

Court of Appeals No. 44706-1-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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**REPLY BRIEF OF APPELLANTS**

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**TABLE OF CONTENTS**

	<u>Page</u>
A. INTRODUCTION .....	1
B. ARGUMENT .....	2
1. Remand is Appropriate Even Under An Abuse Of Discretion Standard Of Review .....	2
2. Judicial Estoppel Requires Inconsistency And Fortin Has Not And Cannot Show That The Harrises Took Inconsistent Positions in the Bankruptcy and Trial Courts.....	6
3. The Note Was Properly Scheduled, It Was Abandoned By Operation Of Law When The Bankruptcy Closed, and Ownership Of It Reverted To The Harrises .....	8
a. Fortin Cites No Persuasive Authority To Distinguish This Case From The Ninth Circuit’s “Undervaluation” Line of Cases And Ignores Precedent Supporting The Harrises’ Position.....	8
b. Fortin Cites No Persuasive Authority To Support His Argument That The Harrises’ Schedule B Was “Woefully Insufficient” To Put The Trustee And Creditors On Notice. ....	14
4. Fortin Cites No Persuasive Authority To Show The Harrises’ Failure To Amend Schedule B When Their Bankruptcy Reopened Supports The Application Of Judicial Estoppel .....	19
5. Fortin Does Not Have A “Reciprocal” Right To Attorney Fees On Appeal That the Harrises Do Not Have In The First Place.....	21
C. CONCLUSION.....	25

## TABLE OF AUTHORITIES

### TABLE OF CASES

<i>Angelo v. Angelo</i> , 142 Wash.App. 622, 175 P.3d 1096 (2008) .....	25
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wash.2d 535, 160 P.3d 13 (2007) ....	6
<i>Atherton Condo. Apartment-Owners Ass'n Bd. Of Dirs. V. Blume Dev. Co.</i> , 115 Wash.2d 506, 799 P.2d 250 (1990) .....	3
<i>Bank of New York v. Hooper</i> , 164 Wash. App. 295, 263 P.3d 1263 (2011).....	25
<i>Barger v. City of Cartersville, Georgia</i> , 348 F.3d 1289 (11th Cir. 2003).....	15, 16, 17
<i>Belfor USA Group, Inc. v. Thiel</i> , 160 Wash. 2d 669, 160 P.3d 39 (2007).....	23, 24
<i>Burnes v. Pemco Aeroplex, Inc.</i> , 291 F.3d 1282 (11th Cir. 2002).....	19
<i>Citizens for Clean Air v. Spokane</i> , 114 Wash.2d 20, 785 P.2d 447 (1990).....	3
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wash. App. 222, 108 P.3d 147 (2005).....	15, 16, 19
<i>Cusano v. Klein</i> , 264 F.3d 936 (9th Cir. 2001).....	9, 10, 11, 12
<i>Eastman v. Union Pacific Railroad Company</i> , 493 F.3d 1151 (10th Cir. 2007).....	2, 3
<i>In re Adair</i> , 253 B.R. 85 (B.A.P. 9th Cir. 2000).....	11, 12, 13
<i>Ingram v. Thompson</i> , 141 Wash. App 287, 169 P.3d 832 (2007).....	3, 10, 11, 12
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677, 132 P.3d 115 (2006) .....	6

<i>Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.</i> , 989 F.2d 570 (1st Cir. 1993).....	19
<i>Robinson v. Tyson Foods, Inc.</i> , 595 F.3d 1269 (11th Cir. 2010).....	2
<i>Seattle First Nat. Bank v. Wash. Ins. Guar. Ass'n</i> , .. 116 Wash. 2d 398, 804 P.2d 1263 (1991).....	25
<i>Skinner v. Holgate</i> , 141 Wash. App. 840, 173 P.3d 300 (2007).....	3, 15, 17, 18, 19
<i>Vucak v. City of Portland</i> , 194 Or.App. 564, 96 P.3d 362 (2004).....	5, 15, 17
<i>Water's Edge Homeowners Ass'n v. Water's Edge Associates</i> , 152 Wash. App. 572, 216 P.3d 1110 (2009).....	6

**STATUTES**

11 U.S.C. § 554(c) .....	19
RCW 4.84.330 .....	22, 24, 25

**A. INTRODUCTION**

The trial court abused its discretion by failing to rule on the issue of abandonment and by selectively viewing the facts in this case in the light most favorable to the moving party.

