

No. 66725-4-I

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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SPARK NETWORKS, PLC,

Respondent,

v.

WILL KNEDLIK,

Judgment Debtor

And

ANNA GIOVANNINI,

Appellant.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 AUG 18 PM 1:31

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Honorable Douglass A. North)

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Judgment Debtor Will Knedlik (“Knedlik”), a disbarred former attorney, had a \$29 million dollar judgment entered against him in California in 2002 in favor of Spark Networks, Limited, fka Spark Networks PLC, fka Matchnet, PLC (“Spark”)<sup>1</sup>. Spark initiated this proceeding in the King County Superior Court to partially satisfy the judgment by executing upon Knedlik’s Washington assets, including certain real property in Bellevue located at 15043 NE Bel-Red Road, Bellevue, Washington (“the Bel-Red Property”). It is the Bel-Red Property which is the subject of this latest appeal brought by Appellant Anna Giovannini (“Giovannini”)<sup>2</sup>.

A litigation guarantee relating to the Bel-Red Property listed Giovannini as a beneficiary of a Deed of Trust purporting to secure an indebtedness from Knedlik in the original amount of \$316,422.69. This deed of trust was recorded against the Bel-Red Property on November 21, 1991 (the “1991 Deed of Trust”). CP at 120.

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<sup>1</sup> On December 31, 2010, the judgment was assigned by Spark to Spark Networks USA, LLC. CP 321-327.

<sup>2</sup> This is now the third appeal in this action which has been brought before this Court by Giovannini. Previously, this Court has decided two appeals involving Giovannini relating to another parcel of property owned by Knedlik located on Rose Point Lane in Kirkland WA (the “Rose Point Lane Property”) and previously executed upon by Spark under its judgment. This Court’s rulings in the previous appeals heard under Case Number 62555-1-I (“Spark I”) and Case Number 64757-1-I (“Spark II”) are the law of this case. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

To address the validity of the 1991 Deed of Trust and certain other adverse claims asserted by Giovannini relating to the Bel-Red Property, Spark filed a Motion for Order to Show Cause and For Summary Judgment Pursuant to RCW 6.32.270 in order to have the validity of Giovannini's claims relating to the Bel-Red Property litigated. CP 42 – 61.

In granting summary judgment in favor of Spark, the trial court found in relevant part that: (1) that Giovannini was judicially estopped from claiming to hold any claim of interest in the Bel-Red Property; (2) that the 1991 Deed of Trust against the Bel-Red Property was time barred and unenforceable; and (3) that her asserted claim of adverse possession of the Bel-Red Property failed. CP 29-40.

This Court should affirm the trial court.

## **II. COUNTERSTATEMENT OF ISSUES**

**1. RCW 6.32.270.** Does RCW 6.32.270 allow the court to make Giovannini a party to this action to adjudicate her claims relating to the Bel-Red Property?

**2. Judicial Estoppel.** Did the trial court error and abuse its discretion in judicially estopping Giovannini from claiming any interest in the Bel-Red Property when she failed to list any such interest in her sworn bankruptcy court schedules and where such sworn schedules are clearly inconsistent with Giovannini's current assertions?

**3. Adverse Possession.** Did the trial court error in finding that Giovannini's claim of adverse possession of the Bel-Red Property failed when Giovannini failed to present evidence relating to all of the necessary elements?

**4. Res Judicata.** Should this Court find that Giovannini cannot now raise arguments of res judicata and collateral estoppel for the first time on appeal when she did not raise these arguments in her opposition to summary judgment before the trial court?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. The Sheriff's Sale of the Bel-Red Property.**

On January 8, 2010, Spark obtained a Writ of Execution for a sheriff's sale of the Bel-Red Property. CP at 99. Knedlik moved to quash the writ but the trial court denied his motion finding in part: (1) fee simple title to the Bel-Red Property was conveyed to Knedlik on December 7, 1990, by a marital dissolution decree entered by Judge Warren Chan, as amended by an Order entered on February 7, 1991; (2) Knedlik had not validly conveyed his fee title interest in the Bel-Red Property to any other entity or individual since it was conveyed to him in 1990; and (3) the Blue Rapids Investment Trust III Limited Partnership ("Blue Rapids") had no separate legal existence from Knedlik and was nothing but his alter ego. CP 107 -108.

