

NO. 35839-5-1 II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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MARK S. FARHOOD, TEE JAY VAUGHN, PATRICIA VAUGHN,  
Trustee of the VAUGHN FAMILY TRUST,

Appellants,

vs.

JILL D. ALLYN, individually and as Administrator of the Estate of  
Joseph Steven Allyn, deceased, and ERICK P. JOHNSON, as Guardian  
ad Litem for JOSEPH BRYCE ALLYN, a minor,

Respondents.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE JOHN F. NICHOLS

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BRIEF OF RESPONDENTS

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RESPONSE TO ASSIGNMENT OF ERROR AND ISSUES  
PRESENTED

I. Response to Assignments of Error.

The trial court did not error in granting Ms. Allyn's motion for summary judgment and entering judgment of dismissal.

II. Issues Presented.

a. Did plaintiffs' cause of action accrue upon the levy of the writ of attachment?

b. Is Mark Farhood judicially estopped from pursuing any remedy in this case?

STATEMENT OF THE CASE

I. Essential Facts Governing This Case.

The essential facts in this case are set out in the Opinion of the Court of the Appeals in *Farhood v. Asher*, Court Appeals No. 28811-7-II consolidated with *Allyn v. Asher*, Court of Appeals No. 29408-7-II. (CP 139-47) The Court is entitled to take judicial notice of this opinion since it is within the Court's record. *Spokane Research and Defense Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005). That opinion will be utilized as the basis for the facts it contains.

Joseph Steven Allyn was a passenger in a vehicle driven by Steven Asher on January 22, 1999. Mr. Asher lost control of the vehicle. Mr. Allyn died as a result of the injuries he sustained in the crash. (CP 140)

Mr. Allyn's widow, Jill Allyn, became personal representative of his estate. She instituted a wrongful action against Mr. Asher in March of 1999. She obtained a writ of pre-judgment attachment on three (3) lots that Mr. Asher owned in Washougal, Washington. The order for writ was obtained ex parte. (CP 140-1)

Subsequently, Mr. Asher sold the real property to Mark Farhood and Cheryl Farhood and to Tee Jay Vaughn and Patricia Vaughn by deed dated August 31, 1999. (CP 141) The deed recites that Mark and Cheryl Farhood would receive an undivided twenty percent (20%) interest while Tee Jay Vaughn and Patricia Vaughn as trustees of the Vaughn Family Trust would receive an undivided eighty percent (80%) interest. The deed was specifically subject to the writ of attachment that Ms. Allyn had obtained. (CP 87-9)

Mark Farhood had taken the laboring oar of acquiring property. He was aware of the pendency of the writ of attachment and had discussed the wrongful death case with Mr. Asher's attorney. (CP 80-1) The title of policy insurance that the purchasers obtained listed the writ of attachment as an exception. (CP 82-3)

Ms. Allyn subsequently obtained a judgment against Mr. Asher in the amount of \$1,100,736.13 costs included. Mr. Asher's auto liability policy paid a portion of this judgment. After all payments, \$545,829.65 remained as of January 18, 2002. On February 22, 2002, Ms. Allyn obtained a writ of execution as to the Washougal property. She bid \$400,000.00 at the sheriff's sale and succeeded to possession of the property. (CP 142)

Mr. Farhood — but not the Vaughns — initiated a suit to quiet title to the property. The trial court found against him. (CP 142) In this suit, he did not raise any issue concerning the constitutionality of the procedure by which the writ had been obtained. (CP 47)

Mr. Farhood appealed. In this action, he claimed for the first time that the procedure by which the writ of attachment was granted was constitutionally infirm. The Court of Appeals reversed and ordered that the Washougal property be quieted in Mr. Farhood and the Vaughns.

