

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).

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 31 PM 1:51
STATE OF WASHINGTON
BY
DEFINITE

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

APPELLANT'S REPLY BRIEF

LAW OFFICES OF
EUGENE N. BOLIN, JR., P.S.

Eugene Nelson Bolin, Jr.
WSBA #11450
114 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

Attorney for Appellant

TABLE OF CONTENTS

I. SUMMARY OF REPLY..... 1

II. "PLAINTIFF'S APPEAL HERE IS A
SCATTERED MISDIRECTION AND ENTIRELY IGNORES
OR MISSTATES THE SALIENT FACTS AND LAW
THAT WERE ACTUALLY AT ISSUE IN THE
UNDERLYING PROCEEDINGS." 5

III. JUDICIAL ESTOPPEL DOES NOT APPLY
TO THE FACTS OF THIS CASE 8

IV. RICHARD ROLAND'S TESTIMONY SUPPORTING THE
SINGLE ISSUE UPON WHICH THE DEFENDANTS'
MOTION WAS PREDICATED, IS CLEARLY FALSE..... 12

ISSUES PRESENTED 13

1. Issue: 13

2. Short Answer:..... 14

V. THE TRIAL COURT SHOULD HAVE PERMITTED
MR. URBICK'S TRUSTEE TO PROSECUTE THE ACTION
UNDER ARKISON IN ANY EVENT..... 15

VI. THE DEFENDANTS HAVE DELIBERATELY AND
DECEPTIVELY MISCHARACTERIZE MR. URBICK'S
CONDUCT IN THE TRIAL COURT, AND NOW THIS COURT,
WITHOUT ONE SHRED OF EVIDENCE OF SUPPORT
THEIR MISCHARACTERIZATIONS 17

VII. THE BANKRUPTCY CASE WAS PROPERLY
RE-OPENED AND MR. URBICK'S SCHEDULES
WERE TIMELY AMENDED..... 20

VIII. CASE LAW IN OTHER JURISDICTIONS IS
CONSISTENT WITH WASHINGTON LAW AND
REQUIRES REVERSAL 21

IX. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

<u>Ajaka</u> , 453 F.3d at 1345	23
<u>American Nat'l Bank of Jacksonville v. FDIC</u> , 710 F.2d 1528, 1536 (11th Cir. 1983)	24
<u>Arkison v. Ethan Allen, Inc.</u> , 160 Wn.2d 535, 539-540, 160 P.3d 13 (2007)	3, 4,15,16
<u>Burnes v. Pemco Aeroplex, Inc.</u> , 291 F.3d 1282, 1287-88 (11th Cir. 2002)	22
<u>Cannon-Stokes v. Potter</u> , 453 F.3d 446, 448 (7th Cir. 2006)	22
<u>Chicon v. Carter</u> , 258 Ga. App. 164, 573 S.E.2d 413, 2002 Ga. App. LEXIS 1379 (Ga. Ct. App. 2002)	24
<u>Jaeger v. Clear Wing Prods.</u> , 465 F. Supp. 2d 879, 2006 U.S. Dist. LEXIS 90146 (S.D. Ill. 2006)	23, 24
<u>In re Cassidy</u> , 892 F.2d at 642	22
<u>In re FV Steel & Wire Co.</u> , 349 B.R. 181, 185 (Bankr. E.D. Wis. 2006)	22
<u>In re Tarrer</u> , 273 B.R. 724,732 (Bankr. N.D. Ga. 2002)	21
<u>Jaeger v. Clear Wing Prods.</u> , 465 F. Supp. 2d 879, 2006 U.S. Dist. LEXIS 90146 (S.D. Ill. 2006)	22, 24
<u>Johnson Serv. Co. v. TransAmerica Ins. Co.</u> , 485 F.2d 164, 175 (5th Cir. 1973)	22
<u>New Hampshire v. Maine</u> , 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)	22, 23

<u>Old Republic Ins. Co. v. Farmer</u> , 324 B.R. 918, 2005 Bankr. LEXIS 674 (Bankr. M.D. Ga. 2005).....	24
<u>Posley v. Clarian Health</u> , 2012 U.S. Dist. LEXIS 132261, 2012 WL 4101914 (S.D. Ind. Sept. 17, 2012)	21
<u>Ryan Operations G.P. v. Santiam-Midwest Lumber Co.</u> , 81 F.3d 355, 362 (3rd Cir. 1996).....	23
<u>Stallings v. Hussmann Corp.</u> , 447 F.3d 1041, 1047, 1048 (8th Cir. 2006)	23
<u>Stark v. St. Mary's Hospital (<i>In re Stark</i>)</u> , 717 F.2d 322, 323 (7th Cir. 1983)	20
<u>Swearingen-EI v. Cook County Sheriff's Dept.</u> , 456 F. Supp. 2d 986,991 (2006)	22
<u>Total Petroleum, Inc. v. Davis</u> , 822 F.2d 734, 738 n.6 (8th Cir. 1987)	23
<u>Statutes</u>	
Bankruptcy Code Section 350(b).....	20

