

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).

RESPONDENTS' OPPOSITION
TO
APPELLANT'S OPENING BRIEF

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I. IDENTITIES OF THE PARTIES

Respondent parties before this Court on appeal are The Spencer Law Firm and John Spencer, defendants in the trial court. In the original complaint plaintiffs named as a defendant Pamela Foley, an associate attorney formerly employed with The Spencer Law Firm. She was dismissed as a party prior to the motion for summary judgment forming the basis of this appeal.

II. THE ISSUES ON APPEAL

The trial court considered the entirety of plaintiff's filings, in opposing the motion for summary judgment, and on reconsideration. The court allowed the plaintiff to make oral argument on those pleadings. It exercised proper discretion in entering an order granting summary judgment dismissing the plaintiff's complaint based on the record established by the motion pleadings.

Plaintiff has submitted a list of what are termed "assignments of error" [App. Opening Brief, pp. 4-6]. Most of these items plaintiff fails to specifically discuss or support with analysis, legal authority or citations to the record in the brief five pages of legal "Argument" he presents in the opening brief [App. Opening Brief, pp. 20-25].

This court will not consider arguments that are unsupported by pertinent authority or meaningful analysis. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249

(1989) (issues unsupported by adequate argument and authority); RAP 10.3(a).

Plaintiff's appeal here is a scattered misdirection and entirely ignores or misstates salient facts and law that were actually at issue in the underlying proceeding. By example, plaintiff "appeals" on a question of the plaintiff's bankruptcy trustee's status, a question which was not decided by the court for the simple dispositive reason that no such motion was ever before the court! In his appellate brief plaintiff also discusses issues relating to a statute of limitations argument. A clear reading of the underlying briefing reveals that there was no statute of limitations argument raised by the defendant in the motion and the question was not a dispositive issue in the trial court motion. The only mention of any statute of limitations was an innocuous comment made by the trial court in colloquy with plaintiff's counsel, addressing the fact that the plaintiff's trustee had not presented any motion to substitute in place of the plaintiff, after which counsel represented to the court that he had spoken with the trustee who had informed him it had no interest in amending the complaint to substitute for the plaintiff. [CR 399, 402; RP 14, 17]

To the extent that the plaintiff's opening brief does appear to present citation or analysis, appellant cites four bases for the appeal of Judge Culpepper's proper dismissal of the complaint (App. Opening Brief, pp. 3-4). Each of these assertions is invalid and in view of the motion record each lacks merit on the facts and the law.

1. The Purported “Erroneous” Facts

Whether or not alleged “facts” presented in the moving papers regarding the termination of the defendants’ underlying representation of plaintiff were or were not “erroneous” in the view of the plaintiff, the trial court record reflects that the plaintiff had adequate opportunity in the 8 weeks between the filing of the motion and the date for filing his opposition to discuss that issue in his motion opposition pleadings. Moreover, plaintiff’s counsel’s version of the so-called “erroneous” facts were fully presented by plaintiff’s counsel and considered by the court at the hearing prior to the court’s dismissal at motion for summary judgment. [CP 403-404; RP 18-19]. This issue is a “red herring”. The issues relating to the initiation of termination of the underlying representation are not exclusive or dispositive to resolution of the legal consequence to plaintiff, of his failure to disclose his potential claims against the defendants to the Bankruptcy Court and to his creditors in his multiple, sworn disclosures to the court which formed the basis of the trial court’s application of judicial estoppel.

2. Plaintiff’s Post-Discharge Amended Bankruptcy Schedules

The record indicates that in opposing the motion for summary judgment, plaintiff did file plaintiff’s “final” “Amended” Bankruptcy Schedules; they were presented to Judge Culpepper and considered with plaintiff’s motion pleadings. [CP 330 – 335] To the extent any other document plaintiff considered was relevant to the plaintiff’s case was not before the court, clearly, it was due to plaintiff’s failure to file it in opposing the defendants’ motion. The fact is, the trial court considered and properly analyzed the issues rising from plaintiff’s bankruptcy filings. The court was made aware by the defendant [CP 100-101], that the plaintiff had re-opened his bankruptcy after his original Discharge [CP 405; RP 20] in an effort to pursue “surplus” claims for his own benefit [CP 398, 409; RP 14, 24] and plaintiff’s counsel discussed the issue at oral argument. More significantly, under Washington law a debtor’s subsequent amendment of bankruptcy schedules, filed only after a debtor’s prior sworn inaccurate representations to the Bankruptcy Court and creditors, does not operate to negate application of the doctrine of judicial estoppel. [*infra*, p. 28, *et. seq.*]

3. Dismissal of the Plaintiff Debtor’s Complaint

The motion heard by the trial court was a motion for summary judgment by the defendants to dismiss complaint of the named plaintiff. The court dismissed the plaintiff’s lawsuit as the sole party named in the complaint and the sole party appearing in

opposition to the Motion for Summary Judgment. Plaintiff vociferously, albeit invalidly, argued to the court in opposition pleadings to the defendants' motion for summary judgment and at the motion hearing, as he does even today, that the claim against these defendants is his property [CR 398-400, RP 13-15]. The plaintiff's position that the claims against these defendants, which he only belatedly disclosed in bankruptcy, are his property, is in clear contravention of existing law. [*infra*, p. 31, *et. seq.*] The court properly exercised its discretion in dismissing the named plaintiff's complaint under the pleadings in the record.

4. **No Motion to the Trial Court Ever Filed by the Trustee to Be Substituted as Real Party in Interest**

The trial court did not err in refusing to grant a "request to name to Trustee as the real party in interest", if only because there was no motion ever presented to the trial court concerning the status of the plaintiff's trustee. In fact, despite the plaintiff's acknowledgement in its complaint that the Trustee might be the real party in interest, and, while plaintiff's counsel said prior to the hearing on defendant's motion for summary judgment and plaintiff's subsequent dismissal that he might file such a motion to substitute the Trustee - no motion was ever filed. [*infra*, p. 33, *et. seq.*] Significantly, at oral argument on the motion plaintiff's (and Trustee's) counsel Eugene Bolin specifically represented to the trial court the reason - "She's told me she doesn't have any interest in the amendment of the complaint. She thinks the case can proceed as it is." [CP 402] Plaintiff's opposition to the motion for summary judgment even included a declaration filed by the trustee prior to the summary judgment hearing. In that declaration the Trustee made no request to be named as a party and fails to even discuss the issue. [CP 314-315]

III. **STATEMENT OF THE CASE**

This matter involves a complaint alleging claims for professional negligence, breach of fiduciary duty, various types of misrepresentation, and violations of the Washington Consumer Protection Act brought against the defendant attorneys based upon alleged actions which took place entirely between mid-2009 and February 2010 [generally, CP 1-25].

The complaint generally asserts that the defendants agreed to represent the plaintiff in legal matters relating to the already impending

collapse of plaintiff's personal business (including representation as plaintiff's prospective bankruptcy counsel), but purportedly failed to adequately do so. Plaintiff was indeed thereafter required to file Chapter 7 Bankruptcy, and simply used other counsel.

