No. 72613-7-I

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

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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.

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# REPLY BRIEF

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## INTRODUCTION

Benjamin Arp fully disclosed his cause of action to the bankruptcy court, Trustee, and creditors: a serious accident, not his fault, causing his memory loss, and leading to his failure to make timely payments beyond the roughly $150,000 he had already paid to his creditors. Sierra[1] apparently believes that Arp had to disclose something more than this. But it provides no authority for its harsh claims, which are contrary to law.

Indeed, Sierra never explains what more Arp could have or should have said. It is inconceivable that Sierra may escape liability for Riley's reckless and damaging misconduct simply because Arp did not – in addition to describing plainly his cause of action – simply repeat, "this is a cause of action." This is particularly true where, as here, it is Sierra that caused Arp to lose his memory.

Bottom line, under the confirmation order, post-confirmation assets captured by 11 USC § 1306 ***remained vested*** in Arp, so his claims were never property of the estate. Arp met his duty to disclose his change in circumstances. He had no further duty. This Court should reverse and remand for trial of Arp's cause of action.

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[1] We adopt Riley and Sierra's use of "Sierra" for both of them in this Reply.

## REPLY RE STATEMENT OF THE CASE

### A. The injuries Ben Arp suffered at Sierra's hands are wholly germane to the trial court's inequitable ruling.

Sierra begins its Statement of the Case with the argumentative assertion that what actually happened here – Riley, while talking on his cell phone in the course of his employment, collided into the back of Arp's car at 60 m.p.h. – "has no bearing on the trial court's order granting summary judgment against Arp." BR 2. But judicial estoppel is an equitable doctrine. Its use to avoid undeniable liability should be severely limited.

### B. Sierra concedes that Arp's wage earner plan was confirmed nearly a year before Riley collided into him and that under the confirmation order, all § 1306(a) assets remained vested in Arp, the debtor.

Sierra makes a number of irrelevant assertions, but concedes several key facts: first, the bankruptcy court confirmed Arp's wage earner plan on December 17, 2009, nearly a year before Riley collided into him on October 5, 2010. BR 3-4. Second, the confirmation order provides that all § 1306(a) assets remained vested in Arp. BR 4. That is, post-confirmation interests like Arp's claims against Sierra never became property of the estate, but rather remained property of the debtor – Arp.

### C. Sierra falsely asserts that Arp "*conceded*" the confirmation order required him to disclose any change in circumstances justifying an amendment to his plan.

Sierra falsely asserts that Arp "*conceded* the bankruptcy court's confirmation order required Arp to disclose any 'change in circumstances' that could . . . justify an amendment to his plan." BR 4 (citing RP 6-7). To the contrary, Arp *denied* this assertion:

> [ARP]: There was no change in circumstance that would give rise to an amended plan, because there was no additional income. There was nothing in the circumstance of the accident itself that could possibly lead to an amended plan.
>
> THE COURT: So do you assert that there was no duty to disclose or notify the trustee of this particular claim?
>
> . . .
>
> [ARP]: It is a change in circumstance, because Ken [*sic*] Arp was injured and was involved in the traffic accident, and certainly that had an impact on his ability to pay those payments, which he had defaulted on. And that was disclosed to the Court.
>
> THE COURT: So was there a duty to notify the trustee of a change in circumstances that was triggered by the accident and the potential claim?
>
> [ARP]: I think only to the extent that it might have impaired his ability to make the plan payments.
>
> THE COURT: So you say no?
>
> [ARP]: ***I would say no in the sense that the claim itself that arose from that accident was given to Ben Arp as his property. It was not property of the estate.***

RP 6-7 (emphasis added).

