No. 35506-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MATTHEW SKINNER,

Appellant,

v.

GARY D. HOLGATE and JUDY HOLGATE, individually and the marital community comprised thereof; ADAM HOLGATE and JANE DOE HOLGATE, individually and the marital community comprised thereof; WESTLANDS RESOURCES CORPORATION, a Washington corporation; WESTLANDS HOLDING COMPANY, INC.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, IN AND FOR THE
COUNTY OF THURSTON
NO. 04-2-00278-5
Paula Casey, Judge

APPELLANT'S REPLY BRIEF

Bradley J. Woodworth
Attorney for Appellant
BRADLEY J. WOODWORTH & ASSOCIATAES, PC
1020 SW Taylor Street, Suite 360
Portland, OR 97205-2565
(503) 226-4644

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Respondents' Brief glosses over and minimizes the very facts that make this case unusual: that between the time Skinner filed his original bankruptcy schedules (which failed to disclose his potential claims against Holgate et al.) and the time Skinner filed his Second Amended Complaint in this case, the bankruptcy trustee (1) took possession of Skinner's claims, (2) administered them in the bankruptcy case, and (3) received payment of $45,000 for them. Further, (4) the Bankruptcy Court's Stipulated Order Approving Compromise explicitly anticipated "allowing the debtor his day in court" and remanded the case to state court, where "the debtor may pursue the causes of action contained therein." None of the decisions defendants rely on involve comparable facts. These facts form the crux of Skinner's argument.

These facts also place this case far beyond the "controlled by well settled law" and "well within the trial court's discretion" tests argued in respondent's motion to affirm on the merits. This case should be set for oral argument and full appellate review to both correct the error below and to distinguish the unique facts of this case, where an omitted claim was subsequently administered for value by the trustee, and expressly remanded for further proceedings in state court.

ARGUMENT

1. Defendants Fail to Note the Crucial Way this Case Differs from the Cases They Rely On

In Section F(2) of their brief, defendants dutifully recite the facts and holdings of four recent Washington Court of Appeals decisions on judicial estoppel: *Cunningham v. Reliable Concrete Plumbing*, 126 Wn. App. 222, 108 P.3d 147 (2005); *Garrett v. Morgan*, 127 Wn. App. 375, 112 P.3d 531 (2005); *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006); and *Miller v. Campbell*, ___ Wn. App. ___, 155 P.3d 154 (2007). Defendants point out that in each of these cases, the plaintiffs had filed bankruptcy cases in which, like Skinner here, they did not reveal the existence of actual or potential claims that could have value to the bankruptcy estate. Defendants quote statements from the decisions applying the doctrine of judicial estoppel. They conclude that the facts of this case fall neatly within the standards for judicial estoppel set forth in those decisions. Both the analysis and conclusion are overly simplistic and are wrong.

None of the decisions defendants rely on consider what should happen if, following the debtor's discharge, the bankruptcy case was reopened and the claim sought to be dismissed was *administered* and *produced a return* to the creditors of the bankruptcy case. That is what happened here, and it changes the picture dramatically.

The decision that comes closest to recognizing how the picture can be changed by subsequent events is *Bartley-Williams*, where the court held (declining to adopt the ruling in *Garrett*) that the **trustee** is not estopped from pursuing a claim that the **debtor** omitted from his or her schedules. The court's reasoning in *Bartley-Williams* makes sense:

> To prohibit the trustee from pursuing the claim on behalf of the estate may **create a windfall for the party seeking to invoke judicial estoppel at the expense of the bankruptcy creditors**. . . . In the typical judicial estoppel situation in which "the debtor 'forgets' to schedule a cause of action and then remembers to

> pursue it after the bankruptcy is over," the correct solution "is often to reopen the bankruptcy case and order the appointment of a trustee who, as owner of the cause of action, can determine whether to deal with the cause of action for the benefit of the estate."

134 Wn. App. at 102 (emphasis added), citing and quoting *An-Tze Cheng v. K & S Diversified Invs., Inc.*, 308 B.R. 448, 459-60 (9th Cir. BAP 2004).

Here, the estate was reopened, and the trustee removed the suit to bankruptcy court and proceeded to administer it as an asset of the estate for the benefit of Skinner's creditors. CP 201-03, 330-40. He ultimately entered into an agreement that produced $45,000 for the estate. CP 33-35. Nothing remotely comparable occurred in any of the cases defendants rely on to support application of judicial estoppel here.

