

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2006 AUG 30 P 2:40

BY C. J. MERRITT No. 78481-7

hjh
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.

BRIEF OF RESPONDENTS

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

Counsel for Respondents Ethan Allen, Inc., et al.:

David M. Jacobi, WSBA #13524
WILSON SMITH COCHRAN DICKERSON
The Financial Center, Suite 1700
1215 Fourth Avenue
Seattle, Washington 98161-1007
Telephone 206.623.4100
Fax 206.623.9273
Email jacobi@wscd.com

ORIGINAL

TABLE OF CONTENTS

RESPONDENTS' STATEMENT OF THE ISSUES.....	1
SUMMARY OF RESPONDENTS' ARGUMENT	2
ARGUMENT AND AUTHORITIES.....	6
1. Judicial estoppel is a flexible equitable doctrine; and the trial court's application of the doctrine is reviewed solely for an abuse of discretion	6
2. Judicial estoppel is a dynamic and discretionary equitable doctrine for the protection of the judicial process that should not be limited by "inflexible prerequisites" to its application	7
3. The trial court properly barred Ms. Carter from obtaining any benefit from a personal injury claim she failed to disclose in her sworn bankruptcy schedules	9
4. The Trustee may not represent and seek relief for Ms. Carter's direct benefit and thereby avoid the judicial estoppel bar to her personal recovery.....	13
CONCLUSION.....	20

TABLE OF CONTENTS

RESPONDENTS' STATEMENT OF THE ISSUES.....	1
SUMMARY OF RESPONDENTS' ARGUMENT	2
ARGUMENT AND AUTHORITIES.....	6
1. Judicial estoppel is a flexible equitable doctrine; and the trial court's application of the doctrine is reviewed solely for an abuse of discretion	6
2. Judicial estoppel is a dynamic and discretionary equitable doctrine for the protection of the judicial process that should not be limited by "inflexible prerequisites" to its application	7
3. The trial court properly barred Ms. Carter from obtaining any benefit from a personal injury claim she failed to disclose in her sworn bankruptcy schedules	9
4. The Trustee may not represent and seek relief for Ms. Carter's direct benefit and thereby avoid the judicial estoppel bar to her personal recovery.....	13
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Autos, Inc. v. Gowin</i> 330 B.R. 788 (D.Kans. 2005)	6, 11, 19
<i>An-Tze Cheng v. K&S Diversified Investments, Inc.</i> 308 B.R. 448 (9th Cir. BAP 2004)	6, 7, 8, 14,17, 18, 19, 20, 21
<i>Bartley-Williams v. Kendall</i> ___ Wn. App. ___, 138 P.3d 1103 (2006).....	1, 5, 6, 14,18,19, 21
<i>Biesek v. Soo Line Railroad Company</i> 440 F.3d 410 (7th Cir. 2006).	3, 13
<i>Cunningham v. Reliable Concrete Pumping,</i> 126 Wn. App. 222, 108 P.3d 147 (2005).....	1, 2, 3, 5,8, 18, 20, 21
<i>DeAtley v. Barnett</i> 127 Wn. App. 478, 112 P.3d 540 (2005).....	3, 8, 19, 20, 21
<i>Donaldson v. Bernstein,</i> 104 F.3d 547 (3d Cir. 1997).....	10, 16
<i>Falkner v. Forshaug</i> 108 Wn. App. 113, 29 P.3d 771 (2001).....	7
<i>Garrett v. Morgan</i> 127 Wn. App. 375, 112 P.3d 531 (2005).....	3, 5, 8, 20
<i>Hamilton v. State Farm Fire & Cas. Co.</i> 270 F.3d 778 (9th Cir. 2001)	3, 10, 11, 12, 14, 15,16, 17, 18, 19, 20, 21
<i>Hay v. First Interstate Bank of Kalipsell, N.A.</i> 978 F.2d 555 (9th Cir. 1992)	14, 16
<i>In re Coastal Plains, Inc.</i> 179 F.3d (5th Cir. 1999)	7, 10, 14, 16

<i>In re Dewberry</i> 266 B.R. 916 (Bankr.S.D.Ga.2001).....	17
<i>In re Lopez</i> 283 B.R. 22 (9th Cir. 2002)	6, 14, 17, 18, 21
<i>Johnson v. Si-Cor, Inc.</i> 107 Wn. App. 902, 28 P.3d 832 (2001).....	3, 7, 9, 20, 21
<i>New Hampshire v. Maine</i> 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).....	7, 8,9, 16
<i>Parker v. Wendy's International, Inc.</i> 365 F.3d 1268 (11th Cir. 2004)	6, 19
<i>Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.</i> 989 F.2d 570, 572 (1st Cir.), <i>cert. denied</i> , 510 U.S. 931, 114 S.Ct. 344, 126 L.Ed.2d 309 (1993).....	14
<i>Oneida Motor Freight, Inc. v. United Jersey Bank</i> 848 F.3d 414, 419 (3d Cir.), <i>cert. denied</i> , 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988).....	15
<i>Seattle-First Nat'l Bank v. Marshall</i> , 31 Wn. App. 339, 641 P.2d 1194, <i>review denied</i> , 97 Wn.2d 1023 (1982).....	7
<i>Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n</i> , 932 F.Supp. 859 (E.D. Tex. 1996).....	16

