

STATE
COURT OF APPEALS
DIVISION TWO

2013 OCT -7 PM 1:19

STATE OF WASHINGTON
BY _____
DEPUTY

No. 44706-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

COREY HARRIS and JULINE HARRIS,

Plaintiffs-Appellants,

v.

MICHAEL FORTIN,

Defendant-Respondent.

BRIEF OF RESPONDENT

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.
Stephen G. Leatham, WSBA #15572
211 E. McLoughlin Blvd, Suite 100
PO Box 611
Vancouver, WA 98666-0611
(360) 750-7547
sgl@hpl-law.com
Attorneys for Respondents

TABLE OF CONTENTS

I. INTRODUCTION1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....2

 A. The Trial Court Properly Granted Summary Judgment in Favor of Defendant, Finding That, as a Matter of Law, Principles of Judicial Estoppel Applied to Preclude Plaintiffs from Pursuing Their Claims Against Defendant....2

III. STANDARD OF REVIEW2

IV. STATEMENT OF THE CASE.....3

V. LEGAL ARGUMENT5

 A. Principles and Underpinnings of the Judicial Estoppel Doctrine.....5

 B. Application of Judicial Estoppel in Connection with Bankruptcy Disclosures6

VI. REQUEST FOR ATTORNEY FEES15

VII. CONCLUSION.....15

TABLE OF AUTHORITIES

Cases Cited

Anfinson v. FedEx Ground Pkg. System, Inc., 174 Wn.2d 851 (2012)....2, 6
Arkison v. Ethan Allen, Inc., 160 Wn.2d 535 (2007).....2, 5, 6
Barger v. City of Cartersville, Georgia, 349 F.3d 1289 (11th Cir. 2003)....9
Bartley-Williams v. Kendall, 134 Wn. App. 95 (2006)5
Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002).....13
Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App.
222 (2005)2, 8, 9, 11, 12
Eastman v. Union Pacific Railroad Company, 493 F.3d 1151
(10th Cir. 2007).....3
Ingram v. Thompson, 141 Wn. App. 287 (2007).....2, 6, 7, 12
Johnson v. Si-Cor Inc., 107 Wn. App. 902 (2001)8
Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11 (2009).....2
Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.,
989 F.2d 570 (1st Cir. 1993).....14
Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010).....3
Skinner v. Holgate, 141 Wn. App. 840 (2007)2, 11, 12
Vucak v. City of Portland, 194 Or. App. 564, 96 P.3d 362 (2004).....10

Rules and Statutory Provisions

RAP 18.115
RCW 4.84.33015

I. INTRODUCTION

The trial court properly granted summary judgment in favor of defendant Michael Fortin, dismissing plaintiffs' claims against him. The trial court correctly concluded that plaintiffs are barred from pursuing their claims under principles of judicial estoppel.

Judicial estoppel was properly applied because plaintiffs took inconsistent positions in the bankruptcy court and in Clark County Superior Court, to their advantage. In their bankruptcy proceeding, plaintiffs asserted that their claim against defendant had zero value. After the trustee then did not pursue the claim against defendant, plaintiffs were granted a discharge from their debts. Within just a few months, plaintiffs sued defendant on the "zero value" claim, contending that defendant owed plaintiffs at least \$956,000. Preserving the sanctity of the judicial process, the trial court dismissed plaintiffs' claim, relying upon principles of judicial estoppel.

The underlying motion presented a pure question of law. No material facts were in dispute. The trial court properly exercised its discretion in granting defendant's motion for summary judgment. The trial court's ruling should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Each of plaintiffs' four assignments of error presents a single contention that the trial court erred in barring plaintiffs from pursuing their claims against defendant on the grounds of judicial estoppel. On the contrary, the trial court properly granted summary judgment in favor of defendant, finding that, as a matter of law, principles of judicial estoppel applied to preclude plaintiffs from pursuing their claims against defendant.

