72613-7

No. 72613-7-1

COURT OF APPEALS, DIVISION I,
IN THE STATE OF WASHINGTON

BENJAMIN C. ARP,

Appellant,

v.

JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO., INC. a Washington State Corporation,

Respondents.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

Benjamin Arp ("Arp") filed a personal injury action against the Rileys and Sierra Construction, Co., Inc. ("Sierra"). Arp's alleged injury occurred during the pendency of his bankruptcy and it is undisputed Arp did not properly disclose any state cause of action in his bankruptcy schedules. As a result, the trial court entered summary judgment against Arp on the separate grounds that he lacked standing to assert an interest in the undisclosed asset and was judicially estopped from bringing a cause of action he failed to disclose to the bankruptcy court, trustee, and his creditors during bankruptcy. This Court should affirm the trial court's judgment based on principles of judicial estoppel.

B. ASSIGNMENT OF ERRORS

Sierra acknowledges the assignments of error in Arp's brief at 2, but believes that the issues pertaining to those assignments of error are more appropriately formulated as follows:

> 1. Where a person seeking the protection of bankruptcy had a duty under bankruptcy law generally and the confirmation order by the bankruptcy court in his case to disclose assets and that person deliberately refuses to disclose the existence of a state lawsuit that would potentially constitute a basis for his creditors being paid, is that person judicially estopped under well-recognized principles of Washington law to pursue such an action by virtue of that person's inequitable behavior?
>
> 2. Where a debtor in a Chapter 13 proceeding failed to disclose the existence of a state court personal injuries action to the

bankruptcy court, does that debtor lack standing to bring an action on behalf of the bankruptcy estate when the debtor is pursuing the action for his own, personal benefit?

C. STATEMENT OF THE CASE

Arp devotes the majority of his Statement of the Case to advising the Court of his alleged injury and the extent of his claimed damages. At the outset, the Court should be aware that Arp's alleged injury has no bearing on the trial court's order granting summary judgment against Arp, or on the issues Arp raises on appeal. To resolve those issues, the Court must instead examine the procedural history of Arp's prior bankruptcy, in which he obtained a discharge of over $113,000 in debts while simultaneously concealing assets from the bankruptcy court, trustee, and his numerous creditors. CP 120, 243. These events, and these events alone, constitute the undisputed material facts upon which the trial court entered summary judgment against Arp on the grounds that he lacked standing to maintain the underlying action, and that he was judicially estopped from bringing a cause of action he wrongfully concealed during bankruptcy. As a result, Sierra provides a Statement of the Case to the germane issue of Arp's bankruptcy.

The record before this Court establishes certain undisputed material facts. On July 22, 2008, Arp filed a petition for voluntary bankruptcy under Chapter 13 in the U.S. Bankruptcy Court for the

Western District of Washington in 08-14588. CP 67, 147-52, 373. At that time, Arp had an ongoing duty to disclose all his personal assets, including any potential personal injury action. 11 U.S.C. § 521.[1] Arp initially attempted to satisfy this duty by filing a personal property schedule, Schedule B, which listed some, if not all, of his personal property that existed when he filed for bankruptcy. CP 219-21. Arp also exempted $380,000 of his assets, which had the effect of making those assets unavailable to his creditors. CP 222. Despite these substantial holdings, Arp sought a discharge of $113,347 of his unsecured debts. CP 243.

In an attempt to ensure his eventual debt forgiveness, on December 10, 2009, Arp's bankruptcy attorney filed a proposed Third Amended[2] Chapter 13 plan, in which he proposed to pay $100 a month for three years toward his debts. CP 101. On December 17, 2009, the bankruptcy court confirmed Arp's Third Amended Chapter 13 plan. CP 114, 154, 323, 373, 416. At the same time, the bankruptcy court imposed explicit disclosure and reporting requirements on Arp, by entering the following orders:

> 4. That the *debtor shall inform the Trustee of any change in circumstances*, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;

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[1] All subsequent statutory references are to Title 11 of the United States Code.

[2] Arp proposed two prior Chapter 13 plans, which, upon objections, were not confirmed.

> ...
> 6. That during the pendency of the plan hereby confirmed, all property of the estate, as defined by 11 U.S.C. § 1306 (a), shall remain vested in the debtor, *under the exclusive jurisdiction of the Court*, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property;

CP 114, 154, 323, 373, 416 (emphasis supplied). During oral argument before the trial court, Arp *conceded* the bankruptcy court's confirmation order required Arp to disclose any "change in circumstances" that could affect his ability to make plan payments or justify an amendment to his plan. RP 6-7.

According to his petition, while his bankruptcy was still pending, Arp experienced a significant change in circumstances in the form of an alleged personal injury. Arp alleges he was in a motor vehicle accident involving a Sierra employee, James Riley, which occurred on October 5, 2010. CP 10, 373. Arp maintains this motor vehicle accident gives him a cause of action against multiple defendants, including Sierra. CP 9-12. Despite this change in circumstances, it is undisputed that Arp did not disclose to the trustee, bankruptcy court, or his creditors that he had any cause of action against any party based on the alleged accident. CP 67-112, 157-202, 276-321; Br. of Appellant at 9-10; RP 12. Arp did, however, send a demand and settlement letter regarding this case to defendant James Riley on March 25, 2011, in which he demanded:

> Mr. Arp's vehicle was a total loss. We are requesting reimbursement of Mr. Arp's deductible as well as loss of use payment since the date of the accident.

CP 264.

Following his alleged accident, Arp continued to make regular $100 plan payments for approximately 10 months.[3] CP 205. But, after August 2011, Arp ceased making any payments. CP 205. After Arp failed to make three months of plan payments, the trustee moved to dismiss Arp's bankruptcy. CP 205, 373.

On January 10, 2012, 15 months after his alleged cause of action accrued and 10 months after he sent his first settlement and demand letter for this case, Arp filed a response in opposition to the trustee's motion to dismiss stating:

> [Arp] was involved in an automobile accident on October 5, 2010. The accident was serious enough that Ben Arp received significant brain injuries which has [*sic*] resulted in significant short-term memory loss. No doubt as a result of this accident, [Arp] has "forgotten" to make his Chapter 13 plan payments.

---

[3] The bankruptcy court record does not make clear the exact day Arp stopped making plan payments. The trustee's motion to dismiss indicates that on November 17, 2011 Arp was delinquent in the amount $271.50. CP 205. As Arp's required plan payment was $100 per month, the record creates the reasonable inference that Arp stopped making plan payments after August 2011. Arp's bankruptcy counsel filed an affidavit in the underlying action further evidencing Arp first failed to make plan payments in September 2011. CP 412. For the sake of clarity, Sierra uses August 2011 as the presumptive month of Arp's last payment prior to the trustee's motion to dismiss. Sierra also notes the *exact* date Arp stopped making plan payments is not material to the issue of summary judgment, or this Court's review thereof.

CP 116, 208, 264. Arp also included an affidavit stating the accident was not his fault. CP 118, 210. Arp *concedes* he did not disclose that he had a potential third-party action against Sierra or any other defendant. RP 12:8-14.

In Arp's motion to reconsider summary judgment, Jeffrey Wells, Arp's bankruptcy counsel, submitted an affidavit explaining his communications with Arp at the time of the trustee's motion to dismiss. CP 410-14.[4] Wells testified that he contacted Arp regarding Arp's failure to make plan payments and Arp informed Wells of his alleged injury. CP 410-14. Wells further testified that Arp informed him that "no offers of settlement or offers of payment for any potential claim had been received." CP 413.

