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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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and 322769-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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KIMBERLY J. HUSTED,

Plaintiff,

WILLIAM LOHMAN,

Appellant,

v.

MELCHER MANUFACTURING, INC., a Washington corporation;  
NEWESCO, INC. d/b/a NELSON-WESTERBERG, INC., an Illinois  
corporation, and DOES 1-10

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The Superior Court (also the “trial court”) based its dismissal of Appellant William Lohman (“Appellant” or “Mr. Lohman”) on the doctrine of judicial estoppel. The trial court’s October 11, 2013 Order and its oral comments at hearing make clear that judicial estoppel was the crux of its ruling dismissing Mr. Lohman with prejudice and substituting bankruptcy trustee Kimberly Husted as Plaintiff.

Application of judicial estoppel is not appropriate, however, where a plaintiff fails to disclose a pre-petition claim in bankruptcy due to mistake or inadvertence. Mr. Lohman supplied evidence that he made such a mistake because he did not understand he had a third party claim. The trial court acknowledged the likelihood of Mr. Lohman’s mistake, but erroneously proceeded to apply judicial estoppel and dismiss Mr. Lohman from the case anyway. That decision constitutes reversible error.

Despite the trial court’s clear—and improper—reliance on judicial estoppel, respondents give short shrift to this ruling and the *Ah Quin* opinion, which places important parameters on the doctrine’s application. Indeed, Respondent Melcher Manufacturing, Inc. (“Melcher”) ignores *Ah Quin* altogether, and Respondent Newesco, Inc. (“Newesco”) devotes only one brief paragraph to it. *Ah Quin* is on point

and provides authority for reversal. This Court should reverse the trial court's ruling and reinstate Mr. Lohman as plaintiff.

## II. FACTS

All parties have already provided statements of the case, and Mr. Lohman will not repeat those here. Several facts, however, are particularly relevant to respondents' arguments and bear emphasis. In particular, both respondents ask this Court to affirm the trial court's ruling on alternative grounds besides judicial estoppel. The trial court, however, grounded its ruling in the doctrine of judicial estoppel, and the alternative grounds respondents advocate afford no basis for affirmance. The following facts are especially pertinent to the central issue of judicial estoppel.

When he filed his bankruptcy schedules, Mr. Lohman disclosed a workers' compensation claim stemming from his pre-petition injuries. CP 96. His schedules did not, however, list any separate claim against Melcher and Newesco. *See* CP 96. Mr. Lohman has consistently explained that he did not disclose the latter because he did not understand he had a third party claim in addition to his workers' compensation claim. CP 143; *see also* RP 14:22-15:15, 18:7-23, 19:4-

15, 21:3-18, 104:14-19.<sup>1</sup> Indeed, Mr. Lohman filed an affidavit stating he believed, at the time of making his bankruptcy disclosures, that the workers' compensation claim was the only claim he had relating to his injuries. CP 143. Mr. Lohman did not file his Complaint against Melcher and Newesco until September 10, 2012, well after filing his bankruptcy petition (November 30, 2011) and personal property schedule (December 12, 2011). CP 1, 51, 96.

The claims against Newesco and Melcher were subsequently disclosed to the original bankruptcy trustee, Mr. Lewis Partridge, early in this litigation. CP 270-71; *see also* RP 21:3-18. Mr. Lohman then successfully sought re-opening of the bankruptcy matter, after which the current trustee, Ms. Husted, was appointed. CP 270-71, 322-23; RP 62:22-25.

After hearing argument on judicial estoppel on May 17, 2013, the trial court acknowledged the likelihood that Mr. Lohman had not intentionally deceived the bankruptcy court, and allowed that Mr. Lohman may not have known he had both a workers' compensation claim and a third party claim against Melcher and Newesco. RP 30:9-32:3, 35:5-9. The trial court then stated it did not wish to invoke judicial

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<sup>1</sup> In references to the Verbatim Report of Proceedings (RP), the numbers following the colon refer to line numbers on the page.

estoppel to dismiss Mr. Lohman's claim where Mr. Lohman may have made a mistake. RP 31:25-32:3, 34:25-35:9.

