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COURT OF APPEALS

No. 35028-9-II

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY Chm  
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DEBORAH DEVENY,

Appellant,

v.

COLLETTE HADALLER and JOHN DOE HADALLER, DEBBIE  
SIMONS and JOHN DOE SIMONS, HEALTHY FOUNDATIONS, INC.,  
and LIFE AND GOODNESS, INC.

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. Preliminary Statement

Deborah DeVeny operated a money-losing tanning salon in Winlock for about three years. She claims that at their initial meeting the defendants, who were seeking to rent retail space for a fitness club, agreed to purchase her business for \$35,000 without any review of the business's financial condition and value. When DeVeny and the defendants failed to reach an agreement, DeVeny sued for breach of contract and related torts.

DeVeny failed to disclose in her discovery answers that she had filed a Chapter 7 bankruptcy only two months earlier, that the business assets were part of her bankruptcy estate, and that she had stated in her bankruptcy schedules that the business had no value. When this information surfaced shortly before trial, the defendants moved for summary judgment arguing that the business was not hers but an asset of the bankruptcy estate and that she was judicially estopped from asserting her claims. The trial court granted the motion.

This appeal calls upon the court to decide these questions:

A. Ownership-of-claim (or capacity) issue:

Under the bankruptcy code the filing of a bankruptcy petition creates a bankruptcy estate consisting of all of the debtor's assets. DeVeny scheduled her business as an estate asset with no value but during the pendency of her bankruptcy purported to sell the business for her own benefit. Did DeVeny have authority to sell the business and the business assets?

B. Judicial-estoppel issue:

Judicial estoppel precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking an inconsistent position. DeVeny told the bankruptcy court her business had no value, causing that court to treat her case as a “no-asset” case, but then claimed in this case that her business had vast value for which she had not been paid. Is she estopped from asserting her claim?

While these are the principal issues, DeVeny appears to raise these additional issues:

C. Preservation-of-error issue:

DeVeny claims that the trial court should not have dismissed her case without permitting the trustee to be substituted as the plaintiff or should have stayed her action so she could re-open her bankruptcy proceeding. DeVeny never asked the trial court to take either of those steps. Can DeVeny assign error to a matter she did not raise before the trial court?

D. Attorney-fees issue:

DeVeny claims that two of her legal theories would entitle her to an award of attorney fees if she is the prevailing party. DeVeny did not prevail below and even if this court granted DeVeny all of the relief she seeks in this court, she would not be the prevailing party under those legal theories. Is DeVeny entitled to an award of attorneys fees on appeal?

## II. Statement of the Case

### A. DeVeney operates an unsuccessful tanning salon.

Deborah DeVeney started operating her small business proprietorship, a Winlock, Washington tanning salon called “Tropic Tanz,” in November 1999.<sup>1</sup> The business assets consisted of four tanning beds (either rented or subject to substantial security interests), miscellaneous furniture (much of it rented) and client lists.<sup>2</sup> The business operated on premises rented under an oral month-to-month tenancy with Bill Allegre, the landlord.<sup>3</sup> Ms. DeVeney had no employees, but sublet a portion of the leased premises to Jennifer Serl to operate a beauty salon.<sup>4</sup>

The business was not successful. According to DeVeney’s records, for the year 2002 the business had sales of about \$13,000 and a net loss of over \$10,000.<sup>5</sup> Those business losses and other creditor problems caused Ms. DeVeney and her husband to file a Chapter 7 (liquidation) bankruptcy in April 2003.<sup>6</sup> The bankruptcy schedules included the Tropic Tanz

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<sup>1</sup> CP 189.

<sup>2</sup> CP 128, 189, 152, 151, 149, 283-84, 305.

<sup>3</sup> CP 284, 304.

<sup>4</sup> CP 189-91, 303, 319, 280-81.

<sup>5</sup> CP 164, 198, 229.

<sup>6</sup> CP 104, 227-30, 215, 237.

business assets, principally the tanning beds worth about \$1,000 each that were subject to security interests vastly exceeding their market value.<sup>7</sup> The schedules showed the value of the business as zero.<sup>8</sup> Based on the information in the schedules, the bankruptcy trustee treated the case as a no-asset case. The court discharged the DeVenys' debts on July 22, 2003.<sup>9</sup>

**B. DeVeney offers to sell the salon.**

Meanwhile on June 27, Collette Hadaller was searching in Winlock for retail space for a new Curves for Women fitness center for her corporation, Healthy Foundations.<sup>10</sup> She encountered Bill Allegre who told her that Tropic Tanz, one of his tenants, had unused space available and suggested that she check it out later that day.<sup>11</sup> Hadaller and Debbie Simons (the other shareholder of Healthy Foundations) entered Tropic Tanz to inquire about leasing the unused space next to the salon on behalf of their corporation.<sup>12</sup> DeVeney declined to sublet any space to them but

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<sup>7</sup> CP 110, 128, 260-64.

<sup>8</sup> CP 109, 124, 260.

<sup>9</sup> CP 16, 117, 268.

<sup>10</sup> CP 337.

