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

NO. 674471

LARRY LARSEN, APPELLANT

v.

**JOSEPH D. BURZOTTA and "JANE DOE" BURZOTTA,
husband and wife, RESPONDENTS**

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES.....	i
II.	STATEMENT OF THE CASE.....	1
III.	ARGUMENT.....	2
	A. Standard of Appellate Review.....	2
	B. <i>Arkison</i> Factors Have Been Met.....	2
	1. Larsen Took Inconsistent Positions.....	3
	a. Larsen’s Inconsistent Positions.....	4
	b. Pro Se Debtors Must Adhere to the Same Standard for Filing as Other Debtors.....	6
	2. Judicial Acceptance of Larsen’s Inconsistent Positions.....	7
	a. No Requirement of Intent to Mislead....	8
	b. Debtor’s Duty to Accurately File.....	9
	3. Larsen Has Derived and Unfair Advantage by Taking Inconsistent Positions.....	9
	a. Larsen’s Unfair Advantage.....	9
	b. Larsen’s Claim That He Derived No Unfair Advantage Fails.....	10
	C. The <i>Markley</i> Factors.....	11
	D. Mistake or Inadvertence Does Not Apply.....	14
	E. Larsen’s Argument Regarding Reopening of Bankruptcy Case.....	16

1.	Failure to Address the Argument.....	16
2.	Existing Authority Does Not Support Larsen's Position.....	17
F.	<i>Ryan Operations</i> is Not Applicable.....	18
1.	Differences in the Application of Judicial Estoppel in the Third Circuit and in Washington.....	18
a.	Inconsistent Positions Not Required to be Irreconcilably Different.....	19
b.	No Requirement of Bad Faith or Intentional Wrongdoing.....	20
c.	No Requirement that Trial Courts Impose Lesser Sanction.....	20
d.	No Requirement that Judicial Estoppel be Used Only in Egregious Circumstances.....	21
2.	Ninth Circuit Law on Judicial Estoppel.....	21
a.	Similarity to State Court Analysis.....	21
b.	The <i>Hamilton</i> Court Analysis.....	23
c.	Differences in Washington State Court Analysis and Ninth Circuit Analysis.....	24
G.	The Trial Court's Ruling is Consistent With the Equities of Judicial Estoppel... ..	27
H.	This Court is Not Bound by Reopening of Larsen's Bankruptcy.....	29

I.	Abuse of Discretion Standard Has Not Been Met...	29
IV.	CONCLUSION.....	30

TABLE OF AUTHORITIES

Washington Cases

<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P. 3d 13 (2007).....	3, 4, 12, 16, 17, 18, 19, 21, 22, 28, 29
<i>Baldwin v. Silver</i> , 147 Wn. App. 531, 196 P.3d 170 (2008).....	8
<i>Bartley-Williams v. Kendall</i> , 134 Wn. App. 95, 138 P.3d 1103 (2006).....	2, 5, 19, 27
<i>Black v. Dept. of Labor and Indust.</i> , 131 Wn.2d 547 (1997).....	10
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 108 P.3d 147 (2005).....	5, 7, 8, 9, 10, 13, 14, 15, 19, 20, 21, 22, 24, 26, 27, 30, 31
<i>Johnson v. Si-Cor Inc.</i> , 107 Wn. App. 902, 28 P.3d 832 (2001).....	12, 13
<i>MackKay v. MackKay</i> , 55 Wn.2d 344, 347 P.2d 1062 (1959).....	2
<i>Markley v. Markley</i> , 31 Wn.2d 605; 198 P.2d 486 (1948).....	11, 12
<i>McFarling v. Evaniski</i> , 141 Wn. App. 400, 171 P.3d 497 (2007).....	4, 5, 9, 10, 13, 14, 15, 18
<i>Miller v. Campbell</i> , 137 Wn. App. 762,155 P.3d 154 (2007).....	15, 16
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.2d 352 (2008).....	10, 11, 17, 20, 21

<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	5, 6, 7, 9, 13, 14, 19, 22, 28
<i>State ex rel. Nielsen v. Superior Court</i> , 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).....	2
<i>State v. Johnson</i> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	16
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995)	16
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	2
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	16

Ninth Circuit Cases

<i>Funtanilla v. Swedish Hospital Health Servs.</i> , 2011 U.S. Dist. LEXIS 2244, 2011 WL 65945 (W.D. Wash.) (2011).....	26
<i>Hay v. First Interstate Bank of Kalispell, N.A.</i> , 978 F.2d 555 (9th Cir. 1992).....	22, 25
<i>Interstate Fire & Casualty Co. v. Underwriters at Lloyd's, London</i> , 139 F.3d 1234 (9th Cir.1998).....	23
<i>Masayesva v. Hale</i> , 118 F.3d 1371 (9th Cir.1997).....	23
<i>McLauchlan v. Aurora Loan Servs. LLC</i> , 2011 U.S. Dist. LEXIS 23330 (W.D. Wash.) (2011).....	26
<i>Rissetto v. Plumbers & Steamfitters Local 343</i> , 94 F.3d 597 (9th Cir.1996).....	23