III. STANDARD OF REVIEW

Summary judgment rulings are typically reviewed *de novo*. See, e.g., *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538 (2007). However, rulings concerning judicial estoppel are reviewed for abuse of discretion. See, e.g., *Anfinson v. FedEx Ground Pkg. System, Inc.*, 174 Wn.2d 851, 860 (2012):

A trial court's decision with respect to the application of judicial estoppel is reviewed for abuse of discretion.¹

An abuse of discretion may only be found when the ruling on review was "manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Id.*, quoting *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17 (2009).

¹ See also *Arkison*, *supra*, at 538; *Skinner v. Holgate*, 141 Wn. App. 840, 847-48 (2007); *Ingram v. Thompson*, 141 Wn. App. 287, 291 (2007); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 227 (2005).

Here, *de novo* review would be appropriate if the trial court had made factual findings or based its decision on grounds other than judicial estoppel. Since the ruling was based solely upon on principles of judicial estoppel, however, the proper standard of review is abuse of discretion. The Eleventh Circuit so held in *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010):

Generally, we review the granting of summary judgment *de novo*, and the district court’s findings of fact for clear error. However, we review the district court’s application of judicial estoppel for abuse of discretion. As this case is decided upon the theory of judicial estoppel, the applicable standard of review is abuse of discretion, with the finding of facts held to clear error.

(Citations omitted.) *See also Eastman v. Union Pacific Railroad Company*, 493 F.3d 1151, 1156 (10th Cir. 2007) (“Assuming the district court had properly characterized the facts in light of the applicable standard, we then review its decision to judicially estop [plaintiff] from pursuing his personal injury claims only for an abuse of discretion.”)

IV. STATEMENT OF THE CASE

Plaintiffs Harris filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code on or about April 26, 2010. CP 142. In plaintiffs’ Schedule B – Personal Property, plaintiffs listed among their assets an “Uncollectible promissory note from Michael A. Fortin (\$400,000),” and stated that the current value of their interest in the

property was zero dollars. CP 164. Plaintiffs continued to list this alleged note as uncollectible, and with no value, in amended schedules filed after this lawsuit was commenced, on January 26, 2012. CP 165, 170.

At the June 2010 meeting of creditors, plaintiffs confirmed their position that the claim against defendant had no value. CP 224-226.

The Chapter 7 trustee subsequently reported that “there is no property available for distribution from the estate over and above that exempted by law.” CP 125. Thus, the trustee took no action to attempt to collect the alleged debt of defendant Fortin for the benefit of the bankruptcy estate’s creditors. CP 130.

On December 3, 2010, plaintiffs were granted a discharge from their debts. CP 176. Then, in September 2011, plaintiffs filed the instant lawsuit against defendant Fortin. In their complaint, plaintiffs sought to recover on the same alleged promissory note they listed in their bankruptcy schedules as being uncollectible and of no value. CP 1-10. In the complaint, however, plaintiffs contended that their claim was worth not less than \$956,000. CP 3.

In August 2012, defendant filed a motion for summary judgment, asserting that plaintiffs’ claims against defendant were barred by

principles of judicial estoppel. CP 130-193.² After hearing oral argument and taking the matter under advisement, the trial court issued its memorandum of decision and order on February 28, 2013, granting defendant's motion for summary judgment. CP 294-296.

V. LEGAL ARGUMENT

A. Principles and Underpinnings of the Judicial Estoppel Doctrine.

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, the trial court correctly ruled that plaintiffs were precluded from pursuing their claims against defendant, after receiving a complete discharge of their own debts, pursuant to principles of judicial estoppel.

A court's application of judicial estoppel rests upon equitable considerations. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538 (2007), *quoting Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98 (2006):

² Defendant respectfully suggests that this Court take note of the pithy four page response plaintiff presented to the trial court in opposition to defendant's motion for summary judgment, and contrast it with their 45 page brief on appeal. Plaintiffs presented virtually no argument in opposition to the motion at the trial court level, further cementing the conclusion that the trial court did not abuse its discretion in granting defendant's motion based upon judicial estoppel.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.

