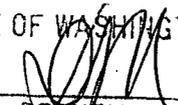


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

NO. 47162-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN A. URBICK,

Appellant,

vs.

THE SPENCER LAW FIRM, LLC, a Washington limited liability company;
JOHN R. SPENCER and JANE DOE SPENCER,
and the marital community composed thereof,

Respondent(s).

APPEAL FROM THE
SUPERIOR COURT FOR PIERCE COUNTY
THE HONORABLE RONALD E. CULPEPPER

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	3
III. ISSUES RELATING TO ASSIGNMENTS OF ERROR	4
IV. STATEMENT OF FACTS	6
V. ARGUMENT	20
A. Burden of the Moving Party in Summary Judgment.....	20
B. Standard of Review.....	20
C. Review of the Equitable Doctrine of Judicial Estoppel	21
D. Judicial Estoppel	21
E. Either John Urbick or His Trustee May Prosecute This Case.....	23
F. The Trustee Should Be Permitted to Proceed.....	24
VI. CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).....	23
Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007).....	3, 11, 12, 18, 24
Beal v. City of Seattle, 134 Wn.2d 769, 773, 954 P.2d 237 (1998)	24
Broussard v. Univ. of Cal., 192 F.3d 1252, 1255 (9th Cir. 1999) ...	21
Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)	22
Crumpacker v. DeNaples, 1998-NMCA-169, 126 N.M. 288, 296, 968 P.2d 799.....	24
Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.2d 222, 108 P. 3d 147 (2005)	11, 12, 18, 21
Del Guzzi Constr. Co. v. Global N.W., Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986)	20
Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).....	10, 21
Hammes v. Brumley, 659 N.E.2d 1021, 1030 (Ind. 1995)	24
Konstantinidis v. Chen, 626 F.2d 933, 936, 938, n.6 (D.C. Cir. 1980).....	22
LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)	20
Miller v. Campbell, 164 Wn.2d 529, 537-38, 192 .3d 352 (2008).....	23
Morris v. California, 966 F.2d 448, 452, 452 (9th Cir. 1991).....	23

Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988)	22
Rousseau v. Diemer, 24 F. Supp. 2d 137, 143-44 (D. Mass. 1998).....	24
Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984)	9
Skinner v. Holgate, 141 Wn. App. 840, 173 P.3d 300 (2007).....	18
Sprague v. Sysco Corp., 97 Wn. App. 169, 179-80, 982 P.2d 1202 (1999)	24
Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989)	23
Total Petroleum, Inc. v. Davis, 822 F.2d 734, 737 n.6 (8th Cir. 1987)	22
Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993)	23
Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989)	20
Young v. United States Dep't of Justice, 882 F.2d 633, 639 (2d Cir. 1989)	22
Other Authorities	
Douglas W. Henkin, <i>Comment, Judicial Estoppel - Beating Shields into Swords and Back Again</i> , 139 U. Pa. L. Rev. 1711, 1741 (1991).....	22
Gonz. L. Rev. 171, 173-175	23
Michael D. Moberly, Article: <i>Playing "Fast and Loose" or Just Fast? A Look at Judicial Estoppel in the Ninth Circuit</i> , 33 Gonz. L. Rev. 171, 202-203	21

Rand G. Boyers, *Comment, Precluding Inconsistent Statements:
The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244,
1248 (1986) note 18, at 1268.....22

I. INTRODUCTION

This is an appeal from a summary judgment granted to the defendants/respondents, Tacoma lawyer John Spencer and his firm,¹ in an action by their client, the plaintiff/appellant John Urbick. Mr. Urbick retained Spencer for the specific purpose of helping him restructure and work out certain business loans, and avoid bankruptcy, during the height of the recession. Following eight months of inexplicable delay, neglect, and procrastination---during which Spencer did nothing---Mr. Urbick lost virtually all of the assets he had accumulated in his lifetime and was forced to file for bankruptcy. None of these facts, all contained in the plaintiff's detailed complaint, were denied by the defendants in the summary judgment proceeding.

