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Nos. 320839-III and 322769-III

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

KIMBERLY J. HUSTED,

Plaintiff

WILLIAM LOHMAN,

Appellant

vs.

MELCHER MANUFACTURING, INC., a Washington corporation;

NEWESCO, INC. d/b/a NELSON-WESTERBERG, INC.,

an Illinois corporation, and DOES 1-10.

Defendants/Respondents.

REPLY BRIEF OF DEFENDANT/RESPONDENT NEWESCO,
INC. d/b/a NELSON-WESTERBERG, INC.

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I. INTRODUCTION

This frivolous appeal can be affirmed on alternate grounds: 1) Trustee is real party in interest and owned the claim; 2) judicial estoppel bars Lohman from bringing claim; and 3) Lohman is barred by *res judicata*: Bankruptcy Court considered and approved settlement (this appeal is a collateral attack on the Bankruptcy Court's Order). This case was dismissed with prejudice on January 17, 2014 following the trial court's October 14, 2013 entry of findings of fact determining that Mr. Lohman "did not disclose this claim in his [bankruptcy] schedules" and "[t]hat as a consequence, this claim remains the property of the Bankruptcy Estate." (Clerk's Papers, "CP") 365, 555. Having determined that Mr. Lohman did not own the claims in this suit, the trial court substituted the bankruptcy trustee Kimberly Husted ("Trustee Husted") as plaintiff based on two doctrines – real party in interest and judicial estoppel.

Because the trial court, acting within its discretion, determined the bankruptcy trustee—and not Mr. Lohman—was the real party in interest, Mr. Lohman did not own the claim against Newesco and Melcher Manufacturing, Mr. Lohman was estopped from bringing suit.

Finally, because the bankruptcy court approved the settlement between Trustee Husted and defendants, Mr. Lohman is now estopped from using this appeal to collaterally attack the bankruptcy court's actions.

The trial court's orders should be affirmed and attorney fees and costs awarded to defendants.

II. COUNTER-STATEMENT OF THE ISSUES

1. Did the Court properly identify the bankruptcy trustee as the real party in interest when Mr. Lohman failed to disclose his tort claims in his bankruptcy?

2. Did the Court properly find that Mr. Lohman was judicially estopped from bringing a personal injury claim when he failed to disclose his tort claims in his bankruptcy?

3. Is Mr. Lohman collaterally estopped from bringing this appeal when he failed to oppose the bankruptcy court's review of the settlement's reasonableness and did not appeal the bankruptcy court's final order?

III. COUNTERSTATEMENT OF THE CASE¹

A. Mr. Lohman Alleges Injury on August 11, 2010 and Filed for Bankruptcy on November 30, 2011.

Mr. Lohman alleges he was injured on August 11, 2010 in an on-the-job accident and alleges he was subsequently fired.² Subsequent to his injury and termination, Mr. Lohman filed for Chapter 7 Bankruptcy on November 30, 2011. *CP 51, 142-43.* Mr. Lohman's attorney in the Spokane tort claim appeared in Mr. Lohman's bankruptcy. *CP 190-91.*

In his bankruptcy schedules, Mr. Lohman made no mention of a tort claim and identified only a worker's compensation claim, which he valued at "0". *CP 96.* At the meeting of creditors, the bankruptcy trustee asked Mr. Lohman if anyone owned him money. *CP 411:8-25.* Mr. Lohman's response was simply that he was expecting a "workmen's comp award for [his] injuries" but the compensation was "just for his surgeries." *Id.* The trustee then asked Mr. Lohman if he had any claims or lawsuits against anyone and he said he only had a "breach of contract claim" unrelated to the lawsuit. *Id.* In Mr. Lohman's statement of financial

¹ Respondent provides a Counterstatement of the Case to correct inaccuracies in plaintiff's statement of the case and to clear up confusion created by multiple incorrect citations to the record. Respondent has not sought to correct all inaccuracies or incorrect citations where it does not consider them to be important to the resolution of the issues before the court. Respondents explicitly reject the assertions of negligence.

