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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**COREY HARRIS and JULINE HARRIS,**

Plaintiffs-Appellants,

v.

**MICHAEL FORTIN,**

Defendant-Respondent.

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On Appeal from the Clark County Superior Court,  
The Honorable Scott A. Collier

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**BRIEF OF APPELLANTS**

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## TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR.....	5
1. Assignment of Error No. 1: Did the state trial court err in barring the Harrises from pursuing the Fortin note on the grounds of judicial estoppel when the Harrises properly scheduled the note in their prior bankruptcy and the note claim was then abandoned under 11 U.S.C. § 554(c), leaving the Harrises free to pursue the note in the state trial court?.....	5
2. Assignment of Error No. 2: Did the trial court err in barring the Harrises from pursuing the Fortin note on the grounds of judicial estoppel because the Harrises failed, when their bankruptcy was later reopened while the trial court suit was pending, to change the note’s description on their amended bankruptcy schedules, even though the note was no longer property of the estate pursuant to 11 U.S.C. §§ 541, 521, 350, and 554(c) and changing the schedules would have had no effect? .....	5
3. Assignment of Error No. 3: Did the trial court err in barring the Harrises from pursuing the Fortin note on the grounds of judicial estoppel when the elements of judicial estoppel are not factually supported?.....	6
4. Assignment of Error No. 4: Did the trial court err in granting Fortin’s motion for summary judgment on the grounds of judicial estoppel when the facts considered in the light most favorable to the Harrises demonstrate that the Harrises did not take inconsistent positions on the note, that the Harrises did not attempt to mislead and the bankruptcy court was not misled, that the trustee investigated the Fortin note fully before it was abandoned to the Harrises, and that nothing the Harrises did or didn’t do when their bankruptcy was reopened would have changed this result? .....	6

C.	STATEMENT OF THE CASE.....	6
D.	SUMMARY OF ARGUMENT .....	13
E.	ARGUMENT .....	16
	1. Standard Of Review.....	16
	2. The Harrises Should Not Be Barred From Pursuing The Fortin Note Because The Note Was Properly Scheduled In Their Bankruptcy And Then Abandoned Under 11 U.S.C. § 554(c), Leaving The Harrises Free To Pursue It In The Trial Court.....	17
	a. The Harrises Properly Disclosed And Scheduled The Fortin Note As An Asset In Their Bankruptcy .....	18
	b. Once The Trustee Completed Administration Of The Asset And The Bankruptcy Case Closed, It Was No Longer Property Of The Estate, Leaving The Harrises Free To Pursue It In The Trial Court .....	26
	3. The Harrises Should Not Be Barred From Pursuing The Fortin Note For Failing To Change The Note’s Description On Their Amended Bankruptcy Schedules, Because The Note Was No Longer Property Of The Estate Pursuant To 11 U.S.C. §§ 541, 521, 350, and 554(c) And Changing The Schedules Would Have Had No Effect.....	27
	4. The Trial Court Erred In Barring The Harrises From Pursuing The Fortin Note Because Judicial Estoppel Requires Inconsistency And The Harrises Did Not Take Inconsistent Positions Regarding The Note In The Bankruptcy and Trial Courts.....	33
	a. The Harrises’ Later Position In The Trial Court Regarding The Note Was Consistent With Their Earlier Position Regarding The Note In The Bankruptcy Court.....	34

b.	Even If The Harrises Could Be Described As Taking “Inconsistent” Positions In The Two Proceedings, The Trial Court Still Erred In Applying The Doctrine Of Judicial Estoppel Because Neither Court Was Misled And The Harrises Won’t Derive An Unfair Advantage If The Claim Proceeds .....	36
5.	The Trial Court Erred In Granting Fortin’s Motion For Summary Judgment On The Grounds Of Judicial Estoppel Because The Facts Considered In The Light Most Favorable To The Harrises Demonstrates That The Harrises Did Not Take Inconsistent Positions On The Note, That The Harrises Did Not Attempt To Mislead And The Bankruptcy Court Was Not Misled, That The Trustee Investigated The Fortin Note Fully Before Abandoning It To The Harrises, And That Nothing The Harrises Did Or Didn’t Do When Their Bankruptcy Was Reopened Would Have Changed This Result.....	38
F.	CONCLUSION .....	43

## TABLE OF AUTHORITIES

### TABLE OF CASES

<i>In re Adair</i> , 253 B.R. 85 (BAP 9th Cir. 2000).....	18, 24, 26, 30, 31
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wash.2d 535 160 P.3d 13 (2007) .....	33, 34
<i>Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.</i> , 115 Wash.2d 506, 799 P.2d 250 (1990) .....	17, 38-40
<i>In re Atkinson</i> , 62 B.R. 678 (Bankr.D.Nev. 1986).....	29, 31
<i>Bartley-Williams v. Kendall</i> , 134 Wash.App. 95 138 P.3d 1103 (2006).....	17
<i>Matter of Baudoin</i> , 981 F.2d 736 (5th Cir.1993) .....	20-21
<i>Matter of Bayless</i> , 78 B.R. 506 (Bankr.S.D.Ohio 1987) .....	20
<i>Citizens for Clean Air v. Spokane</i> , 114 Wash.2d 20 785 P.2d 447 (1990) .....	17, 38
<i>City of Sequim v. Malkasian</i> , 157 Wash.2d 251 138 P.3d 943 (2006) .....	16
<i>In re Coastal Plains, Inc.</i> , 179 F.3d 197 (5th Cir. 1999).....	20
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wash.App. 222, 108 P.3d 147 (2005) .....	17
<i>Cusano v. Klein</i> , 264 F.3d 936 (9th Cir. 2001) .....	17, 19-23, 25
<i>In re DeVore</i> , 223 B.R. 193 (BAP 9th Cir. 1998) .....	18, 26-30
<i>In re Enriquez</i> , 22 B.R. 934 (Bankr.D.Neb. 1982).....	29
<i>In re Fossey</i> , 119 B.R. 268 (Bankr.D.Utah 1990) .....	19, 20
<i>In re Germaine</i> , 152 B.R. 619 (B.A.P. 9th Cir. 1993).....	28

<i>In re Gracyk</i> , 103 B.R. 865 (Bankr.N.D.Ohio 1989).....	29
<i>In re Harris</i> , 32 B.R. 125 (Bankr.S.D.Florida 1983) .....	20
<i>Ingram v. Thompson</i> , 141 Wash.App. 287, 169 P.3d 832 (2007).....	12, 17, 18, 23-25, 27, 33
<i>In re Kayne</i> , 453 B.R. 372 (BAP 9th Cir. 2011).....	19
<i>In re Lintz West Side Lumber, Inc.</i> , 655 F.2d 786 (7th Cir. 1981).....	29
<i>In re McCoy</i> , 139 B.R. 430 (Bankr.S.D.Ohio 1991) .....	19
<i>In re Menk</i> , 241 B.R. 896 (BAP 9th Cir. 1999) .....	18
<i>In re Mohring</i> , 142 B.R. 389 (Bankr.E.D.Cal. 1992) .....	21
<i>In re Ozer</i> , 208 B.R. 630 (Bankr.E.D.N.Y. 1997) .....	29
<i>In re Shelton</i> , 201 B.R. 147 (Bankr.E.D.Va. 1996) .....	26
<i>Skinner v. Holgate</i> , 173 P.3d 300, 141 Wn.App. 840 (2007) .....	16, 20
<i>In re Trahan</i> , 460 B.R. 207 (Bankr.C.D.Ill. 2011) .....	32
<i>Vucak v. City of Portland</i> , 194 Or.App. 564, 96 P.3d 362 (2004) .....	18-20

## **STATUTES**

11 U.S.C. § 350.....	5, 13, 26, 27
11 U.S.C. § 521 .....	5, 13, 19, 25, 27
11 U.S.C. § 521(1) .....	20
11 U.S.C. § 521(a)(1)(B)(i).....	19
11 U.S.C. § 541 .....	13, 27
11 U.S.C. § 541(A)(1).....	18
11 U.S.C. § 554(c) .....	5, 13, 19, 26, 27

**RULES AND REGULATIONS**

CR 56(c) .....16, 38  
Fed.R.Bank.P. 5010 .....31

**A. INTRODUCTION**

Appellants Corey and Juline Harris (“the Harrises”) allege that in 2007, Respondent Michael Fortin (“Fortin”) defaulted on a \$400,000 promissory note they hold.