However, Skinner's situation may be understood by examining what might happen (or could have happened) in *Bartley-Williams* following the court of appeals decision of July 17, 2006. Assume that the trustee pursues the medical malpractice claim and recovers funds for the estate. The trustee pays creditors in full and costs of administration. Further assume that something is left over. What happens to that money? Under the Bankruptcy Code, it goes to the debtors. 11 U.S.C. §726(a)(6). Is this result, dictated by the Bankruptcy Code, "unfair"? Obviously not: it is **required** by the Code. Therefore, it is not in the least unfair for the trustee in this case to return Skinner's claim to him after receiving money to pay creditors and administrative expenses.

The order remanding this case to the state court was signed by United States Bankruptcy Judge Paul D. Snyder on July 8, 2005, and expressly contemplated "allowing the debtor his day in court in the above identified [case again Holgate], and expressly provided that, as to the remanded law suit, "the debtor may pursue the causes of action contained therein." CP 34-35.

This court has an opportunity to decide what should occur when, in contrast to the facts of the cited decisions, a trustee has already administered a previously unscheduled claim, has received money for it, and then has returned the claim to the debtor. In such a case equity does not demand that the debtor be foreclosed from pursuing the claim for at least two reasons.

First, from the defendants' perspective: they had the chance to settle the claim with the trustee in bankruptcy court, and made an offer to do so. When a higher offer was made – one that explicitly provided for return of the case to state court – defendants did not continue to negotiate for settlement on their terms. Rather, they realized a benefit from the settlement the court approved by having their claim paid from the $45,000. CP 283-84. Therefore permitting the case to go forward against them does not work an unfair disadvantage to defendants.

Second, from Skinner's perspective, there is no assurance that he will prevail against defendants when the state court case goes forward, so the trustee has not handed him a windfall. And if he does prevail, his recovery will not be at the expense of the creditors in his bankruptcy case. Thus Skinner, as debtor will have received no unfair advantage.

2. <u>Skinner Did Not Unfairly Benefit from Inconsistent Positions</u>

Defendants spend much of section F(3) of their brief reiterating statements about Skinner's initial failure to disclose his partnership interest. They then leap effortlessly to the conclusion that Skinner benefitted from this failure because:

> Although he [Skinner] claims that the suit is worth over one million dollars, the bankruptcy trustee abandoned it to him for $45,000. Had Skinner been candid with the bankruptcy court, the entire claim would have belonged to the trustee and Skinner's creditors.

Brief of Respondents at 21.We will examine each of the two sentences above in turn.

A. <u>"Although he [Skinner] claims that the suit is worth over one million dollars, the bankruptcy trustee abandoned it to him for $45,000."</u>

First, it is inaccurate to characterize the Settlement Agreement, CP 214-20, as an "abandonment" of the claim.[1] According to §554 of the current Bankruptcy Code, a trustee may "abandon any property of the estate that is burdensome to the estate or of inconsequential value." 11 U.S.C. §554(a), (b). Clearly Skinner's case was not "burdensome" or "of inconsequential value," since it realized $45,000 for the estate. In a true abandonment, the trustee receives nothing for the property abandoned to the debtor. *See generally In re Bolden*, 327 B.R. 657 (Bankr. C.D. Cal. 2005).

---

[1]We acknowledge that the Settlement Agreement uses the word abandonment. CP 218. This word does not change the fact that the Trustee received $45,000 for the claims. Further, the Stipulated Order Approving Compromise does not use the term abandonment. CP 33-35. Later in their Brief, at page 21, defendants again discuss the concept of "abandonment" in a bankruptcy case, citing a 1964 decision. The Bankruptcy Code dates from 1978; before that an almost completely different statutory scheme governed insolvency proceedings. *See In re Johnson*, 357 B.R. 136, 139 (Bankr. N.D. Cal. 2006) (Bankruptcy Act was repealed in 1978 and replaced by Bankruptcy Code).

Second, note that the million-dollar value is what "Skinner claims," not what has been established by a court or by agreement of the parties.

Third, the sentence implies that the trustee somehow did not act of his own volition in entering into the settlement agreement. This notion is both insulting to the trustee and nonsensical. See discussion below of second sentence.

B. "Had Skinner been candid with the bankruptcy court, the entire claim would have belonged to the trustee and Skinner's creditors."