The trial court ultimately continued the hearing on Defendants' motions five times, during which time Mr. Lohman requested re-opening of the bankruptcy matter and the current bankruptcy trustee was appointed. CP 270-71, 322-28, RP 62:22-25.

On October 11, 2013, the trial court entered an Order dismissing Mr. Lohman from the case with prejudice and substituting the new bankruptcy trustee, Ms. Husted, as plaintiff. CP 365-66. The trial court's Order specifically stated its dismissal and substitution was "[b]ased upon the above findings and applying the doctrines of judicial estoppel and the real party in interest". CP 365 (emphasis added). Despite its reference to the real party in interest rule in the Order, the trial court clarified orally that "real party in interest is a subset of judicial estoppel in this particular case because of the bankruptcy issue." RP 107:8-10 (emphasis added). The trial court emphasized that it added this language because it meant to base its ruling on a particular legal theory and wanted to make the theory explicit in the Order. RP 105:1-9, 106:20-25. Specifically, the trial court said:

...the second objection, ...about some language that the legal reason for this is the doctrine of judicial estoppel is very well taken. That should be in here because that is why I made the finding that I did. Mr. Lohman was judicially estopped from

pursuing this claim based on some significant case law from the State of Washington with regard to judicial estoppel. That should be placed in here.

RP 105:1-9 (emphasis and ellipses added).

The trial court also made a finding that the bankruptcy trustee, not Mr. Lohman, owned the claim against Newesco and Melcher. CP 365. The trial court made clear that it was “not basing [its] decision on any finding that the bankruptcy court is making, but on the representations to me.” RP 104:1-3.

The bankruptcy court made no written finding about whether the trustee owned the claim. CP 468. The bankruptcy court’s minute order did not make written findings of fact or conclusions of law, instead referring to the oral record, which is not part of the record here. CP 468. Moreover, even the trustee does not state it owns Mr. Lohman’s claim. Nowhere in its voluminous bankruptcy pleadings does the trustee makes the statement in that it owned the claim against Newesco and Melcher. *See* CP 379-468. The trustee also concedes that, for various reasons, it declined to prosecute the claim, opting instead for a quick settlement. CP 448, 452-56.

The trial court based its dismissal of Mr. Lohman and substitution of the trustee on judicial estoppel. Its ruling places the propriety of applying that doctrine squarely at issue here.

### III. ARGUMENT

#### A. **The Trial Court’s Application of Judicial Estoppel to Dismiss Mr. Lohman with Prejudice and Substitute the Bankruptcy Trustee as Plaintiff Constitutes Abuse of Discretion and Warrants Reversal.**

##### 1. **Where a Party Provides Evidence He Failed to Disclose His Claim Due to Mistake or Inadvertence, a Court Should Not Presume Intent to Deceive and Should Not Apply Judicial Estoppel.**

A court should not apply judicial estoppel where a plaintiff failed to disclose a claim in bankruptcy due to mistake or inadvertence.

“Judicial estoppel is a discretionary doctrine, applied on a case-by-case basis.” *Ah Quin v. County of Kauai Department of Transportation*, 733 F.3d 267, 271 (9<sup>th</sup> Cir. 2013) (citing *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S. Ct. 1808 (2001)), and refusing to “establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel”).<sup>2</sup> “ [I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *Ah Quin*, 733 F.3d at 271 (quoting *New Hampshire*, 532 U.S. at 749-50 (emphasis added; citation and internal quotation marks omitted)).

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<sup>2</sup> The parties have cited various authorities in their arguments about the proper standard of review. Appellant acknowledges that *Ah Quin*, as well as the Washington authorities cited by Respondent Newesco, appear to establish abuse of discretion as the proper standard for review of a ruling applying judicial estoppel. As argued in Appellant’s opening brief, however, the trial court’s decision constitutes error under either this standard or the *de novo* standard.