I. SUMMARY OF REPLY

First, the defendants claim that Mr. Urbick's opening brief is "scattered" and "unfocused." It is not. Mr. Urbick's appeal is based on exactly the same set of facts set forth in his detailed fifteen-page complaint (CP 1-15 excluding attachments), his opposition to the defendants' motion for summary judgment (CP 305-310), and his motion for reconsideration in the trial court (CP 372-413). There has never been any variation in his factual or legal claims in the trial court, or this Court. He has presented four (4) concise assignments of error in an equally concise twenty-five (25) page brief, all of which are both focused and meritorious.

Second, the defendants' main argument is the "inconsistency" of positions in the bankruptcy matter and the malpractice suit against defendants. The defense attorney making this claim filed a false declaration under oath in this action. Richard Roland filed a declaration under penalty of perjury (CP 106-108) claiming he provided the court with "true and correct" copies of the schedules filed in Mr. Urbick's bankruptcy. In fact, the thirty-eight (38) pages of schedules provided to the trial court by the defendants (CP 115-153) had been *superseded* by amended schedules (CP 330-335) filed with the court twenty (20) months before defense counsel executed

his declaration. Mr. Roland did *not* tell the court about the amended schedules, nor has he demonstrated *any* candor to the court in admitting his false declaration.

Third, and relying on the false, sworn testimony of their lawyer, the defendants asserted in their motion for summary judgment (CP 86-102) that Mr. Urbick had *never* amended his bankruptcy schedules to include his malpractice action against Mr. Spencer and his law firm. This was the sole “issue” presented in the defendants’ motion for summary judgment: that Mr. Urbick’s “multiple failures” to list the malpractice claim in his bankruptcy schedules, triggered application of the judicial estoppel doctrine. See CP 91, page 6 of the defendant’s motion for summary judgment, setting forth this single issue.

Fourth, and once this false claim was pointed out to defense counsel in Mr. Urbick’s response to the defendants’ motion for summary judgment, the defendants’ *changed* their argument into an absurd interpretation of the judicial estoppel doctrine. Under the interpretation described in their reply brief (CP 338-350) there can be *no* consideration of judicial amendments, no matter how *timely* and *proper*. Any inconsistency in any two pleadings, in any two cases, even if properly corrected, would trigger judicial estoppel and

dismissal of the subsequent claim or action. *There is no support for such an unbelievably harsh interpretation of the judicial estoppel doctrine in any of the cases cited by the defendants in their brief filed with this Court.*

Fifth, the defendants' arguments in their reply (CP 338-350) also expanded from their original motion for summary judgment to include many others. These same arguments have been adopted in varying degrees by the defendants in this appeal. For example, the defendants argued for the *first* time in their reply brief in the trial court, that 1) Mr. Urbick did not have "standing" to file the malpractice claim (CP 339, par. 1; CP 341) despite Arkison v. Ethan Allen, Inc.¹; 2) that his original bankruptcy schedules dictated application of judicial estoppel without regard to his subsequent, proper, and timely amendments (*Id.*); 3) that the trustee's employment of Mr. Urbick's counsel, and her support and endorsement of his malpractice suit, was inadequate to bar summary judgment (CP 340-341); 4) that proper and timely amendments to bankruptcy schedules are immaterial for purposes of a dismissal based on judicial estoppel; 5) that a debtor's lack of knowledge of a cause of action when

¹ 160 Wn.2d 535, 160 P.3d 13 (2007).

completing original bankruptcy schedules does not preclude judicial estoppel (CP 342-344); 6) that the re-opening of a bankruptcy proceeding to file proper and timely amendments does not negate the application of the judicial estoppel doctrine (CP 344-346); and 7) that Arkison v. Ethan Allen, Inc., “dictates dismissal of the plaintiffs’ complaint based on judicial estoppel” (CP 346-348), despite the critical fact that Mr. Urbick had filed proper and timely amendments and that his trustee was aware of the malpractice suit and supported it. All of the foregoing arguments were presented for the first time in the defendants’ reply brief. Neither Mr. Urbick nor his counsel were therefore afforded an opportunity to respond to them before the trial court dismissed Mr. Urbick’s complaint.