RESPONDENTS' STATEMENT OF THE ISSUES

On July 17, 2006, Division I of the Court of Appeals decided *Bartley-Williams v. Kendall*.¹ Division I affirmed the rule that judicial estoppel is properly applied to bar personal recovery for a debtor in bankruptcy who has received a discharge of her debts by representing that she has no personal injury claim; and who commences a lawsuit seeking personal recovery for the previously undisclosed claim. However, *Bartley-Williams v. Kendall* clarified Division I's earlier decision in *Cunningham v. Reliable Concrete Pumping*,² holding that *Cunningham* applied judicial estoppel to bar all personal injury recovery for the plaintiff/debtor, but was not intended to bar a bankruptcy Trustee from pursuing the debtor's undisclosed claim, as a representative of the plaintiff's creditors, to the extent required to pay valid creditors' claims.

Thus, the question is whether this case should be referred to Division I for consideration in light of that Court's recent decision in *Bartley-Williams v. Kendall*.

For the reasons explained in this responding brief, Ethan Allen, Inc. and the other named defendants (collectively "Ethan Allen") ask this Court to answer the question in the affirmative. *Bartley-Williams* provides the proper answer to the issues raised in the Trustee's appeal.

¹ *Bartley-Williams v. Kendall*, ___ Wn. App. ___, 138 P.3d 1103 (2006).

² *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005).

SUMMARY OF RESPONDENTS' ARGUMENT

Michelle Carter allegedly was poked in the eye during the delivery of a new sofa she ordered from a local Ethan Allen furniture store. (CP 5-6). Within days, she claimed her injuries prevented her from working and asserted that she had a valuable personal injury claim against Ethan Allen, Inc. and other defendants (collectively "Ethan Allen"). (CP 15-17; 36; 38-45; 47-52).³

Shortly after the date of her alleged injury, Ms. Carter filed a Chapter 7 bankruptcy petition to obtain relief from her creditors. She did not advise the Court of her personal injury claim. (CP 66-84). Carter then hired a lawyer to pursue her personal injury claim; but still she did not tell the Bankruptcy Court about the claim. (CP 64). The Court accepted Ms. Carter's false, sworn written statement that she had negligible assets and had no personal injury or other contingent or unliquidated claims. As a direct result of her false sworn statement, the Court granted Ms. Carter a "no asset discharge," freeing her from substantial consumer debt and sending her creditors away without recovery. (CP 84-88; 90).

More than two years later, Ms. Carter commenced this King County lawsuit, seeking to obtain \$1 million in damages for her pre-petition personal injury claim, solely for her own benefit, free and clear of the debts discharged in her earlier bankruptcy. (CP 1-7). Still Ms. Carter did not tell the Bankruptcy

³ This was not a new and unfamiliar experience for Ms. Carter. Ms. Carter trained as a paralegal and had worked for a law firm. Between 1988 and 1998, she had asserted and obtained settlement payments for four personal injury claims. (CP 58-59; 61-62).

Court about her claim and her pending lawsuit -- until Ethan Allen asked the trial court to exercise its discretion to apply the equitable doctrine of judicial estoppel as a bar to her claim. (CP 92-94; 96-97; 124-126).

In the words of the Seventh Circuit, “plenty of authority” holds that judicial estoppel is properly applied to prevent a debtor in bankruptcy from receiving a discharge, and thus a personal benefit, by representing that she has no assets and no claims; and then “turn[ing] around after the bankruptcy ends and recover[ing] on a supposedly nonexistent claim.”⁴ That is also the law in Washington and in the Ninth Circuit. When a party has an affirmative obligation to disclose a personal injury claim or other asset to the Bankruptcy Court, that party should not be permitted to represent the claim does not exist; obtain a discharge of debts; and later assert the supposedly non-existent claim to obtain a money judgment in another court. This is a proper application of the doctrine of judicial estoppel to protect the orderly administration of the courts and to prevent the nondisclosing debtor from “playing fast and loose with the courts.”⁵

The Trustee argues judicial estoppel cannot ever apply to bar a bankruptcy Trustee from appearing as the “real party in interest” and pursuing a claim the debtor did not disclose to the Bankruptcy Court, because the Trustee

⁴ *Biesek v. Soo Line Railroad Company*, 440 F.3d 410, 412 (7th Cir. 2006).

⁵ *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-86 (9th Cir. 2001); *see also Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005); *DeAtley v. Barnett*, 127 Wn. App. 478, 482-84, 112 P.3d 540 (2005); *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005); *cf. Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001) (debtor not barred from pursuing claim when it had no affirmative obligation to disclose the claim in an earlier bankruptcy proceeding).

represents creditors, who should not be punished yet again by the debtor's wrongdoing. If the Trustee had advised the trial court he would seek recovery on Ms. Carter's claim only for the benefit of creditors, and only to the extent of valid creditors' claims, this would be a different case.

