No. 92780-4

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

BENJAMIN C. ARP,

Respondent,

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,

Petitioners.

ARP's RESPONSE TO AMICUS

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INTRODUCTION

Amicus National Assoc. of Chapter 13 Trustees (NACTT) appears to misunderstand the Court of Appeals' holding, making many unsupported assertions that the court "assumed" something, without any citations for support. NACTT's argument is misdirected at a supposed "holding of the Court of Appeals that chapter 13 debtors have no duty under the Bankruptcy Code to disclose post-confirmation property interests." Memo. at 1. The Court of Appeals never issued that holding. On the contrary, it holds that "a debtor in a Chapter 13 bankruptcy has an ongoing duty to disclose postpetition causes of action that could become property of the bankruptcy estate." Slip Op. at 7 (emphasis added).

As fully explained throughout Arp's briefing, and in the Court of Appeals decision itself, that court's actual holding is that where, as here, a Confirmation Order[1] expressly vests all post-confirmation assets in the debtor – assets that he thus holds "free and clear of any claim or interest of any creditor provided for by the plan" under 11 U.S.C. § 1327(c) – he has no duty to disclose. NACTT never addresses the salient question, and takes no position on the merits. NACTT's memo is not helpful.

[1] Arp's Confirmation Order (CP 114) is attached as App. B.

STATEMENT OF THE CASE

The facts are stated in the Slip Opinion (copy attached as App. A). Based on those facts, the Court of Appeals held:

- "a debtor in a Chapter 13 bankruptcy has an ongoing duty to disclose postpetition causes of action that could become property of the bankruptcy estate" (Slip Op. 7, underlining added here, and throughout these bullets);
- but "claims first acquired after confirmation of a Chapter 13 plan do not always become estate assets" (*id.*); for instance,
- "When a court decides that property acquired after confirmation belongs to the debtor, courts have held that the debtor need not disclose that property and therefore have declined to apply judicial estoppel to bar undisclosed claims" (*id.*);
- [discussion of the "tension" between 11 U.S.C. §§ 1327(b) and 1306(a), and various approaches the Ninth Circuit has considered, but not adopted, on which the Slip Opinion posits no holding (*id.* at 8-10)]; here,
- "Arp's plan and confirmation order vested the Sierra Claim in Arp" (*id.* at 10);
- "Thus, Arp owns the claim and has standing to assert it" (*id.*);
- [discussion of various inapposite cases Seirra relied upon, which do] "not support Sierra's assertion that the bankruptcy code requires disclosure in Arp's case" (*id.* at 10-13);
- thus, the "bankruptcy code did not require that Arp amend his schedules to disclose his claim" (*id.* at 13).

In short, the Court of Appeals' holdings are limited to these facts.

ARGUMENT

A. The Court of Appeals did not "conclude" that Chapter 13 debtors have no duty to disclose post-confirmation assets, but rather that where, as here, post-confirmation assets "remain vested" in Arp under the Confirmation Order, *he* had no duty to amend his schedules to reflect assets he owned free and clear of all creditor's claims.

NACTT erroneously asserts that the Court of Appeals "concluded that a chapter 13 debtor has no duty under the Bankruptcy Code to disclose a property interest acquired after the confirmation of a repayment plan." Memo. at 2. As noted *supra*, the Court of Appeals actually held that while Chapter 13 debtors generally *do* have a duty to disclose post-confirmation assets, *Arp* had no such duty because, under his Confirmation Order,[2] all post-confirmation assets remained vested in him (CP 114):

> 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 . . . .

While § 1306(a) expressly captures post-confirmation assets, Confirmation Order ¶ 6 retained all § 1306(a) assets in Arp. This, together with 11 U.S.C. § 1327 ("Except as otherwise

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[2] Even a cursory glance at the numerous opinions cited throughout this appeal makes clear that confirmation orders vary, not only from court to court, but even from judge to judge. This decision turns on the specific order entered here. It has little bearing on the outcome of other cases examining substantively different orders. This is case by case analysis.

provided in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor"), unequivocally vested all post-confirmation assets in Arp. Indeed, Arp holds all post-confirmation assets "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. § 1327(c).

NACTT thus takes no position on the Court of Appeals' actual holdings. It also "takes no position on the ultimate application of judicial estoppel in this case." Memo. at 3. Its Memorandum thus should not affect the disposition of this matter.

B. The Court of Appeals' actual holding is not inconsistent with any federal authority.

Continuing with its misunderstanding of holdings and facts involved in this appeal, NACTT also continues Sierra's tactic of citing inapposite decisions. Memo. at 4-7. For instance, like Sierra, NACTT relies on ***Hamilton v. State Farm Fire & Cas. Co.***, 270 F.3d 778, 785 (9th Cir. 2001), even though Arp has repeatedly explained that ***Hamilton*** involves a cause of action known to the debtor prior to *commencement* of the bankruptcy, not one known only post-*confirmation*. *See* BA 16-17, 23; Reply 17 & n.3. ***Hamilton*** does not address a Confirmation Order that post-confirmation assets "remain vested" in the debtor.

NACTT's other cases fare no better. In ***Jones v. Bob Evans Farms, Inc.***, the "confirmation order required [the debtors] to report to the trustee 'any events affecting disposable income,' specifically including lawsuits that were 'received or receivable' during the term of their plan, which would not exceed five years." 811 F.3d 1030, 1031-32 (8th Cir., 2016). That is effectively the opposite of the confirmation order in this case. ***Jones*** is inapposite.

In ***Robinson v. Tyson Foods, Inc.***, a debtor filed an employment discrimination suit while her bankruptcy was pending. 595 F.3d 1269, 1272 (11th Cir. 2010). Her confirmation order provided that "the property of the estate shall ***not*** vest in the Debtor until a discharge is granted . . . or the case is dismissed." *Id.* (emphasis added). ***Robinson*** is precisely the opposite of this case.

NACTT correctly notes that the Ninth Circuit held (once again) that "a debtor has a duty to disclose post-*petition* assets" in ***Benetatos v. Hellenic Republic***, 371 Fed. Appx. 770, 771 (9th Cir. 2010) (emphasis added). Memo. 5. The court even cites § 1306 for that proposition. 371 Fed. Appx. at 771. But the issue here is whether a duty exists when the Confirmation Order says § 1306(a) assets remain vested in the debtor. ***Benetatos*** does not address that question. It thus is not "strong authority," *contra* Memo. at 5.

