

SUPREME COURT NO. 84568-9  
COURT OF APPEAL NO. 63644-8-I

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SUPREME COURT OF THE STATE OF WASHINGTON

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MICHAEL A. GRASSMUECK, INC. AS CHAPTER 7 TRUSTEE FOR  
THE BANKRUPTCY ESTATE OF JOAN MELNIK,

RESPONDENT,

v.

TIMOTHY C. MCSHANE AND JULIE S. MCSHANE, HUSBAND AND  
WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF,

PETITIONERS.

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SUPPLEMENTAL BRIEF OF RESPONDENT  
MICHAEL A. GRASSMUECK, INC.

---

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## I. INTRODUCTION

### A. Previous Statement of Facts

Throughout these proceedings, McShane continues to misrepresent facts, argue matters not in the record and seeks to create a "revisionist history" of the proceedings below. On March 15, 2010, the Court of Appeals-Division 1 reversed the trial court order granting McShane's CR 59 motion, the order vacating the default judgment and order of dismissal. The Court of Appeals affirmed the trial court order denying McShane's CR 60(b) motion to vacate the default judgment. Respondent Grassmueck directs this Court to the facts set forth in his original appellate and reply briefs, which are consistent with the appeal record and facts set forth in the Court of Appeals opinion.

## II. ISSUES PRESENTED

1. Should McShane prevail when he did not oppose the trustee's October 2008 substitution as real party in interest but then argued - after the trial court denied his April 2009 CR 60(b) motion to vacate - the trustee's substitution was impermissible?

2. Does the trial court have jurisdiction over property of a bankruptcy estate and may a party raise such an issue pursuant to RAP 2.5(a)?

## II. ISSUES PRESENTED (continued)

3. Does this court have jurisdiction to determine core or non-core related to proceedings under 28 U.S.C. Section 157 and 28 U.S.C. Section 1334, may a party raise such an issue pursuant to RAP 2.5(a) and should this court adopt *Pacor, Inc. v. Higgins*, 743 F.2d (3rd Cir. 1984)?

4. Should the court affirm denial of McShane's motion to supplement the record?

## III. ARGUMENT

A. The trustee's substitution is permitted under Washington case law and McShane's failure to raise a real party in interest objection until after the denial of his CR60(b) motion deems it waived.

McShane cites no cases in his petition for review that have any bearing on the arguments set forth in this supplemental brief; McShane failed to cite or analyze one case as to the role and legal authority a bankruptcy trustee possesses in administering a pre-petition claim under the U.S. Constitution, federal code and interpreted case law.

McShane did not object to the trustee's substitution when the court granted it on October 13, 2008. And, CR 59 does not permit a party finding a judgment unsatisfactory to suddenly propose a new theory of the case. *JDFJ Corp. v. International*

*Raceway, Inc.*, 97 Wn. App. 1, 7 970 P.2d 343 (1999); see also, *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 122 P.2d 729, rev. denied 157 Wn. 2d 1022, 142 P.3d 609 (2005). An argument raised for the first time in a motion for reconsideration is waived and a real party in interest defense is not jurisdictional and is freely waivable. *Steger v. General Elec. Co.*, 318 F.3d, 1066, 1080 (11th Cir. 2003). An argument not raised until a motion for reconsideration is waived. *In re Outboard Marine Corp.*, 386 F.3d 824, 828 (7th Cir. 2004). McShane only objected to the Trustee's status as real party in interest after the trial court denied his CR 60(b) motion. McShane did not appeal the ruling affirming the trial court denial of his CR 60 (b) motion, which was the basis of his cross-appeal. CP 213-7.

A real party in interest objection is for the defendant's benefit and should be raised in a timely fashion or it may be deemed waived. Wright and Miller, *Federal Practice & Procedure*, Section 1554, pages 700-704.

When it was discovered Melnik was not the real party in interest, the Trustee moved pursuant to 11 U.S.C. Section 350(b) and Fed. R. Bankr. P. 5010 to reopen the bankruptcy and administer the cause of

action as a bankruptcy estate asset, which the U.S. Bankruptcy Court for the District of Oregon (Case No. 03-64832-aer7) did grant on May 9, 2008. CP 104-8, 236-8.

