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NO. 56736-5-I

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

MICHAEL JAMES MILLER,

Appellant,

v.

ESTATE OF PATRICK W. CAMPBELL, by and through its Personal
Representative CHARLES W. CAMPBELL,

Respondent.

BRIEF OF RESPONDENT

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I. IDENTITY OF MOVING PARTY

The Estate of Patrick W. Campbell, by and through its Personal Representative Charles W. Campbell, asks this Court to grant the relief requested in Part II.

II. RELIEF REQUESTED AND SUMMARY

A. **Plaintiff Miller has failed to challenge the basis of the trial court's ruling dismissing his claim.**

The Estate of Patrick W. Campbell, by and through its Personal Representative Charles W. Campbell (collectively, "Campbell"), asks the court to affirm the trial court's ruling dismissing plaintiff's claim on the ground that plaintiff-appellant, Michael James Miller ("Miller"), failed to disclose his sex abuse claim in bankruptcy, though "he knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured." VRP 25. The trial court ruled that "plaintiff was legally required to list this potential claim and he didn't [, and therefore] judicial estoppel has [been] established and applies." VRP 26.

Miller has appealed, but even with the facts viewed most favorably to Miller, the trial court's decision was within its discretion. Moreover, Miller has failed to provide any reason, before the trial court or in his opening brief before this court, explaining why the court is required to ignore Miller's inconsistent positions, other than to say that he was not fully aware of his injuries at the time of the bankruptcy, that his claim is

still timely under the statute of limitations, and that the dismissal of his claim violates “public policy.” Campbell has cited controlling case law holding that a debtor is required to disclose potential claims even when the full extent of the damages is unknown. Miller offers none to the contrary. This court should affirm the trial court’s ruling.

III. FACTS RELEVANT TO MOTION

A. Four months after his stepfather died, Miller filed a Creditor’s Claim against his stepfather’s estate for half a million dollars.

This case involves a sex abuse claim by Miller against the Estate of his deceased stepfather. Miller alleges abuse occurring between 1975 and 1984. CP 333. Miller was born on October 19, 1965, so the alleged abuse occurred from ages 10 through age 19. *See id.* On July 29, 1998, at age 32, Miller retained counsel and filed a Chapter 7 “no-asset” bankruptcy petition in the United States Bankruptcy Court for the Western District of Washington. CP 291-293. On November 24, 1998, United States Bankruptcy Judge Samuel J. Steiner discharged all of Miller’s debts, in the amount of \$34,220.00. CP 285, 294. Judge Steiner based the discharge on trustee Virginia Burdette’s report that there was no property available for distribution. CP 286. Miller’s creditor’s took nothing. CP 285. Miller’s stepfather Patrick Campbell died on November 17, 2002. CP 334. Roughly four months later, on March 28, 2003, Miller filed a

Creditor's Claim asserting half a million dollars in damages against Campbell, alleging that "Patrick Campbell sexually abused him on multiple occasions, between the years 1975 and 1984." CP 617, 618.

B. It is undisputed that Miller was aware at the time he filed his bankruptcy petition of various disorders he associated with the alleged abuse.

Miller signed his Creditor's Claim against the Estate on March 27, 2003, and filed it the following day. *Id.* Also on March 28, 2003, Miller visited Dr. Lisa Adriance for a psychological assessment. CP 331. Dr. Adriance testified that Miller "reported" feelings of anger and shame, sleeping with a flashlight and baseball bat, problems with sleeping, and intrusive memories, all of which Miller knew to be caused by the alleged sexual abuse:

[Miller] report[ed] that he had experienced severe and prolonged physical, sexual and emotional abuse throughout his childhood. He was very angry about and disturbed by these experiences. He felt extreme shame and had a great deal of difficulty talking about his history, his symptoms, and his goals for treatment.

...

Although he understood that many of his behaviors (*e.g.*, sleeping with a flashlight and baseball bat) and symptoms (*e.g.*, anger problems sleeping, intrusive memories) to be the result of childhood abuse, he was unaware of the relationship between other symptoms (*e.g.* dissociation) and his trauma history.

CP 331. At her deposition, Dr. Adriance made clear that Miller knew, before he was referred to her, that many of his problems were caused by the alleged abuse:

A. . . . [t]he one I think that he was most able to connect was the sleep problem, because he was aware why he was up with the lights on and the baseball bat in his hands. That was a pretty obvious one for him.

Q. Okay.

A. He could talk about his guilt. I don't know that he - I don't know what he thought about his isolation. Obviously things like ruminating or obsessive thoughts, flashbacks, intrusive memories, those kinds of things that were very specific to the trauma, I'm sure he made that connection.

Q. Earlier on, before he had come to you?

A. I assume so. If he's having memories that are intrusive and upsetting about the trauma, I'm assuming he gets it that that's about the trauma.

CP 388-389 (pp. 61-62).

C. Miller testified he had suffered from various problems caused by the abuse since the abuse.

Miller testified he had suffered from various problems caused by the abuse since the abuse. He testified that he has suffered intrusive thoughts about being abused by Pat Campbell in the course sexual relationships beginning at approximately age 20:

Q. In your first sexual relationship with a woman at approximately age 20, did these thoughts, these intrusive thoughts about being abused by Pat Campbell come into play at that time?

A. Yes. I remember.

CP 416 (p. 58, lns. 10-14). Miller also testified that, ever since the alleged abuse, he has had nightmares and slept with a flashlight:

I have a lot of nightmares. I sleep with a flashlight. I leave a light on in the house so I can see it. Those things haven't gone away.

CP 414 (p. 50, lns. 17-24); also, CP 388-389 (pp. 61-62).

Miller further testified he has always been terrorized or felt terrorized since the abuse started, and that he has had frightening dreams about the abuse ever since the abuse.

Q. Was there any period of time since the abuse started that you haven't been terrorized or felt terrorized?

A. Since it stopped, did you say?

Q. Since the time it started, is there any time up till now that you haven't felt terrorized, as you described it?

A. Since it started. I'm not always terrorized, my dreams are often frightening though.

Q. How long have you had frightening dreams?

A. Ever since then, I guess.

CP 415 (p. 56, lns. 11-22).