NACTT concludes this portion of its memo by again misstating the Court of Appeals' analysis, and then calling its misunderstandings "flaws." *Id.* The appellate court nowhere "assumed that debtors have no duty to disclose uncertain property interests as long as the ultimate determination is that the property is excluded from the estate." *Id.* Rather, the Confirmation Order provides that post-confirmation assets remain vested in the debtor, so their status is not uncertain.

Nor does the appellate decision simply assume that "debtors have no duty to disclose property unless it is property of the estate." *Id.* Rather, under the Order and the Code, Arp holds all post-confirmation assets "free and clear of any claim or interest of any creditor provided for by the plan." § 1327(c). There is no duty to disclose assets as to which creditors have no claim or interest.

C. There is no "uncertainty" regarding this property.

NACTT argues that debtors have a duty to disclose significant property interests whose "status" is uncertain. Memo. at 6-7. As explained above, there is no uncertainty here: the Confirmation Order says that all post-confirmation assets remain vested in the debtor. CP 114, ¶6. NACTT simply ignores the Confirmation Order.

NACTT again cites ***Hamilton***, which is inapposite as explained above. Memo. at 6. It also claims that the appellate decision "seems contrary" to ***Dale v. Maney (In re Dale)***, 505 B.R. 8, 13 (B.A.P. 9th Cir. 2014). Memo. at 7. But the ***Dale*** issue is this:

> Did the bankruptcy court err as a matter of law in determining that an inheritance received by a chapter 13 debtor more than 180 days after the petition date, but before a plan was confirmed and before the chapter 13 case was closed, dismissed or converted was an asset of the bankruptcy estate?

505 B.R. at 13 (emphasis added). Again, ***Dale*** is inapposite.

Finally, on this point, NACTT quotes ***Waldron v. Brown (In re Waldron)***, 536 F.3d 1239, 1246 (11th Cir. 2008). Memo. at 7. But ***Waldron*** expressly did "not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty . . . and our precedents . . . do not address that issue." *Id.* at 1246. And ***Waldron*** – like every other case NACTT cites – does not address a confirmation order that says § 1306(a) assets remain vested in the debtor. Arp unquestionably held this asset free and clear.

D. The Court of Appeals did not just "assume" anything, and NACTT's only apposite case supports Arp.

Over and over again, NACTT asserts that the appellate court "assumed" this or "presumed" that. *E.g.*, Memo. at 8. Yet NACTT never cites to the appellate decision when it makes these assertions. NACTT is making all the assumptions here.

Its last argument is about disposable income, or disclosures when someone requests a plan modification. Memo. at 8-10. None of that happened here, as Arp had no new disposable income, and no one sought a modification. Of course, Arp had to inform the Trustee of any additional post-confirmation *income* under the Confirmation Order. CP 114, ¶ 4. His failure to do so would have been a breach of that order. But nothing in the Code – or in any existing law – required Arp to disclose assets that "remain vested" in him. *Id.* at ¶ 6. As ***Waldron*** – which NACTT again quotes at page 9 – observes, the Code imposes no "free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13." 536 F.3d a 1246.

NACTT cites a number of cases having to do with non-disclosure of new disposable income. Memo. at 8-9 (citing ***Taylor v. United States***, 212 F.3d 395 (8th Cir. 2000) (payments from an

ERISA account could be included in the calculation of disposable income, where ERISA plan existed on the petition date and was actually paying out to the debtor during the chapter 13 case); ***Freeman v. Schulman***, 86 F.3d 478 (6th Cir. 1996) (exempt tax refund was disposable income under plan; debtors received the funds during chapter 13 case); ***In re Talley***, 240 B.R. 22 (Bankr. D. Neb. 1999) (exempt monthly pension payments were disposable income under plan; asset existed the petition date, and debtor received the income during the chapter 13 case). Since Arp did not receive any new income during his chapter 13 case – and still has not received any – these cases are no help here.

NACTT also cites ***In re Baxter***, 374 B.R. 292 (Bankr. M.D. Ala. 2007), which actually supports Arp. That court found that the debtors' post-confirmation cause of action based on a violation of the automatic stay was ***not*** property of the estate under 11 U.S.C. § 1327, because that "claim is unnecessary for the execution of the current plan." 374 B.R. at 294-95 (citing and discussing, *inter alia*, ***Muse v. Accord Human Res., Inc.***, 129 Fed. Appx. 487 (11th Cir. 2005) (citing ***In re Carter***, 258 B.R. 526 (Bankr. S.D. Ga. 2001) and ***In re Ross***, 278 B.R. 269 (Bankr. M.D. Ga. 2001), "both holding that post-confirmation causes of action were not part of the chapter

13 bankruptcy estates if unnecessary for execution of the plan"); *see* ***In re Brown***, 260 B.R. 311, 313 (Bankr. M.D. Ga. 2001) ("holding that post-confirmation cause of action for personal injuries is not property of the chapter 13 estate" (emphasis added)); ***In re Tomasevic***, 279 B.R. 358, 362 (Bankr. M.D. Fla. 2002) ("holding that a postpetition cause of action for violation of the Real Estate Settlement Procedures Act is not property of the bankruptcy estate")). But the ***Baxter*** court determined that the *net proceeds* from that cause of action had to be paid into the plan because they were a change in disposable income warranting a plan modification. *Id.* at 295-96.

Applying cases like ***Baxter*** and ***Brown*** here, Arp's post-confirmation personal injury claim was plainly unnecessary for the execution of his current plan: he paid it off in full, giving his creditors the benefit of over $150,000 in payments. NACTT's only arguably apposite case supports Arp's position.

Even assuming *arguendo* that so-called "potential assets" might be disclosable – an assertion finding no support in NACTT's inapposite precedents – Arp's claim against Sierra was not a potential asset under the Confirmation Order, and NACTT does not argue otherwise. Post-confirmation assets remained vested in Arp,

so were never potential assets of the estate. NACTT's policy concerns thus do not arise under this Confirmation Order. The appellate decision cannot lead to other debtors failing to disclose, except in the highly unlikely event that their confirmation orders also say post-confirmation assets remain vested in them.[3]

Unlike Arp's Chapter 13 Plan, the *current* Chapter 13 Plan form expressly warns debtors that after-acquired claims are disclosable property of the estate (App. D at p.4, emphases added):

> **VIII. Property of the Estate**
>
> Property of the estate is defined in 11 USC § 1306(a). Unless otherwise ordered by the Court, property of the estate in possession of the debtor on the petition date shall vest in the debtor upon confirmation. . . . Property (including, but not limited to, . . . any claim) acquired by the debtor post-petition *shall vest in the Trustee and be property of the estate*. The debtor shall promptly notify the Trustee if the debtor becomes entitled to receive a distribution of money or other property (including, but not limited to, . . . any claim) whose value exceeds $2,500.00, unless the plan elsewhere specifically provides for the debtor to retain the money or property.