Other Cases

<i>In re Coastal Plains, Inc.</i> , 179 F.3d 197 (5th Cir. 1999)...	24, 25
<i>Montrose Med. Group Participating Saving Plan v. Bulger</i> , 243 F.3d 773, 779-80 (3rd Cir. 2001).....	18
<i>Ryan Operations G.P. v. Santiam-Midwest Lumber Co.</i> , 81 F.3d 355 (3rd Cir. 1996).....	17
<i>Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n</i> , 932 F. Supp. 859 (E.D. Tex. 1996).....	25

Statutes

11 U.S.C. § 342(b).....	6
11 U.S.C. § 521(a).....	6

Other Authorities

14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.57, at 512 (2003).....	12
14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICE § 382 (5th ed.1996).....	13

II. STATEMENT OF THE CASE

This case arises out of alleged injuries from a motor vehicle accident that occurred on or about October 30, 2007. CP 3. Larsen experienced neck, back and shoulder pain the day of the motor vehicle accident. CP 4. Three months later, Larsen filed for Chapter 7 Bankruptcy on January 30, 2008. CP 5. In his bankruptcy petition, Larsen did not disclose his potential personal injury claim from the October 2007 motor vehicle accident. CP 5-6. By law, Larsen had a duty to disclose his potential personal injury claim to the bankruptcy court. CP 5-6.

On May 7, 2008, Larsen's bankruptcy was discharged. CP 5.

On October 20, 2010, Larsen filed a lawsuit against Burzotta in King County Superior Court. CP 5.

On May 19, 2011, Burzotta filed a motion for summary judgment against Larsen on the grounds that judicial estoppel barred Larsen's lawsuit. CP 3.

Only after Burzotta filed a motion for summary judgment did Larsen move to reopen his bankruptcy case and amend his schedule to disclose his personal injury claim to the bankruptcy court. CP 165.

On June 20, 2011, the trial court granted Burzotta's motion for summary judgment based on judicial estoppel. CP 148-149. On June 30, 2011, Larsen filed a motion for reconsideration. CP 150-159. The trial court denied Larsen's motion for reconsideration. CP 176. The bankruptcy trustee has not been substituted in as the real party in interest in this lawsuit. CP 135-136.

III. ARGUMENT

A. Standard of Appellate Review

A trial court's decision regarding the application of judicial estoppel is reviewed under the abuse of discretion standard. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). An abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

B. Arkison Factors Have Been Met

In *Arkison v. Ethan Allen, Inc.*, the plaintiff was injured by employees of Ethan Allen. 160 Wn.2d 535, 537, 160 P. 3d 13 (2007). After her injury, the plaintiff filed for Chapter 7 bankruptcy,

but did not disclose her potential legal claim as an asset. *Id.* The plaintiff's debts were discharged. *Id.* After her debts were discharged, the plaintiff sued Ethan Allen. *Id.*

After the lawsuit was filed, the bankruptcy trustee was notified of the suit and moved to reopen the bankruptcy and to be substituted in as the real party in interest. *Id.* Ethan Allen moved for summary judgment based on judicial estoppel. *Id.* The *Arkison* court ruled that a trial court could not generally apply judicial estoppel "to bar a bankruptcy trustee standing as the real party from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings." *Id.* at 541.

In its ruling, the Washington Supreme Court outlined three core factors to guide a trial court's application of 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.

Id. at 538-39 (internal quotations marks omitted).

1. Larsen Took Inconsistent Positions

Washington law states that a party cannot maintain a lawsuit

that he or she failed to disclose in a bankruptcy proceeding.

McFarling v. Evaneski, 141 Wn. App. 400, 171 P.3d 497 (2007). A party is estopped from maintaining such inconsistent positions. *Id.*

a. Larsen's Inconsistent Positions

In this case, Larsen had a duty to disclose any potential lawsuits and any casualty losses within one year before or after filing for bankruptcy. CP 5. Larsen was injured on October 30, 2007. Three months later, on January 30, 2008, Larsen filed his bankruptcy petition and did not disclose any potential lawsuits or casualty losses. On May 7, 2008, Larsen's bankruptcy was discharged. On October 20, 2010, Larsen filed a lawsuit based on the injury he sustained on October 30, 2007. Larsen did not disclose this lawsuit to the bankruptcy trustee or move to have the bankruptcy reopened until after Burzotta filed a motion for summary judgment.

