

No. 35506-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
07 FEB 20 PM 1:31
STATE OF WASHINGTON
BY SM DEPUTY

MATTHEW SKINNER,

Appellant,

v.

GARY D. HOLGATE and JUDY HOIGATE, individually and the marital
community comprised thereof; ADAM HOLGATE and JANE DOE HOLGATE, individually
and the marital community comprised thereof; WESTLANDS
RESOURCES CORPORATION, a Washington corporation;
WESTLANDS HOLDING COMPANY, INC.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF THURSTON
NO. 04-2-00278-5
Paula Casey, Judge

BRIEF OF APPELLANT

Bradley J. Woodworth
Attorney for Appellant
BRADLEY J. WOODWORTH & ASSOCIATES, PC
1020 SW Taylor Street, Suite 360
Portland, OR 97205-2565
(503) 226-4644

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	4
	1. Business Relationships.....	4
	2. Skinner’s Bankruptcy Filing.....	5
	3. Skinner’s Dispute with Holgate, Westlands and Crow.....	6
	4. The Reopened Skinner Bankruptcy Case.....	7
	5. The Summary Judgment Motion.....	10
IV.	SUMMARY OF ARGUMENT.....	10
V.	ARGUMENT.....	13
	1. The Court Applied an Incorrect Legal Standard for Judicial Estoppel.....	14
	2. Judicial Acceptance of Original Position.....	16
	3. Unfair Advantage or Detriment.....	20
	4. Skinner’s State of Mind is Relevant to the Inquiry.....	22
	5. The Trial Court Should Not Have Decided Issues of Fact.....	27
VI.	CONCLUSION.....	28

Federal Cases

Barger v. City of Cartersville,
348 F.3d 1289, 1293-94 (11th Cir. 2003) 24, 25

Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282,
1287-88 (11th Cir. 2002) 25

Dunmore v. United States, 358 F.3d 1107 (9th Cir. 2004) 20, 22

Hamilton v. State Farm Fire and Casualty Co.,
270 F.3d 778, 784 (9th Cir. 2001)..... 18, 20, 25

In re An-Tze Cheng, 308 B.R. 448, 460 (9th Cir. BAP 2004) 20

In re Coastal Plains, 179 F.3d 197, 202 (5th Cir. 1999) 25, 27, 28

In re Corey, 892 F.2d 829, 836 (9th Cir. 1989) 24

Jaurdon v. Cricket Communication, Inc.,
412 F.3d 1156, 1158-59 (10th Cir. 2005) 25

Johnson v. State of Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998)..... 24

New Hampshire v. Maine,
532 U.S. 742, 750, 121 S.Ct. 1808 (2001)..... passim

State Cases

Bartley-Williams v. Kendall,
134 Wn.App. 95, 97, 138 P3d 1103 (2006) 14

Cunningham v. Reliable Concrete Pumping, Inc.,
126 Wn. App. 222, 233, 108 P.3d 147 (2005) 18, 19, 20, 26

Garrett v. Morgan,
127 Wn. App. 375, 377-78, 112 P.3d 531 (2005)..... 20, 21, 25, 29

Gildon v. Simon Property Group, Inc.,
158 Wn.2d 483, 145 P3d 1196, 1202 (2006)..... 14, 15

<i>In re Marriage of Scanlon & Witrak</i> , 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001).....	15, 16
<i>Plouffe v. Rook</i> , 135 Wn.App. 628, 147 P.3d 596	15
<i>Rivas v. Eastside Radiology Associates</i> , 134 Wn.App. 921,143 P.3d 330, 332 (2006)	28
<i>Ryan v. State of Washington</i> , 112 Wn. App. 896, 899, 51 P.3d 175 (2002)	15
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 339, 858 P2d 1054 (1993)	15

I. INTRODUCTION

This appeal concerns when it is appropriate for a court to impose judicial estoppel. The plaintiff, Skinner, filed a *pro se* bankruptcy petition in July, 2002; he was assisted by a paralegal who gave him faulty information about filling out his schedules. He omitted from his schedules the fact of his (*de facto*) partnership with defendant Holgate, as well as any potential claim he might have based on that agreement and any claims Holgate or the other defendants might have against him.

Before Skinner received his bankruptcy discharge, a dispute arose between him and defendants. Negotiations failed to resolve that dispute, and about a year and a half later Skinner sued defendants. Skinner's bankruptcy trustee removed the case to bankruptcy court, where it became an active claim: part of the bankruptcy estate that was actively bid for by Holgate and others and was eventually sold to the highest offeror, with a payment to the trustee of \$45,000 and an order remanding the case to state court for trial.

