No. 92780-4

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.

REPLY ON PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

William O'Brien, WSBA #5907
Gregory Wallace, WSBA #29029
Law Offices of William J. O'Brien
800 Fifth Avenue, Suite 3810
Seattle, WA 98104
(206) 515-4800
Attorneys for Petitioners
Riley and Sierra Construction, Inc.

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A. INTRODUCTION

Respondent Benjamin C. Arp filed an answer to the petition for review of Riley and Sierra Construction, Inc. ("Sierra Construction"). Within his answer, Arp included a contingent cross-petition, asking this Court, should it grant review, to accept an additional issue. Arp argues the opinion of the Court of Appeals should be reversed because that court issued a self-contradictory ruling. For the reasons set forth below, Arp's contingent cross-petition should not deter this Court from granting review, confined to the issue raised in the petition.

B. ARGUMENT

Sierra Construction maintains that the Court of Appeals erroneously concluded Chapter 13 debtors do not have an ongoing duty to disclose bankruptcy estate assets following confirmation of the Chapter 13 plan and such debtors take complete title to post-confirmation assets under 11 U.S.C. § 1327.[1] Should this Court grant review, Sierra Construction asks that the Court reverse the Court of Appeals' decision for the reasons set forth in its petition for review. The Court of Appeals incorrectly concluded that § 1327 relieves debtors of the duty to disclose post-confirmation assets because assets statutorily "vest" in the debtor upon confirmation. A determination that the Court incorrectly applied the provisions of the United States

[1] All subsequent statutory references are to Chapter 11 of the United States Code.

Bankruptcy Code in determining Arp did not have to disclose this cause of action would render Arp's contingent cross-petition moot, as both holdings of the Court would require Arp to have disclosed this cause of action to the bankruptcy court, the trustee, and his creditors.

If, however, the Court determines the Court of Appeals did not err in its conclusion that Chapter 13 debtors have no post-confirmation duty to disclose, Sierra Construction submits the opinion should not be reversed for the reason asserted by Arp.

(1) The Court of Appeals Was Not Required to Construe or Otherwise Harmonize the Confirmation Order

Where a judgment is ambiguous, a reviewing court should ascertain the intention of the court entering the original decree by using general rules of construction applicable to statutes, contracts and other writings. *In re Marriage of Sager*, 71 Wn. App. 855, 862, 863 P.2d 106 (1993). However, this Court does not ignore clear language and will not strain to find an ambiguity where there is none. *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000), *as amended* (June 8, 2000). Where the language used is "plain, free from ambiguity and devoid of uncertainty, there is no room for construction . . . ." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citations omitted).

In this case, the bankruptcy court's confirmation order was clear and unambiguous and, thus required no construction or harmonization. While the order states that all property of the estate vested[2] in Arp, he was still required to notify the trustee of any change in his circumstances. These two provisions are not mutually exclusive. Paragraph 6 of the confirmation order granted Arp possession of bankruptcy estate assets, *under the exclusive jurisdiction of the Court*, while Paragraph 4 required Arp to notify the bankruptcy trustee of any future changes in circumstances.

Similarly, the Court of Appeals' opinion is not self-contradictory. While the court found (erroneously) that the vesting provision of Paragraph 6 of the confirmation order did not require Arp to amend his schedules to disclose his claim, it held that Paragraph 4 of the confirmation order *did* require Arp to disclose this cause of action by amending his bankruptcy schedules. Just because one provision of the order did not require Arp to disclose his claim (according to the Court of Appeals), does not foreclose the possibility that a different provision would, in fact, impose that requirement. Arp's argument to the contrary should be rejected.

Further, the requirement to disclose any change in circumstances is consistent with the bankruptcy code, particularly §§ 1306, 1327, and 1329.

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[2] As discussed in the petition for review, the Court of Appeals' opinion confuses vesting of an asset with ownership or title to the asset.

Under § 1306, the bankruptcy estate includes all property the debtor acquires after the commencement of the case until the case is closed, dismissed, or converted. While § 1327 vests possession of estate property in the debtor at the time of confirmation, it does not remove that property from the bankruptcy estate or grant the debtor exclusive title to the assets. Thus, under §§ 1306 and 1327, any property the debtor acquires after plan confirmation remains in the *possession* of the debtor, but ownership of, or title to, the asset belongs to the bankruptcy estate. This is why a debtor must notify the trustee of any change in circumstances. New assets become property of the bankruptcy estate and must be disclosed as such.