Larsen incorrectly claims that failing to list a personal injury claim in his prior Bankruptcy filing is not inconsistent with his subsequent lawsuit against Burzotta. *See Appellant's Brief*, p. 7-9. Larsen is unable to support this assertion with any case law, because his assertion is in direct conflict with the current law on this issue.

In Washington, trial courts will apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy proceedings and then later "pursue the claims after the bankruptcy discharge." *Bartley-Williams v. Kendall*, 134 Wn. App. at 98, 138 P.3d 1103. *See eg. Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel imposed against debtor who failed to disclose potential claim to bankruptcy court); *McFarling v. Evaneski*, 141 Wn. App. 400, 171 P.3d 497 (2007) (debtor who did not disclose personal injury claim in bankruptcy schedules was judicially estopped from later bringing claim); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (applying judicial estoppel to bar debtor who did not disclose potential cause of action for personal injury in bankruptcy from bringing claim).

In each of above cited cases, the court ruled that a debtor who failed to disclose a potential claim to a bankruptcy court took an inconsistent position and was judicially estopped from bringing a subsequent claim. The trial court correctly ruled that Larsen took inconsistent positions by failing to disclose his potential personal injury claim to the bankruptcy court, receiving a discharge of his debt, then pursuing a claim against Burzotta.

b. Pro Se Debtors Must Adhere to the Same Standard for Filing as Other Debtors

Larsen erroneously argues that his prior inconsistent position was due to the fault of “Bankruptcy schedules [that] are unclear, vague and ambiguous.” Appellant’s Brief, p. 8. This is not a recognized defense to judicial estoppel. If a debtor chooses to file for Bankruptcy pro se, then the debtor is required to obtain and read the notice required by 11 U.S.C. § 342(b). The pro se debtor is bound by his actions and filings in bankruptcy. *Id.* A bankruptcy petitioner must disclose pre-petition claims, including contingent and unliquidated claims, in the bankruptcy reorganization plan or in the petitioner’s schedules or disclosure statements. 11 U.S.C. § 521(a).

In *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007), the court rejected an argument similar to Larsen’s claim in this case. Skinner, a pro se debtor, failed to disclose personal assets to the bankruptcy court. *Id.* at 844-47. Skinner then received a discharge of his debts. *Id.* Subsequently, Skinner brought suit against the defendants. *Id.* The trial court granted the defendants’ motion for summary judgment on the grounds of judicial estoppel. *Id.*

On appeal, one of Skinner's arguments was that "he should not be punished as a pro se debtor for failing to understand sophisticated concepts." *Id.* at 853. However, the court rejected Skinner's argument, stating that he "had a duty to carefully schedule his assets. By failing to do so, he attempted to deceive the bankruptcy court and retain the benefit of his claims." *Id.*

In this matter, Larsen fails to cite any case law or other authority that supports his position that a pro se debtor should not be held to the same standard as debtors who have representation.

2. Judicial Acceptance of Larsen's Inconsistent Positions

In this case, the Bankruptcy Court has already accepted Larsen's prior position as a matter of law. In *Cunningham v. Reliable Concrete*, the court declared that judicial estoppel applies if the prior position was accepted by the court. 126 Wn. App. 222, 230-31, 108 P. 3d 147 (2005).

In *Cunningham*, the plaintiff suffered an injury and later filed for bankruptcy. *See id.* at 225-26. However, the plaintiff failed to list his personal injury claim in his bankruptcy schedule. *See id.* The bankruptcy court granted a discharge of the plaintiff's debt. *See id.* Following the discharge, the plaintiff filed a lawsuit for his personal

injury. *See id.* The defendant moved for summary judgment based on judicial estoppel, and the trial court granted the motion. *See id.* On appeal, the court affirmed the trial court's ruling. *Id.* at 235.

The *Cunningham* court ruled that a discharge order in a bankruptcy proceeding constitutes acceptance of a representation based on bankruptcy schedules, which by itself justifies the imposition of judicial estoppel. *See id.* at 230; *Baldwin v. Silver*, 147 Wn. App. 531, 537, 196 P.3d 170 (2008) (ruling that “a court is deemed to have ‘accepted’ a litigant’s inconsistent position when that court discharges the debtor’s debt without knowledge of the cause of action”). Pursuant to *Cunningham*, when the bankruptcy court discharged Larsen’s debt, by law it ‘accepted’ Larsen’s position. Therefore, the trial court correctly applied judicial estoppel in this matter.

a. No Requirement of Intent to Mislead

Larsen mistakenly implies that the trial court erred in granting Burzotta’s summary judgment motion because “neither court was intentionally misled.” Appellant’s Brief, p. 9. However, Washington law is clear that “intent to mislead is not an element of judicial estoppel.” *Cunningham*, 126 Wn. App. at 234; *McFarling*, 141 Wn. App. at 405; *Skinner v. Holgate*, 141 Wn. App. 840, 854,

