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No. 78481-7

CLERK SUPREME COURT  
OF THE STATE OF WASHINGTON

PETER H. ARKISON, CHAPTER 7 TRUSTEE FOR MICHELLE  
CARTER,

Appellant,

v.

ETHAN ALLEN, INC.; RENKINS TRADING, INC., a/k/a/ RENKINS,  
INC.; ETHAN ALLEN INTERIORS; and  
JOHN DOE CORPORATIONS 1-5,

Respondents.

***RESPONSE OF ETHAN ALLEN, INC., ET AL.,  
TO BRIEF OF AMICUS CURIAE***

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY  
Cause No. 05-2-19740-4SEA

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**ETHAN ALLEN'S RESPONSE TO BRIEF OF AMICUS CURIAE**

The Brief of Amicus Curiae, the Washington State Trial Lawyers Association (“WSTLA”), contains little, if anything, that is not already addressed in much greater detail in the briefs of the parties to this appeal. What the WSTLA brief does accomplish, however, is to highlight how unusual the current posture of this appeal is.

It is unusual because Mr. Arkison (Trustee for Ms. Carter’s chapter 7 bankruptcy proceeding and appellant); Ethan Allen (the defendant in Ms. Carter’s personal injury lawsuit and respondent); and WSTLA (the amicus curiae for the plaintiffs’ bar) all appear to be in agreement on virtually every relevant issue – save one.

The one bone of contention is whether the Trustee’s recovery for Ms. Carter’s personal injury claim should be limited to the amount necessary to pay valid claims of the creditors that the Trustee represents - thus barring Ms. Carter from obtaining a personal benefit from the personal injury claim she did not disclose to the Trustee or the Bankruptcy Court before she obtained a “no asset” discharge of her debts in December 2002.

The record and the law are clear. The trial court concluded that Ms. Carter’s conduct warranted application of judicial estoppel to bar her from pursuing her claim and obtaining a personal benefit from a claim she told the Bankruptcy Court did not exist. The trial court also imputed Ms. Carter’s conduct to the Trustee and therefore also barred the Trustee from pursuing the claim, even for the benefit of Ms. Carter’s creditors.

However, all of the parties now agree that Division I properly held, in *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 138 P.3d 1103 (2006), that this approach uses judicial estoppel as a blunt instrument that does damage to Ms. Carter's innocent victims -- the creditors whose rights were wiped out in the no asset bankruptcy. The answer, in *Bartley-Williams* and in numerous well-reasoned recent reported decisions, is to focus the judicial estoppel remedy on the party who has "played fast and loose" with the courts -- in this instance, Ms. Carter.

The Trustee should be permitted to pursue Ms. Carter's claim to the extent necessary to repay valid creditors' claims. At the same time, under the undisputed facts and the authorities the Trustee, Ethan Allen and WSTLA all agree should control, Ms. Carter should be barred from obtaining any financial reward for the claim she hid from the Trustee, her creditors and the Bankruptcy Court. The Bankruptcy Court granted Ms. Carter a no asset discharge of her debts because it believed Ms. Carter when she falsely represented, in a sworn written statement, that the claim did not exist. She may not now assert that the claim does indeed exist and recover money for it in a Washington court.

**1. The undisputed record demonstrates that Ms. Carter was injured before she entered bankruptcy; was actively pursuing monetary damages for her injury while her bankruptcy was pending; did not disclose her personal injury claim to the Bankruptcy Court or the Trustee; obtained a “no asset” discharge based on that false information; and did not make any attempt to advise the Trustee or the Bankruptcy Court of her claim until Ethan Allen asserted judicial estoppel as a bar to her personal recovery.**

Although WSTLA asserts that the record is insufficient to determine whether judicial estoppel should bar Ms. Carter’s personal recovery, in truth the Trustee, Ethan Allen and WSTLA do not dispute any of the following facts, which are firmly established in the record:

-- Ms. Carter was injured on August 10, 2002 when an Ethan Allen delivery person allegedly poked her in the eye with the leg of a sofa. (CP 30-34).