**D. The trial court failed to understand that property vested in the debtor is *not* property of the bankruptcy estate.**

Indeed, Arp went right on to explain to the trial court that it was mistakenly eliding the distinction between property of the estate, on the one hand, and property vested in the debtor, on the other:

> THE COURT: So let me ask questions about that as well. ... I was not a bankruptcy lawyer and only had one significant case dealing with any bankruptcy issues. And of course we almost never see them in Superior Court. Every once in a while.
>
> Isn't it . . . ***just because of the property of the estate might still be vested with the debtor, that doesn't mean it's not bankruptcy estate property, does it***? I mean, ***are those two different things***? Who has it as opposed to whether it's within the bankruptcy? And I might be saying it incorrectly.
>
> [ARP]: ***It is two different things in the sense of it can be the estate property or it can be the debtor's property***.
>
> THE COURT: ***Isn't it still a bankruptcy asset of the estate even if it's vested in the debtor in the context of a Chapter 13 bankruptcy***?
>
> [ARP]: ***It's not*** – and I'm using the word in the technical sense. ***It's not an asset of the bankruptcy estate***. It is still subject to the bankruptcy jurisdiction . . . – and I'll just read it. It's under number 6 of the confirmation order, that during the pendency of the plan hereby confirmed, all property of the estate as defined by 11 USC Section 1306(a), . . . shall remain vested in the debtor. ***Meaning that it's the debtor's property***. . . .

RP 7-8 (all emphases added). The trial court failed to understand this crucial distinction.

## E. Sierra falsely asserts that it is "undisputed" that Arp failed to give notice of his claim.

Sierra falsely asserts that "it is undisputed that Arp did not disclose . . . that he had any cause of action . . . ." BR 4. On the contrary, Arp fully disclosed his cause of action:

> On October 5, 2010 I was in an auto accident, not my fault, which resulted in significant brain injury to myself. Since that time I have experienced short-term memory loss and have quite frankly forgotten to make my plan payments.

CP 118 (BA App. B). Arp argued below (and maintains here) that this is sufficient disclosure under the confirmation order's ¶ 6:

> [W]hile there wasn't a particular duty to do so, because it could not have an effect on the plan . . . ***the fact is that the notice was made***. . . . ***we discharged that duty with that notice***.

RP 11 (emphasis added). Saying you were in an auto accident, not your fault, and suffered severe injuries, says you have a claim.

Sierra again falsely asserts (BR 6) that Arp "*concedes*" he did not disclose an action against Sierra, citing RP 12, lines 8-14:

> THE COURT: But there's nothing in the notification that you're pointing to that saying, I had had this accident, it wasn't my fault, I've got a claim. It's just, I have had an accident, and I have been impaired, correct? [*sic*]
>
> [ARP]: ***And that it wasn't my fault. But the facts of the accident were there***.

This is *not* a concession of non-disclosure. The trial court made an assertion, and Arp corrected it. He never conceded this point.

### F. The "demand letter" is irrelevant.

Sierra makes mention of a "demand letter" Arp's trial counsel (not his bankruptcy counsel) sent to Riley's insurer on March 25, 2011, arguing that Arp failed to disclose it to the bankruptcy court. BR 4-7. Nowhere does Sierra explain what provision in the Bankruptcy Code or the confirmation order required Arp to disclose a letter. He was not required to disclose it. This is irrelevant.

### G. Sierra's claim that Arp has never disclosed this case to the Trustee is unsupported – at best.

Finally, Sierra asserts that "Arp still has not notified the bankruptcy court or trustee of the existence of the underlying case or this appeal." BR 7. Sierra cites various places in the record where the long-discharged and closed bankruptcy docket appears. CP 67-112, 157-202, 276-321. These cites obviously do not support an assertion that Arp has never notified the trustee of this action. Arp cannot fully refute this assertion, however, without going outside the record – nor can Sierra support it. The Court should disregard it.