173 P.3d 300 (2007). Judicial estoppel is proper so long as the debtor knew of the facts giving rise to his inconsistent positions and had a motive to conceal. *Cunningham*, 126 Wn. App. at 234. In this matter, Larsen had knowledge of his potential personal injury claim, failed to disclose his personal injury claim, and had a motive to conceal his personal injury claim from the bankruptcy court. Therefore, judicial estoppel is proper.

b. Debtor's Duty to Accurately File

Larsen further attempts to shirk accountability for his failure to disclose his personal injury claim in his bankruptcy schedule by claiming that it is the bankruptcy court's fault for being misled because it is their responsibility to "make their schedules easy to understand for an unsophisticated debtor." However, Larsen again fails to cite any case law, statute or other authority to support his position. As such, this position should be rejected. *Black v. Dept. of Labor and Indust.*, 131 Wn.2d 547 (1997).

3. Larsen Has Derived an Unfair Advantage by Taking Inconsistent Positions

a. Larsen's Unfair Advantage

Larsen misconstrues the third *Arkison* factor, by claiming that Burzotta "failed to prove that Larsen gained an advantage *in*

this litigation.” See Appellant’s Brief, p. 10 (emphasis added). The applicable case law does not require proof that the plaintiff has an advantage *in the latter litigation*; instead, it states that a debtor gains an advantage at the expense of his creditors by not disclosing assets and then receiving a discharge of his debts. *Cunningham*, 126 Wn. App. at 231; *McFarling*, 141 Wn. App. at 405. Just as in *McFarling* and *Cunningham*, Larsen failed to list his personal injury claim on his bankruptcy schedule, and then gained an unfair advantage by having his debts discharged.

b. Larsen’s Claim That He Derived No Unfair Advantage Fails

Larsen incorrectly relies on *Miller v. Campbell*, 164 Wn.2d 529, 192 P.2d 352 (2008), to claim that he did not derive an unfair advantage. See Appellant’s Brief, p. 7. In *Miller*, the court ruled that judicial estoppel would generally not apply against a debtor when the bankruptcy trustee has been substituted in as the real party in interest.” *Miller v. Campbell*, 164 Wn.2d 529, 542, 192 P.3d 352 (2008).

Larsen’s reliance on *Miller*, however, is misplaced, since the trustee in this case has not substituted in as the real party in interest. Therefore, the holding in *Miller* does not apply, and the trial

court did not abuse its discretion by finding that Larsen gained an unfair advantage by failing to disclose his personal injury claim to the bankruptcy court and then receiving a discharge of his debt from his creditors.

C. The *Markley* Factors

Larsen incorrectly argues that judicial estoppel should not apply in this matter because certain factors listed in *Markley v. Markley*, 31 Wn.2d 605; 198 P.2d 486 (1948), are not met. Specifically, Larsen argues that the parties must be the same in both proceedings and that the party claiming estoppel must have been misled and have changed his position because of the other party's earlier inconsistent assertion. See Appellant's Brief, p. 12-13.

However, the *Markley* factors are not essential to the establishment of judicial estoppel. In *Arkison*, the Washington Supreme Court ruled that the *Markley* factors are "additional considerations" that "**may** guide a court's decision." *Arkison*, 160 Wn.2d 535, 539 (2007) (emphasis added). Justice Sanders stated that the *Markley* factors are ditca that are not "requisite ingredients to a trial court's analysis." *Id.* at 543 (Sanders, J. *concurring*).

Therefore, the inapplicability of certain *Markley* factors do not preclude the application of judicial estoppel.

In addition, the *Markley* decision has been criticized for attempting to interject ordinary estoppel principles into the doctrine of judicial estoppel. See *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 906-08, 28 P.3d 832 (2001). Professor Karl B. Tegland asserts that judicial estoppel "is applicable regardless of whether a judgment on the merits was entered in the first trial. And it may be invoked by a stranger to the first suit against a party who was a party to, or a witness in, the first suit." 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.57, at 512 (2003). Division Three of the Washington Court of Appeals adopted the views of Professor Tegland, stating the following:

the doctrine of judicial estoppel is designed to protect courts, courts should not impose elements of related doctrines like equitable and collateral estoppel, which are intended primarily to protect litigants. We conclude that the doctrine may be applied even if the two actions involve different parties. We further conclude that the doctrine may be applied even if there is no reliance, no resultant damage, and no final judgment entered in the first action.