However, the Trustee has attempted to keep his feet in both camps, rather than commit to pursuing recovery solely for the benefit of innocent creditors. The Trustee told the trial court that by substituting for Ms. Carter as the nominal plaintiff, he might restore all the rights and benefits she would have had, *if* she had truthfully disclosed her assets to the Bankruptcy Court the first time around.⁶ At the same time, the Trustee argues that he cannot be "tarred with the same brush" as Ms. Carter, because he is a "fiduciary" acting as a representative of Ms. Carter's creditors and as such, did not mislead the Bankruptcy Court. (CP 120; App. Br. 10; 17; 26).

The Trustee cannot have it both ways. He cannot, on one hand, avoid judicial estoppel by asserting he represents innocent creditors harmed by Ms. Carter's misrepresentation of her assets; and, on the other hand, obtain recovery for Ms. Carter's personal benefit. If the Trustee intends to obtain relief for Ms. Carter in her own right, the Trustee stands in Ms. Carter's shoes, not those of her creditors. The Trustee cannot act in a representative capacity for Ms. Carter's

⁶ The Trustee asked the trial court to assume that a portion of any tort recovery would be exempt from creditor's claims and would go to Ms. Carter; and that recovery in excess of valid creditors' claims would belong to Ms. Carter as well. (CP 133). Thus, if Ms. Carter's claim is worth \$1 million, as she alleged, Ms. Carter would stand to retain most of the claim's value for herself. (CP 105-107).

personal benefit and disclaim the misconduct that bars her from asserting a tort claim in her own name.

After the Trustee filed his opening brief in this appeal, Division I issued its ruling in *Bartley-Williams v. Kendall*, which provides a clear and well-reasoned statement of the proper application of judicial estoppel to the debtor/plaintiff and the bankruptcy Trustee under virtually identical facts. Division I once again held, just as Washington and Ninth Circuit courts consistently have held in the past, that judicial estoppel bars a non-disclosing debtor, like Ms. Carter, from obtaining any benefit from her personal injury claim.⁷ Division I also held that the bankruptcy Trustee should be permitted to substitute for the debtor/plaintiff as the real party in interest, doing so as a representative of the creditors, *solely for the benefit of creditors, with recovery limited to the amount required to pay valid creditors' claims.*

This is the only outcome consistent with the rationale for the Trustee's argument in this appeal -- that he is prosecuting Ms. Carter's claim "in his capacity as representative of Carter's creditors," and not as a representative of Ms. Carter herself. (App. Br. 10).

Bartley-Williams v. Kendall got it right. Division I's approach properly applies judicial estoppel to prevent a debtor, like Ms. Carter, from telling the Bankruptcy Court a claim does not exist and then, after obtaining freedom from creditors, turning around and pursuing the "non-existent" claim for her own

⁷ *Garrett v. Morgan*, Division II relied heavily on *Cunningham* to conclude that the debtor and the Trustee both were barred from obtaining any recovery for a personal injury claim the debtor had not disclosed to the Bankruptcy Court prior to obtaining a discharge of debts. After *Bartley-Williams*, Division II will no doubt revisit its holding in *Garrett* at the next opportunity.

benefit. At the same time, Division I's approach does not penalize creditors for the debtor's conduct, permitting the Trustee to pursue the undisclosed claim and to collect up to the amount required to pay valid creditor claims. It is the most equitable application of the equitable doctrine of judicial estoppel.⁸

Ethan Allen therefore asks the Court to refer this matter to Division I for resolution consistent with the recent ruling in *Bartley-Williams v. Kendall*.

ARGUMENT AND AUTHORITIES

1. **Judicial estoppel is a flexible equitable doctrine; and the trial court's application of the doctrine is reviewed solely for an abuse of discretion.**

Judicial estoppel applies to bar a party from asserting a claim or position in a legal proceeding that is inconsistent with the claim or position taken by that party in a prior proceeding. "Judicial estoppel is a flexible equitable doctrine," not a strict and inflexible set of rules.⁹ Trial courts exercise broad discretion to apply the doctrine to the specific facts in each case to protect the integrity of the

⁸ *Bartley-Williams* is also consistent with the recent line of authorities that would permit a Trustee to reopen the bankruptcy proceeding to pursue an undisclosed claim. Those authorities consistently state that the court in which the claim is litigated may exercise its discretion to apply judicial estoppel or fashion other appropriate remedies to bar the non-disclosing debtor/plaintiff from taking any benefit from the claim; and limit the Trustee's recovery to the amount required to pay creditors. See, e.g., *In re Lopez*, 283 B.R. 22, 30 (9th Cir. 2002) (permitting Trustee to reopen bankruptcy and pursue undisclosed claim, noting that the court hearing the Trustee's action could impose "any appropriate sanctions" and might limit recovery to the amount required to pay creditors); *Parker v. Wendy's International, Inc.*, 365 F.3d 1268, 1273, n.4 (11th Cir. 2004) (court hearing undisclosed claim may invoke judicial estoppel to limit recovery to an amount that would satisfy creditors' claims and bar recovery for the non-disclosing debtor); *Autos, Inc. v. Gowin*, 330 B.R. 788, 796-797 (D.Kans. 2005) (denying personal recovery to debtor, all proceeds of claim to be distributed to creditors) see also *An-Tze Cheng v. K&S Diversified Investments, Inc.*, 308 B.R. 448, 461 (9th Cir. 2004) (trial court has broad discretion to fashion a "suitable judicial estoppel remedy... that does not wound bystanders").

