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SUPREME COURT  
STATE OF WASHINGTON

No. 78481-7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PETER H. ARKISON, CHAPTER 7 TRUSTEE  
FOR MICHELLE CARTER

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION  
FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of persons seeking legal redress in the civil justice system, including an interest in how these rights may be impacted by a federal bankruptcy proceeding.<sup>1</sup>

## II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves interpretation and application of the doctrine of judicial estoppel, and whether a bankruptcy trustee, as successor in interest to the bankrupt debtor, is estopped from pursuing a personal injury action on behalf of the bankruptcy estate because the debtor did not schedule the potential claim in the bankruptcy proceeding. The underlying facts are drawn from the briefing of the parties. See *Arkison Br.* at 1-5; *Ethan Allen Br.* at 2-6, 12. For purposes of this amicus curiae brief, the following facts are relevant:

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<sup>1</sup> WSTLA Foundation recently filed an amicus curiae brief in *Miller v. Campbell*, (C.A. #56736-5-I), involving the following issue:

In light of Washington public policy underlying RCW 4.16.340, the childhood sexual abuse statute of limitations, does judicial estoppel bar a victim of abuse from pursuing a tort action based on later-developing injuries and/or later-acquired knowledge, because he had some knowledge of abuse at the time he filed bankruptcy and did not list a possible claim for childhood sexual abuse as an asset in the bankruptcy proceeding?

See Brief of Amicus Curiae Washington State Trial Lawyers Association Foundation at 3.

Michelle Carter (Carter) filed a Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Washington. She did not list on her schedule of assets a potential personal injury claim against Ethan Allen, Inc., Renkins Trading, Inc. a/k/a Renkins, Inc., and Ethan Allen Interiors (collectively Ethan Allen). Carter received a “no asset discharge” of her debts in bankruptcy court and the bankruptcy case was closed. Thereafter, she brought this personal injury action against Ethan Allen in King County Superior Court. Peter H. Arkison, the bankruptcy trustee for Carter’s bankruptcy (Arkison), learned of the personal injury action and obtained an order from the bankruptcy court reopening the bankruptcy estate and reappointing him as trustee in order to administer the claim.

Ethan Allen sought summary judgment of dismissal of Carter’s action based on the doctrine of judicial estoppel. It contended her failure to schedule the potential claim in the bankruptcy proceeding prevented her from pursuing the action. Arkison appeared in the superior court action and moved to be substituted as party plaintiff, on the basis that the claim belonged to the bankruptcy estate and that Arkison as bankruptcy trustee was the real party in interest. This motion was granted without opposition.

Arkison opposed the summary judgment of dismissal, but the superior court held that he was judicially estopped from pursuing the personal injury action because of Carter’s failure to schedule the potential

claim in the bankruptcy proceeding. Arkison appealed to this Court, which accepted direct review.

Carter is no longer a party to this action. The briefing before this Court does not indicate that the superior court made any determination, before or after Arkison's substitution for Carter, whether Carter's failure to schedule the potential personal injury claim was inadvertent or deliberate.

### **III. ISSUES PRESENTED**

- 1.) What factors should be considered by a court in determining whether to apply the doctrine of judicial estoppel?
- 2.) Is a bankruptcy trustee judicially estopped from pursuing a personal injury claim initially belonging to the bankrupt debtor because the debtor failed to list the potential claim in a prior bankruptcy proceeding?

### **IV. SUMMARY OF ARGUMENT**

Judicial estoppel is an equitable doctrine designed to protect the integrity of the courts, by precluding a party from asserting one position in a court proceeding, then seeking an advantage by taking a clearly inconsistent position in a later court proceeding. It is not a technical defense available to adversaries for their own purposes, but a means for courts to assure respect for the judicial system without resort to the perjury statutes.

