92780-4

No. 72613-7-1

COURT OF APPEALS, DIVISION I,
IN 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.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James H. Riley and "Jane Doe" Riley, husband and wife and the marital community composed thereof; and Sierra Construction Co., Inc., ("Sierra"), ask this Court to accept review of the Court of Appeals' decision terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on December 28, 2015. A copy of that opinion is in the Appendix at pages A-1 through A-17.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in failing to conclude that a person seeking the protection of bankruptcy had a duty under the Bankruptcy Code to disclose assets so when that person deliberately refused to disclose the existence of a state lawsuit that would potentially constitute a basis for his creditors being paid, was that person judicially estopped under well-recognized principles of Washington law to pursue such an action by virtue of that person's inequitable behavior?

2. Did the Court of Appeals err in failing to conclude that a debtor in a Chapter 13 proceeding failed to disclose the existence of a state court personal injury action to the bankruptcy court, as required by Chapter 13 so that the debtor lacks standing to bring an action on behalf of the bankruptcy estate when the debtor is pursuing the action for his own, personal benefit?

3. Did the Court of Appeals err in establishing a new, higher evidentiary burden on those asserting a claim of judicial estoppel?

D. STATEMENT OF THE CASE

The Court of Appeals opinion sets forth the facts herein. Op. at 2-3. Certain undisputed facts, however, bear emphasis. On July 22, 2008, Benjamin 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. CP 67, 147-52, 373. At that time, Arp had an ongoing duty to disclose all his personal assets, including any potential personal injury action. 11 U.S.C. § 521.[1] Arp initially attempted to satisfy this duty by filing a personal property schedule, Schedule B, which listed his personal property that existed when he filed for bankruptcy. CP 219-21. Arp also exempted $380,000 of his assets, which had the effect of making those assets unavailable to his creditors. CP 222. Despite these substantial holdings, Arp sought a discharge of $113,347 of his unsecured debts. CP 243.

In an attempt to ensure his eventual debt forgiveness, Arp's bankruptcy attorney filed a proposed Third Amended[2] Chapter 13 plan, in which he proposed to pay $100 a month for three years toward his debts. CP 101. On December 17, 2009, the bankruptcy court confirmed Arp's Third Amended Chapter 13 plan. CP 114, 154, 323, 373, 416. At the

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

[2] Arp proposed two prior Chapter 13 plans, which, upon objections, were not confirmed.

same time, the bankruptcy court imposed explicit disclosure and reporting requirements on Arp.[3]

Arp *conceded* below that the bankruptcy court's confirmation order required him to disclose any "change in circumstances" that could affect his ability to make plan payments or justify an amendment to his plan. RP 6-7. Division I agreed. Op. at 13-15.

While his bankruptcy was still pending, Arp was involved in a motor vehicle accident with Sierra on October 5, 2010. CP 10, 373. Arp's motor vehicle accident and his attendant claim against multiple defendants, including Sierra, are a significant change in his circumstances. CP 9-12. Despite this change in circumstances, it is undisputed that Arp did not disclose to the trustee, the bankruptcy court, or his creditors that he had a cause of action against any party based on the alleged accident. CP 67-112, 157-202, 276-321; RP 12. Arp did, however, send a demand and settlement letter to James Riley on March 25, 2011. CP 264.

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[3] 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. § 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 114, 154, 323, 373, 416 (emphasis supplied).

Following his alleged accident, Arp continued to make regular $100 plan payments for approximately 10 months. CP 205. But, after August 2011, he ceased making any payments. CP 205. After Arp failed to make three months of plan payments, the trustee moved to dismiss Arp's bankruptcy. CP 205, 373.

On January 10, 2012, 15 months after his alleged cause of action accrued and 10 months after he sent his first settlement and demand letter for this case, 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.