² Throughout the litigation, Respondent Newesco has disputed Mr. Lohman's representations regarding his employment status with Newesco. Mr. Lohman was an independent contractor. *CP 454.*

affairs, he disclosed eight pending or resolved lawsuits which were all filed in Sacramento or Placer County Superior Court. *CP 58-70, 106.*

Mr. Lohman's bankruptcy estate was closed as a no-asset bankruptcy and the trustee discharged on November 2, 2012. *CP 110.* Over \$900,000 of debt for medical bills, vehicles, and credit card expenditures was discharged. *CP 58-70.*

B. Mr. Lohman Filed This Tort-Based Lawsuit on September 10, 2012.

Mr. Lohman filed the lawsuit against Melcher Manufacturing and Nelson Westerberg on September 10, 2012 through attorney Joann L. Pheasant. *CP 1.*

C. Defendants Jointly Filed Their Motion to Dismiss on March 28, 2013 on the Alternative Theories of Real Party in Interest and Judicial Estoppel.

Defendants moved for dismissal of the case on March 28, 2013, asserting plaintiff was not the real party in interest (*CP 38, 40*) and that judicial estoppel barred Mr. Lohman's claims. *CP 42.*

D. Hearings: Trial Court Made Clear The Bankruptcy Trustee Was the Real Party In Interest and the Case Could Be Dismissed if The Trustee did Not Intervene.

1. First Hearing (5/17/13): Lohman Sought Continuance; Trial Court Noted Bankruptcy Trustee was Real Party in Interest.

At the May 17, 2013 hearing on defendants' motion, plaintiff's counsel conceded that she had not properly sought a continuance pursuant

to CR 56(f), but nonetheless orally sought a continuance during the hearing. (Verbatim Report of Proceedings, "VP") 24:4-6. The court granted plaintiff's request for a continuance, ordering that the bankruptcy trustee either intervene or tell the court he was not going to do so. VP 35. During the hearing, no representations whatsoever were made that the trustee had ever declined to intervene.³ Trial Judge O'Connor raised the issue of "real party in interest" and intervention of the bankruptcy trustee at the first hearing. VP 28, 34, 35.

2. 6/21/13 Hearing: Trustee is Real Party in Interest.

At the June 21, 2013 hearing, the Court expressly stated, "Unless the bankruptcy trustee becomes the real party in interest, this case will be dismissed." VP 42:22-24. The Court reaffirmed this position toward the close of the hearing stating, "If we do not have a real party in interest by the time of our hearing on July 26th, then the order of dismissal will be entered." VP 58:7-9.

3. 7/26/13 Hearing: Trustee's Counsel Requests Additional Time; Mr. Lohman Does Not Object.

Ricardo Aranda, attorney for the bankruptcy trustee appeared on behalf of newly appointed Trustee Husted on July 26, 2013. VP 61: 9-10.

³ In Appellant's brief, he cites RP 34, 35-37 for the proposition that the trustee declined to make a decision to intervene on three separate occasions. In actuality, Ms. Pheasant made the representation as follows: "The bankruptcy trustee, I talked with him now three times, has indicated to me **that he wants to be kept apprised of this case.**" VP 34:5-7 (*emphasis added*).

The court noted Mr. Aranda was not licensed to practice in Washington and stated, "I also appreciate that he is on the phone so I can understand what is happening." *VP 61:13-15*. At the July 26th hearing, Mr. Aranda represented that his office had been trying to "gather all the facts" in the case with the assistance of "counsel for both plaintiff and defense...." *VP 63:19-21*. Mr. Aranda further explained the Trustee required additional time to determine whether or not Mr. Lohman's lawsuit against Newesco and Melcher was the property of the bankruptcy estate. *VP 65:20-22*. Representing to the court that Mr. Lohman would "prefer a continuance over compromising the plaintiff's interest," Mr. Lohman's counsel did not object to the second continuance. *VP 67:6-7*. Additionally, Mr. Lohman's counsel did not object either to Mr. Aranda's appearance at the hearing nor to the Court's assertion to Mr. Aranda that "If you feel you would like this court to know about [aspects of the case], I'm not going to consider that an unauthorized practice of law, I will consider that more like an FYI to the court." *VP 61, 72:2-5*.

