

Cause No. 78481-7

SUPREME COURT
OF THE STATE OF WASHINGTON

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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REPLY BRIEF OF APPELLANT

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The recent decision in *Bartley-Williams v. Kendall*, ___ Wash. App. ___, 138 P.3d 1103 (2006) establishes conclusively in courts within Division 1 that applying judicial estoppel against a bankruptcy trustee due to a debtor's nondisclosure of an asset is reversible error. Respondent Ethan Allen thus concedes in its brief, for all intents and purposes, that the trial court's decision must be reversed.

As a result of the publication of *Bartley-Williams*, Ethan Allen has changed course entirely. Before the King County Superior Court, Ethan Allen successfully argued that the dismissal of the Trustee's claims advanced on behalf of the bankruptcy estate was required by the "controlling precedent" of *Cunningham v. Reliable Concrete Plumbing, Inc.*, 126 Wash. App. 222, 108 P.3d 147 (2005) and *Garrett v. Morgan*, 127 Wash. App. 375, 112 P.3d 531 (2005). Reply Re: Ethan Allen's Motion for Summary Judgment Based on Judicial Estoppel, p. 1, CP 137. Ethan Allen contended that the facts in *Cunningham* were "in all material respects, identical to those here." *Id.* It also contended that *Garrett* "is identical in *all* respects to the instant case" [emphasis supplied], and the "Trustee's personal opinion as to the correctness of that decision does not alter its binding application". *Id.* at p. 2, CP 138. It cited cases for the alleged proposition that the Trustee "stands in the shoes of the debtor" and is bound by the debtor's nondisclosure. *Id.* at pp. 3-4, CP 139-140.

Now, however, Ethan Allen has shifted to the position that the *Bartley-Williams* court “got it right” (Brief of Respondents, p. 5), that Division 1 has now “clarified” that *Cunningham* was actually not intended to preclude a bankruptcy trustee from pursuing a debtor’s undisclosed claims (Brief of Respondents, p. 1), and that Division 2 will “no doubt revisit its holding” in *Garrett v. Morgan* as a result of *Bartley-Williams* (Brief of Respondents, p. 5, fn 7).

Suddenly, then, Ethan Allen agrees with the Trustee that *Cunningham* is inapplicable to the Trustee and that *Garrett* is wrongly decided, in stark contrast to the argument it made in obtaining the trial court decision now under review. Ethan Allen correctly recognizes that its position below has been repudiated by Division 1. Trial courts within Division 1 are now bound by *Bartley-Williams*, and reversal is required.

Ethan Allen attempts to salvage its position, though. Instead of arguing the issue on appeal—an issue it recognizes it cannot win—most of its brief is taken up with the new argument that the Trustee may pursue Michelle Carter’s claim only to the extent of creditor’s claim, and that Ms. Carter should take nothing under the doctrine of judicial estoppel.

While Ethan Allen’s contention may or may not be tenable, it manifestly was never the position Ethan Allen took below. Most important, *it is not what the King County Superior Court decided and it is not the issue on appeal*. The trial court dismissed the case in its entirety,

based on Ethan Allen’s position that the Trustee was bound by the debtor’s failure to disclose the claim. While Ethan Allen is certainly free to make a different argument to the trial court on remand, it has yet to advance that position in this case, and thus is not entitled to the relief it requests on appeal. *See, e.g., Brower v. Pierce County*, 96 Wash.App. 559, 566, 984 P.2d 1036 (1999) (appellate court will not consider argument made for the first time on appeal).

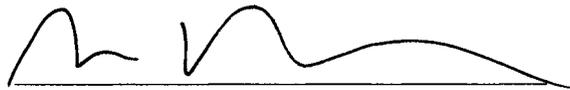
The Trustee raises this matter not because he is an advocate for Ms. Carter—which he assuredly is not—but out of concerns for proper appellate procedure and fundamental fairness. The result Ethan Allen now advocates in its Brief was not sought below, it was not the ruling of the trial court, it is not on appeal, and Ms. Carter does not have an advocate in this appeal.

Further, Ethan Allen reads too much into the *Bartley-Williams* decision. Since the parties agree that application of judicial estoppel is a fact-based determination, whether *Bartley-Williams* “got it right” with respect to estoppel of the debtor but not the Chapter 7 trustee is obviously dependent on the facts of that particular case. Those facts are not sufficiently detailed in the *Bartley-Williams* opinion. One cannot tell from the opinion precisely why the trial court in that case estopped the debtors, and why the appeals court upheld that ruling.

Regardless of the effect on the debtor, both parties to this appeal now agree that, at least in Division 1, dismissal of a bankruptcy trustee on judicial estoppel grounds due to a debtor's nondisclosure of an asset is an abuse of discretion as a matter of law. Reversal is required.

While this Court may choose to send this case to Division 1 with instructions that the case be remanded to Superior Court for further proceedings, this Court should use this appeal as an opportunity to resolve the split between divisions of the Court of Appeals created by *Bartley-Williams*' rejection of *Garrett*. It should accept judicial review of the underlying issue, schedule oral argument, and consider whether *Garrett* should be overruled.

Respectfully submitted this 27th day of September, 2006.



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