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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

KIMBERLY J. HUSTED,

Plaintiff,

WILLIAM LOHMAN,

Appellant,

v.

MELCHER MANUFACTURING, INC., ET AL

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case arises out of the Superior Court of Spokane County, wherein the Court conducted six hearings on a Summary Judgment Motion in order to substitute Trustee Kimberlee Husted of the Eastern District of California for Plaintiff William Lohman. The Court never came to a conclusion on the actual Summary Judgment Motion.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The Court erred in delaying the decision on Summary Judgment for six hearings and over for six months to get the Trustee to re-open the Bankruptcy. Trustee declined to do so after being requested to do so on multiple occasions. The Court postponed its decision repeatedly in order to have Trustee appear. The Court required Plaintiff to reopen the Bankruptcy when the Trustee declined to do so and it wasn't until Trustee Partridge, who presided over the original 341 meeting, was replaced that the Suntag law firm appeared before the trial court. The Trustee's attorneys appeared for the purpose of substituting the Trustee for the Plaintiff and closing the case with prejudice. The Trustee's law firm appearing four times without having either a lawyer with a legitimate Washington License or having a pro hac vice through a

Washington State licensed attorney. The Court insisted that the Trustee substitute for the Plaintiff even when Trustee Partridge declined to do so and despite its ruling that the Plaintiff did not hide his claim from the Bankruptcy Case. *RP 31*.

2. The Court erred in substituting the Trustee for Plaintiff when there was no finding of deceit and where the case was disclosed to the original trustee in the 341 meeting.

B. Issues Pertaining to Assignments of Error

1. Who is the Proper Party in Interest?
2. When the Court finds that there was no deception on the part of the plaintiff in his bankruptcy disclosures, is he precluded from pursuing the tortfeasors?

III. STATEMENT OF THE CASE

Mr. Lohman was injured in an accident while working for Atlas Van Lines aka Nelson Westerberg aka Newesco on August 11th, 2010. *CP 142-43*. The loading ramp he was on split in half and he went to the ground through the gap in the middle. *CP 142-43, 329-30*. Atlas Van Lines (identified as Newesco by Defendants) fired him while he was still in the hospital. *CP 329-30*. He was unable to work, and filed a Chapter 7 Bankruptcy Petition on November 30, 2011. *CP 51, 142-43*. He filed this lawsuit that is based in product liability, personal injury, and

violation of the ADA and employment law. *CP 1-6*. This case was filed the day before the statute expired on September 10, 2012. *CP 1-6*. Plaintiff used the Texas and Illinois Statute of Limitations of two years, rather than the three year Washington State Statute of Limitations.

Defendants removed the case to Federal Court, then it was remanded back to Superior Court. Defendants initiated the Summary Judgment Motion March 29, 2013. *CP 38-49*.

The Court denied the Defendants Motion for Summary Judgment on the basis of Collateral Estoppel. *RP 15-16, 32*. The Court expressed its opinion at the onset of the first hearing on May 17th, explicitly that it thought the Plaintiff shouldn't own the claim or recoup compensation for his injuries. *RP 31-32*. The Court denied Defendants Motion on the basis of Judicial Estoppel at the May 17th hearing but reinstated it on the Order of Substitution of parties. *RP 29-31, 103-109, CP 365-366*. The Court never actually ruled on the substance of the Summary Judgment Motion, namely defendants' argument that plaintiffs' claims were without merit. *CP 44-48*.

Mr. Lohman was grievously injured in this accident; he had numerous operations and has permanent disabilities. *CP 142-43, 329-30*. Both of his biceps were ripped off of his arms, he had multiple surgeries on his arms, and leg, has back injuries and will never be made whole. *CP*

142-43, 329-30. It is hard to see how these injuries and damages constitute a “windfall” for Mr. Lohman. If anything the Court’s ruling present a “windfall” for the tortfeasors, and a paying client to the Suntag Law Firm.

IV. SUMMARY OF ARGUMENT

During the pendency of this five-month decision process and delay by the trial court, the 9th Circuit Court of Appeals decided *Ah Quin v. County of Kauai Department of Transportation, No. 10-16000, United States Court of Appeals, Ninth Circuit July 24, 2013*. This case mandates a different Standard than the one apparently utilized by the Superior Court. The Superior Court’s October order substituting the Trustee for Mr. Lohman was decided on improper grounds and any action in regard to settling the case for what amounted to attorney fees for the Suntag Law Firm should have been stayed pending the resolution of this Appeal.