The purposes underlying judicial estoppel were explained in *Anfinson v. FedEx Ground Pkgs. System, Inc.*, 174 Wn.2d 851, 861 (2012):

There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time.

Three core factors are utilized by courts in determining whether to apply judicial estoppel. *See, e.g., Arkison*, 160 Wn.2d at 538-39:

...(1) whether the parties' 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. (Internal quotation marks omitted.)

B. Application of Judicial Estoppel in Connection with Bankruptcy Disclosures.

It is well established and undisputed that judicial estoppel is properly applied when a bankrupt debtor completely fails to disclose a potential legal claim in his bankruptcy schedules. *See, e.g., Arkison*, 160 Wn.2d at 539. This is not such a case, for plaintiffs did list the Fortin claim in the bankruptcy schedules.

Judicial estoppel is also frequently held to be inapplicable when a party discloses a claim, but undervalues the claim. *See, e.g., Ingram v.*

Thompson, 141 Wn. App. 287 (2007). There, the debtor disclosed a personal injury claim, stating that it was “value unknown, but believed to be less than \$5,000.” *Id.* at 289. After receiving a discharge, the plaintiff filed a lawsuit setting forth a statement of damages totaling almost \$150,000. The court held that this disclosure “was sufficient to put both the bankruptcy trustee and creditors on inquiry notice. *Id.* at 293. Of note, Ingram admitted that the value of his claim was “unknown,” and merely stated his “belief” as to its value. Plaintiffs Harris, in contrast, affirmatively represented that their claim had zero value and was uncollectible.

Ingram and many “undervaluation” cases similar to it involved *personal injury claims*. As the court recognized, placing a value on such claims is difficult and speculative. *Id.* at 293:

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 upon 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 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. Plaintiffs did not simply “undervalue” their claim in the bankruptcy court. Instead, plaintiffs in their bankruptcy schedule listed

the value of their claim on this note as zero dollars. Several months later, in their 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, to their advantage and to the detriment of their creditors. Under those circumstances, judicial estoppel is properly applied.

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. Such was the holding in *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222 (2005). 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. *Id.* at 229. 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. *Id.* at 230.

The court then noted that judicial estoppel applied if the party's prior inconsistent position either benefited him or was accepted by the court. *Id.* at 230-31, citing *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902 (2001). The court held that, by closing the bankruptcy as a no asset case, the bankruptcy court had "implicitly accepted [plaintiff's] position that the

liquidation of nonexempt property would not create a dividend for unsecured creditors.” *Id.* at 231. The court also found that the plaintiffs benefited by their prior inconsistent position, in that they received a complete discharge of debts. *Id.* at 233. The court therefore affirmed an order dismissing the plaintiff’s third party personal injury claim on summary judgment.

The plaintiff in *Cunningham* was held to be judicially estopped because his oral disclosure was misleading to the bankruptcy trustee. Even if *Cunningham* did not intend to mislead the trustee, that fact was irrelevant, because “intent to mislead is not an element of judicial estoppel.” *Cunningham*, 126 Wn. App. at 234.

The same result was reached in *Barger v. City of Cartersville, Georgia*, 349 F.3d 1289 (11th Cir. 2003). There, the plaintiff did not list a pending employment discrimination lawsuit as an asset in her bankruptcy. While she did reveal the existence of the suit to the trustee at the meeting of creditors, she told the trustee that the lawsuit merely sought reinstatement of her former position. *Id.* at 1291. In fact, the plaintiff was seeking compensatory and punitive damages in the suit. *Id.* The court found that judicial estoppel applied to preclude *Barger*’s lawsuit, and held that it had been properly dismissed. *Id.* at 1296:

The fact that *Barger* informed the trustee about her discrimination suit during the creditor’s meeting does not aid her cause. ...*Barger* did not tell the trustee that she was

also seeking back pay, liquidated damages, compensatory damages, and punitive damages. ...Thus, it seems clear that Barger deceived the trustee. The bankruptcy court reasoned away Barger's conduct by concluding that it was ultimately the trustee's responsibility to investigate the lawsuit as property of the estate. The court is not persuaded by the bankruptcy court's reasoning. The foremost responsibility in this matter was for Barger to fully disclose her assets. She did not satisfy her duty. Instead, she dissembled to the trustee and indicated that her discrimination claim had no monetary value. As such, the trustee can hardly be faulted for not further investigating Barger's discrimination suit.