Miller testified that since age twenty he was unable to have sex because he would think about the abuse by Campbell:

Q. What would prevent you from completing the sexual act in those [pre-1996 and Lonnia Cox sexual relationship] cases?

A. Thoughts in my own head.

Q. Thoughts about what?

A. That it's wrong, maybe, things along those lines.

Q. Did it ever involve thinking about the sexual abuse from Patrick Campbell?

A. Yes.

CP 416 (p.58, lns.10-25; pp. 59-61).

Miller also testified that his second marriage, to Lonnia Cox between 1996 and 1997 and before his 1998 bankruptcy, became strained due to deteriorating sexual relations and plaintiff's "fears [he has] in [his] head" and feelings "about Pat Campbell and the things he did to me."

Q. How were sexual relations with Ms. Cox?

A. I was more at ease with her in the beginning. Then it became more strained.

Q. Why did it become more strained?

A. She would ask me questions about what was wrong with me.

Q. What was your response?

A. I didn't want to talk about it. I thought maybe things would just get better alone, that I would get over it.

Q. That you would get over what?

A. The fears I have in my head, my feelings.

Q. Fears in your head and feelings about what?

A. About Pat Campbell and the things he did to me

CP 417 (pp. 61, lns . 9-22).

In sum, even with the facts viewed most favorably to Miller, Miller was aware at the time he filed his bankruptcy of various disorders he associated with the alleged abuse, including intrusive thoughts of sexual abuse, irrational behaviors such as sleeping with a bat and flashlight, nightmares, insomnia, feeling terrorized, deteriorating sexual relations, and fears in his head.

D. Miller disclosed only a "possible claim against Ford under lemon law"

Attached to Miller's bankruptcy petition were various disclosure schedules, including "Schedule B – Personal Property." CP 296-298. Miller disclosed as Item 20 a "possible claim against Ford under lemon law – max recovery \$3,500.00." CP 297. CP 296-298. Plaintiff did not disclose his "possible" claim against Campbell for the alleged sexual abuse. *Id.* As noted above, on November 24, 1998, United States

Bankruptcy Judge, Samuel J. Steiner, issued a “Discharge of Debtor” that released plaintiff from \$34,220.00 in debt owed to creditors. CP 285.

E. On summary judgment, Miller abandoned recovery for some of his injuries.

Campbell moved to dismiss Miller’s sex abuse claim under the doctrine of judicial estoppel, arguing that he could not now be heard to assert the claim having opted not to disclose his alleged sex abuse under penalty of perjury, and having received a “no-asset” discharge. CP 324-329. In his opposition papers, Miller conceded for the first time that part of his claim was no longer viable, and asserted that he sought recovery only for the injuries diagnosed by Dr. Adriance, *i.e.*, PTSD and Major Depression, injuries that Miller could not himself diagnose. CP 268; CP 272 (“Before entering therapy with Dr. Adriance, [Miller] had no idea he was suffering from Post Traumatic Stress Disorder and Major Depression as a result of the [alleged] abuse”; “[t]he present action is premised entirely on those injuries.”)

F. The trial court neither considered nor ruled on the admissibility of the trial court’s finding in a different matter that Miller had lied under oath.

The trial court had previously found in an unrelated matter that “[Miller’s] testimony [in the course of his divorce action] is not credible and that he lied during his testimony at trial.” CP 237. *Also*, CP 238. The

trial court in this case did not base its ruling on this evidence, and it did not rule on its admissibility:

The Court rules that judicial estoppel has been established and applies. The Motion for Summary Judgment is granted. The lawsuit is dismissed.

MS. READ: I meant to move to strike Judge Bowden's order as unduly prejudicial and having nothing to do with the actual facts before this Court

THE COURT: I know you didn't, and I was curious why nobody mentioned it during their oral argument or when I listed that in my timeline and said then "for what it's worth." I didn't hear any argument on it. I have not factored that in my decision.

MS. READ: All right, Your Honor. I would like that to be in the record.

THE COURT: It is.

VRP 26.

G. Miller did not deny he was aware of a claim at the time of his bankruptcy.

Before the trial court, as before this court, Miller asserted a number of theories on what he knew and when. First, he asserts that he had no knowledge of any sex abuse claim at the time of the bankruptcy because the statute of limitations had not yet begun to run on his claim, and he therefore had nothing to disclose to the trustee. BA 16.

Alternatively, Miller also carries forward into this court his argument that his claim is premised solely on his diagnosed injuries caused by recently remembered abuse. BA 7.

Miller also asserts that, at the time of his bankruptcy, he had no memory of some of the incidents of [alleged] sexual abuse which he has more recently remembered.” *Id.* Miller does not describe his “more recently remembered” abuse. CP 334, lns. 27-35. It appears, however, to be additional incidents of already-described abuse, *i.e.*, genital fondling and groin rubbing. CP 333, lns. 18-23.

Finally, Miller at times appears to combine both arguments into one, asserting that he could not disclose any sex abuse claim to his trustee because at the time of his bankruptcy he did not recognize his PTSD and Major Depression: “Miller had no way to know he had a potential claim against [Campbell] at the time of the bankruptcy, in part due to the very symptoms he did not recognize as stemming from the abuse until years later.” BA 34.

Whatever the argument, or whether a combination of all three, the trial court cut to the chase, asking whether Miller knew at the time of his bankruptcy that he had a claim for sex abuse. Miller did not offer any evidence that he was not so aware, or any evidence of inadvertence:

MS. READ: . . . My point is there was no decision to make. There were no grounds for a claim. He couldn't have brought a claim. It didn't exist. If he told the trustee all that -- that's like saying should he have told him he had an operation years ago, which he thought was successful, and then five years later he discovered they left a wad in his stomach. Would that be estoppe[1] if he didn't tell the trustee? I had an operation even though he didn't know anything was wrong?

THE COURT: He wasn't having any problems. That is a different scenario than this case. *I just want to know yes or no: Did your client know when he filed bankruptcy that he had been sexually abused?*

MS. READ: *Vaguely.*

THE COURT: *Did he know when he filed bankruptcy that he had some injuries?*

MS. READ: *Not really.*

VRP 15-16 (emphasis added).