The Harrises filed bankruptcy in 2010 and properly disclosed the note claim on Schedule B of their bankruptcy petition. They described the note as “uncollectible” but listed its face value in parentheses as “(\$400,000)” and under current value of the property to debtor, they listed “0.00”. This put creditors and the trustee on inquiry notice of the asset. The burden was on the trustee to investigate the asset to determine whether or not the expense and time involved in pursuing it was worth it to the estate.

At the 341 meeting of creditors, the trustee questioned the Harrises about the note. Corey Harris testified that recovering on the note was uncertain. He testified he did not believe Fortin was “good for it” because Fortin was a real estate developer who at that time (2010) had been unemployed for several years. In response to the trustee’s question, “And – because [Fortin’s] in the building business there’s no money – there’s no – [he’s] not doing anything?” Corey Harris answered, “I don’t believe so, no.”

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The record indicates that the trustee did not pursue the note asset any further. The Harris bankruptcy was discharged in December 2010. After “diligent inquiry” into the Harrises’ financial affairs, the trustee filed his “Report of No Distribution” in March of 2011. In his report, the trustee certified that the bankruptcy estate had been “fully administered.” The bankruptcy case was closed a week later and the trustee was discharged from his duty.

Under the Bankruptcy Code, the Fortin note was abandoned back to the Harrises by operation of law upon the closing of the bankruptcy case. At that point, the Harrises were free to pursue it in the trial court and in September of 2011, they filed suit against Fortin on the note.

In January of 2012, the Harris bankruptcy was reopened for the Harrises to include a new counterclaim in litigation unrelated to Fortin. The trial court suit was pending at the time. The Harrises filed an amended Schedule B but did not change their description of the Fortin note. There was no reason for them to. Under the Bankruptcy Code, the reopening of the bankruptcy was purely ministerial. No trustee was reappointed and the reopening had no effect on the ownership of the Fortin note claim. It did not bring the Fortin note back into the property of the estate.

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In August of 2012, Fortin filed a motion for summary judgment on the grounds of judicial estoppel. The trial court granted the motion. The court held that the Harrises had taken inconsistent positions in the bankruptcy and trial court by filing the trial court action – that filing suit showed the Harrises believed “the promissory note in 2011 had some value and was collectible.” Further, the trial court held that the Harrises’ failure to revise the note’s description in the amended Schedule B seemed “inconsistent.”

The trial court erred. The elements of judicial estoppel are not supported in this case. The Harrises did not take inconsistent positions in the bankruptcy court and trial court, and did not mislead the bankruptcy court.

The Harrises properly scheduled the claim in their bankruptcy. They disclosed the note, named Fortin, and stated the face value of the note. The fact that the note was described as “uncollectible” and with no known current value was accurate and there is no evidence that they withheld any information from the trustee. The burden was on the trustee, who was free to decide that it was not worth the time investment and cost to pursue litigation of a disputed promissory note, which even if successful might not result in any monetary benefit to the estate. The trustee had the opportunity to investigate the asset and did so. The evidence viewed in

the light most favorable to the Harrises as the nonmoving parties shows that the trustee, after a diligent inquiry, chose not to pursue the asset.

The note claim was abandoned by operation of law when the Harrises' bankruptcy closed. Ownership reverted back to Harrises who were then free to pursue it in the trial court. They did not take inconsistent positions in the bankruptcy court and trial court proceedings.

The Harrises also had no duty to revise the note's description when their bankruptcy was later reopened. The note was no longer property of the estate. And there is nothing to support that if the Harrises had changed the description of the note claim in 2012, that a bankruptcy trustee would have been appointed or that if one had, that he or she would have then tried to revoke the abandonment and bring the note claim back into the estate. Nothing had changed – Fortin's financial situation remained precarious. It was also apparent at that time that Fortin disputed the validity of the note. If anything, a trustee would have been less inclined to pursue the note at that time.

Even if a trustee had been appointed, had further investigated, and had decided to move to revoke the abandonment – such a motion would have been denied. Revocation of abandonment is only warranted under appropriate circumstances – where the trustee is given false or incomplete information, where the debtor fails to list the asset altogether or where

abandonment was the result of mistake or inadvertence. That is not supported here.

The trial court erred in granting Fortin's motion for summary judgment based on the doctrine of judicial estoppel. The Court's order must be reversed and the case remanded for a determination on the merits.

**B. ASSIGNMENTS OF ERROR**

1. Assignment of Error No. 1

Did the state trial court err in barring the HARRISES from pursuing the Fortin note on the grounds of judicial estoppel when the HARRISES properly scheduled the note in their prior bankruptcy and the note claim was then abandoned under 11 U.S.C. § 554(c), leaving the HARRISES free to pursue the note in the state trial court?

2. Assignment of Error No. 2

Did the trial court err in barring the HARRISES from pursuing the Fortin note on the grounds of judicial estoppel because the HARRISES failed, when their bankruptcy was later reopened while the trial court suit was pending, to change the note's description on their amended bankruptcy schedules, even though the note was no longer property of the estate pursuant to 11 U.S.C. §§ 541, 521, 350, and 554(c) and changing the schedules would have had no effect?

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3. Assignment of Error No. 3

Did the trial court err in barring the Harrises from pursuing the Fortin note on the grounds of judicial estoppel when the elements of judicial estoppel are not factually supported?

4. Assignment of Error No. 4

Did the trial court err in granting Fortin's motion for summary judgment on the grounds of judicial estoppel when the facts considered in the light most favorable to the Harrises demonstrate that the Harrises did not take inconsistent positions on the note, that the Harrises did not attempt to mislead and the bankruptcy court was not misled, that the trustee investigated the Fortin note fully before it was abandoned to the Harrises, and that nothing the Harrises did or didn't do when their bankruptcy was reopened would have changed this result?

**C. STATEMENT OF THE CASE**

In April of 2006, Fortin executed a promissory note in favor of the Harrises in the principal amount of \$400,000.00. CP 9-10. In 2007, Fortin defaulted under the terms of the note. CP 4. In April of 2010, the Harrises filed a voluntary Chapter 7 bankruptcy petition in the United States District Court for the Western District of Washington (case number 10-43269-PBS). *See, e.g.*, CP 142. On Schedule B of their petition, the Harrises listed their personal property, including the value of said

property. CP 161-164. The Harrises plainly disclosed Fortin's note on Schedule B as "Uncollectible promissory note from Michael A. Fortin" and listed the face value of the note in parentheses as "\$400,000." CP 164. Under current value of the debtor's interest in this property, Schedule B states "0.00." *Id.*

The bankruptcy meeting of creditors occurred on June 2, 2010. CP 210.<sup>1</sup> At the meeting, the Trustee questioned the Harrises regarding assets that could be pursued on behalf of the bankruptcy estate. CP 210-243. The Trustee specifically questioned Corey Harris regarding some promissory notes, one of which was the Fortin note:

Court: All right. How about Michael Forteen (ph), is he good for it?

CH: In my opinion, no. Michael Forteen is a consultant who used to actually work for me. And he's been unemployed for – I think – two years.

...

Court: ... Was he a builder also?