Relying on a U.S. Supreme Court ruling, the Ninth Circuit found that “ ‘it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake.’” *Ah Quin*, 733 F.3d at 271 (quoting *New Hampshire*, 532 U.S. at 753 (internal quotation marks omitted)). The Ninth Circuit explained that “[a] court is not ‘bound’ to apply judicial estoppel, particularly when ‘a party's prior position was based on inadvertence or mistake.’” *Ah Quin*, 733 F.3d at 272 (quoting *New Hampshire*, 532 U.S. at 753) (internal quotation marks omitted). Indeed, the Ninth Circuit ruled that a court must consider mistake or inadvertence in deciding whether to apply judicial estoppel.

In determining whether to apply judicial estoppel, the district court must consider all factors--including inadvertence or mistake. Nothing in *Hamilton* forecloses the possibility that a court could conclude that, whereas an intentional omission (as in *Hamilton*) would result in an *unfair* advantage, an inadvertent or mistaken omission might *not* be unfair.

*Ah Quin*, 733 F.3d at 275 (fn.6) (emphasis in original). The *Ah Quin* Court reasoned that if a plaintiff mistakenly failed to disclose a claim in bankruptcy, the reasons for applying judicial estoppel, such as preventing the plaintiff from gaining an unfair advantage or protecting creditors from harm, may no longer exist. *Ah Quin*, 733 F.3d at 273-76.

Where a party's mistake or inadvertence is at issue, the Ninth Circuit does not presume the party intended to deceive the court. Rather, it evaluates the party's claimed mistake using a subjective standard.

...rather than applying a *presumption* of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset--though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules.

*Ah Quin*, 733 F.3d at 276-77 (emphasis in original).

In *Ah Quin*, the plaintiff filed an affidavit in which she explained the inadvertence of her failure to disclose her claim in bankruptcy. She swore "she did not think that she had to disclose her pending lawsuit because the bankruptcy schedules were 'vague.'" *Ah Quin*, 733 F.3d at 277.<sup>3</sup> The plaintiff in *Ah Quin* also did not move to re-open the bankruptcy until the defendant raised the issue of judicial estoppel. *Ah Quin*, 733 F.3d at 278. In considering these facts, the Ninth Circuit found that, "viewing the evidence in the light most favorable to Plaintiff, and thus crediting her affidavit,...her bankruptcy filing was inadvertent."

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<sup>3</sup> Cf. *Dzakula v. McHugh*, 746 F.3d 399 (9<sup>th</sup> Cir. 2014) (affirming dismissal of action based on judicial estoppel where "no evidence suggested that Plaintiff's original omission had been inadvertent or mistaken" and where "[p]laintiff presented no evidence, by affidavit or otherwise, explaining her initial failure to include the action on her bankruptcy schedules"). *Dzakula*, 746 F.3d at 400-01.

*Ah Quin*, 733 F.3d at 278 (citation omitted). At the same time, the Court found it could not make an ultimate determination about whether the plaintiff's failure to disclose the claim was due to inadvertence or mistake—a finding which would likely include holding deciding whether plaintiff's affidavit was “a sham” contradicted by the record. *Ah Quin*, 733 F.3d at 278-79. The Court then ruled that the lower court had applied the wrong legal standard in determining mistake or inadvertence by using a narrow interpretation of those terms and remanded the case “for application of the correct legal standard.” *Ah Quin*, 733 F.3d at 279.

**2. The Trial Court Erred By Applying Judicial Estoppel Where Mr. Lohman Provided Evidence That His Failure to Disclose His Claim Was Due to Mistake or Inadvertence.**

The same facts that precluded judicial estoppel in *Ah Quin* are present here to an even greater degree. In his original petition, Mr. Lohman listed his workers' compensation claim, believing at the time he had no other recourse to recover damages for his injuries. CP 96, 143. As if to underscore his ignorance of his claims against Melcher and Newesco at this time, Mr. Lohman did not file his action against them until September 10, 2012—ten months after filing his bankruptcy petition (November 30, 2011), nine months after filing his personal property schedule (December 12, 2011), and within days of the statute of limitations. CP 1, 51, 96.