CP 116, 208, 264. Arp also included an affidavit stating the accident was not his fault. CP 118, 210. Arp *concedes* he did not disclose that he had a potential third-party action against Sierra or any other defendant. RP 12.[4]

[4] Jeffrey Wells, Arp's bankruptcy counsel, submitted an affidavit below explaining his communications with Arp at the time of the trustee's motion to dismiss. CP 410-14. Wells testified that he contacted Arp regarding Arp's failure to make plan payments and Arp informed Wells of his alleged injury. CP 410-14. Wells further testified that Arp informed him that "no offers of settlement or offers of payment for any potential claim had been received." CP 413. Wells's affidavit notably omitted any reference to the fact that Arp had already sent a demand letter regarding this action. *See* CP 264. The record does not indicate whether Wells intentionally omitted this fact, or whether Arp did not inform Wells that he had sent a demand letter. Either way, it is undisputed neither Arp nor Wells informed the bankruptcy court that Arp had previously sent a demand letter based on the same alleged motor vehicle accident.

The bankruptcy court denied the trustee's motion to dismiss and subsequently entered an order discharging *over $113,000* of Arp's unsecured debts. CP 120, 243, 374, 445. As of the date of this filing, Arp still has not notified the bankruptcy court or trustee of the existence of the underlying case or this appeal. CP 67-112, 157-202, 276-321.

After receiving a discharge of his debts, Arp filed the present action against Sierra and other defendants. CP 374, 445. The trial court dismissed Arp's action on summary judgment, first concluding that Arp had an ongoing duty to disclose his assets throughout his bankruptcy, CP 344-75, 445-46, and rejecting Arp's claim he had properly disclosed this case in his opposition to the trustee's motion to dismiss. CP 375, 445-46. The trial court found Arp's response in opposition to the trustee's motion to dismiss Arp's bankruptcy for failing to make numerous months of plan payments "cannot fairly be considered the type of notice required by the confirmation order." CP 374-75, 445-46. The trial court then ruled that Arp was judicially estopped from maintaining a cause of action he had failed to disclose during bankruptcy, and also held Arp lacked standing as a result of Arp's breach of his ongoing duty to disclose this case. CP 375, 446.

On appeal, the Court of Appeals reversed the trial court's judgment, concluding 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 and determining Arp had standing in the case. Op. at 6-13.[5]

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[6]

Washington law on the application of judicial estoppel where a debtor fails to disclose the existence of a legal claim to a bankruptcy court as an asset and then seeks to pursue such a claim subsequently in a separate state or federal court action, is well-developed.[7] However, the Court of Appeals' opinion is simply wrong in asserting that a Chapter 13 debtor like Arp has no statutory duty to disclose assets to the bankruptcy court, and concluding that Chapter 13 debtors "own" an undisclosed asset, conferring standing upon them to pursue that asset with the untoward

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[5] The court ruled 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. Op. at 13-15. But the 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, nor did the record establish that the bankruptcy court accepted Arp's 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 15-17. Sierra believes the Court of Appeals was correct in its reading of the bankruptcy court's order, although it is wrong about the trial court's decision-making.

[6] This Court is fully familiar with the criteria governing the acceptance of review under RAP 13.4(b).

[7] *See, e.g., Anfinson v. Fed Ex Ground Package System, Inc.*, 174 Wn.2d 851, 864-65, 281 P.3d 289 (2012); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007); *McFarling v. Evaneski*, 141 Wn. App. 400, 171 P.3d 497 (2007); *Kee v. Evergreen Professional Recoveries, Inc.*, 2009 WL 2578982 (W.D. Wash. 2009).

effect of allowing a debtor like Arp to hide a significant asset from the bankruptcy court, trustee, and his creditors.

(1) The Court of Appeals Incorrectly Concluded that Chapter 13 Bankruptcy Debtors Have No Ongoing Statutory Duty to Disclose Assets During the Entirety of their Bankruptcy

The Court of Appeals erroneously concluded that 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 § 1327. Review by this Court is warranted to prevent debtors from concealing assets during bankruptcy and to safeguard the right of Washington creditors to recover claims during bankruptcy through modification of the Chapter 13 plan. Moreover, if the Court of Appeals' decision is permitted to stand, Washington's interpretation of Chapter 13 would be contrary to that of other jurisdictions on these important principles of bankruptcy law. RAP 13.4(b)(4).[8]

(a) Chapter 13 debtors have a statutory duty to disclose post-confirmation assets

The most fundamental mistake in the Court of Appeals' decision is its conclusion that Chapter 13 debtors have no duty to disclose any assets

[8] It is not uncommon for this Court to grant review to correct an erroneous discussion of the law in a published Court of Appeals opinion. For example, in *Washburn v. City of Federal Way,* 178 Wn.2d 732, 310 P.3d 1275 (2013) this Court granted review of a Court of Appeals decision that incorrectly treated the law on the necessity of CR 50 motions to preserve a legal issue for appellate review. This Court then affirmed the Court of Appeals' decision on the merits of the case.

that arise after the confirmation of a Chapter 13 plan.[9] The court based its holding on § 1327, which states that the bankruptcy estate assets "vest" in the debtor upon confirmation. The court concluded that a debtor has no duty to disclose assets vested in the debtor, so the debtor has no duty to disclose any assets that arise after confirmation.