In their motion for summary judgment, the defendants falsely claimed that Mr. Urbick failed to identify his potential claim against Spencer in his bankruptcy schedules *before* filing suit. This, they argued, required dismissal of the action under the doctrine of

¹ The defendant/respondent is Tacoma attorney John Spencer and his law firm, sometimes referred to herein as "Spencer." The defendants Pamela Foley, *et ux.*, were dismissed by stipulation of the parties before the court ruled on the defendants' motion for summary judgment.

judicial estoppel. The defendants were wrong. In fact, the plaintiff re-opened his bankruptcy *before* filing this suit against his former attorney. Mr. Urbick also properly filed *amended* schedules identifying the claim against his former attorney *before* filing this suit. Mr. Urbick also properly filed suit against Spencer *before* the statute of limitations tolled on his claims of negligence and consumer protection act violations. Mr. Urbick also specifically reserved the right in his complaint to substitute the Trustee as the real party in interest. Then Mr. Urbick properly obtained the appointment of his attorney as Special Counsel for the Trustee in Bankruptcy Court. He did *everything* right.

When indisputable evidence of these facts was provided in the plaintiff's response to the summary judgment, the defense claimed (falsely again) that the response did not "evidence any new facts" and that the doctrine of judicial estoppel still required dismissal. However, there is no authority to support Spencer's application of judicial estoppel under the facts of this case----*none*. In fact, the doctrine of judicial estoppel is adopted by only some jurisdictions and it is criticized by the remainder because it can result in a gross miscarriage of justice, as it did here.

In his reply brief and at oral argument, Spencer also added a new argument: that Mr. Urbick had not substituted the Trustee as the real party in interest before the hearing on summary judgment. Nonetheless, the trial court entertained argument on this claim too. And then the trial court granted the defendants' motion for summary judgment, dismissing Mr. Urbick's entire suit.

Mr. Urbick filed a motion for reconsideration, which included a declaration by Trustee Kathryn Ellis, asking to be substituted as the plaintiff under Arkison v. Ethan Allen, Inc. The trial court denied the motion for reconsideration. This timely appeal followed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing John Urbick's lawsuit under the doctrine of judicial estoppel, when such dismissal was predicated on erroneous facts provided by the moving party.

2. The trial court erred in disregarding John Urbick's amended schedules which properly disclosed his potential suit against Spencer, before Urbick filed suit against Spencer.

3. The trial court erred by dismissing John Urbick's lawsuit on the basis that his Trustee in Bankruptcy had not been named as a party plaintiff on the date of the summary judgment hearing.

4. The trial court erred by refusing to permit the Trustee to intervene as a real party in interest.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the John Urbick timely re-open his bankruptcy proceeding and properly amend his schedules of assets to reflect a “potential malpractice claim against [his] former attorney [John Spencer]” before bringing such a claim against Spencer?

2. Was there any “inconsistency” in the amended schedules Mr. Urbick filed in Bankruptcy Court, and the lawsuit which he subsequently filed against his former attorney Spencer?

3. Did Mr. Urbick attempt to “conceal” any facts in his amended schedules in Bankruptcy Court, or in the suit he filed against his former counsel in Pierce County Superior Court?

4. Did Mr. Urbick attempt to “mislead” either the Bankruptcy Court or Pierce County Superior Court, when he filed his action against his former attorney Spencer?

5. Did Mr. Urbick obtain any “unfair advantage” by amending his schedules in Bankruptcy Court before proceeding to file suit against his former attorney Spencer?

6. Did Mr. Urbick “impose an unfair detriment” by amending his schedules in Bankruptcy Court before proceeding to file suit against his former attorney Spencer?

7. Did John Urbick’s Trustee in Bankruptcy, or any of his creditors, complain about Mr. Urbick’s amended schedules reflecting a “potential malpractice claim against [his] former attorney [John Spencer]”?