The trial court erred in granting Fortin's motion for summary judgment because the application of judicial estoppel requires inconsistency. The Harrises did not take inconsistent positions in the bankruptcy and trial courts because the note claim was properly scheduled in the bankruptcy. Taken as a whole, the Harrises' description of the note in their bankruptcy schedules was akin to an undervaluation of the claim. It was sufficient to put the trustee and creditors on inquiry notice. In fact, the note was investigated by the trustee, who (after being provided complete and accurate information) then allowed it to be abandoned by operation of law back to the Harrises, who were then free to pursue it. The Harrises had no legal obligation to later amend their bankruptcy schedules to change the note's description, and doing so would have had no effect. As a result, their failure to amend was also not "taking an inconsistent position." And there is no evidence that any information the trustee could have received at any point would have resulted in his administering the note on behalf of the bankruptcy estate.

The trial court erred in granting Fortin’s motion for summary judgment. This matter should be reversed and remanded for a determination on the merits.

**B. ARGUMENT**

**1. Remand is Appropriate Even Under An Abuse Of Discretion Standard Of Review**

Fortin concedes that *de novo* review “would be appropriate if the trial court had made factual findings.” Brief of Respondent (“Rsp. Brief”), page 3. Fortin cites to two cases in support of his proposition that in fact the abuse of discretion standard of review applies in this case. In the first case Fortin cites, the Eleventh Circuit held that although the application of judicial estoppel is reviewed for abuse of discretion, findings of fact are still reviewed for clear error. Rsp. Brief, page 3, *citing Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010). In the second case, the Tenth Circuit held that a judicial estoppel decision is reviewed “only” for abuse of discretion “assuming the district court had properly characterized the facts in light of the applicable standard...” Rsp. Brief, page 3, *citing Eastman v. Union Pacific Railroad Company*, 493 F.3d 1151, 1156 (10th Cir. 2007). As the Court in *Eastman* also pointed out, when the appeal arises in the context of summary judgment, the Court must “view the facts and all reasonable inferences to be drawn therefrom in a light most

favorable to the nonmoving party...” *Eastman*, 493 F.3d at 1156. *See also*, Appellants’ Brief (“App. Brief”), page 19, *citing Atherton Condo. Apartment-Owners Ass’n Bd. Of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990) and *Citizens for Clean Air v. Spokane*, 114 Wash.2d 20, 38, 785 P.2d 447 (1990).

In its Memorandum of Decision, the Superior Court addressed some facts, but ignored others. The Court stated:

In April 2010 the Plaintiff’s, Corey Harris and Julian [sic] Harris, filed a voluntary Bankruptcy Petition in the United States Bankruptcy Court Western District of Washington. In that petition they listed the promissory note from the defendant, Michael Fortin, as uncollectible and of zero value. In this action the plaintiffs are attempting to collect on the above described promissory note executed by the defendant, Michael Fortin. 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 case we have facts that are different from *Skinner* and *Ingram*. 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.

CP 294-296.

Importantly, the Superior Court failed to acknowledge or consider the following facts in the record: (1) the Harrises' bankruptcy schedules listed the face value of the note at \$400,000 (CP 164); (2) the bankruptcy trustee had the opportunity to question the Harrises fully at the bankruptcy meeting of creditors in 2010, and in fact did so (CP 224-226); (3) Corey Harris' testimony at the meeting of creditors about the potential for collecting on the note was **entirely consistent** with Fortin's own later testimony in September 2012 about Fortin's still ongoing precarious financial situation (CP 263-264); (4) the trustee never contacted Fortin about the existence or validity of the debt (CP 130); (5) had the trustee contacted Fortin, Fortin would have disputed the debt's validity (CP 13-37); and (6) the trustee, after making a "diligent inquiry into the financial affairs of the debtor(s)," requested to be discharged of his duty without administering the note (CP 176).