## ARGUMENT

### A. The standard of review is *de novo*.

Sierra says that Arp misstates the applicable standard of review as *de novo*. BR 9-10 (citing ***Harris v. Fortin***, 183 Wn. App. 522, 527, 333 P.2d 556 (2014); ***Arkison v. Ethan Allen, Inc.***, 160

Wn.2d 535, 538, 160 P.3d 13 (2007)). Under "Standard of Review," ***Arkison*** correctly says that summary judgments are reviewed *de novo*, but then says the "application of judicial estoppel" is reviewed for an abuse of discretion. 160 Wn.2d at 538 (citing ***City of Sequim v. Malkasian***, 157 Wn.2d 251, 261, 138 P.3d 943 (2006) (*de novo*); ***Bartley-Williams v. Kendall***, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006) (abuse of discretion)). ***Harris*** says that abuse of discretion applies on summary judgment, "where the moving party invoked the doctrine . . . to bar a claim based on a clearly inconsistent position taken in a prior proceeding." 183 Wn. App. at 527. This is limited.

An error of law is an abuse of discretion. But it is unnecessary to layer these two quite different standards on top of each other. The bottom line here is that this Court must review questions of law *de novo*, which applies here because the trial court misread and/or misapplied the confirmation order as a matter of law.

### B. The trial court erred because Arp was not required to disclose *more than* his cause of action under the plain language of the Bankruptcy Code and confirmation order.

Arp's leading point is that under the Bankruptcy Code and the confirmation order, his post-confirmation property interests remained vested in him, so his disclosure of his cause of action – the facts underlying his claim – more than sufficiently disclosed his change in

circumstances. He had no duty to amend his schedules or to otherwise to bring this claim into the estate. BA 12-17. Specifically,

- 11 USC § 541 captures all debtor assets at the time of filing, with a few exceptions, so does not capture Arp's personal-injury claim, which arose years after filing; and
- 11 USC § 1327 provides that confirmation vested all estate property in Arp, unless the confirmation order provided otherwise; and
- 11 USC § 1306(a) captures all post-confirmation property interests, including Arp's potential claims against Sierra; but
- the confirmation order specifically provides that all § 1306(a) property – including Arp's post-confirmation property interest in this potential claim – "shall remain vested in" Arp, so it never became property of the estate. CP 114.

Since the potential claim was not property of the estate, but rather property of the debtor, the trial court erred in applying judicial estoppel on the theory that Arp failed to disclose estate property – Arp fully disclosed his cause of action,[2] but he had no further duties.

Sierra offers a disquisition on bankruptcy law – with few citations. BR 10-13. This Court should disregard it. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (not considering argument unsupported by authority). In any event, it is not fully consistent with reality. For instance, Sierra

[2] A "cause of action" is the "ground on which the plaintiff's case is based." WEBSTER'S THIRD NEW INT'L DICTIONARY 356 (1993). That is, a "group of operative facts giving rise to one or more bases for suing." BLACK'S LAW DICTIONARY 251 (9th Ed. 2009). Arp thus disclosed his cause of action.

suggests that Chapter 13 bankruptcy is a negotiation and that the plan is an agreement. BR 11. But the Code dictates the plan components. *See, e.g.*, § 1322 (allowed and required plan components); § 1325(a) ("court *shall* confirm" plan complying with Code); § 1328(a) (court "shall grant the debtor a discharge"). Confirmation and discharge are mandatory, not by agreement.

Sierra says that Chapter 13 plans are "merely interlocutory" BA 12. But a plan confirmation order is a final order. *See*, *e.g.*, ***United Student Aid Funds, Inc. v. Espinosa***, 559 U.S. 260, 269, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) ("The Bankruptcy Court's order confirming [the debtor's] proposed plan was a final judgment"). And Sierra implies that plans are just modified whenever something changes (BR 13) but under § 1329(c), the "court may not approve a period that expires after five years after" the first payment is due. Notwithstanding any attempt to modify, Arp's plan could not extend more than five years. It reached its sixtieth month in July 2013, and no additional income was available – nor is it available today.

Finally, Sierra argues that Arp made assets unavailable to his creditors. BR 3. But under Code law, exemptions are favored and are generally liberally construed in debtors' favor. *See*, *e.g.*, ***Law v. Siegel***, __ U.S. __, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014) (even

debtor who committed fraud allowed to retain exemption without surcharge); ***Myers v. Matley***, 318 US 622 at 625, 63 S. Ct. 780, 87 L. Ed. 1043 (1943) (exemption upheld even though debtors had failed to file homestead declaration properly); ***In re Gitts***, 118 B.R. 174 (9th Cir. B.A.P., 1990), *aff'd* 927 F. 2d 1109 (9th Cir. 1991) (same). Code law is nothing like Sierra suggests.