A. **The Facts Known to Plaintiff, Before He Filed His Bankruptcy, Regarding His Relations With the Defendants**

Plaintiff's complaint alleges, at length, the factual issues concerning his relationship with the defendants which plaintiff alleges form the basis of his complaint against them in this action. [CP 3-4, ¶¶ 2.6-2.8, CP 7-11, ¶¶ 5.1-5.13].

It is significant to note that in his complaint plaintiff acknowledges that all of these alleged facts were known to plaintiff and occurred prior to the time that the defendants' representation of the plaintiff terminated [CP 12, ¶ 5.14], and prior to the plaintiff's filing of his bankruptcy [CP 12, ¶ 5.16]. Indeed, plaintiff acknowledges that prior to the separate filing of his bankruptcy complaint with other counsel he was "incredulous" as to the defendants' prior performance. CP 11: 1, ¶ 5.13].

Plaintiff's opposition to the motion below and on appeal recites a litany of asserted facts concerning his relationship with the defendants which all occurred prior to the first filing of his bankruptcy. Those are the facts which involve the plaintiff's relationship with the defendants' of which plaintiff was completely and entirely aware of as of the date the defendants' representation terminated, and prior to plaintiff's filing of bankruptcy. Yet,

in multiple sworn filings, he failed to disclose any possible claim against the defendants based on those facts which he already knew.

In his complaint Plaintiff alleged that he and his bookkeeper met with Mr. Spencer for the purpose of obtaining legal services to negotiate with plaintiff's lender to potentially restructure the contested debts. [CP 12, ¶ 2.6] Plaintiff alleges that he met with Mr. Spencer on more than one occasion before forwarding the Spencer Law Firm a \$3,500 retainer and being presented with and executing a written fee agreement in May, 2009. [CP 12, ¶ 5.14]

Plaintiff notes that Mr. Spencer is licensed to practice in Alaska and travels there. Plaintiff alleges that he spent time during the summer of 2009 in Alaska, and before leaving the Puget Sound area, left the direct responsibility for plaintiff's file with his associate Pamela Foley. [CP 12, ¶ 5.14] Plaintiff acknowledges that he was aware that Ms. Foley initiated work analyzing the plaintiffs' financial condition. Ms. Foley left The Spencer Law Firm in November of 2009, and plaintiff was notified of the termination of her representation of him by correspondence to plaintiff in late November, 2009. [CP 12, ¶ 5.14]

The complaint alleges that late in 2009 plaintiff began corresponding directly with Mr. Spencer, complaining of the manner in which The Spencer Law Firm was conducting its representation, complaining of errors he contended had been made by Ms. Foley and the firm, and alluding to possible legal claims against the firm and its attorneys. [CP 12, ¶ 5.14]

Plaintiff alleges that while being represented by the defendants, he was receiving foreclosure notices from creditors on certain of the rental properties securing the bank loan due to plaintiff's failures to service the debt which began prior to the defendants' representation. [CP 12, ¶ 5.14] With Mr. Spencer in Alaska, in late 2009 plaintiff became unhappy with The Spencer Law Firm's representation. From November 2009 through February 2010 plaintiff communicated to Mr. Spencer his displeasure with The Spencer Law Firm's representation as concerning the alleged failure to properly and successfully negotiate with plaintiff's lenders to mitigate the effect of his non-payment of loans. [CP 12, ¶ 5.14]

B. Plaintiff's Multiple Failures to Disclose Any Potential Claim Against Defendants in His Sworn Bankruptcy Filings

Records of the U.S. Bankruptcy Court reflect that on April 13, 2010, assisted by new counsel he retained, plaintiff filed a personal Chapter 7 bankruptcy petition in the United States Bankruptcy Court [CP 206-279]. The Petition filing was sworn under penalty of perjury "to be true and correct," at over 10 different internal locations. Despite plaintiff's prior-existing dissatisfaction with The Spencer Law Firm's representation and his contemporaneous knowledge that the firm had not been able to successfully negotiate any relief of plaintiff's debts with his creditors, in his April 2010 Bankruptcy petition plaintiff failed to list to the Trustee or to his creditors, any potential claim against the defendants. [CP 234, 235 – (pp. 11-12 of 74, items 21, 35)]

For unknown reasons, on May 10, 2010, again, with the assistance of counsel, the plaintiff filed Amended Schedules of Personal Property. [CP 281-297] These 17 pages of Amended Asset/Property Schedules (sworn by the plaintiff under oath as “true and accurate”) detailed plaintiff’s declared assets, and *again* failed to identify to the Trustee or to the plaintiff’s creditors any potential claim against the attorney defendants based on the allegedly unsatisfactory representation that had been terminated less than 5 months previous. [CP 284-285 – (pp. 3-4 of 17, items 21, 35)]

Based on the plaintiff’s initial sworn Bankruptcy Petition and his sworn Amended Petition Asset Schedules the plaintiff obtained a Chapter 7 Bankruptcy Discharge from the bankruptcy court in July 2010. [CP 299-300] The bankruptcy discharge had the effect of discharging his debts to all of his creditors.

Thus, the undisputed facts reflect that while represented by the counsel who he independently obtained after the termination of the defendants’ representation, and, with complete knowledge of all facts relating to his existing dissatisfaction with their performance, the plaintiff filed two separate Schedules of Assets to the Bankruptcy court, both under oath. Mr. Urbick failed to identify or list any contingent, non-contingent, liquidated or unliquidated claim against these defendants in either his original Schedule of Assets or in his Amended Schedule.

C. The State Court Litigation

In December 2012, plaintiff filed his original complaint in this matter. [CP 1] In addition to alleging the facts concerning his relationship with the

defendants all of which he was aware prior to the filing of his bankruptcy, the complaint also asserts plaintiff's acknowledgement that his bankruptcy Trustee may be the real party interest. [CP 1, ¶ 1.1]

Original defendant Pamela Foley was dismissed by stipulation on July 24, 2013 [CP 33] and the remaining defendants present before the court here filed their Answer on July 29, 2013. [CP 36]

On August 29, 2014 defendants filed their Motion for Summary Judgment with a hearing date noted for September 26. [CP 86] Under the Superior Court Civil Rules plaintiff's opposition pleading was initially due for filing 11 days prior the hearing date, on September 15, 2014. [CR 56(c)] The hearing date was continued until October 31, 2014 while the plaintiff's counsel "conferred extensively" with his clients. [CP 309]

Then, on October 14, 2014 plaintiff finally filed its opposition pleadings to the motion for summary judgment. The opposition consisted of less than 4 pages of legal argument, 4 pages of self-interested declarations of plaintiff and his counsel and a largely clerical declaration by the plaintiff's current bankruptcy Trustee. It is significant to note that these declarations filed in opposition to the defendant's motion for summary judgment did not disclose any "new" facts concerning the acts and conduct of the defendants, beyond those facts which plaintiff was fully aware in February 2010, several months before he initially filed his Bankruptcy Petition and Asset Schedules.