The Plaintiff never misled either the Bankruptcy Court or the Superior Court and should be allowed to proceed with his lawsuit, either as a sole plaintiff or with the Trustee as a joint Plaintiff. The Superior Court erred in the standard of review, the procedural history of postponing the decision on five separate occasions, allowing intercession

by lawyers not licensed in Washington and dismissing the case when it had the parties it wanted in the case. There was a nominal inquiry into Mr. Lohman's state of mind and intention when he presented his bankruptcy petition and Meeting of Creditors during the first hearing. The Court found, at the May 17th hearing, that Mr. Lohman did not intend to deceive the Bankruptcy Court. *RP 8-9, 18, 20-23; 35, 38-39.* When the Bankruptcy Trustee declined to reopen the case, the Court said it would dismiss unless Plaintiff substituted the Trustee for his own claim. *RP 58.* The Trustee had on three separate occasions declined to make a decision to intervene. *RP 34, 35-37.* It was not until after six hearings that the Bankruptcy Trustee, Mr. Partridge was replaced by Ms. Husted. Ms. Husted appeared through her lawyers, the Suntag Law firm did want to be substituted for Mr. Lohman. Ms. Husted's counsel was not licensed in Washington State nor had they acquired a pro hac vice status, yet the Court allowed them to be present and represent their client, the California Trustee. Plaintiffs objected to the presence of the Suntag law firm and the Courts' desire to hear their arguments despite not being licensed in the State of Washington.

Prior to the substitution of Trustee Husted, the Defendants and the Trustee came to an agreement and settlement regarding this case for a relatively nominal sum. The Suntag law firm did no investigation into

the claims of Mr. Lohman. They never acquired the file, the medical records, or any other information. Instead they made a back door deal with the defendants to settle the case for \$65,000. The Court and defense counsel repeatedly brought up the issue that Mr. Lohman was going to “get away” with walking away from \$900,000 in debt including bills from hospitals and doctors. There were no doctors or hospitals in the Debtors’ schedule. *CP 50-141*. The largest claim was the claim for the residence owned by John and Lisa Nixon dba Umfolozi Properties. *CP 77*. The bulk of the other claims were State and Federal taxes. *CP 50-141*. The Umfolozi Properties was exempt from the Bankruptcy.

V. ARGUMENT

A. Standard of Review

This Court reviews claims dismissed based on questions of law *de novo*. *Blackwell v. Department of Social and Health Services*, 131 Wn. App. 372, 375, 127 P.3d 752, 753 (2006); *Sundberg v. Evans*, 78 Wn. App. 616, 621, 897 P.2d 1285, 1287 (Div. III 1995), review denied, 128 Wn.2d 1008, 910 P.2d 482 (1996). This includes both motions for dismissal and motions for summary judgment. *Id.*; see also, e.g., *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 491, 326 P.3d 768, 771 (2014).

While Washington has not squarely addressed the issue, other jurisdictions have found judicial estoppel is a pure question of law. See, e.g., *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 143 (2d Cir. 2005).¹ In particular cases, if judicial estoppel is correctly applied, dismissal follows, and vice versa. *Smeilis v. Lipkis*, 967 N.E.2d 892, 898-99 (Ill. 2012), appeal denied, 979 N.E.2d 889 (2012).

Here, the trial court dismissed Mr. Lohman as a party with prejudice and substituted the bankruptcy trustee as the plaintiff. CP 523-24. The trial court did so in ruling on Melcher and Newesco's Motion to Dismiss which, despite its title, they framed as a motion for summary judgment. CP 38-48. The trial based its ruling "upon the above findings and applying the doctrines of judicial estoppel and the real party in interest." CP 523.² The trial court thus decided a pure question of law: namely, who was the proper plaintiff. Such dismissals are reviewable *de novo* by this Court.

¹ Appellant understands that not every jurisdiction applies the *de novo* standard to cases involving judicial estoppel. See, e.g., *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013). Because the trial court dismissed Mr. Lohman based on legal doctrines without inquiry into the facts, however, Appellant believes those cases that apply the *de novo* standard to questions of judicial estoppel provide the correct rule for this case. Even if abuse of discretion was the proper standard of review for judicial estoppel, however, reversal is still warranted because the trial court misapplied judicial estoppel as discussed *infra*.

² Washington has applied the abuse of discretion standard to cases dismissed under CR 12(b)(7) for failure to join an indispensable party under CR 19. See *Riverview Community Group v. Spencer & Livingston, et al.*, 173 Wn. App. 568; 581, 295 P.3d 258, 264 (Div. III 2013). That is not what occurred here, nor did Melcher and Newesco seek dismissal based on CR 19. Even so, under either the *de novo* or abuse of

B. The trial court committed reversible error by applying judicial estoppel where Mr. Lohman had not deliberately deceived the bankruptcy court and by substituting the bankruptcy trustee as the real party in interest.

Defendants filed their first Motion for Summary Judgment based primarily on two issues:

1. The Plaintiff should be judicially estopped from this lawsuit based on his declarations in his Chapter 7 Bankruptcy, and;
2. That it was impossible for Melcher Manufacturing's ramp to have failed.

Briefing was completed by both parties prior to the July 26, 2013 hearing. The initial Summary Judgment Hearing was set for May 17, 2013. The Court asked for supplemental briefing at that hearing solely on the issue of manufacturer's liability. Briefing was completed by both parties before the June 21st hearing. Both parties requested a decision on the Motion for Summary Judgment on the July 26th hearing.