8. Did John Urbick defraud anyone in the course of his bankruptcy proceeding or the instant action?

9. Did John Urbick mislead anyone in the course of his bankruptcy proceeding or the instant action?

10. Did John Urbick commit perjury in the course of his bankruptcy proceeding or the instant action?

11. Did John Urbick fail to timely file his complaint against the defendants within the relevant statute of limitations?

12. Did John Urbick properly reserve the right in his complaint, even though he was not required to do so, to add or substitute his Trustee in Bankruptcy as a real party in interest?

13. Did John Urbick properly secure the appointment of his attorney as Special Counsel for the Trustee, by the Bankruptcy

Court, so that such counsel could prosecute the malpractice claim against his former attorney?

14. Did the defendants invalidate their own motion for summary judgment by predicating their request for dismissal on the false claim that the plaintiff had not properly disclosed his "potential malpractice claim against [his] former attorney [John Spencer]" in his bankruptcy schedules?

15. Is there any evidence that the plaintiff attempted to manipulate the judicial system?

16. Is there any evidence that the plaintiff attempted to prejudice his creditors?

IV. STATEMENT OF FACTS

In May of 2009, the appellant John Urbick met with Tacoma lawyer John Spencer to ask if Spencer could help him in restructuring his debt in the middle of the recession.² Mr. Urbick needed a brief moratorium on business loan payments, or a restructure of his debt, to offset business losses he was experiencing as a result of the recession. At risk was substantially more than \$1 million in investment properties owned by Mr. Urbick,

² The facts relating to Mr. Urbick's claims against Mr. Spencer and his firm in this introduction are taken from the plaintiff's detailed, fifteen-page complaint at CP 1 - 15.

which secured his loans of approximately \$400,000. Mr. Spencer said he was optimistic that he could re-structure the debt and, even if that did not work, he told Mr. Urbick there were other alternatives to bankruptcy. Bankruptcy, Spencer said, would be reserved as a last resort.³

Mr. Urbick was relieved with these assurances. Mr. Spencer made specific and detailed promises about what he would do for Mr. Urbick in their fee agreement, which Mr. Spencer signed on May 19, 2009.⁴ Mr. Urbick paid Mr. Spencer a retainer too. The fee agreement between Mr. Urbick and Mr. Spencer is critically important because it established the specific duties that Mr. Spencer would fulfill in his representation of Mr. Urbick. Mr. Spencer breached *all* of the duties set forth in his own fee agreement. He did nothing.

Despite repeated calls by Mr. Urbick over the next eight months, Mr. Spencer took no meaningful action to resolve Mr. Urbick's problems with his creditors; nor did Mr. Spencer do anything to protect or defend Mr. Urbick's assets from seizure and foreclosure. On January 21, 2010, Mr. Spencer sent Mr. Urbick an

³ See also Mr. Spencer's testimony at CP 418-430.

⁴ The fee agreement drafted by Mr. Spencer is attached to the plaintiff's complaint as Exhibit 1. CP 17-21.

email responding to the latest telephone message left by Mr. Urbick two days earlier.⁵ Mr. Spencer told Mr. Urbick in the email that Mr. Urbick's case was "a lot different than those that I feel comfortable with handling."⁶ Mr. Spencer then suggested referring the case to "a more seasoned bankruptcy attorney" to represent Mr. Urbick. By then, however, it was too late. Mr. Urbick's creditors had begun executing on security Mr. Urbick provided to his creditors and it could not be stopped. Mr. Urbick's complaint and his declarations support all of these facts.⁷

Mr. Urbick then indeed retained a "seasoned" bankruptcy attorney who filed a Chapter 7 petition on his behalf, resulting in a discharge. This also resulted in the loss of nearly all of Mr. Urbick's assets, save a four-plex in Kent where he resides today. Mr. Urbick truthfully disclosed all assets he was aware of, in his subsequent bankruptcy proceeding---except a potential claim against his former attorney Spencer. Mr. Urbick testified that he did not know that he had such an action, or that it was an asset to be declared in his

⁵ The email is attached to the plaintiff's complaint as Exhibit 2. CP 24-25.

⁶ See par. 5.11 and 5.12 of the plaintiff's complaint at CP 10.