Shortly after filing his action against Melcher and Newesco, Mr. Lohman provided the trial court with an affidavit demonstrating that when he filed for bankruptcy, he misunderstood the nature of his claim and believed at that time he had no claim for his injuries except his workers' compensation claim. CP 143. Mr. Lohman has, both by his own affidavit and through the representations of his counsel, consistently maintained that this misunderstanding was the reason he disclosed only the workers' compensation claim to the bankruptcy court. CP143; *see also* RP 14:22-15:15, 18:7-23, 19:4-15, 21:3-18, 104:14-19.

Mr. Lohman also notified the original trustee early on of the action against Newesco and Melcher. CP 270-71. Though the trustee had no desire to re-open the bankruptcy, Mr. Lohman eventually, and successfully, sought to re-open the bankruptcy at the direction of the trial court. CP 270-71, 322-23, RP 62:22-25; *see also* RP 21:3-18.

Mr. Lohman's affidavit explaining his error, his notification to the bankruptcy trustee of the action against Melcher and Newesco after it was filed, and his petition to re-open the bankruptcy matter are substantially the same circumstances that led the *Ah Quin* court to find sufficient evidence of a mistake to remand the case to the lower court. Moreover, the trial court in this case acknowledged in the initial May 17, 2013 hearing that Mr. Lohman may well have had held a mistaken belief

about his claim and did not intend to deceive anyone. RP 30:9-32:3, 35:5-9. Despite this finding, the trial court applied judicial estoppel, even though it initially said it was not prepared to do that. CP 365, RP 107:8-10; *cf.* RP 31:25-32:3, 34:25-35:9. The trial court had it right the first time: It should have followed its initial instinct and declined to apply judicial estoppel. Doing so was an abuse of the discretion courts have to apply judicial estoppel. If the trial court believed Mr. Lohman failed to disclose his claim because of a mistake, or even that an issue existed as to whether he did, it should have followed *Ah Quin* and declined to apply judicial estoppel.

**3. *Ah Quin* Should Control as the Only Cited Authority to Address a Mistaken Bankruptcy Disclosure.**

Contrary to Respondent Newesco's contention, *Ah Quin* is quite relevant to this case. As explained above, it contains substantially similar facts, and it provides strong guidance on how to treat a party who has produced evidence that he made mistaken bankruptcy disclosures. *Ah Quin* is the only authority cited by any party to squarely address such a situation.

Respondents fail to address the rule established in *Ah Quin*. Melcher ignores *Ah Quin* altogether, and Newesco incorrectly claims it is "inapposite", "inapplicable", "applies to narrow circumstances not applicable here", "does not change the standard to be applied in typical

judicial estoppel cases such as this one,” and that “[n]either the factual scenario nor the policy considerations of *Ah Quin* apply here.”<sup>4</sup> The explanation *supra* demonstrates otherwise, detailing the factual similarities of the two cases. Moreover, in their arguments on judicial estoppel, respondents rely heavily, and in Newesco’s case exclusively, on *Hamilton v. State Farm Fire & Casualty Co.*, 270 F.3d 778 (9<sup>th</sup> Cir. 2001), a 13-year-old case which *Ah Quin* takes pains to distinguish. As the *Ah Quin* Court states, “In *Hamilton*, we were not presented with an opportunity to address inadvertence or mistake.” *Ah Quin*, 733 F.3d at 272 (fn.2). The Court elaborated, explaining that *Hamilton* concerned an intentional omission rather than a mistaken or inadvertent one, which meant the *Hamilton* Court never addressed the proper application of judicial estoppel in the case of a mistake.