Spark was the successful bidder at the sheriff's sale of the Bel-Red Property held on March 5, 2010. CP 99-100. The trial court confirmed

the Sheriff's Sale of the Bel-Red Property to Spark by an order filed July 26, 2010. CP 111-113.

A litigation guarantee relating to the Bel-Red Property listed Giovannini as a beneficiary of the 1991 Deed of Trust granted by Knedlik and purporting to secure an indebtedness from Knedlik in the original amount of \$316,422.69. The 1991 Deed of Trust was recorded against the Bel-Red Property on November 21, 1991. CP at 120.

To address the validity of the 1991 Deed of Trust and certain other adverse claims asserted by Giovannini relating to the Bel-Red Property in a never served complaint, *see* CP 68-75, Spark filed a Motion for Order to Show Cause and For Summary Judgment Pursuant to RCW 6.32.270 in order to have the validity of Giovannini's alleged claims relating to the Bel-Red Property litigated. CP 42-61.

Previously in this proceeding, Giovannini had made similar adverse claims of interests in the Rose Point Lane Property, which had also been owned by Knedlik. All of Giovannini's claims were rejected by the trial court. On appeal, this Court affirmed the trial court concluding that Giovannini's claimed interests in the Rose Point Lane Property were invalid and could not be enforced because: (1) they were time barred; and (2) Giovannini was judicially estopped from claiming them. CP 79-90.

Giovannini's and Knedlik's petition for discretionary review of this Court's decision was denied on September 7, 2010. CP at 92.

Like Giovannini's claims to hold adverse interests in the Rose Point Lane Property, Giovannini's similar claims regarding the Bel-Red Property are equally baseless and untenable.

**B. The 1991 Deed of Trust Against the Bel-Red Property is Time Barred and Unenforceable.**

In a prior filing before the trial court relating to the Rose Point Lane Property, Giovannini produced a promissory note from Knedlik (the "1991 Note) dated November 20, 1991, in the amount of \$316,422.69, which was the exact amount reflected on the 1991 Deed of Trust against the Bel-Red Property. The 1991 Note states "**after date, without grace,** I/We promise to pay[.]" There is no maturity date on the face of the 1991 Note. CP at 131. As such, as this Court has already held, the statute of limitations on the 1991 Note has long since expired and the trial court correctly concluded that the 1991 Deed of Trust against the Bel-Red Property was time barred and unenforceable. CP 37, CP 85-86.

**C. Giovannini's Convoluted Claim of Adverse Possession of the Bel-Red Property is Meritless.**

In response to the order to show cause, Giovannini attempted to assert a convoluted meritless claim of adverse possession. CP at 7. The

main thrust of Giovannini's convoluted assertions appear to be her allegation that "during the mid 1990's Respondent [Giovannini] undertook direct supervision of the 'Bel-Red Property' on behalf of Blue Rapids Investment Trust as trustor and trustee". CP at 10. Giovannini asserted this claim to the trial court in spite of having denied under penalty of perjury in her prior 2007 Bankruptcy having any interest in the Bel-Red Property or in any trust.

**D. Giovannini Had Previously Denied under Penalty of Perjury That She Had any Interests in the Bel-Red Property.**

On or about March 29, 2007, Giovannini filed a bankruptcy petition, with assistance of counsel, and under penalty of perjury with the United States Bankruptcy Court for the Western District of Washington (the "2007 Bankruptcy"). CP 162 - 164. Under Schedule A of her sworn bankruptcy schedules relating to her 2007 Bankruptcy, Giovannini was required to list "all real property in which [she had] any legal, equitable, or future interest." CP at 175. Additionally, Schedule A expressly required that Giovannini "[i]nclude any property in which [she held] rights and powers exercisable for [her] own benefit." *Id.* In her sworn Schedule A, Giovannini listed only her personal residence----claiming no interest whatsoever in the Bel-Red Property or in any other real property then owned by Knedlik. *Id.*

In Schedule B<sup>3</sup> to her 2007 Bankruptcy, Giovannini was required to list “all personal property of the debtor of whatever kind.” CP at 176. Giovannini expressly denied she was owed any accounts receivable. CP at 178. She further stated that the loans she allegedly made to Knedlik had been “assigned more than five years ago,” and had a value of “\$0.00.” CP at 178. Additionally, Item 19 of Schedule B required Giovannini to disclose any “[e]quitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property. CP at 178. She disclosed no such interests. CP at 178. Neither did she disclose the existence of any interests in any partnerships or joint ventures in response to Item 14. CP at 177. She did not disclose the existence of any interests in any trusts in response to Item 20.<sup>4</sup> CP at 178. Further, Item 35 of Schedule B required Giovannini to disclose “[o]ther personal property of any kind not already listed. CP at 180. There, she listed only her monthly Social Security benefits, and made no mention of any trust or limited partnership interests. CP at 180.