⁷ See Mr. Urbick's complaint at CP 1-15 and his declaration at CP 416-417.

Bankruptcy schedules.⁸ There is no evidence to contradict his testimony.

After his bankruptcy discharge, Mr. Urbick consulted another lawyer about unrelated matters leading up to his financial problems.⁹ In the course of those discussions, Mr. Urbick was advised that Mr. Spencer may have committed professional negligence in failing to act with due diligence in his representation of Mr. Urbick.

Mr. Urbick *promptly* returned to his bankruptcy attorney, who re-opened his bankruptcy and filed an amended schedule of assets to include the potential asset of a recovery against Mr. Spencer. Mr. Urbick then timely filed a complaint against Mr. Spencer on January 8, 2013, alleging professional negligence and violations of the Consumer Protection Act.¹⁰

In his complaint, Mr. Urbick specifically reserved the right to add or substitute his Trustee as a party-plaintiff in interest. Mr. Urbick of course advised his Bankruptcy Trustee of this, who

⁸ CP 311-313.

⁹ The facts in this paragraph are set forth in Mr. Urbick's declaration filed in opposition to the defendants' motion for summary judgment. CP 311-313.

¹⁰ The CPA claims were predicated on the entrepreneurial aspects of Mr. Spencer's practice, including the now-apparent exaggeration of his experience and competency to handle bankruptcies like Mr. Urbick's. See Short v. Demopolis, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).

subsequently asked for the appointment of Mr. Urbick's attorney as Special Counsel by the Bankruptcy Court. No one ever told Mr. Spencer that he was doing anything improperly or that he was misleading his creditors or the courts.¹¹ In fact he thought he was doing everything right – because he was.

The defendants then filed a motion for summary judgment which was erroneously predicated upon a *false* claim that that Mr. Urbick failed to ever identify the potential claim against Mr. Spencer, in asset schedules he filed in his bankruptcy proceeding. They argued that "(a) debtor also has an ongoing duty to amend the bankruptcy schedules to accurately disclose all information. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F. 3d 778, 784 (9th Cir. 2001)." ¹² (*Sic*). This is the only full sentence that was underlined in the body of the defendants' 17-page motion for summary judgment. The defendants then asserted that, because Mr. Urbick failed to identify the claim in his bankruptcy proceeding, or amend his bankruptcy schedules to identify the claim, that the doctrine of judicial estoppel required the dismissal of his suit against his former lawyer Spencer.

¹¹ See Mr. Urbick's declaration at CP and especially CP 414-415.

¹² CP 96.

The defendants' motion relied heavily on two cases which they cited repeatedly in their motion for summary judgment. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.2d 222, 108 P. 3d 147 (2005) was cited *eight times* in the defendants' brief asking for summary judgment; and Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 160 P.3d 13 (2007) was cited *six times* in their brief. Both cases were cited as support for the defendants' argument that Mr. Urbick failed to disclose his claim against Spencer in Bankruptcy Court and that the doctrine of collateral estoppel therefore mandated dismissal. There is just one problem: *the facts in Cunningham and Arkison do not apply to the facts of Mr. Urbick's case.*

In Cunningham, the plaintiffs filed a petition in bankruptcy but never listed in their bankruptcy schedules. The Cunninghams were discharged in bankruptcy and then filed their personal injury lawsuit nine days later. The Cunninghams *never* moved to re-open the bankruptcy or *amend* their schedules in Bankruptcy Court *before* filing their lawsuit. When the Cunningham's trustee learned of the suit, she re-opened the bankruptcy proceeding herself---but did *not* amend the schedules---and neither did the Cunninghams. The judicial estoppel doctrine was therefore properly applied to

preclude the Cunninghams from filing a lawsuit which should have been declared as an asset in their bankruptcy schedules.