⁹ *An-Tze Cheng v. K&S Diversified Investments*, 308 B.R. 448, 452 (9th Cir. BAP 2004).

courts, not to protect the interests of parties to litigation. Therefore, a party may rely on the doctrine as an affirmative defense and need not demonstrate detrimental reliance or prejudice.¹⁰

The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity and the waste of time.¹¹

Thus, the trial court's application of judicial estoppel is reviewable only for an abuse of discretion.¹²

2. **Judicial estoppel is a dynamic and discretionary equitable doctrine for the protection of the judicial process that should not be limited by “inflexible prerequisites” to its application.**

Judicial estoppel is a discretionary remedy courts may invoke “to prevent ‘improper use of judicial machinery.’”¹³ The United States Supreme Court bluntly stated the doctrine’s purpose:

[T]o protect the integrity of the judicial process and to prevent parties from playing fast and loose with the courts by prohibiting

¹⁰ *An-Tze Cheng*, 308 B.R. at 458; *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

¹¹ *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001) (quoting *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194, review denied, 97 Wn.2d 1023 (1982)).

¹² *Falkner v. Forshaug*, 108 Wn. App. 113, 124, 29 P.3d 771 (2001), citing *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

¹³ *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citation omitted).

parties from deliberately changing positions according to the exigencies of the moment.¹⁴

The Supreme Court and the Ninth Circuit have cautioned against imposing “inflexible prerequisites” on the application of judicial estoppel, because of the “dynamic nature” of the judicial estoppel remedy.

The dynamic nature of the judicial estoppel doctrine warrants proceeding with caution. Thus, the Supreme Court gave the caveat in *New Hampshire v. Maine* that it was not establishing inflexible prerequisites when it spoke of judicial estoppel typically being informed by the existence of a ‘clearly inconsistent’ position that was accepted by a court in a fashion that would create an impression that the courts are being misled and an unfair advantage or detriment that would result without an estoppel.¹⁵

Consistent with the modern, flexible approach to judicial estoppel, Washington appellate courts have examined each case on its facts to determine whether a trial court has properly exercised its discretion to prevent a litigant from “playing fast and loose with the courts.” Like the Supreme Court in *New Hampshire v. Maine* and the Ninth Circuit in *An-Tze Cheng*, our courts have rejected the idea that three or six or any number of “essential prerequisites” must be present before a court may properly invoke judicial estoppel to protect the integrity of the judicial process and prevent a litigant from “playing fast and loose with the courts.”¹⁶

¹⁴ *New Hampshire v. Maine*, 532 U.S. at 749-50.

¹⁵ *An-Tze Cheng*, 308 B.R. at 453.

¹⁶ *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005); *DeAtley v. Barnett*, 127 Wn. App. 478, 482-84, 112 P.3d 540 (2005); *Garrett v. Morgan*, 127

Like the U.S. Supreme Court, the Ninth Circuit, and the three Divisions of the Washington Court of Appeals, this Court should reject the Trustee's suggestion that a trial court's application of judicial estoppel must be subject to an inflexible formula or a mandatory tri-partite list of "factors." (App. Br. 15). The U.S. Supreme Court itself declined to adopt the three factors described in *New Hampshire v. Maine* as "essential elements" of judicial estoppel. There is no good reason why this Court should declare those three factors to be "essential elements" of judicial estoppel under Washington law.

3. **The trial court properly barred Ms. Carter from obtaining any benefit from a personal injury claim she failed to disclose in her sworn bankruptcy schedules.**

Even if the trial court had been required to consider all three of the *New Hampshire v. Maine* factors to bar Ms. Carter from personal recovery on her personal injury claim under the judicial estoppel doctrine, all three factors were satisfied in this case.

First, Ms. Carter's later position was "clearly inconsistent with her earlier position." Ms. Carter was well aware of her personal injury claim against Ethan Allen when she filed her Chapter 7 petition and when she obtained a "no asset" discharge of her substantial consumer debt in 2002. Ms. Carter asserted "clearly inconsistent" positions in Bankruptcy Court and in King County Superior Court when she failed to list her claims against Ethan Allen on her sworn bankruptcy

Wn. App. 375, 112 P.3d 531 (2005); *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001).

schedules, and then later sued Ethan Allen on the same claims she failed to disclose to the Bankruptcy Court.¹⁷

Second, Ms. Carter succeeded in persuading the Bankruptcy Court to accept her earlier position, creating the perception that the courts were misled. Ms. Carter knew about her personal injury claim, did not disclose the claim, and obtained a “no asset” discharge of her debts because the Bankruptcy Court did not know she had a valuable asset -- the undisclosed claim. This is sufficient “acceptance” of Ms. Carter’s nondisclosure, whether or not her bankruptcy proceeding has been reopened, and even if her discharge is later vacated.¹⁸

Third, Ms. Carter would derive an unfair benefit if not estopped from pursuing the same personal injury claim she knew about and failed to disclose to the Bankruptcy Court when she filed a Chapter 7 petition and obtained a no-asset discharge from the Bankruptcy Court. When she instituted the bankruptcy process, Ms. Carter obtained all of the benefits and protections offered under the Bankruptcy Code and Rules, including an automatic stay of creditor actions to collect her debts and eventually a discharge of her debts. Ms. Carter obtained a “clean slate” and lived free and clear of her consumer debt for years before Ethan Allen asserted judicial estoppel as an affirmative defense to her claim.¹⁹

A proper judicial estoppel analysis of the third "*New Hampshire* factor" should focus on the detriment to the courts and Ms. Carter’s creditors, not on any

¹⁷ *Hamilton v. State Farm Fire & Casualty Company*, 270 F.3d at 784.

