two diametrically opposed readings. This published opinion thus conflicts with a great deal of existing precedent. RAP 13.4(b)(1) & (2).

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[8] *See, e.g.*, ***Stokes v. Polley***, 145 Wn.2d 341, 346-49, 37 P.3d 1211 (2001) (applying rules of construction to interpret court order); ***City of Vancouver v. Pub. Emp't Relations Comm'n***, 180 Wn. App. 333, 352, 325 P.3d 213 (2014) (courts interpret orders in the same manner it interprets statutes).

[9] *See, e.g.*, ***State v. Gresham***, 173 Wn.2d 405, 444, 269 P.3d 207 (2012) (the court makes every effort to harmonize two conflicting provisions) (citing ***Putman v. Wenatchee Valley Med. Ctr., PS***, 166 Wn.2d 974, 980, 216 P.3d 374 (2009); ***City of Fircrest v. Jensen***, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); ***State v. Blilie***, 132 Wn.2d 484, 491, 939 P.2d 691 (1997)); ***State v. S.P.***, 110 Wn.2d 886, 890, 756 P.2d 1315 (1988) ("every 'provision [is to] be viewed in relation to other provisions and harmonized if at all possible to [e]nsure proper construction of every provision'" (quoting ***Addleman v. Bd. of Prison Terms & Paroles***, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)); ***Hospice of Spokane v. Dep't of Health***, 178 Wn. App. 442, 452, 315 P.3d 556 (2013) (an act must be construed as a whole, harmonizing all provisions to ensure proper construction") (quoting ***Seven Gables Corp. v. MGM/UA Entm't Co.***, 106 Wn.2d 1, 6, 721 P.2d 1 (1986).

Harmonization is easy here. Paragraph 6 of the confirmation order unequivocally vests §1306(a) post-confirmation assets in Arp, as the Court of Appeals held. Paragraph 4 says this (CP 114):

> That the debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;

Read in context, "any change in circumstances" means any change in Arp's ability to fulfill his wage-earner plan obligations – ¶ 4 solely pertains to *income*, not to speculative claims. Arp informed the Trustee that he was in a collision, that it was not his fault, and that it injured his memory, causing him to fail to complete his payments. App. B. Under ¶ 6, he did not have to add, "that is a cause of action," or otherwise disclose a claim that belonged to him. This Court should accept review and reverse this incorrect holding.

CONCLUSION

The Court should deny review. But if it grants review, it should also accept review to reverse as to Arp's issue.

RESPECTFULLY SUBMITTED this 18 day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused to be emailed or mailed postage prepaid, via U.S. mail a copy of the foregoing ANSWER TO PETITION FOR REVIEW on the 10 day of March 2016, to the following counsel of record at the following addresses:

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Entered on Docket Dec. 17, 2009

Exhibit B

Judge: Philip H. Brandt
Chapter: 13

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re: BENJAMIN CLARENCE ARP Debtor.	IN CHAPTER 13 PROCEEDING NO. 08-14588 ORDER CONFIRMING CHAPTER 13 PLAN

This Matter having come on for hearing this date before the undersigned bankruptcy Judge, and the Court having heard the arguments, if any, for and against confirmation of the plan proposed herein, and having heard the Trustee's recommendations concerning the plan, the Court does therefore hereby ORDER:

1. That subject to the terms of this order, the plan proposed by the debtor dated 12-09-09 is hereby confirmed;

2. That original attorney fees are set in the amount of $10,915.83;

3. That the debtor shall incur no additional debt except after obtaining prior Court permission;

4. That the debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;

5. That the Trustee shall charge such percentage fee as may periodically be fixed by the Attorney General pursuant to 28 U.S.C. section 586(e);

6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor, under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property;

7. That all disposable income received by the debtor beginning on the date the first payment is due under the plan shall be applied as payments under the plan pursuant to 11 U.S.C. section 1325(b)(1)(B), unless the Court orders otherwise.