McShane asserts that without any motion to reopen the pleadings or a sufficient showing justifying reopening the pleadings or an order reopening the pleadings the trustee is precluded from acting on behalf of the bankruptcy estate. (Petition for Review, Pages 1, 8). McShane fails to cite what Civil Rule should have been used; and, McShane cannot reconcile his argument with the order granting the CR 17(a) motion to substitute the trustee wherein the court ordered:

2.1 [T]he plaintiff's motion to amend the complaint to substitute the Chapter 7 Bankruptcy Trustee Michael A. Grassmueck, Inc. for Joan Melnik as the real party in interest herein is GRANTED. Michael A. Grassmueck, Inc. is substituted for Joan Melnik as the plaintiff.

CP 226-229.

Washington courts recognize and permit substitution of a bankruptcy trustee as a real party in interest. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 176-180, 982 P.2d 1202 (1999), rev. denied 140 Wn.2d 1004 (2000) citing: *Rousseau v. Diemer*, 24 F. Supp. 2d 137, 143-44 (D. Mass. 1998), *Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995) and *Crumpacker v. DeNaples* 126

N.M. 288, 296, 968 P.2d 799 (N.M. Ct. App); wherein, *Sprague* reversed the trial court, ruling substitution of a bankruptcy trustee with relation back is permitted and a trial court abuses its discretion by denying a substitution motion. In accord, *Battle v. Alpha Chemical & Paper Co.*, 770 So.2d 626 (Court of Civil Appeals Alabama 2000). *Sprague* is cited in *Miller v. Campbell*, 164 Wn. 2d 529, 537-538, 192 P.3d 352 (2008) wherein this court held substitution of a bankruptcy trustee as real party in interest of a debtor's claim not disclosed in bankruptcy is permitted where the amendment changes nothing except who may benefit and the reasonable time permitted for substitution relates to the period "after objection" has been made for not prosecuting in the name of the real party in interest." In *Miller*, the estate did not object to the trustee's absence at trial instead choosing to pursue a motion to dismiss for lack of standing on a theory of judicial estoppel. And, in *Miller*, substitution of the trustee was granted at the Supreme Court pursuant to RAP 3.2. 164 Wn.2d at 536-537.

In *Arkison v. Ethan Allan* 160 Wn.2d 535, 541, 160 P.3d 13 (2007), this court cited *In re Lopez*, 283 B.R. 22, 27 (9th Cir. BAP 2002), which held a bankruptcy appellate panel abuses its discretion by preventing a

trustee from reopening a chapter 7 bankruptcy proceeding when reopening would potentially benefit creditors.

And, in *Bartley-Williams v. Kendall*, 134 Wn.App 95, 102 138 P.3d 1103 (2006), the court recognized the "equitable" arguments of the chapter 7 trustee that application of judicial estoppel to a trustee raises new considerations of fairness and equity where prohibiting a trustee from pursuing a claim on behalf of the estate may create a windfall for the party at the expense of bankruptcy creditors (citing *Cheng v. K&S Diversified Invs., Inc.*, 308 B.R. 448, 459-60 (B.A.P. 9th Cir. 2004: "the correct solution 'is often to reopen the bankruptcy case and order the appointment of a trustee who, as owner of the cause of action, can determine whether to deal with the cause of action for the benefit of the estate.'"). See also, *Wieburg v. GTE Southwest Inc.*, 272 F.3d 302, 308 (5th Cir. 2001) where the appellate panel vacated the district court decision dismissing Wieburg's complaint when she failed to disclose the claim in her bankruptcy filings; and, it adopted the reasoning of the Advisory Committee's Notes (1966 Amendment) relating to the last sentence of Fed. R. Civ. P. 17(a):

[n]o action shall be dismissed on the grounds that it is not prosecuted in the name of the real party in interest until a reasonable time

has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.

The panel noted the provision was added simply in the interest of justice and intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake was made. The court then held the district court abused its discretion by dismissing Weiburg's complaint without explaining why ratification by or joinder of the Trustee were not appropriate alternatives. *Weiburg v. GTE Southwest, Inc.*, 272 F.3d at 303. The *Weiburg* reasoning and cite to Fed. R. Civ. P. 17(a) and its advisory notes is the same reasoning and cite used in *Sprague v. Sysco Corp.*, 97 Wn. App. at 172-3.