The defendants, who had never raised judicial estoppel as an issue in bankruptcy court, later moved for summary judgment in state court on that basis. The trial court ruled in their favor. No written ruling was issued, but based on the hearing transcripts it appears the court felt that the inconsistency in Skinner's original bankruptcy schedules and his position in this case was

enough to justify estoppel. The court did not consider whether this inconsistency had been cured by the reopening of the bankruptcy case and administration (and sale) of the claim therein, or whether any party would be unfairly benefited or harmed by allowing the case to go forward, or whether the original omission was a result of Skinner's mistake or inadvertence, rather than bad faith or bad intention, as the law requires. Although Skinner submitted a declaration explaining the omission, the court dismissed this explanation as "irrelevant," and went on to resolve the issue of whether there had been a mistake in favor of defendants, the moving party.

All these aspects of the trial court's judicial estoppel analysis were overly simplistic and were plain error. The grant of summary judgment must be reversed in the interests of justice.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in imposing judicial estoppel solely on the basis of Skinner's failure to list a potential claim on his bankruptcy schedules. The court failed to consider all factors and balance the equities.
2. The trial court erred/abused its discretion by ignoring the effect of the bankruptcy court's reopening of the bankruptcy case, administering Skinner's claim, selling the claim, and remanding the case to state

court to be heard on the merits. The court did not recognize that when that the bankruptcy court administered the originally omitted claim it removed any threat to judicial integrity.

3. The trial court erred in concluding that Skinner derived an unfair advantage from his original failure to list his potential claim in bankruptcy court.
4. The trial court erred/abused its discretion when it stated that Skinner's "excuses" for failing to list the potential claim were "irrelevant to the inquiry" on judicial estoppel.
5. The trial court erred/abused its discretion by ignoring disputes of fact between the parties or resolving a disputed issue of fact in favor of the moving party on summary judgment.

Issues Pertaining to Assignments of Error

1. Does a court incorrectly apply the doctrine of judicial estoppel when it dismisses a case based solely on the fact that the plaintiff failed to list the potential claim in a bankruptcy case, without considering other factors and balancing the equities? (Assignment of Error no. 1)
2. Does a court incorrectly apply the doctrine of judicial estoppel when it implicitly rules that the bankruptcy court's later administration of the claim originally omitted from plaintiff's schedules does not work

to correct the original omission? (Assignment of Error no.2)

3. Does a court err when it imposes judicial estoppel based in part on the wrong standard (benefit to party) and the correct standard (**unfair** benefit to the party) is not supported by the facts? (Assignment of Error no. 3)
4. Does a court incorrectly apply the doctrine of judicial estoppel when it fails to consider whether the plaintiff's inconsistent positions were the result of mistake or inadvertence? (Assignment of Error no. 4)
5. Does a court err when on motion for summary judgment it ignores disputed issues of material fact, or resolves those disputed issues in favor of the moving party? (Assignment of Error no. 5)

III. STATEMENT OF THE CASE

1. Business Relationships

For some time before July 12, 2002, Skinner had business relationships with the defendants and with Andrew Crow, who was previously a defendant. Skinner was in a partnership with defendant Gary Holgate ("Holgate") relating to the Capitol Theater building in Olympia. This partnership was called GM Properties. (CP 529 ¶6). There was no written partnership agreement. (CP 281-82). Holgate was a principal of defendants Westlands Resources Corp. and Westlands Holding Company (together

“Westlands”). (CP 529 ¶6). Skinner’s business relationship with Crow related to a building in Centralia, Washington. (Id. ¶¶24-28).

2. Skinner’s Bankruptcy Filing

On April 3, 2002, a confession of judgment against Skinner was entered in unrelated state court litigation. (CP 63).

On July 12, 2002, Skinner filed a bankruptcy petition in the bankruptcy court for the Western District of Washington at Tacoma, primarily because he had no money with which to satisfy the judgment against him. (CP 529 ¶2; *see* CP 153-76). A paralegal helped him prepare his bankruptcy petition and schedules. (CP 529 ¶3). The schedules he filed did not disclose (1) any potential claim Skinner might have had against Holgate, Westlands or Crow; (2) Skinner’s partnership with Holgate; or (3) any potential debts Skinner owed to Crow, Westlands or Holgate. (CP 153-76). Skinner declared that at the time of his bankruptcy he did not believe that he had any claims against Holgate, Westlands or Crow, nor did he believe he owed money to any of them. (CP 529 ¶6). Skinner did not understand the concept of “contingent or unliquidated claims.”¹ (Id.¶4.). Further, the paralegal who helped him prepare his petition and schedules told him that he should not list anything as “property” unless he had a document showing his

¹See CP 159, question no. 20.

interest. (Id. ¶5.).

On August 13, 2002, Skinner attended the first meeting of creditors and was questioned by the trustee. The trustee asked him: “Anybody owe you money?” Skinner responded, “No.” (CP 178). The trustee did not follow up with questions about **potential** claims Skinner might have against anyone. Nor did the trustee specifically inquire about partnership interests. (CP 177-83).