<sup>11</sup> CP 337.

<sup>12</sup> CP 190; 119-20, 143-44, 337, 367-68.

offered to sell Tropic Tanz and let them take over her lease for \$35,000.<sup>13</sup> According to DeVeney, Hadaller and Simons said “We could do that,” which she contends was an acceptance of her offer.<sup>14</sup> Hadaller and Simons deny that any agreement was reached; rather they requested financial records from DeVeney to assess the value of the business.<sup>15</sup> During the brief meeting DeVeney did not mention that she had filed a bankruptcy petition two months earlier or that she had sworn to the bankruptcy court that the business had a value of zero or that Tropic Tanz had lost over \$10,000 in the previous year.<sup>16</sup>

**C. The defendants sign a lease; the negotiations for the sale of the salon do not progress.**

Later that day, Healthy Foundations, through Hadaller, signed a five-year lease for the entire space with the landlord Bill Allegre. That lease was contingent on DeVeney’s sale of Tropic Tanz.<sup>17</sup> Around July 1 Healthy Foundations moved into the unused portion of the Tropic Tanz space to begin preparing their club space. Healthy Foundations pressed

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<sup>13</sup> CP 144, 120, 337, 368.

<sup>14</sup> CP 190, 169.

<sup>15</sup> CP 120, 144, 337, 368, 382.

<sup>16</sup> CP 120, 144. *See* CP 104, 109, 198.

<sup>17</sup> CP 337-38, 345-47, 284, 288-90.

DeVeny to produce financial records so the negotiations could progress. DeVeny did not produce the records until after July 11.<sup>18</sup>

On July 11, because the negotiations for the sale of Tropic Tanz were not progressing, Healthy Foundations and Allegre voided the June 27, 2003 agreement and entered into a month-to-month lease for the portion of the space in which the Curves fitness center was to be operated.<sup>19</sup> Allegre felt free to do so because DeVeny was behind on her rent and had no written lease.<sup>20</sup>

**D. DeVeny leaves the business for a month; the defendants operate the business during her absence.**

One week later, on July 18 DeVeny abruptly left the Winlock area and coincidentally reported closure of her business to the Department of Revenue.<sup>21</sup> DeVeny claims that before her departure she told Simons, Hadaller and Jennifer Serl (the subtenant who ran a beauty salon on the premises), that she needed to leave the area to take care of her mother, who had a medical emergency.<sup>22</sup> According to DeVeny, she also said that

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<sup>18</sup> CP 338.

<sup>19</sup> CP 338, 349-50, 368, 284-85, 292-94.

<sup>20</sup> CP 285.

<sup>21</sup> CP 311, 282, 300.

<sup>22</sup> CP 311-12, 282.

she would no longer be able to run the business and would not be returning.<sup>23</sup> Simons and Hadaller deny that DeVeny told them anything. Serl did not tell them where DeVeny had gone.<sup>24</sup> In any event, after July 18 DeVeny did not return to the salon or help operate it.<sup>25</sup> Hadaller, Simons and Allegre, the landlord, thought she had abandoned her business. Allegre based his belief on his repeated, unsuccessful attempts to contact DeVeny, her rental delinquency, and his awareness that DeVeny had not paid her utility bills.<sup>26</sup>

Serl showed Hadaller and Simons “how everything worked” at the tanning salon. Hadaller and Simons felt they had to help Serl operate the salon during DeVeny’s absence; otherwise, the business would fail.<sup>27</sup>

When DeVeny departed the salon on July 18, she left behind index cards showing customer information.<sup>28</sup> Simons and Hadaller used the information on the cards during DeVeny’s absence to operate the salon’s

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<sup>23</sup> CP 311-12.

<sup>24</sup> CP 322-23; 338-39, 368-69, 376.

<sup>25</sup> CP 313-15, 338-39, 368-69, 282.

<sup>26</sup> CP 369, 376, 333, 285.

<sup>27</sup> CP 324, 338-39, 368-69, 376.

<sup>28</sup> CP 281, 305-06.

tanning beds to provide tans to those persons who had pre-purchased tans from DeVeny.<sup>29</sup>

Simons and Hadaller learned that their Curves franchise agreement did not permit them to operate a tanning salon in the same corporation as their Curves franchise. At the end of July they formed a new corporation, Life and Goodness, for the tanning business.<sup>30</sup>

On August 4, after the fitness center's grand opening and after DeVeny had stopped coming in to run the tanning salon, Healthy Foundations and Allegre executed an amended lease canceling the July 11 lease and affirming the June 27 lease, but removing the contingency on the sale of Tropic Tanz.<sup>31</sup> Around the same time they discovered that unknown persons had keys to the common entrance to the Curves and Tropic Tanz facilities. To protect their investment in their equipment in their Curves franchise, they changed the locks on the door with the landlord's consent.<sup>32</sup> Because DeVeny was behind on her rent, the

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<sup>29</sup> CP 325-26, 368-70, 375-77.

<sup>30</sup> CP 370-377.

<sup>31</sup> CP 285, 339, 352, 370-71.