CH: No. He was a – a real estate developer who had some other ventures going on.

Court: All right. So you were just private – a private lender to these guys?

CH: Yeah.

Court: And – because they're both in the building business there's no money – there's no – they're not doing anything?

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<sup>1</sup> The date listed on the creditors' meeting transcript states that the meeting occurred on June 2, 2012. This appears to be a typographical error. The Harris bankruptcy petition was filed in April of 2010. The 341 meeting of creditors would not have occurred more than two years later. *See*, CP 173, which confirms that the 341 meeting was scheduled to occur on June 2, 2010, and RP 14, where the court and counsel discuss the apparent typographical error on the transcript.

CH: I don't believe so, no.

CP 224-226.

The Harrises received a discharge in their bankruptcy in December of 2010. CP 176. The Trustee closed the Harris bankruptcy in March of 2011, noting, "I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate."<sup>2</sup>

In September of 2011, the Harrises filed suit in Clark County Superior Court against Fortin on the \$400,000 note. CP 1-10.

In November of 2011, Fortin filed a motion for summary judgment in the Superior Court matter, claiming that he did not owe any money to the Harrises. CP 13-37. The motion was denied because the court found that material issues of fact remained. CP 109 and 110-112.

The Harris bankruptcy was re-opened in January of 2012, while the Superior Court case was still pending.<sup>3</sup> The bankruptcy was reopened so the Harrises could add a new counter-claim (unrelated to Fortin) to the personal property listed in Schedule B. CP 170. The Harrises filed amended bankruptcy schedules on January 26, 2012, but did not change

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<sup>2</sup> CP 175. *See*, also, pg. 15 of the Harrises' bankruptcy case docket attached to Appellant's Motion for Judicial Notice (hereinafter "Docket").

<sup>3</sup> Docket, pg. 16.

their description of the Fortin note on Schedule B. CP 165, 170. The bankruptcy was re-closed in February of 2012.<sup>4</sup>

In August of 2012, Fortin filed a second motion for summary judgment in the Superior Court matter. CP 133-193. Fortin argued that the Harrises should be judicially estopped from pursuing their claim against Fortin, because:

While plaintiffs did not fail to list their claims against defendant in their bankruptcy schedules, they did affirmatively represent to the Court and to the bankruptcy trustee and creditors that the claims were uncollectible and of no value. As a result, the bankruptcy trustee took no action against defendant to pursue a recovery on behalf of plaintiffs' creditors in the bankruptcy proceeding. Under these circumstances, plaintiffs should be precluded from pursuing their claims against defendant, after receiving a complete discharge of their own debts.

CP 134.

In support of the motion, Fortin declared that:

At no time has [Trustee] Don Thacker or anyone other than plaintiffs in this present lawsuit sought to enforce or collect the debt plaintiffs claim I owe to them. Specifically, Mr. Thacker never contacted me regarding the existence or validity of the alleged debt.

CP 130.

In response, the Harrises argued that the asset was fully and completely disclosed, that the Trustee opted not to pursue it and it was abandoned

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<sup>4</sup> Docket, pg. 16.

back to the Harrises, who were then free to pursue it. CP 198-199, RP 11-14, 16, 20. Further, the Harrises argued that they had not taken inconsistent positions on the note in the bankruptcy and Superior Court matters. CP 198, RP 12-13, 16. They argued that although the note was fully and completely disclosed, collectability remained in doubt at the time of the summary judgment motion, as it had been at the time of the bankruptcy filing and 341 hearing, due to Fortin's unemployment and the collapse of the real estate market. *Id.* Prior to the hearing on the motion for summary judgment in October of 2012, the Harrises submitted deposition testimony from Fortin and his wife, taken only a few weeks earlier as part of the bankruptcy proceeding.<sup>5</sup> Fortin testified in September of 2012 that his financial health had not improved over the preceding approximately eight years:

Q: Can you tell me anything about the Fairhaven project?

...

A: It was a residential development. It's a project that was purchased by me and others from Mr. Harris.

...

Q: What happened to it?

A: It was short sold.

...

Q: What can you tell me about Lilac Lane?

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<sup>5</sup> CP 260-269. In April of 2012, Fortin filed an adversary proceeding in the Harris bankruptcy objecting to discharge, alleging that the Harrises owe him money. *See, e.g.* CP 283-293. The depositions were taken as part of the adversary proceeding. The bankruptcy court found that Fortin's objection to the dischargeability of the alleged debt was untimely and dismissed Fortin's claim. CP 283-284.

A: Basically the same situation as Fairhaven.

...

Q: What happened with that?

A: It wasn't short sold, but it was sold for a loss.

...

Q: During this time period that Fairhaven, Lilac went belly up, were you in financial problems yourself at that point because of this project or other reasons?

A: I was a developer during that time frame. I'm not sure how to answer that.

Q: Were you in danger of bankruptcy yourself at that point?

A: Sure.

Q: What time period are we talking about?

A: Again, I'm not up on all the dates, but..

Q: So if it was after you finished working for him, so it had to be 2006, 2007.

A: I was going to say post-2005 to maybe 2007, somewhere in there, 2008, maybe.

Q: When did things turn around for you that you were out of danger of bankruptcy?

A: I'm not sure they ever did turn around.

Q: So things are still shaky financially?

A: I think economically times are tough, yes.

CP 263-264.

The summary judgment motion was heard on October 12, 2012 and the Court took the matter under advisement. CP 259.

On February 28, 2013, the Superior Court issued its Memorandum of Decision and Order on the motion for summary judgment. CP 294-296.

The Court held that the Harrises were judicially estopped from pursuing their claims against Fortin in Superior Court:

The Defendant's Motion for Summary Judgment is based upon the principle of Judicial Estoppel which precludes a party from gaining an advantage by taking one position and

then seeking a second advantage by taking an incompatible position in a subsequent action...In April 2010 the Plaintiff's, Corey Harris and Julian [*sic*] Harris, filed a voluntary Bankruptcy Petition...In that petition they listed the promissory note from the defendant, Michael Fortin, as uncollectible and of zero value...By virtue of the plaintiffs bringing this action it is apparent that they believe the promissory note in September of 2011, had some value and was collectible. In January 2012 the Plaintiffs filed amended schedules with the Bankruptcy Court which again listed the promissory note of the defendant, Michael Fortin, at zero value and uncollectible while this action was pending in Superior Court where the Plaintiffs were acting as the note had value and were attempting to collect on it...

In this matter we have the Plaintiffs listing the note on the schedules but claiming they are uncollectible and of zero value, as compared to the *Ingram* case where they were listed with some value. In addition when the Plaintiffs filed their amended schedules in January 2012 they continued to list the note as uncollectible and zero value. This seems inconsistent with the position they have taken in the Superior Court action filed in September 2011 and clearly gives the impression to this court that they are attempting to deceive the Bankruptcy Court and retain the benefit of their claims. The plaintiffs are taking totally opposite positions at the same time in different courts.

THEREFORE IT IS HEREBY ADJUDGED AND DECREED THAT: the Defendant's Motion for Summary Judgment is hereby granted and that matter [*sic*] is dismissed.

*Id.*

On March 29, 2013, the HARRISES timely appealed the Court's order granting Fortin's motion for summary judgment. CP 300-305.

**D. SUMMARY OF ARGUMENT**

The trial court erred in barring the Harrises' suit against Fortin on the grounds of judicial estoppel.

When a debtor files bankruptcy, all of his legal interests become property of the bankruptcy estate pursuant to 11 U.S.C. § 541. Debtors have a duty under 11 U.S.C. § 521 to properly schedule their assets and liabilities. The policy behind this requirement is to make sure that creditors are aware of the asset and that the trustee can perform a proper investigation of the assets for administration. Once an asset is properly scheduled, the burden is then on the trustee to determine whether or not to pursue administration of the asset. If a debtor properly schedules his assets, any assets that are not administered at the closing of the case are abandoned by operation of law. They cease to be property of the estate and ownership reverts back to the debtor pursuant to 11 U.S.C. §§ 554(c) and 350.