## II. Mr. Farhood's Bankruptcy Proceedings.

Just as the trial court was about to enter its order in the suit to quiet title, Mr. Farhood filed for bankruptcy protection in that matter entitled *In re Farhood*, United States Bankruptcy Court for the Southern District of California No. 02-03631. He did not schedule as an asset any claim that

he might have against Ms. Allyn. To the contrary, he listed her as a creditor holding both secured and unsecured claims. (CP 60-9) He also mentioned Ms. Allyn in his Statement of Financial Affairs in the following terms:

Caption of Suit & Case Number	Nature of Proceeding	Court or Agency Location	Status or Disposition
<i>Jill Allyn v. Steven Asher</i> , Case No. 99-2-01218-0	Execution of prejudgment writ of attachment resulting from wrongful death action	Superior Court of the State of Washington for the County of Clark	Sheriff's foreclosure sale pending

(CP 113) No mention is made of a quiet title suit that he had filed or of any claim against Ms. Allyn or anyone else.

On June 25, 2002, the bankruptcy trustee abandoned the Washougal property as an asset of the bankrupt estate. He noted that the fair market value of Mr. Farhood's twenty percent (20%) undivided interest was less than the amount of the debt owed on the property. (CP 70-1) Mr. Farhood subsequently received a discharge. (CP 72-3)

### III. Possession of the Washougal Property.

Ms. Allyn assumed possession of the Washougal property subsequent to the sheriff's sale. She leased the property and collected

rents from the tenants. She did repairs. She made payments for real property taxes, insurance, and other necessary expenses. All net proceeds were retained in her attorney's trust account. (CP 44-5)

After the Mandate was returned from the Court of Appeals, all net proceeds were remitted to Mr. Farhood and the Vaughns. Ms. Allyn retained no portion of those proceeds. (CP 45)

IV. Proceedings In This Suit.

Mr. Farhood and the Vaughns commenced the instant action on January 6, 2005. They styled their action as "Complaint for Damages for Wrongful Execution, Trespass, Conversion of Rents, and Interference with Property Owner's Rights." (CP 1-9) Their complaint made reference to the *ex parte* writ of attachment that the Court of Appeals had found to be unlawful. (CP 2-3) Ms. Allyn answered. Her answer included the affirmative defenses of "statute of limitations" and "judicial estoppel." (CP 17-8)

On September 5, 2006, Ms. Allyn moved for summary judgment. (CP 43) She alleged, among other things, that the action was barred by the applicable statute of limitations and that Mark Farhood was judicially estopped from asserting any claims. (CP 46-57)

The trial court granted Ms. Allyn's motion. It found that the action was barred by the three-year statute of limitations. It relied heavily on the prior opinion of the Court of Appeals and particularly the statement that "the due process violation was complete when Allyn invoked the exparte attachment." (CP 150-1) It subsequently entered a judgment of dismissal. (CP 155-6) Mr. Farhood and the Vaughns then appealed. (CP 157-62)

## ARGUMENT

### I. Standard of Review.

The trial court decided the matter on summary judgment. An appellate court reviews and order of summary judgment de novo performing the same inquiry as did the trial court. Summary judgment is only appropriate if there is no genuine issue of material fact. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 93 P.3d 108 (2004); *MaIntyre v. State*, 135 Wn.App. 594, 141 P.3d 75 (2006). In this case, the facts are not disputed. The trial court correctly determined the legal issues at hand as will be demonstrated below.

### II. The Trial Court Correctly Determined That the Action was Barred by the Applicable Statute of Limitations.

#### a. The Period of Limitation Is Three Years.

Mr. Farhood and the Vaughns styled this action as one for trespass upon real property, wrongful execution, and conversion in their complaint. (CP 1-9) The limitation period for actions of that type is three years. RCW 4.16.080(1). The “catch all” provision of RCW 4.16.080(2) — any other injury to the person or rights of another not hereinafter enumerated — is also applicable. The Vaughns and Mr. Farhood recognized that the three-year limitation period applied. (CP 101-2)

Ms. Allyn believed that the action was really one based on wrongful attachment. To the extent that its gravamen would be denial of due process under 42 U.S.C. §1983, the three-year limitation period also applies. *Douchette v. Bethel School District No. 403*, 117 Wn.2d 805, 818 P.2d 1362 (1991); *Robinson v. City of Seattle*, 119 Wn.2d 34, 85-6, 830 P.2d 318 (1992). (CP 49)

There can be no doubt here. The period of limitation is three years.

b. The Cause of Action Accrued in 1999.

i. Introduction.