§ 1329 then grants the trustee, debtor, and creditors the ability to apply for modification of the debtor's Chapter 13 plan. Upon proper notification that the debtor has acquired a new asset—and, thus, can afford to make higher plan payments or pay down a larger percentage of unsecured claims—a creditor can seek modification of the debtor's Chapter 13 plan. But, if the debtor has no post-confirmation duty to disclose assets, creditors would have no information on which to act in seeking modification. Without the requirement that a debtor disclose any post-confirmation change in circumstances, such as new assets, §§ 1306, 1327 and 1329 would be rendered meaningless. Thus, the confirmation order's language requiring Arp to notify the trustee of any change is circumstances is clear

on its face and comports with and promotes the requirements of the bankruptcy code.

(2) Because the Confirmation Order Is Not Ambiguous or Contradictory, Arp Cannot Supply His Own Interpretation of "Change in Circumstances"

Arp's assertion that the bankruptcy court's confirmation order and the appellate court's interpretation of the same are somehow contradictory is merely a disingenuous attempt to insert ambiguity where there is none and to persuade this Court to adopt his meaning of "change in circumstances." Arp asserts that "change in circumstances," when read in context, means any change in his ability to fulfill his wager-earner plan obligations, i.e., any change with regard to *income* and not to "speculative claims."

Arp's self-serving conclusion is not supported by the language of the confirmation order. Under Washington's canons of statutory interpretation, courts will not construe a statute that is unambiguous, as is the case here. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). However, if a statute is ambiguous, courts will construe the statute so as to effectuate the legislative intent by reviewing the context of the entire statute. *Id.* (citing *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless

or superfluous." *Id.* (citing *Stone v. Chelan County Sheriffs Dep't*, 110 Wn.2d 806, 810, 756 P.2d 735 (1988); *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

Reading Paragraph 4 as a whole, Arp was required to inform the trustee of "any change in circumstances, *or receipt of additional income* . . . ." (emphasis supplied). If the phrase "any change in circumstances" meant solely a change in Arp's income, the second phrase of that sentence, "or receipt of additional income," would be rendered superfluous. Therefore, "change in circumstances" must mean more than just a change in Arp's income. Further construing this language in accordance with the Bankruptcy Code, the phrase "any change in circumstances" clearly relates to the disclosures required when Arp filed for Chapter 13 bankruptcy. As previously discussed, § 1306 provides that the bankruptcy estate continues *after confirmation* and encompasses all assets the debtor acquires until the bankruptcy closes, is dismissed, or converted. Thus, the confirmation order reflects a debtor's duty to continue to disclose any asset of the bankruptcy estate—including this cause of action—until the case is closed, dismissed, or converted. Arp's suggestion that the phrase "any change in circumstances" includes only changes in his income defies Washington's rules of construction.

Indeed, the Court of Appeals recognized that the confirmation order "clearly required that Arp disclose an injury affecting his ability to work and fund his plan as well as his acquisition of an asset, this personal injury claim that might provide a replacement for his lost earnings." Op. at 14. The Court of Appeals also correctly noted that Arp failed to "offer any persuasive explanation why his response to a motion to dismiss provided a reasonable substitute for an amendment to his schedule of assets." *Id.*

To be certain, Arp never disclosed this cause of action. CP 67-112, 157-202, 276-321; RP 12. Although he argues he informed the trustee he was in a collision that was not his fault, Arp *only* revealed this information in response to the trustee's motion to dismiss for Arp's failure to make plan payments. Arp used the accident as an excuse to avoid dismissal of his case—not to inform the trustee he had a change in circumstances that impacted his creditors' and the trustee's right to seek modification and that potentially could have provided additional assets to pay the more than $113,000 of unsecured debts that were discharged. And, Arp never told the trustee or his creditors he sent a demand and settlement letter to James Riley months prior to suffering his alleged lapse in memory. CP 264. On one hand he was seeking to turn the claim into cash, and on the other he was seeking to extinguish his debts by paying the lowest amount possible and to retain any proceeds of the claim for himself.