Sixth, and despite the trustee’s intervention, defense counsel nonetheless urged the trial court to dismiss Mr. Urbick’s suit on the sole basis of judicial estoppel. However, judicial estoppel *cannot* be applied to dismiss an action over the trustee’s objection. This is the holding of Arkison v. Ethan Allen, Inc., which the defense has asserted as “dispositive” in controlling their motion for summary judgment.

Seventh, *if* and *after* this Court first determines that the doctrine of judicial estoppel was proper under the facts of this case,

the Court should *then* (and only then) evaluate whether an abuse of discretion occurred in the application of the doctrine to the facts of this case. Washington has *not* adopted the defendants' unbelievably harsh interpretation of the already-controversial judicial estoppel doctrine, by disregarding proper and timely amendments to bankruptcy schedules which disclose a third-party action, *prior* to filing the third-party action.

Eighth, this Court should therefore review the threshold issue of whether the doctrine was properly applied by the trial court, under a *de novo* standard, before any application of the 'abuse of discretion' standard. Even if this Court applies the latter standard, the trial court's dismissal of Mr. Urbick's malpractice claim should be reversed because the trial court's dismissal did not follow Washington law. The defendants will have obtained a windfall by successfully insulating themselves from their gross professional neglect.

II. "PLAINTIFF'S APPEAL HERE IS A SCATTERED MISDIRECTION AND ENTIRELY IGNORES OR MISSTATES THE SALIENT FACTS AND LAW THAT WERE ACTUALLY AT ISSUE IN THE UNDERLYING PROCEEDINGS." ²

² Respondent's Opposition brief at page 2, par. 2.

There is nothing “scattered” about this appeal, other than the defendants’ own addition of arguments and claims after discovering that the sole factual basis upon which their motion for summary judgment was based, was *false*. Similarly, nothing in Mr. Urbick’s opening brief “ignores or misstates the salient facts.” Just the opposite is true because defense counsel signed a false declaration in the trial court as support for the *single* factual issue which purportedly supported the defendants’ motion for summary judgment. The defendants’ motion should have been denied for this reason alone: that it was based entirely on a false declaration filed by defense counsel Richard Roland.

Virtually all of the assets Mr. Urbick had accumulated in his lifetime were lost due to John Spencer’s gross neglect and incompetence. Mr. Urbick’s assets had a total value much greater than the debt which was discharged in his subsequent Chapter 7 bankruptcy. Mr. Urbick did not list a potential malpractice claim against Mr. Spencer in his bankruptcy schedules. He did not know he had such a claim; he did not know how to sue his own lawyer who simply quit on him; and he did not know how he could sue to recover assets lost in bankruptcy. And even if he could sue, he did not know if anything about “surpluses” in bankruptcy law, or whether anything

would be left in such a suit after his discharged debt was repaid to his creditors. There is no contrary evidence anywhere in the record of his case, to contradict Mr. Urbick's testimony (CP 311-313 and 414-430) that he did not know he had a potential malpractice claim when he filed his original bankruptcy schedules in 2010.

Mr. Urbick was discharged in bankruptcy on July 27, 2010 (CP 299) and his case was closed on August 4, 2010 (CP 325) (Court docket for U.S. Bankruptcy Court for the Western District of Washington). Once Mr. Spencer learned that he *did* have a claim against his attorney, and that he could recover the "surplus" between what he might recover and his discharged debt, then he acted with due diligence.

On October 31, 2012, an *ex parte* motion was filed with the bankruptcy court to "[r]eopen Chapter 7 Case to Administer Possible Assets." CP 325. (*Emphasis in original*). On December 12, 2012, Mr. Urbick's trustee in bankruptcy made a notation on the docket:

...[a]fter reviewing the case docket and file and determining that no claims bar date has been fixed, hereby notifies the Clerk of the United States Bankruptcy Court that assets will be administered in the above-captioned case. An appropriate notice should be given to creditors to file claims...

CP 326.

On December 13, 2013, the very next day, amendments to Mr. Urbick's schedules B and C were filed by Mr. Urbick's bankruptcy attorney, Desa Conniff. CP 326. On July 30, 2014, the trustee submitted an application to the court to employ Eugene N. Bolin, Jr., Mr. Urbick's counsel, as Special Counsel for the Trustee. On the same date, an order was entered by the court appointing Mr. Bolin as Special Counsel for the Trustee. CP 327. Mr. Urbick then timely filed his malpractice action in Pierce County Superior Court, against Mr. Spencer and his law firm, before the three-year statute of limitations ran.