The United States Supreme Court opinion in New Hampshire v. Maine identifies the appropriate analytical framework for determining

whether judicial estoppel should apply in any given case. Factors that should inform a court's decision include:

- whether a party's later position is clearly inconsistent with its earlier position; and
- whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that the court in the first or second proceeding was misled; and
- whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Additional factors may be taken into account, depending upon the particular factual context. Further, application of the doctrine ultimately may turn on whether the first position taken by the party was the result of inadvertence or mistake, as opposed to a deliberate, conscious choice by the party.

Arkison, as bankruptcy trustee, is not foreclosed from pursuing Carter's personal injury action because she did not list the potential claim in an earlier bankruptcy proceeding. The bankruptcy trustee, as the real party in interest, is not bound by the conduct of the debtor. Because the Court of Appeals opinion in Garrett v. Morgan is to the contrary it must be disapproved.

Whether judicial estoppel principles limit Arkison's recovery in this civil action solely to the amount necessary to satisfy bankruptcy creditors cannot be determined at this time. To the extent the Court of Appeals decision in Bartley-Williams suggests recovery must be so limited it should be disapproved.

## V. ARGUMENT

### A.) **This Court Should Adopt The Analytical Framework Outlined In *New Hampshire v. Maine* For Evaluating Whether Judicial Estoppel Should Be Applied In Any Given Case.**

Judicial estoppel is a longstanding equitable doctrine designed to protect the integrity of the judicial process and prevent manipulation of the courts by litigants. See Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 906-09, 28 P.3d 832 (2001) (discussing Washington doctrine of judicial estoppel in context of prior bankruptcy proceeding); see also In re Coastal Plains, Inc., 179 F.3d 197, 205-06 (5<sup>th</sup> Cir. 1999) (discussing federal doctrine of judicial estoppel, in context of bankruptcy proceeding), *cert. denied*, 528 U.S. 1117 (2000). This doctrine is also known as “preclusion of inconsistent positions.” See Philip A. Trautman, Claim and Issue Preclusion in Civil Litigation in Washington, 60 Wash. L. Rev. 805, 809-10 (1985).

The doctrine’s primary purposes are to preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes, and to avoid inconsistency, duplicity and the waste of time. See Johnson, 107 Wn.App. at 906. It applies where a party asserts a position to his advantage in one court proceeding, and then seeks an advantage by asserting an incompatible position in a later proceeding. See id. In short, judicial estoppel prevents litigants from playing fast and loose with the courts. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9<sup>th</sup> Cir. 2001).

Because the doctrine is equitable in character, its application depends on the particular circumstances of the case. Id., 270 F.3d at 783. It does not establish inflexible prerequisites, nor provide a technical defense to be wielded by an adversary. See Johnson, 106 Wn.App. at 908 (recognizing doctrine is designed to protect courts, not litigants). The application of judicial estoppel to particular circumstances is reviewed under the deferential abuse of discretion standard. See Bartley-Williams v. Kendall, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006); In re Coastal Plains, Inc., 179 F.3d at 205. However, an abuse of discretion occurs when the lower court's exercise of discretion is based on a misapprehension of the law. See id.; cf. Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (holding erroneous view of the law constitutes abuse of discretion).

While the doctrine of judicial estoppel is well-established in Washington, and its purposes are well-defined, there is considerable confusion regarding the criteria to be used in determining whether the doctrine applies. This uncertainty is largely the result of this Court's opinion in Markley v. Markley, 31 Wn.2d 605, 198 P.2d 486 (1948) (quoting legal encyclopedia six-factor test for estoppel arising out of a prior judicial proceeding). Some courts and commentators read Markley as importing factors relevant to equitable estoppel. See Johnson, 106 Wn.App. at 908 (tracing judicial estoppel in Washington, and questioning Markley inclusion of "problematical elements of privity, detrimental