Wells's affidavit notably omitted any reference to the fact that Arp had already sent a demand letter regarding this action. *See* CP 264. The record does not indicate whether Wells intentionally omitted this fact, or whether Arp did not inform Wells that he had sent a demand letter. Either way, it is undisputed neither Arp nor Wells informed the bankruptcy court

[4] Arp attempts to argue that he should be excused from complying with bankruptcy law generally and the bankruptcy court's confirmation order because of the nature of his alleged automobile accident-related injuries. Br. of Appellant at 5-10. Arp's entire argument is belied by the fact he was represented by apparently competent bankruptcy counsel throughout those proceedings. Arp's effort to evoke sympathy for his situation as an excuse for seeking to defeat his creditors' rights to be compensated for Arp's debts should be disregarded.

that Arp had previously sent a demand letter based on the same alleged motor vehicle accident.

The bankruptcy court denied the trustee's motion to dismiss and subsequently entered an order discharging over $113,000 of Arp's unsecured debts. CP 120, 243, 374, 445. As of the date of this filing, Arp still has not notified the bankruptcy court or trustee of the existence of the underlying case or this appeal. CP 67-112, 157-202, 276-321.

After receiving a discharge of his debts, Arp filed the underlying cause of action against Sierra and other defendants. CP 374, 445. Sierra filed a motion for summary judgment based on Arp's failure to disclose this case during his bankruptcy. CP 374, 445. Specifically, Sierra asserted Arp lacked standing because this case is an undisclosed asset of his bankruptcy estate, and Arp is judicially estopped from bringing any cause of action he failed to disclose during the pendency of his bankruptcy. CP 15, 126-42.

The trial court granted summary judgment against Arp, first concluding that Arp had an ongoing duty to disclose his assets throughout his bankruptcy. CP 344-75, 445-46. The trial court then rejected Arp's claim he had properly disclosed this case in his opposition to the trustee's motion to dismiss. CP 375, 445-46. The trial court found Arp's response in opposition to the trustee's motion to dismiss Arp's bankruptcy for

failing to make numerous months of plan payments "cannot fairly be considered the type of notice required by the confirmation order." CP 374-75, 445-46. Accordingly, the trial court exercised its discretion to judicially estop Arp from maintaining a cause of action he had failed to disclose during bankruptcy. CP 375, 446. The trial court also held Arp lacked standing as a result of Arp's breach of his ongoing duty to disclose this case. CP 375, 446. This appeal follows.

D. SUMMARY OF ARGUMENT

Arp's present action is barred under principles of judicial estoppel and lack of standing.

Washington law aggressively applies judicial estoppel in the bankruptcy setting to bar a debtor from acting inequitably by failing to advise the bankruptcy courts of a state court lawsuit, a potentially valuable asset that could be used to pay the debtor's creditors, and then pursuing a state court action for the debtor's personal benefit.

Here, Arp failed to advise the bankruptcy trustee, his creditors, or the bankruptcy court of this lawsuit, though obligated to do so by bankruptcy law generally and the confirmation order in his case. He is estopped to pursue this action. Moreover, by virtue of that non-disclosure, he lacks standing to present this action.

Arp's present action was properly dismissed by the trial court.

E. ARGUMENT

(1) Standard of Review

Arp misstates the applicable standard of review. Br. of Appellant at 12. As noted above, the trial court granted summary judgment based on two different grounds: lack of standing and judicial estoppel. The judgment should be affirmed if either ground is supported in law. Arp raises three questions relative to his lack of standing and judicial estoppel, which are subject to two different standards of review.

Arp contends the trial court erred in applying the doctrine of judicial estoppel based on his failure to disclose. On appeal, this Court reviews a summary judgment based on judicial estoppel for an abuse of the trial court's discretion. *Harris v. Fortin*, 183 Wn. App. 522, 527, 333 P.3d 556 (2014); *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Accordingly, if the Court determines Arp had a duty to disclose this case, the trial court's order granting summary judgment based on judicial estoppel should be affirmed unless this Court finds "no reasonable person would take the position adopted by the trial court." *Public Utility Dist. No. 1 of Okanogan Co. v. State*, __ Wn.2d ___, 342 P.3d 308, 314 (2015) (internal quotation omitted).

Arp also raises the issue of whether the trial court correctly held he lacked standing as a result of his non-disclosure. Whether a party has

legal standing is a question of law reviewed *de novo*. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010).

(2) Overview of Relevant Bankruptcy Law

To fairly evaluate the trial court's judgment applying judicial estoppel and recognizing Arp lacks standing, it is necessary to understand certain principles of bankruptcy law. Individual debtors, such as Arp, generally have the option to file for bankruptcy under Chapters 7 or 13 of the bankruptcy code.

In a Chapter 7 bankruptcy, when the bankruptcy petition is filed all the debtor's assets in existence at that time become property of the debtor's bankruptcy estate. § 541. With very few exceptions, the Chapter 7 bankruptcy estate is established at the time of filing, and does not change. The assets of the Chapter 7 bankruptcy estate, if any, are then used to pay claims filed by the debtor's creditors. Following this process, the debtor receives a discharge of all dischargeable debts the debtor properly listed during bankruptcy.

In contrast to Chapter 7, Chapter 13 bankruptcies involve an ongoing reorganization between the debtor, trustee, and creditors. Like Chapter 7 debtors, a bankruptcy estate containing all the debtor's assets is created at the time a Chapter 13 debtor files for bankruptcy. §§ 541 and

1306. Unlike Chapter 7 bankruptcies, however, a Chapter 13 bankruptcy is not static, and instead grows to include all assets the Chapter 13 debtor acquires during the pendency of the bankruptcy, as set forth in § 1306.

The existence of the debtor's Chapter 13 payment plan further distinguishes Chapter 13 and Chapter 7 bankruptcies. Unlike Chapter 7, Chapter 13 debtors pay their creditors through confirmation of a Chapter 13 payment plan, which provides that the debtor will pay a certain sum of cash and/or assets monthly to the debtor's creditors for a specific amount of time. Importantly, creditors and the trustee can, and do, object to any plan the debtor proposes that does not require the debtor to pay a sufficient amount toward satisfying the debtor's outstanding debts.[5] The initial Chapter 13 plan represents an informed compromise between the parties to the debtor's bankruptcy whereby the creditors agree to accept a reasonable sum of money or assets in exchange for forgiving some of the debtor's debts, and the debtor agrees to turn over some assets each month in exchange for debt forgiveness.

Chapter 13 bankruptcies are also unique in that the debtor, trustee, and creditors can seek to modify the terms of the Chapter 13 payment plan at any time prior to the final plan payment if the debtor acquires new assets. The bankruptcy code specifically permits the bankruptcy court to

[5] In this case in particular, Arp proposed two prior Chapter 13 plans which were rejected on the basis of the trustee and creditor's objection.

modify the terms of the Chapter 13 plan at any time prior to the final plan payment being made. § 1329. The importance of the ability to modify a Chapter 13 plan cannot be overstated because it permits the court to modify the Chapter 13 plan to require the debtor to pay a higher monthly payment or to turn over specific assets if the debtor acquires any new assets during the course of the bankruptcy, including after confirmation of the Chapter 13 plan. § 1329. As a result, any Chapter 13 plan is merely interlocutory in that it may be changed at any time if the debtor's circumstances or assets change during the bankruptcy.

Although Chapter 13 and 7 bankruptcies have some differences, one important common theme is the fundamental importance of the debtor's duty to fully and accurately disclose all his or her assets. As Washington courts have noted:

> [T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.

McFarling, 141 Wn. App. at 403-04 (internal citation and quotation omitted). In other words, in exchange for the benefits of bankruptcy, debtors are required to fully disclose any potential asset. Moreover, debtor's creditors rely on the truth and completeness of the debtor's disclosure when deciding whether to agree to a proposed Chapter 13 plan, or when deciding whether to move to modify the terms of a confirmed Chapter 13 plan.