III. JUDICIAL ESTOPPEL DOES NOT APPLY TO THE FACTS OF THIS CASE

Mr. Urbick did *everything right* to perfect his malpractice claim against his former attorney. His crime---according to the defendants--was not listing a potential malpractice claim against Mr. Spencer in the first two schedules he filed within six months after Mr. Spencer told him that he needed another bankruptcy lawyer. The defendants contend that it does not matter that he obtained the consent of the bankruptcy court to reopen his bankruptcy case; it does not matter that he filed proper and timely amended schedules which listed the malpractice suit against Mr. Spencer; it does not matter that he filed

his suit against Mr. Spencer only after he properly and timely amended his schedules. And it does not matter that he had the support and joinder of his trustee. In an effort to obtain a *windfall* for their client, and escape responsibility for their loss of Mr. Urbick's lifetime assets, the defendants asserted the doctrine of judicial estoppel.

There is very little no doubt that Mr. Spencer and his firm are liable to Mr. Urbick for their gross neglect and incompetency in the handling of Mr. Urbick's legal matters.³ The complaint, which includes Mr. Spencer's detailed fee agreement and his email to Mr. Urbick eight months later saying he wants out of the case, tells nearly the whole story. Other than the bare denials found in Mr. Spencer's answer to the complaint, the record of this action is silent as to *any* defense that might be available to him.

Because of these very difficult facts, Mr. Spencer wishes to avail himself and his law firm of a defense that can be asserted *without* regard to the merits of the claims against him---the doctrine

³ Mr. Urbick's detailed fifteen (15) page complaint describes with specificity approximately one-dozen contractual breaches (pars. 4.1-5.19 at CP 5-12) arising from the defendants' five-page single-spaced fee agreement attached to the complaint (CP 17-21). Mr. Urbick's complaint also summarizes the defendants' breach of another dozen common-law duties (pars. 7.1-7.12 at CP 13-14) by the defendants during their representation of Mr. Urbick. None of these have been controverted other than bare denials contained in the defendants' answer.

of judicial estoppel. Such a defense would create a windfall for the defendants by completely avoiding responsibility for their wrongful conduct and the harm it caused his client. Better yet, a defense based on judicial estoppel avoids *any* discussion of the merits of the claims against Mr. Spencer, and focuses entirely on the plaintiff---Mr. Urbick.

The defendants have also asserted a judicial estoppel defense in an attempt to avoid a *de novo* standard of review in favor of the more difficult *abuse of discretion* standard. However, and since Mr. Urbick complied with *all* statutes and court rules concerning the amendment of his bankruptcy schedules and the filing of the malpractice suit in the trial court, the judicial estoppel doctrine *does not apply* in the first instance. The fundamental requisites of judicial estoppel simply do not exist in the facts of this case; they are merely recited and repeated endlessly in the unsupported arguments by Mr. Spencer's counsel.

That judicial estoppel does not apply is evident from the facts of the case: 1) the bankruptcy court and trustee permitted Mr. Urbick to re-open his bankruptcy proceedings; 2) the bankruptcy court and trustee permitted the amendment of the schedules to include the

malpractice claim against Mr. Spencer;⁴ 3) The bankruptcy court and trustee have never even remotely suggested that they were misled by Mr. Urbick; 4) Mr. Urbick amended his bankruptcy schedules to include the malpractice claim *before* he actually filed the malpractice claim in Superior Court; 4) there is no “inconsistency” in the potential malpractice described in Mr. Urbick’s amended bankruptcy schedules, and the malpractice suit he actually filed in Pierce County Superior Court---they are one and the same; 5) there is no evidence that Mr. Urbick *knew* he had a potential malpractice claim against Mr. Spencer when he filed his original schedules in bankruptcy court;⁵ 6) even if Mr. Spencer remotely suspected that he had a malpractice claim against Spencer, he had three years to bring a malpractice claim; 7) Mr. Urbick timely filed his malpractice suit against Mr. Spencer and his firm, but only *after* he properly and timely filed his amended schedules in the re-opened bankruptcy case; 8) there is no evidence and no testimony---none---that Mr. Urbick *ever* attempted to mislead anyone or any court, in the bankruptcy matter, the

⁴ The complete docket and amended schedules which were filed with the court in December of 2012 are found at CP 316-335. See also the declaration of Mr. Urbick filed in opposition to the defendants’ motion for summary judgment at CP 311-313.