-- Ms. Carter immediately sought medical attention and claimed she was unable to return to work. Within days of this accident, Ms. Carter was in communication with Ethan Allen and its insurers seeking compensation for her injury. (CP 36-56).

-- Two weeks later, on August 26, 2002, Ms. Carter sought protection under chapter 7 of the Bankruptcy Code. She had an affirmative obligation to advise the Bankruptcy Court and her creditors of all assets, including her personal injury claim, which could be marshaled to pay her debts. Nevertheless, Ms. Carter did not tell the Trustee or the Bankruptcy Court that she was actively seeking to recover money for her injury of August 10, 2002. (CP 66-84, 86-88).

-- In early October 2002, Ms. Carter retained counsel to pursue her personal injury claim, who had represented her in two prior personal injury lawsuits. Counsel was in direct written communication with Ethan Allen’s insurer to solicit a settlement offer and to obtain money for Ms. Carter. Still, Ms. Carter did not tell the Bankruptcy Court that she had a valuable personal injury claim, even when she gave sworn testimony at the meeting of creditors around that same time. (CP 64; 100-103; 111-112; 124-125).

-- On December 3, 2002, the Bankruptcy Court granted Ms. Carter a “no asset” discharge, relying on her sworn representation, in her bankruptcy

schedules, that she had no substantial assets and no valuable claims that creditors could look to for payment of her debts. Her creditors took nothing. (CP 90).

-- On June 16, 2005, Ms. Carter sued Ethan Allen. She claimed \$1 million in damages. Prior to that date, Ms. Carter had never notified the Bankruptcy Court or the Trustee -- formally or informally -- that she had such a claim. (CP 30-34; 105-107; 124-125).

-- On August 11, 2005, Ethan Allen asserted that Ms. Carter should be estopped from bringing her personal injury claim because she had never disclosed the claim to the Trustee and had obtained a "no asset" discharge of her debts by falsely representing that she had no such claim. (CP 8-11).

-- In October 2005, after Ethan Allen had asserted judicial estoppel as a bar to Ms. Carter's claim, the Trustee finally learned about the claim. Ms. Carter's bankruptcy proceeding was reopened; and the Trustee appeared as the "real party in interest" some weeks after Ethan Allen noted a motion to dismiss her claim on judicial estoppel grounds. (CP 14-25; 108-109; 124-125; 127-136; 144-149).

**2. The parties and WSTLA are in substantial agreement on the applicable law.**

The Trustee, Ethan Allen and WSTLA are also in substantial agreement on the law that should be applied here.

-- The doctrine of judicial estoppel is equitable in nature. Judicial estoppel protects the "integrity of the judicial process" and "prevents manipulation of the courts by litigants." It applies where a party asserts a position to his advantage in one court proceeding, and then seeks an advantage by asserting an incompatible position in a later proceeding.

-- The trial court's application of judicial estoppel is reviewed under the deferential abuse of discretion standard.

-- Under *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001), there are three factors that "may" be addressed to determine whether judicial estoppel applies to a given situation. However, the Supreme Court carefully cautioned that these factors do not constitute "inflexible prerequisites or an exhaustive formula." The factors are:

Whether the party's later position is "clearly inconsistent" with its earlier position;

Whether judicial acceptance of an inconsistent position in the later proceeding would create the perception that either the first or the second court was misled; and

Whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party, if not estopped.

-- In *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9<sup>th</sup> Cir. 2001), the Ninth Circuit applied these three *New Hampshire* factors to bar a plaintiff from pursuing a claim for his own benefit, when it was clear he knew about the claim, failed to disclose it in an earlier bankruptcy, and obtained a no asset discharge as a result. The fact that the bankruptcy had been reopened was of no importance -- a debtor cannot circle back and "do it over" after his opponent has discovered the nondisclosure and asserted judicial estoppel as a bar to his claim.

