

**FILED**

OCT 20 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Nos. 320839 and 322769

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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KIMBERLY J. HUSTED, TRUSTEE,  
Plaintiff

v.

MELCHER MANUFACTURING, INC., a Washington corporation;  
NELSON WESTBERG, INC., an Illinois corporation, and DOES 1-10,

Defendants/Respondents

and

WILLIAM H. LOHMAN,

Appellant

---

BRIEF OF RESPONDENT MELCHER MANUFACTURING INC.

---

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## I. INTRODUCTION

William Lohman claims he was injured in Texas while unloading a truck. He claims the Melcher ramp he was using failed, but his description of that failure could not possibly have happened and could only have happened because Lohman failed to properly pin the ramp to the truck he was unloading.

Following this incident, Lohman filed for bankruptcy and was discharged as a no-asset bankruptcy. When he brought this action in Spokane County against defendants Newesco and Melcher, they moved to dismiss on the grounds that he did not own the claims, because he had not disclosed claims against them in his bankruptcy schedules and because he was judicially estopped from pursuing these claims. After some foot dragging, Lohman reopened his bankruptcy, and a new trustee was appointed who settled with Melcher and Newesco. The Spokane County case was dismissed and this appeal followed. This appeal is frivolous.

This is a settled area of the law. Plaintiffs have time and again attempted to shed legitimate debt in bankruptcy, often connected with their own tortious wrongs or actionable injuries, then sue to recover losses, real or imagined, leaving their creditors unsatisfied or destitute. If such a plaintiff did not properly disclose the claim to the bankruptcy court in his schedules, that claim remains property of the bankruptcy estate

indefinitely. The plaintiff is not the real party in interest; he does not own the claim and cannot bring an action to recover on it.

Because he was discharged from his previous debts and received the benefit of bankruptcy while failing to disclose this chose in action, Lohman is judicially estopped from claiming he was injured, because such a claim is inconsistent with his bankruptcy schedules.

Lohman did not oppose the Bankruptcy Court's assumption of the claim and settlement with the defendants. The action of the Bankruptcy Court collaterally estops Lohman from contesting the substitution and settlement

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

Melcher assigns no error to the trial court's conduct of this case.

### **B. Issues Pertaining to Assignments of Error**

#### **1. Lohman does not own this claim.**

Lohman filed for bankruptcy following his injury but did not disclose claims against Melcher or Newesco on his bankruptcy schedules.

Does Lohman own this claim?

#### **2. Lohman is judicially estopped from pursuing this case.**

Is Lohman judicially estopped from pursuing this claim?

**3. Bankruptcy Court jurisdiction.**

Did the Bankruptcy Court and Superior Court have jurisdiction to decide the ownership of this claim?

**4. The claim against Melcher is meritless.**

Even if Lohman owned this claim, he could not have been injured by Melcher's ramp in the way he claims he was injured. The trial court did not rule on the merits of Melcher's substantive motion for summary judgment. The undisputed facts show that Lohman's own improper use of the ramp, not any defect in the ramp was the cause of his injuries. Does the record provide an alternative basis to support the trial court's dismissal of this action?

**5. This Appeal is frivolous.**

There are no debatable issues upon which reasonable minds might differ in this appeal; it is totally devoid of merit with no reasonable possibility of reversal. Is this appeal frivolous?

**III. STATEMENT OF THE CASE**

**A. The facts as set out in Lohman's complaint**

William Lohman is a resident of North Dakota, VRP 22, and previously lived in Placer County, California. CP 1. The defendant, Melcher Manufacturing, Inc. is located in Spokane, Washington, and is a Washington corporation that manufactures ramps commonly used in the

trucking industry. CP 1-2. Nelson-Westerberg, Inc., Newesco, is a trucking company headquartered in Chicago and owned a ramp manufactured by Melcher. CP 2. Lohman was unloading a truck near Dallas, Texas, when he claims one of the ramps manufactured by Melcher malfunctioned, and he fell and severely injured himself on August 9, 2010. Lohman claims that Melcher's product was negligently manufactured, defective, and that Melcher violated the Washington Consumer Protection Act. He claims Newesco was negligent in using the ramp, that it terminated him in violation of the Americans with Disabilities Act and the Washington Law Against Discrimination, and that his discharge was retaliation in violation of public policy. Lohman further claims that all this has caused him extensive damage. CP 3-4. Following his injuries, Lohman filed for bankruptcy in the Eastern District of California and was granted a discharge in which he shed over half a million dollars in debt. CP 94, 110. He also settled his Workers' Compensation case for \$65,000. CP 432-33.