In addition to requiring full disclosure of her real and personal property, Giovannini’s sworn Statement of Financial Affairs in her 2007

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<sup>3</sup> Giovannini swore separately to the accuracy of her Schedules on April 11, 2007. CP at 189.

<sup>4</sup> Item 20 states: “Contingent and non-contingent interests in estate of decedent, death benefit plan, life insurance policy, or trust”. CP at 178.

Bankruptcy required her to list “all property owned by another person that the debtor holds or controls.” She marked an X in the box indicating “none”. CP at 206.

**E. Giovannini has Repeatedly Engaged in Inequitable Conduct Against Knedlik’s Creditors by Abusing the Courts.**

Between 1994 and 2007, Giovannini filed four “involuntary” bankruptcy petitions against her son Knedlik. All but one of the petitions were dismissed. CP at 237.

On May 25, 1995, during the first of her four involuntary bankruptcy petitions against Knedlik, the United States Bankruptcy Judge Thomas T. Glover held that **all three** of the deeds of trust on the Rose Point Lane Property that Knedlik executed on behalf of Giovannini between 1991 and 1994 were fraudulent conveyances “executed by Will Knedlik for the purpose of hindering, delaying or defrauding creditors and/or without receiving reasonably equivalent value in exchange therefore[.]” CP 258-259.

In 1997, Giovannini collaterally attacked Judge Glover’s judgment during her third “involuntary” bankruptcy action against Knedlik. Giovannini then appealed United States Bankruptcy Judge Karen A Overstreet’s denial of her collateral attack, and that appeal was also denied by the Bankruptcy Appellate Panel for the Ninth Circuit. CP 274-284.

Also during Giovannini's third "involuntary" petition against Knedlik, Judge Overstreet characterized Knedlik as a "serial filer" and Giovannini as a "so called creditor[.]" CP at 239.

In 1998, while Giovannini's third "involuntary" petition against Knedlik was still pending, Giovannini also sued Skagit Valley Publishing Company, a judgment creditor of her son, in King County Superior Court. Judge George Finkle dismissed Giovannini's action against Skagit Valley Publishing Company, finding that action "more probably than not is interposed for the improper purpose of frustrating the collection of defendant Skagit Valley Publishing Company's 1994 judgment against plaintiff's son and counsel Will Knedlik." CP at 287. Judge Finkle also found Giovannini and Knedlik "jointly and severally liable under Civil Rule 11" and levied a monetary sanction against them. CP at 287.

In December of 2007, in addition to dismissing Giovannini's fourth "involuntary" bankruptcy petition against Knedlik, Judge Overstreet ordered that Giovannini be referred to the U.S. Attorney's office for investigation of criminal abuse of the bankruptcy system. CP at 242. The United States Bankruptcy Panel for the Ninth District ("BAP") affirmed Judge Overstreet's ruling on June 30, 2008. CP 235 - 256.

#### IV. ARGUMENT

##### A. Standard of Review

This Court reviews the Superior Court's decisions granting Spark's summary judgment motion de novo. *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 563, 178 P.3d 1054, review denied 165 Wn.2d 1004 (2008). In a summary judgment motion, "[t]he nonmoving party is entitled to have the evidence viewed in a light most favorable to her and against the moving party" however, "the party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remains, or on having its affidavits considered at face value." *Id.* at 566. A party opposing summary judgment "must demonstrate the basis for her assertions." *Id.*

This Court reviews the Superior Court's decisions to invoke equitable remedies (including judicial estoppel and equitable subordination) for abuse of discretion. *See Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007); *Sorensen v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). The Superior court's denial of a motion for reconsideration is also reviewed for abuse of discretion. *Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637, rev. denied 133 Wn.2d 1012 (1997).