Arp's self-serving statement to the trustee that he was in a collision and his memory was affected was not an open and honest disclosure and is not equal to amending his bankruptcy court schedules, thereby informing his creditors of this asset. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (a debtor "is required to have amended his disclosure statements and schedules to provide the requisite notice, because of the express duties of disclosure imposed on him by § 521(1), and because both the court and [the debtor's] creditors base their actions on the disclosure statements and schedules."). As noted by the Court of Appeals, a docket entry indicating Arp filed a response to the trustee's motion to dismiss provides no notice to creditors that Arp had a change in assets. *See In re Wheeler*, 503 B.R. 694, 697 (Bankr. N.D. Ind. 2013) ("By not disclosing that income, the debtors denied the trustee and creditors the opportunity to consider what, if anything, they might want to do as a result of that change in their circumstances. They might have done nothing; but it is also possible that they might have sought to modify the confirmed plan.").

Further, regardless of Arp's alleged brain injury,[3] he had experienced bankruptcy counsel who failed to report the claim, whether as

[3] While not material to the petition for review, Sierra Construction disputes Arp's characterization of the effect of his alleged brain injury on his failure to appreciate the existence of this claim or his duty to disclose the claim to the bankruptcy trustee. The

a matter of strategy or negligence. Upon review of the affidavit submitted below from Jeffrey Wells, Arp's bankruptcy counsel, it is clear that Wells knew of the claim, at the very latest, when he called Arp to discuss Arp's failure to make plan payments. It was at that point that Arp informed Wells of his alleged injury and that "no offers of settlement or offers of payment for any potential claim had been received." CP 410-14. Wells subsequently failed to inform the bankruptcy court that Arp was seeking an offer of settlement or payment for this claim.

The failure to disclose in circumstances such as these is rarely held to be inadvertent. *See Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012) (intent to hide the claim is self-evident "if a debtor fails to disclose a claim or possible claim to the bankruptcy court . . . because of potential financial benefit resulting from the nondisclosure"); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007) ("The ever present motive to conceal legal claims and reap the financial rewards undoubtedly is why so many of the cases applying judicial estoppel involve debtors-turned-plaintiffs who have failed to disclose such claims in bankruptcy. The

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motor vehicle accident occurred on October 5, 2010. CP 10, 373. On March 25, 2011, Arp sent a demand letter to defendant James Riley seeking reimbursement for Arp's deductible as well as loss of use payment since the date of the accident. CP 264. It was not until sometime after August 2011 that Arp stopped making plan payments. CP 412. Thus, Arp had the mental capacity to send a demand letter and to continue making plan payments for 10 months after his accident. Only when the trustee moved to dismiss the bankruptcy case did Arp use his alleged short-term memory loss as an excuse for forgetting to make plan payments. CP 116, 208, 264.

doctrine of judicial estoppel serves to offset such motive, inducing debtors to be completely truthful in their bankruptcy disclosures."). There is no doubt Arp benefitted financially from his non-disclosure in this case. Arp was permitted to discharge without payment $113,347.04 of debts owed to unsecured creditors through his bankruptcy.

Arp's failure to properly notify his creditors deprived his creditors of the right to consider how they may react to the new information provided to them by § 1329. If Arp's creditors had been properly notified, they could have moved to modify the Chapter 13 plan for additional compensation. *See, e.g., Jones v. Bob Evans Farms, Inc.*, Case No. 15-2068 (8th Cir. Jan. 26, 2016) ("If Jones had disclosed his [post-confirmation] claims, for example, the trustee could have moved the bankruptcy court to order him to make the proceeds from any potential settlement available to his unsecured creditors."). But they were not. Arp deprived his creditors of the knowledge of his claim, all while he moved to pursue it, first by a demand letter, then by an actual suit once his debts were discharged.

Arp had a duty to fully and properly disclose his post-petition asset. Pursuant to § 1306(a), his cause of action, which was acquired "after the commencement of the case but before the case [was] closed," was and is property of the bankruptcy estate, and Arp had the duty to report it pursuant

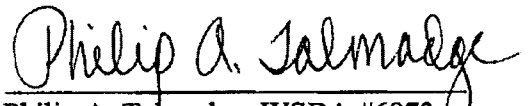
to the bankruptcy code and the Chapter 13 confirmation order. Arp failed to do so.