The period of limitation runs from the date that plaintiffs’ cause of action accrued. It is clear that the date of accrual was

in 1999. That is the only conclusion that can be drawn from the prior decision of the Court of Appeals and the nature of a writ of attachment.

ii. A Cause of Action Accrues When There Is Damage.

A cause of action accrues when a party has the right to apply to a court for relief. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 146 P.3d 423 (2006); *First Maryland Leasecorp v. Rothstein*, 72 Wn.App. 278, 864 P.2d 17 (1993); *Gausvik v. Abbey*, 126 Wn.App. 868, 107 P.3d 98 (2005). That date is most often the time of the act or omission in question. *Samuelson v. Community College District No. 2*, 75 Wn.App. 340, 877 P.2d 734 (1994).

A cause of action accrues when the plaintiff has suffered some appreciable form of injury or damage. *Mayer v. City of Seattle*, 102 Wn.App. 66, 10 P.3d 408 (2000). That injury need not be great. The statute of limitations is not postponed by the fact that further, more serious harm may later flow from the wrongful conduct. As was said in *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954):

When an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date

Accord, *Green v. American Pharmaceutical Company*, 136 Wn.2d 87, 96, 960 P.2d 912 (1988); *Steele v. Organon, Inc.*, 43 Wn.App. 230, 716 P.2d 920 (1986).

iii. Damage Was Present In 1999.

The prior decision of the Court of Appeals made it clear that damage was present in 1999. This is when the cause of action accrued.

In the prior proceeding, Ms. Allyn claimed that Mr. Farhood did not have standing to raise any constitutional violation. The Court of Appeals rejected that argument in the following terms:

Allyn asserts that Farhood does not have standing to claim constitutional error because there was no harm done. As seen below, Asher suffered harm and the violation of his right to due process in the ex parte proceeding. Farhood, as owner, steps into the same interest in the land as Asher had and stands to suffer the same consequences of the violation — loss of the real property — because as assignee of Asher’s full title to and interest in the property, Farhood stands in Asher’s shoes. . . Therefore, Farhood has the distinct and personal interest required for standing. . . .

(CP 142-3) It went on to state:

Though the harm here may have only lasted the 16 days until the adversarial hearing, the due process violation was complete when Allyn invoked the ex parte attachment. . .

(CP 146) These statements should end the discussion. The Ashers were injured when the writ was levied. Mr. Farhood and the Vaughns are the Ashers' assignees. As such, Ms. Allyn may assert any defense against them that she would have against the Ashers. That follows from RCW 4.08.080 that provides as follows:

Any assignee or assignees of any judgment, bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, named in such judgment, bond, specialty, book account, or other chose in action, notwithstanding the assignor may have an interest in the thing assigned: PROVIDED, That any debtor may plead in defense as many defenses, counterclaims and offsets, whether they be such as have heretofore been denominated legal or equitable, or both, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein.

One such defense is the failure to file within the period of limitation. The Ashers would have had to file any claim in tort within three years of the levy of the writ. That defense may be maintained against their assignees, the Vaughns and Mr. Farhood.

Mr. Farhood and the Vaughns argue against this conclusion by stating that "any damages that arose from (the) temporary interference with Asher's property rights were personal to Asher." Brief of

Appellant, pps. 11-12. That was precisely Ms. Allyn's position in the first appeal between these parties. She made that argument, as the Court then noted, to show that the Vaughns and Mr. Farhood had not been harmed by the levy of the writ and therefore had no standing to complain about the procedure used for its issuance.

Mr. Farhood and the Vaughns cannot have it both ways. They must take the burdens of being categorized as the assignees of the Ashers along with the benefits. If they had standing as assignees to recover the property based upon the procedure by which the writ of attachment was obtained, they must accept the fact that they are subject to the same defenses as the Ashers. These defenses include the statute of limitations.