Johnson v. Si-Cor Inc., 107 Wn. App. 902, 907-08, 28 P.3d 832 (2001). (citing 14 LEWIS H. ORLAND & KARL B. TEGLAND,

WASHINGTON PRACTICE: TRIAL PRACTICE § 382 (5th ed.1996)).

Previous Washington courts, when faced with a situation similar to the case at bar, have declined to require the presence all of the *Markley* factors, which would have in effect precluded the application of judicial estoppel. *See eg. Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (ruling that a debtor who failed to disclose potential claim to bankruptcy court was judicially estopped from bringing a subsequent lawsuit); *McFarling v. Evaneski*, 141 Wn. App. 400, 171 P.3d 497 (2007) (applying judicial estoppel to prevent a debtor who failed to disclose a personal injury claim in bankruptcy from later bringing claim); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (barring a debtor from bringing a personal injury claim because the potential cause of action was not disclosed to the bankruptcy court). In *Skinner*, *McFarling*, and *Cunningham*, the courts applied judicial estoppel despite the fact that not all of the *Markley* factors were present (i.e., parties in the previous and subsequent litigation were not the same, the party claiming estoppel was not misled, etc.). *See supra*.

D. Mistake or Inadvertence Does Not Apply

Larsen inaccurately claims that Burzotta failed to disprove Larsen's assertion that his nondisclosure of his potential personal injury claim was based on mistake or inadvertence. See Appellant's Brief, p. 13. In his brief, Larsen asserts a defense of mistake/inadvertence, but fails to cite authority regarding the standard for such a defense. However, a review of the relevant authority shows that Larsen is unable to proffer a defense of mistake/inadvertence.

In *McFarling v. Evaneski*, 141 Wn. App. 400, 402, 171 P.3d 497 (2007), the plaintiff was injured in a car accident. After the accident, the plaintiff filed a petition for Chapter 7 bankruptcy. See *id.* However, the plaintiff failed to list his potential personal injury claim as an asset. See *id.* The bankruptcy court subsequently discharged the plaintiff's debt. See *id.* at 402-03. After receiving a discharge of his debt, the plaintiff brought suit against the defendant. See *id.* The defendant moved for summary judgment based on judicial estoppel. See *id.* The trial court granted the motion for summary judgment. See *id.* On appeal, the trial court's ruling was upheld. See *id.*

In its ruling, the *McFarling* court held that the “failure to list an asset is inadvertence only when, in general, the debtor either lacks knowledge of the undisclosed claim or has no motive for their concealment.” *Id.* at 405; *see also Cunningham*, 126 Wn. App. at 234. The court ruled that since the plaintiff knew of his personal injury claim, the plaintiff’s inadvertence argument was without merit. *McFarling*, 141 Wn. App. at 405. Further, the *McFarling* court ruled that “the application of judicial estoppel does not require proof of deliberate intent to mislead.” *Id.* Here, just as in *McFarling*, Larsen was aware of his injury at the time he filed for bankruptcy and had a motive to conceal that asset from the Court and his creditors.

In *Miller v. Campbell*, 137 Wn. App. 762, 155 P.3d 154 (2007), the court found that a plaintiff was not aware of his injury, where he had suffered sexual abuse as a child. *See id.* at 772-73. The court noted that the unique nature of child sexual abuse could render a victim unable to understand the full extent of the emotional harm. *See id.* As a result, the court ruled that a victim of child sexual abuse was under a “disability” and is not charged with knowledge of the tort claim until the disability is lifted. *See id.*

Unlike *Miller*, Larsen was aware of his injuries the day of the accident. *See* CP 4. After he became aware of his injuries, he filed

for bankruptcy and failed to disclose his potential personal injury claim to the bankruptcy court. Larsen's motor vehicle injuries are not the same type as those considered in *Miller*, therefore, Larsen cannot claim he was unaware of his injuries. The trial court correctly disregarded Larsen's claim that his failure to disclose his personal injury claim to the bankruptcy court was due to mistake or inadvertence.

E. Larsen's Argument Regarding Reopening of Bankruptcy Case Fails

1. Failure to Address the Argument

Larsen mistakenly assigns error to the trial court's grant of summary judgment because his bankruptcy case was reopened. However, Larsen fails to address this issue in his argument section. Washington courts have ruled that appellate courts "will not review issues for which inadequate argument has been briefed or only passing treatment has been made. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (citing *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992); *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)). Since Larsen has failed to address this matter, this Court should not review this issue.

2. Existing Authority Does Not Support Larsen's Position

Even if the Court decides to review this issue, the existing authority does not support Larsen's position. Larsen mistakenly claims that the trial court erred in applying judicial estoppel because Larsen's bankruptcy case was reopened. However, *Skinner v. Holgate*, 141 Wn. App. 840, 852, 173 P. 3d 300 (2007), holds that the trial court has full authority and exclusive jurisdiction to apply judicial estoppel, regardless of the bankruptcy court reopening a debtor's prior bankruptcy case.

