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SUPREME COURT NO. _____
COURT OF APPEALS NO.: 56736-5-I

SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF PATRICK W. CAMPBELL, by and through its Personal
Representative CHARLES W. CAMPBELL

Petitioner,

v.

MICHAEL JAMES MILLER,

Respondent.

PETITION FOR REVIEW

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STATE OF WASHINGTON
COURT OF APPEALS

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I. IDENTITY OF PETITIONER

The Estate of Patrick W. Campbell, by and through its Personal Representative Charles W. Campbell (“the Estate”), the defendant at the trial court and respondent at the Court of Appeals, asks this Court to accept review of the decision identified in Part II below.

II. CITATION TO COURT OF APPEALS DECISION

The Estate petitions this Court for review of the decision of the Court of Appeals in *Miller v. Campbell*, No. 56736-5-I, filed April 2, 2007, and reported at 155 P.3d 154. A copy of the decision of the Court of Appeals is reproduced in Appendix A. A copy of the Court of Appeals’ order denying Campbell’s motion for reconsideration, dated May 9, 2007, is reproduced in Appendix B.

III. ISSUE PRESENTED FOR REVIEW

Should this Court accept review of the decision of the Court of Appeals reversing the trial court’s dismissal of Miller’s claims under the doctrine of judicial estoppel where this decision conflicts with other decisions of the appellate courts pursuant to RAP 13.4(b)(1) and (2) and involves issues of substantial public interest pursuant to RAP 13.4(b)(4)?

IV. STATEMENT OF THE CASE

- A. Miller knew the elements of his cause of action in 1998 when he filed for bankruptcy to obtain a discharge of debts of over \$30,000**

This case involves a claim of sexual abuse which the plaintiff

knew about but failed to disclose when he filed for bankruptcy. Miller who was born on October 19, 1965, alleges he was sexually abused by his stepfather Patrick Campbell between 1975 and 1984. CP 333. In 1998 Miller filed a voluntary “no asset” bankruptcy and obtained a discharge for debts of \$34,220. CP 285, 291-294. Miller understood that he was required to disclose in the bankruptcy any “possible” cause of action: he disclosed “a possible claim against Ford under lemon law” but failed to disclose his claim of sexual abuse against Campbell. CP 296-298. Miller connected many injuries to sexual abuse before 1998. Miller never forgot the abuse. CP 267, 335, 415-417. In 1998 Miller knew that the abuse caused him to feel frightened, ashamed and isolated and caused nightmares. CP 267, 331, 333, 335, 416-417; Appellant’s Reply at 12-13. Miller had long been aware that the childhood sexual abuse caused him to have “anger, problems sleeping and intrusive memories.” A-3, A-8, A-10; CP 267, 331. In 2004 Miller testified that since his twenties he was unable to have sex because of intrusive memories of sexual abuse by Campbell. CP 416-417. A year before his bankruptcy, Miller’s second marriage became strained due to deteriorating sexual relations and Miller’s fears and feelings about Pat Campbell, his memories of him and the things he “did to me.” *Id.* Miller had several motives for not bringing the claim before the bankruptcy court. Aside from the shame of disclosure,

disclosure could have resulted in his discharge in bankruptcy being delayed, or the trustee might have brought an action when Campbell was alive, an outcome Miller dreaded because Campbell might have produced compelling evidence to disprove Miller's allegations. CP 334, 417-418. Equally compelling, Miller's creditors would have had an interest in any money judgment against Campbell. CP 282-323. Campbell died in November 2002, four years after Miller's bankruptcy discharge. Miller went to the funeral to make sure that he was dead ("it was like a victory"). CP 417. Miller testified that he filed suit because Campbell had died and his girlfriend was expecting a child. CP 417-418. With Campbell dead, he wanted revenge by ruining Patrick Campbell's reputation after his death ("I wanted to make it hurt for him . . . maybe he won't be seen as quite the normal guy after all.") CP 417-418.

I consulted an attorney and filed a claim against the estate on March 28, 2003 . . . I was terrified. I had never stopped being afraid of Patrick Campbell, starting from the time I was eleven years old, I had had nightmares about him and about the abuse, and I had problems sleeping. I felt guilty and ashamed much of the time.