reliance, and final judgment”); see also 14A Karl B. Tegland, Wash. Prac. §35.57 at 512 n.6 (2003) (noting Markley “quoted extensively from a legal encyclopedia which may have mixed inconsistent position doctrine with ordinary estoppel principles”). Yet, notwithstanding the criticism in Johnson, decisions before and after Johnson refer to the six-factor formulation in Markley as instructive. See e.g. DeAtley v. Barnett, 127 Wn.App. 478, 483-84, 112 P.3d 540 (2005) (describing Markley factors as nonexclusive), *review denied*, 156 Wn.2d 1021 (2006); Falkner v. Foshaug, 108 Wn.App. 113, 124-25 & n.36, 29 P.3d 771 (2001) (acknowledging Markley factors by quoting from Raymond v. Ingram, 47 Wn.App. 781, 785, 737 P.2d 314 (1987) (quoting Markley), *review denied*, 108 Wn.2d 1031 (1987)).

Given this uncertainty in Washington case law, the Court must revisit what factors are relevant in assessing whether judicial estoppel applies. Arkison correctly argues that the United States Supreme Court’s opinion in New Hampshire v. Maine, 532 U.S. 742 (2001), provides the appropriate framework for this analysis. See Arkison Br. at 12-15. The court articulates three factors that should typically be evaluated in deciding whether the doctrine applies. These are:

- Whether the party’s later position is clearly inconsistent with its earlier position; and
- Whether judicial acceptance of an inconsistent position in the later proceeding would create the perception that either the first or the second court was misled; and

- Whether the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party, if not estopped.

Id. at 750-51.

In articulating these factors the court cautioned that they are not “inflexible prerequisites or an exhaustive formula,” and that additional factors may be considered depending upon the specific factual context. Id. at 751. Further, it recognized that the doctrine generally contemplates that the position taken in the first court proceeding was a deliberate, calculated one, and not the product of mistake or inadvertence. Id. at 750, 753.<sup>2</sup>

This approach to analyzing judicial estoppel has been applied in federal cases involving prior bankruptcy proceedings. See e.g. Hamilton, 270 F.3d at 782-86; see generally Christopher Klein, Lawrence Ponoroff & Sarah Borrey, Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839, 863-66, 883-86 (2005). The New Hampshire v. Maine formulation has also been viewed favorably in a number of recent Washington Court of Appeals opinions. See Falkner, 108 Wn.App. at 124-25 & accompanying notes; DeAtley, 127 Wn.App. at 484; Garrett v. Morgan, 127 Wn.App. 375, 379, 112 P.3d 531 (2005).

This Court should now embrace the approach to judicial estoppel set forth in New Hampshire v. Maine. To the extent the Markley six-

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<sup>2</sup> In New Hampshire, the court noted:

We do not question that it may be appropriate to resist application of judicial estoppel “when a party’s prior position was based on inadvertence or mistake.” John S. Clark Co. v. Faggert & Frieden, P.C., 65 F3d 26, 29 (CA 4 1995); see In re Corey, 892 F2d 829, 836 (CA 9 1989); Konstaninidis [v. Chen], 626 F2d [933] at 939 [(D.C.Cir. 1980)].

532 U.S. at 753.

factor test is contrary and imports irrelevant considerations, it should be overruled as incorrect and harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). However, it is possible to read Markley as applying, as its headnotes indicate, *equitable* estoppel, where one factor in the analysis was a party's prior inconsistent position in a probate proceeding. See 31 Wn.2d at 616-17 (suggesting court procedure a factor in imposing estoppel). If this view is correct, it is only necessary to clarify the holding in Markley to avoid any further misunderstandings.