¹⁸ *Id.* at 784, noting that there may be sufficient “acceptance” to justify application of judicial estoppel even without an actual discharge of debts; citing *In re Coastal Plains*, 179 F.3d at 210; and *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3d Cir. 1997).

reliance by or detriment to Ethan Allen. By omitting her personal injury claim from her sworn bankruptcy schedules, Ms. Carter prevented her creditors, the Trustee and the Bankruptcy Court from making informed decisions about the merits of her case. Furthermore, Ms. Carter's deception has imposed an unwarranted burden on the courts, the Trustee and creditors, who must now revisit her original bankruptcy filing years after the case appeared to be resolved and the books closed.²⁰

Sound judicial policy supports the application of judicial estoppel to bar a plaintiff from pursuing and obtaining any benefit from a personal injury claim or other valuable claim not disclosed in an earlier bankruptcy. A debtor obtains a "benefit" from the Bankruptcy Court from the moment he files a petition in bankruptcy, because he is thereby able to use the powers of the Bankruptcy Court to hold his creditors at bay. In exchange for the considerable protection offered under the Bankruptcy Code, the debtor assumes an affirmative obligation to disclose all assets. A debtor's failure to make a full disclosure is not a mere technicality. Nondisclosure undermines the entire bankruptcy process; and thus nondisclosure must be punished and deterred.

The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets. The Bankruptcy Code and Rules "impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims.*" The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding. [The debtor's] failure to list his claims... as

¹⁹ *Hamilton v. State Farm Fire and Casualty Company*, 270 F.3d at 784.

²⁰ *Autos, Inc. v. Gowin*, 330 B.R. 788, 796 (D.Kans 2005).

assets on his bankruptcy schedules deceived the bankruptcy court and [his] creditors, who relied on the schedules to determine what action, if any, they would take in the matter. [The debtor] did enjoy the benefit of both an automatic stay and a discharge of debt in his Chapter 7 bankruptcy proceeding.²¹

There can be no dispute Ms. Carter knew she had a personal injury claim against Ethan Allen before she commenced her bankruptcy case. Carter retained counsel and commenced settlement negotiations with Ethan Allen before the Bankruptcy Court granted her a “no asset” discharge, but still did not tell the Bankruptcy Court about her claim. She filed a lawsuit in King County Superior Court years later, seeking to recover on her claim solely for her own account, free and clear of creditors who were left without recovery at the end of her prior bankruptcy. Finally, if Ethan Allen had not asserted judicial estoppel as an affirmative defense in response to her complaint, the Trustee, the creditors and the Bankruptcy Court never would have known that Ms. Carter had washed away her debts and kept her most valuable asset for herself -- a personal injury claim allegedly worth \$1 million.²²

²¹ *Hamilton*, 270 F.3d at 785. (Citations omitted, emphasis in original). The Trustee has attempted to argue that the Bankruptcy Court's grant of a discharge and closing of the Carter case was a "non-event." (CP 114). Of course, the resolution of a legal action is hardly a non-event, finality being an essential and valuable attribute of the judicial process. Nor is the fact that Ms. Carter obtained freedom from her creditors for years after the Bankruptcy Court was deceived into granting her a "no asset discharge" a "non-event" for the purposes of the judicial estoppel analysis.

²² If Ethan Allen had not discovered Ms. Carter's deception, she might well have succeeded in settling her claim and keeping the proceeds for herself, after obtaining a “fresh start” in bankruptcy, all the while shielding her personal injury recovery from creditors.

“Plenty of authority” -- indeed, the overwhelming weight of authority -- holds that applying judicial estoppel to bar Ms. Carter from receiving a benefit from her personal injury claim is the right thing to do.²³

4. **The Trustee may not represent and seek relief for Ms. Carter's direct benefit and thereby avoid the judicial estoppel bar to her personal recovery.**

Ethan Allen did not oppose the Trustee’s substitution as the “real party in interest” in this case; nor did it oppose the reopening of Ms. Carter’s bankruptcy proceeding. Ethan Allen agrees that if the Trustee is permitted to pursue Ms. Carter’s claim at all, it must be “in his capacity as representative of Carter’s creditors” (App. Br. 10) and as “a fiduciary charged with liquidating claims and other assets for the benefit of creditors.” (App. Br. 17). Ethan Allen also agrees that the Trustee should be adverse to the debtor, “whose goal is to obtain a discharge while retaining as much property as the law allows.” (App. Br. 17).

