96725-3

No. 76935-9-l

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

BENJAMIN C. ARP,

Petitioner,

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.

PETITION FOR REVIEW

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A. IDENTITY OF THE PETITIONER

Benjamin C. Arp asks this Court to accept review of the Court of Appeals decision set forth in Part B. It is important to note that Mr. Arp is representing himself Pro se given that his attorneys withdrew from his case effective on Dec 24, 2018 and the time to filed petition by January 7, 2019 was short.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its unpublished opinion on November 5, 2018. A copy of that opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in concluding that the confirmation required that Arp disclose his personal injury claim and he failed to do so?
2. Did the Appeal Court err in concluding that the bankruptcy court accepted that Arp took an inconsistent position and that Arp benefited from his nondisclosure?

D. STATEMENT OF THE CASE

Central to these entire court proceedings so far, has been a lengthy series of court documents, hearings and opinions about Arp's near fatal car accident that resulting in serious injuries that eventually lead to his release by his employer the Boeing Company. Prior to this, Arp filed a petition for bankruptcy under Chapter 13 in July 2008 in the United States Bankruptcy Court for the Western District of Washington yet not just of his choosing. He did so for several reasons including to prevent a possible Chapter 7 petition. The confirmation of the plan was complicated. CP 34, 66, 486. It took nearly a year and a half to confirm the plan. During the time before confirmation, Arp had, as is expected of a debtor, fully and honestly disclose all his assets and many were liquated.

The bankruptcy court confirmed Arp's Chapter 13 plan on December 17, 2009. CP 34, 67, 85, 486. The confirmation of the plan was complicated. CP 34, 66, 486. It took nearly a year and a half to confirm the plan. Id. After its initial filing and due in part from its complexity, his bankruptcy continued and in December 2009 the Bankruptcy Court issued a confirmation order for Arp's Chapter 13 plan. This was a well thought out plan with several objections to the original plan and 1st and 2nd amended plans which are equitably reconciled. CP 34, 66, 67, 486.

A substantial number of Mr. Arp's assets, totaling $130,632.72 were liquidated as soon as possible to pay creditors. Id. This plan was not confirmed by default. CP 34, 66, 486. For the Bankruptcy plan to be confirmed the debtor had to satisfy Chapter 13 of the bankruptcy code, the Trustee had to determine, after careful examination, whether he had any objections, and the court had to independently determine it was satisfied with the plan. CP 34, 67, 486. The bankruptcy court, after notice and review by all creditors, confirmed Mr. Arp's third amended wage-earner plan on December 17, 2009. Leading up to Arp confirmation, he had, as is expected of a debtor, fully and honestly disclosed all his assets and many were liquated. Id. After confirmation of the plan, Arp also liquidated his Toyota Highlander and paid $20, 075.20 to the Trustee on April 9, 2010. CP 35, 67, 486. This was also to satisfy the "best interest of creditors test", which is that creditors would do at least as well if Mr. Arp had filed for Chapter 7 instead. Id. His monthly payment plan was set for the minimum 36-month time period. CP 68, 486. Arp made regular $100/month payments beginning September 2008. CP 34,66, 179, 486.

The portions of the confirmation order at issue are:

> 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, CP 35, 85, Appendix.1.

Almost a year after the confirmation of Arp's Chapter 13 plan, James Riley (in the course and scope of his employment by Sierra) rear-ended Arp, causing debilitating brain and physical injuries. On October 5, 2010, Arp sustained a debilitating traumatic brain injury and other serious physical injuries when he was rear ended by a large SUV traveling at a high rate of speed. CP 35, 180. 486. The collision occurred when Mr. Riley slammed his GMC Yukon Denali SUV into the rear of Arp's Honda as Arp was stopped for traffic. Id. James Riley drove the SUV while working for Sierra Construction Company. CP 36, 139, 486. The back of Arp's head was struck by sharp objects from behind the driver seat. CP 36, 180, 486. His chest was crushed between the steering wheel and the driver seat, fracturing his ribs. Id. His head was violently whipped around by the impact. Id. He was very confused at the scene, and had no memory of hitting the car in front of him. Id. He lost consciousness after the impact. Id. He soon began to have many mental and emotional problems,

including memory loss and a greatly diminished ability to concentrate or pay attention. Id. He was easily distracted, had a hard time focusing on the task at hand, and exhibited very serious memory loss. CP 37, 139, 180, 486. Arp had difficulties managing his time and projects at work, and could not multitask at all. CP 37, 181, 486. He had a brain MRI in January 2012. CP 37, 181, 486, 560. It revealed hemorrhaging and other intra cranial abnormalities. CP 37, 181, 486, 557, 560-564. The effects of the brain injury were debilitating, very long lasting, and have not improved. CP 36, 181, 486. A neuropsychologist described his symptoms as consistent with cognitive disorder NOS (not otherwise specified) and adjustment disorder NOS, as well as depression and anxiety. CP 558, 568, 575.

In November 2012, Arp filed this lawsuit against Riley and, in July 2013, filed an amended complaint adding Sierra. Among other damages, the complaint seeks compensation for "[p]ast, present and future lost wages." In Sierra's answer, it asserted the affirmative defenses of judicial estoppel and lack of standing. The lower court granted summary judgment on both grounds.

Arp appealed the trial court's judgment to the Appeals court. In Arp I, the Appeals court reversed the trial court's summary judgment.[1] It

[1] Arp v. Riley, 192 Wn. App. 85, 366 P.3d 946 (2015) (Arp I)

stated that the bankruptcy court's confirmation order required that Arp disclose his personal injury claim, which Arp did not do.[2] But the court held that the record did not establish by undisputed facts all of the elements of judicial estoppel because it did not show that the trial court considered whether the bankruptcy court accepted any inconsistent claim Arp made or whether Arp benefited from making any inconsistent claim.[3] The Appeals Court stated the record did not establish that the trial court "exercised individualized discretion" to decide that permitting Arp to pursue his claim would "affront the integrity of the judicial process."[4]

Our Supreme Court denied Sierra's petition for review and the matter was remanded to the trial court. On remand, the parties conducted additional discovery to address the unresolved factual issues noted in Arp I. Arp then filed a motion for partial summary judgment to strike Sierra's affirmative defense of Judicial estoppel. Sierra renewed its motion for summary judgment, asserting judicial estoppel barred Arp's claim. The trial court denied Arp's motion and granted Sierra's motion for summary judgment. Arp filed a motion for reconsideration, which the trial court denied. Arp appeals the trial court's summary judgment order.

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[2] Arp I, 192 Wn. App. at 101.
[3] Arp I, 192 Wn. App. at 101-01.
[4] Arp I, 192 Wn. App. at 101.

In Arp II[5], the Appeals Court agreed with the trial court that Arp took an inconsistent position; Arp did not properly disclose his claim to the trustee, and based on the trustee's account of Arp's assets, the bankruptcy court discharged his debts, thereby accepting that he had no more assets to disclose. Arp disagrees with the Appeals Court opinion.