**B. The Trial Court Was Correct in Making Giovannini a Party Under RCW 6.32.270.**

Despite Giovannini's claims to the contrary, the Superior Court was completely within its authority to bring Giovannini into this action as a party to adjudicate the validity of her purported interests in the Bel-Red Property. RCW 6.32.270 provides in pertinent part that:

In any supplemental proceeding ,where it appears to the court that a judgment debtor may have an interest in or title to any real property, and *such interest or title is disclaimed by the judgment debtor or disputed by another person*...the court may, if the person or persons claiming adversely be a party to the proceeding, *adjudicate the respective interests of the parties* in such real or personal property, and may determine such property to be wholly or in part the property of the judgment debtor. If the person claiming adversely to the judgment debtor be not a party to the proceeding, *the court shall by show cause order or otherwise cause such person to be brought in and made a party* thereto[.]

RCW 6.32.270 (emphasis added).

Washington's Supreme Court has held that this provision was "intended to supplement the rest of the act in providing a *complete and adequate relief to judgment creditors* of the character formerly available under the common law procedure known as the creditor's bill in equity." *Junkin v. Anderson*, 12 Wn.2d 58, 73, 120 P.2d 548 (1941) *as amended* (1942) (emphasis added) (addressing Rem.Rev.S. § 638-1, the previous codification of RCW 6.32.270).

Supplemental proceedings are akin to proceedings *in rem*. See *Junkin*, 12 Wn.2d at 72; *Davis v. Woollen*, 191 Wash. 379, 382, 71 P.2d 172 (1937). Courts in supplemental proceedings have the power to add as parties those “over whose property, or over whose claim, or possible claim, to property, or lien thereon, the court has jurisdiction.” See *Junkin*, 12 Wn.2d at 72. Given the scope of a court’s power over real property in supplemental proceedings, “[i]f **any** interests are to be adjudicated, **all** the respective interests should be adjudicated. If this section be otherwise construed, the determinations reached in supplemental proceedings would be inconclusive in character and ***subsequent litigation would be unduly fostered.***” *Id.* at 73 (emphasis added).

Washington courts have long used this statutory authority to adjudicate interests in property when judgment debtors have colluded with others to shield assets from judgment creditors. See *e.g.*, *Pappas v. Talyor*, 138 Wash. 22, 30, 244 P. 390 (1926).

In fact, this is not the first time in this case that the trial court used RCW 6.32.270 to add Giovannini as a party. Prior to entry of the orders relating to the Bel-Red Property, the trial court had already properly determined that it had the power under RCW 6.32.270 to add Giovannini as a party and to adjudicate her claimed interests in the Rose Point Lane Property. CP 94-97, CP 144-155. These rulings were affirmed by this

Court. CP 79-90. Given Giovannini's filing of a separate action<sup>5</sup> seeking a judgment quieting title in her to the Bel-Red Property, after the trial court had confirmed the sheriff's sale of the Bel-Red Property to Spark, the trial court was correct and well within its authority to make Giovannini a party to a supplemental proceeding to resolve, once and for all, her claimed interests in the Bel-Red Property.

**C. Giovannini is Judicially Estopped from Claiming Any Interests in the Bel-Red Property.**

In her brief, Giovannini accuses the trial court of disregarding the rules of judicial estoppel. In doing so, she asserts that the Washington State Supreme Court has "squarely rejected tactical uses of judicial estoppel", citing *Miller v. Campbell*, 164 Wn.2d 529, 155 P.3d 154 (2008). Giovannini's long and convoluted argument concerning judicial estoppel obfuscates how simple the application of this long standing principle is in this case.

Both the United States Bankruptcy Code and the related bankruptcy court rules "impose on the debtor an express, affirmative duty to disclose all assets, including contingent and unliquidated claims." *Skinner v. Holgate*, 141 Wn. App. 840, 848, 173 P.3d 300 (2007);

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<sup>5</sup> See, CP 68-77

*Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539 n. 1, 160 P.3d 13 (2007). Consequently, courts may apply judicial estoppel to bankruptcy debtors who fail to list potential legal claims or assets and then later pursue those claims or assets in a different court. *Arkison*, 160 Wn.2d at 539.

Judicial estoppel “is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison*, 160 Wn.2d at 538. The purposes of judicial estoppel are: “(1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and the waste of time.” *Skinner*, 141 Wn.App. at 847 (emphasis added). Put more concisely, “the purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Skinner*, 141 Wn. App. at 849, citing *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

Three factors help courts determine whether to apply judicial estoppel: “(1) whether a party’s later position is “ ‘clearly inconsistent’ with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the

first or the second court was misled' ”; and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party, if not estopped”. *Arkison*, 160 Wn.2d at 538-39, *citing New Hampshire v. Maine*, 532 U.S. at 750-51.