The trial court did not base its ruling on the Vaughns and Mr. Farhood being the Ashers' assignees. It accepted the ruling of the Court of Appeals that the lien that attaches as a result of an improper levy of a writ of attachment amounts to damage. It reasoned that the Vaughns and Mr. Farhood suffered this damage when they were deeded the property subject to the writ. It held that the damage was complete at that very moment and that any cause of action accrued at that time.

Once again, Mr. Farhood and the Vaughns cannot have it both ways. Does the pendency of the lien created by a writ of attachment cause damage? That is precisely what the Court of Appeals previously concluded. And that conclusion allowed the Vaughns and Mr. Farhood to reclaim the property. Having once profited from the legal conclusion the Court of Appeals made, they are in no position to reject it now.

iv. The Levy of The Writ of Execution Is Not a Separate Act.

Mr. Farhood and the Vaughns contend that their cause of action accrued with the subsequent writ of execution levied in 2002. This argument is infirm because a writ of execution is simply the means to discharge an existing writ of attachment.

After judgment is obtained, the sheriff is obliged to sell the property held under the writ of attachment to satisfy the judgment. That follows from RCW 6.25.240, which provides as follows:

If judgment is recovered by the plaintiff, it shall be paid out of any proceeds held by the clerk of the court and out of the property retained by the sheriff if it is sufficient for that purpose as follows:

(1) By applying on the execution issued on said judgment the proceeds of all sales of perishable or other property sold, or so much as shall be necessary to satisfy the judgment.

(2) If any balance remains due, the sheriff shall sell under the execution so much of the personal property attached as may be necessary to satisfy the balance and, if there is not sufficient personal property to satisfy the balance, the sheriff shall sell so much of any real property attached as is necessary to satisfy the judgment.

Notice of sale shall be given and sale conducted as in other cases of sales on execution.

For more than one hundred years, Washington has recognized that once property is attached it must be applied to satisfy any judgment that is obtained. The rule was stated in *Van de Vanter v. Davis*, 23 Wash. 693, 63 P. 555 (1901). In that case, the sheriff had taken possession of property pursuant to a writ of attachment and had received an attachment bond. After judgment was entered, a writ of execution was levied on the attached property and was subsequently sold. The true owners of the property then sued the sheriff for conversion and recovered a judgment against him that the sheriff satisfied. The sheriff then sued on the bond. The bond sureties contended that their attachment bond could not be reached because the sale had been made pursuant to a writ of execution. The Court rejected that argument. It held that the attachment bond covered the damage resulting from the seizure and sale of the property even though the sale was made pursuant to a levy of a writ of execution. It stated:

An examination of the sections of the law cited shows that the very object of the writ of attachment was to seize and hold the property of the debtor for sale to satisfy any judgment recovered against him; that the lien justifying the sale of the property for its satisfaction attached at the moment of levy of the writ of attachment, and remained a continuous lien until the property was finally sold. . . A writ of execution in such case is but the means to discharge the lien, and, if the judgment is not thereby satisfied, may be further executed as an independent writ, as in other cases. The damage that was caused by the sale of the property related back to the seizure of the property under the attachment writ for the purpose of sale in the event of a judgment against the debtor. . . The (sureties) in their brief, say the office of the writ of attachment expired as soon as the writ of execution was issued, and in fact as soon as the judgment was rendered. This is an incorrect statement of the law. The attachment law specifically directs what shall be done under attachment after the judgment has been obtained, and that is that the sheriff shall satisfy the judgment out of the property attached by him in the manner provided by statute.

(Emphasis added.) 23 Wash. at 698; Accord, *BNC Mortgage, Inc., v. Tax Pros, Inc.*, 111 Wn.App. 238, 46 P.3d 812 (2002).

The language of this opinion and RCW 6.25.240 therefore make it clear that any damage from the execution sale related to the levy of the writ of attachment. Once judgment was obtained against the Ashers, the sheriff was required by statute to seek execution. The damage alleged to stem from the writ of execution is therefore properly traced to the levy of the writ of attachment. For that reason, the levy of

the writ of execution and execution sale cannot be considered a new and different act accruing a new cause of action.

v. The Label Placed on the Cause of Action Does Not Matter.