CP 334. In June 2005, the Estate moved to dismiss for lack of standing and judicial estoppel. CP 324-329. In response, Miller produced **no** evidence that his failure to disclose this claim in bankruptcy was a mistake. CP 266-274; 333-336. On the contrary he stated, "Plaintiff was

not deceitful, negligent or inadvertent in not listing a potential claim against Patrick Campbell in his 1998 bankruptcy filing. At that point in time, there was simply no claim to list.” CP 274. Miller argued, **for the first time**, that his claim was limited to injuries he discovered after March 27, 2003. Therefore, he argued, he had no duty to disclose the claim, an argument that is wrong under bankruptcy law, and which the Court of Appeals rejected. A-9. CP 266-274.

B. The trial court in its discretion dismissed Miller’s claim because he had taken inconsistent positions.

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the same or a different court. *Garrett v. Morgan*, 127 Wn. App. 375, 379, 112 P.3d 531 (2005); *Arkison v. Ethan Allan*, no. 78481-7, ___ Wn.2d ___, ___ P.3d ___ (May 31, 2007). In deciding whether to apply judicial estoppel, a court considers three factors: (1) whether the party's later position clearly conflicts with its earlier one, (2) whether the party persuaded a court to accept its early position such that its acceptance of an inconsistent position in a later proceeding creates a perception that the party misled either the first or the second court, and (3) whether the party derives an unfair advantage or imposes an unfair detriment on the opposing party if not estopped. *Garrett*, 127 Wn. App. at 379 citing *New Hampshire v. Maine*,

532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). The trial court made findings that all three elements of judicial estoppel were met. CP 46-49. The court found that Miller knew that he was injured by the sexual abuse in 1998 even if he did not know the full extent of his injuries, and his failure to disclose this at bankruptcy, resulting in a no asset discharge, clearly conflicted with the current claim. The trial court considered and rejected Miller's newly-raised claim splitting argument. *Id.* at CP 37-38, 42, 47-48. As to the third element, Miller's conduct was unfair to both his bankruptcy estate, and to the Estate. *Id.* The Court of Appeals affirmed that "Miller's argument that he had no duty to disclose a possible claim against Campbell was contrary to bankruptcy law." A-9.

"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**" . . . In order to obtain relief from his outstanding debts, Miller **voluntarily** chose to enter a forum where full disclosure of potential and contingent assets was required, even though the potential for success was doubtful or unknown. He knew that Campbell had harmed him. Even if he thought the claim was stale, and **even though he felt so ashamed of his memories that he had never discussed them with anyone**, his duty under bankruptcy law was to disclose.

A-9 (emphasis added).

C. Contrary to evidence of bad faith on record, the Court of Appeals held there should be evidence of bad faith.

Contrary to previous appellate rulings, the Court of Appeals appeared to hold that evidence of bad faith, or “reckless disregard of the truth” is required for application of judicial estoppel. A-11 (“The flavor of manipulation is not readily discernible in this record”); *cf. Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 234, 108 P.3d 147 (2005). Regardless, Miller has repeatedly manipulated these proceedings by inconsistent conduct in order to gain advantage. For example, when the Estate moved for dismissal in the superior court based on Miller’s omission of the sex abuse claim from his bankruptcy disclosure schedules, Miller abandoned his claim for psychological injuries that he had not “discovered” prior to March 27, 2003. CP 18, 272; *cf. CP 343-345, 333-335, 414-418, 673-683*. He stated “plaintiff did not discover his most serious injuries, including [PTSD], until after he saw the forensic psychologist in March 27, 2003.” Though plaintiff claimed in the wake of the Estate’s motion for dismissal that “[t]he present action is premised entirely on these new [diagnosed] injuries, he had not previously limited his claim either in the complaint, or when responding in 2004 to Mr. Campbell’s motion for dismissal under the limitation statute, a point that Miller would certainly have argued if he was limiting his claim at that time. CP 272, 673-683. Further manipulation is exhibited by Miller in his

self-reporting to social worker Jon Conte in the course of his forensic evaluation. CP 72-74, 366-380. Miller told Conte that he suffered no intrusive memories before 2003, that he was unsure whether he remembered the abuse before 2000, and that he had not thought about the abuse between his leaving home and learning that Campbell was dying. CP 369-370. These statements directly contradict his own sworn deposition testimony (CP 413-417), and the statements he had made to Dr. Adriance in 2003. CP 331, 388-389. Miller has never attempted to reconcile his self-report to Dr. Conte with his deposition testimony. A plain review of the record in this respect demonstrates Miller's opportunistic use of the judicial system to suit his litigation objectives and the demands of his claim, *i.e.*, denying knowledge of abuse to obtain a bankruptcy discharge, disclaiming knowledge of the extent of his injuries for purposes of the limitations statute, asserting severe injuries for purposes of damages, and then abandoning some injuries when confronted with the omission in his bankruptcy disclosure schedules.¹ In short, there is substantial evidence of factual and legal manipulation.