Here, the Trustee filed a declaration ratifying Melnik's commencement and maintenance of the lawsuit and requested the trial court substitute it as plaintiff in its capacity as Chapter 7 Trustee for the benefit of Melnik's creditors. CP 236-7.

Then, after a substantial period of "contested and protracted litigation" as found in the record of these proceedings (CP 167-8), McShane moved to vacate the judgment arguing: insufficient service of process (lack of jurisdiction) (CR 60(b)(5)), Melnik's alleged

fraud or misrepresentation (CR 60(b)(4)) or any other reason justifying relief from the operation of the judgment (CR 60(b)(11)).

The trial court denied McShane's motion on April 24, 2009. CP 1-3.

McShane has repeatedly failed to address, reconcile or even acknowledge his own October 8, 2008 response to the CR 17(a) motion where he specifically did not object to the trustee's substitution and clearly stated:

[a]s indicated at the outset, defendant does not object to plaintiff's request to substitute the bankruptcy trustee as the real party interest and amending the case caption. However, an order allowing plaintiff to do so must be without prejudice and reserve defendant's right to assert judicial estoppel, the statute of limitation, and the Relation Back Doctrine, or other applicable defenses if necessary. Allowing plaintiff to amend the complaint should not prevent defendants from seeking summary judgment at a later date if applicable. (Defendant's own emphasis).

CP 24.

In fact, McShane correctly stated the "rule of relation back" in his response:

[p]laintiff argues in her motion the amendment to her complaint should relate back to the filing of the original complaint. However, a determination on this issue is premature. The test for relation back under CR 17(a) and 15(c) is "whether the defendant had notice of the lawsuit and accordingly was not prejudiced, and whether the real party in interest ratified the lawsuit or sought to be substituted as plaintiff within a reasonable time after objecting by the adversary." *Kommavonga v. Haskell*, 149 Wn.2d 288, 317, 67

P.3d 1068 (2003). CP 25.

McShane understood the relation back doctrine.

What other possible explanation is there for this legal analysis in his October 8, 2008 response?

[d]efendants dispute they ever had notice of the complaint because they were never served with the complaint. For these reasons there can be no relation back. However, this issue should reserved as it is not before the Court at this time. No affirmative relief on relation back should be allowed.

CP 25.

In *Kommavonga v. Haskell*, this court held the test for relation back is "whether the defendant had notice and accordingly was not prejudiced and whether the real party in interest ratified the lawsuit or sought to be substituted as plaintiff within a reasonable time after objection."

However, the trial court then granted McShane's May 22, 2009 CR 59 motion for reconsideration based upon his contrary and misleading assertion the trustee's substitution was impermissible since it occurred after the 2006 judgment. And, when Grassmueck sought reconsideration and leave - after McShane failed to meet his burden of proof on the jurisdictional service of process and notice issue - (see burden of proof standard of "clear and convincing evidence" in *Woodruff v. Spence*, 88 Wn. App. 565, 945 P.2d 745

(1997), rev. denied 135 Wn. 2d 1010 (1998)) since "relation back" under *Kommavongsa* and the October 2008 order "struck language" had been satisfied, to wit:

and the amendment shall related back to the date the original complaint was filed.

CP 228.

the trial court denied the trustee's motion and request for leave without legal justification and then summarily dismissed the case. CP 34-5.

Under 11 U.S.C Section 541(a), property of the estate includes all legal or equitable interests of the debtor at the commencement of the case; therefore Melnik's prepetition personal injury cause of action was an asset of the bankruptcy estate. And, when Melnik was granted a discharge on October 3, 2003 the case closed but the cause of action remained property of the bankruptcy estate pursuant to 11 U.S.C. Section 554(d). However, when a debtor fails to schedule an asset and the trustee later discovers it, the trustee may reopen the case to administer the asset on behalf of its creditors. *Kane v. National Union Fire Ins. Co.*, 535 F.3d 380 (5th Cir. 2008) (citing 11 U.S.C. Section 350(b); 3 Collier On Bankruptcy Section 350.03[1] (Alan N. Resnick & Henry J. Sommers ed. 15th ed. rev. 2008).