Mr. Farhood and the Vaughns have alleged that their claims are really for conversion and trespass. Regardless of how they seek to label their claim, the injury, as the Court of Appeals found, was complete upon the levy of the writ of attachment. How the cause of action is labeled does not change that fact.

vi. There Is No Continuous Cause of Action.

Mr. Farhood and the Vaughns also suggest that rules regarding a continuous cause of action should apply here. The effect of a writ of attachment as discussed above, disposes of this argument as well. The Court of Appeals previously found that injury occurred at the time of levy. Everything flowed from this discreet event. There was no continuous physical trespass here as there was in *Doran v. City of Seattle*, 24 Wash. 182, 64 P. 230 (1901), *Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P. 285 (1922), or *Fradkin v. North Shore Utility District*, 96 Wn.App. 118, 977 P.2d 1265 (1999).

Counsel's research has not located any case where a court ruled that wrongful attachment or wrongful execution represented a continuing tort. A leading case, *Schuldes v. National Security Corporation*, 27 Ariz.App. 611, 557 P.2d 543 (1976), is directly contrary. The Court there held that a cause of action for wrongful attachment accrued at the instant of levy. It also stated that the passage of time would not make the initial levy any less wrongful; it would only affect the amount of damages. Finally, it announced a policy in favor of prompt filing of wrongful attachment claims so that damages could be mitigated. 27 Ariz.App. at 615.

Furthermore, other authority holds that a claim for wrongful execution based on improper procedure in obtaining and levying the writ accrues on the date of levy and is not a continuing tort. *Wood v. Currey, infra; Haas v. Buck, infra.*

This argument must be rejected. It is not supported by any authority and has been rejected.

vii. The Cause of Action Did Not First Accrue When the Court of Appeals Rendered Its First Decision.

Finally, Mr. Farhood and the Vaughns allege that the cause of action accrued when the Court of Appeals rendered its first decision. This argument is based on *Gillis v. F & A Enterprises*, 934 P.2d

1253 (Wyo. 1997). Their argument is fallacious because the opinion on which they rely is clearly distinguishable.

In *Gillis v. F & A Enterprises, supra*, F & A Enterprises secured a judgment against Gillis. It levied execution, and an execution sale was held. Gillis appealed but did not file supersedeas to stay proceedings. The appellate court found the record so confused that it could not rule. It remanded the case back to the trial court for new proceedings. The matter was ultimately dismissed at the trial court for the want of prosecution. Gillis then sued for wrongful execution of his property. By statute, the period of limitation for such actions was four (4) years. The suit was commenced more than four (4) years from the levy of the writ of execution; more than four (4) years after the appellate court's opinion reversing a judgment; but slightly less than four (4) years after the mandate from the appellate court was returned. The trial court dismissed the action as untimely filed.

On appeal, the Court held that the cause of action accrued when the appellate court had rendered its decision. It reasoned that the execution sale was a product of a judgment valid from time of rendition to reversal. There was nothing wrong with the levy of the writ of execution itself. The cause of action was only allowable because the underlying judgment had been reversed. As the Court noted:

Appellees rely on the black letter statements of law contained in both American Jurisprudence 2d and Corpus Juris Seccudum to the effect that the statute of limitations for a wrongful levy, execution or seizure accrues at the time of the wrongful act, that is on the date the levy, execution or seizure occurred. . . However, appellees' argument fails to address the fact that the levy, seizure and subsequent sale were not wrongful when they occurred.

The judgments on which appellees acted were erroneous. An erroneous judgment is issued by a court with jurisdiction, but is subject to reversal on timely direct appeal. . . although an erroneous judgment is voidable, it is not void or an absolute nullity. . . until reversed, a voidable judgment is binding and enforceable and "constitutes sufficient justification for all acts done in its enforcement."

934 P.2d at 1255.

Our case represents the reverse of *Gillis v. F & A Enterprises, supra*. The attachment and subsequent execution were based on a judgment Ms. Allyn obtained against the Ashers. No one has alleged that the judgment itself was erroneous. Rather, the problem here is the initial levy of the writ of attachment that the Court of Appeals found to be wrongful. As the Court in *Gillis v. F & A Enterprises, supra*, found, in such cases the cause of action accrues on the date of the wrongful levy.

c. Conclusion.