The court concluded the July 26, 2013 hearing stating, "I think we need to wait and see what the trustee wants to do." *VP 70:24-25*. Mr. Aranda affirmed to the court again that he had been in contact with all of the lawyers "[o]n behalf of the trustee." *VP 71:22-23*. At no point did Mr. Lohman's attorneys assert that contact with Mr. Aranda or the trustee

was insufficient or call into question the trustee's investigation of the claim. Likewise, plaintiff's counsel made no objection to this third continuance.

4. 9/6/13 Hearing: Court Confirms Trustee is Real Party in Interest; Trustee's Counsel Asks for Continuance.

On September 6, 2013, the parties appeared again. *VP 73*. The Court affirmed, "I am the one who has already made a ruling in this matter ... that the proper party in interest is the trustee. I made that ruling some time ago." *VP 78:10-13*. The court further emphasized that the lawsuit "is the property of the bankruptcy trustee." *VP 78:17-18*.

When Mr. Aranda spoke at the hearing, he acknowledged his own special appearance before the court. *VP 73:21-25*. Mr. Aranda represented that the trustee was still looking for Washington counsel and that they had "reached out to see if plaintiff's current counsel might be willing to undertake on behalf of the estate if it proceeds in that matter ... but at this time we don't have local counsel secured, and for that reason we'd like to respectfully request an additional amount of time, 30 days, to try and work that matter out." *VP 74:10-17*.

In response to assertions by plaintiff's counsel concerning the real party in interest, the court responded, "I have made a decision that the bankruptcy trustee is the real party in interest. Until I have a lawyer for

that real party in interest, I am not going to be deciding [the issues presented on summary judgment].” *VP 81:10-13*. In response to a second request for a continuance by Mr. Aranda, the court continued defendants’ motion again.

5. 9/27/14 Hearing: Court Requests Presentment Hearing.

On September 27, 2013, the court requested a presentment hearing for an order substituting the bankruptcy trustee as plaintiff. *VP 97:9-12*. At that same time, the court continued the defendants’ motion to dismiss the case to November 15, 2014 stating, “I will hear argument by the attorney retained by the trustee versus the defendant in this matter.” *VP 99:4-5*. The court requested that the caption be amended to reflect the real party in interest, the bankruptcy trustee. *VP 98-99*.

6. 10/11/13 Hearing: Court Entered Findings and Entered Order Substituting Trustee as Counsel.

On October 11, 2013, the court heard argument on the order substituting the bankruptcy trustee. *VP 103*. The court noted, “First, the plaintiff had objected to finding of fact number 2 that the plaintiff did not disclose this claim in his schedules.” Mr. Lohman’s counsel asserted Mr. Lohman “disclosed a worker’s compensation claim in his bankruptcy petition... So our position has been that it was disclosed but the nature of the claim was mistaken.” *VP 104:14-19*.

Having reviewed briefing and heard argument on the issue, the Court made her factual finding, stating, “So the finding that the plaintiff did not disclose this claim [Finding #2, *CP 365*], 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.” *VP 104:20-25*.

E. Trustee Husted, the Real Party in Interest, Settled the Claim and Obtained Bankruptcy Court Approval of the Settlement; Mr. Lohman Did Not Contest the Settlement.

On November 12, 2013, after being named as the real party in interest, Trustee Husted sought bankruptcy court approval of a \$65,000 settlement of these claims with defendants. *CP 450-459*. Trustee Husted’s Motion was unopposed. Neither Mr. Lohman nor his counsel appeared at the December 10, 2014 hearing, despite having been properly served with all relevant briefing and notices. *CP 468, 462*. The Bankruptcy Court granted Trustee Husted’s Motion and approved the settlement as reasonable. *CP 468*. Mr. Lohman did not appeal the order.

F. Court Dismissed (*CP 555*) this Case on January 17, 2014.

Judge O’Connor reviewed the bankruptcy settlement pleadings (“It [bankruptcy pleadings] is all in the record” *VP 114:5-6*) and dismissed the case on January 17, 2014.