Within this broader bankruptcy framework, the issues presented on appeal must be analyzed within the context of two principles of bankruptcy law in particular. First, the trustee and Arp's creditors at all times were entitled to seek modification of Arp's Chapter 13 plan to require that he turn over some or all proceeds from any settlement or judgment in the underlying lawsuit. Second, the ability of the court, trustee, and creditors to exercise this right to modify Arp's Chapter 13 plan was dependent upon Arp truthfully disclosing any assets he acquired, including the underlying case, until the time his bankruptcy closed.

(3) Washington Law Recognizes Principles of Judicial Estoppel Generally and in the Bankruptcy Context Specifically

Washington law routinely applies the equitable doctrine of judicial estoppel to prevent parties from taking inconsistent positions in court. In *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007) our

Supreme Court articulated the core principles of the doctrine as precluding a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The doctrine is designed to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and waste of time. *Id.* at 538. The Court stated:

> Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is "'clearly inconsistent' with its earlier position"; (2) whether 'judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). These factors are not an "exhaustive formula" and "[a]dditional considerations" may guide a court's decision. *Id.* at 751, 121 S. Ct. 1808; *see, e.g., Markley v. Markley*, 31 Wash.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel). Application of the doctrine may be inappropriate "'when a party's prior position was based on inadvertence or mistake.'" *New Hampshire*, 532 U.S. at 753, 121 S. Ct. 1808 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1985)). In the instant case, we must query for the first time whether a trial court abuses its discretion in applying judicial estoppel against a bankruptcy trustee standing as a real party in interest.

Id. at 538-39. A trial court's decision to apply the equitable doctrine of judicial estoppel is reviewed for an abuse of discretion. *Id.* at 538. *See*

also, Anfinson v. Fed Ex Ground Package Sys., Inc., 174 Wn.2d 851, 861-62, 281 P.3d 289 (2012).

In the bankruptcy context specifically, Washington courts have been aggressive in applying judicial estoppel principles to defend the integrity of the courts and to prevent a bankruptcy debtor from attempting to defraud creditors in bankruptcy by hiding state court lawsuits, whose proceeds could pay such creditors.[6] *See, e.g., Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007); *McFarling v. Evaneski*, 141 Wn. App. 400, 171 P.3d 497 (2007). *See also, Kee v. Evergreen Professional Recoveries, Inc.*, 2009 WL 2578982 (W.D. Wash. 2009).[7]

Arp attempts to distinguish the public policy basis for judicial estoppel here by a hyper-technical argument on the nature of the bankruptcy protection he sought. He should not be allowed to skirt the obvious inequity of his position. He had a duty under bankruptcy law generally and the confirmation order in his case specifically to disclose the

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[6] Thus, there is a distinct irony in Arp's invocation of equity to prevent the dismissal of the present action. Br. of Appellant at 28-29. He hardly possesses "clean hands" where he failed to list this potentially valuable lawsuit as an asset of his estate, defrauding his creditors in bankruptcy of an opportunity to obtain payments for Arp's debts beyond the sums he paid to his creditors.

[7] In *Harris v. Fortin*, 183 Wn. App. 522, 333 P.3d 556 (2014), this Court recently held that judicial estoppel applies even to debtors who fundamentally misrepresent the value of assets in their bankruptcy estate. There, a debtor in a Chapter 7 proceeding listed a promissory note as an asset but asserted it was uncollectible and had no value. This Court applied the doctrine of judicial estoppel both to facts and law and barred the debtor's state court action to collect on the note.

lawsuit as an estate asset. He failed to do so and that should bar his present action.

(4) The Trial Court Correctly Held Arp Had and Breached an Affirmative Duty to Disclose This Case As an Asset During His Bankruptcy

The dispositive inquiry before this Court is whether Arp had a duty to disclose the underlying case to the bankruptcy court, trustee, and his numerous creditors.[8] If Arp had and breached such a duty, the undisputed facts in the record establish the trial court correctly entered summary judgment against Arp based on both lack of standing and judicial estoppel. As provided below, two separate sources of law imposed on Arp a duty to disclose: (1) the bankruptcy court's confirmation order, and (2) the bankruptcy code. Each is addressed in turn.

(a) The Confirmation Order Imposed an Ongoing Duty on Arp to Disclose

Arp first contends the confirmation order modified or removed his ongoing duty imposed by the bankruptcy code to disclose assets. Br. of Appellant at 26-27. As stated below, the confirmation order directly required disclosure of the cause of action as a "change in Arp's circumstances." CP 114, 154, 323, 373, 416. Similarly, Arp is incorrect in contending that any "vesting" provided for by the confirmation order relieved him of the obligation to disclose any asset, whether vested or not.

[8] As indicated *supra*, whether Arp had a duty to disclose is reviewed *de novo*.

(i) The confirmation order required disclosure of Arp's cause of action based on the alleged motor vehicle accident because it was a change in his circumstances

As the trial court held, the confirmation order imposed on Arp an express duty upon Arp to disclose any relevant change in income, assets, or circumstances, which included disclosure of this case. CP 344-75, 445-46. In relevant part, the confirmation order stated:

> 4. That [Arp] shall inform the Trustee of *any change in circumstances*, or receipt of additional income, and shall further comply with any requests of the Trustee with respect to additional financial information the Trustee may require;
>
> ...
>
> 6. That during the pendency of the plan hereby confirmed, all property of the estate as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor, under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property;

CP 114, 154, 323, 373, 416 (emphasis supplied). The confirmation order, therefore, imposed two related duties. First, Arp was required to disclose any change in circumstance, *including but not limited to* receipt of additional income. The only reasonable reading of this part of the order is that Arp had to disclose any event that may affect his assets or liabilities. The fact that the order refers to a "change" in circumstances also establishes the duty would be triggered by future events. Additionally, the

requirement that Arp must comply with requests for additional financial information by the trustee further presupposes Arp was required to disclose the nature of future assets or liabilities, otherwise the trustee would have no basis to request such details.

The confirmation order also imposed a second duty that Arp must refrain from encumbering any asset of the bankruptcy estate without approval of the trustee. The requirement that Arp must notify the trustee prior to encumbering assets reflects the ongoing jurisdiction of the bankruptcy court regarding Arp's future assets, including this case. Hiding a cause of action from the trustee and bankruptcy court certainly "encumbers"[9] that action. Disclosure was required.

Although he admits he was generally required to disclose changes in his circumstances, Arp contends that the cause of action was not a "change in circumstances" because it did not result in an immediate cash benefit. RP 5. Arp contends the confirmation order "does not require disclosure of *non-income assets*." Br. of Appellant at 27 (emphasis

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[9] "Non-technical [words] are to be given their plain, dictionary meaning." *Burns v. City of Seattle*, 161 Wn.2d 129, 162-63, 164 P.3d 475 (2007) (citing Webster's Dictionary for definition). The plain meaning of "encumber" is:

> 1: weigh down, burden.
> 2: to impede or hamper the function or activity of.
> 3: to burden with a legal claim (as a mortgage).

Merriam-Webster, http://www.merriam-webster.com/dictionary/encumber (last visited Apr. 16, 2015).

supplied). Sierra notes that the confirmation order states Arp must disclose changes in circumstances; not that Arp must disclose only *immediate monetary* changes in circumstances. CP 114, 154, 323, 373, 416. Arp reads a qualifier into the confirmation order that is simply not present. And, if followed, leads down a slippery slope that bankruptcy courts have universally refused to follow: debtors decide what assets to disclose.

Even if the confirmation order only required disclosure of monetary changes in circumstances, by Arp's own admission the alleged accident affected his ability to satisfy his Chapter 13 payments. In his opposition to the trustee's motion to dismiss, Arp directly informed the bankruptcy court his motor vehicle accident was a significant event. In fact, Arp contended the accident was so significant that it was the sole reason he failed to make his required plan payments for multiple months. CP 116, 118, 208, 210. The accident cannot be both a significant event excusing his failure to make plan payments for the purposes of avoiding dismissal while simultaneously immaterial for the purposes of disclosure under the confirmation order.