-- In *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 138 P.3d 1103 (2006), Division I held that judicial estoppel should apply to the debtor/plaintiff who knows of a tort claim, does not disclose it in bankruptcy, obtains a no asset discharge, and later seeks to pursue the claim free of his debts. However, the Trustee may reopen the bankruptcy proceeding and pursue the claim *for the benefit of creditors*, who should not be penalized a second time because of the debtor's conduct.

**3. Unlike WSTLA and the Trustee, Ethan Allen and the reported cases hold that the Trustee's pursuit of Ms. Carter's personal injury claim for the benefit of her creditors cannot serve as an end run around the judicial estoppel bar against her personal recovery.**

*This* is where Ethan Allen parts company with WSTLA and the Trustee. The rationale for the Trustee's position on appeal -- and for Division I's decision in *Bartley-Williams* -- is that Ms. Carter's misconduct may not be attributed to the Trustee, who is not in privity with her and is, in

fact, a representative and a fiduciary of Ms. Carter's creditors and the Bankruptcy Court, not Ms. Carter. Thus, rather than "tar the Trustee with the same brush" as Ms. Carter, and thereby punish her innocent creditors, the Trustee should be permitted to pursue the claim for the benefit of creditors.

According to the case law -- and common sense -- this means the Trustee may not recover more than is necessary to make the creditors whole and give Ms. Carter the same recovery she would have obtained if she had disclosed her claim as required. Otherwise, judicial estoppel would become a dead letter, and debtors like Ms. Carter would be free to withhold information about their contingent claims, obtain a no asset discharge of their debts, and then pursue such claims for their own benefit -- unless and until they are caught. If and when a nondisclosing debtor is caught, she would be free to "duck [the] bankruptcy court disclosure obligation, then 'fess up' without consequence once exposed by [an] adversary." *Scoggins v. Arrow Trucking Co.*, 92 F.Supp.2d 1372, 1376 (S.D.Ga. 2000).

The trial court in this case, like Division II in *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.2d 531 (2005), found that the Trustee should be barred from pursuing Ms. Carter's undisclosed claim to the same extent as Ms. Carter would be barred by her own conduct. In order to bar the Trustee, the trial court necessarily found that Ms. Carter's conduct also barred *her* from recovering for her claim.

The trial court did not abuse its discretion and broad equitable powers by invoking judicial estoppel against Ms. Carter's misconduct -- the only error was in extending that remedy to the Trustee to the extent he acts as the representative of her creditors. However, to the extent the Trustee purports to act as a representative who will obtain monetary relief for Ms. Carter, his claim must remain barred.

Under the basic rules stated in *New Hampshire v. Maine*, *Hamilton v. State Farm*, *Bartley-Williams*, and in numerous other authorities in many other jurisdictions, Ms. Carter cannot be permitted to tell the Bankruptcy Court she had no claim; obtain a discharge of her debts based on her representation that she had no claim; and later commence a tort lawsuit in King County Superior Court to obtain money damages for the claim that she said did not exist when she obtained a no asset discharge from the Bankruptcy Court. As the Ninth Circuit concluded in *Hamilton*, this fact pattern is a classic, textbook example of the proper application of the three "*New Hampshire* factors" to bar a plaintiff from pursuing and obtaining any benefit from a claim she did not disclose in Bankruptcy Court.

When Ms. Carter told the Bankruptcy Court she did not have a personal injury claim, she took a position "clearly inconsistent" with her position in the King County Superior Court -- that she did indeed have a personal injury claim, allegedly worth \$1 million.

When the Trustee issued a report advising the Bankruptcy Court and creditors that Ms. Carter had no assets and no personal injury claim, and when the Bankruptcy Court accepted that as true and granted a no asset discharge of her debts, there was "judicial acceptance of an inconsistent position" that creates the perception that the courts have been misled.

When Ms. Carter obtained freedom from her creditors, she gained an "unfair advantage."

Finally, the fact that years later, Ms. Carter was caught in the act and compelled to reopen her bankruptcy and make the proceeds of her personal injury claim available to her creditors is of no importance to the analysis of the three *New Hampshire* factors.