In determining whether to apply judicial estoppel, the district court must consider all factors—including inadvertence or mistake. Nothing in *Hamilton* forecloses the possibility that a court could conclude that, whereas an intentional omission (as in *Hamilton*) would result in an *unfair* advantage, an inadvertent or mistaken omission might *not* be unfair. Similarly, nothing in *Hamilton* forecloses the possibility that a court could reach a different conclusion about the effect of the bankruptcy court's *initial* acceptance of the plaintiff-debtor's position. Indeed, we held in *Hamilton* that the initial "discharge of debt by a bankruptcy court, *under these circumstances*, is sufficient acceptance to provide a basis for judicial estoppel." 270 F.3d at 784 (emphasis added). If the circumstances are materially

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<sup>4</sup> Reply Brief of Defendant/Respondent Newesco, Inc. d/b/a/ Nelson-Westerberg, Inc. (“Newesco Brief”), p.16.

different (*i.e.*, where the plaintiff-debtor's omission was inadvertent or mistaken, instead of intentional), *Hamilton* does not foreclose a different result.

*Ah Quin*, 733 F.3d at 275 (fn.6). *Hamilton* is not on point here. *Ah Quin* is.

On top of failing to deal with *Ah Quin*, Respondents fail to cite any authority, Washington or otherwise, applying judicial estoppel in a case of mistaken disclosure by a bankruptcy debtor. Though *Ah Quin* is a federal case and does not specifically interpret Washington law,<sup>5</sup> it provides a rule that warrants declining to apply judicial estoppel in a case like this one. The trial court failed to heed that rule despite acknowledging the likelihood that Mr. Lohman did not intend to deceive the bankruptcy court. While *Ah Quin* may not be a Washington case, it establishes a sensible rule for a situation—namely, mistake or inadvertence by a debtor—Washington has apparently not addressed. Even if not strictly binding, this Court should follow the rule, and Appellant advances *Ah Quin* in a good faith argument for Washington to adopt its rule. Under that rule, the trial court's failure to properly apply judicial estoppel warrants reversal.

**B. Respondents' Remaining Arguments Fail to Provide Alternative Grounds for Affirmance of the Trial Court's Ruling.**

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<sup>5</sup> Newesco points this out, but fails to provide any authority, Washington or otherwise, that addresses judicial estoppel where a bankruptcy debtor has mistakenly failed to disclose a claim. Newesco Brief, p.16.

Respondents offer several argument they claim provide alternative grounds for affirming the trial court’s decision. They do not. Mr. Lohman addresses each in turn.<sup>6</sup>

**1. The Real Party in Interest Rule Does Not Provide an Independent Ground for Affirming the Trial Court.**

Citing CR 17(a) and a string of generic authorities that address ownership of pre-petition claims by bankruptcy estates and substitution of bankruptcy trustees as plaintiffs, Newesco contends this Court can affirm the trial court based on the notion that Mr. Lohman is not the real party in interest.<sup>7</sup> This argument is incorrect for several reasons. First, Newesco’s authorities do not address cases where an issue existed as to whether the bankruptcy debtor failed to disclose a claim because of mistake or inadvertence. In *Bartley-Williams v. Kendall*,<sup>8</sup> for instance,

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<sup>6</sup> One such argument that merits no attention is Melcher’s recitation of its summary judgment motion challenging the substance of Mr. Lohman’s claims against Melcher. See Brief of Respondent Melcher Manufacturing, Inc. (“Melcher Brief”), Argument section E, pp.15-19. This argument is merely a recitation of issues extensively briefed by both Mr. Lohman, Melcher, and Newesco. See CP 38-223, 228-286, 300-315, 318-347. The trial court never ruled on these issues, and they are not at issue on appeal. See, e.g., CP 365-366, 555-556; RP 32:17-33:13, 44:8-23, 45:14-17, 81:4-10, 98:25-99:10. Melcher’s claim that “[t]here were adequate grounds established by the pleadings and supported by the record before the trial court to dismiss the matter on the merits” is entirely speculative. Melcher Brief, p.15. Moreover, given the several briefs and affidavits Appellant filed in opposition to Melcher’s motion, Appellant strongly disagrees with Melcher that the trial court would have ruled in respondents’ favor. See CP 142-145, 160-174, 228-276, 318-331.