The uncertainty Arp cites about whether he was required to disclose the cause of action actually serves to establish that his duty was firmly entrenched. When there is any doubt regarding whether an asset

must be disclosed, the debtor is required to disclose the asset, even if the debtor believes the asset is not part of the bankruptcy estate. *In re Flugence*, 738 F.3d 126, 129-30 (5th Cir. 2013); *see also In re Wheeler*, 503 B.R. 694, 697 (Bankr. N.D. Ind. 2013):

> [Debtors] argument that it would have made no difference is a non-starter. The information itself was material... By not disclosing that income, the debtors denied the trustee and creditors the opportunity to consider what, if anything, they might want to do as a result of that change in their circumstances. They might have done nothing; but it is also possible that they might have sought to modify the confirmed plan. Nonetheless, they were deprived of that material information and so had nothing to evaluate or to act upon.

The same is true here. Arp denied his creditors the opportunity to decide for themselves whether to attempt to modify the plan under § 1329.[10] As the *Wheeler* court reasoned, Arp's creditors may have elected to leave Arp's plan unchanged, but Arp's unilateral decision that the bankruptcy court, trustee, and creditors were not entitled to know of the existence of this case deprived them of the ability to decide for themselves. The duty to disclose any potential asset is broad enough to cover this case, because

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[10] § 1329 states:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

of, not in spite of, any uncertainty. Debtors may not decide the value or importance of a particular asset, courts do. A court can only do its job where there is full disclosure.

(ii) The confirmation order did not remove Arp's duty to disclose post-confirmation assets

Arp next contends the Court should find the confirmation order removed his duty to disclose. Arp asserts that, not only did the confirmation order not require disclosure, "but rather it provides precisely the contrary." Br. of Appellant at 26. As an initial matter, no portion of the confirmation order can be reasonably interpreted to state that Arp was ordered not to disclose some particular category of assets. The only part of the order that addresses disclosure directly *imposed* a disclosure requirement. CP 114, 154, 323, 373, 416.

Notwithstanding the lack of any direct support from the text of the order, Arp selectively cites an excerpt of the confirmation order for the proposition that the bankruptcy court, for some unknown reason, thought it was wise to prevent Arp's creditors from obtaining information on his post-confirmation assets. *See* Br. of Appellant at 15, 26. Arp quotes the order as follows:

> 6. That during the pendency of the plan hereby confirmed, all property of the estate as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor

Id. at 15, 26. Arp claims if the Court only looks at that portion of the order, it supports Arp's construction. But Arp ends his quote literally in the middle of the sentence he is quoting. That sentence in *full* states:

> 6. That during the pendency of the plan hereby confirmed, all property of the estate as defined by 11 U.S.C. section 1306(a), shall remain vested in the debtor *under the exclusive jurisdiction of the Court, and further, that the debtor shall not, without specific approval of the Court, lease, sell, transfer, encumber or otherwise dispose of such property*;

CP 114, 154, 323, 373, 416 (emphasis added). When the rest of the omitted sentence is added back into the quote, the order reads that all assets, vested or not, are subject to the bankruptcy court's jurisdiction, including restrictions on disclosure and alienation.

Even if Arp had provided the Court the entire relevant sentence of the confirmation order, the excerpted portion of the order he quotes does not actually support his conclusion that vesting removes the need for disclosure. First, the revesting provisions revested bankruptcy estate assets that exist *at the time of the confirmation order*. The confirmation order by operation of statute (and logic) cannot vest assets that do not exist. *See, e.g., Kimberlin v. Dollar General Corp.*, 520 Fed. Appx. 312, 314-15 (6th Cir. 2013); *Barbosa v. Solomon,* 235 F.3d 31, 35-37 (1st Cir. 2000); *In re Waldron*, 536 F.3d 1239, 1242-43 (11th Cir. 2008). It is undisputed Arp's

cause of action did not exist at the time of confirmation, so it could not, and did not, "re"-vest.

Second, Arp's argument is based on the false premise that an asset cannot be both vested in the debtor and still part of the bankruptcy estate subject to ongoing disclosure. The plain terms of § 1306 state assets acquired after a bankruptcy petition is filed both remain property of the estate under subsection (a) and vest in the debtor under subsection (b). § 1306. Bankruptcy Rule 1009(a) further grants a debtor the ongoing right to amend schedules as of right to support ongoing disclosure. Fed. R. Bankr. P. 1009. If there was any doubt of this fact, the confirmation order directly states all future property remains under the exclusive jurisdiction of the bankruptcy court. CP 114, 154, 323, 373, 416. It stretches credulity to assert the bankruptcy court ordered future assets would remain under bankruptcy court jurisdiction, but that the bankruptcy court did not intend for those same assets to be disclosed by the debtor, regardless of their vesting.

The obvious reason assets vested in a debtor must still be disclosed is that the trustee and creditors may at all times prior to the final payment being made (including after confirmation), move to modify a Chapter 13 plan to include new assets that have come to the debtor. § 1329. Importantly, § 1329 does not distinguish between vested and non-vested

assets. Instead, any property acquired by the debtor can be used to satisfy debts by inclusion in a modified plan. Vested assets are not exempt. Moreover, the portion of the confirmation order Arp omits in his selective quotation clearly shows the bankruptcy court's expressed willingness to modify Arp's Chapter 13 Plan in the event he acquired any new assets. CP 114, 154, 323, 373, 416.

Consequently, Arp had a duty to disclose this cause of action, regardless of whether it vested in him through operation of order or statute.

(b) The Bankruptcy Code Imposed a Duty to Disclose on Arp

Arp next contends that the bankruptcy code removed his duty to disclose the cause of action at issue. As the basis of his conclusion he had no duty to disclose, Arp incorrectly asserts the only type of property that becomes part of a debtor's bankruptcy estate if such property is acquired after the bankruptcy is filed is the property identified in § 541(a)(5) and (7). Br. of Appellant at 13. To the contrary, and as stated above, in a Chapter 13 bankruptcy, § 1306(a) expressly expands the scope of the bankruptcy estate:

> Property of the estate includes, *in addition to the property specified in section 541* of this title—

> (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first;

§ 1306(a) (emphasis supplied). Because Arp acquired the cause of action at issue "after the commencement" of his bankruptcy but before it closed, this case became property of Arp's bankruptcy estate under § 1306.

There is no dispute that, as bankruptcy estate property, Arp would have been required to disclose the underlying case if his interest arose prior to confirmation of his Chapter 13 plan. §§ 521 and 541. The dispute between the parties is whether Arp maintained an ongoing duty to disclose any bankruptcy estate asset—including this case—he acquired throughout the pendency of his bankruptcy. If Arp had an ongoing duty, Arp breached that duty by failing to notify the bankruptcy court, trustee, and his creditors that he had acquired an interest in a third-party cause of action.

The duties of a Chapter 13 debtor are governed by federal bankruptcy law. *The consensus of the federal courts is that debtors have an ongoing duty to disclose assets until the time the bankruptcy closes, including after confirmation of a Chapter 13 plan.* For example, the Sixth Circuit directly recognizes a debtor's ongoing duty to disclose and has applied judicial estoppel when the debtor failed to amend and disclose a

lawsuit acquired after confirmation of the Chapter 13 plan, which is exactly the same fact pattern before this Court. *Kimberlin v. Dollar General Corp.*, 520 Fed. Appx. 312, 314-15 (6th Cir. 2013). In *Kimberlin*, the debtor's Chapter 13 plan was confirmed in 2005, and her cause of action arose in 2010. The Sixth Circuit recognized the ongoing duty to disclose, noting the ability of the creditors to modify the plan under § 1329:

> Applying judicial estoppel under these circumstances recognizes the importance of the bankruptcy debtor's affirmative and ongoing duty to disclose assets, including unliquidated litigation interests...Had Kimberlin notified the court of her potential claim within the 41–day period, it could have modified her Chapter 13 plan to grant creditors some percentage of any future recovery. The court could also have converted the Kimberlins' Chapter 13 petition to Chapter 7 or dismissed the petition "for cause." Because Kimberlin never amended her filings or otherwise disclosed the potential claim, she deprived the bankruptcy trustee, court, and creditors of any opportunity to consider possible options.