Sierra also offers a disquisition on judicial estoppel. BR 13-16. Notwithstanding Sierra's inflammatory – and false – rhetoric about Arp "defrauding" creditors, and its somewhat ironic complaint that *Arp* is making a "hyper-technical argument," there is nothing salient here. It amounts to little more than asserting that Washington applies judicial estoppel – unlike here – when appropriate.

### C. Sierra fails to recognize or address the dispositive issue in this appeal, misreads the confirmation order, and cites only authority that supports Arp or is inapposite.

Sierra first mentions what it calls the "dispositive inquiry" at BR 16 – yet misstates the issue. The dispositive question is not whether "Arp had a duty to disclose the underlying case to the bankruptcy court, trustee, and his numerous creditors" – Arp did disclose the accident and injuries – his cause of action – but no "underlying case" existed prior to confirmation. The dispositive question is thus whether the Code and the confirmation order

required Arp to disclose *more than* his cause of action, where both Code and order vested the action solely in him.

Sierra provides a strained reading of the confirmation order at BR 17-19. This is contrary to both ***Johnson v. Si-Cor, Inc.***, 107 Wn. App. 902, 28 P.3d 832 (2001) and ***Castellano v. Charter Communications, LLC***, 2013 U.S. Dist. LEXIS 164636 (W.D. Wa. 2013). *See* BA 17-23. Simply put, these cases acknowledge that all estate property acquired post-confirmation is vested in the debtor, so judicial estoppel does not arise due to an allegedly incomplete disclosure of post-confirmation claims where, as here, the confirmation order says such claims remain vested in the debtor. *Id.* Sierra literally *ignores* ***Castellano***, Judge Bryant's plainly apposite authority. There is no apposite authority to the contrary.

Paragraph 6 of the order begins, "all property of the estate as defined by 11 USC § 1306(a), shall remain vested in the debtor." CP 114 (BA App. A). The additional ¶ 6 language ("the debtor shall not . . . lease, sell, transfer, encumber or otherwise dispose of such property") thus refers to property vested in the debtor. *Id.* But contrary to Sierra's claims, Arp did not "encumber" that property. BR 18. He still holds it free and clear. And he obviously did not "hide" it

by telling the Trustee that he suffered serious injuries in an accident that was not his fault. *Id.* That is his cause of action.

Sierra mischaracterizes Arp's claims at BR 18-19: Arp does not claim that his "cause of action was not a 'change in circumstances' because it did not result in an immediate cash benefit." BR 18. Rather, the change was his loss of memory caused by Sierra's negligence. Arp had – and has – no new income to disclose. And as Sierra concedes, "Arp directly informed the bankruptcy court his motor vehicle accident was a significant event." BR 19. Again, Arp fully disclosed his cause of action.

Sierra cites, but does not discuss, ***In re Flugence***, 738 F.3d 126 (5th Cir. 2013), which supports Arp. BR 20. There, like here, a Chapter 13 debtor had her plan confirmed, after which she was injured in a car accident. 738 F.3d at 128. But unlike here, her plan was then amended, yet she failed to disclose the potential claim during that process. *Id.* Also unlike here, the amended order stated that the bankruptcy estate's assets *would not revest in the debtor until discharge*. *Id.* at 130. Also unlike here, those defendants discovered the debtor's non-disclosure and successfully moved to reopen her bankruptcy, and the bankruptcy court estopped the debtor, but not the Chapter 13 trustee. *Id.* at 128.