**B. The proceedings**

Lohman filed a complaint in Spokane County Superior Court. Initially, the defendants removed the case to Federal District Court, but it was remanded under the Forum Defendant Rule. The defendants then made motions for summary judgment, CP 469-54, which were continued

until Lohman reopened his bankruptcy CP 224-27, 316-17, 349-52, and Trustee Kimberly Husted was substituted as the plaintiff. CP 365-66. The defendants settled the case with Husted and the case was dismissed with prejudice. CP 555-56.

#### **IV. SUMMARY OF ARGUMENT**

As a matter of law, Melcher's ramp could not have been the cause of Lohman's injury in the fashion he claims. Despite his protestations to the contrary, Lohman did not disclose his claims against Newesco and Melcher to his bankruptcy Trustee. Given wholly unambiguous law, he did not own this claim, and he is judicially estopped from pursuing the claim especially given he was represented by the same attorney in both cases. Husted, the new Trustee for Lohman's bankruptcy estate, owns this claim and has settled it for the benefit of his creditors. This appeal is frivolous.

#### **V. ARGUMENT**

##### **A. Standard of review.**

The Superior Court made two decisions in this matter: The application of judicial estoppel because Lohman had failed to disclose claims against Melcher and Newesco on his bankruptcy schedules and the propriety of substituting Husted, the Trustee, for Lohman when the latter asserted ownership of the claims as the real party in interest. This Court

reviews ownership of the claim or standing to sue *de novo*; *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364, 369 (2009). This decision, however, was made by Lohman's bankruptcy Trustee and the Bankruptcy Court. The Court of Appeals reviews the trial court's application of judicial estoppel to the facts of this case for abuse of discretion. *Haslett v. Planck*, 140 Wn. App. 660, 166 P.3d 866 (2007) . The standard of review for the substitution of Husted for Lohman as the real party in interest is abuse of discretion. "We review the district court's refusal to order the ratification, joinder, or substitution of the Trustee for abuse of discretion." *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 308 (5th Cir. 2001); *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 982 P.2d 1202 (1999).

**B. An undisclosed asset in bankruptcy remains an asset of the bankruptcy estate**

When a claim accrues before a debtor files for bankruptcy, the cause of action becomes the property of the bankruptcy estate. When a bankruptcy is filed, the debtor is required to include "all legal or equitable interests . . . in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). This "includes . . . all property of the debtor, even that needed for a fresh start." *Tignor v. Parkinson*, 729 F.2d 977, 980 (4th Cir. 1984) (quoting 1978 U.S. CODE CONG. & AD. NEWS 5868, 6323); 4 W. Collier, BANKRUPTCY § 541.02[3], at 541-15, -16 (15th ed. 1988). *See also In re*

*Merlino*, 62 B.R. 836 (Bankr. W.D. Wash. 1986); *In re Linderman*, 20 B.R. 826 (Bankr. W.D. Wash. 1982). All rights of action in which the debtor has an interest become property of the estate under 11 U.S.C. § 541. See *In re Smith*, 640 F.2d 888, 892 (7th Cir. 1981). Rights of action may be subject to exemption under 11 U.S.C. § 522(1), but the debtor must take affirmative steps to remove exempt property from the estate. See *In re Patterson*, 825 F.2d 1140, 1143 (7th Cir. 1987); *Shirkey v. Leake*, 715 F.2d 859, 863 (4th Cir. 1983); 11 U.S.C. §§ 522(1), 541. Washington Courts recognize these basic rules.

The commencement of a bankruptcy case creates an estate which includes all legal or equitable interests of the debtor in property as of the commencement date. 11 U.S.C. § 541 (a)(1). The bankruptcy trustee has an obligation to collect and reduce to money the property of the estate. 11 U.S.C. § 704(1). If property is subject to exemption under 11 U.S.C. § 522 (b), the debtor must take affirmative steps to remove it from the estate. Unless the bankruptcy court orders otherwise, property of the estate not abandoned under 11 U.S.C. § 554 and not administered in the case remains property of the estate. 11 U.S.C. § 554(d).