What's more, the trial court failed to rule on the issue of abandonment. How could the Superior Court determine judicial estoppel applied without evaluating the issue of abandonment? If the note was abandoned, it belonged to the Harrises and filing suit on it in the trial court

was not taking an inconsistent position. If the note was not abandoned, it remained property of the bankruptcy estate, in which case the trustee was the real party in interest, not the Harrises. *See, e.g. Vucak v. City of Portland*, 194 Or. App. 564, 96 P.3d 362 (2004).

The only way to find that judicial estoppel applied was to ignore certain facts and view only selected facts in the light most favorable to the **moving party**. The Court had to ignore that the face value of the note was disclosed to the trustee and creditors in the schedules; had to ignore Corey Harris' and Michael Fortin's testimony regarding collectability and the fact that Fortin also disputed the validity of the debt. And then doing this, had to infer that if only the Harrises had either not described the note as "uncollectible" in the schedules or had also listed the value of the note as its face value (or some other number) on the schedules, or had disclosed the suit when the bankruptcy was reopened, that the trustee might then have behaved differently towards the note. This is unsupported by the facts and is clear error. **It is drawing inferences in the light most favorable to the moving party.**

Viewing the facts and drawing inferences in the light most favorable to the Harrises reveals that they properly scheduled the note, including its face value; they testified truthfully about the potential for ever collecting any funds on the note; the trustee made a diligent inquiry

and then chose not to pursue judgment on the note; and that the Harrises' amending the schedules when the bankruptcy reopened would have had no effect. The note was abandoned by operation of law. The Court did not properly characterize the facts in light of the applicable standard of review on a summary judgment motion. As a result, even if the appropriate standard of review before this Court is abuse of discretion, the Superior Court's application of judicial estoppel was an abuse of discretion, because the decision was based on untenable grounds or untenable reasons. *Water's Edge Homeowners Ass'n v. Water's Edge Associates*, 152 Wash. App. 572, 584, 216 P.3d 1110 (2009), *citing Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006) ("A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons").

**2. Judicial Estoppel Requires Inconsistency And Fortin Has Not And Cannot Show That The Harrises Took Inconsistent Positions in the Bankruptcy and Trial Courts**

Fortin acknowledges that there are three core factors that guide a trial court's determination of whether to apply the judicial estoppel doctrine and all of them require inconsistency. Rsp. Brief, page 6, *citing Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538-539, 160 P.3d 13 (2007). Without inconsistency, there can be no application of judicial estoppel.

Fortin then apparently takes for granted that the Harrises' filing suit on the note was inconsistent with their position in the bankruptcy court. Or, at the very least, Fortin fails to address the Harrises' arguments in the opening brief as to why there was no inconsistency. The argument in the Respondent's Brief on this issue can be summed up by these simple sentences: "...plaintiffs in their bankruptcy schedule listed the value of their claim on this note as zero dollars. Several months later, in the lawsuit, plaintiffs valued the claim at not less than \$956,000. Coupled with their statements to the bankruptcy trustee, plaintiffs took clearly inconsistent positions in the bankruptcy court and at the trial court." Rsp. Brief, pages 7-8.

These sentences, taken alone, in isolation, could show an inconsistency. Unfortunately, standing alone in this case they ignore context, most of the evidence in the record, and the entirety of Bankruptcy law. In fact, Fortin does not even address the argument that the claim was abandoned by operation of law prior to the Harrises filing suit.

Context matters. The Harrises' "position" in filing suit on the note in the Superior Court can only be understood in the context of their "position" regarding the note as scheduled in the bankruptcy. If the note was property of the bankruptcy estate, properly scheduled but then abandoned by operation of law and ownership of it reverted back to the

Harrises prior to their filing suit, their doing so would be within their right, it would not be an inconsistent act subject to application of the judicial estoppel doctrine.

Fortin does not dispute that the Harrises described the note on Schedule B of their bankruptcy petition, that the note was discussed at the meeting of creditors, that the trustee took no action to attempt to recover on the note for the bankruptcy estate, that the bankruptcy later closed, and that the Harrises had no legal obligation to revise the note's description when they reopened the bankruptcy. Rsp. Brief, pages 3-4 and 13. The only issue then is the adequacy of the Harrises' disclosure of the note in their bankruptcy schedules. App. Brief, page 21.