In Arkison, the debtor Carter also filed for bankruptcy but failed to list a potential lawsuit in her bankruptcy schedules. Like Cunningham, Carter *never* bothered to amend her schedules to include the lawsuit as an asset and her claim too was properly dismissed under the doctrine of judicial estoppel. However, her Trustee, Peter Arkison, moved to intervene and tried to save the lawsuit for the benefit of the creditors. The trial court permitted the Trustee Arkison to intervene as a party in interest, but granted summary judgment dismissing the suit, based on the debtor's failure to identify the potential lawsuit in her bankruptcy schedules. The Supreme Court reversed, holding that the Trustee Arkison had a separate identity from the debtor and should therefore be able to prosecute the lawsuit for the benefit of the debtor's creditors. However, the debtor (Carter) was still barred from any recovery in the lawsuit under the doctrine of judicial estoppel, because of her failure to *ever* identify the lawsuit as an asset in her bankruptcy schedules.

There is *no* similarity between the instant action involving Mr. Urbick, and the Cunningham and Arkison cases. Here, the

defendants did not bother to get a copy of the bankruptcy court docket before making wild claims that Mr. Urbick failed to file any schedules in his bankruptcy proceeding, which identified his claim against Spencer.

However, the Arkison case is beneficial to Mr. Urbick, because it provides that a Trustee may intervene in a case at any time. The trial court eventually refused the Trustee's request to substitute for Mr. Urbick in a motion for reconsideration, which specifically cited Arkison. See discussion *infra*.

Even though the bankruptcy court docket was available to the defendants here before they filed their motion for summary judgment, the defense was unaware that Mr. Urbick had indeed re-opened his bankruptcy, and amended his schedule of assets, *before* timely filing suit against Mr. Spencer. The plaintiff pointed this out in his response to the defendants' motion, asserting that **"THE DEFENDANTS' MOTION IS PREDICATED ON MISTAKEN FACTS."**¹³ (Bold and capital letters in original). Mr. Urbick asserted in his response to the defendants' summary judgment:

In their motion, the defendants claim that John Urbick did not claim this

¹³ CP 306.

lawsuit as a potential asset in his bankruptcy before the instant action was filed. That assertion is demonstrably false.

The instant action was filed on January 8, 2013. Amended schedules were filed with the bankruptcy court in 2012, reflecting Mr. Urbick's discovery of a potential malpractice claim against the defendants herein. See Ex. 2. The bankruptcy case was re-opened specifically to accommodate the filing of amended schedules and remains open now.

Rather than allege that the defendants are attempting to actively mislead the court, and giving them the benefit of the doubt, the defendants' motion was filed without a complete review of the plaintiff's bankruptcy file---at a minimum.

Further, it is likely that Mr. Urbick's claims against the defendants exceed approximately \$400,000 in creditors' claims filed in the bankruptcy action. The recovery in this action may therefore result in a surplus recovery by Mr. Urbick. Mr. Urbick and his bankruptcy trustee are therefore both parties in interest in the instant action.

Mr. Urbick's bankruptcy trustee, Kathryn Ellis, did not object to the filing of amended schedules in 2012, nor did any creditor. The bankruptcy court appointed Mr. Urbick's current lawyer as Special Counsel for purposes of prosecuting the claim against Mr. Urbick's former counsel, John Spencer,

and his Tacoma law firm. See
subjoined declaration of counsel.

Without doubt, this lawsuit should
proceed on the merits. There is no
basis in law or fact to support the
defendants' motion for summary
judgment, which should therefore be
denied.

CP 306-307. (Emphasis in original).

As support for Mr. Urbick's assertions, he attached to his
response the *entire* docket for the his case in U.S. Bankruptcy
Court for the Western District of Washington (Tacoma) as Exhibit
1,¹⁴ which was authenticated by Trustee Kathryn Ellis in her
declaration dated October 14, 2014.¹⁵ The docket revealed that a
motion had been filed to permit the re-opening of Mr. Urbick's
bankruptcy matter on October 31, 2012, which was granted on
November 1, 2012.¹⁶

Amendments to Mr. Urbick's bankruptcy schedules were
then filed on behalf of the plaintiff on December 13, 2012.¹⁷ A copy
of the actual amended schedule was also provided to the court
which reflected a "potential malpractice case against former

¹⁴ CP 316-328.