This is the analysis in *Hamilton*, and it is the proper analysis here.

Now WSTLA and the Trustee argue that the question whether the Trustee's recovery should be limited to the creditors' interest in Ms. Carter's claim is not properly before the Court, because the trial court somehow never decided whether Ms. Carter should be judicially estopped from bringing her own claim.

In other words, WSTLA and the Trustee have asked this Court to pretend the trial court did not decide that judicial estoppel bars both the Trustee and Ms. Carter from pursuing her personal injury claim for her own benefit; or if it did make that decision, that it did so erroneously.

The argument is illogical; and it ignores the undisputed facts and the very same law that WSTLA and the Trustee have asked the Court to apply.

The Trustee and WSTLA cannot dispute that Ms. Carter *knew* she had a tort claim against Ethan Allen when she filed her chapter 7 petition; when she filled out her bankruptcy schedules; when she obtained a no asset discharge of her debts; and when she filed this lawsuit without telling the Trustee, the Bankruptcy Court or her creditors she had done so. Ms Carter attempted to keep this claim for herself, and out of the hands of her creditors, at the same time she washed her debts clean in her "no asset" bankruptcy. The record does not permit any other conclusion.

The Trustee and WSTLA do not dispute that Ms. Carter did not make any effort, formal or informal, oral or written, to advise the Trustee, the Bankruptcy Court or her creditors that she had a valuable claim against Ethan Allen at any time before Ethan Allen raised judicial estoppel as an obstacle to her recovery. The record does not permit any other conclusion.

Finally, WSTLA itself has admitted that this is precisely the situation in which a trial court may properly invoke judicial estoppel to bar a debtor from obtaining recovery for an undisclosed claim. In its Brief of Amicus Curiae in the *Miller v. Campbell* case, WSTLA had this to say:

All three Divisions of this Court have recognized that judicial estoppel may, in appropriate circumstances, bar a claim that a party failed to disclose in a prior bankruptcy proceeding. [Citing *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 909-910, 28 P.3d 832 (2001); *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 226-234, 108 P.3d 147 (2005); *Garrett v Morgan*, 127 Wn. App. 375, 380-381, 112 P.3d 531 (2005)]. *This arises where a bankruptcy debtor has knowledge of a potential*

*claim before filing a bankruptcy petition, but does not list it as an asset, as required under 11 U.S.C. §521(1) and Fed. R. Bankr. P. 1007(h). See Johnson at 910. In so doing, the debtor keeps for himself an asset that may have created a dividend for certain creditors, while gaining the advantage of a discharge of debts based on disposition of his bankruptcy as a "no asset" case. See id. at 909, Cunningham at 232-233. The clear inconsistency of this strategy has resulted in judicial estoppel of a later-asserted claim by the debtor, even where the bankruptcy discharge was vacated. See Cunningham at 232-233; see also Bartley-Williams v. Kendall, \_\_\_ Wn.App. \_\_\_, 138 P.3d 1103, 1106-07 (2006) (noting judicial estoppel against debtor does not preclude bankruptcy trustee from pursuing pre-petition claim for benefit of creditors.<sup>1</sup>*

WSTLA suggests that the question whether the Trustee's recovery should be limited to the amount due Ms. Carter's creditors is "not properly before the Court at this time." Of course it is. The very basis for the Trustee's appeal is that he represents creditors, and therefore may not be "tarred with the same brush" as Ms. Carter. The Trustee argues that he must be permitted to proceed as a representative of the creditors, because punishing the creditors for Ms. Carter's misconduct punishes innocent third parties. That argument rises or falls on the Trustee's agreement that he will not obtain recovery to benefit Ms. Carter, who plainly should be sanctioned for her nondisclosure. Otherwise, the Trustee's substitution as the "real party in interest" is nothing more than change of name; and an end run around the judicial estoppel bar that properly applies against Ms. Carter's personal recovery for her claim.