⁵ Mr. Urbick filed a declaration with the trial court in opposition to the defendants’ motion for summary judgment, in which he described this. CP 311-313.

malpractice matter, or any other matter;⁶ 9) Mr. Urbick is *not* seeking any unfair “advantage”---he simply wants his day in court with the lawyer whose gross negligence cost him virtually everything he owned; 10) none of Mr. Urbick’s creditors, nor any one else (except for the very much self-interested Mr. Spencer) has criticized Mr. Urbick, or alleged that he prejudiced them in some way; 11) Mr. Urbick’s trustee in bankruptcy has authorized his malpractice suit against Mr. Spencer and supports it; 12) Mr. Urbick’s trustee has also appointed Mr. Urbick’s counsel to simultaneously represent her in the malpractice suit, whether or not she is a named party; 13) Mr. Urbick’s creditors would be fully reimbursed for discharged debt from the proceeds of the malpractice suit, rather than providing the defendants with a windfall.

IV. RICHARD ROLAND’S TESTIMONY SUPPORTING THE SINGLE ISSUE UPON WHICH THE DEFENDANTS’ MOTION WAS PREDICATED, IS CLEARLY FALSE

Ironically, the only *false* testimony in this case was made by defense counsel---Richard Roland---and *not* Mr. Urbick. On August 29, 2014, Mr. Roland filed a sworn declaration with the trial court in support of the defendants’ summary judgment which is the subject

⁶ The defense never took Mr. Urbick’s deposition---which is why all of their unsupported claims against him are made only in argument.

of this appeal. CP 106-108. In his declaration, Mr. Roland falsely claimed that he had attached to his declaration a “true and correct copy of the “Amended Schedules” to Mr. Urbick’s bankruptcy.

The schedules attached by Mr. Roland were filed on May 10, 2010---not December of 2012, which was the filing date for the amended schedules which included Mr. Urbick’s listing of the malpractice suit against his client. The entire bankruptcy file is a public record and available online or at the clerk’s office. It is even more egregious that the amended schedule was filed in December of 2012---well over a year before Mr. Roland signed his declaration “under penalty of perjury of the laws of the State of Washington...”

This is a critical if not fatal oversight by Mr. Roland, because he then based his clients’ entire motion on a single---but false---factual issue that Mr. Urbick had never declared his malpractice claim in any bankruptcy schedules. In the defendants’ motion for summary judgment, the following *single* issue was presented for the trial court consideration:

ISSUES PRESENTED

1. **Issue:** Does plaintiff’s multiple failures to list his claim alleging legal malpractice against the defendants here as assets in his sworn Bankruptcy Petition, bar him from

pursuing those claims in this action. Should the Court grant Summary Judgment and dismiss the plaintiff's complaint as unequivocally required by the application of the doctrine of Judicial Estoppel, due to the plaintiff's failure (on two separate occasions) to list his claims against the Spencer defendants as assets in his bankruptcy proceedings where he was discharged?

Short Answer: Yes. Plaintiff's claims are barred under Washington law by the doctrine of judicial estoppel.

CP 91.

Mr. Urbick filed a brief in opposition to the defendants motion for summary judgment which asserted (in the third sentence of the brief) that the defendants' motion "is predicated on demonstrably false facts (and therefore) inapplicable law, and should be denied." CP 305-308. The heading on page 2 of the brief in opposition asserted that "**THE DEFENDANTS' MOITION IS PREDICATED ON MISTAKEN FACTS**". (Bold and caps in original).

Mr. Urbick's brief then elaborated further on the false (or mistaken—giving Mr. Roland the benefit of the doubt) facts provided by the defendants and upon which their motion for summary judgment was based.

V. THE TRIAL COURT SHOULD HAVE PERMITTED MR. URBICK'S TRUSTEE TO PROSECUTE THE ACTION UNDER ARKISON IN ANY EVENT

In his opposition to the defendants' motion for summary judgment, Mr. Urbick also provided the trial court with the declaration of his trustee in bankruptcy, Kathryn Ellis. CP 314-315 (exclusive of attachments). Ms. Ellis attached to her declaration, a *real* "true and accurate" copy of Mr. Urbick's entire court docket in bankruptcy court, Cause No. 10-42867. The PACER transaction receipt indicates that it was provided to Ms. Ellis on or about October 13, 2014. Included in the docket were entries indicating that Mr. Urbick re-opened his bankruptcy on and that the schedules provided by Mr. Roland were only the original schedules filed in 2010. Ms. Ellis testified that:

4. *Amended schedules were filed with the court on or about December 13, 2013, which included 'a potential malpractice action against former attorney' of unknown value. Attached hereto as Ex. 2 is a true and accurate copy of the amended schedules. I have not objected to the amended schedules, nor has any creditor.*

5. Mr. Urbick's bankruptcy attorney claimed a modest exemption in the amount of \$1,614 in the malpractice claim, and would be entitled to that amount upon any recovery. In addition, *Mr. Urbick would be entitled to any surplus proceeds remaining after payment of all costs of administration and creditor claims.*

6. The docket reflects approximately \$409,000 in creditor's 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.*

CP 314-315. (*Emphasis added*).