As *Kane* observed:

It is not serendipitous that the Bankruptcy Code has an explicit provision that prevents the loss of assets that a debtor fails to disclose in [b]ankruptcy [s]chedules. "It happens all the time, especially with claims." And when it does, cases are "routinely re-opened," in accordance with the statute to administer those assets.

*Kane v. National Union Fire Ins. Co.*, 535 F.3d at 385, citing *In re Miller*, 347 B.R. 48, 53 (Bankr. S.D.Tex 2006). (citations omitted).

As the appellate court held, the trial court abused its discretion when it granted McShane's reconsideration motion.

B. Pursuant to RAP 2.5(a), a party may raise for the first time in the appellate court the trial court does not have subject matter jurisdiction over property of a bankruptcy estate pursuant to 28 U.S.C. Section 1334 and 28 U.S.C. Section 157.

The trial court did not have the authority or jurisdiction to vacate a judgment that is property of a bankruptcy estate. 28 U.S.C. Section 1334(e)(1).

The court's action violated the Bankruptcy (Article I, Section 8, Clause 4) and Supremacy Clauses (Article VI, Section 1, Clause 2) of the U.S. Constitution.

Property interests are created and defined by state law. *Butler v. United States* 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed. 136 (1979); however, what constitutes property of a bankruptcy estate is "ultimately a federal question." *In re Becker*, 136 B.R. 113 (Bankr. N.J. 1992) citing *In re Loughnane*, 28 B.R. 940, 942 (Bankr.

D. Colo. 1983). The property of this bankruptcy estate is the personal injury claim - reduced to judgment, which the trial court upheld when it denied McShane's CR 60(b) motion to vacate. (CP 1-3). However, McShane then asserted in his motion for reconsideration:

[t]he complaint cannot be amended to create "a legal fiction" that it was the Trustee and not Melnik who obtained the default judgment. After a final judgment has been entered, amendment of the complaint is prohibited. As such, the lack of standing cannot be cured and the judgment is simply void for lack of personal jurisdiction and must be vacated.

(CP 18).

A district court shall have original and exclusive jurisdiction over all cases under the bankruptcy code. 28 U.S.C. Section 1334(a). And, it shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. 28 U.S.C. 1334(e)(1). And, the trustee "may prosecute or defend any pending action by the debtor or commence or prosecute any action or proceeding on behalf of the estate before any tribunal." Bankruptcy Rule 6009.

*In re Gruntz*, 202 F.3d 1074, 1080 (9th Cir. 2000) the court held a state court modification of an automatic stay constituted an unauthorized infringement upon the bankruptcy court's jurisdiction:

[T]he current bankruptcy jurisdiction statute, 28 U.S.C. 1334, expands the historic role of the federal district courts in bankruptcy. District courts have "*original and exclusive jurisdiction of all cases under title 11.*" 28 U.S.C. Section 1334(a) (emphasis added). By the plain wording of the statute, Congress has expressed its intent that bankruptcy matters be handled exclusively in a federal form. See *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913 (9th Cir. 1996). In short, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so they may deal efficiently and expeditiously with all matters connected with the bankruptcy estate. *Celotex v. Corp. v. Edwards*, 514 U.S. 300, 308, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984)).

While the constitutional parameters of 28 U.S.C. Section 1334 subject matter jurisdiction and 28 U.S.C. Section 157 "core" and "non-core or related to" proceedings will be argued, it is abundantly clear Melnik's prepetition claim - and judgment - were the property of the estate pursuant to 11 U.S.C. Section 541(a).