<sup>32</sup> CP 369, 376.

landlord removed DeVeny's tanning beds and other furniture from the salon to an offsite storage space.<sup>33</sup>

**E. DeVeny reappears; the sale negotiations fail.**

In mid-August DeVeny reappeared. By that time Hadaller and Simons had become aware from records provided by DeVeny that Tropic Tanz had lost over \$10,000 in 2002; they had also obtained an evaluation showing that the business was worth nothing, or might even be a liability.<sup>34</sup> Hadaller, Simons and DeVeny engaged in further negotiations for the sale of the salon in late August and early September, but failed to reach an agreement on the purchase.<sup>35</sup>

**F. DeVeny sues for breach of contract.**

Having failed to sell her business, DeVeny brought this suit against Simons, Hadaller and both of their corporations in July 2004.<sup>36</sup> In her complaint she claimed that the defendants had breached the contract that allegedly was formed on June 27, 2003, made intentional misrepresentations when stating their intent to buy the salon and in their discussions with Allegre, violated the Washington Uniform Trade Secrets

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<sup>33</sup> CP 369-70, 376-77.

<sup>34</sup> CP 198, 308, 339, 371, 378.

<sup>35</sup> CP 193, 197, 339-41, 354-66, 371, 378.

<sup>36</sup> CP 88-93.

Act by using the client information on the index cards, tortiously interfered with her business relations with her customers and with Allegre, and misappropriated the salon's trade name. DeVeny did not assert a claim for unjust enrichment.<sup>37</sup> She claimed she was entitled to hundreds of thousands of dollars in lost profits and a million dollars in emotional-distress damages.<sup>38</sup>

The defendants answered, denying that there ever was an agreement to purchase Tropic Tanz. The defendants claimed the purported contract was barred by the Statute of Frauds and counterclaimed that DeVeny was liable to them for \$4,612.10 for the value of prepaid tanning packages that the defendants had serviced in DeVeny's absence and for which DeVeny had been previously paid by her customers.<sup>39</sup>

**G. DeVeny fails to disclose her bankruptcy in discovery.**

During discovery, Simons and Hadaller served DeVeny with interrogatories and requests for production inquiring into her finances and previous lawsuits, but DeVeny did not disclose any information or

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<sup>37</sup> CP 88-93.

<sup>38</sup> CP 84, 185, 220, 272; RP 15.

<sup>39</sup> CP 381-84.

documents regarding her bankruptcy.<sup>40</sup> In their first set of interrogatories and requests for production, Simons and Hadaller asked DeVeny to identify her tanning business's financial records. In response, she provided tax records, but no bankruptcy records.<sup>41</sup> In separate sets of interrogatories, the defendants asked DeVeny to identify all lawsuits to which she had been a party. Both times she denied involvement in any lawsuit.<sup>42</sup> The defendants also asked DeVeny to identify all documents regarding the purchase of her business's tanning beds, including any debt owed on the beds. They also asked her to produce all documents relating to the value of the business. Her responses did not include any information regarding bankruptcy.<sup>43</sup>

**H. The truth about the bankruptcy emerges; the defendants move for summary judgment.**

DeVeny's bankruptcy documents surfaced only when her expert economist was deposed on January 23, 2006 – four days before the discovery cutoff.<sup>44</sup> After discovering these documents, the defendants

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<sup>40</sup> CP 233-68.

<sup>41</sup> CP 240.

<sup>42</sup> CP 241, 246.

<sup>43</sup> CP 240, 242, 250-51.

<sup>44</sup> CP 120, 144.

asked for a trial continuance to permit them to bring a motion for summary judgment based on the new information about bankruptcy filing.<sup>45</sup> The trial court granted a continuance and postponed the trial date.<sup>46</sup> The defendants moved for summary judgment based on the new information.<sup>47</sup>

The defendants advanced five arguments in their summary-judgment motion. First, they argued that the automatic bankruptcy stay barred or voided the alleged contract to sell the salon. Second, they argued that DeVeny lacked the capacity to sell the salon because at the time of the formation of the alleged contract the bankruptcy estate, and not DeVeny, controlled the estate's assets, including the salon. Third, they argued that the contract to sell the salon remained an asset of the estate because DeVeny had not amended her schedule to include that contract in her bankruptcy filing. Fourth, the defendants argued that DeVeny was judicially estopped from pursuing her claims because she had asserted in the bankruptcy court that the salon was worth zero dollars and that she had never formed a contract to sell it, yet was making contrary assertions in the superior court. Fifth, they argued that DeVeny's tort claims should be dismissed because the salon's assets, including its trade secrets, trade

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<sup>45</sup> CP 269-79.

<sup>46</sup> CP 204-05.

<sup>47</sup> CP 74-86.

name, and lease, were part of the bankruptcy estate, and thus she did not have standing to assert her claims.<sup>48</sup>

DeVeny's response included a declaration from her trustee in bankruptcy stating that he did "not intend to pursue the contract on behalf of the bankruptcy estate."<sup>49</sup> She did not, however, ask the court to stay the proceedings or attempt to reopen the bankruptcy or move to have the trustee substituted as the plaintiff.<sup>50</sup>

**I. The trial court grants summary judgment; DeVeny appeals.**

The trial court granted the defendants' motion and dismissed DeVeny's claims with prejudice.<sup>51</sup> In its oral ruling, the court stated that the automatic bankruptcy stay made the contract void and that DeVeny's tort claims were also dismissed because they arose from her contract claim.<sup>52</sup>

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<sup>48</sup> CP 74-86.