In his brief in opposition, Mr. Urbick also cited Fed.R.Bankr.P. 1009(a)(schedules may be amended as a matter of course before the case is closed). The court in Arkison v. Ethan Allen, Inc., [160 Wn.2d 535, 539-540, 160 P.3d 13 (2007)] (also relied upon by the defense) held that judicial estoppel does not apply to a bankruptcy trustee standing as the real party in interest. Both the trustee and Mr. Urbick are real parties in interest because of the possibility, if not likelihood, of a surplus recovery in the instant action.

VI. THE DEFENDANTS HAVE DELIBERATELY AND DECEPTIVELY MISCHARACTERIZE MR. URBICK'S CONDUCT IN THE TRIAL COURT, AND NOW THIS COURT, WITHOUT ONE SHRED OF EVIDENCE OF SUPPORT THEIR MISCHARACTERIZATIONS

The defense repeatedly impugns, castigates and mischaracterizes Mr. Urbick and his actions (and those of his counsel) in a false and deliberate attempt to mislead this Court and prejudice Mr. Urbick. This is important to note for two reasons. First, virtually any analysis of the doctrine of judicial estoppel, or even whether it applies in the first instance, involves an evaluation of the actor's conduct. In almost every case, courts note whether the actor *intended* to mislead a court or adversaries, or had another wrongful motivation. The second reason the defendants' false characterizations are important to note, is because there is *not a single piece of evidence in the entire record of this case*, to support any of the defendants' disparaging characterizations of Mr. Urbick.

For example, the defendants characterize Mr. Urbick with language such as "*opportunistic*" and "*manipulating*"⁷; and inferences that Mr. Urbick was "aware [of the defendants'

⁷ Respondents' Opposition brief at page 10, par. 3. (Emphasis in original).

malpractice] prior to filing of his bankruptcy...⁸; that Mr. Urbick's declarations are motivated by "*self-interest*" rather than the truth⁹; that his declarations were authored "despite his knowledge of the entirety of the facts concerning his relationship with the defendants," inferring that Mr. Urbick is concealing facts or evidence in his declaration¹⁰; that Mr. Urbick was "seeking an advantage" by his conduct¹¹; that "[a]s a consequence of his multiple failures to disclose his potential claims against these defendants in his sworn Bankruptcy Petitions...plaintiff's complaint was dismissed by application of the rule of judicial estoppel"¹²; that "the claims asserted in that complaint were not previously disclosed to plaintiff's creditors in sworn bankruptcy filings..."¹³; that judicial estoppel protects "the dignity of the judicial proceedings" and "protect[s] against a litigant playing fast and loose with the courts"¹⁴; that "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all their assets"¹⁵; that "[t]he interests of

⁸ *Id.* at page 8, par. 4 through page 9, par. 1.

⁹ *Id.* at page 9, par. 4.

¹⁰ *Id.* at page 9, par. 5.

¹¹ *Id.* at page 14, par. 1.

¹² page 16, par. 2.

¹³ page 14, par. 4.

¹⁴ page 15, par. 2.

¹⁵ page 16, last par.

both the creditors...and the bankruptcy court...are impaired when the disclosure provided by the debtor is incomplete"¹⁶; that "the debtor has a duty to prepare the bankruptcy schedules and statements 'carefully, completely, and accurately' and bears the risk of non-disclosure"¹⁷;

These kinds of baseless claims and inferences are condensed explicitly by the defense at page 12 of their Opposition brief:

Under clear Washington law, plaintiff's *repeated failure* to disclose in both his original and in his "*amended*" sworn bankruptcy petition asset schedules the possible unliquidated contingent claims against the defendant attorneys rising (sic) from the defendants' legal representation which had been terminated several months to his prior Bankruptcy Petition, estops him from *manipulating the judicial process* to pursue claims against these defendants *for his own benefit now*.

(*Id.* at page 12, par. 2). (Emphasis added).