With language like this, debtors are given fair warning, and holding them to a disclosure requirement is equitable. But no such

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[3] A *current* form of confirmation order in the Western District of Washington is dissimilar to Arp's order, omitting the "remain vested" language. *See* App. C. Since Arp's form of order apparently is no longer in use, the appellate decision is truly limited to its facts.

language appeared in Arp's plan, and his Confirmation Order expressly vested after-acquired claims in him. App. C.

It was thus wholly unjust to judicially estop Arp, where no one – not even the National Association of Chapter 13 Trustees – can cite a single case (or a single good reason) requiring a debtor to disclose post-confirmation assets that remained vested in him, rather than becoming property of the bankruptcy estate. But NACTT has nothing to say about that injustice. Memo. at 3.

CONCLUSION

NACTT addresses a question not presented here, attacking a holding that the Court of Appeals never made. It also holds no brief for equity and justice. Its memo is unhelpful.

RESPECTFULLY SUBMITTED this 6th day of May, 2016.

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CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL

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11 U.S.C. §1306. Property of the estate

(a) 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; and

(2) earnings from services performed by the debtor 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.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647 ; Pub. L. 99–554, title II, §257(u), Oct. 27, 1986, 100 Stat. 3116 .)

11 USC 1327 - Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) 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.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650.)

APPENDIX A

IN THE COURT OF APPEALS OF 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.	No. 72613-7-I DIVISION ONE PUBLISHED OPINION FILED: December 28, 2015

LEACH, J. — Benjamin C. Arp appeals the trial court's summary dismissal of his personal injury action against James H. Riley and Sierra Construction Company Inc. (collectively Sierra). The trial court decided that the judicial estoppel doctrine barred this lawsuit because Arp failed to amend the schedules in his Chapter 13 bankruptcy case to inform the court about a personal injury claim he acquired after that court confirmed Arp's payment plan. Because judicial estoppel is an equitable doctrine to be applied by the trial court through its exercise of discretion on a case-by-case basis after evaluating the pertinent factors and because the trial court did not do this, we reverse and remand for proceedings consistent with this opinion.

APPENDIX A

NO. 72613-7-I / 2

FACTS

Arp filed a Chapter 13 bankruptcy petition on July 22, 2008. The bankruptcy court confirmed Arp's Chapter 13 plan on December 17, 2009. The confirmation order required him to inform the Trustee of any change in circumstances and allowed Arp to retain his property:

> 1. That subject to the terms of this order, the plan proposed by the debtor dated 12-09-09 is hereby confirmed;
> . . . .
> 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;
> . . . .
> 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.

On October 5, 2010, Arp suffered serious injuries when a sports utility vehicle (SUV) rear-ended his stopped car. James Riley drove the SUV while working for Sierra Construction Company. Arp sustained physical injuries as well as mental and emotional problems, including difficulty with memory. He cannot engage in the physical activities he previously enjoyed. A neuropsychologist described his symptoms as consistent with cognitive disorder NOS (not otherwise specified) and adjustment disorder NOS, as well as depression and anxiety.

After the accident, Arp missed several payments on his Chapter 13 plan, totaling $2,875.00. The bankruptcy trustee moved to dismiss Arp's bankruptcy case in November 2011. Arp responded, stating that he forgot to make payments because he experienced memory loss as a result of a car accident for which he was not at fault. Arp also noted that he had paid $154,336.42 to his creditors under his Chapter 13 plan. The trustee struck the motion to dismiss, and in March 2012, the bankruptcy court granted Arp a discharge. Arp paid off his remaining debts under the Chapter 13 plan, and the bankruptcy court closed his case in April 2012.

Arp filed suit against Riley and later amended his complaint to include Sierra Construction Company. In Sierra's amended answer, it asserted the affirmative defenses of judicial estoppel and lack of standing. The trial court dismissed Arp's case on summary judgment, concluding that because Arp's personal injury claim against Sierra "is properly considered an asset of the bankruptcy estate, as defined in 11 U.S.C. § 1306(a)(1)," Arp "had a duty to disclose the post-petition asset in his bankruptcy action." It also decided that Arp's response to the trustee's motion to dismiss did not satisfy the disclosure obligation created by the confirmation order. The trial court denied Arp's motion for reconsideration. Arp appeals.

APPENDIX A

NO. 72613-7-I / 4

STANDARD OF REVIEW

This court reviews a trial court's grant of summary judgment de novo, affirming only if no genuine issues of material fact exist, viewing the evidence in the light most favorable to the nonmoving party.[1] But "[w]e review a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion."[2] "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds."[3]

ANALYSIS

Arp challenges the trial court's decision that judicial estoppel bars this lawsuit because he did not properly disclose his claim in his Chapter 13 bankruptcy proceeding. He also challenges its decision that his claim remained an asset of the bankruptcy estate and could be pursued only by the trustee. Arp contends that he had no duty to disclose the claim and that he owned it because of the provisions of the confirmation order. Alternatively, he claims that he made an adequate disclosure.

Sierra responds that both the bankruptcy code and the confirmation order imposed a disclosure obligation. Because Arp did not disclose his claim, judicial

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[1] Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 226-27, 108 P.3d 147 (2005); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).

[2] Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).

[3] Harris v. Fortin, 183 Wn. App. 522, 527, 333 P.3d 556 (2014).

estoppel bars it. Sierra also asserts that Arp's claim remains part of the bankruptcy estate and can only be pursued by the bankruptcy trustee.

Judicial estoppel "'precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'"[4] It is intended to protect the integrity of the courts but is not designed to protect litigants.[5]

A court looks to three factors to determine if judicial estoppel applies: (1) if the party asserts a position inconsistent with an earlier one, (2) if acceptance of the position would create the perception that a party misled a court in either proceeding, and (3) if the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment.[6] But this is not an exhaustive formula nor are there inflexible prerequisites, thus "[a]dditional considerations may inform the doctrine's application in specific factual contexts."[7] Indeed, courts must apply judicial estoppel at their own discretion; they are not bound to apply it but rather must determine on a case-by-case basis if applying the doctrine is appropriate.[8]

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[4] Arkison, 160 Wn.2d at 538 (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)).