Skinner received a bankruptcy discharge on October 16, 2002, and his bankruptcy case was closed on October 30, 2002. (CP 185).

3. Skinner’s Dispute with Holgate, Westlands and Crow

On September 17, 2002, Skinner first wrote to Holgate addressing an apparent disagreement about their partnership. (CP 186-188). Letters dated September 28, 2002, and October 6, 2002, followed. (CP 189-193). Apparently Holgate did not respond. Skinner wrote Holgate again on December 4, 2002, and February 2, 2003, on the same subject. (CP 194-98). An undated letter from Skinner to Holgate refers to “one last effort” to resolve matters. (CP 196-97). It appears from these letters that Skinner believed Holgate owed him something in resolution of the partnership dispute, but what he believed he was owed is unclear, as is the substance of the dispute.

On February 12, 2003, Holgate and Crow wrote to Skinner with a settlement offer. (CP 199-200). The letter estimated that Skinner's share of equity in the Capitol Theater building was worth \$250,000, but that Skinner owed **them** about \$280,000.² The net effect, they claimed, was that rather than them owing anything to Skinner, Skinner actually owed them \$30,000. They offered to settle the dispute by transferring the S. Gold property to Skinner free and clear if he dropped all claims against them. Apparently Skinner's position was that he should get the S. Gold building plus \$80,000. (Id.).

A year later, on February 11, 2004, Skinner filed this suit. He filed his First Amended Complaint in April 2004.

4. The Reopened Skinner Bankruptcy Case

In May 2004 the bankruptcy trustee reopened Skinner's 2002 bankruptcy case and removed this case to bankruptcy court. (CP 201-03). The trustee became the plaintiff by virtue of this removal, and the lawsuit became property of Skinner's bankruptcy estate. (Id. ¶4). Westlands filed a proof of claim for \$9,494.11, and Crow filed a proof of claim for \$146,092. (CP 208 ¶9).

²This figure exceeds by more than \$100,000 the proofs of claim filed by Westlands and Crow when Skinner's bankruptcy case was reopened in 2004. Holgate did not file a proof of claim in the reopened case. (See CP 208 ¶9).

On or about January 7, 2005, a “Settlement Agreement” intended to resolve this lawsuit was signed by Crow, Westlands, and the bankruptcy trustee. (CP 206-11). Although there are signature lines for Skinner and his bankruptcy counsel, neither of them signed. (Id. at p. 6). The First Settlement Agreement provided that Crow and Westlands would pay the trustee \$35,000 to settle the trustee’s claims against them, and the trustee would dismiss the Thurston County suit (this case) with prejudice. Crow would take possession of the S. Gold property; Crow and Westlands would withdraw their proofs of claim; and Crow would dismiss a separate suit against Skinner in Lewis County, filed in March 2004. (Id.). On January 25, 2005, the trustee moved for bankruptcy court approval of the First Settlement Agreement.

During February and March 2005, there were several bankruptcy court filings relating to the hearing on the First Settlement Agreement. (CP 335-36). In March 2005, Tracy Blakeslee’s lawyer wrote the trustee proposing a different settlement – one that would preserve this case and essentially sell it to Mr. Blakeslee, for the benefit of Skinner. (CP 212-13).

On or about May 12, 2005, Crow, Skinner, the trustee and Blakeslee signed the “Second Settlement Agreement.” (CP 214-20). It provides Blakeslee, for Skinner’s benefit, will purchase the claim against Holgate, Westlands and Crow from the trustee for \$45,000, and the claim (*i.e.*, this

case) will be remanded to state court. Skinner agrees to purchase the S. Gold property from Crow and Crow agrees to withdraw his proof of claim. Blakeslee will file a proof of claim, which will be subordinated to all other claims. (Id.).

Hearings were held in bankruptcy court both before and after the Second Settlement Agreement was signed. (CP 336-37). On July 8, 2005, the court signed the Stipulated Order Approving Compromise (the “Compromise Order”). (CP 222-24). The Compromise Order provides that the trustee is authorized to accept \$45,000 from Blakeslee, the Crow claim is withdrawn, and Crow is dismissed from the Thurston County lawsuit. Further, it notes that “**allowing the debtor his day in court**” warrants “**substantial consideration,**” and orders that the Thurston case “**shall be and hereby is remanded to Thurston County Superior Court.**” (Id.) (Emphasis added.)

On August 11, 2005, the bankruptcy court signed an order allowing the Westlands bankruptcy claim in full. This order notes, however, that allowing the claim has “**no preclusionary effect as to *Skinner v. Holgate, et al.*,**” and provides: “Allowance of claim **has no collateral estoppel effect on Superior Court litigation.**” (CP 283-84) (Emphasis added.)