That conclusion is wrong for three reasons. First, § 1306 states that the bankruptcy estate in a Chapter 13 case grows throughout bankruptcy to include all assets the debtor acquires until the bankruptcy closes, which includes post-confirmation assets. At the same time, § 521

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[9] Chapter 13 bankruptcies involve an ongoing reorganization between the debtor, trustee, and creditors. Like Chapter 7 debtors, a bankruptcy estate containing all the debtor's assets is created at the time a Chapter 13 debtor files for bankruptcy. §§ 541, 1306. But, unlike Chapter 7 bankruptcies, a Chapter 13 bankruptcy is not static, and instead grows to include all assets the Chapter 13 debtor acquires during the pendency of the bankruptcy, as set forth in § 1306.

Also, Chapter 13 debtors pay their creditors through confirmation of a Chapter 13 payment plan, which provides that the debtor will pay a certain sum of cash and/or assets monthly to the debtor's creditors for a specific amount of time. Importantly, creditors and the trustee can, and do, object to any plan the debtor proposes that does not require the debtor to pay a sufficient amount toward satisfying the debtor's outstanding debts. The initial Chapter 13 plan represents an informed compromise between the parties to the debtor's bankruptcy whereby the creditors agree to accept a reasonable sum of money or assets in exchange for forgiving some of the debtor's debts, and the debtor agrees to turn over some assets each month in exchange for debt forgiveness.

Chapter 13 bankruptcies are also unique in that the debtor, trustee, and creditors can seek to modify the terms of the Chapter 13 payment plan at any time prior to the final plan payment if the debtor acquires new assets. The bankruptcy code specifically permits the bankruptcy court to modify the terms of the Chapter 13 plan at any time prior to the final plan payment being made. § 1329. The importance of the ability to modify a Chapter 13 plan cannot be overstated because it permits the court to modify the Chapter 13 plan to require the debtor to pay a higher monthly payment or to turn over specific assets if the debtor acquires any new assets during the course of the bankruptcy, including after confirmation of the Chapter 13 plan. § 1329. As a result, any Chapter 13 plan is merely interlocutory in that it may be changed at any time if the debtor's circumstances or assets change during the bankruptcy.

requires debtors to disclose bankruptcy estate assets. Read in tandem, post-confirmation assets are property of the bankruptcy estate, which the debtor must disclose.

Second, the Court of Appeals' opinion incorrectly concluded that § 1327 relieves debtors of the duty to disclose post-confirmation assets because assets statutorily "vest" in the debtor upon confirmation. Under the Court of Appeals' construction, both bankruptcy estates assets existing at confirmation, and assets the debtor acquires after confirmation (such as Arp's cause of action), vest in the debtor. This ruling effectively means that the bankruptcy estate ceases to exist upon confirmation. But this construction is directly contradicted by § 1306, which states that the bankruptcy estate continues after confirmation and encompasses all assets the debtor acquires until the bankruptcy closes, is dismissed, or converted. In other words, under § 1306, and contrary to the court's ruling, the bankruptcy estate does not end at confirmation.

The Court of Appeals' approach also confuses "vesting" of an asset with "ownership" or "title" to the asset. Section 1327 grants debtors only *possession* of bankruptcy estate assets in existence at the time of confirmation; it does not remove those assets from the bankruptcy estate or grant the debtor exclusive title to the assets. *Valley Fed. Sav. Bank v.*

Anderson, 612 N.E.2d 1099, 1104 (Ind. App. 1993); *In re Brensing*, 337 B.R. 376, 383-84 (Bankr. D. Kan. 2006).[10]

Third, the court's ruling is incorrect because it ignores that § 1329 grants the trustee, debtor, and creditors the ability to apply for modification of the debtor's Chapter 13 plan. The *only* reason for a creditor to request modification of the plan is if the debtor has acquired new assets following confirmation and can afford to make higher plan payments, or pay down a larger percentage of unsecured claims. But if the debtor has no post-confirmation duty to disclose assets, creditors would have no information on which to act in seeking modification. Thus, the Court of Appeals' construction of § 1327 renders meaningless § 1329, and also § 1306 after confirmation.