E. **ARGUMENTS WHY REVIEW SHOULD BE GRANTED**

In responding to what amounts to allegations of concealment and nondisclosure carried out by me, the arguments for this petition focus on my participation in the events of my bankruptcy interactions. I did not attend law school, and did not pass the bar, and do not have even a day let alone years of experience as an attorney arguing point of case law and legal doctrine. But what happened to this plaintiff should not happen to any member of public in filing for a Chapter 13 bankruptcy and completing such a bankruptcy. In a case of extreme misfortune, this plaintiff was nearly killed on the I-405 interstate highway in Renton. It should not be forgotten that justice fundamentally comes down to equal protect under the law. That should govern interaction between plaintiff

[5] *Arp v. Riley*, N. 76935-9-I slip Op. at 7 (Div. 1 Nov 5,2018) (Arp II)

and defendant and when that does not happen, every member of the public could be at risk.

(1) The Court of Appeals Incorrectly Concluded that Arp Did Not Inform the Trustee About the Automobile Accident. The Court of Appeals Ignored Facts and Evidence including the Confirmation Order Specifics That Arp's Notice Was Sufficient and Arp Specifically Fulfilled the Requirements of the Chapter 13 Trustee

The Appeal Court in Arp II[6] asserted that the Arp did not disclose his car accident to the Bankruptcy Court and that the bankruptcy court accepted an inconsistent position by Arp. The facts clearly show otherwise yet this fundamental error still persists.

The Appeals Court states that the confirmation order, not Chapter 13 required Arp to disclose car accident but Arp in fact had disclosed his car accident claim the Bankruptcy in compliance with his conformation order. Ibid. This difference of opinion in interpreting Arp action demonstrates a fundamental error that premediates most of the argument about whether there was disclosure or nondisclosure by Arp. The reflects whether there is a carefully understanding of what are the specific requirements by the Bankruptcy Court in its confirmation order. Further

[6] Arp II at 9

does such understanding matches any explanation claiming the Arp did not inform the Bankruptcy Court of car accident between the vehicles drive by James Riley and Benjamin Arp on October 5, 2010.

The confirmation order in part states: "That the debtor shall inform the Trustee of any change in circumstances"

On January 6, 2012, Jeffery B Wells, the bankruptcy attorney for Arp responded to a Motion to Dismiss Arp's Chapter 13 Plan by the bankruptcy trustee resulting from Arp recent sporadic payment in latter part of 2011. CP 91-92. Arp had believed he was regularly been making all his monthly payment to the bankruptcy court and found out from Wells that the bankruptcy court had file a motion to dismiss to his bankruptcy. They immediately worked on a solution to this problem which would inform trustee of how Arp would stay in compliance with his Chapter 13 plan. As a result, Wells because aware of the serious injuries especially due to the traumatic brain injures that Arp has suffered as a result of the car crash. In order for Arp to successfully complete his Chapter 13 plan, Wells sent a Response to the Motion to Discuss informing the Trustee that on October 5, 2010 Arp had been car accident where he received significant brain injuries that resulted in short term memory loss. Wells further noted that no doubt this was the cause of the sporadic payment that prompted the payment problem. Wells include a Declaration of Benjamin

Arp with a simple clear explanation by Arp of the car accident in which was “not of his fault.”. CP 91. Wells further noted to the Trustee that Arp had just owed $2,875 on his Chapter 13 plan in which he had already paid $154,336 and so respectfully requested that the debtor pay off the balance owning on his plan. CP 91-92. This exchange between Wells and the bankruptcy trustee clearly informed the trustee that 15 months before Arp was involved in car accident not of his fault and this information was received by a trustee who managed a large number of bankruptcy files with a very large number of assets. The trustee would easily understand that such an accident could be cause of action that could result in a future personal injury lawsuit. It is disingenuous for the party responsible for the accident to claim that information the trustee received did not indicate to him a cause of action.

The resolution that Wells suggested to the bankruptcy trustee was that Arp’s sister was willing to be of assistance so Arp could pay off the amount still owed in full. That resolution was accepted by the bankruptcy trustee and later was a factor that allow Arp to complete his Chapter 13 plan. CP 91-91. There was no concealing of the car accident from the bankruptcy trustee and the disclosure just described is in compliance with the wording and intent of the Conformation Order that controlled Arp’s Chapter 13. To make the claim that Arp in his interactions of Well in

responding to the Motion to Dismiss was part of a concealment is ludicrous and question the credibility of Wells as Arp's bankruptcy attorney. Wells in his interaction with Arp and his Response to the Motion To Dismiss would in no way participate in or risk his reputation in any attempt by Arp to concealment the car accident. The fundamental error of maintaining that Arp had not informed the trustee as required by the language of the confirmation order is further evident in reviewing the exact language of that order.

The portions of the confirmation order relevant to Arp's informing the bankruptcy of the car accident are these provisions:

> 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, CP 35, 85, Appendix.1.**

The above description of the actions of the plaintiff as seen in his response which Arp and Wells prepared and filed as a Response to Motion to Dismiss is clearly sending change in circumstance information to the

Trustee. It is very important to read the provisions asking if there is any method specific for "shall inform the Trustee" that is required in informing the trustee. The text specifies "the debtor shall inform the Trustee" and any reading of that phrase demonstrates no means of informing the trustee are required whether any possible means or method of using documents are required or excluded whether that be a simple letter, response to a motion, filing of an affidavit or other means; no doubt none specified here or elsewhere in the Confirmation. To maintain otherwise is incorrect, a misrepresentation and a false claim and includes the claims on this by Arp action asserted by Sierra. The assertion that the trustee was no given proper disclosure of the change in circumstances from Arp because it was contained in the Response to Dismiss Motion and therefore "insufficient" or an inadequate method to respond clearly contradicts the actual wording of the confirmation order. In case it is not seen indisputably, in no way does the confirmation order say that a Response to any motion from the Trustee is not allow as a method to "inform the Trustee.' This fundamental error has been repeated and unfortunately believed and taken for fact by the trial courts and appeals court.

2) The court proceedings unfairly applied the doctrine of judicial estoppel in a manner that unjustly harmed Arp in allowing the actions of Sierra to subvert and utilized the court to escape responsibility for the injuries the Arp received from Riley recklessly operating a vehicle and causing a dangerous accident.

The injuries were suffered by Arp due to Riley recklessly operating a vehicle and causing a dangerous accident. Sierra subverted and utilized the court to escape responsibility for the injuries the Arp. Sierra

manipulated and misused the court of Washington to harm not just the integrity of the courts themselves and Arp but damage the right of the public to get compensation for injuries not of their fault that is caused by others in the operation of vehicles on the road within Washington. This court proceedings results in manifest injustice.

3) The Appeal and Trial courts in their misplaced efforts to protect the courts falsely accused Arp of negative motives and fraudulent intentions and the equivalent of deception and specifically claiming Arp in overturning judicial estoppel would damage the integrity of the judicial process and allow debtors to use the bankruptcy process wrongly

. The Appeals Court errored in affirming a false and accusatory conclusion in Arp II that if the trial court "refused to apply judicial estoppel under these facts, it would suggest to debtors that they could disregard bankruptcy court orders without consequence." Arp II.

The Fourteenth Amendment in its Due Process Clause describe a legal obligation of all states. Due process requires fairness in the methods used to deprive a person of life, liberty or property. The conclusion of the Appeals Court failed to apply due process and is manifest injustice.