<sup>7</sup> Melcher also cites generic authority about a bankruptcy estate’s ownership of a claim, but does not seem to argue the real party in interest rule constitutes an independent ground for affirmance. Like Newesco, Melcher fails to cite authority addressing cases, like this one, where a debtor’s failure to initially disclose a claim was due to a mistake.

<sup>8</sup> 134 Wn. App. 95 (2006).

the plaintiff filed suit even before they filed their bankruptcy petition and then omitted the suit from their bankruptcy schedules even though the suit was already pending.<sup>9</sup> In *Cunningham v. Reliable Concrete Pumping, Inc.*,<sup>10</sup> although the plaintiff brought his suit after discharge of his debts in bankruptcy, he had brought a counterclaim for his injuries against the defendant years earlier, thus demonstrating his knowledge of the claim—which he failed to disclose in his bankruptcy schedules.<sup>11</sup> And in *Linklater v. Johnson*<sup>12</sup> and *Sprague v. Sysco Corp.*,<sup>13</sup> there was no discussion of possible mistake nor, apparently, any evidence to that effect proffered by the plaintiff. *Ah Quin* is the only case that addresses a situation involving mistaken or inadvertent non-disclosure.

Second, the trial court explicitly based its to justify its dismissal of Mr. Lohman and substitution of the trustee as plaintiff on judicial estoppel. CP 365, RP 107:8-10. The trial court specifically stated at the October 11 presentment hearing that judicial estoppel was the ground for its ruling and that the real party in interest rule was “a subset of judicial estoppel in this particular case” because of the bankruptcy situation. RP 107:8-10. The trial court thus used judicial estoppel as the basis its conclusion that the trustee was the real party in interest. It found Mr.

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<sup>9</sup> *Bartley-Williams*, 134 Wn. App. at 97.

<sup>10</sup> 126 Wn. App. 222 (2005).

<sup>11</sup> *Cunningham*, 126 Wn. App. at 225-26.

<sup>12</sup> 53 Wn. App. 567 (1989).

Lohman failed to disclose his claim against Melcher and Newesco and was, for that reason, precluded from proceeding as the real party in interest. CP 365-66; *see also* RP 104:20-105:9, 107:7-13. But the trial court did so incorrectly: It applied judicial estoppel where the debtor, Mr. Lohman, had failed to disclose a claim mistakenly—not deceitfully.

Third, the trial court’s ultimate finding that the bankruptcy estate owned the claim was not based on any ruling by the bankruptcy court or any affidavit of the trustee. RP 104:1-3. There is no evidence the bankruptcy court made any written ruling that the bankruptcy estate owned the claim. Nor is there any affidavit or testimony from the trustee stating that it evaluated the claim and determined it to be the property of the bankruptcy estate. *See* CP 379-468. Indeed, the trustee concedes it decided not to prosecute the claim and opted for a quick settlement, apparently without first declaring ownership of the claim. CP 448, 452-56. The trial court made a ruling on this issue on its own, without the evidence, based only on the “representations” made to it. RP 104:1-3.<sup>14</sup> Even if the real party in interest rule provided an alternate ground for

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<sup>13</sup> 97 Wn. App. 169 (1999).

<sup>14</sup> Melcher’s argument to the contrary is without merit. Melcher claims the bankruptcy court ruled Mr. Lohman’s claim an asset of the bankruptcy estate and the trial court accepted that ruling. Melcher Brief, p. 8. In reality, the trial court made the ruling first, no later than October 11, 2013, using language in an order drafted by Melcher’s counsel. CP 365-66. Moreover, the trial court stated on the record that it was not basing this decision on the ruling of any other court. RP 104:1-3.

affirmance, the trial court lacked substantial evidence to find that the bankruptcy trustee owned the claim.