Most importantly, previously in this case, the trial court had held that Giovannini was judicially estopped from claiming to hold any interest in the Rose Point Lane Property. This Court affirmed the trial court’s summary judgment relating to the Rose Point Lane Property establishing as the law of the case that judicial estoppel is appropriately applied here based upon Giovannini’s improper conduct before the respective courts. Now, in this appeal, the exact same evidence of Giovannini’s prior inconsistent statements are before this Court. And, as before, the elements for judicial estoppel, which have already been ruled on, are easily met.

As this Court quoted in *Spark II*:

“In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The doctrine promotes the strong policy of finality in the judicial process. *Roberson*, 156 Wn.2d at 41.

CP at 83.

In her opposition to Sparks' Motion for Summary Judgment, Giovannini claimed that she began the process of adverse possession in the mid-1990s and that she had completed that process by approximately 2004. CP 7-26. Yet, Giovannini did not disclose any interest at all in the Bel-Red Property when she filed a bankruptcy petition in March of 2007, under penalty of perjury and while represented by counsel.

**1. Giovannini's Sworn Statements are Clearly Inconsistent.**

Giovannini's claim to hold an interest in the Bel-Red Property is unquestionably inconsistent with the sworn statements she made in her 2007 Bankruptcy. In her sworn schedules and statement of financial affairs, made under penalty of perjury and with assistance of counsel, Giovannini never disclosed an interest in the Bel-Red property which she now claims she acquired by adverse possession by 2004.

For example, as noted above, under Schedule A of her bankruptcy schedules relating to her 2007 Bankruptcy, Giovannini was required to list "all real property in which [she had] **any** legal, equitable, or future interest." CP at 175. Additionally, Schedule A expressly required that Giovannini "[i]nclude any property in which [she held] rights and powers exercisable for [her] own benefit." CP at 175. In her sworn Schedule A, Giovannini listed only her personal residence---claiming no interest

whatsoever in the Bel-Red Property or in any other real property then owned by Knedlik. CP at 175.

In Schedule B<sup>6</sup> to her 2007 Bankruptcy, Giovannini was required to list “all personal property of the debtor of whatever kind.” CP at 156. Giovannini expressly denied she was owed any accounts receivable. CP at 178. She further stated that the loans she allegedly made to Knedlik had been “assigned more than five years ago,” and had a value of “\$0.00.” CP at 178. Additionally, Item 19 of Schedule B required Giovannini to disclose any “[e]quitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule of Real Property. CP at 178. She disclosed no such interests. CP at 178. Neither did she disclose the existence of any interests in any partnerships or joint ventures in response to Item 14. CP at 177. Giovannini did not disclose the existence of any interests in any trusts in response to Item 20. CP at 178. Further, Item 35 of Schedule B required Giovannini to disclose “[o]ther personal property of any kind not already listed. CP at 180. There, she listed only her monthly Social Security benefits, and made no mention of any trust or limited partnership interests. CP at 180.

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<sup>6</sup> Giovannini swore separately to the accuracy of her Schedules on April 11, 2007. CP at 189.

In addition to requiring full disclosure of her real and personal property, Giovannini's sworn Statement of Financial Affairs in her 2007 Bankruptcy required her to list "all property owned by another person that the debtor holds or controls. She marked an X in the box indicating "none". CP at 206.

Clearly, Giovannini's claim to hold an interest in the Bel-Red property is inconsistent with her prior sworn assertions to the bankruptcy court.

The trial court, in finding that Giovannini was judicially estopped correctly stated: "It's also quite clear that judicial estoppel is a bar to most, if not all of Ms. Giovannini's claims here. She has asserted inconsistent positions under penalty of perjury in other lawsuits, and it would make a mockery of our court system if you could take one position in one action and then turn around and take the opposite position and -- and be allowed to -- to sustain that position in a different action."<sup>7</sup> VRP at Page 10. This is exactly what Giovannini is attempting to do now in claiming an ownership interest in the Bel- Red Property when it's convenient, but not

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<sup>7</sup> This Court has similarly admonished Giovannini with respect to the Rose Point Lane Property stating: "Allowing her to maintain such claims now would support the appearance that she misled the bankruptcy court and her creditors and permit her to obtain an unfair advantage over Spark and her own creditors". CP 311-312, citing *Skinner v. Holgate*, 141 Wn. App. 840, 849-53.

doing so in her 2007 Bankruptcy filing when it was not.<sup>8</sup> The trial court correctly concluded Giovannini was judicially estopped from claiming any interest in the Bel-Red Property via adverse possession or otherwise.