4) The Appeals Court mistakenly concluded that Arp's action "would impair the integrity of the bankruptcy court and disrupt a bankruptcy system premised on the idea that honest but unfortunate debtors disclose all their assets in exchange for a discharge of debt."

Arp in no way disregarded the requirements in his confirmation order from the bankruptcy court. Arp in fact honestly disclosed all his assets and to conclude otherwise harms the integrity of the judicial process, harms the right of the public to gain compensation in the court of Washington and allows an insurance company to escape their responsibilities and obligations in issuing insurance within Washington. This conclusion is manifest injustice.

5) The Court of Appeals Decision Errors in Applying Judicial Estoppel Minimizing Arp's Compliance with the Confirmation Order Requirements. As Such the Decision Relies on False Assumptions and Speculation That Harms Arp.

On remand from *Arp* l[7], Arp retained a Chapter 13 bankruptcy expert in the Western District of Washington, Kathleen Shoemaker. CP 101-136. Arp submitted Ms. Shoemaker's Declaration in support of Arp's Motion for Partial Summary Judgment and in Opposition to Sierra's Motion for Summary Judgment. *Id.*

Shoemaker has practiced bankruptcy law in Fircrest, Seattle and Tacoma for 19 years, appearing as attorney of record in nearly 390

[7] *Arp v. Riley*, 192 Wn. App. 85, 366 P,3d 946 (2015) (Arp l)

Chapter 13 bankruptcies in the United States Bankruptcy Court for the Western District of Washington. CP 48, 102, 486.

From 2004 to 2009, Shoemaker was employed as a Staff Attorney by David M. Howe, the Chapter 13 Trustee in Tacoma. *Id* In her capacity as Staff Attorney for the Chapter 13 Trustee, she reviewed Chapter 13 plans for objection, advised the Chapter 13 Trustee on legal issues related to the office's administration of Chapter 13 cases, and regularly appeared before the Bankruptcy Court representing the Chapter 13 Trustee. CP 102, 486. There were 8,512 Chapter 13 cases filed in the years she worked for the Chapter 13 Trustee in Tacoma. CP 102, 111-113, 486.

She represented the Chapter 13 Trustee in a number of Local Bankruptcy Rules Committee meetings for the Western District of Washington. CP 103, 486. The Seattle and Tacoma offices were particularly close and consistent in their practices and administration of the Chapter 13 Bankruptcy Rules. *Id*. Her expertise in knowing what was decided by the Trustees is substantial and very relevant to this case.

In her practice as the attorney for the Trustee, and in her practice since, the use of "change of circumstances" in the Court's confirmation order of 2009 was controlled by *Anderson*[8]*;* the debtor's duty to disclose a post confirmation "change in circumstance" concerned a "substantial

[8] *In re Anderson*, 21 F.3d 355, 358 (9th Cir. 1994). 11 U.S.C. §1325(b)(1)(b).

change in the debtor's ability to pay all projected disposable income as calculated at the time of confirmation". CP 48, 49, 104, 486.

Since Arp did not incur any lost wages due to the accident that were not covered under his work benefits, he did not have a change in his or ability to pay nor had his income changed during the pendency of the his Chapter 13. CP 48- 50, 104, 486. Therefore, there was no "change of circumstances" pursuant to *Anderson. Id.*

Per the confirmation order, Arp's post-confirmation auto accident, that had uncertain and unknown value sometime in the future, was vested in Mr. Arp, i.e., he owned this asset free of creditors. In Shoemaker's practice, and as staff attorney for the trustee for in the Chapter 13 Bankruptcy Court, an auto accident in and of itself was not a "change of circumstances" under the 2009 confirmation order. CP 52, 105, 486.

In 2014, Shoemaker served on a Chapter 13 Subcommittee for the Local Bankruptcy Rules Committee for the Western District of Washington evaluating potential changes to the Court's local rules concerning Chapter 13 procedures. CP 106, 486. In December 2014, amendments to the Local Rules and Local Forms took effect and some significant amendments to the Court's order confirming plan and the Chapter 13 form plan occurred. CP 53, 106, 486. Those amendments

concerned disclosures expected of a debtor and the effect of vesting of property of a debtor or property of the estate at confirmation. *Id.*

The new form 13 plan quite unlike Arp's provides that any claim acquired by the debtor post-petition shall vest in the Trustee and be property of the estate. The debtor shall promptly inform the Trustee if the debtor becomes entitled to receive a distribution of money or other property unless the plan elsewhere specifically provides for the debtor to retain the money or property new income or property. CP 106-107, 131, 486. This significant changes in Chapter 13 confirmation form have been poorly understood and are central to the errors in judgment in the Arp II opinion

Sierra also submitted the deposition testimony of Ryan Ko, BECU's CR 30(b)(6) designee. CP 451-467. Mr. Ko's testimony relied on by Arp is presented below.[9]

Mr. Ko testified BECU became aware of Arp's auto accident in March 2016. CP 456. (P. 20, L.23-25). CP 490. That is not surprising given the Trustee had handled the auto accident and the Trustee had not requested Arp amend his schedules. Mr. Ko believed during time of Mr Arp's bankruptcy creditor BECU would not have filed a motion in

[9] Mr. Ko's deposition was submitted as a minuscript and specific references are added.

response to Mr. Arp's personal injury claim. CP 465. (P.55, L.19-24). CP 491. Mr. Ko has never brought a motion to modify a plan involving a personal injury claim after plan confirmation in a Chapter 13. proceeding at any time Mr. Ko worked at BECU. CP 463. (P.49, L.15-19). CP 491

While a bankruptcy court has discretion to include provisions in the order confirming the plan, requiring a debtor to amend a schedule of assets to disclose a newly acquired post-confirmation property interest, the bankruptcy court's order in Arp's case did not. The plain language of the confirmation order did not require Arp to amend his schedule of assets. CP 48, 85.

In fact, the plain language only required that Arp 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. CP 35, 85.

Arp informed the Trustee of his injury, although it was late and not right at the time of the car accident, and he did not use the specific word "claim" in his response. As cited, Arp I introduced a high standard of reporting as Arp's injury did not affect Arp's ability to fund his plan. Arp I also errored in not understand that the Trustees would be the one having

the responsibility and authority to decide whether amending the Schedule was needed. The trustee did not make such a decision. The plain language of the confirmation order did not require an electronic schedule amendment. The trustee could have but chose not. Any claim that the trustee in Arp's care acted improperly is unwarranted.

The plain language of the confirmation order in Arp's bankruptcy required that he notify the trustee. Arp informed the trustee of the accident that wasn't his fault, but the Trustee did not ask Arp for any further information. Per Ms. Shoemaker, the late notice and notice on pleading paper in response to a motion to dismiss, was sufficient and timely.

The bankruptcy court did not accept an inconsistent opposition. As argued above, *Arp II* overlooked Arp's main argument that the confirmation order did not impose a duty to amend his case schedules and his disclosure obligation was adequate. Since the confirmation order did not order Arp to amend his schedule of assets, *Johnson*[10] supports that the bankruptcy court did not accept an inconsistent position.