As set forth in *Linklater v. Johnson*, 53 Wn. App. 567], 570, 768 P.2d 1020 [(1989)]:

[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. [footnotes omitted]

*Marks v. Benson*, 62 Wn. App. 178, 184, 813 P.2d 180, 183 (1991). Good faith may apply to cases of estoppel, but no case has applied a good faith standard to ownership of a claim.

**C. The determination of whether this claim was an asset of the bankruptcy estate was made by the Bankruptcy Court and accepted by the Superior Court.**

Lohman's no-asset bankruptcy was devoid of any mention of the claims he makes in this litigation or the defendants Melcher and Newesco. CP 96. Item 21 of Bankruptcy Schedule B is where these claims should have been listed, but Lohman only mentions a workers' compensation claim and the case pending against Umfolozi Properties, LLC, which he valued at \$8,000.00. *In re Lohman*. CP 96, 98.<sup>1</sup> The allegations in Umfolozi center on a lease of real property and are otherwise unrelated to the matters alleged here. *Id.* Dkt # 1. CP 111-17. Lohman's claim for workers' compensation was handled as exempt property. Calif. Civil Proc. Code § 703.140(b)(10)(C). CP 98. Lohman knew the facts supporting a claim against Melcher and Newesco. His failure to list the claims or even mention them on Schedule B means he cannot claim the asset was abandoned, and it remained a part of his bankruptcy estate. This is settled law.

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<sup>1</sup> *Umfolozi* turned into a nondischargeable judgment for fraud, *Umfolozi Properties, LLC v. Lohman*, No. 12-02032 Dkt # 42 & 42, CP 137-41.

Judge O'Connor had a number of choices when confronted with Melcher and Newesco's motions for summary judgment. She might have dismissed the case because Lohman did not own it. Or she might have dismissed it because he was judicially estopped from pursuing the claim. Or she might have given the Trustee in Bankruptcy an opportunity to appear as the plaintiff. Much to the dismay of the defendants, she took the last choice, and, after much foot dragging, Lohman reopened his bankruptcy and Husted, the new Trustee, assumed the asset and negotiated a settlement with the defendants. CP 481-552, 555-57.

On October 11, 2013, Judge O'Connor formally substituted Husted as the plaintiff. "So the finding that the plaintiff did not disclose this claim, I view as making reference to the claim involving Melcher Manufacturing and Newesco, which is the claim I have, not the worker's compensation claim. I am going to leave that finding as it is." VRP 104:20-25. This is consistent with her original oral ruling that the Trustee needed to be brought in, but she did not formalize that decision until the Trustee had taken control of the claims.

It is useful at this point to consider the legal effect of Judge O'Connor's original decision as she effectively punted the issue of ownership to the Bankruptcy Court. Lohman claims he disclosed the asset in his schedules. While it is the defendants' position he did not as matter

of law, he had the opportunity to address the issue in California when the bankruptcy was reopened. If, as he claimed, he had disclosed the asset, he could have argued to the Bankruptcy Court that the Trustee had “technically abandoned” the asset.

Section 554 provides that an unadministered, scheduled asset is deemed abandoned at the close of a bankruptcy case, unless the bankruptcy court orders otherwise. 11 U.S.C. § 554(c). This technical abandonment is generally irrevocable unless appropriate circumstances exist. See *DeVore v. Marshack (In re DeVore)*, 223 B.R. 193, 197 (9th Cir. BAP 1998). Appropriate circumstances include where (1) a debtor provided a trustee with false or incomplete information about an asset; (2) the debtor did not schedule the asset at all; or (3) the trustee abandoned the asset based on mistake or inadvertence and revocation will not cause undue prejudice. *Id.* at 198.

*In re Sas*, 488 B.R. 178, 182 (Bankr. D. Nev. 2013). Naturally, Judge O’Connor could not have made a decision such as this, and Lohman never asserted to the Bankruptcy Court that the asset was abandoned. Lohman requested:

The Debtor, WILLIAM MARTIN LOHMAN hereby respectfully requests that the Court re-open his Chapter 7 Bankruptcy for the purpose of having the Trustee evaluate the case, and determine if the Trustee believes that opening the Chapter 7 is in the interests of the Creditors, or if the claim properly belongs to Mr. Lohman.

CP 356. On November 12, 2013, the Trustee requested permission to compromise the claim.

Under the proposed compromise the Defendants will pay the estate \$65,000 and will not file a claim in the

bankruptcy case. Atlas Van Lines will waive any right to reimbursement of its workers compensation payments and will not make a claim in the bankruptcy case. In return, the Trustee will dismiss the Lawsuit with prejudice and will not seek any additional relief from Defendants on account of the accident or for claims made in the bankruptcy case relating to the Lawsuit or the Debtor's Worker's Compensation claim.