¹ Such pattern and practice is not limited to Miller's bankruptcy and sex abuse cases; in 1999, Snohomish County Judge George Bowden dissolved a judgment in favor of Miller "for the reason that [Miller] did not testify truthfully at trial." CP 237-238.

D. Contradicting its ruling that Miller breached his duty to disclose the appeal court wrongly held Miller was not inconsistent because he is pursuing a “different” claim.

The Court of Appeals concluded that Miller was not inconsistent because (1) Miller was under a “disability” and (2) “Miller is not attempting to revive a known pre-petition claim” but “pursuing a “different claim, a claim for more serious injuries that he did not know about during his bankruptcy.” A-12. First, there is no evidence that Miller was operating under any disability such that he was unable to disclose what he knew to the bankruptcy trustee. Second, splitting Miller’s claim into two claims based on pre-and post March 2003 psychological injuries perpetuates a manipulation for legal purpose that has no scientific basis. Further, the Court of Appeals’ conclusion that Miller commenced this civil action pursuing a “different claim” is wrong because he commenced it asserting his entire claim. It was not until the Estate’s motion to dismiss that Miller said he was abandoning a claim for pre-bankruptcy injuries. CP 18, 274, 333-335, 673-683. Moreover, there is no basis in the record to maintain a distinction between psychological injuries Miller discovered before and after March 2003. For example, “PTSD” is a diagnostic expression of the nightmares and intrusive thoughts from which Miller testified he had always suffered. Miller cannot abandon claims based on nightmares and intrusive thoughts, yet

maintain a claim for “PTSD” as if its basis is independent from the diagnostic label. Miller’s recent experiences are of the same type as he always experienced. Miller testified that when he learned of Campbell’s ill health in 2002 he began suffering from “more of the nightmares that had plagued him for years, remembering more incidents of sexual abuse, and experiencing overwhelming feelings of worthlessness.” CP 334. (“I kept hearing his name constantly. I started having more nightmares . . . I would sit and think about what had happened, and I would remember more things and other incidences . . . and it just **intensified** my nightmares and my feelings of filth and secrecy and dirtiness and inadequacy” CP 417. (“Before that, it was just off and on, but it was definitely there.” *Id.*) Miller also testified that he had not understood until receiving counseling in 2003 that some symptoms that he had always associated with the abuse, for example, sleep problems, nightmares, and vivid or intrusive feelings, were commonly suffered by sex abuse victims. CP 331-335, 416-417. Until seeking counseling, he was unaware that the intrusive feelings were called “flashbacks” and that his symptoms were symptoms of PTSD and Major Depression. CP 335. However, he always knew that he suffered from these symptoms and that they were related to the sex abuse, he just did not know what label to put on them. CP 331-335, 389. Miller “always thought I was the most worthless person on the

face of the earth, and that I could never feel good about myself.” CP 335. Significantly, he did not know his diagnosis when he signed a creditor’s claim against the Estate on March 27, 2003, a requirement for filing this action. CP 330-332, 417-418, 673-683. The following day he sought psychological treatment for the first time, and filed this action in August, 2003. Finally, had Miller pursued his claim in 1998 he would undoubtedly have been referred to a psychologist who would have diagnosed PTSD and explained the causal connection then. In short, there is no logical, practical or scientific basis to treat Miller’s current claim for psychological damages as one based only on post-bankruptcy or post-March 2003 injuries. The Court of Appeals erred because it allowed Miller to divorce the factual basis for his injuries from their diagnostic labels, and call them separate claims. The distinction has no basis in the record and fails to resolve the inconsistency between Miller’s positions in the bankruptcy court and his position in the Superior Court. Miller’s current claim is not a “secondary” claim that can be legally or scientifically divorced from the claim he knew about when he sought and received protection from creditors in the bankruptcy court.