**B.) Judicial Estoppel Does Not Foreclose A Bankruptcy Trustee, As The Real Party In Interest, From Pursuing A Bankrupt Debtor's Civil Action, When The Debtor Did Not Schedule The Potential Action In A Prior Bankruptcy Proceeding.**

The parties agree that the analysis of the Court of Appeals in Bartley-Williams, 134 Wn.App. at 99-102, correctly recognizes that the bankruptcy trustee is not prevented from pursuing the personal injury action because the bankrupt debtor did not list the potential action in the bankruptcy schedule. See Arkison Br. at 15-24; Ethan Allen Br. at 4-6. WSTLA Foundation agrees with this analysis, that the bankruptcy trustee is not foreclosed from pursuing this personal injury action under the doctrine of judicial estoppel. See Bartley-Williams at 99-102; Christopher Klein, et al. at 884; cf. Am. States Ins. v. Symes of Silverdale, 150 Wn.2d 462, 467-69, 78 P.3d 1266 (2003) (recognizing in different bankruptcy context that bankrupt debtor's acts are not binding on trustee).

Because the Court of Appeals opinion in Garrett v. Morgan, 127 Wn.App. at 378-83, is to the contrary it must be disapproved.<sup>3</sup>

**C.) Whether Judicial Estoppel Principles Limit The Bankruptcy Trustee's Recovery In This Case To That Amount Necessary To Satisfy The Bankruptcy Creditors Cannot Be Determined At This Time; To The Extent *Bartley-Williams* Suggests Recovery Must Be So Limited It Should Be Disapproved.**

While Ethan Allen acknowledges that the Court of Appeals opinion in Bartley-Williams is correct in holding that the bankruptcy trustee is not foreclosed by judicial estoppel from pursuing the personal injury action, it urges that the doctrine should apply here to the extent necessary to prevent any recovery of monies that would inure to the benefit of Carter. See Ethan Allen Br. at 13-20. The court in Bartley-Williams, without analysis, imposed this limitation:

We reverse the summary judgment dismissing the suit against Kendall and remand for consideration of the motion to substitute [bankruptcy trustee] Forsch as the real party in interest. We affirm the application of the doctrine of judicial estoppel to the [bankruptcy debtors] Williamses so as to bar them from receiving any benefit from the suit in the event of a recovery.

134 Wn.App. at 102. Notably, the Williamses were still parties to the action at the time the Court of Appeals rendered its decision, appearing pro se. Id. at 96, 97-98, 102.

WSTLA Foundation joins Arkison in urging that whether any recovery by Arkison in this case should be limited to that amount necessary to make the creditors in the bankruptcy whole is not properly

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<sup>3</sup> The separate question whether Bartley-Williams imposes a limitation on a bankruptcy trustee's recovery to only that amount necessary to pay the bankruptcy estate creditors is addressed in §C.), infra.

before the Court at this time. See Arkison Reply Br. at 2-3. Apparently this issue was not raised below. Id. Moreover, Carter is no longer a party to these proceedings, and the briefing does not reveal any determination by the court below whether Carter's failure to schedule the potential action was due to inadvertence or mistake.<sup>4</sup> This should make a difference on whether judicial estoppel is applied. See New Hampshire v. Maine at 750, 753. Lastly, the Court should refrain from deciding whether judicial estoppel will foreclose any recovery for the benefit of the debtor, when it is unclear whether a bankruptcy estate surplus will even arise in this case. See Christopher Klein, et al. at 886 & accompanying notes.

For all of the foregoing reasons, the Court should not reach this issue. To the extent Bartley-Williams suggests such a result is required as a matter of law, it should be disapproved.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and resolve this appeal accordingly.

DATED this 30<sup>th</sup> day of January, 2006.

FILED AS ATTACHMENT  
TO E-MAIL

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BRYAN P. HARNETIAUX

\_\_\_\_\_\*  
DEBRA L. STEPHENS

On Behalf of WSTLA Foundation

\*Brief transmitted for filing by e-mail; signed original retained by counsel.

<sup>4</sup> Ethan Allen argues forcefully that facts and inferences suggest Carter's failure to schedule the potential claim was a calculated one, but again the briefing does not reflect a determination to this effect by the superior court. See Ethan Allen Br. at 2-6.