With certain exceptions, the estate is comprised of the debtor's legal or equitable interests in property "wherever located and by whomever held." *Id.* (emphasis supplied). The district court in which the bankruptcy case is commenced obtains exclusive in rem jurisdiction over all of the property in the estate. 28 U.S.C. Section 1334(e); *Commodity Futures Trading Comm'n v. Co. Petro Marketing Group, Inc.*, 700 F.2d 1279, 1279 1282 (9th Cir. 1983) (interpreting 28 U.S.C. Section 1471, the statutory precursor to 28 U.S.C. Section 1334(e)). The court's exercise of "custody" over the debtor's property, via its exercise of in rem jurisdiction essentially creates a fiction that the property--regardless of its actual location--is legally located

within the jurisdictional boundaries of the district in which the court sits. See *Katchen v. Landy*, 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966) (noting that bankruptcy courts have "constructive possession over estate property (internal quotation marks and citations omitted); *Commodity Futures*, 700 F.2d at 1282 (noting that under the bankruptcy code, "all property of the debtor, wherever located, is in custodia legis of the bankruptcy court.)"

*In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998);

And, in *In re Sasson* the court held that at commencement of the case the bankruptcy court acquired exclusive in "rem jurisdiction" over all the debtor's legal or equitable interests in property wherever located and by whoever held citing 28 U.S.C. Section 1334(e) and *Commodity Futures Trading Comm'n v. Co Petro Marketing Group Inc.*, 700 F.2d 1279, 1282 (9th Cir. 1983). 424 F.3d 864, 870 (9th Cir. 2005), cert. denied, *Sasson v. Sokoloff*, 547 U.S. 1206, 126 S.Ct. 2890, 165 L.Ed.2d 917 (2006). Further, according to *Sasson* the bankruptcy court's jurisdiction is granted by the Bankruptcy Code as derived from the Bankruptcy Clause, U.S. Const. art. 1, section 8, cl. 4 which grants Congress the power to establish ... uniform Laws on the subject of Bankruptcies throughout the United States. *In re Sasson* 424 F.3d at 869.

Therefore, under 28 U.S.C. Section 1334(a), 1334 (e)(1) and 11 U.S.C. Section 541(a):

[t]he court's exercise of "custody" over the debtor's property, via its exercise of in rem jurisdiction, essentially creates a fiction that the property--regardless of actual location--is legally located within the jurisdiction of the district in which the court sits. See *Katchen v. Landy*, 382 U.S. 323, 327, 86 S.Ct. 467, 15 L.Ed.2d 391 (1996)(noting that bankruptcy courts have "constructive possession" over estate property).

*In re Simon*, 153 F.3d at 996.

28 U.S.C. Section 1334(e) states:

[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

And, since a determination of a bankruptcy estate's interest in property, which the debtor possessed an interest is the exclusive jurisdiction of a bankruptcy court the trial court is without jurisdiction and McShane's argument - and appeal - must fail.

Grassmueck's arguments are further strengthened by analyzing and answering the next issue in the affirmative.

C. Under *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir.1984) the test to determine whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.

In 1982, the U.S. Supreme Court - in a four justice plurality - decided *Northern Pipeline Co. v.*

*Marathon Pipe Line Co.*, holding unconstitutional 28 U.S.C. Sec. 1471, a key jurisdictional provision of the Bankruptcy Act of 1978, holding it vested Article III judicial power in non-Article III judges. 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed 2d 598 (1982). While district courts were left without statutory guidance, Congress did respond with the Bankruptcy Amendments and Federal Judgeship Act of 1984, which essentially re-enacted the 1978 Act but divided jurisdictional grants into "core proceedings" (28 U.S.C. Sec. 157(a)(b)(1)(2)) over which bankruptcy courts exercise full judicial power and "otherwise related to or non-core" proceedings (28 U.S.C. Sec. 157(a)(b)(3)(c)(1) over which bankruptcy courts may only exercise limited powers, including mandatory or discretionary abstention pursuant to 28 U.S.C. 1334(c) (1) and (2). Needless to say, "core" or "other wise related to or non-core" proceedings created significant litigation resulting in a complex legal landscape with diverse opinions in federal circuits, bankruptcy courts and any state court - under comity - that dares to "dip a toe" into 28 U.S.C. Sec. 1334 subject matter jurisdiction and its application to 28 U.S.C. Sec. 157.