The primary problem with this sentence is that, from May 2004, when this case was removed to bankruptcy court, until July 2005, when the bankruptcy court approved the Settlement Agreement, the "entire claim" **did** belong to the trustee and Skinner's creditors. While the claim was in the trustee's hands, the trustee had a choice between (1) litigating it and recovering an unknown amount from defendants (which could have been anywhere from nothing to one million dollars) and (2) accepting in settlement a definite sum that would be used to pay administrative costs and creditors' claims. The trustee – acting freely, using his own judgment and drawing upon his own experience – chose the latter course. When he did so, he knew at least as much about the claim as he would have "had Skinner been candid" in his initial schedules. Nothing Skinner did prevented "the entire claim" from belonging to the trustee and creditors.

Finally, we challenge defendants' assumption about what "would have" happened had the trustee chosen to litigate the claim and recovered $1 million. Under the Bankruptcy Code, the proceeds of the suit would have first paid all allowed administrative expenses, including the cost of litigation. 11 U.S.C. §726 (a)(1). Second, all allowed claims would have been paid. *Id.* §726(a)(2), (3), (4). Interest would have been paid on all the preceding. *Id.* §726(a)(5). And if – as seems likely in the case of such a large hypothetical recovery -- there was money left over after payment of all these claims and expenses? This money would **not** belong to the trustee and creditors – it would belong to the debtor. *Id.* § 726(a)(6); *see In re Riverside-Linden Investment Co.*, 925 F.2d 320, 323 (9th Cir. 1991) ("[T]o the extent a surplus exists after payment of claims, the funds revest in the debtor.").

In short, the end result in bankruptcy court is precisely what it would have been had the claim been disclosed on Skinner's original schedules. Here, the trustee and Bankruptcy Court judge clearly concluded that obtaining $45,000 for the estate was a satisfactory result, and that allowing any value of Skinner's claim in excess of that amount to revert to Skinner was a fair resolution of the matter.

3. <u>Skinner Did Not "Offend the Dignity of the Judicial Proceedings"</u>

Defendants' repetition of facts in section F(3) seems aimed at establishing the offensiveness of Skinner's omission of his partnership interest and potential claims from his original bankruptcy schedules. We simply remind the court that the following are also facts in the record.

- There was not a written partnership agreement. *See generally* CP 37-43.
- Skinner believed he had been excluded from the partnership **before** he filed for bankruptcy. CP 39 ¶3.10.
- The post-filing correspondence between Skinner and defendants shows that Skinner believed he was owed something while defendants contended, to the contrary, that **Skinner owed money to them**. CP 186-200. Thus defendants are

wrong to imply that Skinner **knew** he had a $1 million claim on the date he filed for bankruptcy and deliberately concealed it.

- Although, while Skinner was still in bankruptcy, he believed he might have claims against defendants the concept of contingent or unliquidated claims is a sophisticated one that a pro se debtor could reasonably fail to understand. *See In re Emelity*, 251 B.R. 151, 155 (Bankr. S.D. Cal. 2000) (although Congress intended an expansive definition of claim, "courts have struggled" with the limits of the concept).
- Further, the question of when a claim "arises" under bankruptcy law is much litigated. *See, e.g., id.* (analyzing whether a claim arose before petition was filed). Here, a the centerpiece of Skinner's claim against defendants was their failure to exercise an option to purchase a building at a favorable price; that option ripened in **January 2004**, long after Skinner's bankruptcy case was filed and more than a year after it closed. CP 39 ¶3.2; 41 ¶4.5; 44-45. The portion of Skinner's claim based on loss due to failure to exercise the option arguably did not "arise" until well **after** Skinner received his discharge in 2002.

The foregoing facts show that the situation was far more complicated than defendants suggest. Areas of bankruptcy law that reasonable people interpret differently, a pro se debtor advised by a paralegal, a debtor who was confused about the status of his relationship to defendants – all these factors point not to deliberate deception but to honest mistake.

Further, the "dignity of the judicial proceedings" are not offended when the very court in which the mistake was originally made later oversees correction of the mistake and blesses the debtor's ability to pursue a remedy; U.S. Bankruptcy Court Judge Paul B. Snyder: "...the Court [giving substantial consideration to] allowing the debtor his day in court in [*Skinner v Holgate* case]...it is hereby ordered that [*Skinner v Holgate, et al.*] is remanded to Thurston County Superior Court...and the debtor may pursue the causes of action contained therein." CP 34-35.