Defendants never raised the issue of judicial estoppel in the bankruptcy court, but rather participated fully in settlement negotiations. (RP

September 8, 2006 at p. 16 line 13 through p. 17 line 20; p. 19 lines 2-3).

5. The Summary Judgment Motion

Pursuant to the Compromise Order remanding the case to Thurston County, the state court case was reopened in August 2005 and Crow was dismissed as a defendant. Skinner filed a Second Amended Complaint in February 2006, which remaining defendants answered in May. On May 11, 2006, defendants moved for summary judgment based on judicial estoppel. Briefing followed, and the court heard argument on July 14, 2006. The court ruled from the bench in defendants' favor. The order granting summary judgment to defendants was entered August 11, 2006. Skinner moved for reconsideration of the decision, the parties briefed the issue again, and there was another hearing on September 9, 2006, at which the court indicated it did not intend to change its ruling. A final hearing was held on October 6, 2006, to address defendants' petition for attorney fees and the possibility Skinner would seek return of the case to bankruptcy court. The court's order denying Skinner's motion for reconsideration was entered on that date and this appeal followed.

IV. SUMMARY OF ARGUMENT

The court below oversimplified the doctrine of judicial estoppel, holding that it applies whenever a party takes inconsistent positions in two

proceedings. Whether a party has taken inconsistent positions is the first step in the analysis, but it is by no means the last. The trial court's consideration of other factors was, however, minimal or nonexistent. This initial misunderstanding of the correct legal standard led to several additional errors.

First, the court's implicit conclusion that Skinner's omission of the claim from his bankruptcy schedules was "accepted" by the bankruptcy court is wrong. Although Skinner received a discharge in October 2002 (signifying "acceptance"), his bankruptcy case was then reopened in 2004 for the express purpose of administering the potential claim he had failed to list on his schedules when he first filed. The trustee then settled the claim and received money for the claim which was used to pay Skinner's creditors. The bankruptcy court approved the settlement, thereby explicitly "accepting" Skinner's later position – that he had a claim and the claim had value. Further, the bankruptcy court order approving the settlement expressly allowed Skinner to return to state court to litigate his claim, and expressly provided there would be no "preclusionary" or "estoppel" effect on the State Court case. (CP 283-84).

The effect of this later bankruptcy court order should be to override the bankruptcy court's initial "acceptance" of Skinner's omission of the claim on his schedules, and the bankruptcy court's administration of Skinner's

claim should have served as a substitute for judicial estoppel as a remedy for the initial omission. The state court, however, ignored these impacts and treated the matter as if the only bankruptcy court action that counted was its discharge of Skinner almost three years earlier.

A second consideration ignored by the trial court was whether Skinner would derive an **unfair** advantage from allowing this case to go forward (or whether allowing the case to proceed would impose an unfair detriment on defendants). The trial court apparently concluded (without analysis) that Skinner would benefit in some unspecified way. A serious examination of the facts shows, however, that any advantage Skinner might derive is certainly not “unfair.” When his bankruptcy case was reopened, the trustee settled his claim for a payment of \$45,000. The funds were paid over to his creditors and the Trustee. Defendants participated fully in the reopened bankruptcy case; in fact, they attempted to pay \$35,000 to settle the matter. Because of the higher settlement amount, much of defendants’ prepetition claim will be paid and they are not out the \$35,000 they offered to settle. Further, if this suit goes forward, there is no guaranty that Skinner will prevail. If he does, it will not work an “unfair” detriment to defendants, because they had an opportunity to settle it in bankruptcy court on terms that would not have returned the case to state court. And if Skinner prevails when this case is

remanded for trial, that is only because defendants are found liable to him – certainly not an “unfair” result.

Finally, the trial court should have considered whether Skinner’s initial omission was deliberate or the result of mistake. Instead, the court dismissed Skinner’s explanation of his failure to list his partnership on his initial bankruptcy schedules as “irrelevant” to the inquiry. Compounding this error, the court did not recognize that the different explanations offered by Skinner and defendants for Skinner’s initial failure were disputes of material fact precluding summary judgment; rather the court adopted defendants’ (that is, the moving parties’) version of Skinner’s motive and intent.

V. ARGUMENT

Because judicial estoppel is imposed at the discretion of the trial court, the decision is reviewed for abuse of discretion. *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 97, 138 P3d 1103 (2006). “A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons.” *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 145 P3d 1196, 1202 (2006). A decision is “based on untenable grounds if the factual findings are unsupported by the record.” *Ryan v. State of Washington*, 112 Wn. App. 896, 899, 51 P.3d 175 (2002). “A court’s decision ‘is based on untenable reasons if it is based on an

incorrect standard or the facts do not meet the requirements of the correct standard.” *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d at 483, 145 P.3d at 1202.