H. The trial court granted Campbell's motion for summary judgment.

The trial court made findings on each of the three elements of judicial estoppel. VRP 23-26. The trial court then granted Campbell's motion for summary judgment:

The plaintiff, in this case, the Court determines, knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured. He may not have known the full extent of those injuries. But he had an obligation to list the above as a potential asset, and it is not for us to look back and say would the trustee have done this, would the trustee have done that, when we wouldn't have to do that at all had the plaintiff listed what he knew:

That he had been sexually abused and injured. Plaintiff was legally required to list this potential claim and he didn't.

VRP 25-26.

I. Miller moved for reconsideration, and the motion was denied.

Miller moved for reconsideration, based in part on Dr. Jon Conte's May 2005 forensic assessment. CP 72-74. Conte had made the statement that "I can find no evidence that [Miller] understood that the abuse had a negative impact on him until he started therapy in March 2003." CP 370. The Conte report "was based largely on self-report data of Mr. Miller." CP 366. Conte did not indicate he had reviewed Miller's earlier deposition testimony, or even that he was aware of that testimony. CP 366. *Also*, CP 367-380. Campbell objected to the new evidence because, *inter alia*, it had been introduced into evidence for the first time by Miller on reconsideration, after the trial court granted summary judgment. CP 232; CP 15; CP 421-465

Campbell further argued, objections aside, that Conte's report was additional evidence of Miller's inconsistent positions regarding when he remembered his abuse and when he knew he had been injured by it. For example, Conte noted that "Miller reports no symptoms of intrusive memories caused by the abuse until recently." CP 369. But Miller had

earlier testified at his January 2004 deposition that he had suffered intrusive thoughts about being abused by Pat Campbell in the course sexual **relationships beginning at approximately age 20**. CP 416 (p.58, lns.10-25; pp. 59-61).

Also, Miller told Dr. Conte in May 2005 that he “was not sure” he could remember any abuse before 2000. CP 370. Miller’s statement directly contradicts his earlier deposition testimony that, *inter alia*, he has suffered intrusive thoughts about being abused by Pat Campbell in the course sexual relationships beginning at approximately age 20, CP 416 (p. 58, lns. 10-14), and that his second marriage failed **in 1997** due to deteriorating sexual relations and his “fears in [his] head” and feelings “about Pat Campbell and the things he did to me.” CP 417 (pp. 61, lns. 9-22). *Also*, CP 414 (p. 50, lns. 15-25); CP 415 (p. 56, lns.11-22); CP 416 (p.57, lns. 4-10).

Also, Miller told Dr. Conte in May 2005 that “from his leaving home until the time Mr. Campbell was dying, he did not think about the sexual abuse.” CP 370. This statement directly contradicts his earlier statement that intrusive memories of the abuse beginning at age 20. CP 416 (p.58, lns.10-25; pp. 59-61).

In short, Miller had previously testified during his January 2004 deposition to numerous “negative” impacts that he was aware of at the

time of his bankruptcy as being caused by the abuse. On reconsideration, Campbell listed these and other inconsistencies in Miller's self-reporting, as evidenced by Miller's deposition testimony, the Conte Report, and the declaration and deposition testimony of Dr. Adriance. CP 16. The trial court concluded—based on all of this evidence and the fact that Miller had filed a half a million dollar creditor's claim **before** receiving **any** treatment—that Miller's contention that he lacked the knowledge to schedule his sex abuse claim in his 1998 bankruptcy was not credible, and the trial court dismissed Miller's claim. CP 14; CP 20; CP 83-84. The trial court denied Miller's motion for reconsideration. CP 11.

J. The Estate brought a Motion on the Merits.

The Estate brought a Motion on the Merits. In response, Miller made an additional argument that sought to explain why Miller did not disclose the abuse to his trustee: he argued that “any lawsuit premised on what he knew in 1998 would have been dismissed based on the statute of limitations,” and therefore, “[h]e had no potential claim to report in the bankruptcy.” Response to Motion on Merits at 5. Miller also invoked public policy in his response: “judicial estoppel should not apply because of the strong public policy in favor of preserving the rights of childhood sexual abuse victims.” *Id.* at 12.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Summary of arguments.

The crux of this case is whether Miller had the requisite awareness in 1998 to disclose his sex abuse claim to the bankruptcy trustee. The trial court did not abuse its discretion in dismissing Miller's claim. Miller asserts he had no knowledge of his sex abuse claim in 1998. He has already testified, however, that at the time of his bankruptcy he knew he had been sexually abused, and he knew he was suffering from various disorders caused by the alleged abuse, including intrusive thoughts of sexual abuse, irrational behaviors such as sleeping with a bat and flashlight, nightmares, insomnia, feeling terrorized, deteriorating sexual relations, and fears in his head. Miller has offered no reasonable explanation for these inconsistent positions, and the trial court's ruling was based on substantial evidence. This court should affirm on the merits.

B. Standard of review.

Review of a trial court's dismissal of a claim under the doctrine of judicial estoppel is under an abuse of discretion standard. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005) ("We review the trial court's application of judicial estoppel to the facts of the case for an abuse of discretion"). In doing so, the appeals

court “places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party.” *Id.*

C. A debtor has a duty to disclose contingent claims.

1. A debtor’s duty to disclose is not governed by the applicable statute of limitations.

The law imposes on debtors a duty of full disclosure regardless of whether a claim has “accrued” or may yet be brought under the governing state statute of limitations. *See, e.g., Cunningham*, 126 Wn. App. at 229-230 (plaintiff judicially estopped from bringing claim informally disclosed to the trustee but not listed in his bankruptcy schedules; “[t]he Bankruptcy Code and court rules “impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including **contingent** and **unliquidated** claims”) (emphasis added) (citing *In re Coastal Plains*, 179 F.3d 197, 207-08 (5th Cir. 1999), *cert. denied*, 528 U.S. 1117, 145 L. Ed. 2d 814, 120 S. Ct. 936 (2000) (plaintiff judicially estopped from pursuing claims not disclosed in bankruptcy schedules)); *Hay v. First Interstate Bank of Kalispell*, 978 F.2d 555, 557 (9th Cir. 1992) (“We recognize that all facts were not known to [the debtor] at that time, but enough was known to require notification of the existence of the asset to the bankruptcy court.”)