4. <u>The Trustee's Administration of the Claim Cured the Omission</u>

In Section F(4) of Respondents' Brief, defendants present a muddled argument that the reopening of Skinner's bankruptcy case, administration by the bankruptcy trustee of Skinner's claim against defendants, recovery of funds by the trustee enabling him to pay Skinner's creditors and costs of administration, and finally, the bankruptcy court's explicit order that "the debtor may pursue the causes of action contained [on the remanded lawsuit]" should have absolutely no impact on the judicial estoppel analysis. Again, they are wrong.

This portion of the defendants' argument urges the court to blindly follow the ruling in *Garrett* rather than consider that events subsequent to the original omission may indeed work to cure that omission. This court need not reject the *Garrett* ruling to hold that judicial estoppel does not apply here, because the *Garrett* facts are different.[2] We note, however, that the rule in *Garrett* could have potential adverse policy implications.

Bankruptcy law is aimed at providing both relief to debtors and equitable treatment to creditors. *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005).To illustrate how this aim could be thwarted by the *Garrett* rule, imagine a situation in which a debtor with $100,000 in creditors' claims and minimal other assets files for bankruptcy and omits (whether intentionally or not does not matter for this analysis) a potential claim for $500,000 (perhaps, as in *Bartley-Williams*, a medical malpractice claim) from his or her schedules. The debtor receives a discharge in bankruptcy and later files a lawsuit based on the omitted $500,000 claim. Let us also

[2]In *Garrett*, although the debtors' bankruptcy case was reopened to allow them to amend their schedules and include their negligence claim, their state court negligence case was apparently never removed to bankruptcy court to allow the trustee to administer it. 127 Wn. App. at 533. Thus the claim never produced funds for the creditors and was never the subject of a Bankruptcy Court order authorizing the debtors to pursue the claim in state court. **This completely distinguishes *Garrett* from the facts of this case and renders it non-controlling.**

assume that the claim has merit. The defendant seeks dismissal of the case based on judicial estoppel. There are two possible ways the case can go from here.

One, following the *Garrett* ruling, the court can dismiss the case. The result? The defendant – as the court in *Bartley-Williams* points out – gets a windfall. His (or her, or its) bad behavior goes unpunished. And the debtor's creditors receive nothing.

In the alternative, following the *Bartley-Williams* ruling, the court concludes that the better remedy is to reopen the bankruptcy case and allow the trustee to pursue the claim. The result? The defendant is called to account – no free pass based on the debtor's failure to schedule the claim. And the debtor's creditors will be paid from any recovery – probably in full. If the trustee recovers more than what is required to pay everyone else under 11 U.S.C. §726(a), the surplus is returned to the debtor. *Id.* §726(a)(6).[3]

In the latter scenario the debtor cannot be said to have received an unfair benefit or advantage, because the result is exactly what it would have been had the claim been scheduled originally. In addition, the **defendant** does not receive an unfair benefit or

---

[3]In the paragraph beginning at the bottom of page 22 and continuing to page 23 of their Brief, defendants attempt to make a bankruptcy argument. The point of this argument escapes us, but it exhibits some misunderstanding of the role of bankruptcy courts and bankruptcy law. First, defendants appear to contend that bankruptcy courts do not have either resources or jurisdiction to adjudicate claims that originated elsewhere. To the contrary, bankruptcy courts do this all the time. For jurisdiction, see 28 U.S.C. §1334; *see also, e.g., In re Alvarez*, 224 F.3d 1273 (11th Cir. 2000), *cert. denied*, 531 U.S. 1146 (2001). Second, in claiming that the trustee abandoned the claim to Skinner rather than selling it to him, defendants make several errors. They apparently believe that the only possible dispositions of property are sale free and clear of liens and abandonment. In fact, trustees may sell property under 11 U.S.C. §363 in other ways than free and clear of liens. Abandonment is discussed *supra* at pp. 5-6. Defendants state that the distinction between a sale and an abandonment is "important," because "the debtor is considered to have continuously owned the asset" in the case of abandonment. It is not clear what impact this principle might have on judicial estoppel. Further, the principle is derived from a case decided under very old law. Finally, the statement of the principle in that decision continues: "This is a fiction, and a fiction is but a convenient device . . . . It is not a categorical imperative, to be blindly followed to a result that is unjust." *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394 n.1 (9th Cir. 1964).

advantage, and the debtor's creditors are not unfairly cut off from the possibility of any recovery, both of which would be the result if judicial estoppel were applied. We submit that any insult to judicial integrity from the original omission is clearly outweighed by the far more equitable result in the second scenario.