IV. ARGUMENT

A. Standard of Review: Abuse of Discretion.

Contrary to plaintiff's assertion, Washington courts have directly addressed the standard of review to be applied when cases are dismissed on judicial estoppel grounds. In *Bartley-Williams v. Kendall, M.D.*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006), the court unequivocally stated "a lower court's application of the doctrine of judicial estoppel is reviewed for abuse of discretion." See also *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (holding that, when a tort claim is dismissed based on the application of judicial estoppel related to a bankruptcy disclosure, the appellate court will "review the trial court's application of the doctrine of judicial estoppel to the facts of [the] case for an abuse of discretion."). Citing with approval *Hamilton v. State Farm Fire & Casualty*, 270 F.3d 778, 782 (9th Cir. 2001) and *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir. 1999). The abuse of discretion standard is similarly applied in the Ninth Circuit case applying Hawaii law upon which plaintiff principally relies. See *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 270, 272 (2013).

A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or on untenable reasons. *In re Marriage of Littlefield*, 133 Wn.2d 39, 46, 940 P.2d 136 (1997).

Likewise, decisions regarding application of the Civil Rules, such as decisions concerning the real party in interest, are also reviewed for an abuse of discretion. *See, e.g., Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *cert. den'd.*, 522 U.S. 1077, 118 S.Ct. 856, 139 L.Ed.2d 755 (1998). Specifically, trial court orders involving the application of CR 17(a)'s requirement that every action be prosecuted in the name of the real party in interest are reviewed for abuse of discretion. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 171, 982 P.2d 1202 (1999).

The trial court made factual findings prior to entering its order “applying the doctrines of judicial estoppel and the real party in interest” and the court’s rulings should be reviewed only for abuse of discretion. *CP 365.*

B. The Court Properly Ruled That the Bankruptcy Trustee, Not Mr. Lohman, is the Real Party in Interest.

In the original Motion to Dismiss, defendants set forth the requirements of CR 17(a) that “Every action shall be prosecuted in the name of the real party in interest.” *CP 39.* Nowhere in plaintiff’s appellate briefing does he dispute that Trustee Husted was the real party in interest.

The commencement of a bankruptcy creates a bankruptcy estate, which encompasses “the debtor’s legal and equitable interests in property

‘as of the commencement of the case’.” *Bartley-Williams*, 134 Wn. App. at 100-101. In his or her bankruptcy petition, the debtor must list “all legal or equitable interests ... in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This includes all causes of action in which the debtor has an interest, including unliquidated claims and causes of action where the likelihood of success is uncertain. *Bartley-Williams*, 134 Wn. App. at 98; *Cunningham*, 126 Wn. App. at 230 (citing 2 William Miller, *Collier Bankruptcy Manual* ¶ 521.05[3][a] (Lawrence B. King ed. 2002)); *Linklater v. Johnson*, 53 Wn. App. 567, 569, 768 P.2d 1020 (1989).

Once part of the bankruptcy estate, the debtor's interest in the property is represented by the bankruptcy trustee. *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (“When [plaintiff] declared bankruptcy, all the ‘legal or equitable interests’ he had in his property became the property of the bankruptcy estate and are represented by the bankruptcy trustee.”). *Linklater*, 53 Wn. App. at 569-70. Property of the bankruptcy estate, including causes of action that are not abandoned or administered during the bankruptcy, remains property of the estate even after the estate closes. *Bartley-Williams*, 134 Wn. App. at 101. It is therefore the trustee, and not the debtor, who is the real party in interest with standing to pursue such causes of action. *Id.*

In *Bartley-Williams v. Kendall*, the court held that the claims of the debtor plaintiff were dismissed, but the court allowed the trustee to substitute as a plaintiff in the lawsuit, noting: “If the trustee had been substituted as the plaintiff, the claim against [defendant] would have proceeded for the benefit of the creditors of the [debtors’] bankruptcy estate.” 134 Wn. App. 95, 100, 138 P.2d 1103 (2006). In *Bartley-Williams*, the debtors/plaintiffs, however, were barred from receiving any benefit of the suit.

Further, Washington and other states have routinely held that substitution of the trustee is the appropriate resolution when a debtor fails to disclose an asset that rightfully belongs to his creditors.