V. ARGUMENT

A. Grounds for accepting review exist here.

The Estate submits that review is appropriate here under RAP

13.4(b)(1) (2), and (b)(4). The Court of Appeals' decision conflicts with existing appellate court precedent that treat a debtor's decision to withhold the claim in bankruptcy as inconsistent with his post-bankruptcy decision to assert that claim. *Cunningham*, 126 Wn. App. at 234. In the absence of mistake, lack of motive or lack of knowledge, no additional evidence of bad faith or intent is required. *Id.* Permitting Mr. Miller to pursue this claim is contrary to the claim preclusion doctrine and Washington cases that prohibit claim splitting. *Norco Constr., Inc. v. King Cy.*, 106 Wn.2d 290, 294, 721 P.2d 511 (1986). Finally, this case involves an issue of substantial public interest that merits review, namely, whether judicial estoppel should be applied to a child sex abuse claim, where all elements of judicial estoppel are met, there is no evidence of mistake on record, and where the debtor had sufficient knowledge of his cause of action to trigger the obligation to disclose this to the bankruptcy court, even though he may not have made the causally connected all injuries to the sex abuse, as required for accrual for the statute of limitations, RCW 4.16.340.

B. The Court of Appeals decision conflicts with other appellate court decisions under RAP 13.4(b)(1) and (2)

1. Failure to disclose a claim in bankruptcy precludes subsequent assertion of the claim. .

The purpose of judicial estoppel is 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.” *In re Coastal Plains*, 179 F.3d 197, 205 (5th Cir. 1999); *Cunningham*, 126 Wn. App. at 225. Washington courts apply judicial estoppel to debtors who fails to list potential claims among their assets in bankruptcy and then later “pursue the claims after the bankruptcy discharge.” *Arkison*, at slip. op. 5, *Bartley-Williams*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). There is no factual basis for the conclusion that Miller was operating under a disability such that he could not notify the bankruptcy trustee of his claim. Where the three core elements of judicial estoppel are met (*supra* at 4), a failure to disclose a claim in bankruptcy precludes post-bankruptcy pursuit of that claim by the debtor. *Id.*, *Cunningham*, 126 Wn. App. at 234; *Garrett*, 127 Wn. App. at 379. The facts of this case require no separate treatment, and they warrant no different result.

2. The Court of Appeals disregarded prior cases that lack of mistake is inferred from knowledge of the claim or a motive to avoid disclosure.

Although the Court of Appeals affirmed that intent is not an element of judicial estoppel (A-10, *Cunningham*, 126 Wn. App. at 234) the Court appeared to hold that Miller’s claim for post-bankruptcy psychological injuries was permissible because “[t]he flavor of manipulation is not readily discernible in this record.” But existing precedent holds that bad faith or intent is **not** an element of estoppel.

Cunningham, 126 Wn. App. at 234 (“intent to mislead is not an element of judicial estoppel. . . [and] there is nothing in the record to support Cunningham's assertion that he omitted the claim by mistake.”); *see also DeAtley v. Barnett*, 127 Wn. App. 478, 481, 112 P.3d 540 (2005) (no reference to intent); *Arkison*, at slip.op. 4 (listing relevant elements of judicial estoppel). The Court of Appeals cited a third circuit case, *In re Okan's Foods*, 217 B.R. 739, 755-756 (Bankr. D. Pa. 1998) to support its view that there should be some reckless disregard for truth or bad faith. A-11. Bad faith or reckless disregard for truth is an element of judicial estoppel in the Third Circuit. *Krystal Cadillac-Oldsmobile v. GMC*, 337 F.3d 314, 321 (3d Cir. 2003). Even if this rule applied in Washington, a rebuttable inference of bad faith arises when the pleadings demonstrate both **knowledge of a claim** and a **motive to conceal** the claim in the face of an affirmative duty to disclose. *Id.*; *Okan's Foods*, 217 B.R. at 756 (“the only reasonable conclusion” was that the Debtor acted in bad faith or with reckless disregard for truth where “all of the material facts upon which the [claim] is based were known to Debtor” and Debtor had not offered to explain the omission of “such a significant cause of action.”) It is undisputed that, in 1998, Miller had knowledge of his claim against Campbell, and had compelling personal and financial motives not to disclose it in his bankruptcy. A-9-10; *see also*, § IV.A. at 2-3, B. at 6,

