

No. 49389-6-II

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

Christopher Volk,
Appellant,

v.

Christine Amburgey,
Respondent.

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

Appeal from the Superior Court for Pierce County
The Honorable Katherine M. Stolz

Respondent's Brief

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INTRODUCTION

Two basic truths should guide this Court: (1) Christopher Volk, is seeking to avoid responsibility for his 20-year-plus committed intimate relationship (CIR) with Christine Amburgey on a technicality; and (2) that technicality, Amburgey's failure to disclose the CIR to the bankruptcy court in her 2013 bankruptcy action, caused no detriment to her creditors because the primary assets she should have disclosed, Volk's retirement account and the family residence would have been entirely and largely exempt, respectively, from the bankruptcy estate. The question, then, is whether this Court will invoke judicial estoppel to deprive Amburgey, the mother of Volk's children, of her share of Volk's retirement account based on a technicality despite Volk's inability to explain how Amburgey's failure to disclose the CIR to the bankruptcy court gives her an unfair advantage over him or her creditors.

The two basic truths point this Court to the legally correct and just answer: Judicial estoppel should not be applied because Amburgey's failure to disclose her CIR with Volk to the Bankruptcy Court disadvantaged no one because the main assets she would have disclosed were either entirely or mostly exempt and, therefore, unavailable to her creditors, and Volk cannot explain how Amburgey's failure to disclose those assets gave her an unfair advantage in her bankruptcy or in this CIR action.

RESPONSE TO ASSIGNMENT OF ERROR

In its order, dated August 5, 2016, the trial court properly denied Christopher Volk's motion for summary judgment in which he argued that the doctrine of judicial estoppel barred Christine Amburgey, the mother of his children, from asserting that she had a 20-year-plus CIR with him.

ISSUES RELATED TO RESPONSE TO ASSIGNMENT OF ERROR

The doctrine of judicial estoppel only applies if a party takes a position which is inconsistent with a position they took before another tribunal. Washington courts look at several factors but have not applied the doctrine when the inconsistent position creates no unfair advantage in the first or second proceeding. Accordingly, the trial court correctly denied Volk's motion for summary judgment because he has failed to explain how Amburgey's failure to disclose their 20-year CIR to a bankruptcy court in 2013 gave her an unfair advantage over her creditors in the bankruptcy action or him in this action. Volk cannot explain any unfair advantage because there is none; the assets Amburgey would have disclosed, Volk's retirement account and the family residence, were exempt from the bankruptcy estate and there is no persuasive argument that Amburgey's failure to disclose an exempt asset in her bankruptcy now gives her an unfair advantage over Volk in this CIR action.

STATEMENT OF THE CASE

Christine Amburgey and Christopher Volk lived together in Puyallup in a committed intimate relationship (CIR) from 1994 through 2014. The couple had and raised two children, supported one another, and accumulated property. In Volk's declaration, filed in support of his motion for summary judgment, he claims that while raising his children, "Ms. Amburgey stayed in [his] household from about 1994 to January 2014...." (CP 13.) Amburgey separated from Volk in January 2014 because he began abusing alcohol and drugs, and became abusive. The house they lived in had been purchased by Volk prior to their CIR although Amburgey contends that she has an interest in the property because it served as her home, and the home of her family for 20 years. But Volk's retirement account is community property because the bulk of its value was accumulated during the couple's CIR. RCW 26.16.030.

In 2013, while still in a CIR with Volk, Amburgey filed for individual bankruptcy under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Washington. On the advice of counsel, Amburgey did not disclose her CIR with Volk during the bankruptcy. Nevertheless, the two primary assets which Amburgey should have disclosed, the family residence and Volk's retirement account, were beyond the reach of her creditors.

Amburgey's interest in the family residence would likely have been entirely exempt under the federal or Washington homestead exemption, but the extent of her interest is a question of fact which must be determined by the trial court with reference to caselaw relevant to the determination of real property interests in CIR actions. *See* 11 U.S.C. § 522(d)(1); RCW 6.13.030. Volk's retirement account, however, was completely exempt from the bankruptcy estate. 11 U.S.C. § 522(d)(11). The bankruptcy court discharged Amburgey's debts on February 26, 2014, and closed the case without distributing assets to creditors on March 3, 2014. (CP 59.)

In January 2016, after Volk began abusing drugs and alcohol and became abusive, Amburgey and Volk separated, and Amburgey moved out of the couple's Puyallup home. About five months later, on May 10, 2016, Amburgey filed a complaint for the equitable distribution of the property acquired by the couple during their 20-year CIR. After attempting to bully Amburgey into voluntarily dismissing her CIR claim by threatening her with sanctions, Volk's attorney filed a motion for summary judgment arguing that the doctrine of judicial estoppel barred Amburgey from asserting any CIR with Volk prior to her bankruptcy. (CP 11.)