A mistake of either law or fact is an abuse of discretion. “An abuse of discretion is found if the trial court relies on unsupported facts” *Plouffe v. Rook*, 135 Wn.App. 628, 147 P.3d 596. “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P2d 1054 (1993); *see also In re Marriage of Scanlon & Witrak*, 109 Wn. App. 167, 174-75, 34 P.3d 877 (2001).

1. The Court Applied an Incorrect Legal Standard for Judicial Estoppel

No written decision memorializes the trial court’s ruling. Throughout the three hearings held on the question of judicial estoppel, however, the court’s statements suggested it was applying the wrong standard. The court said repeatedly that the inconsistency between Skinner’s original bankruptcy schedules and his position in this suit made judicial estoppel appropriate. At the July 14 hearing, the court said, “In this case, of course, the plaintiff is taking an absolutely contrary position to what he took when he filed his bankruptcy in 2002” (RP July 14, 2006, p. 15 lines 16-17). And: “I am

choosing to apply the doctrine because I believe that there has been a complete reversal of opinions for the benefit of the plaintiff.”³ (Id. p. 16 lines 8-10). At the September 8 hearing, the court stated its understanding of judicial estoppel as follows: “The theory is that when a person takes a position which is inconsistent with a prior position taken in a case that they may be judicially estopped from doing so.” (Id. p. 21 lines 15-18)

The inquiry is more complicated than this. In fact we have found no reported decision imposing judicial estoppel based solely on the taking of inconsistent positions. The trial court abused its discretion by basing its ruling on this erroneous view of the law.

The Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808 (2001), enumerated several factors that “typically inform the decision whether to apply the doctrine” in a particular case. These include: (1) a later position clearly inconsistent with an earlier position; (2) success in persuading a court to adopt the earlier position; and (3) an unfair advantage to the party seeking to assert the inconsistent position or an unfair detriment to the opposing party if the case is not estopped. *Id.* at 750-51. These factors, the Court went on, “do not establish inflexible prerequisites or an exhaustive formula,” but may aid courts in **balancing the equities**. *Id.* at 751 (emphasis

³Although the court mentions “the benefit of plaintiff,” its remarks do not

added). The Court also stated that “it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake.’” *Id.* at 753.

The court below in deciding to impose judicial estoppel did not consider any “factors” aside from the inconsistency between Skinner’s original bankruptcy schedules filed in July 2002 and his position in this case⁴.

While Skinner concedes this inconsistency, it alone is not enough. The trial court should have addressed the other factors cited in *New Hampshire v. Maine* (and other decisions) and then “balanced the equities” to ascertain whether to impose judicial estoppel.

2. Judicial Acceptance of Original Position

Success in asserting the original position is generally considered necessary to judicial estoppel. If “the party has succeeded in persuading a court to accept that party’s earlier position, . . . judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled.’” *New Hampshire v. Maine*, 532 U.S. at 750. The trial court here did not expressly consider, but rather

contain any analysis or examination of what this benefit is.

⁴The court paid lip service to the concept of mistake or inadvertence, but dismissed it as irrelevant. *See infra* at 23-25. The court also gave a nod to the bankruptcy court’s subsequent actions, but again without appearing to appreciate their impact. *See infra* at 21.

appeared to assume, “acceptance” or “success” of Skinner’s original position. The undisputed facts do not support this conclusion.

The bankruptcy court accepted Skinner’s original schedules when it ordered his discharge on October 16, 2002. Courts considering similar situations have held that a discharge order **ordinarily** constitutes acceptance of a representation on bankruptcy schedules. *E.g.*, *Hamilton v. State Farm Fire and Casualty Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 233, 108 P.3d 147 (2005). We do not challenge this conclusion.

The situation here is not the “ordinary” one, however: the fact is that the same bankruptcy court that discharged Skinner in October 2002 **later** – on July 8, 2005 – signed an order **accepting** Skinner’s **current** position with respect to this lawsuit. (CP 222-24). That order followed extended negotiations involving the trustee and the parties to this litigation. The defendants in fact made a settlement offer to the trustee that contemplated payment of \$35,000 and dismissal of this suit with prejudice. (*See* CP 206-11). A higher offer was made by a third party, Tracy Blakeslee, to purchase the suit from the trustee for \$45,000 and preserve the state court litigation. The Settlement Agreement in the bankruptcy proceedings memorializes the Blakeslee offer. (CP 214-20).

The bankruptcy court approved the Blakeslee settlement, reciting (emphasis added):

the parties having appeared and argued the merits of the compromise motion, and the Court having indicated that the Trustee’s discretion warranted substantial consideration as did **allowing the debtor his day in court** in the above identified adversary proceeding, and therefore the higher offer . . . in which the debtor/Blakeslee would buy out the estate’s interest in the litigation, settle with Crow, **and continue the litigation** against Holgate, et al. in Thurston County Superior Court appears to be the highest and best offer and is supported by the trustee (Id.).