The brief declaration of plaintiff in the motion opposition [CP 312-313] effectively says nothing more than that despite his knowledge of the entirety of the facts concerning his relationship with the defendants at the

time he filed his Petition in Bankruptcy, plaintiff's claims should not be dismissed; because plaintiff is not a lawyer and did not recognize specific legal causes of action rising from his ruptured relationship with the defendants until an enterprising attorney offered them to him at least 2 years later. The law is to the contrary and requires dismissal.

The declaration of plaintiff's current Bankruptcy trustee, with one significant exception, does no more than establish the chronology of plaintiff's bankruptcy filings. The trustee informed the court that in 2012 the plaintiff and his new lawyer had the bankruptcy reopened (based on the same facts of which plaintiff and his original bankruptcy attorney had been aware of in 2010) - because he had learned, from his current lawyer, that he might be able to personally collect a "surplus" recovery.

Thus, plaintiff's own evidence of these opportunistic actions manipulating the court for his personal advantage in this matter, operates to cement the legal and evidentiary basis for the Court's application of judicial estoppel to dismiss plaintiff's personal claims against these defendants.

The plaintiff's 4-page opposition pleading, along with a 1-page declaration of the plaintiff's counsel, the combined 4 pages of the plaintiff and the plaintiff's trustee declarations, constituted the entire record presented by the plaintiff to the trial court for its consideration in determining the motion for summary judgment.

The defendants filed their Reply to the opposition on October 27, 2014. [CP 338] Under the Civil Rules [CR 56(c)], the pleadings were then supposed to be closed.

Having the advantage of receiving the defendant's reply to its "opposition", on the afternoon of October 30, 2014, the day immediately prior to the scheduled hearing, plaintiff's counsel improperly filed what he styled a "supplemental" pleading of "authorities."

On October 31, 2014 Judge Ronald Culpepper, Presiding Judge of the Pierce County Superior Court, held oral argument on defendants' motion. [The Report of Proceedings of the hearing was included in plaintiff's subsequent Motion for Reconsideration and is incorporated in the plaintiff's designation of the Clerk's Record on appeal at CP 366-418; RP 1-28.] The court granted defendants' motion for summary judgment [CP 410 – 412; RP 25 – 27] and entered plaintiff's case dismissed. [CP 366-368]

On November 10, 2014 the plaintiff filed a Motion for Reconsideration of the Order of Dismissal including the filing of second declarations from the plaintiff and the plaintiff's trustee, and the plaintiff's former bankruptcy counsel. No showing or evidence was proffered as to why the testimony contained in those materials had not, by due diligence, been completely available to the plaintiff from these declarants prior to the time of the filing of their original declarations opposing the motion for summary judgment hearing that was conducted 8 weeks after the motion was filed.

On December 9, 2014 "having considered the moving party's documents and submissions, and not requiring a response from the opposing side, and considering itself fully advised," Judge Culpepper entered an Order denying the Motion for Reconsideration. [CP 439]

On December 17, 2014 the plaintiff filed its Notice of Appeal.
[CP 440]

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 from the defendants' legal representation which had been terminated several months prior to his original Bankruptcy Petition, estops him from manipulating the judicial process to pursue claims against these defendants for his own benefit now.

The trial court judge exercised proper discretion in ordering the dismissal of the plaintiff's complaint on the basis of judicial estoppel in view of the record. Further, plaintiff's appeal here of an alleged failure by the court to substitute plaintiff's trustee as a real party in interest is incompetent and invalid, as there was never any motion before the trial court to do so.

IV. STANDARD OF REVIEW

The appellate court will "engage in the same inquiry as the trial court" and review "a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion." *Arkison v. Ethan Allen, Inc.*, 160 Wn. 2d 535, 538, 160 P.3d 13 (2007).

"To defeat summary judgment, the nonmoving party must present evidence to rebut the determination of clearly inconsistent positions and establish that application of the doctrine of judicial estoppel would be an abuse of discretion." *Harris v. Fortin*, 183 Wn. App. 522, 527, 333 P.3d 556, 559 (2014).

A trial court abuses its discretion only where “its decision is manifestly unreasonable or based on untenable grounds.” *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007). The Court of Appeals “may affirm on any ground the record adequately supports.” *Id.*, at 141 Wn. App. 849.

If a plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party’s case, summary judgment is appropriate. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). Plaintiff’s opposition pleadings consisted of a bare 4 pages of argument, and summary declarations by the plaintiff, and by the plaintiff’s counsel. In and of themselves, those pleadings fail to present facts which establish that the trial court abused its discretion in applying judicial estoppel to dismiss the plaintiff’s complaint.

Additionally, at oral argument in opposition to the motion for summary judgment plaintiff’s counsel repeatedly argued matters outside of plaintiff’s record. However, such arguments cannot serve as the required evidence [CR 56(a)] necessary to support a position on motion for summary judgment. An attorney’s “[a]rgument is not evidence, and we cannot attribute to any [finder of fact] in this state a lack of sufficient mentality to distinguish between the two.” *Jones v. Hogan*, 56 Wn.2d 23, 31-32, 351 P.2d 153 (1960).

V. ARGUMENT

A. Washington Law Bars the Plaintiff's Complaint Here by Application of the Doctrine of Judicial Estoppel After Plaintiff Obtained A Full Discharge in Bankruptcy Having Previously Failed to Disclose to the Trustee or To His Creditors, (On Two Occasions), the Existence of Any Potential Contingent, Unliquidated Claims Against These Defendants

Judicial estoppel is a “doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

Clearly Judge Culpepper did not abuse his proper discretion invoking the rule of Judicial Estoppel in this case, on this record. His order establishes that he considered all the pleadings filed by the plaintiff in opposition to the defendants’ motion [CP 366-368]. He afforded plaintiff the opportunity of lengthy oral argument, and he went so far as to accept the ‘supplemental authority’ belatedly filed by the plaintiff on the day prior to the motion hearing. Plaintiff’s counsel had ample opportunity to argue at length on the applicable facts and each element presented by the rule of Judicial Estoppel.

Washington courts grant summary judgment under the doctrine of judicial estoppel to dismiss a plaintiff’s state court complaint where the claims asserted in that complaint were not previously disclosed to plaintiff’s creditors in sworn bankruptcy filings in a prior bankruptcy proceeding in which that plaintiff/debtor obtained a discharge. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 228, 108 P.3d 147 (2005).

In the context of complaints based on undisclosed bankruptcy claims / assets, the state court:

invokes judicial estoppel not only to prevent a party from gaining advantage by taking inconsistent positions, but also because of ‘general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.’ and to ‘protect against a litigant playing fast and loose with the courts.’

Hamilton v. State Farm Fire & Casualty Co., 270 F.3d 778 (9th Cir. 2001).

Here, plaintiff’s attorney-client relationship with the defendant attorneys was terminated in February 2010. As of that time plaintiff had complete knowledge of the entire set of facts regarding the work performed by the defendants upon which the causes of action in the complaint here relating to the defendants’ legal services are based.