[5] Ah Quin v. County of Kauai Dep't of Transp., 733 F.3d 267, 271 (9th Cir. 2013); Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-08, 28 P.3d 832 (2001).

[6] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

[7] New Hampshire, 532 U.S. at 743.

[8] Ah Quin, 733 F.3d at 272.

We first decide if Arp's nondisclosure of his claim as an asset in his bankruptcy proceeding constituted a clearly inconsistent position. Nondisclosure of a claim later brought in state court can support the application of judicial estoppel because a party asserts two opposing positions.[9] As a general rule, if a debtor in a bankruptcy proceeding fails to report a cause of action and obtains a discharge or confirmation, a trial court may apply judicial estoppel to bar the action.[10] This prevents a debtor from protecting the asset from creditors by representing to the bankruptcy court that no claim exists and then asserting in another court that the claim does exist.[11] But "[a] party's nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit," especially where a party lacks knowledge or has no motive to conceal the claims.[12]

Arp claims that he did not take any inconsistent position because the bankruptcy code and the confirmation order made him the claim's owner with no duty of disclosure. Sierra disagrees on both points. Deciding if property belongs to the bankruptcy estate or to the debtor involves interpreting bankruptcy code

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[9] Harris, 183 Wn. App. at 528.

[10] Ah Quin, 733 F.3d at 271.

[11] Ah Quin, 733 F.3d at 271.

[12] Miller v. Campbell, 137 Wn. App. 762, 771, 155 P.3d 154 (2007), aff'd on other grounds, 164 Wn.2d 529, 192 P.3d 352 (2008) (affirming the result reached by Court of Appeals but applying a different analysis because of the substitution of the trustee).

provisions.[13] The parties' conflicting positions about the ownership of a claim first acquired after a court confirms a Chapter 13 plan reflect a division among courts about how to classify this category of property.[14] When a court enters a confirmation order in a Chapter 13 bankruptcy proceeding, it orders the debtor to apply part of his future income to discharge debts.[15] While a debtor in a Chapter 13 bankruptcy has an ongoing duty to disclose postpetition causes of action that could become property of the bankruptcy estate,[16] claims first acquired after confirmation of a Chapter 13 plan do not always become estate assets. When a court decides that property acquired after confirmation belongs to the debtor, courts have held that the debtor need not disclose that property and therefore have declined to apply judicial estoppel to bar undisclosed claims.[17]

The bankruptcy code does not clearly state what postconfirmation property belongs to the bankruptcy estate. 11 U.S.C. § 1306(a) provides that the bankruptcy estate includes the property specified in 11 U.S.C. § 541 and "all property of the kind specified in such section that the debtor acquires after the

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[13] Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, 183 Wn. App. 459, 483, 334 P.3d 63 (2014) (citing In re Pettit, 217 F.3d 1072, 1078 (9th Cir. 2000)), aff'd, 184 Wn.2d 176, 357 P.3d 759 (2015).

[14] See In re Jones, 657 F.3d 921, 927 (9th Cir. 2011).

[15] 11 U.S.C. §§ 1321-1325; In re Hannan, 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982).

[16] 11 U.S.C. § 521; In re Flugence, 738 F.3d 126, 129 (5th Cir. 2013); In re Foreman, 378 B.R. 717, 720 (Bankr. S.D. Ga. 2007).

[17] Castellano v. Charter Commc'ns, LLC, No. 3:12-CV-05845-RJB, 2013 WL 6086050, at *6 (W.D. Wash. Nov. 19, 2013).

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," and certain earnings from the debtor's services. But 11 U.S.C. § 1327(b) 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." And unless the plan states otherwise, the debtor holds this property "free and clear of any claim or interest of any creditor provided for by the plan."[18] The Ninth Circuit has noted the tension between these statutes: "Under § 1327(b), property of the estate revests in the debtor upon confirmation of a Chapter 13 plan, but § 1306(a)(1) does not include confirmation of the plan as one of the events defining the time period in which property acquired by the debtor becomes estate property."[19]

Federal circuit courts and bankruptcy courts addressing this tension have taken four different approaches.[20] In re Jones[21] outlines the four approaches various courts have taken. The modified estate preservation approach requires that property of the estate vests in the debtor at the time of confirmation, but postconfirmation property becomes part of the bankruptcy estate under §

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[18] 11 U.S.C. § 1327(c).

[19] Jones, 657 F.3d at 927.

[20] Jones, 657 F.3d at 927-28; Barbosa v. Solomon, 235 F.3d 31, 36-37 (1st Cir. 2000).

[21] 657 F.3d 921, 927-28 (9th Cir. 2011).

1306(a).[22] The estate transformation approach vests postconfirmation property in a debtor under § 1327(b), but the estate retains property where necessary to carry out the confirmation plan.[23] The estate termination approach vests all property in the debtor under § 1327(b) unless the confirmation plan states otherwise.[24] These three approaches proceed from the principle that property of the estate revests in the debtor on plan confirmation unless the plan says otherwise. With the fourth, the estate preservation approach, the bankruptcy estate retains all property after confirmation until dismissal or discharge.[25]

Here, the trial court adopted the modified estate preservation approach:

> This court is persuaded that the "modified estate preservation approach," is the most appropriate, to determine whether the . . . 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 Ninth Circuit has affirmatively rejected the "estate preservation approach," noting that no circuit court had adopted it.[26] It declined to adopt any of the other three approaches because it decided it did not need to adopt any single approach to resolve the case before it.[27] It held that the plain language of

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[22] Jones, 657 F.3d at 927-28; Barbosa, 235 F.3d at 36-37.

[23] Jones, 657 F.3d at 928; Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1340 (11th Cir. 2000).

[24] Jones, 657 F.3d at 928.

[25] Jones, 657 F.3d at 928.

[26] Jones, 657 F.3d at 928.

[27] Jones, 657 F.3d at 928.

§ 1327(b) vests property of the bankruptcy estate in the debtor upon plan confirmation unless the debtor chooses differently in the plan.[28] Arp's plan and the confirmation order vested the Sierra claim in Arp. Thus, Arp owns the claim and has standing to assert it.

In Castellano v. Charter Communications, Inc.,[29] the United States District Court for the Western District of Washington held that a Chapter 13 bankruptcy debtor whose discrimination claim arose postconfirmation had no duty to disclose this claim, citing Johnson v. Si-Cor, Inc.[30] The district court's reliance on Johnson provides guidance here.