Accordingly, “[w]hile state law determines the existence of a claim based on a cause of action, federal law determines when the claim arises

for bankruptcy purposes.” *In re Hassanally*, 208 B.R. 46, 50 (9th Cir. BAP 1997). In material part, the Bankruptcy Code defines a claim very broadly as follows:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured

11 USCS § 101. Congress adopted this expansive definition of a claim to ensure that “all legal obligations of the debtor, **no matter how remote or contingent**, will be able to be dealt with in the bankruptcy case.” H.R.Rep. No. 595, 95th Cong., 2d Sess. 1, 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266 (emphasis added).

Incomprehensibly, though Miller’s challenge to the trial court’s ruling was and continues to be based on the limitations statute governing his sex abuse claim, Miller actually cites cases **rejecting** the proposition that the existence of a claim turns on plaintiff’s appreciation of **all** his injuries, the **frequency or degree** of psychological disturbance, or **the date when he connected all of his diagnosed injuries to his abuse**. *E.g.*, CP 52-56 (attaching *In re Roman Catholic Archbishop of Portland in Oregon*, Bankr. L. Rep. (CCH) P80225, *2 (Bankr. D. Or. Jan. 10, 2005)); BA 20-21. In that case, the court adopted the “fair contemplation test” to determine the existence of a claim, and held that a claim arises when there

is “some prepetition or preconfirmation relationship, such as ‘contact, exposure, impact, or privity’ between the debtor and the claimant.” (citing *In re Piper Aircraft*, 58 F.3d 1573, 1577 (11th Cir. 1995)). There, the court flatly rejected the “accrued state law test,” under which “a claim does not arise in bankruptcy until an action has accrued under relevant substantive non-bankruptcy law.” *Id.* at n.5 (citing *In re Hassanally*, 208 B.R. at 51. Also, e.g., *In re A.H. Robins Co.*, 63 B.R. 986, 992 (Bankr. E.D. Va. 1986) (the bankruptcy courts “will not sanction a state’s statute of limitations as controlling either the existence or non-existence of a “claim” under the Bankruptcy Code.”). In short, as the cases Miller relies upon have held, the applicable a statute of limitations is irrelevant in determining a debtor’s duty to disclose. Campbell objects to Miller’s characterization of the rule in his brief in response to Campbell’s Motion on the Merits. Response to Motion on the Merits at 9 (“Absent an overriding federal interest, the existence of a claim in bankruptcy is generally determined by state law.”) (citing *Hassanally*, 208 B.R. at 49.) That language appears at the **beginning** of the court’s analysis, with the court citing to a United States Supreme Court discussing the law as it existed **before** the enactment of the 1978 bankruptcy code and its elimination of the claim “provability” requirement. *Hassanally*, 208 B.R.

at 49 (“Although the concept of provability was important under the former Bankruptcy Act, it was abandoned in the bankruptcy code.”).

2. Even under the more exacting “conduct plus” test, a claim in bankruptcy exists even when the injury is not yet manifest.

“It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.” *E.g., Cunningham*, 126 Wn. App. at 229-230 (emphasis added); *Coastal Plains*, 179 F.3d at 207-208 (citing 11 U.S.C. § 521(1); *Hay*, 978 F.2d at 557 (9th Cir. 1992).

Accordingly, “the debtor need not know all the facts or even the legal basis for the cause of action.” *In re Envirodyne Indus. v. Viskase Corp.*, 183 B.R. 812, 821 n.17 (Bankr. N.D. Ill. 1995). “[R]ather, if the debtor has enough information (i.e. the material facts) prior to confirmation to suggest that it may have a possible cause of action, then that is a “known” cause of action such that it must be disclosed.” *Id.* (emphasis added) (citing *Hay*, 978 F.2d at 557); *In re Heritage Hotel Partnership I*, 160 Bankr. 374, 378-79 (Bankr. 9th Cir. 1993) (debtor estopped from asserting claim arising out of prepetition relationship of the parties).

Hassanally, cited by Miller, is the seminal 9th Circuit bankruptcy case that establishes when a claim arises in bankruptcy. Not only does it reject a state statute of limitations as governing when the existence of a claim in bankruptcy, but it also provides unequivocally that “a claim arises when [the] conduct occurs, even though the injury resulting from the conduct was not manifest at the commencement of the case.” *Hassanally*, 208 B.R. at 51 (citations omitted). The court acknowledged that the conduct test might be inappropriate to the extent it assumed a prepetition relationship, but it noted, even under the more exacting standard requiring both conduct and a pre-petition relationship, that a claim arises in bankruptcy even if the harm materializes at later date:

The fact that the consequences of the wrongful conduct materialized at a later date does not metamorphose the pre-existing wrongful conduct into future conduct, thereby endowing the results of the wrongful conduct with an independent and unconnected quality.

Id. at 54; also 52 (citing *In re Piper Aircraft Corp.*, 162 Bankr. 619, 627 (Bankr.S.D.Fla.). In *In re Piper*, the court set out the three possible tests to determine the existence of a claim in bankruptcy. *Id.* 622-627. *Piper* rejected outright the “accrued state law claim theory” as contrary to Congressional intent. *Id.* at 623 (“[i]n enacting the current Bankruptcy Code, Congress intentionally eliminated the ‘provability’ requirement to broaden the range of claims that could be dealt with in bankruptcy.”)

Instead, as in *Hassanally*, the *Piper* court concluded that “prepetition exposure” which “connect[ed] the conduct to the claimant” was sufficient to give rise to a “claim” in bankruptcy. *Id.* at 627 (citing *In re Waterman S.S. Corp.*, 141 Bankr. 552, 556 (Bankr. S.D.N.Y. 1992) (claims arose “at the moment the asbestos claimants came into contact with the asbestos”); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir. 1988) (“the court determined that the claim arose when the claimant was inserted with a Dalkon Shield”); *In re Edge*, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (“the Bankruptcy Code recognizes a claim for the victim of prepetition misconduct ‘at the earliest point in the relationship between victim and wrongdoer.’”))