In contrast to the bankruptcy court’s **implicit** “acceptance” of Skinner’s failure to list the claim on his bankruptcy schedules, this order **explicitly** recognizes and allows Skinner’s right to pursue this litigation in state court.⁵ (CP 224). The order rules as follows:

The proceeding identified as Waldron vs. Holgate, Westlands Holding Co., Inc., adversary case number 04-4129, which proceeding was removed from Thurston County Superior Court, case number 04-2-00278-5, known as Matthew Skinner vs. Gary Holgate, Judy Holgate, Adam Holgate, Jane Doe Holgate, Westlands Resources Corporation, Westlands Holding Company, Inc. and Andrew Crow, defendants, shall be and hereby is remanded to Thurston County Superior Court. (CP 224).

There can be no “threat to judicial integrity” where the bankruptcy court (after its “acceptance” of the earlier position) has explicitly noted and

⁵Note that defendants did not raise the issue of judicial estoppel before the bankruptcy court.

approved the debtor’s right to pursue his claim in state court. We have found no reported decision imposing judicial estoppel on facts comparable to these. Specifically, the Washington and Ninth Circuit decisions relied on below do not recite similar facts. None of those cases appear to have been removed to bankruptcy court, and in none of those cases did the bankruptcy court order a remand to allow the plaintiff to have his “day in court.” See *Hamilton v. State Farm*, 270 F.3d at 781-82; *Cunningham v. Reliable*, 126 Wn. App. at 225-26; *Garrett v. Morgan*, 127 Wn. App. 375, 377-78, 112 P.3d 531 (2005).

In contrast, the Ninth Circuit, in *Dunmore v. United States*, 358 F.3d 1107 (9th Cir. 2004), **approved** a solution like the one the bankruptcy court ordered here:

However, **rather than invoking judicial estoppel**, District Judge Patel remedied Dunmore’s inconsistent assertions by allowing him to reopen his bankruptcy case, thereby giving the bankruptcy trustee an opportunity to administer the unscheduled claims. This approach prevented Dunmore from having his cake and eating it too: Dunmore risked that the trustee would retain, rather than abandon, the refund claims. This approach was a **permissible alternative to judicial estoppel** that prevented Dunmore from deriving an unfair advantage if not estopped.

Id. at 1113 n.3 (emphasis added). See also *In re An-Tze Cheng*, 308 B.R. 448, 460 (9th Cir. BAP 2004) (“The correct solution is often to reopen the bankruptcy case and order the appointment of a trustee who, as owner of the cause of action, can determine whether to deal with the cause of action for the

benefit of the estate.”); *Bartley-Williams v. Kendall*, 134 Wn. App. At 102 (same, quoting *Cheng*).

Here, similarly, Skinner’s bankruptcy trustee administered the (previously) unsecured claim and sold it at a price that allowed substantial payment to Skinner’s creditors – including the defendants here. This was a permissible **alternative** to judicial estoppel, not a reason to impose it. The facts of this case do not “satisfy the correct standard” for judicial estoppel. The trial court’s contrary ruling is thus an abuse of discretion.

3. Unfair Advantage or Detriment

The Court in *New Hampshire v. Maine* noted a third consideration: “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.” 532 U.S. at 751 (emphasis added). See *Garrett v. Morgan*, 127 Wn.App. at 379 (citing *New Hampshire v. Maine*).⁶ The trial court’s only nod in the direction of this factor consisted of conclusory statements: “there has been a complete reversal of position for the benefit of plaintiff” (RP July 14, 2006 at 16), and “he [Skinner] did derive an advantage.” (RP September 8, 2006 at 22). The court never said what that benefit or advantage might be, and did not even mention the question of fairness. These “factual findings”

⁶Other Washington courts of appeal have expressed this factor in other ways –

are not supported by the record, and the trial court abused its discretion to the extent it relied on them.

Skinner would not “derive an unfair advantage” if this suit is not estopped. In *Dunmore*, 358 F.3d at 1113 n.3, the Ninth Circuit observed that when the trustee administers a previously unscheduled claim, it is “a permissible alternative to judicial estoppel that prevent[s] [the party] from deriving an unfair advantage if not estopped.” Here, of course, the trustee administered Skinner’s previously unscheduled claim and settled it for the benefit of Skinner’s creditors. Further, the question of whether the state court case would survive was argued in bankruptcy court, where the defendants did not raise the issue of judicial estoppel.