**3. The Note Was Properly Scheduled, It Was Abandoned By Operation Of Law When The Bankruptcy Closed, and Ownership Of It Reverted To The Harrises**

**a. Fortin Cites No Persuasive Authority To Distinguish This Case From The “Undervaluation” Line of Cases And Ignores Precedent Supporting The Harrises’ Position.**

Fortin acknowledges that, “[j]udicial estoppel is...*frequently* held to be inapplicable when a party discloses a claim, but undervalues the claim.” Rsp. Brief, page 6 (Emphasis added). As an initial matter, Fortin does not cite to any cases where judicial estoppel was applied to a properly scheduled claim. If a claim is properly disclosed, but

undervalued, and is then abandoned, judicial estoppel is inappropriate in a later-filed suit.

Fortin tries to distinguish this case from other “undervaluation” cases by first claiming that many undervaluation cases involve personal injury claims and that placing a value on said claims is “difficult and speculative,” unlike, he argues here, where “The valuation of a claim on a promissory note bears none of the speculative uncertainties that are present in attempting to value a personal injury claim.” *Id.* at page 7.

This argument ignores and makes no attempt to distinguish undervaluation cases that do not involve personal injury claims, such as *Cusano v. Klein*, 264 F.3d 936 (9th Cir. 2001). The later-filed suit at issue in *Cusano* involved several claims over song rights, including (as here) breach of contract and conversion. *Id.* at 942 and CP 2. And the Court found that, although he listed the value of the song rights as “unknown,” this was “a sufficient scheduling of Cusano’s interest in his pre-petition compositions, which reverted to him upon confirmation of his plan.” *Cusano*, 264 F.3d at 947. The Court found that “it would have been more helpful for Cusano to break down the description further,” but even so the “listing was not so defective that it would forestall a proper investigation of the asset.” *Id.* at 946.

In addition, the value of the claim on this promissory note is speculative. As the Harrises argued in their opening brief, Fortin disputes that he owes the Harrises any money. And Fortin's financial situation may preclude collection even if the validity of the debt is litigated in favor of the Harrises. App. Brief, page 25. As the Court in *Ingram v. Thompson*, 141 Wash. App 287, 169 P.3d 832 (2007) pointed out (and as cited by Fortin), to determine if value is speculative one looks to the ease in determining the "net value to the plaintiff" and considers things such as "how the evidence comes in, and the credibility of witnesses." Rsp. Brief, page 7, *cites Ingram*, 141 Wash. App. at 293. The net value of the claim to the Harrises is far from certain.

Fortin next argues that this case is distinguishable from undervaluation cases because the Harrises described the value of the note in their bankruptcy schedules as "zero dollars" instead of, in *Ingram* for example, as having "some unknown value." Rsp. Brief, pages 8, 12. This is a distinction without a difference.

When disclosing an asset in the proper bankruptcy schedule, a debtor is only "required to be as particular as is reasonable under the circumstances" in order to permit a proper investigation. *Cusano*, 264 F.3d at 946. No specific words are required – if the value of the asset is unknown, "a simple statement to that effect" suffices. *Id.* That does not

mean a debtor must specifically write the word “unknown” or some variant thereof. They must simply do enough in the schedules to put the trustee and creditors sufficiently on notice of the claim to perform a proper investigation.

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 on Schedule B as a note. The party alleged to owe on the note was plainly identified as Michael Fortin. And the face value of the note was plainly listed as “(\$400,000).” The Harrises also described the note as “uncollectible” with a current value of “0.00.” CP 161-164. Fortin does not allege that the Harrises believed the note was actually collectible when the bankruptcy was filed. In other words, there is no evidence that any information the Harrises provided in their schedules was incomplete or inaccurate. The totality of the disclosure clearly put the trustee and creditors on inquiry notice to investigate. This is no different than other undervaluation cases such as *Cusano*, *Ingram* and *In re Adair*, 253 B.R. 85 (B.A.P. 9th Cir. 2000).

In *Cusano*, the debtor listed the value of song rights in his bankruptcy schedules as simply “unknown.” Not even an approximate dollar figure was given. The Court held that “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.” *Cusano*, 264 F.3d at 947.

In *Ingram*, the debtor listed the value of his claim as “value unknown, but believed to be less than \$5,000.00.” *Id.* at 287. He later filed suit seeking \$150,000. The defendant in that case, as here, argued the description was equivalent to failing to list the asset altogether, but the Court disagreed:

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.