Two months later, after plaintiff had obtained new counsel, and with counsel’s assistance, on April 20, 2010 he filed his first Petition for Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Western District of Washington. [CP 206-279]

As part of plaintiff’s Bankruptcy Petition, plaintiff was required to affirmatively disclose, under penalty of perjury, all his assets, specifically including any “contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims” [CP 216, item #21] and “Other personal property of any kind not already listed” [CP 217, item #35].

Subsequent to the filing of his initial Petition but prior to obtaining his Chapter 7 Bankruptcy Discharge, again, with the assistance of counsel

and again, with full knowledge of the complete sphere of facts concerning the legal services provided to him by these defendants, plaintiff filed, again under penalty of perjury, an Amended Schedule of Assets [CP 281-297] which again failed to disclose or describe any potential claim against these defendants based on their previously concluded performance of legal services. [CP 283, item #21; CP 284, item #35]

As a consequence of his multiple failures to disclose his potential claims against these defendants in his sworn Bankruptcy Petitions before obtaining a Bankruptcy Discharge, the trial court exercised its proper discretion, and under definitive Washington law, *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 160 P.3d 13 (2007), plaintiff's complaint against these defendants was dismissed by application of the rule of judicial estoppel.

B. A Bankruptcy Debtor Is Responsible to Disclose All Assets and Contingent Claims to His Creditors Before Discharge

Before discharge, a bankruptcy debtor has an affirmative duty under the bankruptcy code to disclose all assets, including all contingent and unliquidated claims. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539 n.1, . Consequently, courts apply judicial estoppel to bankruptcy debtors who fail to list potential legal claims and then later pursue those claims in a different court. *Id.*, 160 Wn.2d at 539.

In this context the rationale for application of the doctrine of judicial estoppel is to preclude a debtor who fails to disclose a claim in bankruptcy from pursuing that claim after discharge because:

the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts

will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.

In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999).

When a bankruptcy is filed, the debtor is required to include “all legal or equitable interests . . . in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This “includes . . . all property of the debtor, even that needed for a fresh start.” *Tignor v. Parkinson*, 729 F.2d 977, 980 (4th Cir. 1984) (*quoting* 1978 U.S. CODE CONG. & AD. NEWS 5868, 6323); 4 W. Collier, BANKRUPTCY § 541.02[3], at 541-15, -16 (15th ed. 1988). *See also In re Merlino*, 62 B.R. 836 (Bankr. W.D. Wn. 1986); *In re Linderman*, 20 B.R. 826 (Bankr. W.D. Wn. 1982).

When a claim has accrued before the injured party files for bankruptcy, the cause of action becomes the property of the bankruptcy estate. All rights of action in which the debtor has an interest become property of the estate under 11 U.S.C. § 541. *See In re Smith*, 640 F.2d 888, 892 (7th Cir. 1981); 4 W. Collier, BANKRUPTCY § 541.10[1], at 541-63.

After an individual files for bankruptcy protection, any assets possessed by that individual become the property of the bankruptcy estate. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203-05 (1983). *See also Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (“All the legal and equitable interests a debtor has in his property become the property of the bankruptcy

estate and are represented by the bankruptcy trustee.”). “Causes of action are among such legal or equitable interests.” *Id.* (citing *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986)). After a trustee is appointed, “the debtor’s assets and claims pass to the trustee” *In re Eisen*, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994). Accordingly, under such circumstances, the trustee is the sole party with standing to prosecute a cause of action belonging to the bankruptcy estate.

Bankruptcy petitioners represented by counsel must take care to consult to assure that all possible assets are disclosed to the Trustee and the creditors. Even *pro se* petitioners have a duty to carefully schedule assets when filing for bankruptcy. See *Skinner v. Holgate*, 141 Wn. App. 840, 845, 173 P.3d 300 (2007).

It is well established that the debtor has a duty to prepare the bankruptcy schedules and statements “carefully, completely, and accurately” and bears the risk of nondisclosure. *In re Moberg*, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992). Oral disclosure of a claim to the bankruptcy trustee is not enough. *Id.* at 229, 108 P.3d 147. *Baldwin v. Silver*, 147 Wn. App. 531, 536-537, 196 P.3d 170 (2008). A debtor also has a duty prior to discharge 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) (emphasis added).

When the Trustee is unaware of an accrued right of action and, as a consequence, it is neither abandoned nor administered in the bankruptcy nor the subject of a court order, it remains the property of the Estate. See 11 U.S.C. § 554(d); *First Nat’l Bank v. Lasater*, 196 U.S. 115, 118-19, 25

S. Ct. 206, 207-08, 49 L. Ed. 408 (1905); 4 W. Collier, § 554.03, at 554-11, -12. Thus, a discharged debtor lacks legal capacity to subsequently assert title to and pursue an unscheduled claim simply because a trustee, without knowledge of the claim, took no action with respect to it. *First Nat'l Bank*, 196 U.S. at 119, 25 S. Ct. at 208.

Linklater v. Johnson, 53 Wn. App. 567, 570, 768 P.2d 1020, 1022 (1989).

Consequently, both federal and state courts apply judicial estoppel to bankruptcy debtors who fail to disclose potential legal claims as assets in their bankruptcy proceedings, and then later pursue those claims in a different court. *Arkison, supra* at 160 Wn.2d 539.

Here, in April 2010, plaintiff filed a chapter 7 bankruptcy petition, which he signed under penalty of perjury stating “the information contained in this Petition is true and correct.” [CR 112] Plaintiff’s supporting schedules to his bankruptcy petition failed to disclose his putative claims against the attorney defendants regarding the attorney defendants’ allegedly deficient performance of legal services to plaintiff as an asset in the bankruptcy [CP 234, 235 – (pp. 11-12 of 74, items 21, 35)]. On May 10, 2010, plaintiff filed Amended Personal Property Schedules re-listing his assets. Once again, he failed to list the putative malpractice claims as an asset [CP 284-285 – (pp. 3-4 of 17, items 21, 35)].

By the point when he finalized and filed his first Bankruptcy Schedules in April 2010, plaintiff was in possession of the entire universe of facts which he now argues as support for his causes of action in the complaint in this case. Plaintiff’s claims against the defendants here do not arise based on any facts which arose at any point after the termination of the defendant’s representation, which occurred at least 2 months prior to the

plaintiff's initial filing of his original Bankruptcy Petition. These same facts were fully known to the plaintiff when, after reflecting on his bankruptcy for an additional four months, he filed a sworn “amended” Asset Schedule.

C. Judicial Estoppel

The purpose of the doctrine of judicial estoppel is:

. . . to preserve respect for judicial proceedings without the necessity of resort to perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and . . . waste of time.

Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 226–27, 108 P.3d 147 (2005).

Judicial estoppel is invoked to “protect the integrity of the judicial process” by “preventing parties from playing fast and loose with the courts to suit the exigencies of self interest.” *Miller v. Campbell*, 137 Wn. App. 762, 771, 155 P.3d 154, 159 (2007).