Any cause of action on which Mr. Farhood and the Vaughns could have sued accrued in 1999. They were required to commence their cause of action in 2002. They waited to sue until 2005.

Their cause of action was subject to dismissal because it was not timely filed. The trial court's dismissal was proper for that reason and should be affirmed.

III. Mr. Farhood Is Judicially Estopped From Any Claim.

Mr. Farhood filed for bankruptcy protection without listing any claim against Ms. Allyn as an asset of his bankrupt estate. This judicially estops him from pursuing any remedy against Ms. Allyn.

The trial court did not reach this issue because it determined that the action was barred by the applicable statute of limitations. The Court of Appeals may affirm on any ground established by the pleadings and supported by the proof. *Hunnum v. Friedt*, 88 Wn.App. 881, 889-90, 947 P.2d 760 (1997); *Allstate Insurance Company v. Raynor*, 93 Wn.App. 484, 495, 969 P.2d 510 (1999). Therefore, even if the action is not barred in total, Mr. Farhood cannot obtain any relief.

Mr. Farhood filed for bankruptcy protection on April 11, 2002. He did not list any claim against Ms. Allyn as an asset. He was granted a discharge on July 17, 2002. Furthermore, the trustee abandoned the real property now in question. This series of events requires the application of the doctrine of judicial estoppel.

All divisions of the Court of Appeals have now ruled that a person who fails to list a claim on his bankruptcy schedules is judicially estopped from pursuing that claim. *Johnson v. Si-Cor, Inc.*, 107 Wn.App. 902, 28 P.3d 832 (2001); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 108 P.3d 147 (2005); *Garrett v. Morgan*, 127 Wn.App. 375, 112 P.3d 531 (2005); *DeAtley v. Barnett*, 127 Wn.App. 478, 112 P.3d 540 (2005). The Supreme Court has agreed although it has held that a bankruptcy trustee is not judicially estopped from pursuing a claim of a debtor. *Arkison v. Ethan Allen, Inc.*, \_\_\_ Wn.2d \_\_\_, 160 P.3d 13 (2007)

Judicial estoppel is a doctrine that precludes a party from gaining an advantage by asserting one position before a court and then later taking an inconsistent position. It is invoked to prevent that party from gaining such an advantage and to maintain the dignity of legal proceedings.

*Garrett v. Morgan, supra.*

There are three requirements for the invocation of judicial estoppel:

1. Whether the party's later position clearly conflicts with his earlier one;
2. Whether the party persuaded a court to accept the earlier position such that the court's acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or the second court; and

3. Whether the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped.

*Garrett v. Morgan, supra*, 127 Wn.App. at 379. Each of these requirements is met in this case.

First of all, Mr. Farhood's later position conflicts with his earlier one. He was required to schedule all of his assets including potential causes of action even if there is little likelihood of success. *Cunningham v. Reliable Concrete Pumping, Inc., supra*. He failed to disclose as an asset any claim that he has against Ms. Allyn on his bankruptcy schedules. However, he now claims to have a cause of action against Ms. Allyn. His position in the bankruptcy proceeding is therefore inconsistent with his position now. It is clear that the failure to schedule a cause of action in a bankruptcy case is sufficient to meet this element. *Johnson v. Si-Cor, Inc., supra*; *Cunningham v. Reliable Concrete Pumping, Inc., supra*; *Garrett v. Morgan, supra*; *DeAtley v. Barnett, supra*.

The second element is also satisfied. Because Mr. Farhood did not schedule any claim against Ms. Allyn, his bankruptcy trustee could not take over that claim and pursue it for the benefit of all of his creditors. If not estopped, Mr. Farhood would have the advantage of being able to reap

the fruits of any cause of action that there might be.<sup>1</sup> This is a sufficient advantage to trigger judicial estoppel. *Cunningham v. Reliable Concrete Pumping, supra*, 126 Wn.App. at 231.