The court in *An-Tze Cheng v. Diversified Industries*, 308 B.R. at 459-62, discusses at length why, in the bankruptcy context, imposing judicial estoppel in a knee-jerk fashion when a debtor has failed to schedule a claim may be the wrong answer. We have previously cited *Dunmore v. United States of America*, 358 F.3d 1107, 1113 n.3 (9th Cir. 2004). Both these decisions view reopening the bankruptcy case and allowing the trustee to administer the (previously omitted) claim as a **substitute remedy** – a course of action that can be used **in place of judicial estoppel**. The Bankruptcy Court here did precisely that.

As the New York Appellate Division said in *Koch v. National Basketball Association*, 245 A.D. 230, 666 N.Y.S.2d 630 (NY App Div 1997):

> [T]he reopening of the bankruptcy proceeding, which the Bankruptcy Court was empowered to do in its sole discretion, **revived the original bankruptcy proceeding** and all the procedural and substantive rights of the debtor therein, plaintiff herein, and thereby **nullified the final determination upon which a judicial estoppel could be predicated.**

245 A.D. at 231 (internal citations omitted) (emphasis added). Here, similarly, the Bankruptcy Court's actions in reopening the case, allowing the trustee to administer Skinner's claim, and approving a resolution that allowed Skinner to pursue the claim in state court, all work to override or "nullify" the court's "acceptance" of Skinner's schedules in his earlier discharge.

5. <u>"Intent to Mislead" Cannot Be Decided on Summary Judgment</u>

Defendants' argument that "intent to mislead" is irrelevant to a decision on judicial estoppel is also confusing. First, we note that although the *Cunningham* court held that intent to mislead is not an element of judicial estoppel, it also found "nothing in the record to support Cunningham's assertion that he omitted the claim by mistake." 126 Wn. App. at 234. Further, the court in *Garrett* did not adhere to this rule: first it noted that judicial estoppel may not apply "where the party can reasonably explain the differing positions," 127 Wn. App. at 379; then it recited findings of the trial court to support its conclusion that the trial court had properly applied judicial estoppel – five out of six findings relate to intent. *Id.* at 383. The court in *Miller* argued that despite the *Cunningham*' courts statement about intent, "deliberate or intentional manipulation can typically be inferred from the record in cases where judicial estoppel has been applied." 155 P.3d at 160.

We have pointed to facts supporting Skinner's position that his original omission was unintentional; defendants point to facts which, they contend, support an inference of intent. If intent is a factor – and we submit it is – the trial court should not have decided this issue of fact at all, let alone decided it in favor of the moving party. *City of Spokane v. County of Spokane*, 158 Wn. 2d 661, 671, 146 P.3d 893 (2006) (on summary judgment trial court and appellate court must view all facts and reasonable inferences in the light most favorable to the nonmoving party).

6. Defendants Are Not Entitled to Attorney Fees

Defendants allege alternative bases for awarding them attorney fees. None apply here.

A. "Bad Faith" Theory Does not Support Award of Attorney Fees

Defendants argue first that attorney fees may be awarded if a losing party's conduct constitutes "bad faith," citing *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 557 P2d 342 (1976). The bad faith in that case was evidenced by breach of partnership duties: the managing partner had kept no accounting records and had commingled partnership funds with his own. When asked to produce an accounting he did not do so. He therefore breached his fiduciary duties to his partner. 87 Wn.2d at 799-800. Here, in contrast, it is Skinner, the plaintiff, who has alleged that **defendants** breached their partnership duties.

There is no allegation or argument that Skinner breached his duties to his partner or the partnership. Thus the fact that *Hsu Ying Li* concerns a partnership gives it no special relevance to this case.

The sole factual basis defendants proffer in support of a "bad faith" attorney fee award is that Skinner did not disclose his partnership interest or potential claims against defendants in the schedules filed in his 2002 bankruptcy case. "He had dishonesty of belief and purpose when he filed this lawsuit. That is sufficient 'bad faith' to support an attorney award in an equitable action such as this one." Brief of Respondents at 27-28. Defendants cite no reported decision to support this conclusion.