1. The Factors Defined by the Washington Supreme Court in *Arkison v. Supporting Application of Judicial Estoppel in This Case*

Three “core factors” guide the trial court’s application of judicial estoppel; all factors are clearly satisfied by the undisputed facts of this case. Those factors are: (1) whether a party's later position is clearly inconsistent with the earlier position; (2) whether judicial acceptance of the later position would create the perception that the party misled either the first or second court; and (3) whether the party asserting the inconsistent position would obtain an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39,

160 P.3d 13 (2007); *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009).

a. ***Arkison* Factor 1 – Plaintiff’s Definitive Inconsistent Position**

With respect to the first factor, Washington law is clear that it is inconsistent to fail to disclose a potential legal claim in a bankruptcy proceeding and then, after obtaining a discharge, to attempt to pursue the suit. As the courts describe it, “the initial position asserted is complete nondisclosure of an asset to the bankruptcy court, and the ‘clearly inconsistent’ position is pursuing recovery of that asset in another court proceeding. *Harris v. Fortin*, 183 Wn. App. 522, 528, 333 P.3d 556, 559 (2014). *See, e.g., McFarling v. Evaniski*, 141 Wn. App. 400, 171 P.3d 497 (2007) (debtor who did not disclose personal injury claim in bankruptcy schedules was judicially estopped from later bringing claim); *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel imposed against debtor who failed to disclose potential claim to bankruptcy court, and then re-opened bankruptcy case); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) (applying judicial estoppel to bar debtor who did not disclose potential cause of action for personal injury in bankruptcy from bringing claim).

The existence of the first *Arkison* factor is indisputable in this case. Plaintiff’s lack of disclosure of potential claims and rights of action against the attorney defendants - in two separate sworn pre-discharge bankruptcy petitions filed in 2010 less than 6 months after the termination of his

ruptured relationship with the defendants involving the same prospective bankruptcy proceeding - is clearly inconsistent with his assertion of the claims concerning those disputes advanced four years later, in this litigation.

Further, “intent to mislead is not an element of judicial estoppel,” and “the debtor’s failure to satisfy its statutory disclosure duty is ‘inadvertent’ only when, in general, the debtor either lacks knowledge . . . or has no motive for their concealment.” *Cunningham*, 126 Wn. App. at 234.

Significantly, under the law, a debtor’s “lack of knowledge” is **not** the lack of information as to the possibility that the known facts might later be stated to allege a legal cause of action; the “lack of knowledge” relates only to the operative facts that ultimately form the basis for the cause of action.

A debtor’s belated recognition and dilatory “disclosure” of alleged possible contingent claims, after he has already sworn to the Bankruptcy court that he has no such claims, and after he obtained a discharge of his debts on that basis, is not a sufficient defense under Washington law to avoid judicial estoppel of those dilatory claims in state Superior Court.

Washington law applying judicial estoppel has adopted the rule that:

The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information ... prior to confirmation to suggest that it may have a possible cause of action, then that is a “known” cause of action such that it must be disclosed.

Miller v. Campbell, 137 Wn. App. 762, 771, 155 P.3d 154 (2007) (emphasis added).

This rises from consistent federal bankruptcy law:

The Defendant's knowledge of the claims, or its non-reliance on the nondisclosure, even if supported by the record, are irrelevant. . . . [U]nlike the well-known reliance element for other forms of estoppel, such as equitable estoppel, detrimental reliance by the party seeking *judicial estoppel* is *not* required. Again, the purpose of *judicial estoppel* is *not* to protect the litigants; it is to protect the integrity of the judicial system.

Accordingly, the inconsistent positions prong for judicial estoppel is satisfied. By omitting the claims from its schedules and stipulation, [Debtor] represented that none existed. Likewise, in scheduling its debt . . . [Debtor] did *not* specify that it was disputed, contingent, or subject to setoff.

In re Coastal Plains, Inc., 179 F.3d 197, 210 (5th Cir. 1999).

Plaintiff's own complaint in this action expressly confirms that plaintiff was fully aware and on notice of the entire collection of facts which his lawyer now says support the formation of the causes of action alleged in the complaint as of the point in time the defendants' representative relationship with the plaintiff terminated in early 2010. [CP 3-4, ¶¶ 2.6-2.8, CP 7-11, ¶¶ 5.1-5.13]. At the time that plaintiff was filing his multiple sworn filings in the bankruptcy court only months after his relationship with the defendants had ended, plaintiff was under no legal disability, and in fact, was conducting himself volitionally and with the assistance of counsel. [CP 112]

b. *Arkison* Factor No. 2 – Judicial Recognition of Plaintiff's Position That He Changed His Bankruptcy Schedules After Discharge Only After Learning He Might Recover Payments From a Claim Against the Defendants Lead to a Perception That Plaintiff Misled the Bankruptcy Court in Obtaining His Discharge

Significantly, and more to the point, the second *Arkison* factor is satisfied and bars post-discharge legal claims even when the specific legal grounds for such claims are not definitively known at the time of filing of the

bankruptcy schedules. “The Bankruptcy Code and court rules ‘impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.’” *Cunningham*, 126 Wn. App. at 230–31 (quoting *In re Costal Plains, Inc.*, 179 F.3d 197, 207-208 (5th Cir. 1999)). As such, “[p]ossible causes of action should be listed, even if the likelihood of success is unknown.” *Cunningham*, 126 Wn. App. at 231.

Here, despite the contentious rupture of his relationship with The Spencer Law Firm, the plaintiff did not disclose to his creditors any potential claims against the firm rising from their legal services in his either of his two bankruptcy Asset Schedules, each filed no more than six months after the termination of the defendants’ services. The Bankruptcy Court accepted plaintiff’s sworn representations and thereafter granted him a discharge of all his debts in bankruptcy on that basis.

“A bankruptcy court is deemed to have ‘accepted’ a litigant’s inconsistent position when that court discharges the debtor’s debt without knowledge of the cause of action.” *Baldwin v. Silver*, 147 Wn. App. 531, 537, 196 P.3d 170 (2008). The Bankruptcy court entered an Order of Discharge for the plaintiff here on July 27, 2010 [CR 299]. The consequences of plaintiff’s failure to disclose potential claims against the defendants were accrued at the time he obtained his Chapter 7 bankruptcy discharge in 2010.

As recently determined in the case of *Harris v. Fortin*, 183 Wn. App. 522, 333 P.3d 556 (2014), the bankruptcy court’s “accepts” plaintiff’s non-disclosure in his original bankruptcy filings when the debtor obtains its discharge. Allowing the later prosecution of a claim not disclosed in the

bankruptcy petition gives rise to an improper perception that the debtor misled the bankruptcy court:

Because [plaintiff's] bankruptcy was closed as a no asset case, the bankruptcy court implicitly accepted Harris's position as asserted throughout the bankruptcy proceeding. *See Cunningham*, 126 Wash.App. at 231, 108 P.3d 147. [Plaintiff's] inconsistent position created a perception that misled the bankruptcy court. Thus, the second [*Arkison*] core factor is satisfied.