It is extremely important to note here, again, that there is not *one shred of evidence* anywhere in this case, that Mr. Urbick ever attempted to mislead anyone for any reason at any time. In fact, just the opposite is true. He has at all times been honest, frank, and forthright in all of his business affairs and in this case. And he is not

¹⁶ page 17, par. 1.

¹⁷ page 18, par. 3.

motivated by some improper attempt to obtain a "benefit" to which he is not entitled. He is attempting to recover the value of specific assets which he slowly and diligently acquired during his lifetime as a wage earner.

VII. THE BANKRUPTCY CASE WAS PROPERLY RE-OPENED AND MR. URBICK'S SCHEDULES WERE TIMELY AMENDED

The defense also repeatedly refers to Mr. Urbick's "failure" to include the malpractice claim in his original bankruptcy schedules, suggesting that deliberate intent or at least neglect in his filings. This, too, is a mischaracterization of what happened.

Bankruptcy Code Section 350(b) authorizes the bankruptcy court to reopen a case for various reasons including to "administer assets, to accord relief to the debtor, or for other cause." In exercising its discretion to grant such a motion, "the bankruptcy court should exercise its equitable powers with respect to substance and not technical considerations that will prevent substantial justice." *Stark v. St. Mary's Hospital (In re Stark)*, 717 F.2d 322, 323 (7th Cir. 1983) (*per curiam*). In re-opening a debtor's claim to permit the addition of a cause of action as an asset, courts focus on three considerations: "1) the benefit to the debtor; 2) the prejudice or detriment to the defendant in the pending litigation; and 3) the

benefit to the debtor's creditors. In re Tarrer, 273 B.R. 724,732 (Bankr. N.D. Ga. 2002).

This is precisely what the bankruptcy court did here. The trustee did not oppose Mr. Urbick's motion to re-open for the purpose of amending his schedules because it served the interests of Mr. Urbick *and* his creditors---who stand to receive the full benefit of the discharged debt if Mr. Urbick's appeal is successful and he is permitted to try his claims against his former counsel.

VIII. CASE LAW IN OTHER JURISDICTIONS IS CONSISTENT WITH WASHINGTON LAW AND REQUIRES REVERSAL

Most courts allow debtors to re-open and amend schedules to include a third-party action, where there is no bad faith or wrongful intent. For example, in Posley v. Clarian Health, 2012 U.S. Dist. LEXIS 132261, 2012 WL 4101914 (S.D. Ind. Sept. 17, 2012), the plaintiff filed for bankruptcy after she filed a third-party suit against her employer for discrimination. The employer then filed a motion to dismiss based on a claim of judicial estoppel, because the plaintiff failed to list the suit in her bankruptcy schedules. In analyzing whether judicial estoppel applied, the court reviewed the relevant authorities, the logic of which is apparent in this appeal:

It has been generally held that the subjective intent of the plaintiff is pertinent in determining whether judicial estoppel is applicable. New Hampshire v. Maine, 532 U.S. 742, 750 (2001); see In re Cassidy, 892 F.2d at 642 ("[Judicial estoppel] should not be used where it would work an injustice, such as where the former position was the product of inadvertence or mistake."); Jaeger v. Clear Wing Prods., Inc., 465 F. Supp. 2d 879, 882-83 (S.D. Ill. 2006) (internal quotations omitted) ("Notably, judicial estoppel does not apply when a debtor's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court."); Swearingen-El v. Cook County Sheriff's Dept., 456 F. Supp. 2d 986,991 (2006)("Judicial estoppel is not warranted here. Defendants cannot show plaintiff intended to deceive the bankruptcy court."); Johnson Serv. Co. v. TransAmerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973) ("[T]he rule looks toward cold manipulation and not an unthinking or confused blunder.") In re FV Steel & Wire Co., 349 B.R. 181, 185 (Bankr. E.D. Wis. 2006) (holding the debtor cured any inconsistent positions and indicated the omission was inadvertent by reopening the case and amending the schedules); Cannon-Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006)("If [Debtor] were really making an honest attempt to pay her debts, then as soon as she realized that it had been omitted, she would have filed amended schedules and moved to reopen the bankruptcy.")

Even if the Court inferred manipulative or deceptive motivation from the record, for purposes of the Motion to Dismiss, the Court makes all reasonable inferences in favor of Ms. Posley. See Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1287-88 (11th Cir. 2002)(inferring "intentional manipulation" based on the totality of the facts, including the plaintiff's insinuation that disclosure would affect the outcome of the bankruptcy). Thus, regarding Ms. Posley's assertions as true, the Court finds she did not intend to deceive the courts or prevail

in the same litigation twice. Accordingly, judicial estoppel is not appropriate and I.U. Health's Motion to Dismiss is denied.