Finally, the unfair advantage has been found in each of the cases cited above where judicial estoppel has been raised. It is now beyond dispute that a party cannot enforce a claim not listed on bankruptcy schedules.

Mr. Farhood claims that his reference to the “execution of prejudgment writ of attachment” in connection with Ms. Allyn’s wrongful death claim on his Statement of Financial Affairs is somehow a sufficient disclosure of a claim he had against her. He is simply wrong. The reference gives no clue that any claim exists. More to the point, claims of this type must be listed on Schedule B. That schedule begins as follows:

Except as directed below, list all personal property of the debtor of whatever kind. . .

(CP 62)

Next, Mr. Farhood asserts that the cause of action had not accrued when he made his bankruptcy filing. He argues that the claim accrued on the sheriff’s sale in August of 2002. As noted above, this cause of action

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<sup>1</sup> Ms. Allyn denies that any of the claims that Mr. Farhood or the Vaughns have asserted in this action have any validity. Should the matter be remanded, she will vigorously contest the claim.

accrued well before his 2002 bankruptcy filing. Even if the claim is seen as one for wrongful execution, as Mr. Farhood and the Vaughns assert, it had accrued by the time he had filed for bankruptcy protection. A cause of action for wrongful execution accrues when the writ is levied, not when the execution sale occurs. *Wood v. Currey*, 57 Cal. 208 (1881); *Haas v. Buck*, 182 La. 566, 162 So. 181 (1935); *Little v. Sowers*, 167 Kan. 72, 204 P.2d 605 (1949). Therefore, any appropriate characterization of the cause of action leads to the conclusion that it accrued prior to Mr. Farhood's bankruptcy filing.

Finally, Mr. Farhood states that he made no statement in his bankruptcy filing inconsistent with the existence of a claim against Ms. Allyn. Failure to schedule a claim amounts to a sufficient inconsistent statement. *Cunningham v. Reliable Concrete Pumping, Inc.*, *supra*.

There is no genuine issue of material fact. Mark Farhood is judicially estopped from asserting any claim in this matter.

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CONCLUSION

The trial court properly dismissed plaintiffs' action because it was barred by the statute of limitations. Its decision should be affirmed.

RESPECTFULLY SUBMITTED this 8 day of Aug,  
2007.

  
\_\_\_\_\_  
BEN SHAFTON, WSB #6280  
Of Attorneys for Respondents

NO. 35839-5-1 II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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MARK S. FARHOOD, TEE JAY VAUGHN, PATRICIA VAUGHN,  
Trustee of the VAUGHN FAMILY TRUST,

Appellants,

vs.

JILL D. ALLYN, individually and as Administrator of the Estate of  
Joseph Steven Allyn, deceased, and ERICK P. JOHNSON, as Guardian  
ad Litem for JOSEPH BRYCE ALLYN, a minor,

Respondents.

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APPEAL FROM THE SUPERIOR COURT

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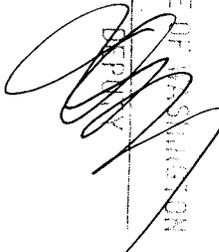
HONORABLE JOHN F. NICHOLS

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AFFIDAVIT OF MAILING

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07 AUG 10 PM 12:05  
STATE OF WASHINGTON  
BY  DEPUTY  
COURT OF APPEALS  
DIVISION II

STATE OF WASHINGTON )  
 )  
County of Clark ) ss.

THE UNDERSIGNED, being first duly sworn, does hereby depose  
and state:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.
2. On August 8, 2007, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the to the following person(s):

Elena Luisa Garella  
Attorney at Law  
9270 N Northlake Way, Suite 301  
Seattle, WA 98103

I SWEAR UNDER PENALTY OF PERJURY THAT THE  
FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY  
KNOWLEDGE, INFORMATION, AND BELIEF.

DATED this 8 day of August, 2007.

Lorrie Vaughn  
LORRIE VAUGHN

SIGNED AND SWORN to before me this 8 day of August,  
2007.

TJ  
NOTARY PUBLIC FOR WASHINGTON  
My appointment expires: 9.1.07