Miller addresses none of these authorities in his opening brief (or in his response to Campbell’s Motion on the Merits to Affirm), instead citing and discussing the applicable statute of limitations at BA 12-15, arguing that Miller was aware only of some of his injuries at the time of his bankruptcy at BA 18, and concluding that his position is the correct one because, although he cites to no evidence supporting such findings, “Miller was not deceitful, negligent or inadvertent.” BA 20. Moreover, Miller’s argument at BA 26-28, that he prevails because there are no reported cases dealing with a sexual abuse victim’s duty to disclose in the bankruptcy courts, is not compelling because, as shown above, the

bankruptcy courts have dealt successfully with the problem of latent injuries in multiple other contexts.

3. Miller had a duty to disclose in this case.

Here, Miller had a “claim” under the bankruptcy code because he testified he always knew he had been sexually abused, and he testified he knew at the time of the bankruptcy that he was suffering from various disorders caused by the abuse, including intrusive thoughts of sexual abuse, irrational behaviors such as sleeping with a bat and flashlight, nightmares, insomnia, feeling terrorized, deteriorating sexual relations, and fears in his head. CP 331; CP 388-389 (pp. 61-62); CP 416 (p. 58, lns. 10-14; CP 414 (p. 50, lns. 17-24); CP 415 (p. 56, lns.11-22); CP 416 (p.58, lns.10-25; pp. 59-61); CP 417 (pp. 61, lns. 9-22).

Miller’s explanation for the nondisclosure—that he did not know at the time of his bankruptcy that he was suffering from PTSD and Major Depression—fails as a matter of law because a debtor need not know the full extent of his injuries before a “claim” arises. *E.g., In re A.H. Robins Co.*, 839 at 202-203 (4th Cir. 1988) (rejecting accrual theory and determining that a claim arises at the moment the conduct giving rise to the alleged liability occurred); *In re Piper*, 162 B.R. at 627 (Bankr. S.D. Fla. 1994) (a claim arises when there is “some prepetition relationship, such as contact, exposure, impact, or privity, between the debtor’s

prepetition conduct and the claimant.”) The Ninth Circuit has adopted this approach, as discussed above and as shown by the cases cited by Miller. *E.g.*, CP 52-56. A claim in bankruptcy arises when there is “some prepetition or preconfirmation relationship, such as ‘contact, exposure, impact, or privity’ between the debtor and the claimant.” *In re Roman Catholic Archbishop of Portland in Oregon*, Bankr. L. Rep. (CCH) P80225 at *2 (Bankr. D. Or. Jan. 10, 2005) (citing *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993) (a claim in bankruptcy is one that is within the “fair contemplation” of the parties at the time of the bankruptcy); *In re Heritage Hotel Partnership I*, 160 Bankr. at 378-79 (debtor estopped since undisclosed claims “arose out of the prepetition lending relationship and derive from the same nucleus of operative fact.”); *In re Hassanally*, 208 B.R. at 54 (“the determination of when the claim arose under federal law need not be analyzed any further than when the alleged negligent conduct occurred, for a contingent claim arose at that time.”) (emphasis added).

Instead, by focusing on applicable statute of limitations, Miller attempts to explain his decision to withhold his sex abuse from the bankruptcy trustee by arguing “provability,” *i.e.*, (1) Miller speculates that that at the time of his bankruptcy he would **not** have prevailed against a defense based on the applicable statute of limitations. Response to Motion on the Merits at 5 (“[a]ny lawsuit premised on what he knew in 1998

would have been dismissed based on the statute of limitations. He had no potential claim to report in the bankruptcy”); and (2) that he had no “other” claim in 1998, *i.e.*, for “Major Depressive Disorder and Posttraumatic Stress Disorder ([PTSD],” because he was not diagnosed with these disorders in 1998 and this part of his claim was therefore still timely under the statute of limitations. BA 15 (“Miller did not discover his most serious injuries, including PTSD until after March 27, 2003. The present action is premised on those injuries and on incident of sexual abuse first remembered after Patrick Campbell’s death in 2002. The Complaint in this matter was filed August 8, 2003.”) Miller thus attempts to explain his inconsistent positions by resort to a statute of limitations that the Ninth Circuit and countless other federal courts have held has nothing to do with the existence of a claim in bankruptcy, or whether a debtor has a duty to disclose the factual basis for the claim and any injuries that exist at the time of the bankruptcy. *E.g.*, *In re Hassanally*, 208 B.R. at 54. Miller’s argument is unsupported, and Campbell has found no legal argument that might support it. Moreover, in yet another contradiction, Miller’s position before this court that “[a]ny lawsuit premised on what [Miller] knew in 1998 would have been dismissed based on the statute of limitations” is inconsistent with his position before the trial court in his successful opposition to Campbell’s motion for summary judgment under

the statute of limitations. Response to Motion on the Merits at 5; CP 471-72. As Miller is fully aware, and as he argued before the trial court, “the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.” RCW 4.16.340. The truth is that Miller’s lawsuit *was* “premised on what he knew in 1998,” and it was *not* dismissed based on the statute of limitations. CP 471-72.

Miller’s argument on appeal—as before the trial court—confuses the leeway given claimants under a RCW 4.16.340 with the law governing a debtor’s duty to disclose. Miller admits his claim had accrued at the time of the bankruptcy. BA 23. Miller may not disclaim his alleged abuse and injuries in the Bankruptcy Court simply because they were undiagnosed at that time. Moreover, Miller offers no evidence that his injuries were **incapable** of diagnosis at that time and, in fact, the diagnoses he **did** receive were based on the injuries from which he testified he had always suffered. *E.g.*, CP 331-332. Moreover, as the trial court noted, there would be no need speculate about what would have occurred in 1998, “when we wouldn’t have to do that at all had the plaintiff listed what he knew.” VRP 25-26.