Dated: December 17, 2009

PHB

Philip H. Brandt, Judge

Presented by:

Exhibit C

THE HONORABLE TIMOTHY W. DORE
Hearing Date: January 18, 2011
Hearing Time: 9:30 a.m.
Response Date: January 11, 2011
Hearing Location: Seattle
Chapter 7

THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re BENJAMIN ARP, Debtor.	Case No. 08-14588 RESPONSE TO MOTION TO DISMISS

COMES NOW the Debtor, Benjamin Arp, by and through his attorney of record Jeffrey B. Wells, and in response to the Trustee's motion to dismiss for lack of payment, states as follows. As set forth in the declaration of Benjamin Arp which accompanies this response, the Debtor was involved in an automobile accident on October 5, 2010. The accident was serious enough that Ben Arp received significant brain injuries which has resulted in significant short-term memory loss. No doubt as a result of this accident, the Debtor has "forgotten" to make his Chapter 13 plan payments.

Because there appears to be only a relatively small amount of $2,875 due and owing to complete his Chapter 13 case, and because the requisite three years has now passed, the Debtor has asked his sister whether she could gift him the remaining balance, so that his Chapter 13 plan can be completed. His sister has indicated she is willing to be of assistance so the Debtor

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will be able to complete his Chapter 13 plan with one payment.

The Debtor has paid over $154,336.42 into the plan and while regrettable, the recent lack of payments given Mr. Arp's injury is understandable. Therefore, Debtor respectfully requests that the court not dismiss Debtor's plan but allow the Debtor to pay off the balance due and owing on his plan.

Dated this 6th day of January, 2012.

/s/ Jeffrey B. Wells, WSBA #6317
Jeffrey B. Wells, WSBA #6317
Attorney for Debtor

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THE HONORABLE TIMOTHY W. DORE
Hearing Date: January 18, 2011
Hearing Time: 9:30 a.m.
Response Date: January 11, 2011
Hearing Location: Seattle
Chapter 7

THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re BENJAMIN ARP, Debtor.	Case No. 08-14588 DECLARATION OF BENJAMIN ARP IN RESPONSE TO MOTION TO DISMISS

I am the debtor herein.

On October 5, 2010 I was in an auto accident, not of my fault, which resulted in significant brain injury to myself. Since that time I have experienced short-term memory loss and have quite frankly forgotten to make my plan payments. I have made arrangements to obtain a gift from my sister and pay off the balance remaining on my plan. I therefore request that my plan not be dismissed, but that I be allowed to make a one-time payment on the remaining balance to complete my Chapter 13.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my information and knowledge.

Dated this 10th day of January, 2012.

/s/ Benjamin Arp
Benjamin Arp

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BENJAMIN C. ARP, Appellant, v. JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO. INC., a Washington State Corporation, Respondents.	)	No. 72613-7-I DIVISION ONE PUBLISHED OPINION FILED: December 28, 2015

LEACH, J. — Benjamin C. Arp appeals the trial court's summary dismissal of his personal injury action against James H. Riley and Sierra Construction Company Inc. (collectively Sierra). The trial court decided that the judicial estoppel doctrine barred this lawsuit because Arp failed to amend the schedules in his Chapter 13 bankruptcy case to inform the court about a personal injury claim he acquired after that court confirmed Arp's payment plan. Because judicial estoppel is an equitable doctrine to be applied by the trial court through its exercise of discretion on a case-by-case basis after evaluating the pertinent factors and because the trial court did not do this, we reverse and remand for proceedings consistent with this opinion.

FACTS

Arp filed a Chapter 13 bankruptcy petition on July 22, 2008. The bankruptcy court confirmed Arp's Chapter 13 plan on December 17, 2009. The confirmation order required him to inform the Trustee of any change in circumstances and allowed Arp to retain his property:

> 1. That subject to the terms of this order, the plan proposed by the debtor dated 12-09-09 is hereby confirmed;
> . . . .
> 4. That the debtor shall inform the Trustee of any change in circumstances, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;
> . . . .
> 6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. section 1306(a) shall remain vested in the debtor, under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property.