In this case, the Harrises properly scheduled the Fortin note claim in their bankruptcy. Therefore, creditors and the trustee were on inquiry notice of the asset. The burden was on the trustee to decide whether or not to pursue administration of a note claim where liability was disputed and collection uncertain. The trustee chose not to administer the note claim, and when the Harrises' bankruptcy closed in 2011, the claim was

abandoned back to the Harrises. They were then free to try to pursue judgment and collection in the state trial court. They filed suit in September of 2011.

Once an asset is abandoned it is no longer part of the bankruptcy estate and the reopening of a bankruptcy case does not negate abandonment. When a bankruptcy is reopened, a discharged trustee's authority is also not automatically revived. The reopening of a bankruptcy case is purely ministerial. Abandonment is irrevocable unless appropriate circumstances exist to set it aside. "Appropriate circumstances" include where a trustee is given false or incomplete information about an asset, where the debtor fails to list the asset altogether, or where the abandonment was due to the trustee's mistake or inadvertence.

The Harrises had no duty to revise their description of the note in their amended bankruptcy schedules. The note was abandoned and no longer property of the estate. No trustee was appointed to the reopened bankruptcy. Even if the Harrises had revised the description of the note, nothing had changed. Fortin's financial situation remained poor and at that time it was clear he disputed the validity of the note. Viewing the evidence in the light most favorable to the Harrises as the nonmoving parties, there is nothing to support that revising schedule B when the bankruptcy reopened would have resulted in a trustee being appointed or if

one was, that said trustee would have moved to revoke the abandonment. And, any motion to revoke the abandonment would have failed because no grounds for revocation of abandonment exist. The Harrises did not provide incomplete or false information to the trustee regarding the Fortin note. They plainly and properly listed it on Schedule B. And the trustee investigated it. Abandonment was not due to mistake or inadvertence.

The trial court erred in applying the doctrine of judicial estoppel because judicial estoppel requires inconsistency. The Harrises did not take inconsistent positions in the bankruptcy and trial court regarding the Fortin note. In the bankruptcy, the Harrises properly disclosed the Fortin note asset and truthfully stated that collectability on the note was uncertain. There is no evidence that the Harrises misled the bankruptcy court or withheld any information from the trustee. Once the note was abandoned, there was nothing inconsistent about the Harrises filing a suit in the state trial court.

The Harrises had no duty to revise their description of the Fortin note when the bankruptcy was reopened. It was no longer property of the estate and further amending Schedule B would have had no effect. It was not inconsistent for the Harrises to leave the Fortin note's description in Schedule B as previously described, even though the trial court suit was pending at the time.

The facts considered in the light most favorable to the Harrises reveal that the Harrises did not take inconsistent positions in the bankruptcy court and trial court; that the Harrises properly scheduled the Fortin note claim in their bankruptcy; that they provided accurate information to the trustee and did not withhold any information about the note; that the trustee was on notice of and did investigate the asset; that the trustee chose not to pursue the disputed and potentially uncollectible note; that the note was abandoned back to the Harrises by operation of law when their bankruptcy case closed; that the reopening of the Harris bankruptcy had no effect; and that even if the Harrises had revised Schedule B, the result would have been the same. The trial court erred in granting Fortin's motion for summary judgment.

## **E. ARGUMENT**

### **1. Standard Of Review**

The trial court's grant of a motion for summary judgment is reviewed de novo. *Skinner v. Holgate*, 173 P.3d 300, 303, 141 Wash.App. 840 (2007), citing *City of Sequim v. Malkasian*, 157 Wash.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is warranted if the evidence demonstrates "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Any doubt as to the existence of a genuine issue of material fact must be

resolved in favor of the nonmoving party. *Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990). All facts must be considered in the light most favorable to the nonmoving party. *Id.*, citing *Citizens for Clean Air v. Spokane*, 114 Wash.2d 20, 38, 785 P.2d 447 (1990).

**2. The Harrises Should Not Be Barred From Pursuing The Fortin Note Because The Note Was Properly Scheduled In Their Bankruptcy And Then Abandoned Under 11 U.S.C. § 554(c), Leaving The Harrises Free To Pursue It In The Trial Court**

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash.App. 222, 224-225, 108 P.3d 147 (2005). A trial court’s application of the doctrine is reviewed for abuse of discretion. *Ingram v. Thompson*, 141 Wash.App. 287, 169 P.3d 832 (2007). “It is well established that judicial estoppel may apply to parties who accrue legal claims, file for bankruptcy, fail to list the claims among their assets, and then attempt to pursue the claims after the bankruptcy discharge.” *Id.*, citing *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 98-99, 138 P.3d 1103 (2006). However, there is a large difference between complete nondisclosure of an asset and simply undervaluing an asset. *See, e.g., Cusano v. Klein*, 264 F.3d 936 (9th Cir.

2001); *Ingram, supra*; *In re DeVore*, 223 B.R. 193 (BAP 9th Cir. 1998); *In re Adair*, 253 B.R. 85 (BAP 9th Cir. 2000); and *Vucak v. City of Portland*, 194 Or.App. 564, 96 P.3d 362 (2004).

In this case, the trial court erred in applying the doctrine of judicial estoppel because the Harrises properly disclosed the Fortin note in their bankruptcy and the evidence viewed in the light most favorable to the Harrises demonstrates that the bankruptcy trustee, after investigation, simply chose not to pursue it. Upon the closing of the Harrises' bankruptcy, the Fortin note claim was abandoned by operation of law and thus reverted back to the Harrises, such that they could choose whether or not to pursue it in the trial court.

**a. The Harrises Properly Disclosed And Scheduled The Fortin Note As An Asset In Their Bankruptcy**

Whether an asset is properly scheduled determines who it belongs to if it is not administered when a bankruptcy case closes.<sup>6</sup> In this case, the Harrises properly disclosed and scheduled the Fortin note claim.

When a bankruptcy case is filed, an "estate" is created and all of the debtor's legal interests at the time the bankruptcy is commenced become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). Debtors

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<sup>6</sup> In the context of bankruptcy, an "administered" asset is simply one that has been collected and included in required payments to creditors. *See, e.g., In re Menk*, 241 B.R. 896, 911 (BAP 9th Cir. 1999).

have an affirmative duty to schedule their assets and liabilities. 11 U.S.C. § 521(a)(1)(B)(i).<sup>7</sup> “The debtor has a duty to prepare schedules carefully, completely, and accurately.” *Cusano*, 264 F.3d at 946 (internal citations omitted). If possible, a debtor should list the approximate dollar amount of each asset. *Id.* If faced with a range of values, the debtor should “choose a value in the middle of the range.” *Id.* (internal citations omitted). There are some assets with an unknown value and in that case, “a simple statement to that effect” suffices. *Id.* (internal citations omitted.)

The word “scheduled” has a very specific meaning – it refers only to assets listed in a debtor’s schedules of assets and liabilities. *See, e.g., In re Kayne*, 453 B.R. 372 (BAP 9th Cir. 2011); *In re McCoy*, 139 B.R. 430, 432 (Bankr.S.D.Ohio 1991); *In re Fossey*, 119 B.R. 268 (Bankr.D.Utah 1990); and *Vucak*, 96 P.3d at 365. If a debtor properly schedules her assets, any assets that are not administered revert to the debtor upon the closing of the bankruptcy case. 11 U.S.C. § 554(c). Alternatively, if a

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<sup>7</sup> 11 U.S.C. § 521 provides in relevant part:  
(a) The debtor shall —  
    (1) file —  
        (A) a list of creditors; and  
        (B) unless the court orders otherwise —  
            (i) a schedule of assets and liabilities...

debtor fails to properly schedule an asset, that asset continues to belong to the bankruptcy estate when the case closes.