<sup>49</sup> CP 59-60.

<sup>50</sup> CP 66-73.

<sup>51</sup> CP 2-3.

<sup>52</sup> RP 17-18.

DeVeny moved for reconsideration.<sup>53</sup> The court denied the motion, finding that the motion presented no issues of fact or law not addressed in its original decision.<sup>54</sup>

This appeal followed.<sup>55</sup>

### **III. Argument**

**A. The trial court's grant of summary judgment was correct because after her bankruptcy filing DeVeny had no ability to sell Tropic Tanz.**

Upon filing her bankruptcy petition DeVeny lost the ability to sell Tropic Tanz or its assets because (1) the purported sale violated the bankruptcy stay; (2) the property was property of the estate, not DeVeny, making the purported contract void; and (3) the business, which was not properly scheduled if DeVeny's claims are true, remained an asset of the estate after discharge.

***1. DeVeny's attempted sale of Tropic Tanz violated the bankruptcy stay, voiding the purported sale.***

The trial court granted the defendants' summary-judgment motion because DeVeny could not have sold Tropic Tanz because it was an asset

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<sup>53</sup> CP 4-14.

<sup>54</sup> CP 1.

<sup>55</sup> CP 95-99.

of the bankruptcy estate.<sup>56</sup> According to DeVeny, she contracted to sell the business two months after she had filed her bankruptcy petition and one month before the court granted her discharge.<sup>57</sup> The trial court's ruling was correct.

The filing of a bankruptcy petition acts as a stay applicable to all persons preventing "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."<sup>58</sup> Actions taken in violation of this automatic bankruptcy stay are void from the beginning.<sup>59</sup>

DeVeny's bankruptcy estate included Tropic Tanz, as is clear from her bankruptcy filing. She filed her bankruptcy petition under the name "Deborah A. DeVeny dba Tropical Tanz Tanning Salon."<sup>60</sup> Under "Schedule B," she listed Tropic Tanz.<sup>61</sup> It thereby became a part of her

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<sup>56</sup> RP 17-18.

<sup>57</sup> CP 89-90, 104.

<sup>58</sup> 11 U.S.C. § 362(a)(3).

<sup>59</sup> *In re Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001) ("[A]ctions taken in violation of the automatic stay are void ab initio"); *In re National Environmental Waste Corp.*, 129 F.3d 1052, 1054 (9th Cir. 1997) ("Actions taken in violation of the stay are void.").

<sup>60</sup> CP 204.

<sup>61</sup> CP 109.

bankruptcy estate.<sup>62</sup> Indeed, DeVeny concedes that the assets were part of her bankruptcy estate.<sup>63</sup>

The automatic stay, which took effect when DeVeny filed her bankruptcy petition in early April, 2003, barred her attempt to sell Tropic Tanz in June, 2003. Had the defendants agreed to the alleged contract, (which they did not), the stay would have voided that agreement. Since DeVeny could not, as a matter of law, have sold Tropic Tanz in June 2003 – at least not without the bankruptcy court’s approval – any purported contract was void as a matter of law. Since all of DeVeny’s claims arise from the alleged breach of contract, the trial court correctly granted a summary-judgment dismissal of her claims.

***2. DeVeny lacked the capacity to sell Tropic Tanz because the bankruptcy estate, and not DeVeny, controlled that property.***

A debtor in bankruptcy has a duty to file a list of creditors and a schedule of assets and liabilities.<sup>64</sup> DeVeny listed Tropic Tanz as an asset. The filing of a bankruptcy petition creates an estate composed of the

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<sup>62</sup> 11 U.S.C. § 541(a).

<sup>63</sup> See Brief of Appellant at 14 (“Among the assets scheduled in the bankruptcy case were her tanning salon . . . .”); at 16 (stating that the trial court conferred property of the bankruptcy estate on the defendants and that the salon was property of the estate at the time of the alleged contract). See also CP 210-11 (to the same effect).

<sup>64</sup> 11 U.S.C. § 521(a)(1).

debtor's assets.<sup>65</sup> This estate includes all legal or equitable interests in property as of the commencement of the case, as well as any property the estate acquires after the estate's commencement.<sup>66</sup> Because Tropic Tanz was an asset of the bankruptcy estate, not of DeVeney, she lacked legal capacity to contract regarding that business.

DeVeney did not supplement her bankruptcy filing and list the alleged contract to sell her business. Under the bankruptcy code, she was required to list all executory contracts—including those entered into after she filed her petition, IF any existed.<sup>67</sup> Not surprisingly, she did not

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<sup>65</sup> 11 U.S.C. § 541(a).

<sup>66</sup> 11 U.S.C. § 541(a)(1), (7).