Id., 183 Wn. App. at 530.

Plaintiff's briefing on the Motion for Summary judgment in this case clearly acknowledged that he had no intent to file any claim against the defendants based on their representation, until after he had received discharge of his debts and until after he was informed that he might personally recover monies outside the bankruptcy. Indeed, this fact was the subject of discussion and Judge Culpepper found it to be persuasive as a basis for his exercise of discretion. [CR 408-411, RP 23-26]

c. *Arkison* Factor No. 3 – The Plaintiff Gained an Advantage When the Bankruptcy Court Accepted His Statements and Granted Plaintiff's Discharge Years Before Plaintiff Disclosed Any Claim

The third *Arkison* factor is also satisfied here. That factor does not require proof that the plaintiff has acquired an advantage in the latter litigation; rather, this factor is satisfied when the debtor gains an advantage at the expense of his creditors by not disclosing assets and then receiving a discharge of his debts. *See McFarling*, 141 Wn. App. at 404 (plaintiff “gained a benefit at the expense of his creditors when he received a ‘no asset’ discharge of his debts”) (quoting *Cunningham*, 126 Wn. App. at 231, 233).

Judicial estoppel applies “if a litigant’s prior inconsistent position benefited the litigant *or* was accepted by the court.” *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 909, 28 P.3d 832 (2001). *Either* of these two results permits the application of judicial estoppel. *Both* are *not* required. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-231, 108 P.3d 147 (2005). A bankruptcy court is deemed to have “accepted” a litigant’s inconsistent position when that court discharges the debtor’s debt without knowledge of the pre-petition cause of action. *Baldwin v. Silver*, 147 Wn. App. 531, 537, 196 P.3d 170 (2008).

Plaintiff was fully aware of all the facts giving rise to the potential existence of legal claims against the Spencer defendants based on the legal services he had complained of, prior to the filing of his 2010 Bankruptcy Petition.

A federal court aptly summed the rationale for judicial estoppel:

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 [debtor'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. [Debtor], having obtained judicial relief on the representation that no claims existed, can not now resurrect them and obtain relief on the opposite basis.

In re Coastal Plains, Inc., 179 F.3d 197, 213 (5th Cir. 1999).

Allowing plaintiff to maintain these claims against the attorney defendants here and now based on the defendants’ allegedly unsatisfactory performance of legal services (the factual basis of which were completely

known to plaintiff prior to the plaintiff's initial filing of his original Bankruptcy petition in April 2010), patently supports an appearance that in 2010 plaintiff misled the bankruptcy court and his creditors.

Allowing plaintiff to maintain those claims now, for his own account, permits him now to obtain an unfair advantage over his creditors who moved on after plaintiff's 2010 discharge. *See Skinner v. Holgate*, 141 Wn. App. 840, 849-53, 173 P.3d 300 (2007).

Plaintiff asserts that the trial court erred in view of some language in the case of *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). The portion of the *New Hampshire* decision advanced is that a trial court should refuse to apply judicial estoppel where plaintiff's non-disclosure is argued as a "mistake or inadvertence." Plaintiff's argument is misplaced and unavailing. *New Hampshire* does not establish a rigid standard for application of judicial estoppel. Washington courts have recognized that *New Hampshire* actually stands for the proposition that a trial court is inherently vested with discretion and not required to abstain from applying judicial estoppel in every such case.

In *Skinner v. Holgate*, 141 Wn. App. 840, 850, 173 P.3d 300, 304 (2007), this court addressed *New Hampshire*. The court said:

[Plaintiff] took contrary positions in two different proceedings. The trial court relied on the entirety of the record when it balanced the equities in favor of applying the doctrine of judicial estoppel. Furthermore, despite Skinner's argument that the trial court should have addressed other factors cited in *New Hampshire*, that very case held that the trial court's inquiry is inherently discretionary and fact specific, and that in enumerating these factors, the court does not "establish inflexible prerequisites or an exhaustive

formula for determining the applicability of judicial estoppel.”
New Hampshire, 532 U.S. at 751, 121 S. Ct. 1808.

D. **Under Washington Law, the Re-Opening of a Debtor’s Bankruptcy for the Purpose of Belated Disclosure of a Contingent Claim Does Not Negate the Application of Judicial Estoppel by the Superior Court**

Plaintiff’s argument that because after he obtained a discharge based on his non-disclosure of the claims against the defendants in 2010, in 2012 his bankruptcy case was reopened, is of no moment. This issue was discussed at length in the motion pleadings and considered at oral argument by the trial court who appropriately recognized that it fails as a matter of fact and law.

This specific argument was also considered and rejected in the Washington *Cunningham* case. See *Cunningham*, 126 Wn. App. at 232-33 (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001)) (“The courts have made clear that the failure to schedule claims about which the debtor had knowledge ‘is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated.’”).

Washington law is clear that re-opening a bankruptcy in a belated effort to perfect a previously non-disclosed claim does not provide a plaintiff relief. In *Skinner v. Holgate*, *supra*, the Washington Supreme court applied the rule of judicial estoppel to dismiss a superior court complaint. The plaintiff/bankruptcy debtor had failed to disclose a contingent claim in his original bankruptcy filings and obtained a discharge. But then (as implied here) the plaintiff later cut a deal with the Bankruptcy trustee to reopen the bankruptcy in an attempt to allow the debtor to bring a separate legal action

against a third-party in state court. The *Skinner* court rejected that proposition out of hand. The court upheld the trial court dismissal of the plaintiff/debtor's superior court action despite the plaintiff's re-opening of his bankruptcy, after he had obtained a discharge based on sworn filings which failed to disclose the existence of the contingent claim.

The *Skinner* court observed that “[w]hen the bankruptcy court reopened [the plaintiff/debtor’s bankruptcy] case, it did not relieve the trial court of its authority to judicially estop [the plaintiff/debtor] from maintaining his suit.” *Skinner v. Holgate*, at 141 Wn. App. 851 (emphasis added).

Reopening of a bankruptcy after receiving a discharge does not negate the fact that the Bankruptcy court previously “accepted” his prior sworn statements which were inconsistent with the subsequent filing of an undisclosed claim, or negate the 3rd element of the *Arkison* rule. In his motion opposition papers plaintiff cited the case of *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005) for support. *Cunningham*, however, entirely disposes of plaintiff’s argument regarding the self-serving re-opening of his bankruptcy and supports Judge Culpepper’s application of judicial estoppel under the facts asserted by plaintiff here.

In *Cunningham*, the plaintiff/debtor specifically “contend[ed] that the re-opening of his bankruptcy case prior to the summary judgment motion in this case negated any benefit from his non-disclosure [and other arguments]. . . .” *Id.*, 126 Wn. App. at 230-31.

The *Cunningham* court rejected plaintiff's argument. The court said:

. . . None of these arguments is persuasive.