Debtors who fail to recognize the strict requirements of § 521, whether by neglect or indifference, “do so at their own peril.” *Vucak*, 96 P.3d at 365, quoting *Matter of Bayless*, 78 B.R. 506, 509 (Bankr.S.D.Ohio 1987). The scheduling requirements are strict because that is the initial information upon which creditors rely; and complete and accurate information enables the trustee to perform a proper investigation of the assets for administration. *Cusano*, 264 F.3d at 946; and *Vucak*, 96 P.3d at 365, quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999).

An asset is, of course, improperly scheduled if it is completely omitted from bankruptcy filings. *See, e.g., Skinner*, 173 P.3d at 302; and *Vucak*, 96 P.3d at 366-367. But a debtor may also fail to properly schedule an asset by listing it in the wrong place or by describing it so vaguely that a creditor would not be on notice of the claim. *See, e.g., Fossey*, 119 B.R. at 272 (debtor listed cause of action in statement of financial affairs but not in his schedules of assets and liabilities; cause of action was not scheduled under § 521(1)); *In re Harris*, 32 B.R. 125, 127 (Bankr.S.D.Florida 1983) (reference to partnership in statement of financial affairs not enough to schedule debtor’s interest in mortgages held by partnership); *Matter of Baudoin*, 981 F.2d 736, 739 Fn. 4 (5th Cir.

1993) (reference to “any possible claim against creditor for actions taken against debtor prior to bankruptcy proceeding” in schedule of assets is insufficient scheduling for the purpose of abandonment.).

“Although there are no ‘bright line rules for how much itemization and specificity is required,’ [a debtor is] required to be as particular as is reasonable under the circumstances.” *Cusano*, 264 F.3d at 946, quoting *In re Mohring*, 142 B.R. 389, 395 (Bankr.E.D.Cal. 1992).

In this case, there is no dispute that the Harrises listed the Fortin note claim on Schedule B. They listed the note’s face value of \$400,000, but they described the note as “uncollectible” and under current value listed “0.00”. At issue, then, is whether this disclosure was “as particular as is reasonable under the circumstances” such that creditors were sufficiently on notice of the claim and such that the trustee had enough information to perform a proper investigation. The answer is undoubtedly, yes.

The Harrises disclosed the note claim in the proper schedule. It was not buried in a statement of financial affairs or vaguely described. It was described as a note. The party owing on the note was also plainly identified as Michael A. Fortin. The face value of the note was plainly listed as “(\$400,000).” Therefore, creditors and the trustee were well aware that Fortin owed \$400,000 to the Harrises and that it was an asset of

the estate. At the 341 meeting of creditors, Corey Harris did not testify that the \$400,000 was not owed. He testified that he believed he would not **collect** on the note because of Fortin's personal financial situation. This was entirely consistent with how the asset was listed in Schedule B – as uncollectible, but with a face value of \$400,000 and no known current value.

The facts of this case are analogous to cases in which the debtor scheduled but undervalued an asset. For example, in *Cusano*, the debtor listed the value of the asset (“song rights”) as “unknown.” *Cusano*, 264 F.3d at 942. He later filed suit on the claim in the federal district court. The district court found he had failed to properly schedule his assets, and as such, that the “song rights” remained the property of the bankruptcy estate. *Id.* at 942, 945. The Ninth Circuit Court of Appeals disagreed, holding:

Cusano's listing was not so defective that it would forestall a proper investigation of the asset. Cusano scheduled “songrights in...Songs written while in the band known as ‘KISS’.” He listed their value as “unknown.” ...

The “songrights” asset as described by Cusano can reasonably be interpreted to mean copyrights and rights to royalty payments for songs written for the band KISS prepetition...**Although it would have been more helpful for Cusano to break down the description further so that it named songs, albums, and dates of and parties to royalty and copyright agreements, the additional detail would not have revealed anything that was otherwise**

**concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it. Any undervaluation of the “songrights” asset does not impair Cusano’s interest in it, because only an express order of revocation after reopening of the bankruptcy case would do so, and that did not occur.** We conclude, therefore, that his listing of the “songrights” asset was a sufficient scheduling of Cusano’s interest in his prepetition compositions, which reverted to him upon confirmation of his plan.

*Id.* at 946-947 (Emphasis added. Internal citations omitted).

Similarly, in *Ingram*, the debtor listed a personal injury claim on his bankruptcy schedules as “value unknown, but believed to be less than \$5,000.00.” *Ingram*, 169 P.3d at 832-833. He later filed suit on the claim seeking almost \$150,000 in damages. *Id.* The trial court granted defendant’s motion for partial summary judgment, capping the amount of recoverable damages at \$5,000. Division I of this Court reversed, holding:

[Defendant] claims that undervaluing an asset on the bankruptcy schedule is equivalent to failing to list the asset because in both situations the debtor has represented that his assets are fewer than what he later claims. But all of the cases that [defendant] relies on to support this argument involve a complete failure to list the claim....

Ingram listed the value of his claim as “unknown, but believed to be less than \$5,000.00” Under *Cusano*, this was sufficient to put both the bankruptcy trustee and creditors on inquiry notice. **The bankruptcy trustee had the opportunity to inquire into the claim to decide whether the potential benefit to the creditors was worth the cost of litigating it.**

Valuation of a personal injury claim is highly speculative as it must take into consideration not only damages but also liability, causation, and comparative fault. The net value to the plaintiff may depend on subrogation issues, how the evidence comes in, and the credibility of the witnesses.

**Given the uncertainty inherent in valuation of the claim, and the fact that Ingram properly disclosed its existence, he did not take clearly inconsistent positions. The bankruptcy court allowed him to retain the claim as a personal asset and as a result he is now free to make out of it whatever he can.** We conclude that the trial court abused its discretion in applying judicial estoppel to limit Ingram's recovery.

*Id.* at 834-835 (Emphasis added. Internal citations omitted).

Also *see*, *Adair*, where a debtor listed the value of a lawsuit at \$20,000 but then later recovered more than \$400,000. *Adair*, 253 B.R. at 86-88. The Trustee unsuccessfully moved to reopen the bankruptcy, and the Ninth Circuit Bankruptcy Appellate Panel held:

The Trustee argues he was misled because Debtor falsely valued the Lawsuit at \$20,000 in her Schedule B. The Trustee's factual premise is incorrect. Although Debtor's Schedule B indicated in the value column that the value of the Lawsuit was \$20,000, it also clearly stated in the description column that the **recovery was uncertain** and that the reference to \$20,000 was for exemption purposes only. **Debtor, in effect, stated that the value of the Lawsuit was unknown as of the date she signed her schedules. The mere fact that Debtor indicated that the value of the Lawsuit was unknown does not mean that she misled the Trustee or that he was deprived of sufficient information so as to preclude him from performing his duties.**

*Id.* at 89 (Emphasis added).

In this case, the trial court erroneously determined that describing the note as “uncollectible” and with a current value of “0.00” distinguished this case from the “undervaluation” line of cases. The court stated, “In this matter, we have the Plaintiffs listing the note on the schedules but claiming they are uncollectible and of zero value, as compared to the *Ingram* case where they were listed with some value.” CP 296. This reasoning ignores *Cusano*, the case *Ingram* relies on, where no value was listed for the asset.

This case is indistinguishable from the undervaluation cases. The evidence in this case reveals that the HARRISES provided their creditors and the trustee with an accurate and full description of the note claim. The HARRISES were as particular as was reasonable under the circumstances in scheduling the claim and clearly put their creditors and the trustee on inquiry notice. The trustee did, in fact, inquire into the asset.