In his motion for summary judgment and his reply, Volk studiously avoids distinguishing between the types of property which would have been available to Amburgey's creditors had she disclosed her CIR with Volk and those which would have been exempt

from the bankruptcy estate. Instead, Volk made the overbroad argument that Amburgey cannot claim the existence of any CIR prior to filing of her bankruptcy petition because she failed to disclose the CIR to the bankruptcy court.

Volk supported his argument with the patently incorrect assertion that had Amburgey disclosed the CIR, all the CIR property would have become property of the bankruptcy estate; there is no dispute that Volk's retirement account was exempt from the bankruptcy estate. There is also no dispute that up to \$125,000.00 of Amburgey's interest in the family residence was exempt, although the extent of Amburgey's interest is a question of fact. Volk also argued that if judicial estoppel were not invoked, Amburgey would have an unfair advantage, but, for obvious reasons, he makes no attempt to explain how Amburgey's failure to disclose exempt CIR assets gave her an unfair advantage over her creditors or would give her an unfair advantage over him.

After oral argument, the trial court denied Volk's motion for summary judgment. (CP 83.) The court found that Amburgey had no obligation to disclose her CIR with Volk to the bankruptcy court. (CP 84.) That being said, Amburgey, for the purposes of this appeal, does not argue that she did not have such an obligation. Whether such an obligation existed, however, is beside the point because the primary assets which Amburgey claims an interest in through her CIR complaint are the retirement account which Volk built up during

the 20 years that he and Amburgey were in a CIR and the family residence. It makes no difference whether she disclosed the retirement account and family residency to the bankruptcy court because the retirement was exempt from the bankruptcy estate and completely beyond the reach of her creditors, and the family residency likely is, too, depending on the factual inquiry in the trial court.

STANDARD OF REVIEW

On appeal, summary judgment orders are reviewed de novo and, so, the “appellate court engages in the same inquiry as the trial court....” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is proper when, based on all the evidence before the court, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party, Volk, has the burden of proving that there is no genuine dispute as to *any* material fact and all reasonable inferences which flow from the evidence before the court must be construed against him. *See Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349–50, 588 P.2d 1346 (1979). Summary judgment can only be granted if, based on all the evidence, a reasonable person could only reach one conclusion. *Id.*

ARGUMENT

This Court should affirm the trial court's denial of Volk's motion for summary judgment because Amburgey, despite having an obligation to disclose her CIR with Volk in her bankruptcy, gained no advantage over her creditors or Volk by failing to disclose assets which were exempt from the bankruptcy estate. Volk's motion for summary judgment was properly denied, even if the trial court employed a legally incorrect rationale for denying it. To the extent CIR assets were not exempt, the trial court must engage in a factual inquiry to determine which individual assets were not exempt and, therefore, cannot be claimed in Volk's CIR case. Volk only supported his unfair advantage claim with conclusory statements and citations to cases irrelevant here because they involve situations in which the party being estopped failed to disclose nonexempt assets.

Finally, even if this Court were to find that judicial estoppel applies in this case, it should only apply the doctrine to those assets which would have been available to Amburgey's creditors had she disclosed them because a CIR is not a claim in and of itself; it is a type of relationship recognized in Washington under which individual assets, which may be equitably distributed upon the dissolution of the CIR, fall.

A. Judicial estoppel should not be applied here to bar Amburgey from asserting claims to CIR property which were completely exempt from the bankruptcy estate.

“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007). Washington courts consider three “core factors” when determining whether judicial estoppel applies:

- (1) Whether a party's later position is clearly inconsistent with its earlier position;
- (2) Whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and
- (3) 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.

Id. (internal quotations and citations omitted). Those three factors are the most important but they are not individually or collectively dispositive and they are not exhaustive. *Id.*

1. *Judicial estoppel is not applied in the context of bankruptcy unless the litigant failed to disclose nonexempt assets available to pay off creditors.*

In the context of bankruptcy, it appears that Washington courts only apply judicial estoppel when a party fails to disclose an asset

which would have been a part of the bankruptcy estate had it been disclosed, *i.e.*, a nonexempt asset. For instance, all the cases cited by Volk involve a party's failure to disclose a nonexempt asset or claim which could have been distributed or pursued by the bankruptcy trustee.