supra; CP 331, 333, 335, 416-417. The Court of Appeals also cited *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362, 364 (3d Cir. 1996) as authority bad faith was required. However, in *Ryan*, 81 F.3d at 362, the debtor lacked a motive for concealment. There was no basis to infer the *Ryan* debtor “deliberately asserted inconsistent positions in order to gain advantage” because the debtor *previously* obtained authorization from the bankruptcy court to file the claims, thereby informing the court of the claims; further, the debtor’s failure was offset by its failure to disclose related liabilities, and the creditors would receive 91 percent of any benefit. *Id.* The Court of Appeals quoted dicta from *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993) that “judicial estoppel is not an absolute bar to obtaining legal relief on the basis of new information.” That case is not pertinent: in *Chevariat* there was no evidence that the plaintiff suppressed information in earlier proceedings: the court held that the plaintiff may have lacked knowledge of the diesel spill which it asserted later. *Id.* at 1428. It then affirmed dismissal of the new claim on other grounds **without** ruling on judicial estoppel. *Id.*

Here, it is undisputed that Miller knew that he was damaged by Campbell’s sex abuse in 1998. While judicial estoppel might not apply in cases of mistake, inadvertence is **only** inferred if the debtor lacks

knowledge of the claim or a motive to conceal it, neither of which apply. *Cunningham*, 126 Wn. App. at 234, *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002); *Coastal*, 179 F.3d at 210; *Payless Wholesale Distrib. Inc. v. Alberto Culver, Inc.*, 989 F.2d 570 (1st Cir. 1993). Moreover, Miller **denied** that his omission was inadvertent. CP 274; *cf. Lang v. Hougan*, 136 Wn. App. 708, 719, 150 P.3d 622 (2007). In imposing a bad faith requirement that calls for more than knowledge, motive and absence of mistake, the Court of Appeals contradicted the standard that has been applied in Washington, the Ninth Circuit and in other jurisdictions. *Id.*, *Cunningham*, 126 Wn. App. at 234; *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001); *New Hampshire*, 532 U.S. at 753; *Coastal*, 179 F.3d at 210; *Laisure-Radke v. Barr Labs., Inc.*, 2006 U.S. Dist. LEXIS 42046, 8-9 (D. Wash. 2006). Moreover, the “flavor of manipulation” and inconsistent conduct **are** present on this record. *See* § IV.C. at 7, *supra*. The Court of Appeals wrongly permitted Miller to further violate the judicial process when Miller again changed his position in response to Campbell’s motion. *Cf. Cunningham*, 126 Wn. App. at 224.

3. Washington cases prevent claim splitting.

Miller will have to present the same evidence (intrusive thoughts, nightmares, sleep problems, dissociation, feelings of lack of self-worth,

shame, sexual dysfunction) as he would have presented in 1998. Dividing his claim in the fashion proposed by the Court of Appeals may be attractive if the goal is to craft a basis for keeping some part of the claim alive. Nonetheless, as a legal matter, it is nothing more than impermissible claim splitting which Washington courts prohibit. *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 442, 423 P.2d 624 (1967); *Nguyen v. Sacred Heart Med.*, 97 Wn. App. 728; 987 P.2d 634 (1999).

Where [the second claim clearly is a new, distinct claim, it is still possible that an individual issue will be precluded . . . under . . . issue preclusion. In . . . claim preclusion, all issues which might have been raised and determined are precluded.

Shoemaker v. Bremerton, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). The standard for determination for claim preclusion is as follows:

(1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Norco Constr., Inc. v. King Cy., 106 Wn.2d 290, 294, 721 P.2d 511 (1986). All the elements of claim preclusion are present on this record: Miller's creditors' rights are impaired or destroyed; substantially the same evidence will be presented; both claims involve the same infringement of rights and arise from the same nucleus of facts. *See also Oneida Motor*

Freight, v. United Jersey Bank, 848 F.2d 414, 418 (3d Cir. 1988) (court rejected debtor's argument against judicial estoppel because the claims arose from the same circumstances (breach of agreements) that gave rise to the debtor's right it failed to disclose).