In *Arkison v. Ethan Allen*, the Supreme Court ruled that judicial estoppel does not apply to "bar a bankruptcy trustee standing as the real party from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings." *Arkison*, 160 Wn.2d at 541. In *Arkison*, the debtor's bankruptcy case had been reopened and the trustee had been substituted in as the real party in interest. However, in this case, Larsen only moved to reopen his bankruptcy case after Burzotta filed a summary judgment motion based on judicial estoppel. Larsen's bankruptcy case was not reopened until after the trial court issued its ruling. Further, the bankruptcy trustee in this matter has not substituted in as the real

party in interest. Therefore, *Arkison* does not apply.

In addition, no other relevant cases hold that the reopening of a bankruptcy case is sufficient to preclude the application of judicial estoppel where the plaintiff failed to disclose an asset to the bankruptcy court.

F. *Ryan Operations* is Not Applicable

Larsen inaccurately asserts that the Washington Supreme Court, in *Miller v. Campbell*, 164 Wn.2d 529, 192 P.2d 352 (2008), adopted the Third Circuit holding in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3rd Cir. 1996).

Larsen's implication mischaracterizes the actual holding in *Miller*. The *Miller* court cites *Ryan Operations* with approval only in adopting the principal that "the doctrine of judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability." *Miller*, 164 Wn.2d at 544. *Miller* does not adopt the entire holding of *Ryan Operations*, nor does it adopt the Third Circuit's approach to the application of judicial estoppel. *See id.*

1. Differences in the Application of Judicial Estoppel in the Third Circuit and in Washington

Larsen incorrectly attempts to impose the Third Circuit's

approach to the application on this Court. *See* Appellant's Brief, p. 6. However, this approach is significantly different than the approach laid out by Washington's Supreme Court in *Arkison*. *See Arkison*, 160 Wn.2d at 538-539.

The Third Circuit approach requires that the inconsistent positions be irreconcilably different, that the change of position was done in bad faith, and that the sanction of estoppel is tailored to address the harm and cannot be remedied by a lesser sanction. *See Montrose Med. Group Participating Saving Plan v. Bulger*, 243 F.3d 773, 779-80 (3rd Cir. 2001).

a. Inconsistent Positions Not Required to be Irreconcilably Different

In Washington, trial courts generally apply judicial estoppel to preclude debtors who failed to disclose potential legal claims to the bankruptcy court from later pursuing these claims. *See Bartley-Williams v. Kendall*, 134 Wn. App. at 98, 138 P.3d 1103; *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007); *McFarling v. Evaneski*, 141 Wn. App. 400, 171 P.3d 497 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005). Trial courts are not mandated to determine if the inconsistent positions are irreconcilably different. *See supra*.

A debtor who fails to disclose a pre-petition claim in bankruptcy proceedings and attempts to assert the cause of action on those same claims has taken an inconsistent position. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. at 227-28. A debtor's failure to disclose a potential claim to the bankruptcy court is an inconsistent position in and of itself. *Id.* at 230. Here, Larsen failed to disclose his personal injury claim in bankruptcy, Larsen's debt was discharged, and Larsen later attempted to assert his cause of action against Burzotta. Therefore, under *Cunningham*, Larsen has taken an inconsistent position. A trial court does not need to determine whether said positions are irreconcilable.

b. No Requirement of Bad Faith or Intentional Wrongdoing

Larsen incorrectly claims that the doctrine of judicial estoppel applies only with proof of intentional wrongdoing, and does not apply where a prior position is taken in good faith. See Appellant's Brief, p. 5. While this may be the holding under *Ryan Operations*, this is not the law in Washington.

c. No Requirement that Trial Courts Impose a Lesser Sanction

Larsen fails to cite any controlling authority that shows that a

trial court must impose the least restrictive sanction available in the application of judicial estoppel. See Appellant's Brief, p. 6. In applying judicial estoppel, Washington courts seek "to preserve respect for judicial proceedings, and to avoid inconsistency, duplicity, and . . . waste of time." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P. 3d 13 (2007) (internal quotation marks omitted) (citing *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 225, 108 P.3d 147 (2005)). There is no Washington case law, or other controlling authority, that mandates that trial courts impose the least restrictive sanction in the application of judicial estoppel.

d. No Requirement that Judicial Estoppel be Used Only in Egregious Circumstances

Larsen erroneously claims that judicial estoppel should only be applied in "egregious cases" as an "extraordinary remedy". This aspect of the holding in *Ryan Operations* was not adopted by the Supreme Court in *Miller*. See *Miller*, 164 Wn.2d at 544.