Additionally, recovery on the Fortin note is speculative, like recovery on the personal injury claim was in *Ingram*. Fortin disputes that he owes the HARRISES anything on the note. Further, Fortin’s financial situation may preclude collection even if the validity of the note is litigated in favor of the HARRISES. The trustee was aware of Fortin’s apparent precarious financial situation through Corey Harris’ testimony at the meeting of creditors. And the HARRISES’ description of the \$400,000

note as “uncollectible” in Schedule B, like the facts of *Adair*, served only to further explain why the value column listed “0.00.”

The note claim was properly scheduled. It was then up to the trustee to investigate whether to pursue the asset or allow it to be abandoned back to the Harrises.

**b. Once The Trustee Completed Administration Of The Asset And The Bankruptcy Case Closed, It Was No Longer Property Of The Estate, Leaving The Harrises Free To Pursue It In The Trial Court**

Any properly scheduled property of the estate that is not administered at the time a bankruptcy case is closed is abandoned to the debtor and deemed administered.<sup>8</sup> This is also referred to as “technical abandonment” and occurs automatically upon the closure of a bankruptcy case, without notice or a hearing. *DeVore*, 223 B.R. at 193, citing *In re Shelton*, 201 B.R. 147, 154 (Bankr.E.D.Va. 1996). “The rationale for the general rule is that once an asset has been abandoned, it is no longer part of the estate and is effectively beyond the reach and control of the trustee.”

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<sup>8</sup> 11 U.S.C. § 554(c) provides:

Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

11 U.S.C. § 350 provides:

- (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
- (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

*Id.* at 198. Once an asset has been abandoned and reverts back to the debtor, he is “free to make of it whatever he can.” *Ingram*, 169 P.3d at 835.

As stated above, the Harrises properly scheduled the Fortin note claim in their bankruptcy. When the bankruptcy case closed in 2011, the note was abandoned and reverted back to the Harrises, who were then free to attempt to pursue judgment in the trial court.

**3. The Harrises Should Not Be Barred From Pursuing The Fortin Note For Failing To Change The Note’s Description On Their Amended Bankruptcy Schedules, Because The Note Was No Longer Property Of The Estate Pursuant To 11 U.S.C. §§ 541, 521, 350, and 554(c) And Changing The Schedules Would Have Had No Effect**

The Fortin note was abandoned and reverted back to the Harrises in 2011. As shown above, once the note was abandoned, it belonged to the Harrises, who were permitted to file suit on it, should they choose to do so.

In 2012, the Harrises re-opened their bankruptcy so they could add a new counter-claim (unrelated to Fortin) to the personal property listed in Schedule B. They filed an amended Schedule B in January of 2012, but did not change the description of the Fortin note claim. This fact was apparently significant to the trial court, which stated in its order granting Fortin’s motion for summary judgment:

In January 2012 the Plaintiffs filed amended schedules with the Bankruptcy Court which again listed the promissory note of the defendant, Michael Fortin, at zero value and uncollectible while this action was pending in Superior Court where Plaintiffs were acting as [*sic*] the note had value and were attempting to collect on it... This seems inconsistent with the position they have taken in the Superior Court action filed in September 2011 and clearly gives the impression to this court that they are attempting to deceive the Bankruptcy Court and retain the benefit of their claims. The plaintiffs are taking totally opposite positions at the same time in different courts.

CP 296.

The trial court erred in barring the Harris's' claim on this ground. The Fortin note did not become property of the estate again when the bankruptcy was reopened in 2012. The note was abandoned in 2011. No Bankruptcy Code provision reverses an abandonment upon the reopening of a case.

Once an asset is abandoned, it is no longer part of the bankruptcy estate. *Devore*, 223 B.R. at 198. The reopening of a bankruptcy case does not negate the technical abandonment of an asset:

The reopening of a case is "merely a ministerial or mechanical act which allows the court to receive a new request for relief; the reopening, by itself, has no independent legal significance and determines nothing with respect to the merits of the case."

*Id.*, quoting *In re Germaine*, 152 B.R. 619, 624 (B.A.P. 9th Cir. 1993).

Abandonment is generally irrevocable, even if it is subsequently discovered that the abandoned property has greater value than previously

believed. *Id.* at 197, citing *In re Lintz West Side Lumber, Inc.*, 655 F.2d 786, 789 (7th Cir. 1981); *In re Ozer*, 208 B.R. 630, 633 (Bankr.E.D.N.Y. 1997); *In re Gracyk*, 103 B.R. 865, 867 (Bankr.N.D.Ohio 1989); *In re Atkinson*, 62 B.R. 678, 679 (Bankr.D.Nev. 1986); and *In re Enriquez*, 22 B.R. 934, 935 (Bankr.D.Neb. 1982).

Despite the general rule, the bankruptcy court does have discretion to set aside technical abandonment by court order, even after a case closes. *Id.* at 198. As the Ninth Circuit’s Bankruptcy Appellate Panel notes, courts have set aside technical abandonment under “appropriate circumstances” and:

“Appropriate circumstances” have been found where the trustee is given false or incomplete information about the asset by the debtor; the debtor fails to list the asset altogether; or where the trustee’s abandonment was the result of mistake or inadvertence, and no undue prejudice will result in revocation of the abandonment...

Likewise...where an asset was not disclosed in the bankruptcy petition, the case was never fully administered within the meaning of § 350(a), and therefore not properly and finally closed under that section. In essence, these cases depend on a finding that the property in question was not properly scheduled, and thus the § 554(c) requirement was not met, or on equitable considerations.

*Id.* (internal citations omitted).

In this case, no grounds for revocation of technical abandonment exist. The Harrises disclosed the note claim and provided accurate

information about the note. There is no evidence that the Harrises withheld any information from the trustee. The burden was on the trustee. It was up to the trustee to decide whether or not the expense and time involved in pursuing a disputed legal claim with an uncertain recovery was worth it for the bankruptcy estate. The trustee had the opportunity to, and did, investigate the asset. The evidence supports that the abandonment was not the result of mistake or inadvertence.

In the *Adair* case, the debtor disclosed her interest in a personal injury lawsuit on her Schedule B, noting that recovery was “uncertain.” *Id.* at 87. At the 341 meeting, the trustee questioned the debtor about the suit and the debtor’s personal injury attorney wrote a letter to the trustee describing recovery as “speculative at best.” *Id.* The trustee made no further inquiries regarding the suit and after stating he had “made a diligent inquiry” into the debtor’s assets, the debtor’s bankruptcy case was closed and the suit, therefore, abandoned. *Id.*

The debtor later settled the lawsuit for more than \$400,000. *Id.* The trustee moved to compel the debtor to turn over the proceeds from the settlement. *Adair*, 253 B.R. at 87. The bankruptcy court declined and on appeal, the Ninth Circuit’s Bankruptcy Appellate Panel upheld the bankruptcy court’s decision:

The Trustee bore the burden of acting if he wanted further updated information about the Lawsuit. His failure to request such information, and his decision to abandon, which decision he now regrets, do not mean that the bankruptcy court abused its discretion in refusing to reopen Debtor's case and revoke the Trustee's abandonment of the Lawsuit.

*Id.* at 91, citing *Collier on Bankruptcy and Atkinson*, 62 B.R. at 680)(“a bankruptcy court should not reopen a case to recover an asset that a trustee made a deliberate informed decision not to administer.)”.

This case is similar to *Adair* in that the Harrises properly disclosed the potential asset and the trustee had the opportunity to and did investigate the asset. And like in *Adair*, the Harris bankruptcy was closed after the trustee determined that the estate of the debtors was fully administered following “a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate...”.

CP 175.