After an intervening appeal in the District Court, ***Flugence*** affirmed the bankruptcy court. *Id.* at 132. It recognized the "possible conflict" between § 1306(a)(1) and 1327(b). 738 F.3d at 129-30 & n.2 ("although a cause of action acquired post-confirmation and pre-closure, -dismissal, or -conversion would seem, on the one hand, to be 'property of the estate' under § 1306(a)(1), it would also appear, on the other hand, to have 'vest[ed] . . . in the debtor' under § 1327(b)"). But the conflict was "irrelevant" because §1327(b) vests all estate property in the debtor, "*unless otherwise specified by the confirmation plan* – and here, the plan explicitly stated that the estate's assets would *not* revest in the debtor until discharge." *Id.* at 130 & n. 3 (second emphasis added).

By contrast, Arp's plan confirmation order expressly states that "all property of the estate, as defined by . . . § 1306(a), shall remain vested in the debtor." CP 114, BA App. A (emphases added). In other words, ***Arp's confirmation order itself resolved any ambiguity between § 1306(a) and § 1327(b), leaving post-confirmation property interests vested in the debtor***. Unlike in ***Flugence***, there is no "uncertainty" or ambiguity here: post-confirmation property interests remained vested in Arp.

And unlike the initial confirmation order in ***Flugence***, Arp's confirmation order was never amended, and thus was final and binding. *See, e.g.*, ***Espinosa***, 559 U.S. at 269 ("The Bankruptcy Court's order confirming [the] proposed plan was a final judgment"). Sierra ignores this dispositive difference between ***Flugence*** and this case: Arp may rely on the confirmation order vesting all estate property in him. Sierra never even attempted to set that order aside.

Sierra also cites – and partially quotes the middle of a paragraph from – an inapposite Indiana decision, ***In re Wheeler***, 503 B.R. 694 (Bankr. N.D. Ind. 2013). BR 20. The omitted start of the paragraph is material here (503 B.R. at 697):

> Debtors should have disclosed the social security disability award and the receipt of social security benefits; it represented a material change in their income and circumstances.

The ***Wheeler*** debtors told the court they would not receive any SSI benefits, but then failed to disclose tens of thousands of dollars in SSI income. *Id.* at 696. *Income* is always material, and it must always be disclosed. *Id.* (citing, *inter alia*, 11 USC § 521(f)(4)). But Arp has never received income from Sierra's gross negligence. ***Wheeler*** is neither apposite nor controlling. Sierra has no authority. This Court should reverse the trial court's incorrect judicial estoppel ruling.

### D. Arp never claimed that the confirmation order "removed his duty to disclose" – he did disclose his cause of action.

Sierra again misstates Arp's argument, the confirmation order, and the Bankruptcy Code, at BR 21-24. First, Arp never contended that "the confirmation order removed his duty to disclose." BR 21. Rather, Arp *did disclose* his changed circumstances and his cause of action; and § 1306(a) *could* capture all post-confirmation property (including his potential claims); but the confirmation order provides that all § 1306(a) post-confirmation property ***remained*** vested in Arp, so his disclosure of his cause of action was more than adequate, and he had no further duties. BA 12-16, 26-27.

Sierra either misstates or ignores the effect of § 1306(a), which is inoperative due to the confirmation order. Again, § 1306 normally captures "all property . . . that the debtor acquires after the commencement of the case but before the case is closed," which plainly encompasses Arp's claims against Sierra. But the confirmation order instead says that "all property of the estate, as defined by . . . § 1306(a), ***shall remain vested in the debtor***." CP 114, BA App. A (emphasis added). As a result, there was no property of the estate to disclose – it was all property of the debtor – *ab initio*. There was no duty to further disclose it. *See, e.g.*, ***Castellano***.

Sierra assumes – without citing authority – that the statement in ¶ 6 (property vested in debtor is "under the exclusive jurisdiction of the [bankruptcy] Court") *ipso facto* means that Arp had to disclose *more than* his cause of action. BR 22-23. But this language merely ensures the debtor may not "lease, sell, transfer, encumber or otherwise dispose of such property" before his plan is completed. CP 114, BA App. A. This language cannot and does not bring property vested in the debtor into the bankruptcy estate.