Other jurisdictions allow substitution of a bankruptcy trustee for a plaintiff-debtor with relation back under Federal Rule of Civil Procedure 17(a) or state counterparts. In *Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995), the Indiana Supreme Court allowed substitution of the bankruptcy trustees for the debtors who originally filed the suit. The court first found that although the bankrupt parties who brought the suit were not the real parties in interest, they had standing to sue because they alleged a direct injury. *See id.* The court concluded that substitution of the bankruptcy trustees, with relation back to the original filing, was sound public policy because it protected innocent creditors and there was no prejudice to the defendants:

We believe that permitting bankrupt parties to substitute the trustee as the real party in interest is sound public policy. In general, the plaintiff-debtor does not have anything to gain from failing

to commence a suit in the name of the trustee, because a debtor who fails to do so is precluded from pursuing that claim in his or her own name. Instead, it is the creditors of such plaintiff-debtors who are deprived of access to a potential asset. The innocent creditors of the plaintiff-debtors should not suffer due to commencing a lawsuit in the name of the plaintiff-debtor rather than in the name of the trustee. Furthermore, the defendants in these cases were not unfairly prejudiced - they had notice of the claims against them and the amended complaints were identical in all respects except of course for the substitution of the names of the real parties in interest.

Id. (emphasis added).

Sprague, 97 Wn. App. at 177-78. This is a well settled law. Trustee Husted, not Mr. Lohman, owns this claim.

At a series of hearings conducted pursuant to continuances requested by Mr. Lohman's counsel and counsel for Trustee Husted, the trial court spelled out for Mr. Lohman's counsel the procedure that should be followed before this case could move forward. The Bankruptcy Court needed to re-open the case and the trustee needed to be appointed as the real party in interest. Trustee Husted elected to intervene as the real party in interest. Trustee Husted reviewed and evaluated the case and settled it for the benefit of Mr. Lohman's bankruptcy creditors. *CP 379-468*.

Mr. Lohman has not owned the claims in this suit throughout the pendency of the litigation because of the nature of a Chapter 7 Bankruptcy. All pre-Chapter 7 petition claims are owned by the Estate.

The only party that could have brought the suit was the Bankruptcy Trustee and the Trustee elected to intervene and settle. The trial court's discretionary ruling concerning real party in interest should be affirmed. Judge O'Connor's subsequent dismissal of a case properly settled between the defendants and the real party in interest and approved by the Bankruptcy Court (Trustee) should be upheld.

C. The Trial Court Properly Determined Mr. Lohman Was Judicially Estopped from Bringing a Claim He Failed to Disclose on His Bankruptcy Filing.

The theories of judicial estoppel and real party in interest are related and are supported by the general concept that a debtor's failure to list a personal injury claim misleads the Bankruptcy Court as to the assets and is unfair to the creditors.

[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding.

Hamilton, 270 F.3d at 785 (citation and internal quotation omitted).

When a debtor files a petition for bankruptcy, an "estate" is created. 11 U.S.C. § 541(a). All legal or equitable interest in the debtor's property at the time of filing becomes the property of the bankruptcy estate unless it is subject to an exemption. 11 U.S.C. § 522(b)(1), §

541(a)(1). The Bankruptcy Code and Rules impose upon bankruptcy debtors “an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.” *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778, 785 (9th Cir. 2001) (citations and internal quotation omitted). A debtor must disclose all possible causes of action, “even if the likelihood of success is unknown.” *Cunningham*, 126 Wn. App. at 230. A debtor also has an ongoing duty to amend the bankruptcy schedules to accurately disclose all information. *Hamilton*, 270 F.3d at 784.

Plaintiff’s arguments based on the *Ah Quin* case are inapposite. The *Ah Quin* case does not interpret Washington law and is inapplicable. *Ah Quin* has no effect because it applies to narrow circumstances not applicable here and does not change the standard to be applied in typical judicial estoppel cases such as this one. Neither the factual scenario nor the policy considerations of *Ah Quin* apply here. *Ah Quin*’s ruling does not change well-established Washington case law or policy on the doctrine of judicial estoppel. Because Judge O’Connor utilized the correct, established Washington judicial estoppel standard and properly exercised her judgment in applying the facts of this case, the dismissal of plaintiff’s claims under this equitable discretionary doctrine should be affirmed.

D. **Mr. Lohman's Appeal Is Further Barred by the Doctrine of Collateral Estoppel Because He Failed to Contest the Bankruptcy Approval of the Settlement Between Defendants and Real Party in Interest, Trustee Husted.**

In ruling on the settlement between Trustee Husted and the defendants, the Bankruptcy Court of necessity found that Trustee Husted, not Mr. Lohman, owned the claim. Under Bankruptcy Rule 8002 any appeal of the Bankruptcy Court's order must have been made within 14 days or it becomes final and unappealable. Thus, the determination of whether Mr. Lohman owns the claim has been resolved by a court of competent jurisdiction and *res judicata* issue preclusion bars Mr. Lohman's collateral attack in this appeal.