2. Ninth Circuit Law on Judicial Estoppel

a. Similarity to State Court Analysis

Unlike the Third Circuit's approach, both the Ninth Circuit and Washington State law focus on the three core factors found in

Arkison to decide whether the application of judicial estoppel is proper. See *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778, 782-83 (9th Cir. 2001). In addition, both hold that a representation made in a bankruptcy is binding. *Id.* at 784. *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778 (9th Cir. 2001), citations omitted. See also *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel imposed against debtor who failed to disclose potential claim to bankruptcy court); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (applying judicial estoppel to bar a debtor who did not disclose a potential personal injury claim to the bankruptcy court from later bringing suit).

The failure of a debtor to give notice of a potential cause of action in bankruptcy schedules, disclosure statements, and/or a reorganization plan estops the debtor from prosecuting that cause of action. See *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992); *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778 (9th Cir. 2001). A debtor is under a continuing duty to amend his or her bankruptcy schedules and statement of financial affairs. See, e.g., *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001).

Judicial estoppel in the Ninth Circuit has been applied in cases where the court “accepted” the party’s previous inconsistent position. *Interstate Fire & Casualty Co. v. Underwriters at Lloyd's, London*, 139 F.3d 1234, 1239 (9th Cir.1998); *Masayesva v. Hale*, 118 F.3d 1371, 1382 (9th Cir.1997). Judicial estoppel bars inconsistent positions in the same litigation and also bars incompatible statements in two different cases. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir.1996); *Hamilton*, 270 F.3d at 783.

b. The *Hamilton* Court Analysis

In the case of *Hamilton v. State Farm Fire & Cas. Ins. Co.*, Hamilton failed to list a claim against his insurer, State Farm, in his bankruptcy schedules. On appeal, Hamilton argued that judicial estoppel should not apply since his bankruptcy discharge was later vacated. The court, however, ruled the following:

We now hold that Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings, and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated. Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may “accept” the debtor’s assertions by relying on the

debtor's nondisclosure of potential claims in many other ways. *See, e.g., In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999) (finding that judicial acceptance was satisfied when the bankruptcy court lifted a stay based in part on the debtor's nondisclosure in its bankruptcy schedules and in a lift-stay stipulation); *Donaldson v. Bernstein*, 104 F.3d 547, 555-56 (3rd Cir. 1997) (holding that judicial acceptance was satisfied when the court approved the debtor's plan of reorganization).

Hamilton v. State Farm Fire & Cas. Ins. Co., 270 F.3d 778, 784 (9th Cir. 2001) (*emphasis added*).

The *Hamilton* court found that Hamilton was bound by the doctrine of judicial estoppel even if the bankruptcy was later opened and the discharge of debts vacated. *Id.*; *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 233, 108 P.3d 147 (2005). In short, the *Hamilton* court held that you cannot "cure" the misrepresentation retroactively. *Hamilton*, 270 F.3d at 784. As such, Larsen's attempt to "cure" his misrepresentation and continue with the present suit against Burzotta is directly contrary to Ninth Circuit and Washington State case law.

c. Differences in Washington State Court Analysis and Ninth Circuit Analysis

Larsen erroneously argues that judicial estoppel should not apply in this case because his failure to disclose his potential claim against Burzotta was a mistake. However, the Ninth Circuit does

not recognize an inadvertence exception to the judicial estoppel doctrine in the context of bankruptcy.

In *Hamilton*, the debtor failed to disclose a claim against his insurer, State Farm, during his bankruptcy proceeding. *See id.* Although he asserted that his failure to disclose was mistaken or inadvertent, the Ninth Circuit did not allow an exception to the judicial estoppel doctrine.

It is immaterial that Hamilton did not file this action against State Farm for one year after filing for bankruptcy. **Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.** *Hay*, 978 F.2d at 557 ("We recognize that *all* facts were not known to Desert Mountain at that time, but enough was known to require notification of the asset to the bankruptcy court."); *In re Coastal Plains*, 179 F.3d at 208 (quoting *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996) ("If the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a known cause of action such that it must be disclosed") (internal quotations omitted)). **Hamilton knew of all the material facts surrounding the damage to the house and State Farm's investigation and denial of his claim at the time he filed his bankruptcy schedules and for many months before pursuing legal action.**

Hamilton v. State Farm Fire & Cas. Ins. Co, 270 F.3d 778, 784 (9th

Cir. 2001), *emphasis added*; *see also Funtanilla v. Swedish*

Hospital Health Servs., 2011 U.S. Dist. LEXIS 2244, 2011 WL 65945, *4 n.3 (W.D. Wash.) (2011) ("In the bankruptcy context . . . the Ninth Circuit has not recognized an exception for inadvertence or mistake. Rather, the debtor's failure to disclose, on its own, gives rise to judicial estoppel."); *McLauchlan v. Aurora Loan Servs. LLC*, 2011 U.S. Dist. LEXIS 23330 (2011) (Although not argued by the individual defendants, the Ninth Circuit has not recognized the Fifth Circuit's inadvertence standard in bankruptcy cases.).