Ms. Husted believes the compromise is in the best interest of the estate and the Court should approve it under Federal Rule of Bankruptcy Procedure 9019(a) and grant such other relief as is just and proper.

CP 393. On December 10, 2013, the Bankruptcy Court granted this motion. Lohman did not oppose this motion or appeal it within 14 days.

CP 468, 552. B.R. 8002. Lohman is collaterally estopped from obtaining appellate review of the Superior Court's order by his failure to oppose or appeal the motion to approve settlement in Bankruptcy Court.

Effect on pending action. If two actions which involve the same issue are pending between the same parties, it is the first final judgment rendered in one of the actions which becomes conclusive in the other action, regardless of which action was brought first.

Restatement (Second) of Judgments § 27, cmt. 1 (1980). The "same parties" are Lohman and the Trustee and "same issue" is the ownership of the claims against Melcher and Newesco. The Bankruptcy Court finally resolved that issue of claim ownership against Lohman and that final, appealable decision precedes the Order of Dismissal of the Spokane County Superior Court. CP 555-56. While neither Melcher nor Newesco

were parties to the bankruptcy proceedings in California, Lohman was. He had a full and fair opportunity to litigate the issues of whether Husted should be substituted for himself and pursue his claim in Spokane, and he failed to appear or take any issue with it before the Bankruptcy Court. *See, Alcantara v. Boeing Co.*, 41 Wn. App. 675, 705 P.2d 1222 (1985).

**D. Judicial estoppel barred Lohman's claim**

In *Hamilton v. State Farm & Casualty Company*, 270 Fed.3d 778 (9th Cir. 2001); Hamilton sued State Farm, which had carried casualty insurance on a rental house he owned. Hamilton made a claim against State Farm for substantial damages to his house, damages that he listed as \$160,000.00 on his liabilities under the bankruptcy act. State Farm refused to pay, because it believed that Hamilton had committed a fraud. Hamilton's bankruptcy trustee noticed that Hamilton had listed a large vandalism loss and attempted to obtain some more particulars. When Hamilton would not respond, the trustee filed a motion to dismiss Hamilton's bankruptcy on bad faith, lack of truthfulness under oath, and failure to cooperate. The bankruptcy court dismissed the petition. Hamilton then commenced an action against State Farm and the Ninth Circuit barred his recovery because of his inconsistent prior statements in the bankruptcy action.

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamers Local 343*, 94 F.3d 597, 600-601 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of ‘general considerations 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.’ *Russell*, 893 F.2d at 1037.

270 F.3d at 782.

Washington courts have adopted this position. “We conclude that judicial estoppel applies only if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.” *Johnson v. Lopez Foods*, 107 Wn.2d 902, 909, 28 P.3d 832 (2001). In *Witzel v. Tena*, 48 Wn.2d 628, 295 P.2d 1115 (1956) the plaintiff had obtained a divorce in Nevada to which her husband had assented. She had declared that they had no community property. The Nevada court granted a divorce, but some 15 years later the former wife demanded an accounting. The trial court and Supreme Court both agreed that she was estopped by her Nevada pleading that the parties had no community property and dismissed the action.<sup>2</sup> The principle is sound and long standing.

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<sup>2</sup> This might at first blush seem like an issue of *res judicata* or collateral estoppel, but the issues are different precluding application of the former doctrine, and the determination of no community property was not essential to the Nevada decision thus precluding

Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (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." *New Hampshire v. Maine*, 532 U.S. 742, 750–51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.1982)). These factors are not an "exhaustive formula" and "[a]dditional considerations" may guide a court's decision. *Id.* at 751, 121 S.Ct. 1808; *see, e.g., Markley v. Markley*, 31 Wn.2d 605, 614–15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). Application of the doctrine may be inappropriate " 'when a party's prior position was based on inadvertence or mistake.' " *New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808 (quoting *John S. Clark Co. v. Faggert & Frieden, P. C.*, 65 F.3d 26, 29 (4th Cir.1995)).

*Arkison v. Ethan Allen, Inc.*, 160 Wn. 2d 535, 538-39, 160 P.3d 13 (2007).