<sup>67</sup> 11 U.S.C. § 541(a)(7); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (holding that debtor in bankruptcy is required to amend disclosure statements and schedules to provide notice of estate's claims and other assets); 11 U.S.C. § 521(a)(1) ("The debtor shall file . . . a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs."); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002) ("a debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court . . . . The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change."); *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999); *In re Myers*, 362 F.3d 667, 673 n. 6 (10th Cir. 2004) ("When a debtor petitions for bankruptcy, all assets and obligations, including executory contracts, generally transfer to the bankruptcy estate."); *In re Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991) ("appreciation enures to the bankruptcy estate, not the debtor.")

identify the alleged contract.<sup>68</sup> It is not surprising because, as the defendants have always asserted, defendants never contracted to purchase Tropic Tanz.<sup>69</sup>

**3. *DeVeny cannot assert any of her claims because the alleged contract and Tropic Tanz remained assets of the bankruptcy estate following discharge.***

DeVeny filed her Chapter 7 bankruptcy petition on April 10, 2003 under the name “Deborah A. DeVeny dba Tropical Tanz Tanning Salon.”<sup>70</sup> In Schedule B to her bankruptcy petition, she listed Tropic Tanz Tanning Salon as having a current market value of zero dollars.<sup>71</sup> Although DeVeny was required to list all executory contracts in Schedule G, she did not list the alleged contract to sell Tropic Tanz to defendants, which she claimed was formed on June 26 or 27, 2003. On July 22, 2003, the bankruptcy court discharged her debts.<sup>72</sup>

A debtor’s bankruptcy estate includes all of the debtor’s assets.<sup>73</sup> A debtor has an affirmative duty to set forth those assets on a bankruptcy

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<sup>68</sup> CP 113, 115.

<sup>69</sup> CP 120-144.

<sup>70</sup> CP 104.

<sup>71</sup> CP 108-111.

<sup>72</sup> CP 268.

<sup>73</sup> *See* 11 U.S.C. § 541(a)(1).

schedule,<sup>74</sup> and to amend the schedule to include claims acquired during bankruptcy and based on estate assets.<sup>75</sup> Upon discharge, scheduled assets that are not administered by the trustee revert to the debtor.<sup>76</sup> However, unscheduled assets remain the property of the estate and do not revert to the debtor, even after discharge.<sup>77</sup>

Even if the court ignored the effect of the bankruptcy stay and plaintiff's lack of capacity to contract, and assumed that the alleged contract to sell Tropic Tanz was formed, the contract would still be the property of the bankruptcy estate. DeVeny failed to list that asset in her schedule, and contrary to her argument, which assumes that the asset was properly scheduled, that asset therefore did not revert to her when her debts were discharged. Because she has no legal interest in that alleged

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<sup>74</sup> 11 U.S.C. § 521(a)(1), *Cusano v. Klein*, 264 F.3d 936, 945 (9th Cir. 2001).

<sup>75</sup> *Cf. Hamilton*, 270 F.3d at 784.

<sup>76</sup> *See* 11 U.S.C. § 554(c).

<sup>77</sup> 11 U.S.C. § 554(d); *Dunmore v. U.S.*, 358 F.3d 1107, 1112 (9th Cir. 2004); *Cusano*, 264 F.3d at 945–46 (“If [a debtor] fail[s] properly to schedule an asset . . . that asset continues to belong to the bankruptcy estate and d[oes] not revert to [the debtor].”).

contract, she has no standing to pursue the breach-of-contract claim.<sup>78</sup> Plaintiff's breach-of-contract claim was therefore properly dismissed.

Similarly, if one assumes for the sake of argument that the alleged increase in the business's value from \$0 to \$35,000 has some basis in reality, that increase is the property of the bankruptcy estate. On April 10, 2003, DeVeny listed Tropic Tanz's value as \$0. She now claims that on June 26 or 27, 2003, her business's value was \$35,000. Because her bankruptcy was still pending in June 2003, if such an increase had occurred, DeVeny had a duty to list that increased value in her bankruptcy schedule. She did not do so. The increased value she now claims therefore did not revert to her upon discharge; if it exists, it is still the property of the estate.<sup>79</sup> Quite simply, the business was not hers to sell.

***4. The trial court did not interfere with the bankruptcy court's jurisdiction but simply addressed the claims DeVeny presented.***

Throughout her brief, DeVeny claims that the trial court interfered with the bankruptcy court's exclusive jurisdiction and that the defendants

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<sup>78</sup> *Cf. Dunmore*, 358 F.3d at 1112 (stating that at time of filing of complaint debtor lacked standing to seek tax-refund claims that were not listed in bankruptcy schedule).