5) CONCLUSION

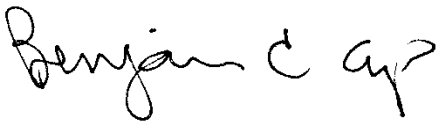
[10] *Johnson v. Si-Cor*

The opinion in Arp I and Arp 2 based on the decision in the trial courts promoted a fundamental error and harms the Plaintiff and would establish a precedent that affect others future litigants in Washington State courts and the public which damages the judicial system and denies due process.

The Supreme Court should accept for the reasons indicated herein. RAP 13.4(b). The court should deny the Appeals Court judgement in affirming judicial estoppel and its conclusions that Arp failed to disclose his personal injury claim, that the bankruptcy court accepted Arp's inconsistent position and that Arp benefited as a result. This further shows the application of judicial estoppel is not warranted.

DATED this 7th day of January, 2019.

Respectfully submitted



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APPENDIX

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. 76935-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 5, 2018

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). Arp sued Sierra for damages caused by a motor vehicle accident. Sierra asserted the affirmative defense of judicial estoppel, claiming that Arp was barred from asserting his claim because he did not disclose it in his Chapter 13 bankruptcy proceedings. Arp previously appealed this matter in Arp v. Riley,[1] which this court remanded for additional findings about this issue.

[1] 192 Wn. App. 85, 366 P.3d 946 (2015) (Arp I).

On remand, the trial court found that the elements of judicial estoppel were satisfied because Arp asserted an inconsistent position when he did not disclose his personal injury claim to the bankruptcy court, the trustee, or his creditors, and then sued Sierra after the bankruptcy court discharged his debts. Arp also benefited from his nondisclosure because the bankruptcy court discharged a portion of his debts and one of his creditors testified that it would have taken additional action if Arp had disclosed his claim. The trial court did not abuse its discretion by applying judicial estoppel and finding that its application was necessary to protect the integrity of the judicial system based on the factors listed above and because Arp's disclosure was not inadvertent. We affirm.

FACTS

In July 2008, Arp filed a petition for voluntary bankruptcy under Chapter 13 in the United States Bankruptcy Court for the Western District of Washington. In December 2009, the bankruptcy court confirmed Arp's Chapter 13 plan. In the confirmation order, the bankruptcy court imposed explicit disclosure and reporting requirements on Arp:

> 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.

In October 2010, after confirmation of his Chapter 13 plan but before he received a discharge, Arp claims that he was in a motor vehicle accident with Riley. Riley was driving in the course of his employment with Sierra Construction Company Inc. Arp sent a demand and settlement letter about his claim to Riley in March 2011. The letter stated that Arp was seeking compensation for his insurance deductible, loss of use payment, and would be seeking compensation for medical damages. Arp did not disclose to the trustee, bankruptcy court, or his creditors that he had any claim against any party based on the incident.

Arp stopped making plan payments in July 2011. The trustee moved to dismiss Arp's bankruptcy in November 2011. In January 2012, Arp filed a response in opposition to the trustee's motion to dismiss, stating, in relevant part,

> [Arp] was involved in an automobile accident on October 5, 2010. The accident was serious enough that [he] 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.
>
> . . . [T]he 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 will be able to complete his Chapter 13 plan with one payment.

The trustee struck its motion to dismiss. In March 2012, the trustee submitted a certificate of completion; the trustee stated that Arp completed all payments due under the Chapter 13 confirmed plan and recommended that the bankruptcy court grant Arp a discharge. The bankruptcy court entered an order discharging over $113,000 of Arp's unsecured debts. In April 2012, the trustee filed a final report and account, stating that Arp's bankruptcy estate had been fully administered.

In November 2012, Arp filed this lawsuit against Riley and, in July 2013, filed an amended complaint adding Sierra. Among other damages, the complaint seeks compensation for "[p]ast, present and future lost wages." In Sierra's answer, it asserted the affirmative defenses of judicial estoppel and lack of standing. The lower court granted summary judgment on both grounds.

Arp appealed the trial court's judgment to this court. In Arp I, this court reversed the trial court's summary judgment.[2] It stated that the bankruptcy court's confirmation order required that Arp disclose his personal injury claim, which Arp did not do.[3] But it held that the record did not establish by undisputed facts all of the elements of judicial estoppel because it did not show that the trial court considered whether the bankruptcy court accepted any inconsistent claim

[2] Arp I, 192 Wn. App. at 101.
[3] Arp I, 192 Wn. App. at 101.

Arp made or whether Arp benefited from making any inconsistent claim.[4] And the record did not establish that the trial court "exercised individualized discretion" to decide that permitting Arp to pursue his claim would "affront the integrity of the judicial process."[5]

Our Supreme Court denied Sierra's petition for review and the matter was remanded to the trial court. On remand, the parties conducted additional discovery to address the unresolved factual issues noted in Arp I. Arp then filed a motion for partial summary judgment to strike Sierra's affirmative defense of judicial estoppel. Sierra renewed its motion for summary judgment, asserting judicial estoppel barred Arp's claim. The trial court denied Arp's motion and granted Sierra's motion for summary judgment. Arp filed a motion for reconsideration, which the trial court denied. Arp appeals the trial court's summary judgment order.

STANDARD OF REVIEW

This court reviews a trial court's grant of summary judgment de novo.[6] A reviewing court affirms summary judgment only when the evidence presented demonstrates no genuine issue of material fact exists and the moving party is

[4] Arp I, 192 Wn. App. at 100-01.
[5] Arp I, 192 Wn. App. at 101.
[6] 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).

entitled to judgment as a matter of law.[7] It considers all facts and reasonable inferences in the light most favorable to the nonmoving party.[8]

This court reviews a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion.[9] "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds."[10]

ANALYSIS

Elements of Judicial Estoppel

"Judicial estoppel 'precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.' It is intended to protect the integrity of the courts but is not designed to protect litigants."[11] Courts examine three factors to determine whether judicial estoppel applies: (1) whether a party asserts a position inconsistent with an earlier one, (2) whether acceptance of the position would create the perception that a party misled a court in either proceeding, and (3) whether the party asserting the inconsistent position would receive an unfair advantage or impose an unfair detriment.[12] But these factors are not an "exhaustive formula."[13]

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[7] Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).
[8] Steinbach, 98 Wn.2d at 437.
[9] Arp I, 192 Wn. App. at 91.
[10] Harris v. Fortin, 183 Wn. App. 522, 527, 333 P.3d 556 (2014).
[11] Arp I, 192 Wn. App. at 91 (internal quotation marks omitted) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)).
[12] Arp I, 192 Wn. App. at 92.
[13] Arp I, 192 Wn. App. at 92.

"[C]ourts 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."[14]

Judicial estoppel can apply in the bankruptcy context when the debtor does not disclose a cause of action in his bankruptcy proceedings that he later brings in state court.[15] Under these circumstances, the debtor asserts two inconsistent positions.[16]

Law of the Case from Arp I

First, Arp contends that in Arp I, this court did not hold that he took an inconsistent position in the bankruptcy court and establish the law of the case that it must now follow. We agree.