In settlement negotiations, defendants Westlands and Crow offered to pay \$35,000 to the bankruptcy estate and withdraw their proofs of claim in exchange for dismissal of the suit with prejudice. When a higher bid came in – one that would preserve Skinner’s state court claim – defendants could have raised their offer. They did not. Further, defendant Westlands had the opportunity to (and presumably did) argue to the bankruptcy court for acceptance of its offer and dismissal of this case with prejudice. The court ruled in favor of the competing offer. The bankruptcy estate received a

see, e.g., Johnson v. Si-Cor, 107 Wn.App. at 909 – but this is the clearest expression of it.

payment of \$45,000, and the claim of Westlands in the bankruptcy case was allowed and will be substantially paid. The settlement agreement approved by the bankruptcy court clearly contemplated that this case would go forward. (*See* CP 466-72). In approving the agreement, the bankruptcy court explicitly stated that Skinner should be allowed “his day in court.” (CP 473-75) and without “preclusionary” or “estoppel” effect. (CP 283-84).

For the same reasons, defendants will not suffer “an unfair detriment.” They had an opportunity in bankruptcy court to settle the case completely. They participated in negotiations with the trustee and hearings before the bankruptcy court. Notably, they never raised the issue of judicial estoppel there, but rather were willing to pay \$35,000 (and abandon their claims against Skinner) to make Skinner’s claims against them go away.

For all these reasons, any “advantage” to Skinner or “detriment” to defendants is plainly fair. And it is not at all clear that allowing the case to go forward in state court confers a benefit or advantage on Skinner, as there is no assurance he will prevail. If he does, it will be a benefit earned fairly, given payment of his creditors out of the bankruptcy court settlement and defendants’ opportunities to settle the case in that forum.

4. Skinner’s State of Mind Is Relevant to the Inquiry

Much of the briefing below addressed the judicial estoppel defense of

mistake or inadvertence. *See New Hampshire v. Maine*, 532 U.S. at 753: “[I]t may be appropriate to resist application of judicial estoppel when a party’s prior position was based on inadvertence or mistake.” (Internal quotation marks omitted.) This is overwhelmingly the position of lower courts as well. The Ninth Circuit adopted it in an ADA case, *Johnson v. State of Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998), saying, “If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply.” *See also In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989) (bankruptcy case); *Barger v. City of Cartersville*, 348 F.3d 1289, 1293-94 (11th Cir. 2003) (defining intent as “purposeful contradiction – not simple error or inadvertence”).

The trial court in this case, however, stated: “The excuses given regarding disclosure are **not relevant** to the inquiry. The inquiry is whether there was disclosure of the assets under oath. There was not disclosure.” (RP April 14, 2006 at 15 lines 13-15) (Emphasis added.) This statement expresses an erroneous view of the law and thus constitutes an abuse of discretion.

Facts supporting Skinner’s defense of mistake are in the record. Skinner explained to the court below that when he filed his bankruptcy petition and schedules he **did not believe he had disputes** with Holgate, Westlands or Crow. (CP 529 ¶4). Because he was not familiar with the

concept of “contingent or unliquidated claims,” *id.*, he was not in a position to infer that past events which might ripen into a dispute should be disclosed. The precise limits of what is a contingent or unliquidated claim have, in fact, been the subject of considerable bankruptcy court litigation. *See, e.g., Jaurdon v. Cricket Communication, Inc.*, 412 F.3d 1156, 1158-59 (10th Cir. 2005) (rejecting appellants’ argument that they had no “claim” because they had lost at the trial court level). It is improper to use judicial estoppel to punish a *pro se* debtor for failing to understand these sophisticated concepts.

The length of time between Skinner’s bankruptcy and his suit against defendants supports his position that at the time of his bankruptcy petition he did not understand he had a potential claim. In some cases where courts have applied judicial estoppel following bankruptcy, the debtors filed suit **during the pendency** of the bankruptcy case in which the schedules did not disclose the claims. *See, e.g., Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287-88 (11th Cir. 2002); *In re Coastal Plains*, 179 F.3d 197, 202 (5th Cir. 1999). In *Garrett*, suit was filed **one month** after the debtor filed for bankruptcy. 127 Wn. App. at 532. In other cases the unscheduled claim was clearly alive and known at the time of the bankruptcy. In *Hamilton*, the debtor filed suit only three months after his bankruptcy was dismissed. 270 F.3d at 781. In *Cunningham*, the debtor filed suit **seven days** after receiving a discharge. 126

Wn. App. at 227. Here, in contrast, the debtor did not file his suit until well over a year after his discharge, some 19 months after filing his bankruptcy petition.

A final factor supporting Skinner's position that his omission of the potential claim was a mistake is that he was not advised by a lawyer in preparing his petition but by a paralegal. (CP 529 ¶3). He asked this person about what items he should list as property in the schedules and was told that if he did not have a document to evidence ownership, he should not list the property.⁷ (Id. ¶5). The omissions on his bankruptcy schedules were the result of good-faith mistakes, not of any intent to mislead or "play fast and loose" with the judicial system.