### E. Arp never argued that the Bankruptcy Code "removed his duty to disclose" – he disclosed his cause of action.

Similarly to the above analysis, Arp has never argued that the Bankruptcy Code "removed his duty to disclose the cause of action at issue." BR 24. On the contrary, Arp did disclose his cause of action – the facts giving rise to his claims against Sierra.

Nor did Arp ever assert that "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 property identified in § 541(a)(5) and (7)." *Id.* Rather, Arp expressly argues (at BA 15-16, and throughout this Reply) that (as Sierra puts it) "§ 1306(a) expressly expands the scope of the bankruptcy estate." BR 24. But Sierra simply fails to come to grips with the plain language of the

confirmation order providing that all § 1306(a) assets shall ***remain vested*** in Arp. BR 24-31. ***Castellano*** is dispositive.

Sierra continues to mischaracterize the issue as whether Arp had *any* duty to disclose. BR 25-29. Rather, the issue is whether he had a duty to disclose *more than* his cause of action. Sierra cites no case saying that full disclosure of a cause of action – the facts giving rise to a claim – is insufficient. There are no such cases.

Thus, the cases Sierra cites at BR 25-29 are not germane to the relevant issue or legal analysis for the reasons stated in the parentheticals below.[3] Three cases deserve fuller comment, however, ***In re Barbosa***, 235 F.3d 31 (1st Cir. 2000); ***Edwards v. Alamo Group (USA)***, 24 Fed. Appx. 693 (9th Cir 2001); and ***In re Waldron***, 536 F.3d 1239 (11th Cir. 2008). In ***Barbosa***, unlike here, the debtors were estopped from profiting from the sale of property that was *originally part of the bankruptcy estate* and subject to a *confirmation modification action*, where the debtors "stripped down"

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[3] ***Kimberlin v. Dollar General Corp.***, 520 Fed. Appx. 312 (6th Cir. 2013) (refusing to address §§ 1306 & 1327, where debtor conceded her duty to disclose); ***Flugence*** (which supports Arp, as discussed *supra*); ***Allen v. C&H Distrib., LLC***, No. 10-1604 (W.D. La. Mar. 26, 2015) (debtors sought and received three plan amendments after a post-confirmation accident, but failed each time to disclose the PI suit); ***Hamilton v. State Farm Fire & Cas. Co.***, 270 F.3d 778 (9th Cir. 2001) (*see* BA 16-17); ***Pelzel v. LSI Title Agency, Inc.***, No. 3:11-cv-05106 (W.D. Wa. Sept. 18, 2014) (debtor filed suit *before filing bankruptcy* and failed to disclose it).

a mortgage and realized 215% of the property's value projected in the plan. 235 F.3d at 33-34, 41.

Contrary to Sierra's contention that ***Barbosa*** recognizes Chapter 13 debtors' continuing duty to disclose *a cause of action* that arises post-confirmation (BR 26), ***Barbosa*** expressly adopts the rule "that by virtue of §§ 1327(b)-(c), property of the estate at the time of confirmation vests in the debtors free of any claims from the creditors" *Id.* at 36-37. While ***Barbosa*** also holds that proceeds from the sale of property that was *originally part of the bankruptcy estate* are captured by § 1306(a)(1), that decision says nothing about a new cause of action that arises post-confirmation, much less does it address a confirmation order providing that § 1306(a) property interests remain vested in the debtor. *Id.* Sierra's claim (BR 27) that ***Barbosa*** "entertained and rejected the exact same argument made by Arp here" is both false and misleading.[4]

In ***Waldron***, debtors suffered injuries in a car accident a few months after their plan was confirmed, but they apparently conceded that proceeds arising from that accident would be property of the

[4] ***Barbosa***'s main analysis – that *res judicata* does not bar a trustee's modification action in the circumstances of that case – may be called into question by the United States Supreme Court's more recent decision affording *res judicata* effect to confirmation orders, ***Espinosa***, *supra*.

estate, and so obtained bankruptcy court approval of a $25,000 partial settlement of their claims. 536 F.3d at 1241. They later sought approval to settle their UIM claims without further court approval, claiming that *those* accident proceeds would not be property of the estate. *Id.* The bankruptcy court rejected that argument, and the District Court and the 11th Circuit affirmed. *Id.*

But contrary to Sierra's claims, the ***Waldron*** court expressly would "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 Sierra cites – does not address a confirmation order that says § 1306(a) property interests remain vested in the debtor.[5]

In ***Edwards***, the Chapter 11 debtor knew of his potential causes of action *before confirmation*, so this unpublished memorandum decision plainly has no application here. 24 Fed.