Volk's main supports for his argument are *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007), and *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001). In *Arkison*, the Washington Supreme Court allowed a bankruptcy trustee to pursue a specific claim—a personal-injury claim against a furniture manufacturer—which the debtor had been judicially estopped from asserting because of her failure to disclose the claim in her bankruptcy. *Arkison*, 160 Wn.2d at 536–38. In *Hamilton*, the Ninth Circuit Court of Appeals affirmed a trial court's dismissal of a plaintiff's bad-faith and breach-of-contract claims against his insurer because he failed to disclose those claims in his bankruptcy. *Hamilton*, 270 F.3d at 780. In each case, the undisclosed claims were not exempt from the bankruptcy estate and, so, constituted a potential asset which could be used to satisfy the debtor's creditors. *Arkison*, 160 Wn.2d at 537–39; *Hamilton*, 270 F.3d at 780–82.

Even in granting this discretionary review, Commissioner Barse had to acknowledge an unpublished opinion of this Court holding that where there is no actual harm because of the alleged inconsistent position, it is inappropriate to apply judicial estoppel to

bar subsequent claims. The case cited by Commissioner Bearse, *Van Allen v. Weber*, No. 42169-1-II, 2012 WL 6017690, at *6–8, 172 Wn.App. 1015 (Dec. 4, 2012), was unpublished and, therefore, it has no precedential value, is not binding on this Court (although it is this Court’s opinion), and is cited only for such persuasive value as this Court deems appropriate. GR 14.1. That being said, the case is directly on point and, because it is this Court’s opinion, should be particularly persuasive here.

In *Van Allen*, the plaintiff, Van Allen, had maintained a position in her CIR claim for assets which she did not disclose in her prior bankruptcy. 2012 WL 6017690, at *1–2. Specifically, she failed to list three pieces of real property in her bankruptcy schedules of assets and liabilities. *Van Allen*, 2012 WL 6017690, at *1. During the trial of Van Allen’s subsequent CIR action, the defendant, Weber, argued that judicial estoppel barred Van Allen from making claims related to those properties because she had not disclosed them in her bankruptcy. *Van Allen*, 2012 WL 6017690, at *2. The trial court rejected Weber’s judicial-estoppel argument, found that Weber and Van Allen had established a CIR, and divided the couple’s assets and liabilities. *Van Allen*, 2012 WL 6017690, at *2.

On appeal, this Court affirmed the trial court’s rejection of Weber’s judicial-estoppel argument for several reasons. *Van Allen*, 2012 WL 6017690, at *6–8. First, this Court pointed out that “judicial es-

toppel applies only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court." *Van Allen*, 2012 WL 6017690, at *6 (internal quotations and citations omitted). This Court then reasoned that "in and of itself, a bankruptcy debtor's failure to schedule an asset does not sufficiently involve the court so that the debtor's position becomes a position accepted by the court," and that the bankruptcy court had not accepted Van Allen's inconsistent position because her creditors were paid in full. *Van Allen*, 2012 WL 6017690, at *7. Put another way, this Court refused to apply judicial estoppel against a litigant whose inconsistent position had no effect on her prior bankruptcy. For that same reason, the lack of any effect caused by Van Allen's failure to disclose, this Court concluded that she had not gained an unfair advantage over her creditors. *Van Allen*, 2012 WL 6017690, at *7.

Moreover, one of the cases specifically relied on by this Court in *Van Allen, Johnson v. Si-Cor Inc.*, directly supports the position that judicial estoppel should not be applied to bar claims related to property which was not disclosed during a prior bankruptcy but, had it been disclosed, would have had no effect on the bankruptcy. 107 Wn.App. 902, 909–10, 28 P.3d 832 (2001). In that case, Division Three of the Court of Appeals held that judicial estoppel did not bar the plaintiff, Johnson, from pursuing a lawsuit against McDonald's which he failed to disclose in his bankruptcy. *Id.* at 912–13. The court reasoned that it would be appropriate to apply judicial estoppel

if the debtor failed to disclose a nonexempt asset which could be used to pay off creditors but that it would be inappropriate to do so if the disclosure of that asset would have had no impact on the outcome of the bankruptcy. *Id.* at 908–10. It was inappropriate to apply judicial estoppel to bar Johnson’s claim against McDonald’s because the claim was exempt and, therefore, had no effect on his bankruptcy. *Id.* at 912.