On October 5, 2010, Arp suffered serious injuries when a sports utility vehicle (SUV) rear-ended his stopped car. James Riley drove the SUV while working for Sierra Construction Company. Arp sustained physical injuries as well as mental and emotional problems, including difficulty with memory. He cannot engage in the physical activities he previously enjoyed. A neuropsychologist described his symptoms as consistent with cognitive disorder NOS (not otherwise specified) and adjustment disorder NOS, as well as depression and anxiety.

After the accident, Arp missed several payments on his Chapter 13 plan, totaling $2,875.00. The bankruptcy trustee moved to dismiss Arp's bankruptcy case in November 2011. Arp responded, stating that he forgot to make payments because he experienced memory loss as a result of a car accident for which he was not at fault. Arp also noted that he had paid $154,336.42 to his creditors under his Chapter 13 plan. The trustee struck the motion to dismiss, and in March 2012, the bankruptcy court granted Arp a discharge. Arp paid off his remaining debts under the Chapter 13 plan, and the bankruptcy court closed his case in April 2012.

Arp filed suit against Riley and later amended his complaint to include Sierra Construction Company. In Sierra's amended answer, it asserted the affirmative defenses of judicial estoppel and lack of standing. The trial court dismissed Arp's case on summary judgment, concluding that because Arp's personal injury claim against Sierra "is properly considered an asset of the bankruptcy estate, as defined in 11 U.S.C. § 1306(a)(1)," Arp "had a duty to disclose the post-petition asset in his bankruptcy action." It also decided that Arp's response to the trustee's motion to dismiss did not satisfy the disclosure obligation created by the confirmation order. The trial court denied Arp's motion for reconsideration. Arp appeals.

STANDARD OF REVIEW

This court reviews a trial court's grant of summary judgment de novo, affirming only if no genuine issues of material fact exist, viewing the evidence in the light most favorable to the nonmoving party.[1] But "[w]e review a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion."[2] "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds."[3]

ANALYSIS

Arp challenges the trial court's decision that judicial estoppel bars this lawsuit because he did not properly disclose his claim in his Chapter 13 bankruptcy proceeding. He also challenges its decision that his claim remained an asset of the bankruptcy estate and could be pursued only by the trustee. Arp contends that he had no duty to disclose the claim and that he owned it because of the provisions of the confirmation order. Alternatively, he claims that he made an adequate disclosure.

Sierra responds that both the bankruptcy code and the confirmation order imposed a disclosure obligation. Because Arp did not disclose his claim, judicial

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[1] Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 226-27, 108 P.3d 147 (2005); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).

[2] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

[3] Harris v. Fortin, 183 Wn. App. 522, 527, 333 P.3d 556 (2014).

estoppel bars it. Sierra also asserts that Arp's claim remains part of the bankruptcy estate and can only be pursued by the bankruptcy trustee.

Judicial estoppel "'precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'"[4] It is intended to protect the integrity of the courts but is not designed to protect litigants.[5]

A court looks to three factors to determine if judicial estoppel applies: (1) if the party asserts a position inconsistent with an earlier one, (2) if acceptance of the position would create the perception that a party misled a court in either proceeding, and (3) if the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment.[6] But this is not an exhaustive formula nor are there inflexible prerequisites, thus "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[7] Indeed, courts must apply judicial estoppel at their own discretion; they are not bound to apply it but rather must determine on a case-by-case basis if applying the doctrine is appropriate.[8]

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[4] Arkison, 160 Wn.2d at 538 (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)).

[5] Ah Quin v. County of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013); Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-08, 28 P.3d 832 (2001).

[6] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

[7] New Hampshire, 532 U.S. at 743.

[8] Ah Quin, 733 F.3d at 272.