Judicial estoppel applies where the litigant's inconsistent position either "benefited the litigant *or* was accepted by the court. Either of these two results permits the application of judicial estoppel. Both are not required.

Id. (emphasis added).

In a Chapter 7 Bankruptcy such as plaintiff's:

[b]y not disclosing the asset, the debtor keeps an asset that may have created a dividend for the debtor's unsecured creditors. By closing the case as a "no asset" case, the court implicitly accepts the debtor's position, as stated in the debtor's bankruptcy schedules, that the liquidation of the debtor's nonexempt assets would not create a dividend for unsecured creditors.

Johnson v. Si-Cor Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001).

Plaintiff's evidence in his opposition pleadings to the trial court motion for summary judgment and in his brief on appeal here, state point-blank that the basis for his self-serving re-opening of his bankruptcy in 2012 was that his new lawyer informed him that based on the same facts he knew in 2010, that he might recover a personal "surplus". Filing a complaint in state court on this basis turns the federal law regarding the responsibilities of a bankruptcy debtor on its head and clearly operates to manipulate both the bankruptcy court and the superior court.

E. **Plaintiff Has No Legal Ownership Interest in the Claim; As Such His Claims for Personal Recovery of Damages Is an Overt Effort to Manipulate Both the Bankruptcy Court and the State Courts**

Beyond the issues of judicial estoppel, it is patently clear that once the plaintiff has disclosed a possible contingent claim in his bankruptcy Asset Schedule, he does not own it and thus he no longer has standing to pursue the claim; any such claim made in his name must be dismissed. Once part of the bankruptcy estate, the debtor's interest in the contingent claim "asset" would accrue to the bankruptcy estate. *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) ("When [plaintiff] declared bankruptcy, all the 'legal or equitable interests' he had in his property became the property of the bankruptcy estate and are represented by the bankruptcy trustee."); *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989).

Properties of the bankruptcy estate, including causes of action, which are not abandoned or administered during the bankruptcy, remain property of the estate even after the estate closes. *Bartley-Williams v. Kendall, M.D.*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). In *Bartley-Williams v. Kendall*, the court held that the claims of the debtor plaintiff were dismissed and also that the debtors/plaintiffs were barred from receiving any benefit of the suit. "If the trustee had been substituted as the plaintiff, the claim against [defendant] would have proceeded for the benefit of the creditors of the [debtors'] bankruptcy estate." *Id.*, 134 Wn. App. 95, 100, 138 P.2d 1103 (2006).

Despite this clear legal precedent, plaintiff and his counsel have continued to attempt to manipulate this court in pressing this claim as his own. Only the personal interests of the plaintiff in attempting to obtain a

personal recovery of a speculative “surplus” have led to his reopening of the bankruptcy. With counsel’s assistance, he comes to this court and demands relief to which he is clearly not legally entitled.

In *Cunningham v. Reliable Concrete Plumbing, supra*, 126 Wn. App. 222, 224-226, the court upheld the use of judicial estoppel against parties who brought a pre-petition claim which was not disclosed during the bankruptcy proceedings. In *Cunningham*, the bankruptcy was later re-opened by the trustee. However, the trustee did not move to substitute as the real party in interest, and the plaintiff’s claims were dismissed by the court. *Id.* at 126 Wn. App. at 226.

In *DeAtley v. Barnett*, 127 Wn. App. 478, 112 P.2d 540 (2005), the court similarly held that when bankruptcy petitioners failed to disclose a pre-petition asset consisting of a contractual right of first refusal and then received a bankruptcy discharge on the underlying contract obligation, the trial court acted properly in its exercise of discretion to apply judicial estoppel to dismiss the post-discharge state court claims by the bankrupt. *Id.*, 127 Wn. App. at 482-487. In *DeAtley*, similar to *Cunningham*, and as in the case here, the trustee had not moved to substitute as the real party in interest, and the court was found to have properly exercised its discretion in dismissing the plaintiff’s-debtor’s claims. *Id.*

Under Washington law when a debtor fails to list a legal claim in bankruptcy proceedings and the case is subsequently re-opened, “there is no debate” that debtor loses all interest in the claim. *Sprague v. Sysco Corp.* 97 Wn. App. 169, 172, 982 P.2d 1202 (1999).

F. **The Claims in This Case Have Consistently Been Maintained by the Plaintiff, Not the Plaintiff's Trustee and the Court Had the Discretion to Apply Judicial Estoppel to Dismiss the Plaintiff's Claims**

A glance at the record clearly indicates that both the plaintiff and the plaintiff's trustee were aware of the issue of the possible substitution of the trustee as plaintiff, even from the date of the original complaint. Notwithstanding, there was never any request to the court for such action at any time prior to the dismissal. The facts indicate at least one reason this has not occurred. This is seemingly because the plaintiff's counsel asserts, even on this appeal, that the plaintiff remains in a legal position to maintain his own claim for damages against the defendants. Were the trustee formally named as the party in interest here, it would incontrovertibly establish the fact of counsel's actual conflict of interest in representing the bankruptcy trustee against the interests of the debtor.

Thus, there is no motion in the record which has requested such a substitution. In opposition to the motion for summary judgment, the plaintiff presented a sworn declaration by the trustee. In that declaration, however, with ample opportunity to do so, the trustee fails to even address a request to be included as the real party in interest [CP 314-315].

In fact, completely contrary to the plaintiff's assertion here on appeal, at the hearing on summary judgment rather than to "refuse" to name the trustee as the "real party in interest," the court specifically considered and inquired of plaintiff's counsel regarding the trustee's status as a party. Plaintiff's counsel then specifically represented to the court that the trustee,

his client, declined to be named as a the party in interest to the suit. [CP 402, RP 17] The Reporter's verbatim transcript is definitive:

Defense Counsel - Mr. Roland:

“ . . . This is about whether under the rules the plaintiff's case should be dismissed, and if the bankruptcy trustee chooses to do something about this, then it's the bankruptcy trustee's issue. The bankruptcy trustee is not a party to this action. . . .”

Judge Culpepper:

“Actually that's a good point Mr. Bolin. The bankruptcy trustee is maybe interested but I don't know. In the *Arkison* case the trustee himself filed the claim. Here the bankruptcy trustee, maybe he's just an interested observer.”

Plaintiff/Plaintiff's trustee's Counsel - Mr. Bolin:

“She's told me she doesn't have any interest in the amendment of the complaint. She thinks the case can proceed as it is. And she's far more experienced in bankruptcy than any of the three of us as the trustee.”

[CP 402, RP 17] (emphasis added).

Washington law is clear that:

The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf. . . . [O]nce a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention. . . .”

Haller v. Wallis, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) .

Because the plaintiff has no standing on any claim after he files his bankruptcy, to accomplish a change to make the Trustee the real party in interest, it is necessary amend the pleadings to identify the parties. This is accomplished by a motion under CR 16. The plaintiff's (and the Trustee's)

counsel himself) specifically represented to the court that the trustee had “no interest” in accomplishing that. Plaintiff’s argument on appeal that the court improperly refused grant a substitution of the trustee is unavailing, if only for the reasons that there was no such motion before the court, and, plaintiff’s counsel represented to the court that the trustee did not request it.