D. The trial court did not abuse its discretion in dismissing Miller’s claim under the doctrine of judicial estoppel.

“Numerous federal circuits hold that pre-petition claims must be disclosed in the bankruptcy reorganization plan or otherwise mentioned in

the debtor's schedules or disclosure statements." *Cunningham v. Reliable Concrete Pumping*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005). Judicial estoppel applies when the debtor (1) takes a prior inconsistent position by failing to disclose a claim about which the debtor had knowledge; and (2) that position is accepted by a court and the claim is thereafter asserted. *Id.* at 227-233. "The courts have made clear that the failure to schedule claims about which the debtor had knowledge 'is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated.'" *Id.* at 232-33 (citations omitted). "Intent to mislead is not an element of judicial estoppel." *Id.* at 234.

In *Cunningham*, the plaintiff argued he was not judicially estopped from asserting his personal injury that he did not disclose in a prior bankruptcy because "he disclosed the claim against [the defendant] during the first meeting of creditors following the bankruptcy filing." *Id.* at 229. The issue was whether "anything short of listing the claim in the bankruptcy schedules is sufficient to avoid the effect of judicial estoppel." *Id.* The court held that "under the facts of this case, the failure to list the claim in the bankruptcy schedules fulfills the first [prior inconsistent position] criterion of judicial estoppel." *Id.* The court further held that Cunningham's earlier position was "accepted by the court" because "[t]he bankruptcy court implicitly accepted Cunningham's position that the

liquidation of nonexempt property would not create a dividend for unsecured creditors.” *Id.* at 231. Also, *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531, 533 (2005) (judicial estoppel “serves to preclude [bankruptcy debtor] from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court”).

Here, the trial court found that “[t]he plaintiff, in this case, the Court determines, knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured.” VRP 25-26. The court ruled that “[Miller] was legally required to list this potential claim and he didn’t” and therefore judicial estoppel applied. VRP 25-26. By withholding the information in his bankruptcy and suing four months after Campbell’s death, Miller has derived an unfair advantage over and imposes an unfair detriment on Campbell’s Estate, because Campbell is now dead and cannot defend himself. The ruling is not an “abuse of discretion,” but rather was based on substantial evidence with Miller having all inferences in his favor. The trial court’s ruling should be affirmed.

1. Miller submits no facts supporting an inference of “inadvertence.”

Both federal and Washington state courts recognize that a debtor’s non-disclosure may be inadvertent, which might preclude the application

of judicial estoppel. *See, e.g., Cunningham*, 126 Wn. App. at 234 (“In short, intent to mislead is not an element of judicial estoppel. Moreover, there is nothing in the record to support Cunningham’s assertion that he omitted the claim by mistake.”) (citing *Coastal Plains*, 179 F.3d at 210 (“in considering judicial estoppel for bankruptcy cases, the debtor’s failure to satisfy its statutory disclosure duty is “inadvertent” only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.”))).

As noted above, Miller does not seriously dispute that his sex abuse claim was a “claim” under the bankruptcy code. *E.g.*, BA 23. He argues instead that “his failure to list any [sex abuse] claim was at most inadvertent.” BA 2-24 (“It is certainly not surprising that it did not occur to [Miller] to tell the trustee in bankruptcy in 1998 that he had been sexually abused 15 to 20 years earlier. There is no evidence that he did this in any calculated or even knowing manner.”)

Miller’s argument fails, however, for even if *Cunningham* adopted the rule that evidence of inadvertence “might” preclude the application of judicial estoppel, Campbell has introduced facts from which a court could infer that Miller **intentionally** withheld his claim from the bankruptcy **and** had a **motive** to do so. As discussed above, Miller testified during his January 2004 deposition to numerous “negative” impacts that he was

aware of at the time of his bankruptcy as being caused by the abuse. In his 1998 bankruptcy, he disclosed none of them and discharged his debts. Then, in 2003, Miller filed a half a million dollar creditor's claim against Campbell before receiving any treatment. Then, in 2005, Miller visited a forensic psychologist and denied many of the injuries to which he had previously testified. *Compare* CP 369 ("Miller reports no symptoms of intrusive memories caused by the abuse until recently") *with* CP 416 (p.58, lns.10-25; pp. 59-61) (Miller testified he suffered intrusive thoughts about being abused by Pat Campbell in the course sexual relationships beginning at approximately age 20); *compare* CP 370 (Miller told Dr. Conte he "was not sure" he could remember any abuse before 2000) *with* CP 417 (pp. 61, lns. 9-22) (Miller testified that his second marriage failed in 1997 due to deteriorating sexual relations and his "fears in [his] head" and feelings "about Pat Campbell and the things he did to me." *Also*, CP 414 (p. 50, lns. 15-25); CP 415 (p. 56, lns.11-22); CP 416 (p.57, lns. 4-10); and, *compare* CP 370 (Miller told Dr. Conte in May 2005 that "from his leaving home until the time Mr. Campbell was dying, he did not think about the sexual abuse") *with* CP 416 (p.58, lns.10-25; pp. 59-61) (Miller testified to intrusive memories of the abuse beginning at age 20).

On summary judgment, the burden shifts to plaintiff to introduce facts to reasonably explain the differing positions. *See Young v. Key*

Pharmaceutical, 112 Wn.2d 216, 225, 77 P.2d 182 (1989) (under CR 56, the moving party bears the initial burden of showing the absence of an issue of material fact. If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff). Here, however, *Miller never argued inadvertence before the trial court, and has introduced no facts supporting a finding of inadvertence.* Miller offered no testimony by declaration or affidavit before the trial court that attempted to explain why he did not notify his trustee of his sex abuse claim. Miller's claim that his non-disclosure is "not surprising" is not evidence. BA 23. The trial court's query to Miller ("I just want to know yes or no: Did your client know when he filed bankruptcy that he had been sexually abused?") was not met with any evidence of inadvertence, but instead with the seemingly flippant response that Miller "vaguely" knew of the abuse, and that Miller did "not really" know he was injured).