Ultimately, the Court of Appeals rested its decision on *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001) and *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 137

[10] Even if the Court of Appeals were correct and Arp gained title to all bankruptcy estate assets at the time of confirmation, that fact would still not alter the propriety of the trial court's judgment because the cause of action here did not exist at the time of confirmation. Instead, Arp's alleged injury occurred, and his cause of action arose, 10 months *after* his plan was confirmed. As a long line of cases from virtually every jurisdiction have concluded in similar cases, confirmation cannot vest in a debtor a cause of action that does not exist at the time of confirmation. *See, e.g., Barbosa v. Solomon*, 235 F.3d 31, 37 (1st Cir. 2000); *Valley*, 612 N.E.2d at 1104; *In re Reynard*, 250 B.R. 241, 246 (Bankr. E.D. Va. 2000); *In re Holden*, 236 B.R. 156, 161 (Bankr. D. Vt. 1999); *In re Rangel*, 233 B.R. 191, 197-98 (Bankr. D. Mass. 1999); *In re Kolenda*, 212 B.R. 851, 855 (W.D. Mich. 1997); *In re Fisher*, 203 B.R. 958, 964 (N.D. Ill. 1997). The cause of action here never vested in Arp, and vesting does not confer exclusive title. As a result, and because Arp never disclosed the cause of action, the trial court correctly found that Arp lacked standing.

(2005), decisions that are in contrary to decision in virtually every other jurisdiction that hold Chapter 13 debtors have a duty to disclose post-confirmation assets.[11]

The Court of Appeals' decision and the two cases on which it relies are based on an incorrect understanding of Chapter 13 and should be reviewed and reversed by this Court. The erroneous conclusion that Chapter 13 debtors have no post-confirmation duty to disclose actively injures Washington creditors and undermines Washington bankruptcy courts. Creditors are injured because the Court of Appeals' view essentially strips them of their ability to modify the Chapter 13 plan to increase plan payments in the event that debtor acquires additional assets during the plan period. Logically, a creditor cannot move to modify a plan based on the debtor acquiring new assets if the creditor never knew the

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[11] *E.g., In re Flugence*, 738 F.3d 126, 129-30 (5th Cir. 2013); *Kimberlin v. Dollar Gen. Corp.*, 520 Fed. Appx. 312, 315 (6th Cir. 2013); *Rainey v. United Parcel Serv., Inc.*, 466 Fed. Appx. 542, 544 (7th Cir. 2012); *In re Fridley*, 380 B.R. 538, 543 (B.A.P. 9th Cir. 2007); *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344 (11th Cir. 2006); *Martin v. Cash Exp., Inc.*, 60 So. 3d 236, 249 (Ala. 2010); *Harrah v. DSW Inc.*, 852 F. Supp. 2d 900, 903 (N.D. Ohio 2012); *Vaughn v. Metro. Gov't of Nashville & Davidson County*, 3:12-CV-01320, 2014 WL 234200 at *4 (M.D. Tenn. Jan. 22, 2014); *In re Wheeler*, 503 B.R. 694, 697 (Bankr. N.D. Ind. 2013).

In recognizing a debtor's ongoing duty to disclose, courts have applied judicial estoppel when the debtor failed to amend her/her schedule and disclose a lawsuit acquired after confirmation of the Chapter 13 plan. *Kimberlin*, 520 Fed. Appx. at 314-15. *See also, Barbosa,* 235 F.3d at 35-37 (First Circuit); *Flugence*, 738 F.3d at 129-30 (Fifth Circuit); *In re Waldron*, 536 F.3d 1239, 1242-43 (11th Cir. 2008) (Eleventh Circuit). In fact, the First Circuit entertained and rejected the exact same argument made by Arp here: that § 1327 vests *post-confirmation* assets in the debtor at confirmation "free and clear from any claim or interest of any creditor." *Barbosa*, 235 F.3d at 36-37.

assets existed. Creditors will never know such assets exist if debtors have no duty to disclose. If the decision is left to stand, Washington creditors will lose their ability to modify Chapter 13 plans, in contravention of § 1329.