G. The Trial Court’s Exercise of Discretion and Denial of Plaintiff/Appellant’s Motion for Reconsideration Was Entirely Appropriate

Following the entry of the order granting the defendant’s motion for summary judgment, the plaintiff filed a motion for reconsideration. The motion was reviewed by the trial court and denied. Plaintiff has indicated in its Notice of Appeal that it appeals the trial court denial of its motion for reconsideration.

The appellate court reviews a trial court’s determination of a motion to reconsider for a manifest abuse of discretion. “[D]iscretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 684-85, 41 P.3d 1175, 1180 (2002), citing *Associated Mtg. Invest. v. G.P. Kent Const. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, 562 (1976).

A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ only if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 821-22, 225 P.3d 280, 288 (2009). Further, a

decision is “manifestly unreasonable” only if the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take.” *Id.*

In this matter, plaintiff’s motion on reconsideration consisted merely of a set of re-worked declarations from the same deponents originally presented, solely designed to cure defects in his original filings after realizing deficiencies in his opposition noted at oral argument.

Judge Culpepper reviewed plaintiff’s “reconsideration” pleadings and obviously concluded that they failed to meet the standards required under the provisions of the Civil Rules. [CP 439] The court apparently considered all the materials filed by the plaintiff on the motion for reconsideration, including what are clearly seen as improper, inconsistent, “additional” declarations of the plaintiff and his Trustee and a declaration of plaintiff’s bankruptcy attorney which merely re-addressed the same arguments first submitted by the defendant in the original motion.

These materials presented in plaintiff’s motion for reconsideration were nothing more than enhanced versions of the same materials presented by the plaintiff in opposition to the original motion, which the trial court heard and in its discretion, declined to accept. These second declarations did not present any new evidence that was not available at the time the original declarations had been filed 3 weeks earlier, prior to the motion hearing.

1. **Evidence That Was Available to a Party Opposing a Motion for Summary Judgment But Not Offered Until a Motion for Reconsideration Is Not “New Evidence” and Will Not Be Considered With Respect to the Reconsideration**

A motion for reconsideration may only use the evidence in the prior record before the court or on “[n]ewly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.” CR 59(a)(4).

“Both a trial and a summary judgment hearing afford the parties ample opportunity to present evidence. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence. *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31 (1991); *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

Plaintiff initially flouted the judicial process in filing this lawsuit after having failed on multiple occasions to disclose the potential existence of the claims against these defendants to the Bankruptcy Court, and then again, in filing additional pleadings in opposition to the motion for summary judgment after the pleadings allowed by the Superior Court Civil Rules were closed. Plaintiff again flagrantly violated the process and the Court Rules in his motion for reconsideration in filing second declarations of the same persons whose declarations were relied upon in the plaintiff’s opposition to the original motion for summary judgment which contained information entirely available to the plaintiff prior to the motion for summary judgment.

2. **The Contents of the Declarations of the Plaintiff, Plaintiff's Trustee and Plaintiff's Bankruptcy Counsel Filed by Plaintiff in Its Motion for Reconsideration Was Not "Newly Discovered" Evidence As Required Under CR 59 and Failed to Validly Support the Request for Reconsideration**

The rule precluding a party who is unsuccessful on summary judgment to attempt a "second try" after the pleadings are closed and hearing is concluded, was succinctly stated in *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999). The court said: "The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence."

It is apparent that in considering the motion for reconsideration, the trial court recognized the obvious; that at the time of the original motion plaintiff and his counsel were patently aware of, and had full access to all of the facts alleged in plaintiff's second declaration in this matter that was filed in support of his motion to "reconsider."

It is abundantly clear that any testimonial statements by the plaintiff or the trustee contained in the second declarations filed with respect to reconsideration, both of whom were and are represented by the same counsel, were, through any miniscule effort at due diligence, entirely available to the plaintiff before filing its opposition pleadings and before the hearing of the underlying motion and the entry of the summary judgment. Indeed, the indisputable facts are that plaintiff had from the end of August 2014 when the motion was filed until almost 8 weeks later on the Monday before the motion hearing on the Friday of the final week of October, to present his evidence in opposition to defendant's summary judgment motion. In fact,

plaintiff was filing “supplemental” pleadings literally up to the day prior to the hearing.

Clearly, at the time of the original motion plaintiff and his counsel were absolutely aware of, and had full access to all of the facts alleged in plaintiff’s second declaration filed in support of his Motion to “reconsider.”

Plaintiff did not even make an effort on reconsideration to argue that any of the information contained in the second declarations of plaintiff and the trustee were presented as “previously unavailable” as required by CR 59. These second declarations were merely an obvious effort to attempt to repair the defects in plaintiff’s case that were previously noted by defendants and the court in the motion reply and at oral argument.

The trial court acted with inherent, obvious, reason, and, was entirely within its discretion to conclude that the contents of those second declarations which addressed the same issues by the same declarants were unavailing on reconsideration in accordance with the legal standards for such motions.

VI. CONCLUSION

The trial court reviewed and considered all materials filed by the plaintiff in opposing the defendants’ motion for summary judgment. Additionally, it heard extensive oral argument from the plaintiff. Based on the record before it, the trial court acted entirely properly and reasonably in the exercise of its discretion in concluding that application of the rule of judicial estoppel was correct in this case, on this record.

Under the law, the plaintiff has no ownership interests in any claim against these defendants, and the court was correct in dismissing the plaintiff's complaint. There was never any motion before the trial court relating to any request by the plaintiff's bankruptcy trustee to displace the plaintiff, and amend the complaint to substitute as the real party in interest. In fact, at oral argument the plaintiff's counsel, who also represents the trustee, represented to the court that after "extensive consultation" with him, the trustee did not wish to request any amendment.

On reconsideration, the court considered plaintiff's arguments again and again reviewed materials submitted by the plaintiff. Again, the court properly exercised its discretion and denied the plaintiff's motion, upholding its prior ruling granting the defendants summary judgment against plaintiff.

Defendants respectfully request that this Court dismiss Plaintiff's appeal.

DATED this 10th day of June, 2015.

FORSBERG & UMLAUF, P.S.

By: 
Richard R. Roland, WSBA #18588
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENTS' OPPOSITION TO APPELLANT'S OPENING BRIEF on the following individuals in the manner indicated:

Eugene N. Bolin, Jr., Esq.
Law Offices of Eugene N. Bolin, Jr.
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Facsimile: 888-527-2710
 Via Electronic Mail – Per Email Service Agreement
 Via Hand Delivery

SIGNED this 10th day of June, 2015, at Seattle, Washington.


Elizabeth S. Sado

FORSBERG AND UMLAUF PS

June 10, 2015 - 12:05 PM

Transmittal Letter

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Sender Name: Elizabeth S Sado - Email: esado@forsberg-umlauf.com

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