In short, the trial court did not abuse its discretion, even with all facts construed most favorably to Miller, because Miller offered nothing on which to premise a finding of inadvertence. Rather, the evidence was that Miller was "talking out of both sides of his mouth" depending on the legal inquiry, *i.e.*, disclaiming knowledge of his abuse and the awareness of his injuries for purposes of a statute of limitations analysis or to receive

a bankruptcy discharge, or asserting that awareness at his deposition to support his claim. *See Reigel v. Kaiser Foundation Health Plan of N.C.*, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (the doctrine of judicial estoppel ensures that a party will not “speak out of both sides of [his] mouth . . . before th[e] court.”) To explain away the inconsistency, Miller has opted to assert a limitations-based argument based on theories of claim accrual and timeliness. BA 16. He has never offered evidence supporting a finding of inadvertence. BA 23-25. Accordingly, even under an “inadvertence” exception to judicial estoppel, the trial court did not abuse its discretion.

Campbell also objects to Miller’s argument, based on *Johnson v. State of Oregon*, 141 F.3d 1361, 1369 (9th Cir. 1998), that intent is an element of judicial estoppel. BA 24. *Johnson* was decided three years **before** *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001) (CP 226-231), the latter being a Ninth Circuit Court of Appeals case that dealt directly with judicial estoppel **in the bankruptcy context**, and which held that the doctrine applied to bar subsequent claims undisclosed by the debtor but about which the debtor has knowledge:

[The debtor] 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.

Hamilton, 270 F.3d at 784 (citing, *inter alia*, *In re Coastal Plains*, 179 F.3d at 210 (“the inconsistent positions prong for judicial estoppel is satisfied. By omitting the claims from its schedules and stipulation, Coastal represented that none existed”); *Hay*, 978 F.2d at 557 (“We recognize that all facts were not known to [the debtor] at that time, but enough was known to require notification of the existence of the asset to the bankruptcy court.”)) Here, Miller offers no facts supporting a finding of inadvertence, and ignores established precedent holding that a debtor’s failure to disclose claims about which he has knowledge permits the application of judicial estoppel to bar the later-asserted claim. BA 24-25.

E. The purposes of judicial estoppel are met in this case.

Miller’s argument that the purposes of judicial estoppel are not met in this case is unavailing. *See* BA 28-30. Miller lied in his divorce proceeding. CP 237-328. He lied to Dr. Conte. *Compare* CP 369 *with* CP 416 (p.58, lns.10-25; pp. 59-61); CP 417 (pp. 61, lns. 9-22); CP 415 (p. 56, lns.11-22); *compare* CP 370 *with* CP 414 (p. 50, lns. 15-25); CP 415 (p. 56, lns.11-22); CP 416 (p.57, lns. 4-10). Miller withheld his sex abuse from the Bankruptcy Court, only to disclose it four months after his stepfather died, but *before* he sought treatment. CP 296-298; CP 249;

CP 617, 618. *Miller's assertion that he did not know he had a claim before he saw Dr. Adriance is unsupportable because he filed a half million dollar Creditor's Claim before he saw Dr. Adriance.* CP 617, 618; CP 331. Miller learned nothing between the time of his bankruptcy and the time of his Creditor's Claim, the ignorance of which *prevented* him from asserting his half million dollar claim for damages. The *Cunningham* court noted that one of the purposes of the doctrine of judicial estoppel is to preserve "*respect for the judicial proceedings* without the necessity of resort to the *perjury statutes.*" *Cunningham*, 126 Wn. App. at 225. The court should affirm the trial court's ruling because no law supports Miller's various theories on why he had no claim in 1998, and the trial court properly found that Miller "knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured." VRP 25. Miller offers no evidence to the contrary.

F. No public policy interest is served by exempting sex abuse victims from bankruptcy disclosure requirements.

Miller will likely argue that the policy interests reflected by Washington's state statute of limitations for childhood sexual abuse victims (RCW 4.16.340) are such that this court should refuse to apply judicial estoppel in this case because Miller is an alleged victim of childhood sexual abuse. *E.g.*, Response to Motion on the Merits at 12

(“Judicial estoppel should not apply in Michael Miller’s case because of the strong policy in favor of preserving the rights of childhood sexual abuse victims”).

Such an argument is not viable because well-settled law addresses the issue here, and there is no conflict between the bankruptcy code’s disclosure requirements and the doctrine of judicial estoppel on the one hand, and the purposes of the extended state statute of limitations on the other. Miller would **not** have been prejudiced by disclosing his sex abuse in his 1998 bankruptcy, because, as Miller notes, “the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later.” BA 14; RCW 4.16.340. Miller prevailed on this point before the trial court. CP 471-72. In bankruptcy, the trustee may opt to assert the claim, or he may not if insufficiently choate, but at least the trustee has the option, and through disclosure the debtor can prevent application of judicial estoppel. On the other hand, if a debtor cannot remember his abuse, then he cannot disclose it, and there is no basis for a finding of inconsistent positions. Either way, there is nothing about a debtor’s disclosure obligation in bankruptcy that limits the protections for childhood sex abuse victims afforded by state law. All rights and remedies are available to the debtor in bankruptcy, with judicial estoppel applying only where the debtor attempts to pursue claims about

which he had knowledge, but did not disclose, during his bankruptcy proceedings. RCW 4.16.340 protects childhood victims of sexual abuse, and judicial estoppel addresses the problem when “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled[.]’” *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted). None of these objectives are conflicting, and neither conflict with the bankruptcy code’s policies that seek to give debtors a “fresh start” while instituting an orderly system of debt collection. In short, no policy purpose is served by exempting Miller from the bankruptcy disclosure requirements (a matter of federal concern), and Miller’s rights under RCW 4.16.340 are not diminished by the application of judicial estoppel.

G. The trial court did not err in denying Miller’s motion for summary judgment on liability.

Campbell briefly addresses Miller’s unsupported contention that Campbell is liable for sex abuse as matter of law because he is dead. BA 31-34. Miller argues that, because his abuser is dead, his abuser cannot rebut his claim, and therefore Miller is entitled to judgment as a matter of law. *Id.* This is not the law.