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<sup>1</sup> *Miller v. Campbell, No. 56736-5-1 Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation at 9-10 [emphasis added].*

Finally, WSTLA suggests that the trial court was required to determine “whether Carter’s failure to schedule the potential action was due to inadvertence or mistake.” This implies that as a prerequisite to applying judicial estoppel, the trial court was required to divine Ms. Carter’s subjective intent and understanding and to negate the possibility that her nondisclosure was “inadvertent” or “mistaken.” There is no such requirement under *New Hampshire, Hamilton, Johnson, Garrett, Cunningham* or *Bartley-Williams*. Nor should there be such a requirement.

Ms. Carter knew she had a claim -- she was actively pursuing money for and had an attorney to help her do it. She knew why she was in Bankruptcy Court and why the Court required her to disclose all of her assets, including “contingent and unliquidated claims of any nature.” She was in Bankruptcy Court to stop her creditors from trying to collect her debts because the Bankruptcy Court imposed an automatic stay on all collection efforts. She was in Bankruptcy Court to obtain a full and final discharge of her unsecured debts, expecting to wipe out her financial obligations by paying pennies on the dollar or nothing at all. In exchange for this relief, Ms. Carter was required to disclose any and all assets, including valuable contingent claims, to the Trustee, her creditors and the Bankruptcy Court, because the Court would require those assets and claims to be applied against her debts as part of the final settlement of her obligations. Ms. Carter knew she received a “no asset” discharge of her debts; and she knew she *did* have an asset that the

Bankruptcy Court never took into account. That asset is the personal injury claim she attempted to pursue later, for her own account, free from her creditors, seeking damages of \$1 million.

A debtor's failure to disclose a cause of action *might* be deemed "inadvertent" where the debtor lacks knowledge of the factual basis of the undisclosed claims or has no motive for concealment. *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000). But here, Ms. Carter knew she had a valuable claim, and she had every reason to conceal it. But for the fact that Ethan Allen "blew the whistle," Ms. Carter would have been able to take the money and run. According to Ms. Carter, this was not a small claim; and it is not a claim Ms. Carter forgot about or could have forgotten about. She was visiting doctors and lawyers, staying home from work, and actively pursuing money for the claim at the same time she appeared in Bankruptcy Court seeking relief from her creditors. In fact, when Ms. Carter appeared and testified under oath in October 2002, to make a full disclosure of all of her assets and liabilities in a meeting with the Trustee and her creditors, she did not make any mention of her personal injury claim. She did not "forget" about it – because just the week before, Ms. Carter had gone to Portland to meet with an attorney, Mr. Breshears, who had represented her in two prior personal injury lawsuits; and retained him to proceed against Ethan Allen and its insurer. (CP 64; 102-103).

Nor did Ms. Carter make any effort to set the record straight at any time before Ethan Allen took action to force her hand. There is no evidence Ms. Carter went back to the Trustee or the Bankruptcy Court to advise, formally or informally, that her personal injury claim had been left out of her disclosure of assets. Ms. Carter brought suit against Ethan Allen and “fessed up” only because Ethan Allen's assertion of judicial estoppel gave her no other choice.

Courts routinely and properly preclude a debtor from recovering anything under this scenario, just as WSTLA admitted in its *amicus* brief in the *Miller v. Campbell* appeal in Division I. For example, in *Rose v. Beverly Health and Rehabilitation Services, Inc.*, 356 B.R. 18 (E.D.Cal. 2006), the Federal trial court recently barred the debtor's recovery under similar facts. In *Rose*, the plaintiff knew she had a potential claim against her employer for failure to accommodate her disability. Aware of that claim, she filed a chapter 7 bankruptcy. She did not disclose the claim at any time before she received a no asset discharge. Later, she brought the claim against her employer. When the employer moved to dismiss on judicial estoppel grounds, the plaintiff submitted a declaration asserting that she had not understood the bankruptcy schedules required her to disclose the claim. She asserted she had not acted in “bad faith” or with “an intention to mislead.” She argued that by reopening her bankruptcy, she demonstrated good faith and that her creditors would be no worse off than if she had timely disclosed the claim to begin with. Relying

on *Hamilton*, the trial court had no difficulty rejecting the debtor's self-serving "evidence" and arguments. While we are loathe to burden the Court with lengthy quoted material, it would be difficult to improve on the trial court's decision in *Rose*, and we won't attempt to:

[P]laintiff in this case had a duty to disclose to the bankruptcy court any potential claims she may have had against Defendants... *Hamilton, Hay*<sup>2</sup>, and *Monroe County Oil*<sup>3</sup> make it clear that the duty of the bankruptcy petitioner to disclose the existence of a potential claim is not a formalistic duty predicated on the procedural status of a claim, but is a duty of candor that accrues from the time the facts that give rise to the potential claim are known. *Hay*, 978 F.2d at 557. It is also clear from the discussion in the above cited cases that the subjective intent of the bankruptcy petitioner at the time of the bankruptcy filing to pursue or not pursue the claims is not relevant. ...

The obvious thrust of the question [asking for disclosure of contingent and unliquidated claims] is to elicit a complete disclosure of all potential assets that could be marshaled to satisfy the bankruptcy estate's obligations. ...

Plaintiff contends that, notwithstanding any breach of duty to list her potential claims against Defendants in her statements to the bankruptcy court, the doctrine of judicial estoppel should not be applied in her case because her responses to the bankruptcy court did not constitute intentional misrepresentations. In this regard Plaintiff avers she had no intention to mislead, that she was reasonably unaware that she had any claims that would require disclosure on the bankruptcy court's schedules and that she made efforts to correct the mistake when it was discovered. ...

Whether Plaintiff's intentions were innocent when she made the representation to the bankruptcy court that she had no potential claims does not directly enter into the determination of whether judicial estoppel applies. *If evidence existed that Plaintiff had, in fact, attempted in good faith to inform both the creditors and the bankruptcy court that Plaintiff had pending claims, then a case could be made there was a good faith attempt to adequately disclose the existence of the claims against Defendants.... No such evidence of affirmative efforts to notify the bankruptcy court of the existence of the claims prior to discharge of Plaintiff's debts is in evidence in the present case.*

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<sup>2</sup> *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555 (9<sup>th</sup> Cir. 1992).

<sup>3</sup> *Monroe County Oil v. Amoco Oil Co.*, 75 B.R. 158 (S.D.Ind. 1987), cited with approval in *Hay*.

It is also irrelevant that Plaintiff has, or has attempted to, reopen her bankruptcy proceeding. There is no authority that such actions, occurring after the discharge of the Plaintiff's debts, excuses the debtor's failure to timely declare all interests of the bankruptcy estate. It is important to note, however, that this court's determination that judicial estoppel operates in this case to prevent Plaintiff from advancing her claims on her own behalf does not necessarily mean that an appointed trustee of the bankruptcy estate may not advance claims belonging to Plaintiff for the benefit of the bankruptcy estate. See *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 99-100, 138 P.3d 1103 (Wash.App.2006) (differentiating holdings in *Hamilton* and related cases where the bankrupt sought to maintain a suit for their own benefit instead of the benefit of the bankruptcy estate).

Finally, it is worth noting that, despite Plaintiff's protestations of innocent intent, even if subjective intent were a factor in the application of judicial estoppel, there is no evidence in the present case of innocent intent. Plaintiff's self-serving declaration notwithstanding, Plaintiff has followed precisely the course of conduct she would have followed had she desired to conceal her potential claim from the bankruptcy court so as to secure the benefit of any settlement or judgment for herself without need to use the proceeds to pay her debts. While the court does not impute any malfeasance to Plaintiff, the court notes that it is not part of Defendants' burden to show that Plaintiff was ill-intentioned. Plaintiff, for her part, cannot show that she was not ill-intentioned.