By the same token, the Trustee also should be adverse to, and may not speak and seek relief for, a debtor who attempts to obtain a bankruptcy discharge while attempting to retain *more* property than the law allows, by failing to disclose a known claim in her sworn bankruptcy schedules. A debtor like Ms. Carter who "forgets" to disclose a valuable personal injury claim when seeking a discharge in bankruptcy should be judicially estopped from obtaining any benefit from her undisclosed claim in another court. The mere fact that the Trustee has substituted as a nominal plaintiff in pursuit of the debtor’s previously undisclosed claim cannot mean the debtor’s slate is wiped clean, the judicial estoppel bar is

²³ *Biesek v. Soo Line Railroad Company*, 440 F.3d at 412-413.

raised, and the debtor may collect on her claim as though nothing had ever happened. The name of the plaintiff in the caption is not dispositive -- the role the named plaintiff plays is key.

A trilogy of Ninth Circuit decisions -- *In re Lopez, Hamilton* and *An-Tze Cheng* -- as well as Division I's recent ruling in *Bartley-Williams v. Kendall*, show that equity is best served by (1) applying judicial estoppel to bar the bankruptcy debtor from representing she has no claim and then attempting to recover on the supposedly non-existent claim after obtaining a discharge of her debts; and (2) permitting the Trustee to pursue the undisclosed claim *solely for the benefit of creditors and to the extent of valid creditors' claims*. This aims the judicial estoppel remedy at the debtor and will not result in "collateral damage" to the creditors.

The analysis begins with *Hamilton*, decided in 2001.²⁴ In *Hamilton*, the Chapter 7 debtor did not list a claim against State Farm in his sworn bankruptcy schedules, but filed suit against State Farm after the conclusion of his Chapter 7 bankruptcy. The Ninth Circuit flatly stated:

In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir.1992) (failure to give notice of a potential cause of action in bankruptcy schedules and Disclosure Statements estops the debtor from prosecuting that cause of action); *In re Coastal Plains*, 179 F.3d 197, 208 (5th Cir.1999), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000) (holding that a debtor is barred from bringing claims not disclosed in its bankruptcy schedules); *Payless Wholesale Distributors, Inc. v.*

²⁴ *Hamilton v. State Farm Fire & Casualty Company*, 270 F.3d 778 (9th Cir. 2001).

Alberto Culver (P.R.) Inc., 989 F.2d 570, 572 (1st Cir.), *cert. denied*, 510 U.S. 931, 114 S.Ct. 344, 126 L.Ed.2d 309 (1993) (debtor who obtained relief on the representation that no claims existed cannot resurrect such claims and obtain relief on the opposite basis); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3rd Cir.), *cert. denied*, 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988) (debtor's failure to list potential claims against a creditor "worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect," and debtor is estopped by reason of such failure to disclose).²⁵

The Hamilton Court went on to hold that the debtor had asserted "inconsistent positions" when he failed to list claims against State Farm in his bankruptcy schedules and later sued State Farm on the same claims. The Court also held that the Bankruptcy Court had "accepted" the debtor's non-disclosure when it granted a discharge of debts, even though the discharge was later vacated.

Hamilton clearly asserted inconsistent positions. He failed to list his claims against State Farm as assets on his bankruptcy schedules, and then later sued State Farm on the same claims. ...

Hamilton also argues that the bankruptcy court did not "accept" his prior assertion for the purposes of judicial estoppel. Hamilton concedes that the bankruptcy court relied on his failure to include his claims against State Farm as assets when it discharged his debts, but [argues] that the court's subsequent dismissal of his bankruptcy vacated the discharge of debt, and that the discharge must have been permanent to satisfy the judicial acceptance requirement of judicial estoppel. We reject this argument. ...

We now hold that Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated. Our holding does not imply that the

²⁵ *Hamilton*, 270 F.3d at 783.

bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may "accept" the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways. *See, e.g., In re Coastal Plains*, 179 F.3d at 210 (finding that judicial acceptance was satisfied when the bankruptcy court lifted a stay based in part on the debtor's nondisclosure in its bankruptcy schedules and in a lift-stay stipulation); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3rd Cir.1997) (holding that judicial acceptance was satisfied when the court approved the debtor's plan of reorganization).²⁶

The *Hamilton* Court also found that the debtor had derived a benefit from his failure to disclose an asset, even though the Bankruptcy Court had already vacated the discharge of his debts:

In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process. The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets. The Bankruptcy Code and Rules "impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims.*" *In re Coastal Plains*, 179 F.3d at 207-208; *Hay*, 978 F.2d at 557; 11 U.S.C. § 521(1). The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding. *In re Coastal Plains*, 179 F.3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F.Supp. at 867; Fed. R. Bankr.P. 1009(a) (schedules may be amended as a matter of course before the case is closed). Hamilton's failure to list his claims against State Farm as assets on his bankruptcy schedules deceived the bankruptcy court and Hamilton's creditors, who relied on the schedules to determine what action, if any, they would take in the matter. Hamilton did enjoy the benefit of both an automatic stay and a discharge of debt in his Chapter 7 bankruptcy proceeding. *See New Hampshire v. Maine*, 121 S.Ct. at 1815 (noting that courts may consider whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped).²⁷

²⁶ *Hamilton*, 270 F.3d at 784.