Then there were hearings on the following dates:

Hearing #2: June 21, 2013

Hearing #3: July 26, 2013

Hearing #4: September 6, 2013

discretion standards, Appellant contends the trial court's decision to substitute the bankruptcy trustee as the real party in interest is reversible error.

Hearing #5: September 27, 2013

Hearing #6: October 11, 2013. the final “presentment hearing”.

The Court accepted the substitution of parties and signed the order dismissing the case with prejudice.

The Court having five Hearings on the Summary Judgment Motion, and a sixth Hearing for a Presentment by the Defendants, is well outside the normative behavior of Court Process. There was no reason to have hearing after hearing for the Summary Judgment Motion. The Courts’ sole reason for continuing its decision was to substitute the Trustee despite the fact he declined to intervene. The case was stretched out long enough that a Trustee with a private law firm was substituted regardless of Plaintiff’s honesty or representations to the Bankruptcy Court and the prior Trustee’s disinclination to re-open the Chapter 7 case. The ownership of the claim is governed by 11 U.S.C. § 554.

Linklater v. Johnson articulates the rationale behind the legal capacity to sue. “[A] discharged debtor lacks legal capacity to subsequently assert title to and pursue an unsecured claim simply because a trustee, without knowledge of the claim, took no action with respect to it.

Linklater v. Johnson, 53 Wn. App. 567, 570, 768 P.2D 1020(1990). A major difference between *Linklater* and this case is the fact that Trustee Partridge was informed in the Bankruptcy schedules of the two causes of

action that Mr. Lohman believed he had, and also upon Lohman's oral representation during the Creditors' 341 Meeting. The Trustee was informed about this litigation by counsel when this suit commenced and prior to Hearings 1 through 6. *RP 270-271*. The trustee declined to intervene but requested that Plaintiff's counsel keep him informed. The Trustee was fully aware of this litigation but he did not want to intervene. *RP 270-271*.

The Spokane Superior Court decided that despite the candor by Plaintiff to the Trustee and the Superior Court, and despite its finding that he disclosed the claims as he understood them, the trial court wanted a substitution of parties. The trial court was willing to conduct hearing after hearing to get the result that it wanted. Ironically, the Court never made a ruling on the Summary Judgment.

There was no Motion before the Court to replace Mr. Lohman with the Trustee by either Defense counsel. The ongoing continuances of the Summary Judgment hearings were at the Courts' bequest to get the result it wanted. The Superior Court did not wait for a Motion from a party but substituted its own unstated Motion. This is far from the objective review most commonly held by this Court.

The *Ah Quin* case explained the standards for estoppel in the context of a Bankruptcy. *Ah Quin v. County of Kauai Department of*

Transportation, 733 F.3d 267 (9th Cir. 2013). The Majority holding in Ah Quinn stated that “rather than the application of a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff’s bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood.” *Ah Quin*, 733 F. 3d at 276. The Superior Court actually did this (prior to the Ah Quinn decision) and found that Mr. Lohman had not been deceitful, but it did not want Mr. Lohman to benefit from his injuries. “The application of judicial estoppel in these circumstances operates to the detriment primarily of innocent creditors and to the benefit of only an alleged bad actor.” *Ah Quin*, 737 F. 3d at 275.

The application of estoppel operates to the benefit of defendants Melcher and Newesco. When the Bankruptcy trustee declines to pursue the claim the right to bring the action reverts to the Plaintiff *Cf. Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555, 557 (9th Cir. 1992). If the Superior Court had applied the correct standard and made a decision on Summary Judgment after the first two hearings, the case should have been Mr. Lohman’s to prosecute. The ill health and subsequent death of the Trustee substituted Ms. Husted and the Suntag Law Firm who decided they would step in and acquire the case. The Suntag Law firm did not engage in litigation as is commonly practiced. They conducted

no investigation, did not review the file, or make any other action, which would have put them in a better position to either try the case or settle it. Instead, they negotiated with the defendants prior to being substituted in as the party in interest for a nuisance value suit of \$65,000. This sum ensures that the Suntag law firm gets their fees but does little for the remaining creditors and nothing for Mr. Lohman who suffers from the injuries and job loss as a result of the accident and being fired for having the accident.

This was not a case where application of judicial estoppel, and the resulting substitution of the bankruptcy trustee as the real party in interest, was warranted. The trial court's action in this regard constitutes reversible error.

VI. CONCLUSION

For the above reasons, Appellant Lohman requests reversal of the trial court's ruling.

DATED this 18th day of September 2014.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on the on the date provided at the signature below, I caused the following individuals to be personally served with the above document:

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I also certify that on the on the date provided at the signature below, I served the following individual by depositing a copy of the above document in the U.S. mail:

Ricardo Z. Aranda
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 18th day of September, 2014, and signed at Nine
Mile Falls, Washington.

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PHEASANT

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