Kimberlin, 520 Fed. Appx. at 314-15. The First, Fifth, and Eleventh Circuits apply an identical approach to the construction of the Sixth Circuit, and have recognized Chapter 13 debtors like Arp have an ongoing duty to disclose causes of action that arise after confirmation of a Chapter 13 plan. *Barbosa*, 235 F.3d at 35-37 (First Circuit); *Flugence*, 738 F.3d at 129-30 (Fifth Circuit) (recognizing duty to disclose cause of action that accrued after confirmation of Chapter 13 plan); *Waldron*, 536 F.3d at

1242-43 (Eleventh Circuit); *see also*, *Allen v. C&H Distributors, LLC*, No. 10-1604, 2015 WL 1399683, at *4 (W.D. La. Mar. 26, 2015) (applying judicial estoppel and recognizing duty to debtor to disclose cause of action that arose a month after confirmation of Chapter 13 plan). In fact, the First Circuit entertained and rejected the exact same argument made by Arp here: that § 1327 vests *post-confirmation* assets in the debtor at confirmation "free and clear from any claim or interest of any creditor." *Barbosa*, 235 F.3d at 36-37.

The Ninth Circuit has also long recognized that the bankruptcy code and rules of procedure impose on debtors an ongoing duty to maintain accurate schedules reflecting all assets. *Hamiliton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) ("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.") (citing, *inter alia*, Fed. R. Bankr. P. 1009(a)). The duty to disclose extends even to assets the debtor believes may not be part of the bankruptcy estate because the debtor must disclose regardless of uncertainty. *Flugence*, 738 F.3d at 130.

The ongoing duty to disclose is also the duty to "carefully, completely, and accurately" disclose new assets. *Pelzel v. LSI Title Agency, Inc.*, No 3:11-cv-05106, 2014 WL 4674240 at *7 (W.D. Wash.

Sept. 18, 2014). As the party voluntarily accepting the benefits and duties of bankruptcy, the debtor has the burden to disclose any *potential* asset with precision and clarity. *In re JZ LLC*, 371 B.R. 412, 417 (9th Cir. 2007) ("the debtor ... bears the risk of nondisclosure.").

Finally, the ongoing duty to disclose is also the duty to make that disclosure by amending the debtor's schedules and Statement of Financial Affairs. Washington courts have held that disclosure is only sufficient if it occurs on the debtor's schedules or Statement of Financial Affairs. *Miller v. Campbell*, 164 Wn.2d 529, 540, 192 P.3d 352 (2008) (emphasis omitted and supplied) ("Courts may generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets..."); *Baldwin v. Silver*, 147 Wn. App. 531, 536 n.1, 196 P.3d 170 (2008), *review denied*, 166 Wn.2d 1019 (2009). *See also*, *Hamilton*, 270 F.3d at 784 ("Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.") (emphasis supplied). The Ninth Circuit agrees that a debtor must amend his or her schedules throughout the life of bankruptcy if the debtor acquires a cause of action:

> A debtor *must* amend his schedule of assets when he or she becomes aware of the existence of a cause of action that is an asset of the bankruptcy estate, because both the court

> and his creditors base their actions on the disclosure statements and schedules.

Edwards v. Alamo Group (USA), 24 Fed. Appx. 693, 694 (9th Cir. 2001) (emphasis in original) (applying judicial estoppel to bar undisclosed post-petition cause of action).

Importantly, disclosure through any means other than through listing an asset on bankruptcy Schedule B or a Statement of Financial Affairs—including during a response in opposition to a motion to dismiss the bankruptcy—is insufficient to satisfy the debtor's ongoing duty to make full and accurate disclosures. *Id.; see also, In re Fetner,* 218 B.R. 262 (Bankr. D.D.C. 1997); *In re Moore,* 175 B.R. 13, 17 (Bankr. S.D. Ohio 1994).

For the same reason, Arp's reliance on *Johnson v. Si-Cor*, 107 Wn. App. 902, 26 P.3d 832 (2001) is misplaced. *Johnson* involved a Chapter 13 bankruptcy that was subsequently converted to a Chapter 7. *Id.* at 905. When a Chapter 13 bankruptcy is converted, the new Chapter 7 bankruptcy estate includes only the property that existed at the time the bankruptcy was filed, not the property in existence at the time of the conversion. § 348(f)(1)(a). Because his bankruptcy was converted, Johnson's post-petition cause of action ceased to be bankruptcy estate property at the time of conversion. § 348.

Arp cannot rely on *Johnson* because his bankruptcy was not converted to Chapter 7. In the context of a converted Chapter 13 case, Johnson's creditors were not entitled to assert any interest in the cause of action after conversion. In contrast, Arp's case presents an entirely different fact pattern because Arp's bankruptcy was never converted to Chapter 7. As a result, at all times Arp's creditors were entitled to assert an interest in the underlying cause of action. Consequently, unlike *Johnson*, Arp derived an unfair benefit when he received a discharge under Chapter 13 while his creditors were deprived of the opportunity to modify his Chapter 13 plan. For the same reason, the bankruptcy court's order discharging Arp's debts constitutes acceptance of the non-disclosure because at the time of the discharge Arp was materially violating his ongoing duty to disclose.

Arp also incorrectly states that *Johnson* stands for the proposition that Chapter 13 debtors have no ongoing duty to disclose post-confirmation causes of action. *Johnson* makes no such pronouncement. In *dicta*, the court indicates "we *question* whether Mr. Johnson was obligated to amend his bankruptcy schedules for the purpose of disclosing his claim against [defendant]." *Id.* at 910 (emphasis supplied). First, *questioning* whether a duty exists is not synonymous with holding the duty does not exist. Notably, the Ninth Circuit's decision in *Edwards*

reaffirming the existence of an ongoing duty to amend was rendered three months after *Johnson*, and removes any "questioning" as to whether the ongoing duty exists. *Edwards*, 24 Fed. Appx. at 694. It does.

Second, to the extent the existence of a post-confirmation duty to amend was unclear 15 years ago at the time *Johnson* was decided, as described in detail above, that uncertainty has been firmly resolved in favor of recognizing the ongoing duty to disclose. In fact, the bankruptcy record supports the conclusion the bankruptcy court was well aware of *Johnson*, and imposed an ongoing duty to disclose in the confirmation order to avoid any doubt that *Johnson's* "questioning" did not abridge Arp's duty to maintain accurate schedules, through amendment if necessary.

Accordingly, the bankruptcy code imposed on Arp an ongoing duty to disclose the instant case, even if he incorrectly believed the asset did not belong to his bankruptcy estate. The undisputed facts evidence Arp never amended his Schedule B (personal property) to discharge this duty. Arp's breach of this duty supported summary judgment.

(c) Under the Bankruptcy Code, Whether This Cause of Action "Vested" Is Irrelevant to Disclosure

In arguing he had no duty to disclose a bankruptcy estate asset, Arp places great emphasis on the notion that the cause of action vested in

him by statute upon confirmation. Br. of Appellant at 14-15. Arp cites § 1327 for this proposition, which states:

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

§ 1327(b). "In deriving the meaning of a statute, courts should read the statute in its entirety, rather than isolating individual phrases." *Seto v. Am. Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007). Plaintiff's construction ignores the rest of the bankruptcy code.