These factors are not absolutes, but merely guides for a court's application of the doctrine. "In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. In this case, we simply observe that the factors above firmly tip the balance of equities in

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resolution on the latter grounds. One might imagine the case resolving on any of a number of maxims such as clean hands, waiver or laches as well.

favor of barring New Hampshire's present complaint." *New Hampshire v. Maine*, supra, 532 U.S. at 751.

Lohman's claim was clearly known to him because he was pursuing a worker's compensation claim for injuries arising out of the same underlying facts. *In re Lohman* Dkt #1 p. 22. CP 73. He cannot claim some inadvertence or understandable mistake. Having obtained the benefit of the bankruptcy and discharging \$624,158.00 in debt, Lohman cannot recover anything. CP 93, 199.

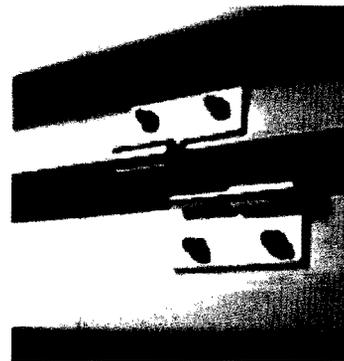
**E. Lohman's claims against Melcher are meritless**

The trial court did not reach the issue of whether Lohman's claims had the slightest merit against Melcher Manufacturing. "[A]n appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). There were adequate grounds established by the pleadings and supported by the record before the trial court to dismiss the matter on the merits. *Rash v. Providence Health & Servs.*, 31277-1-III (Wn. App.. Sept. 16, 2014).

Lohman raised three claims against Melcher: Breach of Warranty, violation of the Consumer Protection Act and Strict Product Liability. CP 2-6. Damages arising from personal injuries are not compensable under

the CPA. *Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 318, 858 P.2d 1054 (1993). If the Legislature had intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than “injured in his or her business or property.” *Id.*, citing *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 370, 773 P.2d 871 (1989). Lohman’s breach of warranty claim is likewise limited to “property damage or economic loss which befalls the ultimate consumer.” *Daughtry v. Jet Aeration Co.*, 91 Wn. 2d 704, 713, 592 P.2d 631 (1979). The same rule applies in Texas. *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977). Lohman did not respond to these assertions. “When a non-moving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established.” *Lipscomb v. Farmers Ins. Co. of Washington*, 142 Wn. App. 20, 27, 174 P.3d 1182 (2007).

Lohman claimed Melcher’s “ramps include a pin system that holds them together” and “the pins [] spontaneously disengage[d], which in turn caused the ramps to collapse.” Compl. §§2.1 & 2.2 CP 2-3. This may be hard to visualize, but the pin



system holds the dual ramps together on a large ramp and looks like the

illustration above. Were these pins to fail, the ramp would not collapse; the two halves would just not be firmly joined together. CP 300-15, 341-46. This system can be viewed at <http://www.melcher-ramps.com/index.htm>. While Lohman may have been injured, his explanation of the failure of Melcher's ramp as the cause of his injury does not make any sense. The two ramps can separate and can be used to drive a vehicle up or down a ramp. When put together they are one large ramp for a hand truck. If the pins failed or were not connected, there is nothing to "collapse."

When Melcher made this argument to the Superior Court, Lohman responded claiming the ramp had failed. However, the steps he claimed he took in connecting the ramps were physically impossible. CP 300-15, 341-46. This is beside the point. Lohman has produced no evidence of design defects, and, given the unrefuted testimony of Mr. Hardan, "Once pinned, the ramp cannot fall from the truck and no incident of something like that, such as a pin coming out or breaking has ever been reported to us." CP 301 At that point expert testimony was essential for Lohman to make a prima facie case.

To establish a design defect product liability claim, a plaintiff must show that the product was not reasonably safe as designed. RCW 7.72.030(1)(a). A plaintiff may demonstrate this by using either a risk-