The transcript of Skinner's August 13, 2002, bankruptcy meeting with creditors at which he was questioned by the trustee supports Skinner's position that any failure to disclose was unintentional or the result of mistake. The trustee asked Skinner (CP 178): "Anybody owe you money?" and Skinner replied: "No." Skinner did not believe at the time that Holgate, Westlands or Crow owed him money. (CP 529 ¶6). The trustee did not follow up his question with others such as, for example, "Do you have any actual or

⁷Although, as the trial court points out, Skinner was aware he was in a partnership with Holgate, there was no written partnership agreement. (CP 281-82). Thus it was reasonable for Skinner to conclude, pursuant to the paralegal's advice, that the partnership was not something he should list on his schedules.

potential dispute with anyone that could result in that person owing you money?” Since Skinner, as of August 13, 2002, did not believe Holgate, Westlands or Crow owed him money, his response to the trustee’s question was truthful and correct.

The trustee on this same occasion noted that paralegals assisting with bankruptcy filing preparation “really don’t know what they’re doing under exemptions.” (CP 180). According to Skinner, the paralegal who helped him prepare his schedules also did not understand what is estate property under the Bankruptcy Code. The trustee would have agreed, we believe, that a paralegal also might not be able to explain the intricacies of contingent claims or executory contracts to a debtor.

Defendants argued below that the standard for determining “inadvertence” comes from *In re Coastal Plains*, 179 F.3d at 212. There the court held that a large corporate chapter 11 debtor, assisted by counsel, could not claim it had inadvertently failed to disclose claims when it “both knew of the facts giving rise to its inconsistent positions *and* had a motive to conceal the claims.” (Emphasis in original.) Even if this Fifth Circuit decision were binding on this court, we note that the court in its ruling did not so much announce a standard as state that in **these** circumstances **this** debtor could not claim inadvertence as a defense to judicial estoppel. In *Coastal Plains*, the

CEO who signed the schedules did not dispute that, at that time, he “believed that Coastal had claims for \$10 million against Browning.” *Id.* He testified he did not know the meaning of “contingent” and “unliquidated” claims and had relied on his attorney to fill out the schedules. However, Coastal’s attorney testified that the claim against Browning was a contingent or unliquidated claim that should have been included in the schedules. *Id.*

The facts of the Coastal Plains bankruptcy filing are at the opposite end of the spectrum from the facts of Skinner’s filing. The result in that case simply does not govern here.

5. The Trial Court Should Not Have Decided Issue of Fact

In addition to ruling that Skinner’s “excuses” for nondisclosure were “not relevant,” the trial court essentially decided that despite Skinner’s explanations, he was aware that he had a claim against defendants at the time he filed for bankruptcy and was not “forthright in his disclosure of his assets.” (RP September 8, 2006 p. 21 line 23 to p. 22 line 7). In coming to this conclusion, the court decided a disputed issue of fact in favor of the moving party, directly contrary to the law on summary judgment. *See Rivas v. Eastside Radiology Associates*, 134 Wn.App. 921,143 P.3d 330, 332 (2006) (all facts and reasonable inferences considered in light most favorable to nonmoving party). In contrast to the trial court here, the trial court in *Garrett*

made detailed findings of fact about the plaintiff's knowledge, supported by the record. *See* 127 Wn.App. at 382 (plaintiffs filed their malpractice case while their bankruptcy case was pending and after filing suit denied knowledge in bankruptcy court of the claim).

To the extent the trial court based its ruling on its resolution of disputed fact issues, the ruling is erroneous and must be reversed.

VI. CONCLUSION

For all the foregoing reasons, this court should reverse the trial court's grant of summary judgment to defendants.

Respectfully submitted this 16th day of February, 2007.

BRADLEY J. WOODWORTH & ASSOCIATES, PC

By: _____

Bradley J. Woodworth, WSBA # 32691
Attorney for Appellant

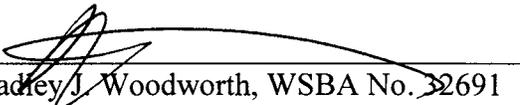
CERTIFICATE OF SERVICE

I, Bradley J. Woodworth, certify that I served a copy of the Brief of Appellant by causing the document to be mailed by first class mail to the following on the date set forth below:

Mr. Richard A. Paroutaud
Mano McKerricher Paroutaud & Hunt
20 S.W. 12th Street
P.O. Box 1123
Chehalis, WA 98532-0169

DATED February 16, 2007.

BRADLEY J. WOODWORTH & ASSOCIATES, PC



Bradley J. Woodworth, WSBA No. 32691
Of Attorneys for Plaintiff

FILED
COUNTY OF PUYALLUP
DIVISION 1
10:13 AM
07 FEB 2007
STATE OF WASHINGTON
DEPUTY
BY _____