*Id.* at 293.

In *Adair*, the debtor disclosed her interest in a lawsuit on Schedule B, but stated in the description column: “Recovery is uncertain at this time. \$20,000 is listed herein **for exemption purposes only.**” *In re Adair*, 253 B.R. at 86 (Emphasis added). In response to the trustee’s inquiry, the debtor’s counsel stated in a letter, “recover [*sic*] is speculative at best...” *Id.* In other words, there may be a recovery, or there may be no recovery at all. The trustee made no further inquiries and the debtor later settled the case for \$430,000. *Id.* at 87. The Court held that the debtor’s disclosures were not misleading and that there was no general ongoing duty for a

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debtor to supplement information “with regard to assets that the Debtor clearly disclosed in her bankruptcy schedules.” *Id.* at 90-91.

Hypothetically, if the Harrises had listed “0.01” instead of “0.00” in the current value column of Schedule B, would the claim qualify as undervalued per Fortin’s argument? Would Fortin argue that, even though the face value of the note was disclosed in the schedules, listing “0.01” in the current value column of Schedule B would provide inquiry notice, but listing “0.00” would not? What if the current value was listed as “\$400,000.00,” but in the description column the Harrises had written the word “uncollectible”? Or if the Harrises had added to the description column a sentence stating an intent to file suit if the trustee did not, despite their belief that the note was “uncollectible”? There is no evidence that anything the Harrises disclosed regarding the note was inaccurate, incomplete, or untruthful.

The Harrises properly disclosed the note claim. This was sufficient to put the trustee and creditors on notice to investigate. What’s more, the trustee did investigate. Fortin argues that the bankruptcy court was clearly misled because the trustee did not pursue the note on behalf of the estate. *Rsp. Brief*, page 11, 15. But this presumes that if the trustee had just gotten something different or additional from the Harrises, that he would have pursued the note. The facts of this case, when viewed in the

light most favorable to the non-moving party, show that Fortin disputes the debt and that the note may in fact be uncollectible. CP 224-226, 13-37, 130, 263-264. 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 bankruptcy court was never misled. And there is nothing to indicate that anything the trustee could have heard would have resulted in him pursuing the note.

Because the note was properly scheduled and not administered, it was abandoned by operation of law and the Harrises were free to file suit on the note in the Superior Court. Their filing suit was not an inconsistent act and therefore the trial court erred in applying the doctrine of judicial estoppel.<sup>1</sup>

**b. Fortin Cites No Persuasive Authority To Support His Argument That The Harrises' Schedule B Was "Woefully Insufficient" To Put The Trustee And Creditors On Notice.**

The Harrises properly disclosed the note claim in Schedule B. As described above, this was sufficient to put the trustee and creditors on notice of the claim. The burden was then on the trustee to investigate to decide whether to administer the claim or allow it to be abandoned.

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<sup>1</sup> *Also see*, App. Brief, pages 18-27, 33-36. The Harrises' failure to later amend their bankruptcy schedules was also not an inconsistent act. See Section B. 4, *infra*, and App. Brief pages 27-32 and 36.

Fortin argues that “merely making the bankruptcy trustee and the creditors aware of the existence of a claim may not be enough to avoid the application of judicial estoppel” and that the Harrises’ disclosure “is woefully insufficient to put the trustee and creditors on notice....” Rsp. Brief, pages 8, 12. It is true that judicial estoppel may still be applied in circumstances where the trustee and creditors knew of the claim, but Fortin can cite to no authority that supports applying the doctrine **when the claim was properly scheduled**. All of the cases cited by Fortin in support of his argument involve circumstances where the debtor failed to list the claim in his or her schedules and the trustee or creditors otherwise became aware of the claims.

Fortin cites to four cases to support his argument that judicial estoppel was properly invoked despite the Harrises’ disclosure of the note in their bankruptcy schedules: *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash. App. 222, 108 P.3d 147 (2005); *Barger v. City of Cartersville, Georgia*, 348 F.3d 1289 (11th Cir. 2003); *Vucak v. City of Portland*, 194 Or. App. 564, 96 P.3d 362 (2004); and *Skinner v. Holgate*, 141 Wash. App. 840, 173 P.3d 300 (2007). All of these cases are fundamentally distinguishable from this case and therefore shed no light on the appropriateness of the trial court’s actions.