Similarly, Washington law holds that a debtor's failure to disclose in bankruptcy is inadvertent only if the debtor lacks knowledge or has no motive for its concealment. *Cunningham*, 126 Wn. App. at 234. Intent to mislead is not required. *Id.*; *McFarling*, 141 Wn. App. at 405. Here, Larsen was aware of his loss at the time he filed for bankruptcy, since he admitted being hurt the day after his motor vehicle accident and then filed for bankruptcy three months later. Larsen also had a motive to conceal his claim – he gained an advantage at the expense of his creditors by not disclosing assets and then receiving a discharge of his debts. *See Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *Cunningham*, 126 Wn. App. at 231; *McFarling v.*

Evaneski, 141 Wn. App. 400, 405, 171 P.3d 497 (2007). Larsen had knowledge of his claim and a motive for concealment.

G. The Trial Court's Ruling is Consistent With the Equities of Judicial Estoppel

Larsen incorrectly argues that judicial estoppel should not apply in this case because it is not meant to be a technical defense for litigants to avoid liability. See Appellant's Brief, p. 10. This argument fails because the trial court acted in accordance with the equities in applying judicial estoppel in this matter.

"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." *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). The purpose of judicial estoppel is to preserve the respect for judicial proceedings, to avoid inconsistency, duplicity, and waste of time. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P. 3d 13 (2007). A trial court should rely on the entirety of the record when it balances the equities in favor of applying judicial estoppel. *Skinner v. Holgate*, 141 Wn. App. 840, 850, 173 P.3d 300 (2007).

In *Skinner*, the plaintiff failed to disclose assets to the bankruptcy court. See *id.* at 844-46. The bankruptcy court

discharged his debt, at which point the plaintiff then filed suit on a claim that he had not disclosed previously. *See id.* The defendants then moved for summary judgment based on judicial estoppel. *See id.* The trial court ruled against the plaintiff, and on appeal, the appellate court upheld the trial court's ruling. *See id.*

The court in *Skinner* addresses the motives of the plaintiff, referring to his "attempt to sanitize his failure to list the assets." *See id.* at 855. The *Skinner* court was not persuaded by the plaintiff's attempt to make up for his failure to disclose his assets, since the plaintiff did not come forward until after his nondisclosure was discovered, more than a year later. *See id.*

In this case, just as in *Skinner*, the equities do not balance in Larsen's favor. Larsen was injured in October of 2007, filed for bankruptcy in January of 2008, yet did not even attempt to disclose his personal injury lawsuit until June of 2011. Moreover, Larsen's attempt to "sanitize" his failure to list his personal injury claim by moving to reopen his bankruptcy case *did not occur until after* Burzotta filed his motion for summary judgment based on judicial estoppel. As such, this Court should uphold the trial court's ruling.

H. This Court is Not Bound by Reopening of Larsen's Bankruptcy

Larsen moved to reopen his bankruptcy after Burzotta filed a motion for summary judgment, in a last ditch effort to avoid the application of judicial estoppel. CP 165. After the trial court granted Burzotta's motion for summary judgment, the bankruptcy court granted Burzotta's request to reopen his bankruptcy. CP 148-49, 160, 166. The bankruptcy trustee has not been substituted in as the real party in interest in Larsen's bankruptcy case. CP 135-136. Larsen now argues, incorrectly, that the trial court erred in applying judicial estoppel in this matter.

Washington courts have upheld the application of judicial estoppel even in situations where the discharge from the bankruptcy was later vacated. *See Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 232-33, 108 P.3d 147 (2005); *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 270 F.3d 778, 784 (9th Cir. 2001).

I. Abuse of Discretion Standard Has Not Been Met

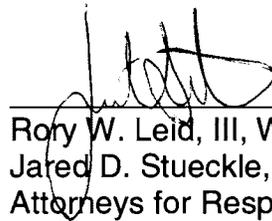
In order to be successful on appeal, Larsen must show that the trial court abused its discretion when it granted Burzotta's motion for summary judgment. *See Cunningham v. Reliable*

Concrete Pumping, Inc., 126 Wn. App. 222, 227, 108 P.3d 147 (2005). Larsen has failed to meet this burden. In addition, Larsen has failed to provide any controlling case law, statute or other controlling authority that support his position that judicial estoppel was not properly applied in this matter.

IV. CONCLUSION

Based on the foregoing reasons, this Court should uphold the trial court's ruling.

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