We first decide if Arp's nondisclosure of his claim as an asset in his bankruptcy proceeding constituted a clearly inconsistent position. Nondisclosure of a claim later brought in state court can support the application of judicial estoppel because a party asserts two opposing positions.[9] As a general rule, if a debtor in a bankruptcy proceeding fails to report a cause of action and obtains a discharge or confirmation, a trial court may apply judicial estoppel to bar the action.[10] This prevents a debtor from protecting the asset from creditors by representing to the bankruptcy court that no claim exists and then asserting in another court that the claim does exist.[11] But "[a] party's nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit," especially where a party lacks knowledge or has no motive to conceal the claims.[12]

Arp claims that he did not take any inconsistent position because the bankruptcy code and the confirmation order made him the claim's owner with no duty of disclosure. Sierra disagrees on both points. Deciding if property belongs to the bankruptcy estate or to the debtor involves interpreting bankruptcy code

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[9] Harris, 183 Wn. App. at 528.
[10] Ah Quin, 733 F.3d at 271.
[11] Ah Quin, 733 F.3d at 271.
[12] Miller v. Campbell, 137 Wn. App. 762, 771, 155 P.3d 154 (2007), aff'd on other grounds, 164 Wn.2d 529, 192 P.3d 352 (2008) (affirming the result reached by Court of Appeals but applying a different analysis because of the substitution of the trustee).

provisions.[13] The parties' conflicting positions about the ownership of a claim first acquired after a court confirms a Chapter 13 plan reflect a division among courts about how to classify this category of property.[14] When a court enters a confirmation order in a Chapter 13 bankruptcy proceeding, it orders the debtor to apply part of his future income to discharge debts.[15] While a debtor in a Chapter 13 bankruptcy has an ongoing duty to disclose postpetition causes of action that could become property of the bankruptcy estate,[16] claims first acquired after confirmation of a Chapter 13 plan do not always become estate assets. When a court decides that property acquired after confirmation belongs to the debtor, courts have held that the debtor need not disclose that property and therefore have declined to apply judicial estoppel to bar undisclosed claims.[17]

The bankruptcy code does not clearly state what postconfirmation property belongs to the bankruptcy estate. 11 U.S.C. § 1306(a) provides that the bankruptcy estate includes the property specified in 11 U.S.C. § 541 and "all property of the kind specified in such section that the debtor acquires after the

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[13] Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, 183 Wn. App. 459, 483, 334 P.3d 63 (2014) (citing In re Pettit, 217 F.3d 1072, 1078 (9th Cir. 2000)), aff'd, 184 Wn.2d 176, 357 P.3d 759 (2015).

[14] See In re Jones, 657 F.3d 921, 927 (9th Cir. 2011).

[15] 11 U.S.C. §§ 1321-1325; In re Hannan, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982).

[16] 11 U.S.C. § 521; In re Flugence, 738 F.3d 126, 129 (5th Cir. 2013); In re Foreman, 378 B.R. 717, 720 (Bankr. S.D. Ga. 2007).

[17] Castellano v. Charter Commc'ns, LLC, No. 3:12-CV-05845-RJB, 2013 WL 6086050, at *6 (W.D. Wash. Nov. 19, 2013).

commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first," and certain earnings from the debtor's services. But 11 U.S.C. § 1327(b) states, "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." And unless the plan states otherwise, the debtor holds this property "free and clear of any claim or interest of any creditor provided for by the plan."[18] The Ninth Circuit has noted the tension between these statutes: "Under § 1327(b), property of the estate revests in the debtor upon confirmation of a Chapter 13 plan, but § 1306(a)(1) does not include confirmation of the plan as one of the events defining the time period in which property acquired by the debtor becomes estate property."[19]

Federal circuit courts and bankruptcy courts addressing this tension have taken four different approaches.[20] In re Jones[21] outlines the four approaches various courts have taken. The modified estate preservation approach requires that property of the estate vests in the debtor at the time of confirmation, but postconfirmation property becomes part of the bankruptcy estate under §

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[18] 11 U.S.C. § 1327(c).

[19] Jones, 657 F.3d at 927.

[20] Jones, 657 F.3d at 927-28; Barbosa v. Solomon, 235 F.3d 31, 36-37 (1st Cir. 2000).

[21] 657 F.3d 921, 927-28 (9th Cir. 2011).