The law of the case doctrine "ordinarily precludes redeciding the same legal issues in a subsequent appeal" of the same claim.[17] A reviewing court will not consider the same legal issues if there is no "'substantial change in the evidence at a second determination of the cause.'"[18] But a court should

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[14] Arp I, 192 Wn. App. at 92.
[15] Arp I, 192 Wn. App. at 92.
[16] Arp I, 192 Wn. App. at 92.
[17] Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988).
[18] Folsom, 111 Wn.2d at 263 (quoting Adamson v. Traylor, 66 Wn.2d 338, 339, 402 P.2d 499 (1965)).

reconsider an identical legal issue if the prior appeal is clearly erroneous and application of the law of the case doctrine would result in manifest injustice.[19]

In Arp I, this court decided that the record did 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."[20] It also stated, "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."[21]

Arp asserts that the language "for purposes of this opinion, we assume that Arp has taken an inconsistent position" means this statement is not a holding and is not the law of the case. Sierra responds that this court did hold that the confirmation order required that Arp disclose his personal injury claim and his purported disclosure was insufficient. Thus, by necessity, this court's conclusion established as the law of the case that he took an inconsistent position.

Sierra properly asserts that it is the law of the case that the confirmation order required Arp to disclose his claim and he did not do so. But these conclusions do not necessarily establish the first element of judicial estoppel—

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[19] Folsom, 111 Wn.2d at 264.
[20] Arp I, 192 Wn. App. at 100.
[21] Arp I, 192 Wn. App. at 99.

that a party asserted a position inconsistent with an earlier one. And, as stated above, in Arp I, this court remanded for additional findings, in part, based on its express statement that the record did not show that the trial court considered whether the bankruptcy court accepted an inconsistent position. Whether Arp asserted an inconsistent position is not the law of this case.

The Bankruptcy Court Accepted Arp's Inconsistent Position

Arp next challenges the trial court's conclusion that the bankruptcy court accepted his inconsistent position. We agree with the trial court.

Arp appears to assert that because the trustee did not ask to modify his asset schedules, the bankruptcy court did not recognize his personal injury claim as an asset subject to the Chapter 13 proceedings. But Henry Hildebrand III, a Chapter 13 trustee of 34 years, testified that Chapter 13 trustees rely on a debtor to fully and honestly disclose all assets, including postconfirmation causes of action. Here, the trustee submitted a certificate of completion to the bankruptcy court, stating that Arp had completed all his payments due under his Chapter 13 plan. And we held in Arp I that Arp did not properly disclose his claim by including it in his response to the trustee's motion to dismiss.

To show that the bankruptcy court, in deciding to discharge Arp's debts, accepted Arp's inconsistent position, Sierra correctly notes that Washington courts and the Ninth Circuit Court of Appeals recognize a bankruptcy discharge

as sufficient acceptance of the debtor's representations about debts for purposes of judicial estoppel.[22] Sierra also relies on Kunica v. St. Jean Financial, Inc.,[23] in which the bankruptcy court adopted the debtor's inconsistent position when it dismissed the case based on a motion by the trustee and the debtor's stated position.

Arp responds that finding a bankruptcy discharge sufficient acceptance of the debtor's representations about debts is inconsistent with Johnson v. Si-Cor, Inc.[24] Arp relies on this court's summation of Johnson in Arp I. This court explained that because Chapter 13 did not require that Johnson disclose or schedule his postconfirmation cause of action, the bankruptcy court did not accept his position that no claim was available to his creditors.[25] But, unlike the situation in Johnson, this court held in Arp I that the confirmation order, not Chapter 13, required Arp to disclose his claim, which he did not do. So Johnson does not support Arp's position.

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[22] Fortin, 183 Wn. App. at 525 (stating that because Harris misrepresented to the bankruptcy court that the promissory note at issue was uncollectible and had no value, the bankruptcy court implicitly accepted Harris's position when it closed his bankruptcy as a no-asset case); Hamilton, 270 F.3d at 784 (holding "Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated").

[23] 233 B.R. 46, 59 (S.D.N.Y. 1999).

[24] 107 Wn. App. 902, 28 P.3d 832 (2001).

[25] Arp I, 192 Wn. App. at 97.

Arp also claims that the cases that Sierra relies on are misleading. He attempts to distinguish them from his case on the basis that they involve either prepetition nondisclosure, Chapter 7 no-asset discharges, or distinct fact patterns based on the language of the Chapter 13 confirmation orders. But Arp does not explain why these differences affect application of the rule to his case. Generally, this court will not consider arguments a party does not support with pertinent authority, references to the record, or meaningful analysis.[26] Because Arp does not provide meaningful analysis to support his argument, we decline to consider it.

We agree with the trial court that Arp took an inconsistent position; Arp did not properly disclose his claim to the trustee, and based on the trustee's account of Arp's assets, the bankruptcy court discharged his debts, thereby accepting that he had no more assets to disclose.

Arp's Nondisclosure Benefited Him

Arp also claims that the trial court erred in deciding that his nondisclosure impacted the actions of his creditors and benefited him. We disagree.

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[26] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); State v. Camarillo, 54 Wn. App. 821, 829, 776 P.2d 176 (1989) (no references to the record); RAP 10.3(a).

First, Arp relies on Gosney v. Fireman's Fund Insurance Co.[27] for the proposition that judicial estoppel requires a finding that his disclosure would have changed the outcome of the bankruptcy. In Arp I, this court remanded, in part, because the record did not show that Arp benefited from his nondisclosure.[28] This court stated, "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."[29]

On remand, Sierra showed how Arp's nondisclosure impacted at least one creditor with testimony from Ryan Ko, the bankruptcy and foreclosure manager for Boeing Employees Credit Union (BECU). Ko testified that BECU would have taken additional action if it had been made aware of additional assets. He stated, "BECU was negatively impacted because we were not given a choice or an opportunity to take action." Ko acknowledged that a year before his deposition an attorney called him and asked "if BECU would have taken action had [it] known of a personal injury claim." Ko responded that BECU would not have filed a motion to modify the asset schedule.

Arp also relies on Ko's testimony that since working at BECU, Ko had never asked the bankruptcy court to modify a plan involving a personal injury

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[27] 3 Wn. App. 2d 828, 884, 419 P.3d 447 (2018), review denied, No. 96029-1 (Wash. Oct. 3, 2018).

[28] Arp I, 192 Wn. App. at 100.

[29] Arp I, 192 Wn. App. at 100.

claim after plan confirmation in a Chapter 13 proceeding. Ko further stated that BECU had never moved to modify a plan in a Chapter 13 bankruptcy involving a postpetition personal injury claim. But Ko also stated that he was unsure "if other personal injury claims have been brought to [his] attention." And he testified that BECU bases the amount it seeks to collect in bankruptcy on the debtor's asset disclosures and prefers to recover as much debt as possible. Arp's nondisclosure denied his creditors, including BECU, the opportunity to decide whether to attempt to recover the money that he owed them. For example, Arp repaid only $3,195.70 of the $22,685.46 in credit line debt and $708.81 of the $5,031.65 in credit card debt that he owed BECU. Ko's testimony supports the trial court's conclusion that Arp's nondisclosure impacted the actions of at least one of his creditors. And, consistent with Gosney, it provides evidence that the bankruptcy court may have changed the relief that it provided.