The Bankruptcy Court for the Western District of Michigan reached the same conclusions on virtually identical facts in *Johnson v. Lewis Cass Int. School Dist.*, 345 B.R. 816 (W.D.Mich. 2006). Once again, the debtor knew she had a claim. She did not tell the Bankruptcy Court. She obtained a no asset discharge. She sued. She told the Trustee about her claim only after the defendant had asserted judicial estoppel. In response to the plaintiff's assertion that she had not acted in "bad faith," the Bankruptcy Court was blunt. The Court found that the failure to disclose was not "inadvertent" because the plaintiff knew of her claim and had every reason not to disclose it. Furthermore, the plaintiff could not show that there was an "absence of bad

faith” because she had made no attempt to advise the Bankruptcy Court of her claim until the defendant raised judicial estoppel as a defense. Finally, the Court rejected the plaintiff’s attempt to blame her bankruptcy attorney, noting that she had signed her bankruptcy schedules under penalty of perjury and had a personal and affirmative obligation to be sure she had answered accurately and completely.

If the Defendants had not discovered the Debtor’s bankruptcy, raised the issue of judicial estoppel, and thereby compelled the Debtor to belatedly disclose the existence of the pending action to the Trustee, the Debtor would have strolled away from her chapter 7 case with a discharge of her debts. The Debtor would have retained any subsequent monetary recovery from the wrongful discharge action and her creditors would have received nothing. This is precisely the type of “windfall” judicial estoppel seeks to prevent.... Thus, the Debtor’s knowledge of her claims... and her motive to conceal them in her bankruptcy case mandates applying judicial estoppel in this adversary proceeding.

*Johnson v. Lewis Cass*, 345 B.R. at 823.

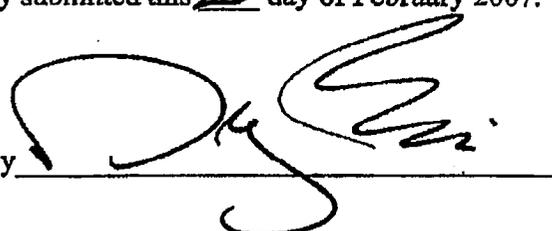
The trial court in our case confronted the same fact pattern. The trial court found these facts required application of the doctrine of judicial estoppel as to Ms. Carter, and extended the judicial estoppel bar to the Trustee as well. *Bartley-Williams* came along and held, as the Trustee has argued on appeal, that as a representative of the creditors, the Trustee should be permitted to pursue the claim so the creditors will not be punished twice -- once by Ms. Carter’s nondisclosure of the claim, and a second time by a court attempting to protect the integrity of the judicial process from Ms. Carter’s duplicity. Ethan Allen, the Trustee and WSTLA agree that was the proper result.

That does not mean Ms. Carter can ride the Trustee's coattails to a personal recovery. She remains barred from obtaining money for her claim. The Trustee's recovery was properly limited to the amount necessary to pay creditors in *Bartley-Williams*. Just as in *Bartley-Williams*, this Court may properly modify the trial court's ruling so that judicial estoppel will permit the Trustee to obtain recovery to the extent necessary to pay the valid claims of Ms. Carter's creditors. However, to the extent judicial estoppel applies to bar either the Trustee or Ms. Carter from obtaining additional recovery that inures to Ms. Carter's personal benefit, the trial court's order must stand.

**CONCLUSION**

The Court should adopt the arguments advanced in this brief and resolve this appeal accordingly.

DA[TE]D and respectfully submitted this <sup>13</sup>20 day of February 2007.

By \_\_\_\_\_  


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CERTIFICATE OF SERVICE

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1. I am a citizen of the United States and a resident of Seattle, Washington. I am over the age of 18 years and not a party to the ~~within entitled cause.~~ I am employed by the law firm of Wilson Smith Cochran <sup>CLERK</sup> Dickerson, whose address is 1215 Fourth Avenue, Suite 1700, Seattle, Washington, 98161.

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In addition, a copy of the same was mailed to:

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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 21<sup>st</sup> day of February,  
2007.

  
Betty J. Dobbins

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