Not only did the Harrises have no duty to revise Schedule B, doing so would have had no effect. Even if in 2012 the Harrises had changed the note claim's description, the evidence viewed in the light most favorable to the Harrises reveals that it would have made no difference. When the bankruptcy case closed, the trustee was discharged.<sup>9</sup> The reopening of the

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<sup>9</sup> Docket, pg. 15.

case did not revive the trustee's authority.<sup>10</sup> The trustee was not reappointed when the bankruptcy case was reopened.<sup>11</sup> Even if the Harrises had revised the note claim's description, there is no reason to think a trustee would have been appointed at that time. And even if one was, there is no reason to think that a trustee would have moved to revoke the abandonment, or that such a motion would be successful. Nothing had changed regarding the Harrises' belief as to the note's potential collectability. Upon further investigation, a trustee would have learned not only that Fortin's financial situation remained precarious **but also that Fortin disputed the validity of the note.** CP 264, CP 13-34,130. The evidence viewed in the light most favorable to the Harrises indicates that if they had revised Schedule B in 2012, a trustee would have been **less** inclined to pursue the asset. *See*, Section E.5, *infra*.

The note did not magically become part of the estate again upon the reopening of the case. The Harrises had no duty to revise their description of the note in their bankruptcy schedules when the case was reopened and doing so would have had no effect.

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<sup>10</sup> Fed.R.Bank.P. 5010; *In re Trahan*, 460 B.R. 207, 210 (Bankr.C.D.Ill. 2011) ("The appointment of a trustee upon the reopening of a bankruptcy case is not automatic. To the contrary, in Chapter 7, 12, and 13 cases, the UST is only authorized to appoint a trustee in a reopened case after obtaining from the court an express finding that a 'trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.'").

<sup>11</sup> Docket, pgs. 15-16.

4. **The Trial Court Erred In Barring The Harrises From Pursuing The Fortin Note Because Judicial Estoppel Requires Inconsistency And The Harrises Did Not Take Inconsistent Positions Regarding The Note In The Bankruptcy and Trial Courts**

The policy behind the doctrine of judicial estoppel is to preserve respect for judicial proceedings and to avoid inconsistency, duplicity and waste of time. *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007) (Internal citations omitted). Although not an exhaustive list, there are three core factors that guide a trial court's determination of whether to apply the judicial estoppel doctrine:

- (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 538-539 (Emphasis added. Internal citations omitted). **Judicial estoppel requires inconsistency.** If consistent positions are taken, the application of judicial estoppel is unwarranted.

The trial court in this matter applied the doctrine after determining:

In this matter we have the Plaintiffs listing the note on the schedules but claiming they are uncollectible and of zero value, as compared to the *Ingram* case where they were listed with some value. In addition when the Plaintiffs filed

list the note as uncollectible and zero value. This seems inconsistent with the position they have taken in the Superior Court action filed in September 2011 and clearly gives the impression to this court that they are attempting to deceive the Bankruptcy Court and retain the benefit of their claims. The plaintiffs are taking totally opposite positions at the same time in different courts.

CP 296.

It was error for the trial court to bar the Harrises' claim against Fortin on the grounds of judicial estoppel, because the Harrises did not take inconsistent positions on the Fortin note.

**a. The Harrises' Later Position In The Trial Court Regarding The Note Was Consistent With Their Earlier Position Regarding The Note In The Bankruptcy Court**

The Harrises plainly disclosed Fortin's note on Schedule B as "Uncollectible promissory note from Michael A. Fortin" and listed the face value of the note in parentheses as "\$400,000." CP 164. Under current value of the debtor's interest in this property, Schedule B states "0.00." *Id.*

At the creditors meeting, the trustee questioned the Harrises regarding potential assets that could be pursued on behalf of the bankruptcy estate, including the Fortin note. Corey Harris testified that in his opinion, Fortin was not "good for it" because "he's been unemployed for – I think – two years." CP 224-225. In response to the trustee's

question, “because [Fortin’s] in the building business there’s no money – there’s no – [he’s] not doing anything?,” Harris answered, “I don’t believe so, no.” CP 225-226.

There was no attempt by the Harrises to deceive the bankruptcy court, to convince the trustee not to pursue the note as an asset of the estate. As shown above, the Harrises properly scheduled the note in their bankruptcy. The information they provided was accurate. The trustee had an opportunity to inquire and did so by questioning the Harrises at the meeting of creditors. The Harrises answered the trustee’s questions fully and accurately. There is no evidence to support that the Harrises withheld any information. And to the extent the trustee required additional information, the burden was on the trustee to seek it. He was free to choose whether or not the pursuit of the asset was likely to result in a recovery for the estate, such that the time and expense was worth it. The trustee, after investigation, did not pursue the note claim. And once the asset was abandoned, it reverted to the Harrises. The Harrises then filed suit in the trial court, as they were permitted to do.

In the bankruptcy court, the Harrises asserted that Fortin owed them \$400,000 on the note, but that collectability was uncertain. The Harrises later filed suit in the trial court asserting that Fortin owed them \$400,000 on the note. There is no inconsistency here. The mere act of

filing suit was not taking a new position as to the collectability of any judgment, should one be entered.

Further, the later reopening of the bankruptcy while the suit was pending had no effect on the ownership of the note, it remained the Harrises' property and they had no duty to revise their description of the abandoned asset. Revising the note's description would have accomplished nothing. It was no longer an asset of the estate, the evidence reveals that collecting on the note remained an issue, and if a trustee had been reappointed to the bankruptcy, he or she not only likely would not have moved to revoke abandonment, any such motion would likely have been denied. *See*, Sections E.2. and 3., *supra*, and E.5., *infra*.

**b. Even If The Harrises Could Be Described As Taking “Inconsistent” Positions In The Two Proceedings, The Trial Court Still Erred In Applying The Doctrine Of Judicial Estoppel Because Neither Court Was Misled And The Harrises Won’t Derive An Unfair Advantage If The Claim Proceeds**

The application of judicial estoppel in this case still fails even if one could argue that the Harrises' filing suit in the trial court was inconsistent with their posture on the note in the bankruptcy court. There is no evidence that anything the Harrises told the bankruptcy court was untruthful or misleading. There is no evidence in the record that the Harrises withheld any information from the bankruptcy court regarding

the note. It was properly scheduled. The trustee had an opportunity to investigate, and did so. The trustee then stated that he had made a diligent inquiry into the Harrises financial affairs and the location of property belonging to the estate. CP 175.

The application of judicial estoppel in this case presumes that if the Harrises had revised their description of the note in Schedule B in 2012, that the asset would not have been abandoned. It is not clear what information the trial court believed the Harrises should have changed or added to their description of the note. Regardless, the court apparently believed that not providing the bankruptcy court with this information was misleading in some way, and unfair. It wasn't. As shown above, the Harrises properly scheduled the note claim, the burden was on the trustee, and once abandoned, the reopening of the bankruptcy had absolutely no effect on the note. If the Harrises proceed against Fortin in the trial court, this creates no perception that either the bankruptcy court or trial court were misled in any way and affords the Harrises no unfair advantage. *See*, Sections E.2. and 3., *supra*, and E.5., *infra*.

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**5. The Trial Court Erred In Granting Fortin’s Motion For Summary Judgment On The Grounds Of Judicial Estoppel Because The Facts Considered In The Light Most Favorable To The Harrises Demonstrates That The Harrises Did Not Take Inconsistent Positions On The Note, That The Harrises Did Not Attempt To Mislead And The Bankruptcy Court Was Not Misled, That The Trustee Investigated The Fortin Note Fully Before Abandoning It To The Harrises, And That Nothing The Harrises Did Or Didn’t Do When Their Bankruptcy Was Reopened Would Have Changed This Result**

Summary judgment is warranted if the evidence demonstrates

“there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the nonmoving party. *Atherton Condo. Apartment-Owners Ass’n Bd. Of Dirs. V. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990). All facts must be considered in the light most favorable to the nonmoving party. *Id.*, citing *Citizens for Clean Air v. Spokane*, 114 Wash.2d 20, 38, 785 P.2d 447 (1990).