Sometime after Johnson filed a Chapter 13 case, he sustained injury when he bit into a McDonalds sandwich.[31] Johnson did not list his claim against McDonalds on his Chapter 13 bankruptcy schedule or inform creditors upon conversion to a Chapter 7 bankruptcy.[32] When Johnson sued McDonalds, the trial court dismissed his lawsuit as barred by judicial estoppel.[33] Division Three of this court reversed for three reasons: (1) the trial court questioned if Johnson was obligated to amend his bankruptcy schedule to disclose his claim, (2) a debtor's failure to amend a schedule of assets does not sufficiently involve the

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[28] Jones, 657 F.3d at 928.

[29] No. 3:12-CV-05845-RJB, 2013 WL 6086050, at *6 (W.D. Wash. Nov. 19, 2013).

[30] 107 Wn. App. 902, 910-11, 28 P.3d 832 (2001).

[31] Johnson, 107 Wn. App. at 904.

[32] Johnson, 107 Wn. App. at 905.

[33] Johnson, 107 Wn. App. at 904.

court so that it accepts the debtor's position, and (3) the record did not show that Johnson's nondisclosure provided him a benefit.[34] Thus, judicial estoppel did not bar his suit.[35]

Sierra contends that because Johnson is a Chapter 7 conversion case and not a Chapter 13 case, the same analysis does not apply. It correctly argues that under 11 U.S.C. § 348(f)(1)(A), the conversion to Chapter 7 caused all postpetition Chapter 13 property to belong to the debtor.[36] But in Johnson, the defendant specifically argues that Johnson's failure to amend his Chapter 13 schedules to include his lawsuit supported the court's application of judicial estoppel.[37]

The Johnson court did note that sometimes Chapter 13 can present a strong case for judicial estoppel: as part of a Chapter 13 confirmation process, the bankruptcy court may require a debtor to represent to it what creditors would have received under a Chapter 7 liquidation, providing the court with evidence to

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[34] Johnson, 107 Wn. App. at 910.
[35] Johnson, 107 Wn. App. at 912.
[36] 11 U.S.C. §348 provides,

> (f)
>
> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.

[37] Johnson, 107 Wn. App. at 910.

show that the creditors are doing at least as well under Chapter 13.[38] But this describes a debtor's duty existing during and before confirmation and not after the bankruptcy court confirms the plan. As this court later explained in Cunningham v. Reliable Concrete Pumping, Inc.,[39] Johnson's conversion to Chapter 7 did not change the fact that under Chapter 13 he did not have to disclose or schedule his postconfirmation cause of action, and, "[t]herefore, his omission had no effect on the court's valuation process or subsequent decision to confirm his plan," and thus it "did not 'accept' his position that no claim was available to his creditors."

Sierra also contends that Kimberlin v. Dollar General Corp.[40] required Arp to disclose his claim to the bankruptcy court. In Kimberlin, the plaintiff's claim against her employer arose several years after a bankruptcy court confirmed her Chapter 13 plan,[41] and the district court applied judicial estoppel to dismiss her claim because she did not disclose it to the bankruptcy court.[42] On review, the Sixth Circuit recognized but declined to resolve the conflict between 11 U.S.C. § 1306 and § 1327, deciding the judicial estoppel issue on the parties' shared assumption that Kimberlin was required to disclose her cause of action.[43] Thus,

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[38] Johnson, 107 Wn. App. at 909-10.
[39] 126 Wn. App. 222, 232, 108 P.3d 147 (2005).
[40] 520 F. App'x 312 (6th Cir. 2013).
[41] Kimberlin, 520 F. App'x at 313.
[42] Kimberlin, 520 F. App'x at 313.
[43] Kimberlin, 520 F. App'x at 314.

Kimberlin does not support Sierra's assertion that the bankruptcy code requires disclosure in Arp's case.

The bankruptcy code did not require that Arp amend his schedules to disclose his claim. The trial court erred to the extent it reached a contrary conclusion. Because Arp owned that claim, the trial court also erred when it decided that he lacked standing to assert it.

Next, we read the confirmation order to see if it required disclosure. The code allows for a plan to include "any other appropriate provision not inconsistent with this title."[44] The bankruptcy court has discretion to include provisions in the plan requiring a debtor to amend a schedule of assets to disclose a newly acquired postconfirmation property interest.[45] And 11 U.S.C. § 1329 of the code permits trustees and creditors to modify the payment plan postconfirmation and before completion of a debtor's payments.[46] Here, Arp's plan specifically required that he inform the trustee of any change in circumstance or receipt of additional income. And while the order vested all after-acquired property in Arp, the bankruptcy court retained jurisdiction over these assets. Arp had to obtain

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[44] 11 U.S.C. § 1322(b)(11).

[45] See In re Waldron, 536 F.3d 1239, 1246 (11th Cir. 2008); Fed. R. Bankr. P. 1009.

[46] 11 U.S.C. § 1329(a) provides that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified" at the request of a creditor to "alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan."

specific permission from the court to exercise any right to "lease, sell, transfer, encumber or otherwise dispose of such property." Sierra argues that this language required Arp to disclose all assets he acquired after confirmation.

Arp asserts that because he owned any claim acquired after the court confirmed his plan, the confirmation order did not impose a duty to disclose the acquisition of that claim. Arp also contends that he satisfied any disclosure obligation imposed by the confirmation order with his response to the trustee's motion to dismiss. But his position that the order did not impose a disclosure obligation ignores the plain language of the order requiring disclosure of "any change in circumstance." Arp provides no credible interpretation of this language. It clearly required that Arp disclose an injury affecting his ability to work and fund his plan as well as his acquisition of an asset, his personal injury claim that might provide a replacement for his lost earnings.

Additionally, Arp does not offer any persuasive explanation why his response to a motion to dismiss provided a reasonable substitute for an amendment to his schedule of assets. In a world of electronic filings where creditors rely upon publicly available dockets to keep informed about the status of cases, an entry disclosing a response to a motion to dismiss does not provide the same notice as an entry disclosing a change in assets. The record adequately supports the trial court's conclusion that Arp's response to the

trustee's motion to dismiss "cannot fairly be considered the type of notice required by the confirmation order." Thus, for purposes of this opinion, we assume that Arp has taken an inconsistent position.