<sup>79</sup> *See In re Ogle*, 261 B.R. 22, 29 (Bkrcty. D. Idaho 2001) ("In the context of Chapter 7 liquidations, the Ninth Circuit was consistently held that post-petition appreciation of estate property enures to the benefit of the bankruptcy estate rather than the debtor.")

invited that interference.<sup>80</sup> She is wrong. The trial court did no more than rule on the issues presented to it. It did not rule on any bankruptcy issues other than to conclude – correctly – that the business was an asset of the bankruptcy estate, a question necessary to dispose of the matter DeVeny had brought before it. This no more “interfered” with the bankruptcy court than this court did in *Garrett*,<sup>81</sup> *Cunningham*,<sup>82</sup> or *DeAtley*.<sup>83</sup>

**5. DeVeny’s remaining tort claims were properly dismissed because they all depended on her invalid breach-of-contract claims.**

DeVeny’s remaining claims for (1) Intentional Misrepresentation, Deceit; (2) Violation of Washington Uniform Trade Secrets Act (UTSA); (3) Tortious Interference with Business Relations; and (4) Misappropriation of Trade Name – Violation of Consumer Protection Act (CPA) fail because they arose from her breach-of-contract claims and at

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<sup>80</sup> Brief of Appellant at 1 (“The trial court did not have jurisdiction to enter an order apparently intended to preserve a closed bankruptcy estate.”); at 15-16 (“The trial court purported to displace the Bankruptcy Court.”); at 6 (“Respondents requested that . . . Judge . . . Tabor open DeVeny’s closed federal bankruptcy case. . .”).

<sup>81</sup> *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005) (holding that plaintiffs’ failure to list personal-injury claim in bankruptcy schedules judicially estopped them from pursuing claim in later litigation).

<sup>82</sup> *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (holding that plaintiff was judicially estopped from pursuing personal-injury claim not disclosed in bankruptcy petition).

<sup>83</sup> *DeAtley v. Barnett*, 127 Wn. App. 478, 112 P.3d 540 (2005) *review denied*, 156 Wn.2d 1021 (2006), *cert. denied*, 127 S. Ct. 123 (2006) (holding that plaintiff was judicially estopped from pursuing claim not scheduled in bankruptcy documents).

the time these torts were allegedly committed the tanning salon was an asset of the bankruptcy estate, not the plaintiff.

Tropic Tanz's trade secrets, month-to-month rental agreement, trade name and other assets were included in the bankruptcy estate. DeVeney does not have standing to complain even if a tort were committed, though none was. Her tort claims were thus also properly dismissed.

For all of these reasons DeVeney did not have the capacity to contract for the sale of Tropic Tanz on June 26 or 27, 2003. The trial court's order should be affirmed.

**B. Alternatively, the trial court's grant of summary judgment should be affirmed because DeVeney is judicially estopped from asserting her claims.**

*1. This court may affirm on an alternate theory supported by the record.*

The trial court granted summary judgment because DeVeney had no ability to dispose of assets of the bankruptcy estate. But this court can affirm the decision below on any theory supported by the record, even if the trial court did not rely on that theory.<sup>84</sup> Here, judicial estoppel provides an alternate basis for affirmance.

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<sup>84</sup> *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002), review denied, 149 Wn.2d 1013 (2003).

***2. Judicial estoppel prevents the taking of inconsistent positions and protects the bankruptcy process.***

In her bankruptcy filing, DeVeney failed to disclose that she had entered a contract to sell Tropic Tanz, and claimed that Tropic Tanz had no value. Both assertions directly contradict the very foundation of her claims in this lawsuit. Because all of her present claims rely upon her recent contradictions of the sworn bankruptcy filing, she is judicially estopped from making these claims.

The doctrine of judicial estoppel precludes a party from gaining an advantage by asserting one position before one court and later taking a clearly inconsistent position in another.<sup>85</sup> Giving judicial-estoppel effect to debtors' statements in bankruptcy filings protects the integrity of the bankruptcy process by increasing the likelihood that courts and creditors are not deceived by a debtor's failure to fully disclose all assets,<sup>86</sup> and protects opposing litigants in later suits from the debtor taking, under oath, contradictory positions. As the Ninth Circuit has explained:

The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the integrity of the

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<sup>85</sup> *Garrett v. Morgan*, 127 Wn. App. at 379; *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d at 783.

<sup>86</sup> *See Hamilton*, 270 F.3d at 785.

bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.<sup>87</sup>

In addition, judicial estoppel arises from “general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,” and to “protect against a litigant playing fast and loose with the courts.”<sup>88</sup>

***3. The three factors supporting judicial estoppel are present here.***

In deciding whether to apply judicial estoppel, courts consider three factors: (a) whether a party’s later position was clearly inconsistent with its earlier position; (b) whether that party benefited from the inconsistent position or succeeded in persuading a court to accept that party’s earlier inconsistent position, so that judicial acceptance of an

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<sup>87</sup> *Hamilton*, 270 F.3d at 785 (quoting *In Re Coastal Plains, Inc.*, 179 F.3d at 208).

<sup>88</sup> *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990); *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 601 (9<sup>th</sup> Cir. 1996). See also *Garrett*, 127 Wn. App. at 379 (judicial estoppel maintains the dignity of judicial proceedings).

inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (c) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.<sup>89</sup> Both the Washington courts and the Ninth Circuit apply judicial estoppel to preclude litigants from taking positions contrary to the assertions they make in bankruptcy proceedings.<sup>90</sup>

Judicial estoppel is appropriate here because each of the three identified factors is present here.

a. Inconsistent position.