²⁷ *Hamilton*, 270 F.3d at 785 (emphasis in original).

After *Hamilton*, the Ninth Circuit Bankruptcy Appellate Panel decided *In re Lopez*.²⁸ The Panel held that a Chapter 7 debtor could reopen his bankruptcy case to schedule an omitted cause of action, after a defendant had asserted judicial estoppel as a defense to the claim. This would permit the Trustee to administer the asset for the benefit of creditors. However, the Panel declined to decide what sanctions should be imposed against the debtor, leaving that up to the court in which the omitted cause of action would be heard. “That court could also rule that she is judicially estopped from asserting her claims. We express no opinion whether any such judicial estoppel would bar Lopez [the debtor] or her chapter 7 trustee from prosecuting the Action for the benefit of creditors, or from recovering anything... above some limit, such as what it would take to pay creditors in full. These are matters for that court to decide”²⁹

In 2004, the Ninth Circuit Bankruptcy Appellate Panel closed the circle with its decision in *An-Tze Cheng*.³⁰ The Panel adopted a simple two-step process for deciding whether judicial estoppel should apply in the bankruptcy context. *First*, the court should decide whether the facts warrant application of judicial estoppel against the debtor. *Second*, the court should fashion a remedy that will

²⁸ *In re Lopez*, 283 B.R. 22 (9th Cir. B.A.P. 2002).

²⁹ *In re Lopez*, 283 B.R. at 30. *See also In re Dewberry*, 266 B.R. 916 (Bankr.S.D.Ga. 2001) (court where undisclosed claim is pending has exclusive jurisdiction to decide whether judicial estoppel should bar recovery).

³⁰ *An-Tze Cheng v. K&S Diversified Investments, Inc.*, 308 B.R. 448 (9th Cir. B.A.P. 2004).

not punish innocent creditors or other parties.³¹ Nothing in *An-Tze Cheng* purported to change the fundamental rule adopted in *Hamilton* -- when a debtor does not disclose a known claim, obtains a discharge and later seeks to assert the omitted claim for his own benefit, the claim is barred by judicial estoppel. This is true whether or not the bankruptcy is reopened or the discharge is vacated.

Division I's decision in *Bartley-Williams v. Kendall* is the logical culmination of the *Hamilton/Lopez/An-Tze Cheng* line of cases, as well as the Washington line of authorities addressing judicial estoppel in the bankruptcy context.³² In *Bartley-Williams*, as in our own case, the debtor knew she had a personal injury claim, "forgot" to schedule the cause of action in her bankruptcy and then "remembered" to pursue it in King County Superior Court after the bankruptcy was over. The trial court refused to permit the Trustee to substitute as plaintiff and dismissed the claim in its entirety on judicial estoppel grounds. On appeal, Division I distinguished its own earlier ruling in *Cunningham v. Reliable Concrete Pumping*,³³ noting that although the Cunninghams' Trustee had reopened the bankruptcy to administer their previously undisclosed personal injury claim, he never substituted as the real party in interest in the Cunningham tort action. Thus, the Cunningham action was deemed maintained by the debtor

³¹ *Id.* 308 B.R. at 452.

³² *Bartley-Williams v. Kendall*, ___ Wn. App. ___, 138 P.3d 1103 (2006); see cases cited in footnote 3, *supra*.

³³ *Cunningham v. Reliable Concrete Pumping*, 26 Wn. App. 222, 108 P.3d 147 (2005).

on his own behalf, and was properly barred by judicial estoppel. Division I distinguished *Hamilton* and *DeAtley* on the same basis.³⁴

Following the Ninth Circuit's lead in *An-Tze Chang*, Division I held in *Bartley-Williams* that the debtor/plaintiff should be barred by judicial estoppel from receiving any benefit from the Washington lawsuit on her personal injury claim. However, the Court remanded the case to the trial court to permit substitution of the Trustee, who *could* pursue the claim *solely for the benefit of creditors*.³⁵

Bartley-Williams is consistent with *An-Tze Cheng*, which is in turn the lynchpin of the Trustee's argument on appeal. It is also consistent with *Parker v. Wendy's International, Inc.*, which held that the Trustee could substitute and pursue the debtor's undisclosed claim, but noted that in further proceedings judicial estoppel properly could be invoked to limit recovery to the amount required to satisfy creditors' claims.³⁶

Under *Bartley-Williams* and the other well-reasoned authorities, judicial estoppel is targeted at the party who has "played fast and loose with the courts," the nondisclosing debtor who obtains a discharge and later attempts to pursue a claim he told the Bankruptcy Court did not exist. The Trustee may pursue the

³⁴ *Bartley-Williams*, 138 P.3d at 1105-1106.

³⁵ *Id.*, 138 P.3d at 1107.