In *Vucak v. City of Portland*, 194 Or. App. 564, 96 P.3d 362 (2004), the court held that plaintiff's tort claim had to be dismissed because it was not adequately scheduled in her bankruptcy proceeding. The court reached this conclusion despite the fact that plaintiff disclosed that she had been in an auto accident, that she was receiving insurance disability benefits, and that she received personal injuries in the collision. *Vucak*, 96 P.3d at 364. The court also reached its conclusion despite the trustee's actual knowledge of the potential claim and the trustee's belief that the claim had been adequately disclosed. *Id.* at 365. The court concluded that the claim had not been abandoned to the plaintiff by the trustee, that plaintiff was not the real party in interest, and that summary judgment was properly granted. *Id.* at 366.

These decisions compel the conclusion that the trial court properly granted summary judgment in favor of defendant in this case. Plaintiffs

Harris repeatedly represented to the bankruptcy court and trustee that their claim had a value of zero dollars. Given those representations, it is hardly surprising that the trustee elected not to pursue the claim. When plaintiffs were granted a discharge, the bankruptcy court implicitly accepted their representation that the Fortin claim had no value. Equitable principles would not be promoted by allowing plaintiffs to secure a discharge of their obligations after making these representations and then, months later, pursue litigation on that same claim for damages of close to \$1 million.

Such a result was reached in *Skinner v. Holgate*, 141 Wn. App. 840 (2007). There, the plaintiffs again failed to disclose a business claim, as well as other assets. After receiving a no asset discharge, plaintiff filed a lawsuit against his former business partner.

In affirming a summary judgment order dismissing the claim, the court found that *Cunningham, supra*, was “directly on point.” *Id.* at 848, and stated:

Courts will generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during the bankruptcy proceedings but then pursue the claim after the bankruptcy discharge.

In affirming the summary judgment order, the court held that “a discharge order constitutes acceptance of a representation on bankruptcy schedules. This acceptance alone justifies the application of judicial estoppel.” *Id.* at 850. The court found it was not significant that there were no reported

decisions applying judicial estoppel to similar facts. *Id.* at 852. In these types of cases, “the trial court’s inquiry is inherently discretionary and fact specific...” *Id.* at 850.

The court concluded judicial estoppel applied to the plaintiff’s [Skinner] 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. His no asset discharge was a benefit because he sought to pursue a claim outside the bankruptcy court..., especially in that the claim was not made until after one year when the discharge could not be re-opened or overturned.

Defendant Fortin suggests that plaintiffs’ representation that their claim was “uncollectible” and of no value is substantively identical to failing to disclose the claim. Plaintiff in *Ingram* at least disclosed to the trustee and creditors that he had a claim that was worth some unknown value. Plaintiffs Harris, in contrast, represented that their claim had no value and that, even if the claim would have had value, it was uncollectible. This type of disclosure is woefully insufficient to put the trustee and creditors on notice that a claim existed which could be of value for potential distribution to creditors. In short, *Ingram* is distinguishable, and plaintiffs’ claims against defendant Fortin were correctly dismissed under *Cunningham* and *Skinner*.