utility analysis or a consumer expectation standard. See *Falk v. Keene Corp.*, 113 Wash.2d 645, 649-50, 782 P.2d 974 (1989) (interpreting RCW 7.72.030(1)(a) and (3)). Under a risk-utility analysis, a plaintiff must show that, at the time of manufacture, the likelihood and seriousness of harm caused by the product outweighed the manufacturer's cost and opportunity to design a product that would not have caused that harm. RCW 7.72.030(1)(a). Alternatively, the plaintiff may establish manufacturer liability by showing the product was unsafe as contemplated by a reasonable consumer. RCW 7.72.030(3). Several factors contribute to this consumer expectation determination, including “[t]he relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk[.]” *Seattle-First Nat'l Bank v. Tabert*, 86 Wash.2d 145, 154, 542 P.2d 774 (1975); *Bruns v. PACCAR, Inc.*, 77 Wash. App. 201, 209, 890 P.2d 469 (1995). Lohman has not suggested an alternative method of construction or shown that when properly used a Melcher ramp does not perform properly. Trying to show that the hinge failed is not sufficient to make a case here. Mechanical failure alone is insufficient to establish product liability. *Langston v. Kidder*, 670 So.2d 1, 5 (Miss. 1995). The evidence demonstrates that Lohman’s story of what happened is not possible. Unless Lohman can produce evidence showing some phenomenon caused

the product to be defective, he cannot prevail. “When the product in question is of a complex and technical nature such that a lay juror could not, in the absence of expert testimony, infer that a defective condition of the product caused the product's failure and caused the resulting injury to the plaintiff, expert testimony is a necessary component of a plaintiff's case.” *Browder v. Gen. Motors Corp.*, 5 F. Supp. 2d 1267, 1281 (M.D. Ala. 1998). Thus even were we to accept Lohman's claims of properly using the Melcher ramp, he has still presented no evidence the product was defective, because he cannot explain how the ramp separated and how that is somehow connected to the defective design of the dual ramp joint hinge or ramp.

**F. This Appeal is frivolous in violation of RAP 18.9.**

Lohman's brief makes claims unsupported by the record or appropriate reference to it. For example, on page 5 of his brief Lohman makes a number of unsupported statements. He claims the Court found he did not intend to deceive the Bankruptcy Court, but Judge O'Connor only conjectured, “[T]his individual may not have deliberately misled the [bankruptcy] court so I am not quite prepared to [rule the debtor's claim is barred].” VRP 38:8-9. Lohman goes on to claim that the former Trustee, Partridge, had declined to intervene, but Partridge had no authority having been discharged from his duties. CP 110. His statement of the case is

likewise marked with unsupported or argumentative assertions. He claims on page 2, Melcher's ramp "split in half" and he "went to the ground through the gap in the middle." But he declared on June 7, 2013, "the right side of the board separated and went to the ground." CP 275. Lohman's story changed repeatedly. It is certainly not "A fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3

Lohman complains of the number of hearings and the delays in completely resolving this matter even though he was to blame for at least some of them. VP 24:4-6; VP 67:6-7. Lohman cites no authority for the proposition that an appellate court might overturn the matter because of the number of hearings or the delays in resolving a motion for summary judgment. We are unaware of any.

Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wash.2d 427, 442-43, 730 P.2d 653 (1986) (quoting *Boyles v. Dep't of Ret. Sys.*, 105 Wash.2d 499, 509, 716 P.2d 869 (1983) (Utter, J., concurring in part, dissenting in part)); *Pearson v. Schubach*, 52 Wash.App. 716, 725-26, 763 P.2d 834 (1988). An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal. *Green River*, 107 Wash.2d at 442-43, 730 P.2d 653 (quoting *Boyles*, 105 Wash.2d at 509, 716 P.2d 869 (Utter, J., concurring in part, dissenting in part)).

*Eugster v. City of Spokane*, 139 Wn. App. 21, 34, 156 P.3d 912, 919 (2007).

When presented with Melcher and Newesco's motions for summary judgment, Judge O'Connor might have ruled that Lohman was judicially estopped from asserting the claim. The evidence from his bankruptcy adversary proceedings that Lohman had defrauded his creditors was sufficient evidence to justify such a ruling. Because the standard of review is abuse of discretion, Judge O'Connor's decision would have been unassailable. She might also have dismissed the case because Lohman was not the real party in interest, or ruled in favor of the defendants on the merits of their claims. Had Judge O'Connor done other than she did, the Trustee might have come along and complained of these dismissals. The Trustee would not have been estopped because she was not a party. Thus, Judge O'Connor's decision to insist upon a joinder of the Trustee, a decision she had clearly made at the first hearing on May 17th, CP 224-27, was a prudent use of judicial resources. Her rationale is important and a correct statement of the law.

Here is my take on this. The law with regard to the bankruptcy trustee is very important in these types of proceedings because there is a major policy issue here that, assuming for the moment that the defendants may have some legal liability, that if there are potentially funds available for bankruptcy creditors, even if the bankruptcy

has been closed, then the policy would be to go forward with the litigation.