Perhaps this is because there is no support for it in decisional law. In *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App, 918, 982 P.2d 131 (1999), the court turned to federal law on bad faith because "Washington case law provides little precedent for what constitutes bad faith." 96 Wn. App. at 135. The court found there "three types of bad faith conduct that have warranted attorney's fees: (1) prelitigation misconduct; (2) procedural bad faith; and (3) substantive bad faith." *Id.* The court then summarized what each type of misconduct comprises. Prelitigation misconduct is "'obdurate or obstinate conduct that necessitates legal action' to enforce a clearly valid claim or right." *Id.* at 136. "Procedural bad faith is unrelated to the merits of the case" and refers to such vexatious litigation conduct as dilatory discovery tactics, misuse of discovery, and misquoting or omitting material portions of documentary evidence. *Id.* Plainly neither of these types of bad faith is asserted here.

The third category, substantive bad faith, "occurs when a party intentionally brings a frivolous claim, counterclaim or defense with improper motive." *Id.* Citing *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998), the court notes, "Bringing a frivolous claim is not enough, there must be evidence of an 'intentionally frivolous [claim] brought for the purpose of harassment." *Id.* In *Rogerson Hiller* the trial court had imposed attorney fees based on the taking of inconsistent positions. *Id.* at 137.

The court of appeals reversed. (The court in *Pearsall-Stipek* also reversed an award of attorney fees.) In sum, attorney fees for "substantive bad faith" are imposed only rarely, and cannot be based merely on "inconsistent positions" or a "frivolous claim."

Thus there is no support for an attorney fee award here. Further, there are simply too many disputed questions of fact about Skinner's intent to award attorney fees on the basis of bad faith.

B. <u>Defendants Are Not Entitled to Attorney Fees Under RCW 25.05.250</u>

Note at the outset that this provision of state law also requires a finding of bad faith. But there are additional reasons why defendants' attempt to shoehorn this case into a provision of the Revised Uniform Partnership Act must fail. First, their argument asks this court to reach the merits of the litigation and rule in their favor on the merits. Second, their contention that RCW 25.05.250(9) is the basis for plaintiff's claims against them is simply wrong. Finally, even if RCW 25.05.250(9) applied to this case, that provision does not give them what they are asking for.

A partnership is "an association of **two or more persons** to carry on as co-owners a business for profit." RCW 25.05.005(6) (emphasis added). The partnership at issue here had only two persons. Thus, upon dissociation by either partner, the partnership **by definition** must have been in dissolution with its affairs being wound up. RCW 25.05.250, which defendants rely on, addresses what happens when a partnership **continues** after the dissociation of one of its partners. Because this partnership **could not continue** after dissociation of one of its two partners, RUPA article 8 rather than article 7 applies. *See* RCW 25.05.235(1).

RCW 25.05.300 (article 8) describes events causing dissolution of the partnership. The partnership here was one for a particular undertaking, *see* CP 64, so RCW 25.05.300(2) applies. Which partner dissociated is in dispute: Skinner alleges that defendant Holgate wrongfully dissociated in May 2002. CP 39-40; *see* RCW 25.05.230(2)(b)(I). Defendants allege Skinner dissociated at the time of his bankruptcy filing, July 12, 2002. *See* RCW 25.05.225(6)(a). The court cannot decide this issue[4] in favor of either party on this cross-appeal, but in any event the partnership was in dissolution within 90 days of the dissociation event. RCW 25.05.300(2)(a). At the latest, then, dissolution and winding up should have begun by mid-October 2002. Skinner brought this case because, *inter alia*, the affairs of the partnership had not been wound up and he had not received an accounting by February 2004. CP 40. Nothing in article 8 of the Revised Uniform Partnership Act authorizes payment of attorney fees.

Even if defendants were correct and article 7 were to apply, they are not entitled to attorney fees under RCW 25.05.250(9), for several reasons. First, the "action" referred to in this statute "must be commenced within one hundred twenty days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered." This suit was filed on or about February 11, 2004. It was not filed within either of the two alternative limitations periods.

- On February 12, 2003, defendants Holgate and Crow made a written offer to Skinner to resolve all open issues. CP 199-200. If this is construed as an "offer to pay," the suit would have to have been brought by mid-June 2003 for RCW

[4]Defendants also claim that "there is no question Skinner filed a bankruptcy in 2002 during the term of the GM Properties partnership." Respondents' Brief at 28. To the contrary, there is indeed a question. Skinner alleges that he was excluded from the partnership before he filed for bankruptcy, and defendants themselves acknowledge that Skinner was removed from the partnership bank account in April 2002, three months before his bankruptcy. *Id.* at 5, citing CP 109-12.