Under 28 U.S.C. Sec. 1334(a), the district court shall have "original and exclusive" jurisdiction of all cases under title 11; however under 1334(b), district

courts shall have original but not exclusive jurisdiction of all civil proceedings "arising under" or "arising in" or "related to" cases under title 11; however subsections 1334(e)(1) and (2) provide:

[t]he district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all property, wherever located, of the debtor as of the commencement of such case, and of property of the estate, and

(2) over all claims or causes of actions that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

If Sec. 1334 subject matter jurisdiction exists, a court must determine if the matter is a core Sec. 157(a)(b)(1)(2)(3) proceeding or otherwise "related to" Sec. 157(a)(b)(3)(c)(1) proceeding under title 11; however, any determination a proceeding is not core shall not be made solely on the basis its resolution may be affected by State law. 28 U.S.C. 157(b)(3).

*In re Arnold Print*, 815 F.2d 165 (1st Cir. 1987), a debtor-in-possession's (11 U.S.C. Sec. 1107) state law contract claim was a core proceeding - a claim for payment of a post-petition debt since it was a "matter concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A).

It is the nature of the proceeding--its relation to the basic function of the bankruptcy court--

not the state or federal law for the claim, that makes the difference here.

*In re Arnold Print*, 815 F.2d 165, 169 (1st Cir. 1987).

See also, *In re Merc. Steel Bldgs., Inc.*, 136 B.R. 606, 609 (Bkrtcy.D. Puerto Rico 1992) citing *In re Arnold Print* and *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987), if the proceeding, by its nature, arises only within the bankruptcy context - a right created by federal bankruptcy law - it is a core proceeding.

In *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984) the court devised the generally accepted test to determine the existence of "related to" jurisdiction:

[t]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.

*Pacor, Inc. v. Higgins* is cited in *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 131 L.Ed. 430, at footnote [5] where the court stated:

[p]roceedings "related" to the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. Section 541, and (2) suits between third parties which may have an effect on the bankruptcy estate. See 1 Collier on Bankruptcy Paragraph 3.01[1][c][iv], p. 3 - 28 (15th ed. 1994). The first type of "related to" proceeding involves a claim like the state-law breach of contract action at issue *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*,

458 U.S. 50 (1982)....

*Pacor* has been adopted in the First, Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits; the Ninth Circuit adopted *Pacor* in *In re Fietz*, 825 F. 2d 455, 457 (9th Cir. 1988):

[t]he usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. [citation omitted]. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

According to *Fietz*, *Pacor* best represents congressional intent to reduce substantially time-consuming and expensive litigation regarding a bankruptcy's court jurisdiction over a particular proceeding. 852 F. 2d at 458. In Washington, see *St. John Med. Ctr. v. Dep't of Soc. & Health Servs.*, 110 Wn. App. 51, 62, 38 P.3d 383, 2002, rev. denied, 146 Wn.2d 1023, 52 P. 3d 520 (2002) and *In re Spokane Raceway Park, Inc.*, 392 B.R. 451 (Bkrtcy.E.D. Wash. 2008).

D. McShane's motion to supplement the record should be denied.

McShane presents no compelling reason to supplement.

#### IV. CONCLUSION

McShane argues *Rose v. Fritz*, 104 Wn. App. 116 (2001) controls. Grassmueck respectfully disagrees. The constitutional authority of the Bankruptcy and Supremacy Clauses, federal statutes originating therefrom and case law interpreting such, including *Pacor* - as argued herein clearly dictate otherwise. This judgment is property of the bankruptcy estate; a final determination of the rights of the parties. CR 54(a). If a judgment is vacated by an erroneous state court ruling, a bankruptcy court is not bound. *In re Birting Fisheries, Inc.*, 300 B.R. 489, 500 (B.A.P. 9th Cir, 2003), citing *Gruntz*, 202 F.3d at 1083 "even assuming the state had concurrent jurisdiction, their judgment would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings."

The respondent has met the test of RAP 2.5(a); jurisdictional issues were raised below. This court should affirm the trial court order denying McShane's CR 60(b) motion to vacate the default judgment; and affirm the appellate court reversal of the trial court order granting the motion to reconsider, the order vacating the default judgment and order of dismissal.

Respectfully submitted <sup>9/14</sup> October 9, 2010.

  
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