But Arp's violation of a disclosure obligation does not, as the trial court appears to have decided, mean that judicial estoppel bars Arp's claim as a matter of law.[47] Indeed, the record leaves unanswered serious questions about the equity of applying judicial estoppel to bar his claim.

Judicial estoppel is an equitable doctrine courts apply to protect the integrity of the judicial process,[48] not to benefit a party. When considering whether the doctrine applies in an individual case, a court must consider if the litigant before it asserted inconsistent claims, if the bankruptcy court accepted those claims, and if the litigant benefited from asserting inconsistent claims.[49] And while a court need not make a finding of manipulative intent, usually this has been implied in cases where a court applies judicial estoppel.[50] The record before us does not show that the trial court considered if the bankruptcy court accepted any inconsistent claim made by Arp or if Arp benefited from making any inconsistent claim. Certainly the record lacks sufficient evidence of undisputed facts to allow the trial court to resolve these questions as a matter of law. The

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[47] Miller, 137 Wn. App. at 771.
[48] Miller, 137 Wn. App. at 771.
[49] Arkison, 160 Wn.2d at 538-39 (quoting New Hampshire, 532 U.S. at 750-51).
[50] Miller, 137 Wn. App. at 771-72.

record also does not show that the trial court exercised discretion to decide if allowing Arp to pursue his claim would affront the integrity of the judicial process.

Sierra identifies no evidence showing that the bankruptcy court accepted any inconsistent claim asserted by Arp when it granted him relief. Arp had nearly completed his plan payments when he was injured. At the time the trustee moved to dismiss the bankruptcy, Arp had already paid creditors $154,336.42, with only $2,875.00 left to pay. The trustee struck the motion to dismiss. The bankruptcy court had already entered a confirmation order vesting in Arp ownership of assets he acquired after entry of the order, including his claim against Sierra. Sierra produced no evidence showing that any creditor would have considered requesting a plan amendment if Arp had disclosed his claim in an amended schedule. Neither has Sierra offered any persuasive reason to believe the bankruptcy court would have changed the relief it granted Arp. Thus, undisputed facts do not show that the bankruptcy court accepted an inconsistent position or that Arp benefited from nondisclosure.

The trial court erred by resolving the application of judicial estoppel as a matter of law on summary judgment. Before summarily deciding that judicial estoppel barred Arp's claim, the trial court should have considered if undisputed facts in this particular case established pertinent factors as a matter of law. If so,

it must also exercise discretion to decide if allowing Arp to pursue his claim against Sierra would affront the integrity of the judicial process.

CONCLUSION

Because Arp owned any claim he first acquired after the bankruptcy court confirmed his Chapter 13 plan, Arp did not have a statutory duty to disclose the claim and had standing to pursue it. But the bankruptcy court's confirmation order required disclosure of the claim, and we accept the trial court's decision that Arp did not adequately disclose it. But the record does not establish by undisputed facts the pertinent elements of judicial estoppel. Also, the record does not establish that the trial court exercised individualized discretion to decide that allowing Arp to pursue his claim would affront the integrity of the judicial process. We reverse and remand for proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Dwyer, J.

Becker, J.

Entered on Docket Dec. 17, 2009

Exhibit B

Judge: Philip H. Brandt

Chapter: 13

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re: BENJAMIN CLARENCE ARP Debtor.	IN CHAPTER 13 PROCEEDING NO. 08-14588 ORDER CONFIRMING CHAPTER 13 PLAN

This Matter having come on for hearing this date before the undersigned bankruptcy Judge, and the Court having heard the arguments, if any, for and against confirmation of the plan proposed herein, and having heard the Trustee's recommendations concerning the plan, the Court does therefore hereby ORDER:

1. That subject to the terms of this order, the plan proposed by the debtor dated 12-09-09 is hereby confirmed;

2. That original attorney fees are set in the amount of $10,915.83;

3. That the debtor shall incur no additional debt except after obtaining prior Court permission;

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;

5. That the Trustee shall charge such percentage fee as may periodically be fixed by the Attorney General pursuant to 28 U.S.C. section 586(e);

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;

7. That all disposable income received by the debtor beginning on the date the first payment is due under the plan shall be applied as payments under the plan pursuant to 11 U.S.C. section 1325(b)(1)(B), unless the Court orders otherwise.

Dated: December 17, 2009

PHB

Philip H. Brandt, Judge

Presented by:

APPENDIX B

APPENDIX C

The *current* "**ORDER** Confirming Chapter 13 Plan" in the Western District of Washington.

The debtor(s) chapter 13 plan (Related document 6) has been recommended for confirmation by the Chapter 13 Trustee, satisfies the requirements of 11 U.S.C. section 1325, and is hereby confirmed according to the terms and conditions set forth therein. It is further ordered that:

(1) the debtors shall incur no additional debt except after obtaining prior Trustee permission pursuant to LBR 3015-2 or prior Court permission;

(2) the debtors shall promptly notify the Trustee if their projected gross annual income increases by more than 10% above the gross amount disclosed in the most recently filed Schedule I;

(3) the debtors shall promptly comply with the Trustee's requests for financial information;

(4) the debtors shall timely file required tax returns during the life of the plan;

(5) the Trustee shall charge the percentage fee as periodically set pursuant to 28 U.S.C. section 586(e);

(6) nothing in this order or the confirmed plan shall restrict the Trustee from recovering on claims on avoidance actions or otherwise, including claims pursuant to 11 U.S.C. sections 544, 547, 548, 550 and/or 551 and the estate retains the right and standing to pursue all claims under the previously enumerated sections; and

(7) all property of the debtors and the estate shall remain under the exclusive jurisdiction of the Court.

Hereby ordered by Judge Timothy W Dore.

This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached. (Entered: 10/16/2015 at 02:16:05)

APPENDIX D

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re: Debtor(s).	Case No. CHAPTER 13 PLAN __Original __Amended Date: _____

I. Introduction:

A. Debtor is eligible for a discharge under 11 USC § 1328(f) (check one):
_____ Yes
_____ No

B. Means Test Result. Debtor is (check one):
_____ a below median income debtor with a 36 month applicable commitment period
_____ an above median income debtor with a 60 month applicable commitment period

II. Plan Payments:

No later than 30 days after the filing of the plan or the order for relief, whichever date is earlier, the debtor will commence making payments to the Trustee as follows:

A. AMOUNT: $ _____
B. FREQUENCY (check one):
___Monthly
___Twice per month
___Every two weeks
___Weekly
C. TAX REFUNDS: Debtor (check one): ___COMMITS; ___DOES NOT COMMIT; all tax refunds to funding the plan. Committed refunds shall be paid in addition to the plan payment stated above. If no selection is made, tax refunds are committed.
D. PAYMENTS: Plan payments shall be deducted from the debtor's wages unless otherwise agreed to by the Trustee or ordered by the Court.
E. OTHER: _____

III. Plan Duration:

The plan's length shall not be less than the debtor's applicable commitment period as defined under 11 U.S.C. §§ 1322(d) and 1325(b)(4) unless the plan either provides for payment in full of allowed unsecured claims over a shorter period or is modified post-confirmation. A below median debtor's plan length shall automatically be extended up to 60 months after the first payment is due if necessary to complete the plan.