³⁶ *Parker v. Wendy's International, Inc.*, 365 F.3d 1268, 1273, n.4 (11th Cir. 2004); *see also Autos, Inc. v. Gowin*, 330 B.R. 788, 796-797 (D.Kans 2005) (all recovery from undisclosed claim must be distributed to creditors, debtor denied personal recovery).

claim to the extent of valid creditors' claims, but the debtor may recover nothing. The judicial estoppel remedy thus applied does not penalize innocent creditors, as *An-Tze Cheng* counsels against; but it does serve the fundamental purposes described in *Hamilton, Cunningham, Garrett, DeAtley* and *Si-Cor* -- to protect the integrity of the judicial process and ensure full and honest disclosure of all assets and claims in bankruptcy proceedings.³⁷

CONCLUSION

The Washington and federal authorities are clear. In the proper application of judicial estoppel, a plaintiff/bankruptcy debtor may not file sworn schedules of assets and liabilities in the Bankruptcy Court which omit a known pre-petition personal injury claim; obtain a discharge of debts; wait until the dust clears; bring suit in state court seeking a judgment on the personal injury claim that supposedly did not exist during the bankruptcy proceedings; and advise the Bankruptcy Court of the claim only after judicial estoppel is asserted as an affirmative defense.

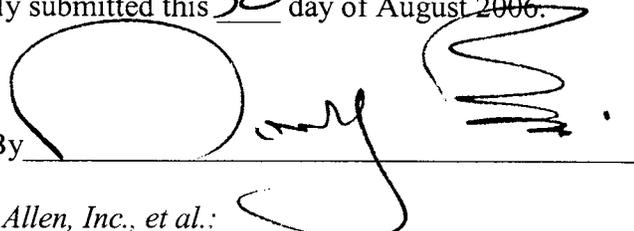
³⁷ *Bartley-Williams* is inconsistent with Division II's decision in *Garrett v. Morgan*, but this may stem from a lack of clarity in Division I's earlier decision in *Cunningham*, which Division II attempted to follow. In *Cunningham*, the Trustee reopened the bankruptcy and appeared through counsel to pursue the appeal "for the Trustee and to the extent necessary Richard and Marci Cunningham." On the appeal, the Trustee's counsel argued he was pursuing the claim for the benefit of creditors. Yet immediately following oral argument, the Trustee's counsel withdrew; and the reported decision identifies only the Cunninghams as *pro se* appellants. (Supp. CP 1 *et seq.*; Appendix to Answer to Motion for Direct Review at A081-A099). The *Cunningham* decision addresses the reopening of the bankruptcy, but does not discuss the Trustee's role in detail or expressly consider the application of judicial estoppel to the Trustee. With the clarification provided in *Bartley-Williams*, it seems likely that Division II will follow Division I's lead in subsequent cases.

However, judicial estoppel should be targeted at the party who has "played fast and loose with the courts," and should not result in collateral damage to innocent creditors. Thus, the bankruptcy Trustee may pursue the claim on behalf of creditors, to the extent required to pay valid creditors' claims against the debtor. The debtor still should take nothing.

This is the rule consistent with the Ninth Circuit decisions in *Hamilton*, *Lopez*, and *An-Tze Cheng*. It is consistent with the Washington decisions in *Cunningham v. Reliable*, *DeAtley v. Barnett*, and *Johnson v. Si-Cor*; and it is the rule now clearly stated in Division I's July 2006 ruling in *Bartley-Williams v. Kendall*.

Ethan Allen therefore asks the Court to refer this case to Division I for consideration in light of *Bartley-Williams v. Kendall*.

DATED and respectfully submitted this 30th day of August 2006.

By 

Counsel for Respondents Ethan Allen, Inc., et al.:

David M. Jacobi, WSBA #13524
WILSON SMITH COCHRAN DICKERSON
The Financial Center, Suite 1700
1215 Fourth Avenue
Seattle, Washington 98161-1007
Telephone 206.623.4100
Fax 206.623.9273
Email jacobi@wscd.com

CERTIFICATE OF SERVICE

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 Dickerson, whose address is 1215 Fourth Avenue, Suite 1700, Seattle, Washington, 98161.
2. I arranged for service and filing of *BRIEF OF RESPONDENTS* with this Declaration, served as follows:

Hand Delivered on August 30, 2006

Attorney for Apellant

Alan J. Wenokur
Attorney at Law
600 Stewart Street, Suite 620
Seattle, WA 98101

Attorney for Plaintiff, Chapter 7 bankruptcy proceeding

Michael Gossler
Montgomery Purdue Blankinship & Austin PLLC
701 Fifth Avenue, Suite 5500
Seattle, WA 98104-7096

Attorney for Michelle Carter

Jeffrey Jones
Krutch, Lindell, Bingham, Jones & Petrie
1420 Fifth Ave., Suite 3150
Seattle, WA 98101

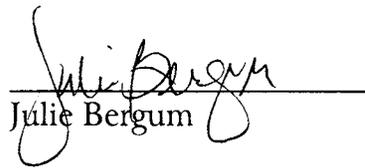
Clerk's Office
Supreme Court
State of Washington
Olympia, Washington 98504

In addition, copies of the same were mailed to:

Co-Counsel for Plaintiff
Charles Beshears
Attorney at Law
1500 SW First Ave., Suite 700
Portland, OR 97201

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 30th day of August, 2006


Julie Bergum