In particular, § 1306 states that the bankruptcy estate does not end at confirmation, instead it grows until the bankruptcy closes. § 1306. The reasonable construction of *both* statutes is the construction adopted by the trial court: assets in existence at the time of confirmation vest in the debtor under § 1327, but assets acquired after confirmation become property of the debtor's bankruptcy estate under § 1306. As the Eleventh Circuit has explained:

> While the case is pending, the post-petition property is added to the estate until confirmation, the event that triggers section 1327(b) and "vests" the property of the estate in the debtor. That is, the property interests comprising the pre-confirmation estate property are transferred to the debtor at confirmation, and this "vesting" is free and clear of the claims or interests of creditors provided for by the plan, section 1327(b), (c). Finally, the property of the estate once again accumulates property by operation of section 1306(a) until the case is "closed, dismissed, or converted."

Waldron, 536 F.3d at 1243 (internal quotations omitted). The Ninth Circuit recently cited approvingly to this reasoning in *In re Dale*, 505 B.R. 8, 13 (B.A.P. 9th Cir. 2014).

This construction, the so-called "modified estate preservation approach" (*see* CP 135-37, 375, 446), is also in harmony with § 1329, which provides that the debtor, trustee, or, creditors may move to modify the Chapter 13 plan "[a]t any time *after confirmation of the plan* but before the completion of payments under such plan...to increase or reduce the amount of payments on claims of a particular class provided for by the plan." § 1329(a). In contrast, Arp's view that the bankruptcy estate contains no assets following confirmation due to irretrievable vesting of those assets in the debtor renders meaningless § 1329(a) because it would be impossible to increase plan payments in that the bankruptcy estate would contain zero assets. "Construction that would render a portion of a statute 'meaningless or superfluous' should be avoided, as should a construction that would yield 'unlikely' or 'absurd' results." *Seto*, 159 Wn. App. at 192.

(d) <u>Arp's Opposition to the Trustee's Motion to Dismiss Did Not Constitute Adequate Disclosure</u>

Arp next contends that, to the extent he had a duty to disclose this case, he met that duty by filing a response in opposition to the trustee's motion to dismiss his bankruptcy. Br. of Appellant at 9-10.

This Court should begin its analysis of Arp's argument by recognizing the obvious difference between disclosing the *fact* that an auto accident took place and disclosing an *asset*—a cause of action arising out of the accident. A cause of action is an asset that is property of the debtor's bankruptcy estate and may be used to satisfy debts. Facts related to a cause of action are only facts, not a bankruptcy estate asset, and have no value. The record before this Court shows Arp only disclosed the *fact* that he was in a motor vehicle accident. The record is equally clear Arp never disclosed he had a *cause of action* based on that motor vehicle accident. So the record on appeal is undisputed that Arp never disclosed to the bankruptcy court, trustee, or his creditors that he had any interest in the underlying cause of action.

Further, the Court should note that Arp's "disclosure" occurred 15 months *after* his cause of action accrued. No reasonable reading of the bankruptcy code permits debtors to accept the benefits of bankruptcy and delay scheduling their assets for well over a year. Rather, Arp was required to *timely* disclose this case, which the undisputed facts evidence he failed to do.

Similarly, the Court should also take note that the "disclosure" was a defensive act, not an affirmative attempt to advise the bankruptcy court, trustee, or his creditors of this asset. Arp concealed even the existence of the motor vehicle accident for 15 months until he was served with a motion to dismiss his bankruptcy. The only reasonable inference from the record is that Arp would have continued to hide these events if he had not been faced with the prospect of dismissal of his bankruptcy. Even then, he disclosed the motor vehicle accident only as an excuse for failing to make plan payments, not as a potential asset available to be used to satisfy his $113,000 in debts.

Even if the Court ignores the suspicious timing and inadequate content of Arp's "disclosure," as explained *supra*, disclosure in any manner other than through amending the debtor's schedules is, as a matter of law, insufficient to constitute adequate disclosure. *Baldwin*, 147 Wn. App. at 536 (judicial estoppel is appropriate where a debtor "fail[s] to include the lawsuit *as an asset* in the bankruptcy proceedings") (emphasis supplied); *Miller*, 164 Wn.2d at 540 ("Courts may generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy proceedings...".) (emphasis omitted and supplied). In other words, it is not enough that the facts incident to the cause of action be made known, the debtor must disclose the cause of

action as an actual asset. This disclosure may occur only through listing the asset on Schedule B. § 521.

Disclosure of assets may only occur through schedules because that is the only method for clearly and efficiently advising creditors of a debtor's assets so the creditor may easily determine whether to file a claim. "[T]he bankruptcy schedules and statement of financial affairs of a debtor serve a vital role for creditors in a bankruptcy case, in that they ensure that adequate and truthful information is available to trustees and creditors, not just an objecting creditor, *without the need for further investigation* to determine whether or not the information is true and correct." *In re Buescher*, 491 B.R. 419, 431 (Bankr. E.D. Tex. 2013) (emphasis supplied). In other words, "the purpose of the schedules is to obviate the need for the trustee and creditors to conduct an investigation." *In re Mitchell*, 102 Fed. Appx. 860, 863 (5th Cir. 2004) (internal citation omitted).

The need to clearly and simply communicate a debtor's assets through proper scheduling is even more evident by contrasting the filings at issue. Arp's Schedule B, listing all his disclosed personal property, is a grand total of three pages. CP 219-21. Immediately below is the relevant portion of Arp's Schedule B.

B6B (Official Form 6B) (12/07) - Cont.

IN RE Arp, Benjamin Clarence Case No. 08-14588

Debtor(s) (If known)

SCHEDULE B - PERSONAL PROPERTY
(Continuation Sheet)

TYPE OF PROPERTY	NONE	DESCRIPTION AND LOCATION OF PROPERTY	HUSBAND, WIFE, JOINT, OR COMMUNITY	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
20. Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	X			
21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.		claim against attorney Mathew O'Conner		unknown

CP 221. The clarity and ease of use of Schedule B versus a random narrative pleading is self-evident. Any creditor attempting to determine if Arp had assets sufficient to warrant the creditor taking action in the bankruptcy court should have been able to make his or her determination by examining the three pages of Arp's Schedule B. If Arp had properly scheduled this case, his creditors would have been able to determine immediately and without further investigation the value of Arp's assets. Of particular note, in five words, paragraph 21 of Arp's Schedule B discloses to his creditors that he has a potential lawsuit. Arp could have, and should have, added five more words to disclose this case.

In contrast to the simplicity and clarity of Schedule B, Arp's contention that disclosure may occur in an opposition to a motion to dismiss would require creditors to read every pleading throughout the course of the bankruptcy, even if it appears unrelated to the creditor's

interests, to determine if the debtor has "disclosed" any unscheduled assets. The fact that Arp's "disclosure" occurred in Docket Entry Numbers 151 and 152 of his bankruptcy further illustrates the unreasonableness of this burden. CP 109, 199, 318. Sierra also notes that Arp's bankruptcy contained 163 filings over nearly four years; the bankruptcy docket sheet is 45 pages long. CP 67-112, 157-202, 267-321. Creditors cannot reasonably be expected to follow hundreds of bankruptcy filings for years at a time searching for hidden disclosures.

No bankruptcy statute or rule authorizes Arp's form of masked "disclosure." Permitting any debtor to hide the ball from his or her creditors in such a manner would undermine a bankruptcy process founded on the principle of full and honest disclosure in exchange for the forgiveness of debt. The trial court correctly determined that referencing a motor vehicle accident in an opposition to a motion to dismiss "cannot fairly be considered the type of notice required by the confirmation order." CP 374-75, 445-46.

Finally, the vague and imprecise "disclosure" Arp provided is wholly inadequate to accurately and completely advise his creditors he has a potentially valuable asset. Importantly, the burden is on Arp to fully advise his creditors of any assets. *JZ,* 371 B.R. at 417. "The debtor is required to be as particular as is reasonable under the circumstances...."