Fortin himself establishes why *Cunningham* is inapposite:

There, the plaintiffs **failed to list a personal injury claim in their schedules**, and then sued on that claim after their bankruptcy was closed as a no asset case. The plaintiffs argued, and the court accepted the inference, that they disclosed the claim orally during the meeting of creditors. Nevertheless, the court concluded that **the plaintiffs' failure to list the claim in their bankruptcy schedules fulfilled the prior inconsistent position element of judicial estoppel.**

Rsp. Brief, page 8 (Emphasis added. Internal citations omitted). Fortin then goes on to cite to *Cunningham* regarding the second and third prongs of the judicial estoppel test (judicial acceptance of an inconsistent position and derivation of an unfair advantage), having blown past the first. In *Cunningham*, it was **the failure to list the claim in the bankruptcy schedules** that established the required inconsistency. None of the elements of judicial estoppel can be met without establishing an inconsistent position. Fortin has not and cannot do so in this case.

Fortin next cites to the Eleventh Circuit *Barger* case. Again, a case involving a failure by the debtor to list a claim on her bankruptcy schedules. There the debtor's employment discrimination lawsuit was already pending when she filed for bankruptcy, though she did not list it on her schedules. *Barger*, 348 F.3d at 1294-1295. Although she advised the trustee about the lawsuit at the meeting of creditors, she withheld vital information from him – she told the trustee that she was only seeking

reinstatement of her position, and neglected to advise the trustee of her claims for back pay, liquidated damages, and punitive damages. *Id.* at 1296. In this case, not only did the Harrises disclose the claim on Schedule B, there is no evidence that they provided any inaccurate or untruthful information or that they withheld any information.

In the *Vucak* case, the debtor failed to list her personal injury claim on Schedule B. *Vucak*, 194 Or. App. at 364. She did, however, list on Schedule I that she was receiving disability benefits from an insurance company and disclosed in her Statement of Financial Affairs (“SOFA”) that she had been in an automobile accident. *Id.* The Oregon Court of Appeals specifically discussed the importance of the debtor’s duty to **properly** schedule assets, noting:

In this case, if we consider only the information that plaintiff listed on her “schedules,” we must conclude that she not only failed to list the claim on Schedule B of the petition (Personal Property); she also on that same schedule, expressly marked “NONE” where the form asked her to disclose any “contingent and unliquidated claims.” The only information pertaining to plaintiff’s personal injury claim against the city in her schedules is in Schedule I, where plaintiff specified “Farmer’s Insurance Disability Benefits” as a form of “other monthly income.” That information could not possibly put an interested party on notice that the events causing the disability might also form the basis of a potential personal injury claim.

*Id.* at 366. The Court declined to extend the meaning of “schedule” to include the SOFA. *Id.* Fortin also cites to this Court’s *Skinner* decision,

and again, Fortin himself explains why the case doesn't support his argument:

The court concluded that judicial estoppel applied to the plaintiff's [Skinner] [*sic*] **failure to properly schedule his assets**. The court stated, at 853:

**Skinner had a duty to carefully schedule his assets.** By failing to do so, he attempted to deceive the bankruptcy court and retain the benefit of his claims. **We hold that the trial court did not abuse its discretion when it found that Skinner derived an unfair advantage when he breached his duty to schedule all of his assets...**

Rsp. Brief, page 12, *citing Skinner*, 141 Wash. App. at 853 (Emphasis added).

In this case, the Harrises properly scheduled the claim. Although Fortin believes the Harrises' Schedule B disclosure "is substantively identical to failing to disclose the claim" (Rsp. Brief, page 12), he can cite to no authority to support that proposition. In all of the cases Fortin himself cites, judicial estoppel was only appropriate where the asset was not properly scheduled and Fortin has not and cannot show that the Harrises improperly scheduled the note in this case.