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[5] The ***Waldron*** court's rationale is essentially that "'Congress . . . intended . . . that the debtor repay his creditors to the extent of his capability ***during the Chapter 13 period***.'" 536 F.3d at 1246 (quoting ***Arnold v. Weast (In re Arnold)***, 869 F.2d 240, 242 (4th Cir. 1989) (citing ***Deans v. O'Donnell (In re Deans)***, 692 F.2d 968, 972 (4th Cir. 1982)); *see also* 11 USC § 1325(b); ***Barbosa***, 235 F.3d at 37)) (emphasis added). That period has long-since passed, and Arp paid off his plan in full.

Appx. at 694. Nor does it even suggest – much less stand for the proposition – that "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 accurate disclosures." BR 29 (citing ***Edwards***; ***In re Fetner***, 218 B.R. 262 (Bankr. D.D.C. 1997); and ***In re Moore***, 175 B.R. 13 (Bankr. S.D. Ohio 1994)).[6] What ***Edwards*** actually says is that a Chapter 11 "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***." 24 Fed. Appx. at 694 (second emphasis added; cite omitted). But Arp's cause of action was not part of the bankruptcy estate at the outset, and "remained vested" in him thereafter, so he had no duty to list it.

**F. *Johnson v. Si-Cor* remains apposite.**

Sierra attempts to distinguish ***Johnson*** on the grounds that Johnson's Chapter 13 bankruptcy was converted to a Chapter 7, and 11 USC § 348(f)(1)(a) says that the converted bankruptcy estate includes only property of the estate at the time the Chapter 13 was

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[6] ***Fetner*** and ***Moore*** each concern listing a debtor's *exemptions*, and have nothing to do with Sierra's assertion above.

filed, so the post-confirmation cause of action was not property of the new Chapter 7 estate. BR 29-30. As with so many things in bankruptcy, however, this issue is *much* more complex than Sierra suggests – there are *many* cases on the subject. *See, e.g.*, ***In re Sundale, Ltd.***, 471 B.R. 300, 304-06 (S.D. Fla. 2012) (citing no fewer than ***five*** different federal approaches to this issue, and ***nine*** cases); *see also* ***Rogers v. Freeman***, 527 B.R. 780, 784-87 (N.D. Ga. 2015) (quoting ***Sundale*** at length, and adding ***eight*** decisions agreeing with it, and ***three*** disagreeing with it – that's ***20*** cases so far).

Indeed, although Sierra itself repeatedly (and correctly) argues that § 1306(a) makes post-confirmation assets property of the estate, it fails to recognize that as a result, the post-confirmation cause of action was property of the estate in ***Johnson***. Put as simply as possible, although §1327 "revests" the property of the estate in the debtor at confirmation, *it cannot "revest" post-confirmation assets in the debtor* – they do not yet exist. ***Rogers***, 527 B.R. at 787-88. Instead, § 1306(a) takes all post-confirmation assets into the estate. *Id.* Thus, contrary to Sierra's argument, Johnson's post-confirmation cause of action was property of the estate post-confirmation. *Id.* ***Johnson*** remains apposite and helpful.

But it is true that Arp's case is different from ***Johnson*** – it is stronger. Here, the confirmation order expressly provided that those § 1306(a) assets that normally would be captured by the estate "remain vested" in Arp. Thus, Arp had no duty to disclose more than his change in circumstances – his cause of action. He fully disclosed those facts, and judicial estoppel does not apply.