**2. Allowing Giovannini to Assert Her Current Claims Relating to the Bel-Red Property Would Establish a Court Was Misled.**

Allowing Giovannini to claim now that she somehow owns the Bel-Red Property or hold interests secured by it would demonstrate that a court was misled by Giovanni's inconsistent sworn statements filed with each court under penalty of perjury. Such a ruling would necessarily mean that Giovannini successfully concealed assets from the Bankruptcy Court, the court appointed Chapter 13 Trustee, and her then-creditors.

**3. Allowing Giovannini to Assert Her Current Claims Relating to the Bel-Red Property Would Establish Unfair Advantage to Giovannini and Unfair Detriment to Spark As a Legitimate Creditor of Her Son.**

There is no question that allowing Giovannini to now claim she owns the Bel-Red Property by adverse possession or holds interests secured by it would allow her an unfair advantage over Spark, Knedlik's legitimate judgment creditor. For one, recognizing any such claim by Giovannini now would unfairly reward Giovannini's collusion with her

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<sup>8</sup> In fact, in her Opening Brief, Giovannini continues to assert that her Chapter 13 bankruptcy schedules were accurate. (See Appellant Br. At 16)

son Knedlik, already noted by at least four other courts, to shield her son's assets from his creditors.

Accordingly, all three elements of judicial estoppel are easily met regarding the Bel-Red Property. Under the law of this case, Giovannini is clearly estopped from claiming any interest in the Bel-Red Property, and to hold otherwise would undermine the courts and their judicial process.

**4. Giovannini's Application of *Miller v. Campbell* is Misplaced.**

In asserting her arguments against the application of judicial estoppel as the law of this case, Giovannini cites repeatedly to the decision of this Court in *Miller v. Campbell*, 137 Wn.App. 762, 155 P.3d 154 (2007). The holding in *Miller* is in no way analogous to the case at hand. *Miller* involved a plaintiff who had sued the estate of his deceased stepfather to recover damages for sexual abuse inflicted upon him by the stepfather when he was a child. *Id.* at 764. There, the trial court applied the doctrine of judicial estoppel because the plaintiff had failed to disclose this potential claim as an asset in his prior bankruptcy. *Id.* at 768. However, when the plaintiff had filed for bankruptcy, he was unaware of the serious injuries for which he was seeking compensation. *Id.* at 773. This Court found that, under these circumstances, the statements in the plaintiff's bankruptcy schedules were not inconsistent primarily based on

the unique nature of childhood sexual abuse which “may render the victim *unable* to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later.” *Id.* at 773.

In holding for the plaintiff, while admitting that he had a duty to disclose, the court reasoned that “judicial estoppel, an equitable doctrine, is not to be applied inflexibly.” *Miller*, 137 Wn.App. at 771. Under the circumstances, this Court held in *Miller* that judicial estoppel would not apply to the particular facts of that case because there were “no tenable grounds for concluding that Miller’s present lawsuit is not clearly inconsistent with his position in bankruptcy.” *Id.* at 774.

This case is not *Miller*. Giovannini is not a victim of sexual abuse. Her sworn statements to the bankruptcy court and to the trial court regarding her interests in the Bel-Red Property are clearly inconsistent and Giovannini is judicially estopped from claiming any interest in it.

**D. Giovanni’s Claims of Adverse Possession of the Bel-Red Property Are Untenable.**

Equally as untenable as her arguments against the application of judicial estoppel, are Giovannini’s claims of adverse possession of the Bel-Red Property. As with her briefing regarding judicial estoppel,

Giovannini has asserted long and meandering arguments meant to obfuscate how untenable her claim of adverse possession really is.