¹⁵ CP 314-315.

¹⁶ CP 325.

¹⁷ CP 326.

attorney.”¹⁸ The docket also reflected the order authorizing the appointment of Mr. Urbick’s attorney in the Spencer matter, as Special Counsel for the Trustee in Mr. Urbick’s suit against Mr. Spencer and his law firm.¹⁹ A copy of the order was also provided to the trial court.²⁰

Once the defendants’ error was pointed out in the plaintiff’s response, the defendants filed a reply brief which still *ignored* the factual error in their motion---that Mr. Urbick had not properly listed the Spencer claim in his bankruptcy schedules.²¹ The defendants ignored the irrefutable fact that Mr. Urbick *had indeed timely re-opened his bankruptcy before filing suit against Spencer.*

The defendants also ignored that Mr. Urbick had indeed timely *amended* his schedule of assets to include his potential claim against the defendants, before filing suit against Spencer. The defendants also ignored that Mr. Urbick had indeed timely *filed* his claim against the defendants within the appropriate statute of

¹⁸ See Exhibit 2 to the plaintiff’s opposition to defendants’ motion for summary judgment at CP 329-335, and particularly CP 332.

¹⁹ CP 327.

²⁰ CP 310.

²¹ Referring to Mr. Urbick’s response, the defense counsel argued in their reply that “The Plaintiff’s Response To The Motion For Summary Judgment Fails to Offer Any Evidence Which Would Negate The Dismissal Of Plaintiff’s Claims.” (*Emphasis in original*). CP 340 at lines 1-2.. Lest there be any confusion on the point, the defendants claimed *“It is significant to note that these declarations do not evidence any new facts...”* (*Emphasis added*). CP 340 at lines 6-7.

limitations. The defendants ignored that Mr. Urbick, in paragraph 1.1 of his complaint, had specifically “reserve[d] the right to substitute the Trustee in Bankruptcy as the real party in interest, as that issue has yet to be determined.”²² And the defendants ignored that Mr. Urbick’s Bankruptcy Trustee had indeed *appointed* Mr. Urbick’s attorney as Special Counsel to pursue the claim against the defendants.²³

In their reply brief, the defendants simply remained undeterred by their own error---which they did not deny. They continued to assert---erroneously---the application of the judicial estoppel doctrine in their reply brief. But they *also* added a new argument that was not contained in their original motion: “Plaintiff has no ownership interest in the claim; as such it must be dismissed.” (Emphasis in original).²⁴

By the end of their reply brief, the defendants *infer* that Mr. Urbick’s timely amendments to his bankruptcy schedules are indeed an obstacle to summary judgment: “In the absence of this dilatory and deliberate reopening of the plaintiff’s bankruptcy for the sole purpose of attempting to make this claim, there would be no

²² CP 1.

²³ CP 310.

²⁴ CP 341.

real question but that the plaintiff's claims should be dismissed by application of judicial estoppel."²⁵

During oral argument, the defendants again cited the Cunningham and Akison cases to the trial court, along with Skinner v. Holgate, 141 Wn. App. 840, 173 P.3d 300 (2007). The Skinner case is even more off-point than Cunningham and Atkison because the opinion lists *numerous* assets that Skinner attempted to conceal in his bankruptcy proceeding, along with evidence that he deliberately intended to do so.

No matter. Richard Roland, the defendants' attorney, said in oral argument:

The law that's binding on this court is the Washington law that's articulated in Arkison, Cunningham, Skinner v. Holgate, and the other cases that we cited here, and those cases remain sound and they do hold what they hold, and even though it may be a disadvantage to the plaintiff that they have to walk away and abide by the rule of law and the facts here dictate that the dismissal should occur.²⁶ (*Sic*).

Mr. Roland also reinforced the *new* argument made for the first time in the defendants' reply: that the plaintiff had failed to

²⁵ CP 349.