IV. Distribution of Plan Payments:

Upon confirmation, the Trustee shall disburse funds received in the following order and creditors shall apply them accordingly, PROVIDED THAT disbursements for domestic support obligations and federal taxes shall be applied according to applicable non-bankruptcy law:

A. ADMINISTRATIVE EXPENSES:
1. Trustee. The percentage set pursuant to 28 USC §586(e).
2. Other administrative expenses. As allowed pursuant to 11 USC §§ 507(a)(2) or 707(b).
3. Attorney's Fees: Pre-confirmation attorney fees and/or costs and expenses are estimated to be $_____. $_____ was paid prior to filing. To the extent pre-confirmation fees and/or costs and expenses exceed $3,500, an appropriate application, including a complete breakdown of time and costs, shall be filed with the Court within 21 days after confirmation.
Approved attorney compensation shall be paid as follows (check one):
a. ____ Prior to all creditors;

b. ____ Monthly payments of $_____;
c ____ All remaining funds available after designated monthly payments to the following creditors:_____.
d. ____ Other:_____.
If no selection is made, fees will be paid after monthly payments specified in Sections IV.B and IV.C.

B. CURRENT DOMESTIC SUPPORT OBLIGATION: Payments to creditors whose claims are filed and allowed pursuant to 11 USC § 502(a) or court order as follows (if left blank, no payments shall be made by the Trustee):

Creditor	Monthly amount
_____	$_____
_____	$_____

C. SECURED CLAIMS: Payments will be made to creditors whose claims are filed and allowed pursuant to 11 USC § 502(a) or court order, as stated below. Unless ranked otherwise, payments to creditors will be disbursed at the same level. Secured creditors shall retain their liens until the payment of the underlying debt, determined under nonbankruptcy law, or discharge under 11 USC § 1328, as appropriate. Secured creditors, other than creditors holding long term obligations secured only by a security interest in real property that is the debtor's principal residence, will be paid the principal amount of their claim or the value of their collateral, whichever is less, plus per annum uncompounded interest on that amount from the petition filing date.

Interest rate and monthly payment in the plan control unless a creditor timely files an objection to confirmation. If a creditor timely files a proof of claim for an interest rate lower than that proposed in the plan, the claim shall be paid at the lower rate. Value of collateral stated in the proof of claim controls unless otherwise ordered following timely objection to claim. The unsecured portion of any claim shall be paid as a nonpriority unsecured claim unless entitled to priority by law.

Only creditors holding allowed secured claims specified below will receive payment from the Trustee. If the interest rate is left blank, the applicable interest rate shall be 12%. If overall plan payments are sufficient, the Trustee may increase or decrease post-petition installments for ongoing mortgage payments, homeowner's dues and/or real property tax holding accounts based on changes in interest rates, escrow amounts, dues and/or property taxes.

1. Continuing Payments on Claims Secured Only by Security Interest in Debtor's Principal Residence and Non-Escrowed Postpetition Property Tax Holding Account (Interest included in payments at contract rate, if applicable):

Rank	Creditor	Nature of Debt	Property	Monthly Payment
____	_____	_____	_____	$_____
____	_____	_____	_____	$_____
____	_____	_____	_____	$_____

2. Continuing Payments and Non-Escrowed Postpetition Property Tax Holding Account on Claims Secured by Other Real Property (Per annum interest as set forth below):

Rank	Creditor	Nature of Debt	Property	Monthly Payment	Interest Rate
____	_____	_____	_____	_____	___%
____	_____	_____	_____	_____	___%
____	_____	_____	_____	_____	___%
____	_____	_____	_____	_____	___%

3. Cure Payments on Mortgage/Deed of Trust/Property Tax/Homeowner's Dues Arrearage:

Periodic	Arrears to be	Interest

APPENDIX D

Rank	Payment	Creditor	Property	Cured	Rate
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%

4. Payments on Claims Secured by Personal Property:

a. **910 Collateral.**

The Trustee shall pay the contract balance as stated in the allowed proof of claim for a purchase-money security interest in any motor vehicle acquired for the personal use of the debtor(s) **within 910 days** preceding the filing date of the petition or in other personal property acquired within **one year** preceding the filing date of the petition as follows. Debtor stipulates that pre-confirmation adequate protection payments shall be paid by the Trustee as specified upon the creditor filing a proof of claim. If no amount is specified, the Trustee shall pay the amount stated as the "Equal Periodic Payment".

Rank	Equal Periodic Payment	Creditor	Description of Collateral	Pre-Confirmation Adequate Protection Payment	Interest Rate
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%
____	$_____	_____	_____	$_____	___%

b. **Non-910 Collateral.**

The Trustee shall pay the value of collateral stated in the proof of claim, unless otherwise ordered following timely objection to the claim, for a purchase-money security interest in personal property which is non-910 collateral. Debtor stipulates that pre-confirmation adequate protection payments shall be paid by the Trustee as specified upon the creditor filing a proof of claim. If no amount is specified, the Trustee shall pay the amount stated as the "Equal Periodic Payment".

Rank	Equal Periodic Payment	Creditor	Debtor(s) Value of Collateral	Description of Collateral	Pre-Confirmation Adeq. Protection Payment	Interest Rate
____	$_____	_____	$_____	_____	$_____	___%
____	$_____	_____	$_____	_____	$_____	___%
____	$_____	_____	$_____	_____	$_____	___%
____	$_____	_____	$_____	_____	$_____	___%

D. PRIORITY CLAIMS: Payment in full, on a pro rata basis, of filed and allowed claims entitled to priority in the order stated in 11 USC § 507(a).