The real party in interest rule provides no independent ground for affirmance. The trial court did not have affidavits or testimony from the trustee, nor any written ruling from the bankruptcy court, declaring Mr. Lohman's claim to be the trustee's property. Moreover, the trial court declared judicial estoppel to be the ultimate ground upon which it based its substitution of plaintiffs. Because Mr. Lohman's failure was due to a mistake and was not intentional, the trial court's application of judicial estoppel was erroneous and should be reversed.

**2. Collateral Estoppel Does Not Preclude Mr. Lohman from Pursuing His Claim.**

Both Newesco and Melcher argue collateral estoppel warrants affirmance of the trial court. Collateral estoppel does not apply here for three reasons. First, as Newesco concedes, collateral estoppel applies to "two actions which involve the same issue...pending between the same parties." Restatement (Second) of Judgments § 27, cmt.1 (1980) (quoted in Newesco Brief at pp.17-18; emphasis added). Newesco then observes that Newesco and Melcher were not parties to the bankruptcy action, which Newesco relies upon as establishing collateral estoppel here. Newesco Brief, p.18. Likewise, the bankruptcy trustee was never a party to the Spokane County Superior Court action. The bankruptcy matter

and this action were not between the same parties. Collateral estoppel does not apply.

Second, as Newesco observes, where collateral estoppel applies, the first final judgment is the one that becomes conclusive. The trial court dismissed Mr. Lohman with prejudice on October 11, 2013. CP 365-66. Mr. Lohman timely appealed that October 11 Order, and this Court found the Order final as to Mr. Lohman and appealable as a matter of right by written ruling dated January 24, 2014. The bankruptcy court did not approve the settlement by written minute order until December 10, 2013, two months after the trial court dismissed Mr. Lohman with prejudice. CP 468. Moreover, the bankruptcy court's minute order did not make written findings of fact or conclusions of law and instead referred to the oral record, which Respondents have not provided in this appeal. CP 468. Even if collateral estoppel applies, therefore, the trial court's dismissal of Mr. Lohman on October 11 was the first final judgment entered on that issue and the only one that includes written findings and conclusions that are part of the record.

Third, the bankruptcy court never made a ruling on who owns the claim. It only approved the settlement. While that decision could imply that the bankruptcy trustee owns the claim, respondents provide no document proving the bankruptcy court made any ruling to that effect. If

the bankruptcy court made its own ruling, respondents have failed to prove it. Collateral estoppel provides no ground for affirmance.

Reversal is warranted.

**C. This Appeal Has Substantial Merit. An Award of Fees or Costs Is Not Proper.**

Respondents' failure to deal with *Ah Quin*'s relevance here and its careful analysis of cases like this one, where a debtor made an error and intended no deceit, provide substantial ground for disagreement between reasonable minds on the issue. This appeal has clear legal merit, and a fee or cost award under RAP 18.9 or 18.1 is plainly unwarranted.

#### **IV. CONCLUSION**

Just last year, the Ninth Circuit established a rule for applying judicial estoppel in a particular situation—namely, when a bankruptcy debtor and plaintiff in an action mistakenly or inadvertently failed to disclose the pre-petition claim in his bankruptcy schedules, but discloses the claim later. That is what occurred here. The recent *Ah Quin* decision establishes that application of judicial estoppel in such a case is not proper. Even so, that is what the trial court did; it applied a discretionary doctrine in an improper situation. This error warrants reversal and reinstatement of Mr. Lohman as plaintiff in the action.

DATED this 14th day of November, 2014.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the on the date provided at the signature below, I served the following individual by depositing a copy of the above document in the U.S. mail:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 14th day of November, 2014, and signed at Nine Mile Falls, Washington.

ROTH LAW OFFICES

By:   
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