The facts in this case do not support the trial court’s grant of Fortin’s motion for summary judgment. When viewed in the light most favorable to the Harrises, the evidence reveals the following:

- Fortin executed a promissory note in favor of the Harrises in the principal amount of \$400,000 (CP 9-10);
- Fortin defaulted on the note (CP 4);

- In 2010, the Harrises filed bankruptcy (CP 142);
- On Schedule B of their bankruptcy petition, the Harrises disclosed the Fortin note as “Uncollectible promissory note from Michael A. Fortin (\$400,000) and under “Current Value of Debtor’s Interest in Property” Schedule B listed “0.00” (CP 164);
- At the 341 meeting of creditors in 2010, the bankruptcy trustee asked the Harrises specific questions about the note (CP 224-226);
- Corey Harris testified that in his opinion, Fortin was not “good for it” because “he’s been unemployed for – I think – two years.” (*Id.*);
- In response to the trustee’s question, “because [Fortin’s] in the building business there’s no money – there’s no – [he’s] not doing anything?” Harris answered, “I don’t believe so, no.” (CP 225-226);
- There is nothing in the record to suggest that Corey Harris withheld information about the note or testified untruthfully at the meeting of creditors (CP, RP);
- The Harris bankruptcy was discharged in December of 2010 (CP 176);
- In March of 2011, the trustee filed his Report of No Distribution, noting “I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate,” and he requested to be discharged from trustee duties (CP 175);

- In March of 2011, the Harris bankruptcy was closed and the trustee was discharged (Docket, pg. 15);
- The Fortin note claim was not administered when the bankruptcy closed (*Id.*, CP 175);
- In September of 2011, the Harrises filed suit in the state trial court against Fortin on the \$400,000 note (CP 1-10);
- In November of 2011, Fortin filed a motion for summary judgment in the state trial court, claiming that he did not owe the Harrises any money (CP 13-37);
- The motion for summary judgment was denied because the court found that material issues of fact remained (CP 109 and 110-112);
- The Harris bankruptcy was reopened in January of 2012 so the Harrises could add a new counterclaim (unrelated to Fortin) to the personal property listed in Schedule B (CP 170);
- The Harrises filed amended bankruptcy schedules but did not change their description of the Fortin note claim (CP 165, 170);
- No trustee was appointed to the bankruptcy when it reopened (Docket, pgs. 15-16);
- If a trustee had been appointed to the reopened bankruptcy, further investigation of the Fortin note claim would have revealed that Fortin's

financial situation had not improved and that Fortin disputed the validity of the note (CP 130, 263-265); and

- The bankruptcy was re-closed in February of 2012 (Docket, pg. 16).

The facts viewed in the light most favorable to the HARRISES reveal the HARRISES did not take inconsistent positions on the Fortin note in two different court proceedings. They properly scheduled their claim in the bankruptcy, provided full and accurate information about the claim to the bankruptcy court and the bankruptcy court chose not to pursue it. The evidence indicates that the trustee was put on inquiry notice of the claim and investigated it before allowing it to be abandoned by operation of law. The asset then reverted back to the HARRISES upon the bankruptcy case closing, leaving the HARRISES free to pursue the suit in the state trial court. Filing suit in the state trial court was not inconsistent with the HARRISES' Schedule B, and the bankruptcy court was not misled.

In addition, there was nothing inconsistent or misleading about the HARRISES not amending Schedule B to change the note's description after the trial court suit was filed and the bankruptcy reopened. Amending the note's description would have had no effect. The claim was no longer property of the estate and the reopening of the bankruptcy did not bring it back. And nothing had changed. Fortin's financial situation remained

precarious and he disputed the validity of the note. Even if the Harrises had revised the note's description on their amended Schedule B, and even if this prompted the appointment of a trustee, the evidence shows if anything, said trustee would be even less inclined to want to pursue the asset. Viewing the evidence in the light most favorable to the Harrises, a trustee appointed to the reopened bankruptcy would not have filed a motion to revoke the abandonment of the note, or if he or she did, such a motion would be denied. The result would be the same – the Harrises could pursue the claim in the state trial court.

The trial court's grant of Fortin's motion for summary judgment erroneously presumes that the Harrises misled the bankruptcy court and would derive an unfair advantage as a result. This is simply not the case. In addition, it presumes that at the time the Harrises reopened their bankruptcy case, that the note claim remained property of the estate. The trial court failed to rule on the issue of abandonment. The Harrises argued that the note claim was abandoned, and the trial court failed to address this argument at the hearing on Fortin's motion for summary judgment and in its written order. This alone is a sufficient basis for remand.

The trial court's order applying the doctrine of judicial estoppel to the Harrises' claims against Fortin must be reversed.

## **F. CONCLUSION**

The trial court erred in granting Fortin's motion for summary judgment. The facts viewed in the light most favorable to the HARRISES reveal that the application of judicial estoppel in this case was unwarranted.

There was nothing inconsistent or misleading about the HARRISES describing a \$400,000 promissory note claim in their bankruptcy schedules as "uncollectible" and with a current value of "0.00," and then later filing suit on the note in the state trial court. The HARRISES provided accurate information to the bankruptcy court regarding the note and did not withhold information. They properly scheduled the note claim in their bankruptcy, placing creditors and the trustee on inquiry notice. The burden was on the trustee to investigate the asset in order to determine if it was worthwhile to pursue it on behalf of the bankruptcy estate. In this case, the trustee chose not to pursue a potentially uncollectible asset, and it was abandoned by operation of law when the bankruptcy case closed. Once abandoned, it was no longer property of the estate and reverted to the HARRISES to make of it what they could. As a result, they were free to file suit in the state trial court.

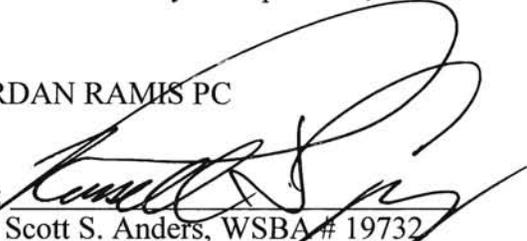
There also was nothing inconsistent or misleading about the HARRISES not revising their description of the note claim when their

bankruptcy was later reopened while the state court suit was pending. The reopening of the bankruptcy did not revoke abandonment of the note claim or bring it back into the estate's property. It did not revive the trustee's authority. Even if the Harrises had revised the note's description, the evidence reveals that the validity of the note was disputed by Fortin and that collectability remained an issue. Revising the note would have had no effect and the result would have been the same.

The Court's order granting summary judgment on the grounds of judicial estoppel must be reversed, and the case remanded for a determination on the merits.

RESPECTFULLY SUBMITTED this 3rd day of September, 2013.

JORDAN RAMIS PC

By: 

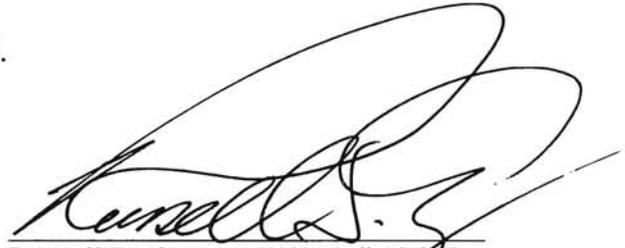
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CERTIFICATE OF SERVICE

I hereby certify that on the date shown I served a true and correct copy of the BRIEF OF APPELLANTS by first class mail, postage prepaid, on:

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