Ingram v. Thompson, 141 Wn. App. 287, 292, 169 P.3d 832 (2007). Reasonable specificity under these circumstances would be for Arp use phrases such as "right to sue," "cause of action," or, even more accurately here: "I sent the other driver's insurance company a demand and settlement letter on March 25, 2011." CP 264. The schedules also require the debtor to place a value on the asset, which was also missing here.

The undisputed facts of this case evidence Arp had a duty to carefully, completely, and accurately disclose this cause of action to the bankruptcy court, trustee, and his creditors through amending his personal property schedule, Schedule B. The same facts establish Plaintiff breached this duty. Summary judgment was properly entered.

(5) The Bankruptcy Court Did Not Abuse Its Discretion in Applying the Doctrine of Judicial Estoppel Because Arp's Concealment of the Underlying Case from the Bankruptcy Court Is Inconsistent with His Maintenance of a Civil Action

As set forth more fully above, Arp breached his duty to disclose this cause of action in bankruptcy court. Arp's failure to disclose this case during bankruptcy supports summary judgment based on judicial estoppel. Unlike the issues of whether Arp had a duty to disclose or has standing, the Court reviews the application of judicial estoppel for an abuse of the trial court's discretion. *Harris*, 183 Wn. App. at 526-27. As such, the trial

court's decision should be affirmed unless the judgment is based on "untenable or unreasonable grounds." *Id.* at 527.

Washington law's three factors of judicial estoppel bar Arp's present claim: (1) whether the party has taken inconsistent positions, (2) whether the first court "accepted" the first position, and (3) whether the party asserting the inconsistent position would derive an unfair benefit or impose an unfair detriment if not estopped. *Id.* In this case, the trial court did not abuse its discretion in applying judicial estoppel because the undisputed material facts support all three factors.

(a) Arp Took Inconsistent Positions

The undisputed facts show Arp took inconsistent position when he brought the underlying action after failing to disclose it to the bankruptcy court.

Where a bankruptcy debtor fails to disclose an asset, the debtor takes the position that the asset does not exist. *Id.* The debtor's subsequent maintenance of a civil case based on the undisclosed asset is an inconsistent statement and supports the application of judicial estoppel. *Id.* "To defeat summary judgment, the nonmoving party must present evidence to rebut the determination of clearly inconsistent positions and establish that application of the doctrine of judicial estoppel would be an abuse of discretion." *Id.*

Arp has produced no evidence to rebut the determination of clear inconsistency. The record before this Court contains no evidence Arp's failure to completely, timely, and correctly disclose this case was an asset. CP 372-74. In particular, there is no affidavit or testimony from Arp before the Court that tends to establish Arp's non-disclosure was unintentional rather than an attempt to hide the asset from the bankruptcy court and his creditors. Absent any such evidence to rebut the inconsistency, the trial court did not abuse its discretion in finding Arp maintained inconsistent positions.

Moreover, the only affidavit filed on behalf of Arp supports the inference that Arp concealed as much as possible from the bankruptcy court. Wells, Arp's bankruptcy counsel, submitted an affidavit to the trial court stating that at the time of the trustee's motion to dismiss Arp informed bankruptcy counsel that he has sustained an injury but that "no offers of settlement or offers of payment for any potential claim had been received." CP 413. What Arp apparently did *not* disclose to his counsel is that at that time he had already sent a demand letter regarding the alleged accident in which he demanded:

> Mr. Arp's vehicle was a total loss. We are requesting reimbursement of Mr. Arp's deductible as well as loss of use payment since the date of the accident.

CP 264. Arp's attempted sleight-of-hand regarding the distinction between "settlement offer" and "demand" is further evidence of his attempts to intentionally deceive the bankruptcy court.

The summary judgment record contains sufficient evidence to support the trial court's conclusion that Arp took inconsistent statements. The first judicial estoppel factor is met.

(b) The Bankruptcy Court Accepted Arp's Position

The second judicial estoppel factor is that the inconsistent position was accepted by the bankruptcy court. *Harris,* 183 Wn. App. at 558-59.

Washington courts follow the majority rule that a bankruptcy court accepts non-disclosure if the debtor receives a discharge. *Id.* at 530; *Hamilton*, 270 F.3d at 784. When a discharge is entered, the bankruptcy court implicitly accepts the debtor's position that the creditors were not entitled to assert an interest in any undisclosed property. *Id.*

In this case, the bankruptcy court accepted Arp's non-disclosure in multiple ways. Most obviously, the bankruptcy court accepted Arp's non-disclosure when it granted him a discharge of over $113,000 of his debts. Second, the bankruptcy court accepted Arp's non-disclosure by refraining from modifying his Chapter 13 plan. Under § 1329, the bankruptcy court was entitled to modify Arp's plan to take into account additional assets,

including this lawsuit. In not entering such an order, the bankruptcy court accepted Arp's assertion he had no additional undisclosed assets.

Ample evidence supports the trial court's conclusion the bankruptcy court accepted Arp's non-disclosure. The second judicial estoppel factor is met.

(c) Arp Unfairly Benefited From His Non-Disclosure

The final judicial estoppel factor is that the debtor unfairly benefited from the non-disclosure. *Harris*, 183 Wn. App. at 528.

Arp clearly benefited from his non-disclosure. Arp failed to provide material information which deprived the bankruptcy court, trustee, and his creditors the opportunity to move to modify his plan to assert an interest in any settlement or recovery from this case. As a result, Arp derived the unfair benefit of avoiding the outcome that the bankruptcy court would order some or all of any judgment or settlement in this case must be used to satisfy Arp's $113,000 in outstanding debts. It goes without saying that Arp's creditors would have had a strong incentive to move the bankruptcy court to include any such proceeds in Arp's Chapter 13 plan so as to satisfy those debts. By refusing to disclose this case, Arp unfairly avoided any such attempt to use his newly acquired assets to satisfy his well-overdue debts.

The record establishes Arp obtained an unfair benefit from concealing this asset from his creditors. The final judicial estoppel factor is met. Accordingly, the trial court did not abuse its discretion in applying judicial estoppel and summary judgment should be affirmed.

(6) The Trial Court Correctly Held Arp Lacks Standing in that He Failed to Disclose the Underlying Cause of Action and, Therefore, Was Not Pursing this Action on Behalf of the Bankruptcy Estate

As set forth more fully *supra,* Arp had and breached a duty to disclose this cause of action. As the trial court correctly held, Arp's failure to disclose this case deprived him standing.[11]

Under Chapter 13, "debtors have standing to bring causes of action in their own name on *behalf of the estate.*" *Wilson v. Dollar General Corp.*, 717 F.3d 337, 344 (4th Cir. 2013) (emphasis added). But, the test for whether the debtor is acting on behalf of the estate is whether the debtor has properly disclosed the cause of action in bankruptcy. The logic of this conclusion is clear because a debtor cannot be acting on behalf of the bankruptcy estate to recover on a civil claim if no other party to the bankruptcy knows the case exists. *Cowling v. Rolls Royce Corp.*, No 11-cv-01979, 2012 WL 4762143 at *5 (S.D. Ind. Oct. 5, 2012) ("Because he has not disclosed the lawsuit, he does not have standing to bring the claims

[11] As stated above, whether a party has legal standing is a question of law reviewed de novo. *Spokane Airports, supra.*

he asserts here."); *Pierce v. Visteon Corp.*, 2013 WL 3225832 at *17 (S.D. Ind. June 25, 2013):

> Adams' pending bankruptcy is under Chapter 13; therefore, she could, if she raises the issue in her petition and so states, bring her claim on behalf of her bankruptcy estate. However, as previously mentioned, Plaintiffs present no evidence that Adams intends to bring her claim on behalf of her bankruptcy estate or has disclosed her claim in her pending bankruptcy. In the absence of such evidence, Adams does not have standing to bring her claim.