Perversely, while creditors would effectively lose the right to seek plan modification, debtors' right would remain intact. As the debtor would have full knowledge of his or her financial affairs, the debtor could always move to reduce the amount of plan payments if the debtor loses some of his or her ability to pay.[12]

Effectively preventing creditors from modifying Chapter 13 plans is also inconsistent with Ninth Circuit law on this same issue. In *Fridley, supra,* the Ninth Circuit rejected a Chapter 13 debtor's attempt to repay the entire balance of all outstanding plan payments in exchange for an immediate discharge. 380 B.R. at 544. The Ninth Circuit's express reason for denying the debtor's facially reasonable request was that doing so would have robbed the trustee and creditors of the ability modify the Chapter 13 plan to increase the amount of unsecured debt the debtor would be required to repay in light of the debtor's financial good-fortune

[12] This one-sided balance of future risk benefits only the debtor and is contrary to the Bankruptcy Code's fundamental underpinning that the debtor alone accepts the duty to fully and candidly disclose all his or her assets in exchange for a fresh start. *In re Tully*, 818 F.2d 106, 110 (1st Cir. 1987) ("Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.").

following confirmation. *Id.* The court noted the importance of preserving the creditor's ability to modify the plan post-confirmation. *Id.*

As the Ninth Circuit stated, creditors and the trustee always have the ability after confirmation to ask the bankruptcy court to modify the Chapter 13 plan to require the debtor to make additional or higher plan payments. As the Eleventh Circuit in *Waldron* found under similar circumstances, 536 F.3d at 1245,[13] the Court of Appeals' decision that debtor may conceal post-confirmation assets directly undermines the creditor's right to modify the plan if the debtor's financial circumstances change. The Court of Appeals' decision marginalizes this statutory protection for creditors by allowing debtors to side-step plan modification by withholding the financial information creditors would rely upon when proposing plan modification.

This Court should grant review to avoid having an erroneous statement of law on a Chapter 13 debtor's duty to disclose in a published Court of Appeals decision. RAP 13.4(b)(4).

(b) The Court of Appeals decision misstates bankruptcy law on the standing of a debtor to pursue an action on behalf of the bankruptcy estate

[13] *See also, In re Mattson*, 456 B.R. 75, 82 (Bankr. W.D. Wash. 2011) (granting request to modify plan to require higher payments due to debtor's increased financial capacity).

The Court of Appeals concluded Arp had standing to pursue the present action because title in the action vested in him. Op. at 6-13. This was another erroneous description of Chapter 13 law.

Under Chapter 13, "debtors have standing to bring causes of action in their own name on *behalf of the estate.*" *Wilson v. Dollar General Corp.*, 717 F.3d 337, 344 (4th Cir. 2013) (emphasis added). But, the test for whether the debtor is acting on behalf of the estate is whether the debtor has properly disclosed the cause of action in bankruptcy. The logic of this conclusion is clear because a debtor cannot be acting on behalf of the bankruptcy estate to recover on a civil claim if no other party to the bankruptcy knows the case exists. *Cowling v. Rolls Royce Corp.*, 2012 WL 4762143 at *5 (S.D. Ind. 2012) ("Because he has not disclosed the lawsuit, he does not have standing to bring the claims he asserts here."); *Pierce v. Visteon Corp.*, 2013 WL 3225832 at *17 (S.D. Ind. 2013). When a Chapter 13 debtor pursues an undisclosed asset, the debtor is pursuing the claim for his or her *own* benefit because the debtor would not have to share any recovery from an undisclosed claim with his or her creditors. Such a debtor lacks standing. *Id.*

Because this cause of action is property of Arp's bankruptcy estate, Arp only had standing *if he was acting on behalf of the estate.* Arp's pursuit of this lawsuit, however, is for his *own* benefit, not the benefit of

the bankruptcy estate. By not disclosing this case, Arp has not brought this cause of action on behalf of the estate and, therefore, he lacks standing, as the trial court properly concluded.

Review is necessary on this issue to avoid the Court of Appeals' erroneous treatment of the standing issue in its published opinion. RAP 13.4(b)(4).