In her pleadings to the trial court, Giovannini failed to address each of the elements of adverse possession, much less provide evidence in support of each of those elements.<sup>9</sup>

In order to prove adverse possession, Giovannini must prove that she possessed the Bel-Red Property “in a manner that was (1) exclusive, (2) open and notorious, (3) hostile, and (4) actual and uninterrupted for the statutory period of 10 years.” *Teel v. Stading*, 155 Wn. App. 390, 393-94, 228 P.3d 1293 (2010). RCW 4.16.020(1); *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984). Further, “[t]he party claiming adverse possession must establish *each element by a preponderance of the evidence.*” *Teel*, 155 Wn. App. at 394 (emphasis added) (citing *Varrelman v. Blount*, 56 Wn.2d 211, 211-2, 351 P.2d 1039 (1960)). “To prove hostility, the claimant **must produce evidence** showing that [s]he treated the property as would a true owner through the statutory period.” *Id.* at 395 (emphasis added) (citing *Chaplin*, 100 Wn.2d at 860-61). Under Washington law, however, “[p]ermission, express or implied, from the

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<sup>9</sup> Even if Giovannini could somehow provide evidence for each element of her adverse possession claim, which she cannot, she still would be precluded from pursuing that claim by the doctrine of judicial estoppel.

true owner negates the hostility element because permissive use is inconsistent with making use of the property as would a true owner.” *Teel*, 155 Wn. App. at 394 citing *Chaplin*, 100 Wn.2d at 861-62.

In her brief, Giovannini argues that because she filed an involuntary petition in bankruptcy against Knedlik<sup>10</sup> that somehow this action: (1) stripped him “of all rights, interests and claims in real estate”; and (2) is sufficient proof of “hostility” and “exclusivity”. Appellant’s Brief at Page 44.

Simply stated, Giovannini cannot, and has not established any of the elements of adverse possession with any evidence. In fact, in her brief and previous pleadings, Giovannini has not even bothered attempting to list each element and her claim fails as a matter of law.

As a threshold matter, Giovannini cannot have acquired any interest, much less an adverse interest, in the Bel-Red Property through acquiring a limited partnership interest in Blue Rapids because: (1) Blue Rapids did not own the Bel-Red Property after 1990; and (2) Blue Rapids is merely Knedlik’s alter ego. CP 107-108. Of course, Giovannini implicitly acknowledged understanding that Knedlik himself, rather than

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<sup>10</sup> An action which was found to have been done in collusion with Knedlik wherein the bankruptcy court judge observed that Knedlik was using his mother in order to obtain relief under the bankruptcy laws. CP at 239.

Blue Rapids, owned the Bel-Red Property, when she accepted the 1991 Deed against that property from Knedlik in his individual capacity. CP 127-129. Further, by Giovannini's own account, regardless of whether Blue Rapids owned the Bel-Red Property or not, Knedlik voluntarily conveyed his interests in Blue Rapids to her and assisted her in respect to the Bel-Red Property. CP at 70. Knedlik's cooperation (or collusion) with Giovannini with respect to that property negates the required hostility element of Giovannini's "adverse" possession claim. *See Teel*, 155 Wn. App. at 394 citing *Chaplin*, 100 Wn.2d at 861-62. It is also consistent with Knedlik's decades-long pattern of using Giovannini as his legal proxy in an attempt to improperly shield his assets from legitimate creditors. Nor, of course, is there any evidence of exclusivity when Knedlik allegedly continued in the same role with respect to the Bel-Red Property as he had before the purported transfer of his interests in Blue Rapids to Giovannini. CP at 70.

Absent evidence that the required elements of adverse possession were met, Giovannini's specious claim collapses under its own weight. Even if there were any merit to Giovannini's adverse possession claim, however, which there obviously is not, Giovannini still could not assert it because, as noted previously, she is judicially estopped from doing so.

**E. Giovannini Cannot Raise Her Arguments Relating to Res Judicata and Claim Preclusion for the First Time on Appeal.**

Giovannini argues in her opening brief that under the doctrines of res judicata and collateral estoppel that Spark's execution against the Bel-Red Property was somehow precluded. Appellant's Brief at 28-29. Her sole support of these claims is a pleading (not a court order or judgment) filed in Knedlik's 1997 Bankruptcy entitled "Revised Statement of Trustee Concerning Investigation as to Possible Assets". CP at 14.