When a Chapter 13 debtor pursues an undisclosed asset, the debtor is pursuing the claim for his or her *own* benefit because the debtor would not have to share any recovery from an undisclosed claim with his or her creditors. Such a debtor lacks standing. *Id.*

Because this cause of action is property of Arp's bankruptcy estate, Arp only had standing if he was acting on behalf of the estate. Arp's pursuit of this lawsuit, however, is for his *own* benefit, not the benefit of the bankruptcy estate. By not disclosing this case, Arp has not brought this cause of action on behalf of the estate and, therefore, he lacks standing. Moreover, Arp does not even alleged he is pursuing this action on behalf of this estate.

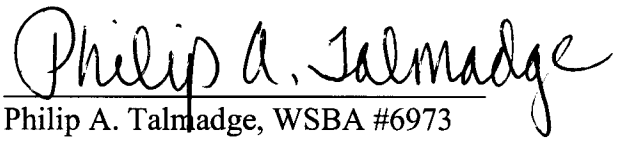
The trial court correctly concluded Arp lacked standing and entered summary judgment on that ground.

F. CONCLUSION

Arp had an ongoing duty to disclose the underlying cause of action based on the bankruptcy code and the confirmation order requiring he disclose any "change in circumstances." Arp ignored and breached this duty by failing to amend his schedules to disclose this case while simultaneously discharging over $113,000 in debt. As a result, the trial court did not abuse its discretion in applying judicial estoppel. Moreover, the same facts establish Arp lacks standing. Summary judgment was properly granted on both grounds. This Court should affirm that judgment in Sierra's favor and award costs on appeal to Sierra.

DATED this 24th day of April, 2015.

Respectfully submitted,



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APPENDIX

JUDGE MARY E. ROBERTS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

BENJAMIN C. ARP, Plaintiff, v. JAMES H. RILEY and "JANE DOE" RILEY, husband and wife and the marital community composed thereof; and SIERRA CONSTRUCTION CO. INC., a Washington State Corporation, Defendants.	NO. 12-2-36991-7 KNT ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT **Clerk's Action Required**

This matter came before the court on the plaintiff's motion for partial summary judgment as to the defendants' affirmative defenses of judicial estoppel and lack of standing, and the defendants' cross motions for summary judgment of dismissal based on those same affirmative defenses. The court heard oral argument from the parties and considered the following written submissions:

1. Plaintiff's Motion for Partial Summary Judgment;

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Kent, WA 98032-4429
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2. Declaration of Kathryn Majnarich in Support of Plaintiff's Motion for Partial Summary Judgment;
3. Declaration of Jeffrey B. Wells Regarding Plaintiff Benjamin Arp's Chapter 13 Proceeding;
4. Defendant Sierra Construction Co., Inc.'s 1) Response in Opposition to Plaintiff's Motion for Partial Summary Judgment and 2) Cross Motion for Summary Judgment of Dismissal;
5. Declaration of Gregory Wallace [Dated June 9, 2014];
6. Declaration of Brett M. Wieberg in Support of Defendants Rileys' Response to Plaintiff Motion for Summary Judgment and Cross Motion for Summary Judgment; and
7. Plaintiff's Reply to Defendants' Response to Motion for Partial Summary Judgment.

The facts material to the parties' cross-motions are not disputed:

- On July 22, 2008, Mr. Arp filed a petition for Chapter 13 bankruptcy protection;
- On December 17, 2009 a bankruptcy plan was confirmed; the confirmation order required that Mr. Arp, "inform the Trustee of any change in circumstances, or receipt of additional income," and prohibited him from disposing of property of the estate without court approval;
- On October 5, 2010, Mr. Arp was involved in the accident that underlies this lawsuit;
- On November 17, 2011, the bankruptcy trustee moved to dismiss the bankruptcy case based on Mr. Arp's failure to make plan payments.

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- On January 10, 2012, Mr. Arp filed a response to the trustee's motion to dismiss, which stated that Mr. Arp's failure to make plan payments was related to a brain injury incurred October 5, 2010, in an automobile accident not of his fault.
- On March 26, 2012, the bankruptcy courted granted Mr. Arp a discharge;
- On April 6, 2012, the bankruptcy case was closed.
- On November 14, 2012, this lawsuit was commenced against the Rileys by the filing of the complaint.
- On July 7, 2013, the plaintiff filed his amended complaint, naming Sierra Construction Co., Inc. in addition to the Rileys.
- On April 23, 2014 Sierra filed its amended affirmative defenses, including the affirmative defenses of judicial estoppel and lack of standing.
- On June 9, 2014, the Rileys filed an amended answer, which included the affirmative defenses of judicial estoppel and lack of standing.

The plaintiff's injury claim is properly considered an asset of the bankruptcy estate, as defined in 11 U.S.C. § 1306(a)(1). As such, Mr. Arb had a duty to disclose the post-petition asset in his bankruptcy action. This duty was recognized by the December 17, 2009 confirmation order, which, as stated above, required that Mr. Arp inform the Trustee of such an asset, and prohibited him from disposing of the asset without court approval.

The plaintiff's response to the trustee's November 27, 2011, motion to dismiss, which stated that Mr. Arp's failure to make plan payments was related to a brain injury incurred in an automobile accident not of his fault cannot fairly be considered the type of notice required by

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the confirmation order. The purpose behind the disclosure requirement is to notify the trustee of post-petition assets that should be available to consider during the life of the Chapter 13 plan. This court is persuaded that the "modified estate preservation approach," is the most appropriate, to determine whether the this post-confirmation accident-related claim is an asset of the bankruptcy estate, or whether it revested with Mr. Arp upon confirmation. It remained an asset of the bankruptcy estate and should have been properly disclosed for consideration by the bankruptcy court.

The plaintiff is judicially estopped from pursing his claims in the lawsuit, because of his failure to properly disclose the asset in his bankruptcy proceeding. In addition, this failure means that the claim remains an asset of the bankruptcy estate, and may only be pursued by the Trustee; Mr. Arp lacks standing.

The plaintiff's motion for partial summary judgment is DENIED. The defendants' motions for summary judgment of dismissal are GRANTED. The plaintiff's claims are DISMISSED WITH PREJUDICE.

See digital signature
JUDGE MARY E. ROBERTS

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King County Superior Court
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Case Number: 12-2-36991-7
Case Title: ARP VS RILEY ET ANO

Document Title: ORDER ON SUMMARY JUDGMENT

Signed by: Mary Roberts
Date: 8/4/2014 9:00:00 AM

Judge/Commissioner: Mary Roberts

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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Brief of Respondents in Court of Appeals Cause No. 72613-7-I to the following:

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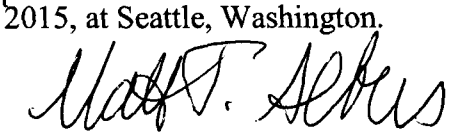
Jeffery B. Wells Wells & Jarvis 500 Union Street, Suite 502 Seattle, WA 98101-2332	Brett M. Wieburg Joshua Rosen Law Offices of Sweeny Helt & Dietzler 1191 2nd Avenue, Suite 500 Seattle, WA 98101-2990
Paul L. Crowley Lockner & Crowley, Inc., P.S. 524 Tacoma Avenue South Tacoma, WA 98402-5416	William O'Brien Gregory Wallace Law Offices of William J. O'Brien 800 Fifth Avenue, Suite 3810 Seattle, WA 98104
Clayton G. Kuhn Sandberg Phoenix 600 Washington Avenue 15th Floor St. Louis, MO 63101	Original and copy sent by legal messenger for filing with: Court of Appeals, Division I Clerk's Office 600 University Street Seattle, WA 98101-1176

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

DATED: April 24th, 2015, at Seattle, Washington.



Matt J. Albers, Legal Assistant
Talmadge/Fitzpatrick/Tribe

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