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SUPREME COURT  
STATE OF WASHINGTON

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Cause No. 78481-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

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PETER H. ARKISON, CHAPTER 7 TRUSTEE  
FOR MICHELLE CARTER,

Appellant,

v.

ETHAN ALLEN, INC.; RENKINS TRADING, INC.,  
a/k/a RENKINS, INC.; ETHAN ALLEN INTERIORS;  
and JOHN DOE CORPORATIONS 1-5,

Respondents.

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ANSWER OF APPELLANT TO  
BRIEF OF AMICUS CURIAE

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Bankruptcy Trustee Peter Arkison, Appellant, concurs with the position advocated by Amicus Curiae Washington State Trial Lawyers Association Foundation. WSTLA Foundations’s analysis and its conclusions are consistent with the Trustee’s arguments in this appeal.

The Trustee submits this Answer to the Brief of Amicus to expand on two issues raised by WSTLA Foundation.

**A. THE MARKLEY DECISION SHOULD BE CLARIFIED BY THIS COURT.**

WSTLA Foundation notes the confusion in decisions of the Courts of Appeals as to how to read the “six factor test” set forth in *Markley v. Markley*, 31 Wn.2d 605, 198 P.2d 486 (1948).<sup>1</sup> WSTLA Foundation suggests that it may be necessary to overrule *Markley*, unless this Court were to clarify that *Markley* should be read as an equitable estoppel that than judicial estoppel case.

An overruling of *Markley* is not necessary, both because the list of six factors was plainly dicta and was not adopted in the *Markley* decision, and because the basis for the decision in the case is equitable not judicial estoppel.

*Markley* never explicitly adopted the six factors as constituting the legal test for application of the doctrine of judicial estoppel. The list is contained in an extended excerpt from Volume 19 of Am.Jur. 31 Wn.2d

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<sup>1</sup> The inconsistency in this case law is also noted in the Trustee’s initial Brief, at pp. 13-15.

at 614-615. Immediately thereafter, the *Markley* court continued quoting from that same treatise a comment that courts disagree about how to apply these factors and do not uniformly hold that every factor must be present in every case. Nothing in *Markley* suggested that the Court was instructing future trial and appellate courts to look for all six factors in deciding judicial estoppel issues.

Moreover, the *Markley* case was not resolved by application of the doctrine of judicial estoppel. The decision, like the case's headnotes, reflects a holding on equitable estoppel grounds. Indeed, the court declined to rule that the appellant's actions in a Kansas probate proceeding gave rise to a judicial estoppel, viewing those actions instead as a basis for affirming the lower court's findings of fact. 31 Wn.2d at 492.

This Court may provide much needed clarification by adopting the three factors set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001), thus bringing this state's rule in line with federal jurisprudence. In the process it should state that *Markley* has been misconstrued as a judicial estoppel case when it was not, and that *Markley* does not require any particular test for application of judicial estoppel.

**B. WHETHER JUDICIAL ESTOPPEL FORECLOSES ANY RECOVERY FOR THE DEBTOR SHOULD BE DECIDED ON A CASE-BY-CASE BASIS BY LOWER COURTS.**

WSTLA Foundation argues that this Court should refrain from deciding whether judicial estoppel will foreclose any recovery for the benefit of the bankruptcy debtor Michelle Carter. WSTLA Foundation contends that the decision in *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 138 P.3d 1103 (2006), does not create any type of *per se* rule with respect to a debtor's rights in the undisclosed action.

The Trustee agrees, not because of the adverse impact on the debtor, but because of the potentially adverse impact on administration of a valuable asset in the bankruptcy case. A *per se* rule—that is, a rule that a debtor may *never* benefit in any manner from an undisclosed claim as a matter of law—may in some cases remove all incentive for a debtor to participate in the litigation, thus inhibiting the ability of the bankruptcy trustee to maximize the value of the claim for creditors. In order to insure the debtor's participation, a “carrot” may in certain instances need to be dangled in front of the debtor: the possibility of some recovery after all creditors have been paid in full with interest, and/or the allowance of an exemption claim that is protected from both the trustee and creditors. *See* 11 U.S.C. § 726(a)(6) (providing for a distribution to the debtor after all costs of bankruptcy administration have been paid and all creditors have

been paid in full with interest); 11 U.S.C. § 522(d) (listing a debtor's available exemptions).

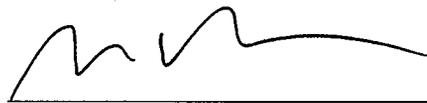
This is not to suggest that a debtor who fails to disclose a bankruptcy asset should be immune from sanction if his or her actions are indeed offensive to considerations of law and equity. The trial court indisputably retains the discretion to apply the doctrine of judicial estoppel against the debtor (though not against the bankruptcy trustee) on a case-by-case basis, and to fashion an appropriate remedy. The position of the trustee as to whether estoppel should be applied in a given case may turn on the facts and procedural posture of the particular case, the nature and severity of the debtor's transgressions, and the status of the bankruptcy case. The trial court should be able to consider the trustee's position in exercising its discretion. A *per se* rule forecloses that option.

Further, a rule that a nondisclosing debtor is barred from "receiving any benefit from the suit" (in the words of *Bartley-Williams*), as a matter of law, may interfere with a bankruptcy court's role in policing its own cases. As noted in the Trustee's initial Brief at pp. 29-31, the bankruptcy court may review the debtor's behavior and punish appropriately. Remedies include denial or revocation of the debtor's discharge, denial of exemptions otherwise permitted under bankruptcy law, and criminal prosecution. But if, for example, "receiving any benefit" includes entitlement to an exemption under federal bankruptcy

law, such a state law rule could come into conflict with federal provisions. It might also suggest a particular outcome with respect to the debtor's discharge or the debtor's ability to receive a distribution from the bankruptcy estate after creditors have been paid in full.

In the interest of fostering comity between the state and federal bankruptcy courts, the impact on the debtor of his or her failure to disclose should be addressed on a case-by-case basis at the bankruptcy court and state trial court levels. The type of *per se* rule advocated by Ethan Allen could hamstring the ability of the federal bankruptcy courts to exercise their own discretion and apply federal law remedies to a nondisclosing debtor.

Respectfully submitted this 20<sup>th</sup> day of February, 2007.



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