Initially, Giovannini is barred from bringing these arguments now because she has asserted them for the first time on appeal. Questions not raised in any manner before the trial court will not be considered on appeal. *Fisch v. Marler*, 1 Wn.2d 698, 717 97 P.2d 147 (1930); *Gill v. Strouf*, 5 Wn.2d 426, 105 P.2d 829 (1940). Objections based on a theory not presented to the trial court cannot be raised for the first time on appeal. See *Miller v. Staton*, 58 Wn.2d 879, 884, 365 P.2d 333 (1961); *Titus v. Tacoma Smeltermen's Union*, 62 Wn.2d 461, 383 P.2d 504 (1963). The rule that appellate courts will generally limit review to claims argued before the trial court "is especially true for summary judgment proceedings." *Nguyen v. Sacred Heart Medical Center*, 97 Wn. App. 728, 733, 987 P.2d 634 (1999). Likewise, Giovannini is barred from asserting

errors as to “denial of partial summary judgment” (Appellant’s Brief at Pages 45-46) because nothing in the record shows that Giovannini ever moved for partial summary judgment with respect to the Bel-Red Property.

Even if Giovannini had timely asserted her arguments of res judicata and collateral estoppel before the trial court, her arguments would have failed as a matter of law. As the Washington State Supreme Court has stated:

The general doctrine is that the plea of Res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

*K. A. Sanwick v. Puget Sound Title Insurance Company*, 70 Wn.2d 438, 442, 423 P.2d 624 (1967) quoting *Sayward v. Thayer*, 9 Wash. 22, 38 P. 137 (1894) (emphasis added).

The courts have consistently said that application of the doctrine of res judicata will apply to judgments rendered in the first proceeding to subsequent judicial proceedings when there is identical: (1) subject matter; (2) claim or cause of action; (3) person and parties; and (4) quality of the persons for or against whom the claim is made. *Pederson v. Potter*, 103

Wn. App. 62, 72, 11 P.3d 833 (2000) citing *Kuhlman v. Thomas*, 78 Wn.App. 115, 122, 897 P.2d (1995).

Collateral estoppel prevents a relitigation of a particular issue in a later proceeding involving the same parties even though the later proceeding may involve a different claim or cause of action. *King v. City of Seattle*, 84 Wn.2d 239, 243, 525 P.2d 228 (1974) citing *Bordeaux v. Ingersoll Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967).

Simply put, Giovannini's assertions of res judicata and collateral estoppel relating to Knedlik's 1997 bankruptcy fail to meet any of the required elements of these doctrines. Initially, it must be noted that the document relied upon by Giovannini in support of her arguments is not a judgment or order of any court. Rather, it is merely a pleading filed in Knedlik's 1997 bankruptcy proceeding. CP at 14.

Next, Spark was not a creditor or party to the 1997 Knedlik bankruptcy which was filed years before Spark obtained its judgment against Knedlik in 2002. Thus, there can be no identity of person and parties. Giovannini's assertions fail.

## V. CONCLUSION

The trial court properly rejected Giovannini's claims of interest in the Bel-Red Property under RCW 6.32.270. Giovannini is judicially

estopped from claiming any such interests and her claim of adverse possession is meritless. Spark respectfully requests that the order of the trial court be affirmed.

DATED this 17<sup>th</sup> of August, 2011.

SCHWEET RIEKE & LINDE, PLLC  
Attorneys for Respondent Spark



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By: Thomas S. Linde, WSBA 14426  
Jacob Rosenblum, WSBA ~~42269~~

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## DECLARATION OF SERVICE

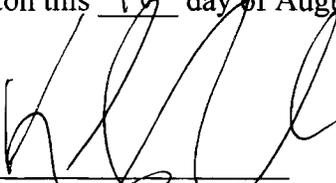
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following true and correct:

That on August 18, 2011, I caused the service of the above Brief of Respondent Spark Networks, PLC, on the following:

Office of the Clerk Court of Appeals, Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Anna Giovannini, <i>Pro Se</i> Appellant 6109 106 <sup>th</sup> Avenue Northeast Kirkland, Washington 98033	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Will Knedlik 6109 106 <sup>th</sup> Avenue Northeast Kirkland, Washington 98033	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Will Knedlik P.O Box 99 Kirkland, Washington 98083	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

Peter Ehrlichman Dorsey & Whitney LLP 701 5 <sup>th</sup> Avenue, Suite 6100 Seattle, WA 98104-7043	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
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Signed at Seattle, Washington this 16<sup>th</sup> day of August, 2011.



Karen L. Linde