It is also telling that plaintiffs in this case amended their bankruptcy schedules several months **after** filing the instant lawsuit. In their amendment, they still asserted that the claim against defendant Fortin was uncollectible and of no value. While plaintiffs may have been under no legal obligation at that point to amend their schedules so as to list what they actually believed the value of their claim to be, it is unsettling that they would reopen their bankruptcy case and continue to list the Fortin claim as having zero value, at the same time they were suing Mr. Fortin for almost \$1 million. To now take an inconsistent position is precisely why the judicial estoppel doctrine exists. Plaintiffs have repeatedly misled the bankruptcy court, contrary to their obligations. *See Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002):

A debtor seeking shelter under the bankruptcy laws must disclose all assets, or potential assets, to the bankruptcy court. 11 USC § 521(1), and 541(a)(7). The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather, a debtor must amend his financial statements if circumstances change. Full and honest disclosure in a bankruptcy case is “crucial to the effective functioning of the federal bankruptcy system.” For example, creditors rely on a debtor’s disclosure statements in determining whether to contest or consent to a no asset discharge. Bankruptcy courts also rely on the accuracy of the disclosure statements when considering whether to approve a no asset discharge. Accordingly, “the importance of full and honest disclosure cannot be overstated. (Citations omitted.)

The First Circuit sharply criticized a debtor who was not forthright to the bankruptcy court, and then sought to pursue a civil suit after receiving a discharge, in *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993). There, Payless filed for bankruptcy protection, omitted any mention of the claims it later filed against the defendants, and then filed a multi-million dollar lawsuit against the defendants. The court decried this strategy in no uncertain terms, at 571:

The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless's present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively. Payless, having obtained judicial relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis. This may not be strictly equitable estoppel, as the court observed. Indeed, defendants may have a windfall. However, it is an unacceptable abuse of judicial proceedings. (Citation omitted.)

Each of the core factors relied upon by courts in determining whether to apply judicial estoppel is met here. First, plaintiffs took clearly inconsistent positions regarding the value of the Fortin claim in the bankruptcy court and in the underlying lawsuit. Repeatedly representing that a claim is worth zero dollars in the bankruptcy court is clearly

inconsistent with subsequently filing suit for at least \$956,000. Second, plaintiffs' representations in the bankruptcy court misled the bankruptcy trustee and court. This is shown by the trustee not pursuing the claim against defendant and by the court granting plaintiffs a discharge from their debts. Third, plaintiffs gained an unfair advantage by taking clearly inconsistent positions. They were able to escape the claims of each of their debtors and then race back to Superior Court to pursue a \$956,000 claim that they had represented as being of no value. The trial court properly exercised its discretion in granting defendant's motion for summary judgment and dismissing plaintiffs' lawsuit.

VI. REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, defendant requests an award of reasonable attorney fees on appeal. As he did in the trial court, defendant relies upon the attorney fee provisions in the underlying loan documents, and the fact that the contractual attorney fee provision is deemed reciprocal under RCW 4.84.330. CP 9-10.

VII. CONCLUSION

For the foregoing reasons, the trial court's discretionary decision to grant defendant's motion for summary judgment, and the ensuing entry of judgment, should be affirmed.

DATED this 4 day of October, 2013.

HEURLIN, POTTER, JAHN, LEATHAM,
HOLTMANN & STOKER, P.S.



Stephen G. Leatham, WSBA #15572
Of Attorneys for Respondent

COURT OF APPEALS
DIVISION II

2013 OCT -7 PM 1:18

STATE OF WASHINGTON

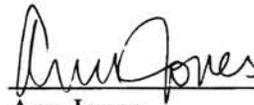
DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of
Washington that I caused the foregoing BRIEF OF RESPONDENT to be
served on the following:

Scott S. Anders
Russell D. Garrett
JORDAN RAMIS PC
1499 SE Tech Center Pl Ste 380
Vancouver, WA 98683-9575
Of Attorneys for Plaintiffs-Appellants

by mailing by U.S. Mail, First Class postage prepaid, a true copy to the
foregoing on the 4th day of October, 2013.

DATED this 4th day of October, 2013, at Vancouver, Washington.


Ann Jones