E. NONPRIORITY UNSECURED CLAIMS: From the balance remaining after the above payments, the Trustee shall pay filed and allowed nonpriority unsecured claims as follows:

1. Specially Classified Nonpriority Unsecured Claims. The Trustee shall pay the following claims prior to other nonpriority unsecured claims as follows:

Rank	Creditor	Amount of Claim	Percentage To be Paid	Reason for Special Classification
____	_____	$_____	_____%	_____
____	_____	$_____	_____%	_____

2. Other Nonpriority Unsecured Claims (check one):
   a. ____ 100% paid to allowed nonpriority unsecured claims. **OR**

b. ____ Debtor shall pay at least $ _____ to allowed nonpriority unsecured claims over the term of the plan. Debtor estimates that such creditors will receive approximately _____ % of their allowed claims.

V. **Secured Property Surrendered**:
The secured property described below will be surrendered to the following named creditors on confirmation. Upon confirmation, all creditors (including successors and assigns) to which the debtor is surrendering property pursuant to this section are granted relief from the automatic stay to enforce their security interest against the property including taking possession and sale.

Creditor	Property to be Surrendered

VI. **Executory Contracts and Leases**:
The debtor will assume or reject executory nonresidential contracts or unexpired leases as noted below. Assumption will be by separate motion and order, and any cure and/or continuing payments will be paid directly by the debtor under Section VII, unless otherwise specified in Section XII with language designating that payments will be made by the Trustee, the amount and frequency of the payments, the ranking level for such payments with regard to other creditors, the length of the term for continuing payments and the interest rate, if any, for cure payments. Any executory contract or unexpired lease not assumed pursuant to 11 USC § 365(d) is rejected. If rejected, the debtor shall surrender any collateral or leased property and any duly filed and allowed unsecured claim for damages shall be paid under Section IV.E.2.

Contract/Lease	Assumed or Rejected

VII. **Payments to be made by Debtor and not by the Trustee:**
The following claims shall be paid directly by the debtor according to the terms of the contract or support or withholding order, and shall receive no payments from the Trustee. (Payment stated shall not bind any party.)

A. DOMESTIC SUPPORT OBLIGATIONS: The claims of the following creditors owed domestic support obligations shall be paid directly by the debtor as follows:

Creditor	Current Monthly Support Obligation	Monthly Arrearage Payment
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

B. OTHER DIRECT PAYMENTS:

Creditor	Nature of Debt	Amount of Claim	Monthly Payment
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

VIII. **Property of the Estate**
Property of the estate is defined in 11 USC § 1306(a). Unless otherwise ordered by the Court, property of the estate in possession of the debtor on the petition date shall vest in the debtor upon confirmation. However, the debtor shall not lease, sell, encumber, transfer or otherwise dispose of any interest in real property or personal property without the Court's prior approval, except that the debtor may dispose of unencumbered personal property with a value of $10,000.00 or less without the Court's approval. Property (including, but not limited to, bonuses, inheritances, tax refunds or any claim) acquired by the debtor post-petition shall vest in the Trustee and be property of the estate. The debtor shall promptly notify the Trustee if the debtor becomes entitled to receive a distribution of money or other property (including, but not limited to, bonuses, inheritances, tax refunds or any claim) whose value exceeds $2,500.00, unless the plan elsewhere specifically provides for the debtor to retain the money or property.

APPENDIX D

IX. Liquidation Analysis Pursuant to 11 USC § 1325(a)(4)

The liquidation value of the estate is $_____. In order to obtain a discharge, the debtor must pay the liquidation value or the total of allowed priority and nonpriority unsecured claims, whichever is less. Under 11 USC §§ 1325(a)(4) and 726(a)(5), interest on allowed unsecured claims under Section IV.D and IV.E shall be paid at the rate of _____% per annum from the petition filing date (no interest shall be paid if left blank).

X. Other Plan Provisions:

A. No funds shall be paid to nonpriority unsecured creditors until all secured, administrative and priority unsecured creditors are paid in full, provided that no claim shall be paid before it is due.

B. Secured creditors shall not assess any late charges, provided payments from the plan to the secured creditor are current, subject to the creditor's rights under state law if the case is dismissed.

C. The holder of a secured claim shall file and serve on the Trustee, debtor and debtor's counsel a notice itemizing all fees, expenses or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed , and (2) that the holder asserts are recoverable against the debtor or the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses or charges are incurred, per Fed. R. Bankr. P. 3002.1(c).

D. Mortgage creditors shall file and serve on the Trustee, debtor and debtor's counsel a notice of any change in the regular monthly payment amount, including any change that results from an interest rate or escrow adjustment, no later than 21 days before a payment in the new amount is due, per Fed. R. Bankr. P. 3002.1(b).

E. Provision by secured creditors or their agents or attorneys of any of the notices, statements or other information provided in this section shall not be a violation of the 11 USC § 362 automatic stay or of privacy laws.

XI. Certification:

A. The debtor certifies that all post-petition Domestic Support Obligations have been paid in full on the date of this plan and will be paid in full at the time of the confirmation hearing. Debtor acknowledges that timely payment of such post-petition Domestic Support Obligations is a condition of plan confirmation pursuant to 11 USC § 1325(a)(8).

B. By signing this plan, the debtor and counsel representing the debtor certify that this plan does not alter the provisions of Local Bankruptcy Form 13-4, except as provided in Section XII below. Any revisions to the form plan not set forth in Section XII shall not be effective.

XII. Additional Case-Specific Provisions: (must be separately numbered)

Attorney for Debtor(s)	DEBTOR	Last 4 digits SS#	Date
Date	DEBTOR	Last 4 digits SS#	Date

OFFICE RECEPTIONIST, CLERK

To: Jaimie O'Tey
Cc: Ken Masters; lizardlawfirm@leonardmoen.com; jeff@wellsandjarvis.com; Phil Talmadge
Subject: RE: Arp v. Riley / Case No. 92780-4 - Response to Amicus

Rec'd 5/6/16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jaimie O'Tey [mailto:jaimie@appeal-law.com]
Sent: Friday, May 06, 2016 4:31 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Ken Masters <ken@appeal-law.com>; lizardlawfirm@leonardmoen.com; jeff@wellsandjarvis.com; Phil Talmadge <phil@tal-fitzlaw.com>
Subject: Arp v. Riley / Case No. 92780-4 - Response to Amicus

Attached for filing is Respondent Arp's Response to Amicus and attachments Appendix A – D.

Arp v. Riley, et al.
Washington State Supreme Ct No. 92780-4

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Thank you,
Jaimie

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