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**4. Fortin Cites No Persuasive Authority To Show That The Harrises' Failure To Amend Schedule B When Their Bankruptcy Reopened Supports The Application Of Judicial Estoppel.**

Fortin concedes that the Harrises' bankruptcy closed, and when it later reopened they had "no legal obligation at that point to amend their schedules...." Rsp. Brief, page 13. Nevertheless, Fortin then devotes almost two pages of his brief to arguing that the Harrises' failure to amend the schedules was "telling" and "unsettling." *Id.* If there was no legal obligation, it is not clear why Fortin believes the failure to amend then supports the application of judicial estoppel.

"[I]ntent to mislead is not an element of judicial estoppel." Rsp. Brief, page 9, *citing Cunningham*, 126 Wash. App. at 234. Both cases cited by Fortin again involve a debtor's complete omission of the claim; a failure to properly schedule the asset. That alone makes them inapposite. *See, Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002) and *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993). The continuing duty to disclose described in the *Burnes* case does not apply post-abandonment under 11 U.S.C. § 554(c). If there was no obligation to amend and doing so would have made no difference, how can the failure to do so be dishonest or misleading?

Fortin attempts to make the failure to amend sound deceptive by alleging the Harrises “repeatedly” represented to the bankruptcy court that the claim was worth zero dollars and by emphasizing that the trial court complaint then alleged \$956,000.00 in damages. Rsp. Brief, pages 14-15. The Harrises did not repeatedly represent that the claim was worth zero dollars. The only place zeros appear are in the current value column of Schedule B, which is modified by the description column where the face value of the note is disclosed, as well as the Harrises’ belief that the note was uncollectible. CP 164. Fortin glosses over Corey Harris’ testimony at the meeting of creditors by simply stating in the Statement of the Case, “At the June 2010 meeting of creditors, plaintiffs confirmed their position that the claim against defendant had no value.” Rsp. Brief, page 4. The Harrises never testified that the note claim had no value. Corey Harris testified that Fortin was not “good for it” because “[h]e was a – a real estate developer...” and “he’s been unemployed for – I think – two years.” CP 224-226. The only thing the Harrises confirmed at the meeting of creditors was their (apparently accurate) belief that the note was probably uncollectible. What’s more, the fact that the trial court complaint alleges \$956,000 in damages (as opposed to the \$400,000 face value of the note) is not evidence of some prior nefarious attempt by the Harrises to deceive the bankruptcy court about the note’s value. The complaint filed in the

Superior Court includes the \$400,000 principal, as well as interest provided for in the note (CP 3 and 7), which the trustee could easily have inquired into. In any event, even if he had so inquired, there is no reason to think the note would not still have been abandoned, considering the debt was disputed and collection was uncertain.

The core factors relied upon by courts in determining whether to apply judicial estoppel are not met in this case. The Harrises did not take inconsistent positions in the bankruptcy and trial courts, because the note claim was properly scheduled in their bankruptcy, investigated by the trustee, then abandoned by operation of law back to the Harrises, who were free to pursue it in the trial court. The Harrises' later failure to amend their bankruptcy schedules was not "taking an inconsistent position," because such an amendment would have had no effect and there is no evidence that any information the trustee could have learned at any time would have changed the result. The application of judicial estoppel requires inconsistency. The trial court erred in granting Fortin's motion for summary judgment.

**5. Fortin Does Not Have A "Reciprocal" Right To Attorney Fees On Appeal That the Harrises Do Not Have In The First Place.**

Fortin claims a right to attorney fees on appeal pursuant to "the attorney fee provisions in the underlying loan documents" and the

reciprocity of the contractual fees provision under RCW 4.84.330.<sup>2</sup> The attorney fee provision of the promissory note between the Harrises (as lenders) and Fortin (as borrower) provides:

**ATTORNEYS' FEES; EXPENSES. Lender may hire or pay someone else to help collect this Note if Borrower does not pay.** Borrower will pay Lender that amount [sic]. This includes, subject to any limits under applicable law, Lender's attorneys' fees and Lender's legal expenses, whether or not there is a lawsuit, including attorneys' fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals...

CP 10 (Emphasis added). By its terms, the contract provision is limited to help with collection, which can include attorneys' fees and expenses.

Although appeals are listed, the provision must be read in conjunction with the first sentence, that is it includes appeals **related to help collecting on the note**. Fortin acknowledges the summary judgment motion that is the issue of this appeal "presented a pure question of law."