1306(a).[22] The estate transformation approach vests postconfirmation property in a debtor under § 1327(b), but the estate retains property where necessary to carry out the confirmation plan.[23] The estate termination approach vests all property in the debtor under § 1327(b) unless the confirmation plan states otherwise.[24] These three approaches proceed from the principle that property of the estate revests in the debtor on plan confirmation unless the plan says otherwise. With the fourth, the estate preservation approach, the bankruptcy estate retains all property after confirmation until dismissal or discharge.[25]

Here, the trial court adopted the modified estate preservation approach:

> This court is persuaded that the "modified estate preservation approach," is the most appropriate, to determine whether the . . . post-confirmation accident-related claim is an asset of the bankruptcy estate, or whether it revested with Mr. Arp upon confirmation. It remained an asset of the bankruptcy estate and should have been properly disclosed for consideration by the bankruptcy court.

The Ninth Circuit has affirmatively rejected the "estate preservation approach," noting that no circuit court had adopted it.[26] It declined to adopt any of the other three approaches because it decided it did not need to adopt any single approach to resolve the case before it.[27] It held that the plain language of

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[22] Jones, 657 F.3d at 927-28; Barbosa, 235 F.3d at 36-37.

[23] Jones, 657 F.3d at 928; Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1340 (11th Cir. 2000).

[24] Jones, 657 F.3d at 928.

[25] Jones, 657 F.3d at 928.

[26] Jones, 657 F.3d at 928.

[27] Jones, 657 F.3d at 928.

§ 1327(b) vests property of the bankruptcy estate in the debtor upon plan confirmation unless the debtor chooses differently in the plan.[28] Arp's plan and the confirmation order vested the Sierra claim in Arp. Thus, Arp owns the claim and has standing to assert it.

In Castellano v. Charter Communications, Inc.,[29] the United States District Court for the Western District of Washington held that a Chapter 13 bankruptcy debtor whose discrimination claim arose postconfirmation had no duty to disclose this claim, citing Johnson v. Si-Cor, Inc.[30] The district court's reliance on Johnson provides guidance here.

Sometime after Johnson filed a Chapter 13 case, he sustained injury when he bit into a McDonalds sandwich.[31] Johnson did not list his claim against McDonalds on his Chapter 13 bankruptcy schedule or inform creditors upon conversion to a Chapter 7 bankruptcy.[32] When Johnson sued McDonalds, the trial court dismissed his lawsuit as barred by judicial estoppel.[33] Division Three of this court reversed for three reasons: (1) the trial court questioned if Johnson was obligated to amend his bankruptcy schedule to disclose his claim, (2) a debtor's failure to amend a schedule of assets does not sufficiently involve the

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[28] Jones, 657 F.3d at 928.

[29] No. 3:12-CV-05845-RJB, 2013 WL 6086050, at *6 (W.D. Wash. Nov. 19, 2013).

[30] 107 Wn. App. 902, 910-11, 28 P.3d 832 (2001).

[31] Johnson, 107 Wn. App. at 904.

[32] Johnson, 107 Wn. App. at 905.

[33] Johnson, 107 Wn. App. at 904.

court so that it accepts the debtor's position, and (3) the record did not show that Johnson's nondisclosure provided him a benefit.[34] Thus, judicial estoppel did not bar his suit.[35]

Sierra contends that because Johnson is a Chapter 7 conversion case and not a Chapter 13 case, the same analysis does not apply. It correctly argues that under 11 U.S.C. § 348(f)(1)(A), the conversion to Chapter 7 caused all postpetition Chapter 13 property to belong to the debtor.[36] But in Johnson, the defendant specifically argues that Johnson's failure to amend his Chapter 13 schedules to include his lawsuit supported the court's application of judicial estoppel.[37]

The Johnson court did note that sometimes Chapter 13 can present a strong case for judicial estoppel: as part of a Chapter 13 confirmation process, the bankruptcy court may require a debtor to represent to it what creditors would have received under a Chapter 7 liquidation, providing the court with evidence to

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[34] Johnson, 107 Wn. App. at 910.
[35] Johnson, 107 Wn. App. at 912.
[36] 11 U.S.C. §348 provides,

> (f)
>
> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.