2. *Judicial estoppel should not apply to Amburgey’s claims related to property that was exempt from the bankruptcy estate because the disclosure of exempt assets would have had no effect on the outcome of her bankruptcy.*

Here, unlike the debtors in the cases cited by Volk, Amburgey did not fail to disclose a claim, she failed to disclose specific assets in which she had an interest because of her CIR with Volk. The primary assets to which she has a claim is Volk’s retirement account and the family residence. But retirement accounts that are exempt from taxation, such as 401(k) accounts, are exempt from the bankruptcy estate. 11 U.S.C. § 522(d)(11). And “property exempted [11 U.S.C. § 522] is not liable during or after the case for any debt of the debtor that arose ... before the commencement of the [bankruptcy] case....” 11 U.S.C. § 522(c). Volk’s retirement account is exempt from taxation, was exempt from Amburgey’s bankruptcy estate, was not available to pay off her creditors, and, therefore, the disclosure of that asset would have had no effect whatsoever on her bankruptcy; if she had disclosed it, her case still would have been

closed as a “no asset” case. Amburgey’s interest in the family residence was also largely, if not entirely exempt because of Washington’s homestead exception. RCW 6.13.030.

Additionally, as this Court explained in *Van Allen*, the failure to disclose an exempt asset cannot be said to create an unfair advantage for the debtor over her creditors, let alone the respondent in a subsequent CIR action. *Van Allen*, 2012 WL 6017690, at *7.

In sum, judicial estoppel is only applied by Washington courts if a litigant’s subsequent inconsistent position—such as claiming an interest in property during a CIR which should have been, but was not, disclosed in a prior bankruptcy—creates an unfair advantage for the party asserting or creates the perception that the first or second court was misled. The failure to disclose an exempt asset in a bankruptcy, however, does not create the perception that the bankruptcy court has been misled because disclosure of the asset has no effect on the outcome of the bankruptcy and, therefore, it cannot be said that the bankruptcy court relied on the inconsistent position. Moreover, the subsequent assertion of an interest in property which would have been exempt from the bankruptcy estate had it been disclosed does not create any unfair advantage for the debtor because exempt assets are not available to pay off creditors.

Here, the bankruptcy court that handled Amburgey’s bankruptcy cannot be said to have been misled by her failure to disclose exempt assets because the disclosure of those assets would have had

no effect on her bankruptcy and, for that same reason, her failure to disclose those assets did not give her an unfair advantage over her bankruptcy creditors or, in this action, Volk.

B. A CIR is a relationship under which individual property claims may be brought, and, so, judicial estoppel should not be indiscriminately applied to the distinct claims which a plaintiff brings in a CIR action.

A CIR is not comparable to breach-of-contract or personal-injury claims; it is a type of relationship recognized in Washington, under which the property and liabilities accumulated by the couple during the relationship may be treated as community property and which, therefore, are subject to equitable division upon dissolution. Amburgey's obligation was not to disclose her CIR, but to disclose her interest in the individual assets in which she had obtained an interest through her CIR with Volk. Because a CIR is not a claim in and of itself and many of the assets which become community property under a CIR may be completely exempt from the bankruptcy estate, it makes no sense to use judicial estoppel to indiscriminately bar a plaintiff from making CIR claims on property which could never have been used to satisfy her debts in bankruptcy.

If this Court finds that judicial estoppel is applicable, it should remand this case to the trial court so that the trial court may determine which of the assets Amburgey claims to have an interest in were exempt from the bankruptcy estate and those that were not.

These are issues of fact that the trial court must answer. There is no reason to apply judicial estoppel to assets which are exempt because those assets do not become a part of the bankruptcy estate and are not reachable by creditors in bankruptcy. 11 U.S.C. § 522(c). The specific assets at issue in the CIR action are not laid out in the record submitted to this Court by Volk and remanding this case to the trial court for a determination of which assets were exempt is a reasonable and appropriate measure.

C. Amburgey has standing to bring claims for the distribution of assets exempt from the bankruptcy estate.

Lastly, Volk's argument that Amburgey has no standing to bring any claims for any property acquired during the CIR is predicated on his failure to acknowledge that a CIR action is an action for the distribution of individual assets and liabilities. *It is not* a single claim, it is a multitude of claims that require factual determinations. Amburgey has legitimate claims to property which she and Volk acquired during their CIR. Some of those claims were exempt from bankruptcy and never could have become part of the bankruptcy estate. *See* 11 U.S.C. § 522. The bankruptcy trustee, as the representative of the bankruptcy estate, has the capacity to sue or be sued on behalf of the estate. 11 U.S.C. § 323. But there does not appear to be any authority supporting the position that the trustee has the authority to sue or be sued with regard to assets or liabilities which are

not a part of the bankruptcy estate, nor would one to expect to find such authority because the trustee is, by definition, merely the representative of the estate. *See* 11 U.S.C. § 323(a).