C. CONCLUSION

This Court should accept review for the reasons indicated in the petition for review and affirm the trial court's judgment applying judicial estoppel and concluding Arp lacked standing as a result of his breach of the duty to disclose the underlying cause of action during bankruptcy. Should the Court grant review, however, it should deny Arp's contingent cross-petition, as the Court of Appeals was not required to harmonize the bankruptcy court's confirmation order, nor was the order ambiguous such that Arp's proposed definition of "change in circumstances" should apply.

DATED this 23d day of March, 2016.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

William O'Brien, WSBA #5907
Gregory Wallace, WSBA #29029
Law Offices of William J. O'Brien
800 Fifth Avenue, Suite 3810
Seattle, WA 98104
(206) 515-4800
Attorneys for Petitioners
Riley and Sierra
Construction Co., Inc.

DECLARATION OF SERVICE

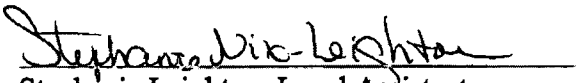
On said day below, I served in the manner set forth below a true and accurate copy of the Reply on Petition for Review in Supreme Court Case No. 92780-4 to the following counsel of record:

Kenneth W. Masters Shelby R. Frost Lemmel Masters Law Group, P.L.L.C. 241 Madison Avenue North Bainbridge Island, WA 98110 ken@appeal-law.com Shelby@appeal-law.com	☐ Fax ☐ Messenger ☐ Express Mail ☒ E-mail ☐ Regular U.S. Mail
Ruth A. Moen Leonard W. Moen & Associates 947 Powell Ave. SW, Suite 105 Renton, WA 98057-2975 lizardlawfirm@leonardmoen.com	☐ Fax ☐ Messenger ☐ Express Mail ☒ E-mail ☐ Regular U.S. Mail
Jeffrey B. Wells Wells & Jarvis 500 Union Street, Suite 502 Seattle, WA 98101-2332 jeff@wellsandjarvis.com	☐ Fax ☐ Messenger ☐ Express Mail ☒ E-mail ☐ Regular U.S. Mail
William J. O'Brien Gregory Wallace Law Office of William J. O'Brien 800 Fifth Ave., Ste 3810 Seattle, WA 98104 William.obrien@zurichna.com Gregory.wallace@zurichna.com	☐ Fax ☐ Messenger ☐ Express Mail ☒ E-mail ☐ Regular U.S. Mail

Brett M. Wieburg Joshua Rosen Law Offices of Sweeney Heit & Dietzler 1191 Second Ave., Suite 500 Seattle, WA 98101-2990 Brett.wieburg@libertymutual.com Joshua.rosen@libertymutual.com	☐ ☐ ☐ ☒ ☐	Fax ABC Messenger Express Mail E-mail Regular U.S. Mail
Paul L. Crowley Lockner & Crowley, Inc. P.S. 524 Tacoma Avenue South Tacoma, WA 98402-5416	☐ ☐ ☐ ☒ ☐	Fax ABC Messenger Express Mail E-mail Regular U.S. Mail
Clayton G. Kuhn Sandberg Phoenix 600 Washington Avenue, 15th Floor St. Louis, MO 63101 ckuhn@sandbergphoenix.com	☐ ☐ ☐ ☒ ☐	Fax ABC Messenger Express Mail E-mail Regular U.S. Mail

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 23, 2016, at Seattle, Washington.



Stephanie Leighton, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

To: Matt Albers
Cc: William OBrien; gregory.wallace@zurichna.com; brett.wieburg@libertymutual.com; joshua.rosen@libertymutual.com; crowley@524law.com; ckuhn@sandbergphoenix.com; lizardlawfirm@leonardmoen.com; jeff@wellsandjarvis.com; Ken Masters; 'Shelby Lemmel'; Phil Talmadge; Sheela Schlorer
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Case Name: Benjamin C. Arp v. James H. Riley, et al.
Case Cause Number: 92780-4
Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973
Contact information: Matt J. Albers, (206) 574-6661, matt@tal-fitzlaw.com

Please let me know if you have any questions. Thank you.

Very truly yours,

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe PLLC
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
Phone: (206) 574-6661
E-mail: matt@tal-fitzlaw.com