Second, Arp contends that he did not benefit from his nondisclosure. He does not appear to contest that discharge of debt provides a benefit for purposes of judicial estoppel.[30] "'Courts may generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy

[30] McFarling v. Evaneski, 141 Wn. App. 400, 404, 171 P.3d 497 (2007) (holding McFarling "gained a benefit at the expense of his creditors when he received a 'no asset' discharge of his debts" after he misled the bankruptcy court about his assets).

proceedings and then later 'pursue the claims after the bankruptcy discharge.'"[31] Based on Arp's initial disclosures to the bankruptcy court, he received a discharge of about $113,000 of unsecured debts. But Arp asserts that if he had disclosed his claim and BECU had requested amendment of his asset schedules, BECU's entitlement would have been limited to the portion of the personal injury claim that represented an income substitute. To support this proposition, Arp relies on In re Burgie,[32] In re Hall,[33] and In re Carlson.[34]

Burgie, however, does not support Arp's claim that personal injury settlement proceeds are not income or an income substitute. The Burgie court stated, "Only regular income and substitutes therefor can be counted in the determination of disposable income for the purposes of the chapter 13 test. . . . [And] personal injury settlement proceeds are disposable income to the extent that they are not reasonably necessary for the support of the debtors."[35] Further, Hall does not assist Arp because it considered whether social security benefits are income that may be subject to a debtor's Chapter 13 plan.[36] And Carlson involves an unpublished bankruptcy court order that we do not find

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[31] McFarling, 141 Wn. App. at 404 (internal quotation marks omitted) (quoting Arkison, 160 Wn.2d at 539).

[32] 239 B.R. 406 (B.A.P. 9th Cir. 1999).

[33] 442 B.R. 754 (Bankr. D. Idaho 2010).

[34] 650 F. App'x 307 (9th Cir. 2016).

[35] Burgie, 239 B.R. at 410-11 (citing In re Claude, 206 B.R. 374 (Bankr. W.D. Pa. 1997)).

[36] Hall, 442 B.R. at 756-57.

persuasive. The trial court did not err in determining that Arp's nondisclosure benefited him.

Application of Judicial Estoppel

Last, Arp asserts that the trial court abused its discretion by applying judicial estoppel because its holding does not protect the integrity of the judicial process. Again, we disagree.

Arp asserts that "[e]quity cannot tolerate the result in this case" because of his arguments addressed above and the fact that he suffered severe and permanent damage as the result of Sierra's negligence. But, as we held, the confirmation order required that Arp disclose his claim, he did not do so, he asserted an inconsistent position in the bankruptcy proceedings, and he benefited from his nondisclosure.

In addition, substantial evidence supports the trial court's finding that his nondisclosure was not inadvertent. Courts may decide not to apply judicial estoppel in cases of simple error or inadvertence.[37] Failure to list an asset is inadvertent only when the debtor lacks knowledge of the undisclosed claim or has no motive to conceal it.[38] The trial court reasoned that Arp understood he had a potential cause of action against Sierra during bankruptcy because he sent

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[37] Cunningham, 126 Wn. App. at 234.

[38] Urbick v. Spencer Law Firm, LLC, 192 Wn. App. 483, 490-91, 367 P.3d 1103 (2016).

a demand letter to Riley before discharge. And as a Chapter 13 debtor, Arp had a motive to conceal his claim before the bankruptcy court closed his case to prevent his creditors from benefiting from a potential damages award. The trial court noted that even after the considerable litigation in this case, Arp still has not properly disclosed his claim to the bankruptcy court or asked to file an amended schedule. So substantial evidence supports the trial court's finding that Arp's nondisclosure was not inadvertent.

The trial court also reasoned that if it refused to apply judicial estoppel under these facts, it would suggest to debtors that they could disregard bankruptcy court orders without consequence. This "would impair the integrity of the bankruptcy court and disrupt a bankruptcy system premised on the idea that honest but unfortunate debtors disclose all their assets in exchange for a discharge of debt." The trial court did not abuse its discretion with its analysis supporting its exercise of that discretion to apply judicial estoppel to bar Arp's claim.

Appellate Costs

Sierra requests that this court award it appellate costs. Because Sierra is the substantially prevailing party, we award Sierra costs under RAP 14.2.[39]

[39] RAP 14.2 states that generally, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review."

CONCLUSION

Arp I established as the law of this case that the confirmation order required that Arp disclose his personal injury claim and he failed to do so. The trial court did not err in determining that the bankruptcy court accepted that Arp took an inconsistent position and that Arp benefited from his nondisclosure. Nor did the court abuse its discretion by applying judicial estoppel to bar Arp's claim. We affirm.

Leach, J.

WE CONCUR:

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. 76935-9-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Benjamin C. Arp, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.

Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

BENJAMIN C. ARP,

Plaintiff,

v.

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

Defendants.

NO. 12-2-36991-7 KNT

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

~~(Proposed)~~

Following the appellate court's reversal of this Court's prior order granting summary judgment and remand for further factual findings on the defense of judicial estoppel, Plaintiff Benjamin C. Arp ("Arp") filed a Motion for Partial Summary Judgment, in which he moved this Court to strike the affirmative defense of judicial estoppel of Defendants James H. Riley and "Jane Doe" Riley and Sierra Construction Co., Inc., (hereinafter collectively "Defendants") and to find that allowing Arp to pursue his personal injury claim would not affront the integrity of the judicial process.

Defendant Sierra Construction Co., Inc. ("Sierra") filed a Renewed Motion for Summary Judgment requesting the Court bar Arp from continuing the instant lawsuit

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under the doctrine of judicial estoppel. Defendants James H. Riley and "Jane Doe" Riley joined Sierra's Renewed Motion for Summary Judgment.

For the reasons that follow, the Court finds Defendants presented substantial evidence to satisfy the elements of judicial estoppel. Further, the Court has balanced the equities of the case and concluded that the Court should exercise its independent discretion to apply judicial estoppel in this case.

Accordingly, Plaintiff's Motion for Partial Summary Judgment is denied and Defendants' Renewed Motion for Summary Judgment is granted.

FACTUAL AND PROCEDURAL HISTORY

A. Plaintiff's Bankruptcy

The record before this Court establishes certain undisputed material facts. On July 22, 2008, Arp filed a petition for voluntary bankruptcy under Chapter 13 in the U.S. Bankruptcy Court for the Western District of Washington in 08-14588. Arp filed a personal property schedule, Schedule B, which listed his personal property that existed when he filed for bankruptcy. Arp exempted $380,000 of his assets, which had the effect of making those assets unavailable to his creditors. Arp also sought a discharge of $113,347 of his unsecured debts.

On December 10, 2009, Arp's bankruptcy attorney filed a proposed a Chapter 13 plan, in which he proposed to pay $100 a month for three years toward his debts. On December 17, 2009, the bankruptcy court confirmed Arp's Chapter 13 plan. At the same time, the bankruptcy court imposed explicit disclosure and reporting requirements on Arp, by entering an order with the following provisions:

> 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;

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...