[37] Johnson, 107 Wn. App. at 910.

show that the creditors are doing at least as well under Chapter 13.[38] But this describes a debtor's duty existing during and before confirmation and not after the bankruptcy court confirms the plan. As this court later explained in Cunningham v. Reliable Concrete Pumping, Inc.,[39] Johnson's conversion to Chapter 7 did not change the fact that under Chapter 13 he did not have to disclose or schedule his postconfirmation cause of action, and, "[t]herefore, his omission had no effect on the court's valuation process or subsequent decision to confirm his plan," and thus it "did not 'accept' his position that no claim was available to his creditors."

Sierra also contends that Kimberlin v. Dollar General Corp.[40] required Arp to disclose his claim to the bankruptcy court. In Kimberlin, the plaintiff's claim against her employer arose several years after a bankruptcy court confirmed her Chapter 13 plan,[41] and the district court applied judicial estoppel to dismiss her claim because she did not disclose it to the bankruptcy court.[42] On review, the Sixth Circuit recognized but declined to resolve the conflict between 11 U.S.C. § 1306 and § 1327, deciding the judicial estoppel issue on the parties' shared assumption that Kimberlin was required to disclose her cause of action.[43] Thus,

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[38] Johnson, 107 Wn. App. at 909-10.
[39] 126 Wn. App. 222, 232, 108 P.3d 147 (2005).
[40] 520 F. App'x 312 (6th Cir. 2013).
[41] Kimberlin, 520 F. App'x at 313.
[42] Kimberlin, 520 F. App'x at 313.
[43] Kimberlin, 520 F. App'x at 314.

Kimberlin does not support Sierra's assertion that the bankruptcy code requires disclosure in Arp's case.

The bankruptcy code did not require that Arp amend his schedules to disclose his claim. The trial court erred to the extent it reached a contrary conclusion. Because Arp owned that claim, the trial court also erred when it decided that he lacked standing to assert it.

Next, we read the confirmation order to see if it required disclosure. The code allows for a plan to include "any other appropriate provision not inconsistent with this title."[44] The bankruptcy court has discretion to include provisions in the plan requiring a debtor to amend a schedule of assets to disclose a newly acquired postconfirmation property interest.[45] And 11 U.S.C. § 1329 of the code permits trustees and creditors to modify the payment plan postconfirmation and before completion of a debtor's payments.[46] Here, Arp's plan specifically required that he inform the trustee of any change in circumstance or receipt of additional income. And while the order vested all after-acquired property in Arp, the bankruptcy court retained jurisdiction over these assets. Arp had to obtain

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[44] 11 U.S.C. § 1322(b)(11).

[45] See In re Waldron, 536 F.3d 1239, 1246 (11th Cir. 2008); Fed. R. Bankr. P. 1009.

[46] 11 U.S.C. § 1329(a) provides that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified" at the request of a creditor to "alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan."

specific permission from the court to exercise any right to "lease, sell, transfer, encumber or otherwise dispose of such property." Sierra argues that this language required Arp to disclose all assets he acquired after confirmation.

Arp asserts that because he owned any claim acquired after the court confirmed his plan, the confirmation order did not impose a duty to disclose the acquisition of that claim. Arp also contends that he satisfied any disclosure obligation imposed by the confirmation order with his response to the trustee's motion to dismiss. But his position that the order did not impose a disclosure obligation ignores the plain language of the order requiring disclosure of "any change in circumstance." Arp provides no credible interpretation of this language. It clearly required that Arp disclose an injury affecting his ability to work and fund his plan as well as his acquisition of an asset, his personal injury claim that might provide a replacement for his lost earnings.

Additionally, Arp does not offer any persuasive explanation why his response to a motion to dismiss provided a reasonable substitute for an amendment to his schedule of assets. In a world of electronic filings where creditors rely upon publicly available dockets to keep informed about the status of cases, an entry disclosing a response to a motion to dismiss does not provide the same notice as an entry disclosing a change in assets. The record adequately supports the trial court's conclusion that Arp's response to the

trustee's motion to dismiss "cannot fairly be considered the type of notice required by the confirmation order." Thus, for purposes of this opinion, we assume that Arp has taken an inconsistent position.