Let me just explain to you what happened in my case. It is the Spokane Radio case, an employment discrimination case. I cannot recall if it was just before trial or if we had just started trial, but it came to my attention that the plaintiff had filed a no-asset chapter 7 bankruptcy petition and was discharged. A claim that formed the basis of the case had already been made with the EEOC. That claim was not reported to the bankruptcy trustee. The bankruptcy trustee ultimately closed the estate as a no-asset.

When the court learned about that, inquiry was made of the bankruptcy trustee how he would like to proceed. The bankruptcy trustee elected to become the real party in interest in the case. So I changed the caption, allowed him to proceed as the real party in interest. He entered into a contract with the plaintiff's counsel for continued representation in the case.

The trial was held and the plaintiff prevailed. It was not a huge judgment, I think it was \$50,000 or so. The attorney fees were a lot higher, as you can imagine in these kinds of claims. The award was turned over to the bankruptcy trustee and he paid all the creditors. Then there became an issue about whether there was any money left over. I concluded, just so you get the full picture, that if there was money left over, the plaintiff could retain it.

**The public policy issue here is we may have some money. Believe me, we went through every one of these judicial estoppel arguments because the defendant really did not want to go this way, it just wanted the case dismissed. That is how I solved the case because I think that is the proper way to do it.** The bankruptcy trustee must be involved and in my case the bankruptcy trustee elected to become involved. The case law is clear that the public policy of trying to get money back to the creditors is going to trump the judicial estoppel argument in the proper circumstance. It is important for you to

understand that it is my background on this. [Emphasis added]

VRP 28:3 – 29:24. Judge O'Connor was hardly of the opinion she was doing the defendants a service, but the only alternative to her decision was to grant the defendant's motions to dismiss. Melcher's bankruptcy was closed, and the Trustee had been discharged when the defendants made their motion for summary judgment. The only way a trustee could make a decision was to reopen the bankruptcy and appoint a new trustee. CP 110. At the July 26th hearing the Trustee was still trying to determine if she owned the claim. VRP 63:14 – 64:6. By September 6th, she had decided she owned the claim but was still looking for a Washington attorney. VRP 73:23 – 74:17. The September 27th and October 3rd hearings were taken up with formally substituting the Trustee as the party plaintiff. CP 365-66. While Lohman continued to claim he had disclosed the claim, his remedy was in the Bankruptcy Court to demonstrate that the trustee had technically abandoned the claim as we have discussed above. He did not do that, however, and thus both the Bankruptcy Court and Spokane County Superior Court proceeded to approve a settlement between the Trustee and the defendants.

Lohman's current counsel represented him in part of his bankruptcy proceedings, CP 176-77, and his professionally prepared

petition was apparently done by her paralegal.<sup>3</sup> When he filed this claim in Spokane County Superior Court, he was well aware that the Bankruptcy Court had taken no action concerning his claims for personal injuries against Melcher and Newesco, but he made no effort to notify the Court of his claims. Basic principles of law and equity dictate the decision of the Superior Court and Bankruptcy Court. None of the cases Lohman has cited support his contention that Husted did not own this claim. Given the undisputed facts in this matter, the defendants are entitled to reasonable attorney's fees because this appeal has no possibility of reversing the Superior Court and is meritless.

## **VI. CONCLUSION**

The Court of Appeals should affirm the Trial Court and award the defendants their costs and reasonable attorneys' fees on appeal. The law is settled in this area. Lohman did not own the claim and Judge O'Connor did not abuse her discretion in holding him judicially estopped and substituting the Trustee. The Bankruptcy Court's unappealed decision resolves the issue of ownership of the claim.

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<sup>3</sup> This appear in Lohman's Brief re Appealability filed in this court January 2, 2014. Page 16.

Respectfully submitted this 16th day of October 2014.

LEE SMART, P.S., INC.

By: \_\_\_\_\_

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**DECLARATION OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on October 17, 2014, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA LEGAL MESSENGER, U.S. MAIL  
AND/OR FEDERAL EXPRESS**

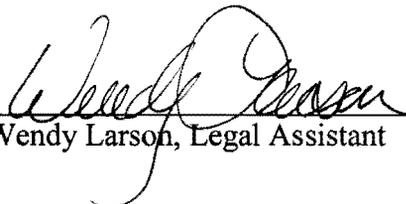
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Wendy Larson, Legal Assistant