First, the trial court properly denied Miller’s motion for summary judgment on liability under CR 56(f), which gives the trial court discretion

to deny a motion for summary judgment when the non-moving party cannot produce opposing affidavits.

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f). Here, Campbell died four months before Miller asserted his claim, so he could not rebut Miller's allegations. CP 334. The trial did not err in using its discretion under CR 56(f) to deny Miller's motion. Miller complains that the trial court erred by not requiring Campbell to obtain a continuance, but no amount of continuances would have cured the problem of Campbell's unavailability.

Second, when cross-examination elicits facts that tend to show the untruth of otherwise uncontradicted direct testimony, the trier of fact is not required to believe the direct testimony. *Simmons v. Anderson*, 177 Wash. 591, 596-97, 32 P.2d 1005 (1934). In *Simmons*, the court ruled as follows:

Since it is the exclusive province of the jury to pass upon the credibility of the witness . . . the jury may accord to the testimony such weight as it deems proper, even though the testimony be uncontradicted and not directly impeached, and may exercise its judgment and discretion in this respect to the extent of wholly disregarding the testimony where there are facts or circumstances, admitted or proved, which tend to establish the untruth of such testimony . . . As interested testimony, the jury could reject it, draw

inferences from all the existing circumstances, and accept other evidence even though interested.

Id. Here, there is ample evidence—arising from the estoppel issue alone—from which a jury could reject Miller’s claim that he was the victim of sex abuse. Indeed, a central question at trial would have been why Miller did not tell his bankruptcy trustee about his sex abuse claim, though he had the wherewithal to tell his trustee about his “**possible Lemon Law**” claim against Ford. CP 297 (emphasis added). Additionally, Miller’s Creditor’s Claim—asserted **before** his psychological assessment—directly refutes Miller’s assertion that he did not know he had a claim until he saw Dr. Adriance. Miller’s decision to sue four months after the death of his stepfather supports the inference that he waited to bring his claim until it could not be rebutted directly. The trial court’s finding that Miller previously lied under oath in his divorce matter supports an inference that Miller is capable of dissembling when he deems it expedient. Miller’s various inconsistencies as outlined in this brief and before the trial court, and the many others that would have come out at trial, would have provided an ample factual basis for Campbell’s position that Miller is not credible and that his claim is manufactured.

In sum, Miller’s appeal of the trial court’s ruling on liability should be denied because (1) the trial court properly applied CR 56(f), and (2)

there is ample evidence from which a jury could conclude that Miller was never sexually abused. *See Johnson v. Rothstein*, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). (“We hold that a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact.”)

H. Campbell is entitled to fees for a frivolous appeal.

Based on Miller’s various briefs, Campbell requests attorney fees on appeal pursuant to RAP 18.9(a). This rule permits an award of attorney fees to party burdened by a frivolous appeal. *Id.* An appeal is frivolous when “there are no debatable issues upon which reasonable minds could differ and when the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987).

The comment to RAP 18.9 provides that “[a]n appeal is not frivolous if the appellant cites a case supporting its position.” *Van Dintner v. Kennewick*, 64 Wn. App. 930, 937, 827 P.2d 329 (1992); *Johnson v. Mermis*, 91 Wn. App. 127,138, 995 P.2d 826 (1998) (fee award proper when there was “no reasonable basis to argue that the trial court abused its discretion.”)

Here, Miller offers no factual basis or legal authority for reversing the trial court. Miller cites authority directly contradicting his position, and simply repeats, often verbatim, the same arguments made before the trial court. *E.g., compare CP 79-81 with BA 28-30.* To summarize, Miller testified that he knew at the time of his bankruptcy that he was suffering from various disorder caused by sex abuse. He then asserted that he could not advise his trustee of the sex abuse or his injuries because he had not been diagnosed as having PTSD or Major Depression until 2003, but he offers no explanation *on why he could not disclose what he did know.* Miller's argument is made without supporting authority, and he offers no reasonable explanation for his inconsistent positions on when he had a claim.

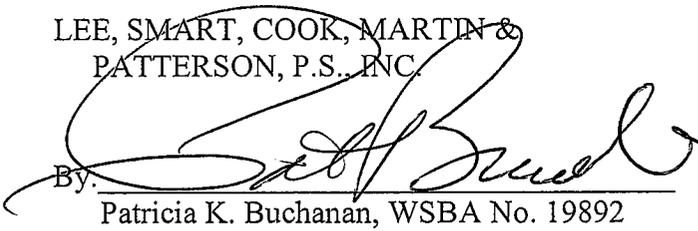
V. CONCLUSION

The trial court's ruling should be affirmed because it is correct and because it has not been challenged with facts or legal authority. No one is asking Miller to disclose to his trustee that he had PTSD or Major Depression; he could not disclose these diagnoses because he is not trained to diagnose himself. But the law **does** require Miller to disclose what he does know, *i.e.*, the sex abuse he never forgot, and the various traumas he already knew about, so the trustee could send Miller for an assessment to investigate the scope of Miller's alleged injuries, and

evaluate the potential value of the claim and whether to pursue it. Miller's position that at the time of the bankruptcy he "vaguely" knew he had been abused, and that he "[did] not really" know he was injured directly contradicts his own testimony, and his position is untenable as matter of law. Further, Miller submitted no evidence from which to infer inadvertent nondisclosure. Finally, neither the doctrine of judicial estoppel nor the debtor's disclosure obligations in bankruptcy in any way diminish the rights of childhood sexual abuse victims under RCW 4.16.340. The trial court did not abuse its discretion in dismissing Miller's claim under the doctrine of judicial estoppel, and this court should affirm the trial court.

RESPECTFULLY SUBMITTED this 8th day of March, 2006.

LEE, SMART, COOK, MARTIN &
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By. 

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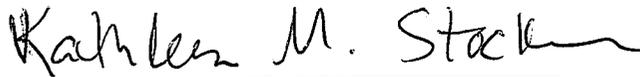
CERTIFICATE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on March 8, 2006, I caused service of the foregoing pleading on each and every attorney of record herein:

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