(2) The Court of Appeals' Decision Is Inconsistent with Decisions Defining the Elements of, and the Evidence Necessary to Support, the Defense of Judicial Estoppel

The Court of Appeals' opinion also misstates and misapplies the law regarding judicial estoppel. In particular, the Court of Appeals' opinion dramatically increases the evidentiary burden a moving party must meet to assert the defense, and contradicts decisions of this Court and the Court of Appeals regarding the types of bankruptcy proceedings that warrant the application of judicial estoppel.

(a) The Court of Appeals' decision creates a new and significantly higher evidentiary standard for judicial estoppel

Although the Court of Appeals found the Bankruptcy Code does not require disclosure of post-confirmation assets, op. at 6-13, that court found the bankruptcy court's confirmation order imposed a post-confirmation duty to disclose, and that that Arp breached this duty by failing to amend his schedules to disclose this case. *Id.* at 13-15.

Nevertheless, the court rejected the trial court's application of judicial estoppel because it ruled the trial court did not consider whether, and the record did not establish, the bankruptcy court accepted Arp's non-disclosure or that Arp received a benefit. *Id.* at 15-17. In finding the record did not prove Arp received a benefit, the court reasoned that Arp had nearly completed his plan,[14] and Sierra did not produce evidence that "any creditor would have considered requesting a plan amendment if Arp had disclosed his claim in an amended schedule" or that "the bankruptcy court would have changed the relief it granted Arp." Op. at 16.

The Court of Appeals' reasoning is flawed and inconsistent with this Court's jurisprudence. First, the decision places new burdens on a defendant to produce evidence that a creditor would have moved to modify a Chapter 13 plan based on an undisclosed asset in order to show the debtor benefited from non-disclosure.[15] Second, the court implied it would need evidence that the bankruptcy court would have changed the relief it granted Arp if it had known of the cause of action. Neither of

[14] The Court of Appeals noted that Arp had $2,875 left to pay on his plan at the time the trustee moved to dismiss. Op. at 16. While true, this overlooks the fact that Arp's plan allowed him to avoid *repaying $113,000 in unsecured debt.* So, although Arp had $2,875 in plan payments remaining, he had well over $115,000 in outstanding unsecured debt remaining at the time of the trustee's motion to dismiss.

[15] Similarly, the Court of Appeals incorrectly concluded that the trial court erred in failing to "exercise[] individualized discretion" when applying judicial estoppel. Op. at 17. The record contained ample evidence establishing the judicial estoppel factors sufficient for the Court to infer the trial court determined judicial estoppel was justified under the fact of this case, especially under an abuse of discretion standard of review.

these evidentiary "requirements" is supported by any prior judicial estoppel decision. Instead, the relevant benefit Arp achieved, and which is supported by the record, is that Arp was able to avoid the possibility that the trustee or a creditor would move the bankruptcy court to modify the plan, or that the bankruptcy court would modify the plan *sua sponte* under § 1329. As the Eighth Circuit recently recognized in these exact circumstances:

> 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.

Jones v. Bob Evans Farms, Inc., ___ F.3d ___, Case No. 15-2068 (8th Cir. Jan. 26, 2016).[16]

It would also be extremely difficult for any party to carry the new evidentiary burden the Court of Appeals imposed. Civil case defendants cannot reasonably be expected to obtain affidavits from bankruptcy creditors or bankruptcy judges opining on what actions they might have

[16] *See also, Wheeler*, 503 B.R. at 697 ("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."); *Flugence*, 738 F.3d at 129-30 ("Whether a particular asset should be available to satisfy creditors is often a contested issue, and the debtor's duty to disclose assets—even where he has a colorable theory for why those assets should be shielded from creditors—allows that issue to be decided as part of the orderly bankruptcy process."); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010) ("The application of judicial estoppel does not require that the nondisclosure must lead to a different result in the bankruptcy proceeding.").

taken in light of a hypothetical disclosure. Imposing this heavy evidentiary burden would restrict the ability of trial courts to exercise discretion to employ judicial estoppel to protect the integrity of the courts. Under the new standard, debtors could literally conceal assets during bankruptcy with the express intention of defrauding their creditors and judicial estoppel could not be applied absent direct proof the bankruptcy court or a creditor would have taken a different and specific action had the fraud not occurred. This is not, and should not become, the law in Washington.