6. That 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, ***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;

After confirmation of his Chapter 13 plan, but before he received a discharge, Arp allegedly sustained the personal injury that is the subject of this lawsuit. Arp alleges he was in a motor vehicle accident involving Defendants, which occurred on October 5, 2010. Arp maintains this motor vehicle accident gives him a cause of action against Defendants. It is undisputed that Arp did not disclose to the trustee, bankruptcy court, or his creditors that he had any cause of action against any party based on the alleged accident. Arp did, however, send a demand and settlement letter regarding this case to defendant James Riley on March 25, 2011.

Following his alleged accident, Arp continued to make regular $100 plan payments ~~for approximately 10 months~~. But, after August 2011, Arp ceased making any payments. After Arp failed to make three months of plan payments, the trustee moved to dismiss Arp's bankruptcy.

On January 10, 2012, 15 months after his alleged cause of action accrued, Arp filed a response in opposition to the trustee's motion to dismiss stating:

> [Arp] was involved in an automobile accident on October 5, 2010. The accident was serious enough that Ben Arp received significant brain injuries which has [*sic*] resulted in significant short-term memory loss. No doubt as a result of this accident, [Arp] has "forgotten" to make his Chapter 13 plan payments.

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Arp also included an affidavit stating the accident was not his fault. The trustee withdrew his motion to dismiss and the bankruptcy court subsequently entered an order discharging over $113,000 of Arp's unsecured debts.

B. Initial Proceedings in this Case.

After receiving a discharge of his debts, Arp filed the underlying cause of action against Defendants. Defendants filed a motion for summary judgment based on Arp's failure to disclose this case during his bankruptcy. Specifically, Defendants asserted Arp lacked standing because this case is an undisclosed asset of his bankruptcy estate, and Arp is judicially estopped from bringing any cause of action he failed to disclose during the pendency of his bankruptcy. This Court granted summary judgment on both grounds.

C. Appeal.

Arp filed an appeal of the Court's judgment to the appellate court. After briefing and argument, the appellate court entered its opinion reversing this Court's judgment. The appellate court found that Arp had no duty to disclose the cause of action under the Bankruptcy Code because it arose after confirmation of his bankruptcy plan and 11 U.S.C. § 1327 revested the cause of action in Arp. Arp v. Riley, 192 Wash. App. 85, 98 (2015). For that reason, the appellate court also concluded Arp had standing in the case. Id.

The appellate court, however, found that Arp had a duty to disclose the lawsuit imposed by the order confirming Arp's Chapter 13 plan and that Arp violated that duty for the purposes of judicial estoppel. Id. at 99. But, the appellate court also concluded that: (1) the record did not indicate the trial court considered whether the bankruptcy court accepted Arp's non-disclosure or if Arp benefited from his non-disclosure, and (2) the record did not establish the trial court "exercised individualized discretion" to decide whether to apply judicial estoppel prior to entering its order. Id. at 100. Accordingly, the

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appellate court reversed the summary judgment ruling and ordered the case remanded for further proceedings. Defendants subsequently filed a Petition for Review by the Washington Supreme Court, which was joined by amicus the National Association for Chapter 13 Trustees ("NACTT). Defendants' Petition was denied and the matter remanded to this Court.

D. Remand and Arp's Motion for Partial Summary Judgment.

After remand, Arp filed a Motion for Partial for Summary Judgment on the basis of judicial estoppel. Contrary to the appellate court's opinion and remand mandate, Arp argued his "disclosure" of the automobile injury claim in response to the trustee's motion to dismiss was proper, he did not take inconsistent positions by failing to disclose his personal injury claim, and the accrual of his personal injury claim did not constitute a "change in circumstances" obligating him to disclose the cause of action during bankruptcy. Arp further argued the bankruptcy court did not accept his non-disclosure and that Arp did not benefit from that non-disclosure. Finally, Arp contended that the facts related to his non-disclosure do not favor of the application of judicial estoppel in order to preserve the integrity of the Court. For the reasons set forth below, Arp has failed to establish, as a matter of law, that judicial estoppel does not bar his claim.

E. Renewed Motion for Summary Judgment.

After remand, the parties engaged in additional discovery concerning the defense of judicial estoppel and the factual issues raised by the appellate court. Defendant Sierra filed a Renewed Motion for Summary Judgment on the basis of judicial estoppel, which Defendants James H. Riley and "Jane Doe" Riley joined. Pursuant to the appellate court's opinion, Defendants argued that Arp had, and breached, a duty to disclose this cause of action during bankruptcy. See id. at 99. Defendants further argued the bankruptcy court accepted Arp's non-disclosure and Arp benefited from that non-

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disclosure. Finally, Defendants contended that the facts related to Arp's non-disclosure tip the equities of the case in favor of the application of judicial estoppel in order to preserve the integrity of the Court. As stated below, the Court finds substantial evidence in the record to satisfy the elements of judicial estoppel and concludes it should exercise individualized discretion to apply judicial estoppel in this case. The Court's reasoning follows.

ANALYSIS

The Court's analysis is guided by the law of the case doctrine as applied to the appellate court order in this case. Under the law of the case doctrine, a question of law decided by an appellate court is binding in subsequent stages of the case. Lodis v. Corbis Holdings, Inc., 192 Wash. App. 30, 54 (2015). Although another appellate court may revisit a previously-decided point of law, a trial court has no such discretion and is bound by the appellate court's prior legal conclusions. Id.

As applied here, the appellate court's order resolves an important threshold question of law. According to the appellate court, the record on the initial appeal contains sufficient evidence that Arp had a duty to disclose this cause of action under the terms of the bankruptcy court confirmation order because his alleged injury and the related cause of action constituted a "change in circumstances" within the meaning of that order. Arp, 192 Wash. App. at 99. The appellate court also concluded the original record on appeal contained sufficient evidence to support this Court's prior conclusion that Arp asserted inconsistent statements in failing to disclose this cause of action to the bankruptcy court while separately representing to this Court that Arp had a valid claim against Defendants. Id. In its Renewed Motion, Defendants have presented the same evidence demonstrating Arp's inconsistent positions, and the Court sees no reason to

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draw a different conclusion from that evidence. Consequently, the first element of judicial estoppel is satisfied.

Nevertheless, under the appellate court's order, judicial estoppel should not be applied absent evidence that the bankruptcy court accepted Arp's non-disclosure and that Arp received some benefit from his non-disclosure. Id. at 100.

Washington courts follow the majority rule that a bankruptcy court accepts non-disclosure if the debtor receives a discharge. Harris v. Fortin, 183 Wash. App. 522, 530 (2014); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784 (9th Cir. 2001) ("a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated."). When a discharge is entered, the bankruptcy court implicitly accepts the debtor's position that the creditors were not entitled to assert an interest in any undisclosed property. Id.

In this case, the bankruptcy court accepted Arp's non-disclosure when it granted him a discharge of his debts. This fact alone constitutes substantial evidence that the bankruptcy court implicitly accepted Arp's representation that he had not experienced a "change in circumstances" following confirmation of his Chapter 13 plan. See Harris, 183 Wash. App. at 530.