Mr. 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. The Restatement of Judgments provides authority for the proposition that an unappealed trial court decision in a later-filed action can collaterally estop the losing party in the first-filed action from obtaining appellate review of the trial court decision in that initial action.

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). Comment 1 makes it clear that the Bankruptcy Court has finally resolved the issue of claim ownership against Mr. Lohman and that final decision precedes any issue or order of the Spokane County Superior Court. While neither Melcher nor Newesco were parties to the bankruptcy proceedings in California, Mr. Lohman was. He had a full and fair opportunity to litigate the issues of whether Trustee 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. The rules concerning collateral estoppel are well settled and longstanding. *See, Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (9th Cir. 2001).

Mr. Lohman repeatedly claimed the Bankruptcy Court, not the Spokane County Superior Court, should determine his right to the claim. Having been given the opportunity to make this argument to the bankruptcy court (*see CP 469-552*), Lohman declined and consequently he is collaterally estopped from denying that Trustee Husted, rather than he, is entitled to the claim. This reasoning further supports denial of Mr. Lohman's appeal.

E. Attorneys' Fees Should Be Awarded Respondent Pursuant to RAP 18.9, 18.1.

Lohman's appeal is frivolous. Respondent Newesco should be awarded its attorneys' fees for having to respond to this appeal. RAP 18.9(a). Lohman has failed to demonstrate any debatable abuse of discretion by the trial court. "An appeal is frivolous if, considering the entire record, it has so little merit that there is no reasonable possibility of reversal and reasonable minds could not differ about the issues raised." *Johnson v. Jones*, 91 Wn. App. 127, 135, 955 P.2d 826 (1998). This is an appeal of discretionary rulings that are supported by the facts and clear case law.

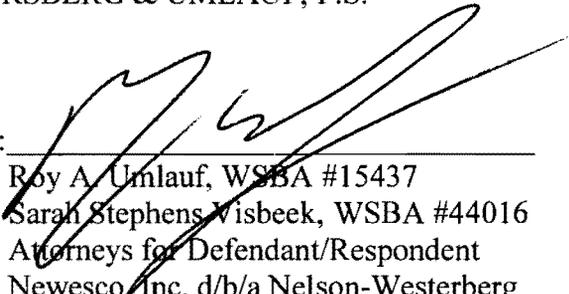
V. CONCLUSION

It was fully within the trial court's discretion to rule on the issues of real party in interest and judicial estoppel. The trial court bent over backward to afford plaintiff sufficient time to have Trustee Husted appointed as the real party in interest and ultimately ruled, under an abuse of discretion standard and consistent with Washington law, that the bankruptcy trustee was the real party in interest and that Mr. Lohman was judicially estopped from pursuing his claim because of the inconsistent positions he had taken before the Bankruptcy Court and the Superior Court of Spokane County. Further, Mr. Lohman failed to appeal the California Bankruptcy Court's approval of the settlement reached between

the real party in interest, Trustee Kimberly Husted, and defendants. As such, Mr. Lohman is collaterally estopped from taking a new position before this or any other tribunal. The trial court's orders should be affirmed in all respects.

DATED this 16th day of October, 2014.

FORSBERG & UMLAUF, P.S.

By: 

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

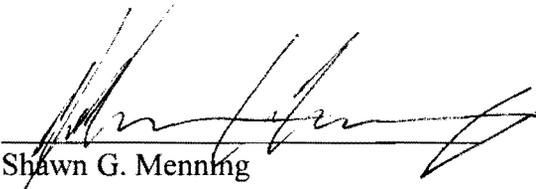
On the date given below I caused to be served the foregoing REPLY BRIEF OF DEFENDANT/RESPONDENT NEWESCO, INC. D/B/A NELSON-WESTERBERG, INC. on the following individuals in the manner indicated:

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SIGNED this 16th day of October, 2014, at Seattle, Washington.


Shawn G. Menning