(b) The Court of Appeals' opinion conflicts with this Court's prior decisions regarding the evidence sufficient to satisfy the judicial estoppel element of acceptance

The Court of Appeals' decision also conflicts with this Court's ruling in *Arkison*, regarding judicial acceptance. The appellate court relied heavily on its conclusion that the record lacked evidence that the bankruptcy court accepted Arp's non-disclosure. This analysis is incorrect because, to the extent the bankruptcy court was required to accept the non-disclosure, that element was met through the discharge of over $113,00 of Arp's unsecured debt. In *Harris v. Fortin*, 183 Wn. App. 522, 530, 333 P.3d 556 (2014), Division I, following this Court's *Arkison* decision, noted that the receipt of a discharge in bankruptcy *automatically* constitutes

acceptance for the purposes of judicial estoppel. *Id.* at 530 (emphasis supplied); *see also, Skinner v. Holgate*, 141 Wn. App. 840, 850, 173 P.3d 300 (2007) (finding discharge constitutes acceptance).

Arguably, the most troubling consequence of the Court of Appeals decision is that it effectively ends the availability of judicial estoppel as a defense trial courts may employ to remedy a debtor's intentional manipulation of the bankruptcy process. If Arp's receipt of a bankruptcy discharge of $113,347 of his unsecured debts was not a benefit, it is difficult to imagine a greater benefit that a later court may find to be sufficiently advantageous to the debtor to warrant the application of judicial estoppel. The Court should accept review to clarify the appropriate judicial estoppel factors and the evidence sufficient to establish those standards. RAP 13.4(b)(1-2).

F. CONCLUSION

This Court should accept review for the reasons indicated herein. RAP 13.4(b). The Court should 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.

DATED this 27th day of January, 2016.

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. 72613-7-I DIVISION ONE PUBLISHED OPINION FILED: December 28, 2015

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

FACTS

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

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

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

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

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

STANDARD OF REVIEW

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[9] Harris, 183 Wn. App. at 528.

[10] Ah Quin, 733 F.3d at 271.

[11] Ah Quin, 733 F.3d at 271.

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

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

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

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

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

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

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

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

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

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

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[18] 11 U.S.C. § 1327(c).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[44] 11 U.S.C. § 1322(b)(11).

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

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

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

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

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

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

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

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

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[47] Miller, 137 Wn. App. at 771.

[48] Miller, 137 Wn. App. at 771.

[49] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire, 532 U.S. at 750-51).

[50] Miller, 137 Wn. App. at 771-72.

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

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

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

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

CONCLUSION

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

Leach, J.

WE CONCUR:

Dwyer, J.

Becker, J.

JUDGE MARY E. ROBERTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BENJAMIN C. ARP, Plaintiff, 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, Defendants.	NO. 12-2-36991-7 KNT ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT **Clerk's Action Required**

This matter came before the court on the plaintiff's motion for partial summary judgment as to the defendants' affirmative defenses of judicial estoppel and lack of standing, and the defendants' cross motions for summary judgment of dismissal based on those same affirmative defenses. The court heard oral argument from the parties and considered the following written submissions:

1. Plaintiff's Motion for Partial Summary Judgment;

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2. Declaration of Kathryn Majnarich in Support of Plaintiff's Motion for Partial Summary Judgment;
3. Declaration of Jeffrey B. Wells Regarding Plaintiff Benjamin Arp's Chapter 13 Proceeding;
4. Defendant Sierra Construction Co., Inc.'s 1) Response in Opposition to Plaintiff's Motion for Partial Summary Judgment and 2) Cross Motion for Summary Judgment of Dismissal;
5. Declaration of Gregory Wallace [Dated June 9, 2014];
6. Declaration of Brett M. Wieberg in Support of Defendants Rileys' Response to Plaintiff Motion for Summary Judgment and Cross Motion for Summary Judgment; and
7. Plaintiff's Reply to Defendants' Response to Motion for Partial Summary Judgment.