In addition, Defendants produced the affidavit of Henry Hildebrand, a Chapter 13 Trustee for 34 years and former President of the National Association of Chapter 13 Trustees ("NACTT"), provided the following sworn statements in an affidavit. , Hildebrand stated the following:

- It is Hildebrand's experience that actions to modify a confirmed plan depend upon the information that is provided to the court and to the trustee, including the

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submission of updated schedules of assets by a debtor. (Hildebrand Affidavit, at ¶ 9).

- When a debtor acquires a material post-petition asset, the debtor is required to amend his schedules in order to give notice to the court, creditors, and the Trustee. (Id. at ¶ 13).
- When a debtor discloses a material post-petition asset, any unsecured creditor or the trustee may seek to modify the existing Chapter 13 plan, including adjusting the plan to account for a new asset or post-petition property. (Id. at ¶ 13).
- As a Chapter 13 trustee, Hildebrand relies on the debtor to honestly and fully disclose any significant assets the debtor acquires after confirmation of the Chapter 13 Plan, including personal injury or other causes of action that the debtor may have against third parties. (Id. at ¶ 15.)
- A debtor's failure to reveal the existence of a material post-petition asset withholds valuable information regarding property that a trustee may seek to account for in a confirmed Chapter 13 plan. (Id. at ¶ 16.)
- Trustees and unsecured creditors often request modification of a Chapter 13 plan to account for post-petition assets so that the plan can be adjusted to alter the amounts that will he paid to the debtor's creditors. (Id. at ¶ 17.)
- If a Chapter 13 debtor fails to disclose a material newly acquired asset, including a cause of action, there is a risk that any potential recovery from the lawsuit would avoid the scrutiny of the trustee and thus not be considered before the debtor receives a discharge. (Id. at ¶ 18.)
- By failing to disclose this cause of action, Arp deprived the bankruptcy court, the Chapter 13 trustee, and his unsecured creditors of the ability to seek a modification of his Chapter 13 plan. (Id. at ¶ 19.)

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On this record, the Court finds the undisputed evidence compels the conclusion that the bankruptcy court accepted Arp's non-disclosure at the time it granted him a discharge.

Defendants have also presented substantial evidence that Arp's failure to disclose impacted the actions of his creditors. Defendants presented the testimony of Ryan Ko ("Ko"), the Bankruptcy and Foreclosure Manager for Boeing Employees' Credit Union ("BECU"), a creditor in Arp's bankruptcy was only repaid a fraction of the debt it was owed through Arp's repayment plan. (Ryan Ko Depo., pp. 18:12-19:5). Ko testified BECU seeks to recover as much of a debt as possible, that the credit union bases the amount it seeks to collect in bankruptcy on the debtor's asset disclosures, and that BECU would have taken some additional action in Arp's bankruptcy to obtain additional payments if it was aware that Arp had additional assets. (Id., pp. 19:7-20:14). Ko further testified that BECU was harmed because Arp concealed his claim. (Id., pp. 23:3-24). This direct evidence sufficiently satisfies the Court that one or more of Arp's creditors would have considered requesting an amendment to his Chapter 13 plan if Arp had disclosed his claim in an amended schedule.

The Court must also consider whether Arp received a benefit from his non-disclosure. The appellate court correctly noted that Arp had already paid his creditors approximately $154,000 under his Chapter 13 plan and had less than $3,000 remaining to pay under his plan when he was allegedly injured. However, the Court finds it significant that under the same plan, although Arp paid approximately $157,000 to his creditors, he also received a discharge of over $113,000 of his debts that he did not repay. The Court is satisfied that the receipt of $113,000 in debt forgiveness, notwithstanding the payment of $157,000 in other debts owed, constitutes a substantial and real benefit to Arp. Therefore, the undisputed record establishes each of the elements of judicial estoppel is satisfied.

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Although the elements of judicial estoppel are met, Defendants are not automatically entitled to summary judgment. Judicial estoppel is an equitable doctrine invoked at the court's discretion to prevent impairments to the integrity of the judiciary. Accordingly, the Court must still examine the equities of the case and decide whether the balance of the relevant facts justifies the Court to exercise individual discretion to apply judicial estoppel to bar Arp's claim.

After balancing the equities and the relevant facts of this case, the Court is satisfied that it should exercise its discretion to apply judicial estoppel to bar Arp's claim. Arp filed a voluntary petition for bankruptcy and requested a significant discharge of apparently valid debts. In exchange, Arp voluntarily assumed the obligations of a bankruptcy debtor and consented to the bankruptcy court's jurisdiction over his assets. Arp does not dispute that the bankruptcy court entered a lawful order requiring him to disclose changes in his financial circumstances, which included the acquisition of a right to file a cause of action. The Court agrees with the appellate court's conclusion that Arp's letter in response to the trustee's motion to dismiss did not discharge Arp's duty to disclose. Instead, Arp stayed silent and allowed the bankruptcy court to enter a discharge of his considerable debts without informing the bankruptcy court, trustee, or his creditors that he had an interest in this cause of action.

The Court also takes note of the absence of facts showing Arp's non-disclosure was inadvertent. Failure to disclose an asset is only inadvertent when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. Urbick v. Spencer Law Firm, LLC, 192 Wash. App. 483, 490-91 (2016). Arp clearly understood he had a potential cause of action against Defendants during bankruptcy given that he sent a demand letter prior to the close of his bankruptcy case. In addition Chapter 13 debtors always have a motive to conceal causes of action that arise at

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any time before the bankruptcy closes. Jones v. Bob Evans Farms, Inc., 811 F.3d 1030, 1034 (8th Cir. 2016) (holding debtor had motive to conceal employment discrimination claim where debtor received right to sue letter after confirmation of debtor's Chapter 13 plan). The Court also notes that even after the considerable litigation in this case concerning his failure to disclose this case to the bankruptcy court, to this date, Arp had never informed the bankruptcy court of the existence of this cause of action, much less filed amended schedules as he was required to do. The appellate court's order left no room for any confusion that Arp was required to disclose this case pursuant to the bankruptcy court's confirmation order. Arp has continued to refuse to do so. The Court finds no genuine question of fact that Arp's non-disclosure was not inadvertent.

If the Court were to refuse to apply judicial estoppel under these facts, it would send the message to debtors that the bankruptcy court orders could be disregarded without consequence. Sending that message would impair the integrity of the bankruptcy court and disrupt a bankruptcy system premised on the idea that honest but unfortunate debtors disclose all their assets in exchange for a discharge of debt. As a result, the Court finds it necessary to exercise its discretion to apply judicial estoppel to bar Arp's claim, and grants Defendants' Renewed Motion for Summary Judgment.

CONCLUSION

The Court finds the undisputed facts establish the elements of judicial estoppel are met and that the individual facts of this case suggest that the Court should exercise its discretion to apply judicial estoppel to bar Arp's claim. Wherefore, It is thereby

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ORDERED AND DECREED that Arp's Partial Motion for Summary Judgment is DENIED. Defendants' Renewed Motion for Summary Judgment is GRANTED.

Dated this 5th day of May 2017

The Honorable Elizabeth Berns

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CERTIFICATE OF SERVICE

I certify that I filed and e-served through the Washington State Appellate Court's Portal to all the undersigned counsel a copy of the foregoing PETITION FOR REVIEW this 8th day of January, 2019.

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