As a result, the bankruptcy trustee has standing to bring claims on assets which are not exempt and become a part of the bankruptcy estate and Amburgey has standing to bring claims on assets which are exempt and do not become a part of the bankruptcy estate. The reasonable approach for this Court to take is to remand this matter to the trial court so it may determine which of the assets Amburgey seeks distribution of in her CIR action are a part of the bankruptcy estate and those which are exempt. Only then may any court make a determination regarding who has standing, be it the bankruptcy trustee or Amburgey, to bring a particular claim.

D. Volk's request for attorney's fees can and should be rejected on its face because it is only supported by the baseless claim that Amburgey's position is not supported in law or fact.

Lastly, Volk's claim for attorney's fees is without merit. He claims that he should be awarded his attorney's fees and costs because his attorney sent Amburgey a letter warning her that her claims to property acquired during the CIR was not well grounded in law and fact. (Pet'r's Am. Opening Brief, 17–18.)

Amburgey has claimed an interest in property which she did not disclose in her bankruptcy but which was completely exempt

from the bankruptcy estate. With respect to that property, Amburgey's failure to disclose had no effect on the bankruptcy proceedings and did not give her an unfair advantage over her creditors or Volk. As a result, Amburgey's CIR claim has a solid basis in law and fact and, accordingly, there is no reason for this Court to award Volk any attorney's fees or costs.

CONCLUSION

The petitioner, Christopher Volk, seeks to reverse the trial court's dismissal of his motion for summary judgment in order to deprive Christine Amburgey—the mother of his children whom he loved and lived with for 20 years—of her interest in the property which they acquired during their CIR. He attempts to do this by invoking the doctrine of judicial estoppel, arguing that Amburgey has gained an unfair advantage over him and her creditors by failing to disclose her CIR with him in her 2013 individual bankruptcy. His argument is supported by unsupported assumptions and should be rejected because it is not supported by the law and is offensive to any reasonable notion of fairness.

Volk's first assumption—that had Amburgey's failure to disclose her CIR with Volk had an actual impact on her bankruptcy—is unsupported by the record before and is, at least in part, demonstrably wrong. The main assets Amburgey claims interests are Volk's

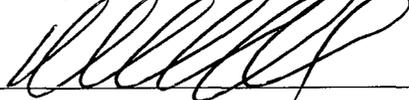
retirement account and the family residence. The retirement account was undisputedly exempt from the bankruptcy estate, could not be distributed to Amburgey's creditors, and, therefore, Amburgey's failure to disclose it had no effect on her bankruptcy and gave her no advantage over her creditors or Volk. Up to \$125,00.00 of Amburgey's interest in the family residence may be exempt, too, but the extent of her interest is a question of fact. There may be individual assets which Amburgey should have disclosed in her bankruptcy but there is no information regarding those assets in the record and so there is no way for this Court to determine whether claims for those assets should be barred by judicial estoppel.

The second assumption—that a CIR action can be barred in its entirety because it is one, indivisible claim—is patently incorrect. A CIR is a type of relationship under which an unmarried couple's property may be treated as community property in a dissolution action. The individual assets claimed in a CIR action must be considered individually, and just because judicial estoppel bars a claim for one asset does not mean it bars all claims for all assets. Volk has not provided any authority to the contrary and there does not appear to be any.

Accordingly, this Court should affirm the trial court's denial of Volk's motion for summary judgment and remand this case back to the trial court so that it may determine which assets claimed in Amburgey's CIR action were not exempt from the bankruptcy estate and may be barred by judicial estoppel

Respectfully Submitted this 3rd day of August, 2017.

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CERTIFICATE OF SERVICE

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I, Kimberly Wailes, hereby declare under penalty of perjury
under the laws of the State of Washington that I am employed by
Campbell, Dille, Barnett & Smith, PLLC, and that on today's date
August 3, 2017, I served **Respondent's Brief** in the manner indi-
cated by directing delivery to the following individuals:

| | |
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| Counsel for Petitioner Matthew D. Taylor, WSBA #31938 MCKINLEY IRVIN 1201 Pacific Ave., Ste. 200 Tacoma, WA 98402 253-592-6350 | <input type="checkbox"/> U.S. Mail Hand Delivery <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight <input checked="" type="checkbox"/> Email/E-service <input type="checkbox"/> Messenger |
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Dated this 3rd day of August, 2017.

CAMPBELL, DILLE, BARNETT & SMITH, PLLC



Kimberly Wailes, paralegal to Daniel W.
Smith and Brian J. Hansford