But Arp's violation of a disclosure obligation does not, as the trial court appears to have decided, mean that judicial estoppel bars Arp's claim as a matter of law.[47] Indeed, the record leaves unanswered serious questions about the equity of applying judicial estoppel to bar his claim.

Judicial estoppel is an equitable doctrine courts apply to protect the integrity of the judicial process,[48] not to benefit a party. When considering whether the doctrine applies in an individual case, a court must consider if the litigant before it asserted inconsistent claims, if the bankruptcy court accepted those claims, and if the litigant benefited from asserting inconsistent claims.[49] And while a court need not make a finding of manipulative intent, usually this has been implied in cases where a court applies judicial estoppel.[50] The record before us does not show that the trial court considered if the bankruptcy court accepted any inconsistent claim made by Arp or if Arp benefited from making any inconsistent claim. Certainly the record lacks sufficient evidence of undisputed facts to allow the trial court to resolve these questions as a matter of law. The

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[47] Miller, 137 Wn. App. at 771.
[48] Miller, 137 Wn. App. at 771.
[49] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire, 532 U.S. at 750-51).
[50] Miller, 137 Wn. App. at 771-72.

record also does not show that the trial court exercised discretion to decide if allowing Arp to pursue his claim would affront the integrity of the judicial process.

Sierra identifies no evidence showing that the bankruptcy court accepted any inconsistent claim asserted by Arp when it granted him relief. Arp had nearly completed his plan payments when he was injured. At the time the trustee moved to dismiss the bankruptcy, Arp had already paid creditors $154,336.42, with only $2,875.00 left to pay. The trustee struck the motion to dismiss. The bankruptcy court had already entered a confirmation order vesting in Arp ownership of assets he acquired after entry of the order, including his claim against Sierra. Sierra produced no evidence showing that any creditor would have considered requesting a plan amendment if Arp had disclosed his claim in an amended schedule. Neither has Sierra offered any persuasive reason to believe the bankruptcy court would have changed the relief it granted Arp. Thus, undisputed facts do not show that the bankruptcy court accepted an inconsistent position or that Arp benefited from nondisclosure.

The trial court erred by resolving the application of judicial estoppel as a matter of law on summary judgment. Before summarily deciding that judicial estoppel barred Arp's claim, the trial court should have considered if undisputed facts in this particular case established pertinent factors as a matter of law. If so,

it must also exercise discretion to decide if allowing Arp to pursue his claim against Sierra would affront the integrity of the judicial process.

CONCLUSION

Because Arp owned any claim he first acquired after the bankruptcy court confirmed his Chapter 13 plan, Arp did not have a statutory duty to disclose the claim and had standing to pursue it. But the bankruptcy court's confirmation order required disclosure of the claim, and we accept the trial court's decision that Arp did not adequately disclose it. But the record does not establish by undisputed facts the pertinent elements of judicial estoppel. Also, the record does not establish that the trial court exercised individualized discretion to decide that allowing Arp to pursue his claim would affront the integrity of the judicial process. We reverse and remand for proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Dwyer, J.

Becker, J.

11 U.S. Code § 541 - Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)

(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)

(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent)

in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) In the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $5,000;

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b);

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition; or

(10) funds placed in an account of a qualified ABLE program (as defined in section 529A(b) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,225.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)

(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2594; Pub. L. 98–353, title III, §§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub. L. 101–508, title III, § 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 102–486, title XXX, § 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title II, §§ 208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129; Pub. L. 109–8, title II, § 225(a), title III, § 323, title XII, §§ 1212, 1221(c), 1230, Apr. 20, 2005, 119 Stat. 65, 97, 194, 196, 201; Pub. L. 111–327, § 2(a)(22), Dec. 22, 2010, 124 Stat. 3560; Pub. L. 113–295, div. B, title I, § 104(a), Dec. 19, 2014, 128 Stat. 4063.)

11 U.S.C. §1306. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title-

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647 ; Pub. L. 99–554, title II, §257(u), Oct. 27, 1986, 100 Stat. 3116 .)

11 USC 1327 - Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650.)

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ANSWER TO PETITION FOR REVIEW

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Thank you.

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