In Jaeger v. Clear Wing Prods., 465 F. Supp. 2d 879, 2006

U.S. Dist. LEXIS 90146 (S.D. Ill. 2006), the court held:

Courts have been reluctant to apply the doctrine of judicial estoppel in the bankruptcy context where the nondisclosure of a claim was inadvertent. For instance, earlier this year, the Eighth Circuit Court of Appeals stressed: "Notably, judicial estoppel does not apply when a debtor's prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." Stallings v. Hussmann Corp., 447 F.3d 1041, 1048 (8th Cir. 2006), quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3rd Cir. 1996).

The doctrine of judicial estoppel, which "protects the integrity of the judicial process," Total Petroleum, Inc. v. Davis, 822 F.2d 734, 738 n.6 (8th Cir. 1987), should be invoked when a party abuses the judicial forum or process by making a knowing misrepresentation to the court or perpetrating a fraud on the court. Stallings, 447 F.3d at 1047. See also New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)(confirming that it may be "appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake").

If a debtor's failure to disclose a claim in his bankruptcy proceeding was "calculated to make a mockery of the judicial system," then judicial estoppel bars him from taking advantage of the situation. Ajaka, 453 F.3d at 1345. In the case *sub judice*, as in Ajaka, genuine issues of material fact certainly remain as to whether Jaeger's failure to disclose constituted "cold manipulation" or "intentional contradiction" as opposed

to a "confused blunder" or "simple error or inadvertence." *Id.*, n.7. See also American Nat'l Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1536 (11th Cir. 1983)(explaining that judicial estoppel applies to the "calculated assertion" of divergent positions).

So summary judgment is not warranted on the basis of judicial estoppel...

Some courts allow debtors to re-open and/or amend their bankruptcy schedules even *after* they have commenced a third-party action, for the express purpose of avoiding a judicial estoppel defense raised in the third-party action. See Chicon v. Carter, 258 Ga. App. 164, 573 S.E.2d 413, 2002 Ga. App. LEXIS 1379 (Ga. Ct. App. 2002); Old Republic Ins. Co. v. Farmer, 324 B.R. 918, 2005 Bankr. LEXIS 674 (Bankr. M.D. Ga. 2005)(Debtor permitted to reopen bankruptcy case to amend schedules and add a personal injury claim to defeat a judicial estoppel claim, where there was no evidence of improper motive); Jaeger v. Clear Wing Prods., 465 F. Supp. 2d 879, 2006 U.S. Dist. LEXIS 90146 (S.D. Ill. 2006)(Debtors permitted to reopen bankruptcy case to amend schedules and add a personal injury claim to defeat a judicial estoppel claim where the failure to list the potential asset was due to "oversight").

IX. CONCLUSION

One of the central purposes of the doctrine of judicial estoppel is to prevent parties from playing "fast and loose" with the law and the courts. The defense has repeatedly made totally unsupported claims that Mr. Urbick is playing "fast and loose." However, this is precisely what the defense has done from the moment they filed their summary judgment in the trial court. Defense counsel has filed false declarations under oath, shifted the basis for the motion from a single issue to several new and different arguments, and gratuitously castigating Mr. Urbick wherever possible, regardless of the total absence of any derogatory evidence about Mr. Urbick. Fundamentally, there is *no* factual or legal basis for the application of judicial estoppel in this action and this Court should therefore reverse the trial court and remand this case for trial.

RESPECTFULLY SUBMITTED this 30th day of July, 2015.



Eugene Nelson Bolin, Jr., WSBA No. 11450
Counsel for Appellant
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165

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 reply brief to counsel for respondents at the following address:

Roy Umlauf, WSBA #14537
John P. Hayes, WSBA #21009
Richard R. Roland, WSBA #18588
Forsberg & Umlauf PS
901 5th Ave., Ste. 1400
Seattle, WA 98164-2047
rumlauf@forsberg-umlaf.com
jhayes@forsberg-umlaf.com
rroland@forsberg-umlaf.com

DATED this 30th day of July, 2015, at Edmonds, Washington.

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 31 PM 1:51
STATE OF WASHINGTON
BY [Signature] DEPUTY

[Signature]
Eugene Nelson Bolin, Jr., WSBA No. 11450
Counsel for Appellant
Waterfront Park Building
144 Railroad Avenue, Suite 308
Edmonds, WA 98020
425-582-8165