**G. "Vesting" gave Arp the assets free and clear of all creditor claims, so it is not "irrelevant."**

Sierra again misstates Arp's argument, claiming that he relies on ***§ 1327*** for the idea that the post-confirmation cause of action vested in him. BR 31-32. Rather, the ***confirmation order*** provides that all § 1306(a) assets – including the cause of action that Arp fully disclosed – remained vested in Arp. As explained immediately above, §1327 vests only pre-confirmation assets in the debtor at confirmation. But that does not produce Sierra's "absurd" result (that no modification could occur, BR 33) because Order ¶ 7 (CP 114) does capture post-confirmation *income*. Here though, none exists, so Arp's disclosure of his cause of action was more than adequate.

**H. There is no difference between the "*fact*" that an auto accident occurred and Arp's cause of action.**

Sierra's next argument (BR 33-39) is premised on the notion that disclosing the facts is somehow different than disclosing the

cause of action. As explained above, a "cause of action" ***is*** the "ground on which the plaintiff's case is based." WEBSTER'S at 356. It ***is*** a "group of operative facts giving rise to one or more bases for suing." BLACK'S at 251. Arp fully disclosed his cause of action.

Sierra then faults Arp for his loss of memory that Sierra caused. BR 34-35. There is nothing "suspicious" or "inadequate" about his full disclosure of his cause of action. BR 35. And neither of the cases Sierra cites holds that fully disclosing a cause of action is insufficient under the Bankruptcy Code – they hold that *not* disclosing a cause of action is a problem. *Id.* (citing ***Baldwin v. Silver***, 147 Wn. App. 531, 196 P.3d 170 (2008); ***Miller v. Campbell***, 164 Wn.2d 529, 192 P.3d 352 (2008)). No Code provision or case required Arp to amend his schedules to add a claim that remained vested in him and outside the bankruptcy estate, nor to otherwise disclose more than his cause of action. Sierra cites none. BR 36-39.

## I. The trial court abused its discretion where, as here, Arp fully disclosed his cause of action and had no legal duty to amend his schedules or otherwise bring that asset – which remained vested in him – into the estate.

For all the reasons stated above, Arp did not take inconsistent positions (BR 39-42): he could not disclose a non-existent asset in his bankruptcy schedules; when his counsel told him that the

bankruptcy would be dismissed because he was forgetting to make his payments, he fully disclosed his cause of action and completed his wage earner plan. There is nothing inconsistent here.

Nor did the bankruptcy court "accept" any inconsistent position by closing the fully completed Chapter 13 proceeding. BR 42-43. Again, Arp had no duty to schedule a § 1306 post-confirmation asset that remained vested in him and was never property of the estate under the confirmation order. And the bankruptcy court did not "accept" a non-disclosure, but rather received a full disclosure and closed the bankruptcy.

Finally, Arp obviously has not unfairly benefited from fully disclosing the change in circumstances constituting his cause of action. He fully paid-off his wage-earners plan, which was his right. He had no duty to schedule an asset that remained vested in him under the confirmation order. And he has a right under Washington law to seek just compensation for the severe injuries Sierra inflicted on him, and has plainly suffered severe delays in that regard.

The trial court abused its discretion because its interpretation of the law and the confirmation order is incorrect as a matter of law. The Court should reverse and remand for trial.

## J. Arp has standing.

Arp's cause of action was never property of the estate. He plainly has standing to sue Sierra for Riley's gross negligence in running into him at 60 m.p.h. while talking on the phone. The trial court legally erred in reaching the opposite conclusion.

## CONCLUSION

It is difficult to listen to Sierra pose as though it cared about Arp's creditors. If it had *any* concern for them, it would have sought to reopen the bankruptcy. Opportunistically, it does nothing to "help" the creditors. It has neither legal authority for its position nor the moral high ground. This Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 16th day of June 2015.

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**CERTIFICATE OF SERVICE BY MAIL AND/OR EMAIL**

I certify that I caused to be mailed, and/or emailed a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 16th day of June, 2015, to the following counsel of record at the following addresses:

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