DeVeny's present claims contradict at least two critical positions she took in her bankruptcy. By not amending her petition to include the alleged contract for the sale of Tropic Tanz, she swore that she had not

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<sup>89</sup> *Id.* at 782–83; *Garrett*, 127 Wn. App. at 379.

<sup>90</sup> *Hamilton*, 270 F.3d at 782–86 (holding that judicial estoppel barred plaintiff from suing State Farm on claim that plaintiff had failed to disclose in bankruptcy filing); *Security Ins. Co. v. Machevsky*, 81 Fed. Appx. 241 (9th Cir. 2003) (holding that party was judicially estopped from asserting first-party insurance claim regarding artwork that party had failed to disclose as asset in prior bankruptcy); *Garrett*, 127 Wn. App. at 377–83 (holding that plaintiffs' failure to list personal-injury claim in Chapter 7 schedule judicially estopped their pursuing claim in subsequent litigation); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (holding that judicial estoppel prevented plaintiff from pursuing personal-injury claim that he had failed to disclose in bankruptcy petition); *DeAtley v. Barnett*, 127 Wn. App. at 482–84, (holding that plaintiffs' failure to list right of first refusal in bankruptcy documents judicially estopped them from asserting that right in subsequent lawsuit).

entered into such a contract.<sup>91</sup> She also swore in her bankruptcy filing that Tropic Tanz had a market value of zero.<sup>92</sup> Both of these assertions were true.<sup>93</sup> She now swears that a contract was formed, that she has lost the contract price, and that the “loss” of Tropic Tanz has cost her hundreds of thousands of dollars in lost profits.<sup>94</sup> The inconsistency is clear.

b. Benefit to litigant or court acceptance of her position.

The second factor is phrased in the disjunctive: judicial estoppel applies if the litigant’s earlier inconsistent position benefited the litigant or if the earlier inconsistent position was accepted by the court. Either result authorizes application of judicial estoppel. Both are not required.<sup>95</sup> In any event, however, here both criteria exist.

DeVeney benefited from her earlier inconsistent position because the bankruptcy court, taking her statements about the value of Tropic Tanz as true, did not liquidate the business for the benefit of creditors. DeVeney

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<sup>91</sup> See *Hamilton*, 270 F.3d at 784 (holding that debtor in bankruptcy is required to amend disclosure statements and schedules to provide notice of estate’s claims and other assets);

<sup>92</sup> CP 109-11.

<sup>93</sup> CP 120, 144, 174-76.

<sup>94</sup> CP 89-91, 185, 190-91.

<sup>95</sup> See *Cunningham*, 126 Wn. App. at 230-31.

was thus able to retain the assets and then attempt to sell them for her own benefit and to the detriment of her creditors.

Moreover, as two divisions of this court have recognized, the court accepted DeVeney's earlier inconsistent position (Tropic Tanz was worth nothing) by closing the case as a "no-asset" case:

By closing the case as a "no-asset" case, the [bankruptcy] court implicitly accepts the debtor's position, as stated in the debtor's bankruptcy schedules, that the liquidation of the debtor's non-exempt assets would not create a dividend for unsecured creditors.<sup>96</sup>

Since both criteria are satisfied, the second judicial-estoppel factor exists.

c. Unfair advantage

The third factor in judicial estoppel is satisfied because allowing DeVeney to make contradictory statements now would give her an unfair advantage. In the present case, she is claiming that she entered into a \$35,000 contract with defendants to sell Tropic Tanz, and that the business had a vast market value. She claims that defendants' breach of this alleged contract has caused her to suffer hundreds of thousands of dollars in lost profits. Without judicial estoppel, she would escape all liability for her

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<sup>96</sup> *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001); *Cunningham*, 126 Wn. App. at 231.

personal debt, including debt related to the tanning salon, while at the same time posturing herself to reap a sizeable profit from this lawsuit.

Since all three factors supporting judicial estoppel exist, this court can properly affirm on that alternate basis.

**C. DeVeny’s unjust-enrichment argument is unrelated to the bases for the trial court’s decision and thus provides no basis for reversal.**

The burden of establishing trial-court error is on the appellant who must demonstrate that she is entitled to the relief sought.<sup>97</sup> But that burden is not satisfied by argument unsupported by recognizable legal theory or citations to legal authority. “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”<sup>98</sup>

In her brief DeVeny baldly asserts that the defendants were unjustly enriched, without explaining how this issue – involving a claim she did not even allege<sup>99</sup> – is related to the trial court’s reasons for

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<sup>97</sup> *Kane v. Smith*, 56 Wn.2d 799, 806, 355 P.2d 827 (1960) (refusing to consider assertions of error not supported by authority); *View Ridge Park Associates v. Mountlake Terrace*, 67 Wn. App. 588, 602, 839 P.2d 343 (1992), *review denied*, 121 Wn.2d 1016 (1993) (party asserting trial-court error has the burden of showing on appeal that it is entitled to the relief sought).

<sup>98</sup> *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998).