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<sup>2</sup> Rsp. Brief, page 15. RCW 4.84.330 provides in relevant part:

4.84.330. Actions on contract or lease which provides that attorneys' fees and costs incurred to enforce provisions be awarded to one of parties--Prevailing party entitled to attorneys' fees--Waiver prohibited.

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

...

As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Rsp. Brief, page 1. The underlying motion, and this appeal, are unrelated to the terms of the note and the debt owed.

The Washington Supreme Court ruled on a very similar issue in *Belfor USA Group, Inc. v. Thiel*, 160 Wash. 2d 669, 160 P.3d 39 (2007). In that case, the Thiels (homeowners) hired Belfor (a contractor) to perform home repairs. The parties entered into a contract, the form of which was provided by Belfor. Belfor performed the repairs, but the Thiels did not pay. Belfor filed suit against the Thiels, who counterclaimed for defective workmanship. *Belfor USA Group, Inc.*, 160 Wash. 2d at 670. Belfor filed a motion to compel arbitration under the terms of the agreement. *Id.* The agreement had a unilateral attorney fee provision. It provided:

If, for any reason the amount due under this Work Authorization is not paid when due, the Contractor shall be entitled to his expenses and attorneys fees **incurred in the collection of this agreement.**

*Id.* at 671 (Emphasis added). The Thiels objected to arbitration, but the trial court stayed the case and compelled arbitration. *Id.* at 670. The Thiels sought discretionary review of that order in the Court of Appeals, where a Commissioner denied the motion for discretionary review and awarded fees to Belfor for its defense of the motion. The Thiels objected to the fee award, a panel of the Court of Appeals denied their motion, and

the Supreme Court accepted discretionary review of the issue. *Id.* The Supreme Court reversed the attorney fee award to Belfor. Because the attorney fee provision was unilateral, RCW 4.84.330 applied, and that statute states “fees shall be awarded to the prevailing party, who is the ‘party in whose favor final judgment is rendered.’” *Id.* The Court held:

While Belfor prevailed in compelling arbitration in accordance with the contract, **Belfor has not yet prevailed in collecting under the contract. Since the contract only provides for fees incurred in collecting under the contract for the amount due (as opposed to fees for enforcing a contractual term), Belfor is not entitled to attorney fees only for successfully compelling arbitration.** Nothing herein should be construed to mean that if Belfor prevails in arbitration, the arbitrator may not award Belfor all attorney fees incurred to that date in collecting under the contract. **But at this point, Belfor is not yet a “prevailing party” for purposes of the contract’s attorney fees provision.**

*Id.* at 671 (Emphasis added).

In the Superior Court complaint, the Harrises allege Fortin owes them a debt under the note. CP 2-10. Fortin alleges he does not owe any debt. CP 117-127. The merits of these claims have not (and perhaps will never be) litigated. If the Harrises prevail on this appeal, the case will be remanded for a determination on the merits of the debt dispute, and once there is a ruling on the merits, the prevailing party could allege a right to attorneys fees and costs pursuant to the terms of the note. If Fortin prevails, there will be no determination on the merits and neither party is

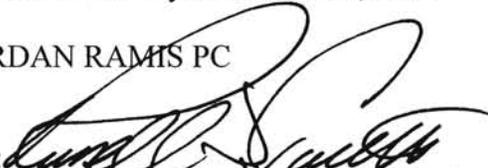
entitled to attorneys fees. *Also see, Bank of New York v. Hooper*, 164 Wash. App. 295, 305, 263 P.3d 1263 (2011) ([Appellant] correctly argues RCW 4.84.330 is a mutuality provision. Because [Appellant] would not have been entitled to attorney fees against [Respondents], RCW 4.84.330 does not provide a basis for those parties to recover attorney fees against [Appellant].”); *Seattle First Nat. Bank v. Wash. Ins. Guar. Ass’n*, 116 Wash. 2d 398, 413, 804 P.2d 1263 (1991) (“[F]or purposes of a contractual attorneys’ fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute.”); and *Angelo v. Angelo*, 142 Wash.App. 622, 647, 175 P.3d 1096 (2008).

### C. CONCLUSION

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 4th day of December, 2013.

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CERTIFICATE OF SERVICE

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

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WESTERN DISTRICT OF WASHINGTON  
VANCOUVER