The facts material to the parties' cross-motions are not disputed:

- On July 22, 2008, Mr. Arp filed a petition for Chapter 13 bankruptcy protection;
- On December 17, 2009 a bankruptcy plan was confirmed; the confirmation order required that Mr. Arp, "inform the Trustee of any change in circumstances, or receipt of additional income," and prohibited him from disposing of property of the estate without court approval;
- On October 5, 2010, Mr. Arp was involved in the accident that underlies this lawsuit;
- On November 17, 2011, the bankruptcy trustee moved to dismiss the bankruptcy case based on Mr. Arp's failure to make plan payments.

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- On January 10, 2012, Mr. Arp filed a response to the trustee's motion to dismiss, which stated that Mr. Arp's failure to make plan payments was related to a brain injury incurred October 5, 2010, in an automobile accident not of his fault.
- On March 26, 2012, the bankruptcy courted granted Mr. Arp a discharge;
- On April 6, 2012, the bankruptcy case was closed.
- On November 14, 2012, this lawsuit was commenced against the Rileys by the filing of the complaint.
- On July 7, 2013, the plaintiff filed his amended complaint, naming Sierra Construction Co., Inc. in addition to the Rileys.
- On April 23, 2014 Sierra filed its amended affirmative defenses, including the affirmative defenses of judicial estoppel and lack of standing.
- On June 9, 2014, the Rileys filed an amended answer, which included the affirmative defenses of judicial estoppel and lack of standing.

The plaintiff's injury claim is properly considered an asset of the bankruptcy estate, as defined in 11 U.S.C. § 1306(a)(1). As such, Mr. Arb had a duty to disclose the post-petition asset in his bankruptcy action. This duty was recognized by the December 17, 2009 confirmation order, which, as stated above, required that Mr. Arp inform the Trustee of such an asset, and prohibited him from disposing of the asset without court approval.

The plaintiff's response to the trustee's November 27, 2011, motion to dismiss, which stated that Mr. Arp's failure to make plan payments was related to a brain injury incurred in an automobile accident not of his fault cannot fairly be considered the type of notice required by

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the confirmation order. The purpose behind the disclosure requirement is to notify the trustee of post-petition assets that should be available to consider during the life of the Chapter 13 plan. This court is persuaded that the "modified estate preservation approach," is the most appropriate, to determine whether the this post-confirmation accident-related claim is an asset of the bankruptcy estate, or whether it revested with Mr. Arp upon confirmation. It remained an asset of the bankruptcy estate and should have been properly disclosed for consideration by the bankruptcy court.

The plaintiff is judicially estopped from pursing his claims in the lawsuit, because of his failure to properly disclose the asset in his bankruptcy proceeding. In addition, this failure means that the claim remains an asset of the bankruptcy estate, and may only be pursued by the Trustee; Mr. Arp lacks standing.

The plaintiff's motion for partial summary judgment is DENIED. The defendants' motions for summary judgment of dismissal are GRANTED. The plaintiff's claims are DISMISSED WITH PREJUDICE.

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JUDGE MARY E. ROBERTS

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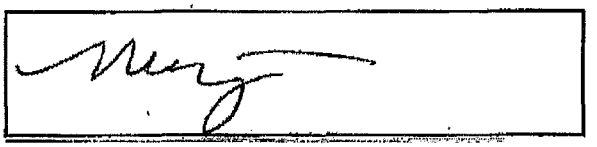
Case Number: 12-2-36991-7
Case Title: ARP VS RILEY ET ANO

Document Title: ORDER ON SUMMARY JUDGMENT

Signed by: Mary Roberts
Date: 8/4/2014 9:00:00 AM



Judge/Commissioner: Mary Roberts

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DECLARATION OF SERVICE

On said day below, I served via email and deposited in the U.S. Mail a true and accurate copy of the Petition for Review filed with the Court of Appeals Cause No. 72613-7-I to the following:

Ruth A. Moen Leonard W. Moen & Associates 947 Powell Avenue SW, Suite 105 Renton, WA 98057-2975	Kenneth W. Masters Shelby R. Frost Lemmel Masters Law Group 241 Madison Avenue North Bainbridge Island, WA 98110
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Clayton G. Kuhn Sandberg Phoenix 600 Washington Avenue 15th Floor St. Louis, MO 63101	Original + 1 Copy via ABC: Court of Appeals, Division I Clerk's Office 600 University Street Seattle, WA 98101-1176

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: January 27, 2016, at Seattle, Washington.

Stephanie Nix-Leighton

Stephanie Nix-Leighton