<sup>99</sup> CP 88-93 (no claim of unjust enrichment in complaint).

dismissal of her claims.<sup>100</sup> That passing, irrelevant treatment does not satisfy her burden of showing trial-court error.

**D. DeVeny cannot claim trial-court error on issues she never presented to that court.**

DeVeny apparently claims that the trial court should not have dismissed her case because that court should have substituted the trustee as the plaintiff under CR 17(a). At the same time, DeVeny inconsistently claims that “the trial court should have stayed DeVeny’s civil action so that she could petition the bankruptcy court to re-open her case and adjudicate the bankruptcy issues.”<sup>101</sup> But DeVeny never brought a motion asking the trial court to take either of those steps and thus did not preserve those alleged errors for review.<sup>102</sup>

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<sup>100</sup> Brief of Appellant at 16-17.

<sup>101</sup> Brief of Appellant at 17-18.

<sup>102</sup> See RAP 2.5(a) (appellate court may refuse to review any claim of error not raised in trial court); *Bellevue School Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967) (“In a plethora of decisions, involving many varying situations, this court has steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. The trial court must have an opportunity to consider and rule upon a litigant’s theory of the case before this court can consider it on appeal.”) See also *Leen v. Demopolis*, 62 Wn. App. 473, 479, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022 (1992) (litigant may not remain silent regarding claimed error and later raise issue on appeal); *Postema v. Postema Enterprises, Inc.*, 118 Wn. App. 185, 193, 72 P.3d 1122 (2003), *review denied*, 151 Wn.2d 1011 (2004) (“An appellate court may refuse to review any claim of error which was not raised at the trial court level. The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials”); *Grange Ins. Ass’n v. Ochoa Through Ochoa*, 139 Wn. App. 90,

Moreover, DeVeny's own submissions showed that the trustee had no interest in pursuing the claim. Because, among other reasons, the contract was obviously disputed, the trustee stated that he did not intend to pursue the contract on behalf of the bankruptcy estate.<sup>103</sup> The substitution of the trustee as plaintiff would have been a futile act.

**E. DeVeny is not entitled to attorney fees on appeal because she cannot prevail on a theory that would authorize fees.**

DeVeny seeks attorney fees on appeal because she claims two of her statutory theories below – the Washington Trade Secrets Act and the Consumer Protection Act – authorize the award of attorney fees to a prevailing party.<sup>104</sup>

But DeVeny did not prevail below on either of those theories. She did not establish a willful or malicious misappropriation of trade secrets, a prerequisite to her obtaining attorney fees under the trade secrets act.<sup>105</sup> Nor did she establish a violation of the CPA, a prerequisite to an attorney-

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92, 691 P.2d 248 (1984) (objection not made to the trial court would not be addressed on appeal); *Stastny v. Board of Trustees of Central Washington University*, 32 Wn. App. 239, 249, 647 P.2d 496, review denied, 98 Wn.2d 1001 (1982), cert. denied, 460 U.S. 1071 (1983) (“Failure to object or take exception at the trial level bars raising an issue for the first time on appeal.”)

<sup>103</sup> CP 59-60.

<sup>104</sup> Brief of Appellant at 18-19.

<sup>105</sup> See RCW 19.108.040.

fee award under RCW 19.86.090. And even if she had established a CPA claim, she would only be entitled to an attorney-fee award for efforts related to her CPA claim.<sup>106</sup> Her appellate brief does not even address the CPA claim, let alone prevail on it.

Moreover, even if DeVeny obtains all the relief she claims on this appeal (reversal and remand for trial),<sup>107</sup> she will not have prevailed on her claims under the two Acts. Therefore, she is not entitled to attorney fees on appeal.<sup>108</sup>

#### IV. Conclusion

DeVeny sought to pursue claims that were not hers to pursue and that were subject to judicial estoppel because they were inconsistent with her position in the bankruptcy court. This court should affirm the summary-judgment dismissal of her claims and award the respondents their costs.

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<sup>106</sup> *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 170-71, 795 P.2d 1143 (1990).

<sup>107</sup> See Brief of Appellant at 19.

<sup>108</sup> *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004) (costs and fees should not be awarded until the prevailing party is determined by a trial on the merits. “Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees.”) See also *McClarty v. Totem Elec.*, 157 Wn.2d 214, 231 n. 12, 137 P.3d 844 (2006) (approving appellate court’s decision to defer award of fees because claim had not been decided on the merits).

Dated this 28 day of November, 2006.



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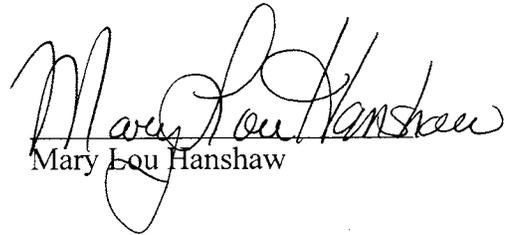
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**Certificate of Service**

I certify that on the 29th day of November 2006 I caused a true and correct copy of Respondents' Brief to be served on the following counsel in the manner indicated below:

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