²⁶ CP 396.

substitute Mr. Urbick's Trustee in Bankruptcy, as the plaintiff/party in interest. Mr. Roland then said:

With regard to the substance, I think the first point to really address here is the fact that under any scenario this claim is no longer the plaintiff's claim. Mr. Urbick is the plaintiff. The declarations that were filed on his behalf in opposing motion clearly establish that whatever claim there is is inside the bankruptcy estate. (Sic).²⁷

There is no authority to support this argument---whatsoever. First, the declaration submitted in opposition to the motion for summary judgment by Mr. Urbick's Trustee, Kathryn Ellis, provided testimony that Mr. Urbick was indeed an interested party:

In addition, Mr. Urbick would be entitled to any surplus proceeds remaining after payment of all costs of administration and other claims. . . . The docket reflects approximately \$409,000 in creditors' claims have been filed. I understand that the recovery in Mr. Urbick's claim against John Spencer and his Tacoma law firm, may well exceed that amount. Mr. Urbick may therefore receive a surplus recovery.²⁸

There is simply no federal or Washington authority that might require the substitution of a Trustee for the debtor, where a surplus

²⁷ See Transcript of Proceedings, filed as part of Mr. Urbick's motion for reconsideration, at CP 390, lines 12-18.

²⁸ CP 315.

recovery is involved and both the debtor *and* the Trustee have interests in the proceeds of the lawsuit.

Following oral argument, the case was dismissed by the Hon. Ronald Culpepper on October 31, 2014.²⁹ Mr. Urbick's timely motion for reconsideration was denied on December 9, 2014.

V. ARGUMENT

A. Burden of the Moving Party in Summary Judgment

In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). The evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989).

B. Standard of Review

An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. Del Guzzi Constr. Co. v. Global N.W., Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

²⁹ *Id.*

C. Review of the Equitable Doctrine of Judicial Estoppel

However, appellate courts review the trial court's application of the equitable doctrine of judicial estoppel to the facts of this case for an abuse of discretion. Cunningham v. Reliable Concrete, Inc., 126 Wn. App. 222, 108 P.3d 147 (2005), *citing* Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001), 270 F.3d at 782 (*citing* Broussard v. Univ. of Cal., 192 F.3d 1252, 1255 (9th Cir. 1999)). Such an abuse occurred here, resulting in a gross miscarriage of justice.

D. Judicial Estoppel

"There are credible arguments for rejecting the judicial estoppel doctrine altogether," at least in the Ninth Circuit, according to the Gonzaga Law Review. See, Michael D. Moberly, Article: *Playing "Fast and Loose" or Just Fast? A Look at Judicial Estoppel in the Ninth Circuit*, 33 Gonz. L. Rev. 171, 202-203. According to the Article:

. . . the principal purpose of the judicial estoppel doctrine, which is also commonly referred to as the doctrine of preclusion of inconsistent positions, is to protect the integrity of the judicial process by precluding parties from asserting inconsistent positions in order to obtain an unfair advantage over their opponents. By preventing litigants from playing "fast and loose" with the judicial

system, judicial estoppel also minimizes repetitious litigation and enables courts to protect themselves from manipulation.

Despite these laudable purposes, judicial estoppel is not a widely accepted doctrine.³⁰ In this regard, the doctrine again differs from equitable estoppel, which is all but universally recognized. Indeed, one court has stated "judicial estoppel has not been followed by anything approaching a majority of jurisdictions, nor is there a

³⁰ Although the citations for most of the assertions in this quotation are omitted, the citation for this assertion (footnote 20 at page 174 in the Article) is as follows:

See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991) ("This court does not recognize the doctrine of judicial estoppel."); *Konstantinidis v. Chen*, 626 F.2d 933, 938 (D.C. Cir. 1980) ("The judicial estoppel doctrine has no vitality in this jurisdiction."); Douglas W. Henkin, *Comment, Judicial Estoppel - Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1741 (1991)(suggesting that "Massachusetts, South Carolina, and Louisiana have rejected judicial estoppel outright " at 1741 and that "one of the purposes behind judicial estoppel is to preserve judicial resources" at 1720; Rand G. Boyers, *Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244, 1248 (1986) note 18, at 1268 (observing that "South Carolina has not adopted the doctrine of judicial estoppel"). *See generally Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n.6 (8th Cir. 1987)(observing that "the doctrine is not followed in a majority of jurisdictions"). Nor is judicial estoppel uniformly applied in those jurisdictions that have accepted the doctrine. *See, e.g., Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) ("The circumstances under which the doctrine could be applied are far from clear."); *Rockwell Int'l Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208, 1210 (9th Cir. 1988) ("The judicial estoppel doctrine ... is applied differently among the circuits."); *cf. Konstantinidis*, 626 F.2d at 936, n.6 ("The definitions of ... "judicial estoppel" vary considerably throughout the literature of this confused area of the law.").

discernible modern trend in that direction." In fact, the doctrine has been poorly received by state courts outside Tennessee where it originated. It is only occasionally applied in other state courts.

Id. at 33 Gonz. L. Rev. 171, 173-175 (*Citations omitted*).

The Article also cites cases in which the Ninth Circuit has "repeatedly" declined to specify the circumstances under which the doctrine will apply."³¹

E. Either John Urbick or His Trustee May Prosecute This Case

In Miller v. Campbell, 164 Wn.2d 529, 537-38, 192 .3d

352 (2008), our Supreme Court held:

This court has held that a plaintiff may amend a complaint to name the real party in interest even after the statute of limitations has run on a claim "where the only change is a change in the representative capacity in which suit is brought, and there is no prejudice to the defendant." Beal v. City of Seattle, 134

³¹ Morris v. California, 966 F.2d 448, 452, 452 (9th Cir. 1991); *see also*, Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993)("The precise law of judicial estoppel is unclear in the Ninth Circuit."); Stevens Technical Servs., Inc. v. S.S. Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989)("This circuit ... has not stated the requirements for the application of the doctrine."); [*unpublished citations omitted*]; ". . . the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982).

Wn.2d 769, 773, 954 P.2d 237 (1998). In Beal, we clarified that the rules do not require a showing of mistake or excusable neglect in order for a change in the representative capacity of the plaintiff to relate back to the time of filing. *Id.* at 782-83. Courts have reached the same conclusion regarding the substitution of a bankruptcy trustee as the real party in interest of a debtor's claim that was not disclosed in bankruptcy. See, Sprague v. Sysco Corp., 97 Wn. App. 169, 179-80, 982 P.2d 1202 (1999)(allowing the substitution of the bankruptcy trustee and noting, "the amendment changes nothing except who will benefit from the action"); Rousseau v. Diemer, 24 F. Supp. 2d 137, 143-44 (D. Mass. 1998); Hammes v. Brumley, 659 N.E.2d 1021, 1030 (Ind. 1995); Crumpacker v. DeNaples, 1998-NMCA-169, 126 N.M. 288, 296, 968 P.2d 799.

F. The Trustee Should Be Permitted to Proceed

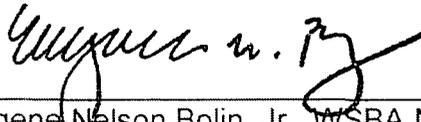
The discussion *supra* regarding Arkison v. Ethan Allen, Inc., is controlling that a Trustee must be permitted to prosecute a debtor's action for damages, even when the debtor's individual claims are barred by the judicial estoppel doctrine.

VI. CONCLUSION

There is no factual or legal basis to support the trial court's dismissal of this action under the doctrine of judicial estoppel or any other legal theory. John Urbick did everything a reasonable person

would have done to protect his interests and those of his creditors.
There is absolutely no evidence that Mr. Urbick attempted to
mislead or deceive anyone. This case should be remanded back to
the trial court for trial.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.



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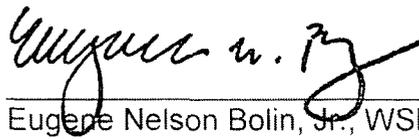
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the below date, I electronically transmitted a true and accurate copy of appellant's opening brief to counsel for respondents at the following address:

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DATED this 11th day of May, 2015, at Edmonds, Washington.



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