25.05.250(9) to apply.

- Skinner wrote several letters to Holgate between September 17, 2002, and February 2, 2002. CP 186-98. If one or more of these letters is construed as "demand for payment," the suit would have to have been brought by February 3, 2003, at the very latest, for RCW 25.05.250(9) to apply.

Further, RCW 25.05.250(9) also provides: "The court shall determine the buyout price of the dissociated partner's interest." No such determination was made here. In fact, the court did not address any of the partnership issues raised in the suit, because it held that Skinner was judicially estopped from pursuing the suit. The plain implication of RCW 25.05.250(9) is that any attorney fees awarded must actually be related to litigation of **partnership issues**. Because there was no such litigation here, RCW 25.05.250(9) cannot apply.

Finally, as defendants observe, RCW 25.05.250(9) makes an award of attorney fees discretionary, and only against "a party that the court finds acted arbitrarily, vexatiously, or not in good faith." We submit that if any party acted "vexatiously" here, it was defendants, because they seek attorney fees that were not incurred in an action in which the court determined a buyout price for the interest of a dissociated partner.

C. <u>Defendants Are Not Entitled to Attorney Fees Under RAP 18.9</u>

Defendants also argue for attorney fees under RAP 18.9, citing two decisions on attorney fees for "frivolous appeals." We note that defendants have omitted several details that the cited decisions have to say on the issue. The court in *Public Employees Mutual Insurance Co. v. Rash*, 48 Wn. App. 701, 740 P.2d 370 (1987), explains the analysis well:

> In determining whether an appeal is frivolous, justifying the imposition of terms and compensatory damages, the court should consider: (1) that a civil appellant has a right to appeal under RAP 2.2; (2) that all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) that the record should be considered as a whole; (4) that an appeal that is affirmed simply because the arguments are rejected is not

> frivolous; and (5) that "an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there [is] no reasonable possibility of reversal."

48 Wn. App.. at 706-07, quoting *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). We urge this court to consider Skinner's right to appeal and the record as a whole, and to resolve all doubts in Skinner's favor.

That said, that the question raised in this appeal is one on which reasonable minds can differ is plain even from the decisions defendant relies on. Defendants claim that "ample, clear case law" supports their arguments. We believe, to the contrary, that recent decisional law on judicial estoppel in Washington shows a willingness by the courts of appeal to consider each case based on its own facts, and to diverge from arguable "precedent" when the facts demand it.

For example, although the court in *Cunningham* had said intent is not a factor, the court in *Garrett*, nevertheless took intent into account in ruling. 127 Wn. App. at 383. The court in *Bartley-Williams* "declined to adopt" the *Garrett* court's reasoning about whether a trustee should be allowed to pursue a claim that a debtor would be judicially estopped from pursuing. 134 Wn. App. at 100. The court in *Miller*, reversing a ruling imposing judicial estoppel, noted that it is "an equitable doctrine, . . . not to be applied inflexibly," and that "[a] party's nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit." 155 P.3d at 159-60.

The facts of this case are in material respects unlike those of the cases defendants rely upon. The facts are similar to those in which other courts have held judicial estoppel is inappropriate. Reasonable minds can differ on how to apply this "flexible" "equitable" doctrine in this case.

CONCLUSION

For all the reasons set forth herein and in Skinner's opening brief, this court should reverse the trial court's grant of summary judgment to defendants.. If this court affirms the ruling below, it should also affirm the trial court's refusal to award attorney fees to defendant, and should decline to award attorney fees based on RAP 18.9.

Respectfully submitted this 3rd day of May, 2007.

BRADLEY J. WOODWORTH & ASSOCIATES, PC

By: Bradley J. Woodworth, WSB No. 32691
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Bradley J. Woodworth, certify that I served a copy of Appellant's Reply Brief by causing the document to be mailed by first class mail to the following on the date set forth below:

Mr. Richard A. Paroutaud
Mano McKerricher Paroutaud & Hunt
Attorneys at Law
20 S.W. 12th Street
P.O. Box 1123
Chehalis, WA 98532-0169

Philip A. Talmadge
Sidney Charlotte Tribe
Talmadge Law Group PLLC
Attorneys at Law
18010 Southcenter Parkway
Tukwila, WA 98188

DATED May 3, 2007.

BRADLEY J. WOODWORTH & ASSOCIATES, PC

Bradley J. Woodworth, WSBA No. 32691
Of Attorneys for Appellant