C. Whether a debtor is estopped from pursuing post-bankruptcy a claim of childhood sex abuse when he breached his duty to disclose the claim in bankruptcy presents an issue of substantial public interest

The Court of Appeals made a fundamental error by holding that Miller was under "a disability" in 1998 and in applying the accrual standard of RCW 4.16.340. A-12.; *cf.* A-9.² The standard of knowledge of a potential claim that triggers a debtor's duty of disclosure in bankruptcy is legally distinct and separate from the standard of knowledge for accrual of a cause of action of child sex abuse under RCW 4.16.340. RCW 4.16.340 establishes the *latest* date by which a claim must be brought; in bankruptcy, the debtor must disclose a claim even where the extent of injuries are unknown. *Garrett*, 127 Wn. App. at 379. The Court of Appeals' claim splitting ignores the broad requirement of disclosure that the Court itself recognized Miller breached. A-9-10. Under Bankruptcy law a debtor has as affirmative duty to disclose all contingent

² The Court of Appeals cited *Cloud v. Summers* 98 Wn. App. 724, 735, 991 P.2d 1169; (1999) a discovery rule case. *Cloud* is also inapposite because, there was undisputed evidence *Cloud* did not, by reason of mental illness, connect his injuries to sexual abuse until two months before filing proceedings (*id.* at 732, 735, 737).

claims, however uncertain recovery may appear to be, and even where he does not know all his injuries. *Id.*; *Garrett*, 127 Wn. App. at 379; *Cunningham*, 126 Wn. App. 229-30; *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 556 (9th Cir. 1992). By omitting a claim from its schedules, a debtor represents that none exists, and the inconsistent positions prong for judicial estoppel is satisfied. *Id.*, *Coastal*, 179 F.3d at 210. In 1998 Miller represented that he had **no** claim for sex abuse. In the absence of any showing that he suffered a new injury arising from **different** circumstances, it was logically inconsistent, and contrary to bankruptcy and the claim preclusion doctrines, to permit Miller to pursue any injuries arising from the cause of action that he failed to disclose. CP 37-38. Accrual of a claim in bankruptcy is legally distinct from accrual under a limitations statute. *Ellwanger v. Budsberg*, 140 B.R. 891, 897 (Br. D. Wash. 1992).

To attempt to define when the debtor's interest in the subject cause of action arose based on when it accrued for purposes of a state's statute of limitation is conceptually flawed. . . . This contingent interest passed to the estate at the time of the bankruptcy filing.

Id. (emphasis added). The court rejected the lower court's conclusion that "if the cause of action did not accrue until after [the bankruptcy filing date] it did not exist and is not property of the estate. *Id.* at 898; *see also*, *State Farm Life Ins. Co. v. Swift*, 129 F.3d 792, 795-796 (5th Cir. 1997).

Washington's policy toward sex abuse, as set forth in RCW 4.16.340, should not blind the court to the need to protect the court's integrity or apply reversal by a strained interpretation of the law and of the facts, where the trial court properly exercised its discretion. If Miller had no ability to disclose his claim in bankruptcy, judicial estoppel would not bar his claim. Appellate courts review the trial court's application of judicial estoppel for an abuse of discretion. *A-6; Cunningham*, 126 Wn. App. at 227; *DeAtley*, 127 Wn. App. at 485. The trial court's order should not be disturbed "except on a **clear** showing of abuse of discretion." *Id.*, *Arkison*, at slip. op. 9 ("absent **some inconsistency** on the part of trustee" in bankruptcy, applying estoppel is an abuse of discretion.) The Court of Appeals erred in overturning the trial court's decision because there is clear evidence of Miller's numerous inconsistencies, and Miller failed to meet his burden to produce evidence of a material fact to preclude dismissal. *Garrett*, 127 Wn. App. at 379; *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 225, 77 P.2d 182 (1989). The court of appeals decision conflicts with precedent that a discharged Chapter 7 debtor receiving a "no-asset" discharge lacks legal capacity to pursue an unscheduled claim absent re-opening in bankruptcy. *DeAtley*, 127 Wn. App. at, 483; *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989).

VI. CONCLUSION

The court of appeals decision appealed from contradicts existing Washington law relative to judicial estoppel in the context of bankruptcy. The claim is precluded if not disclosed in bankruptcy, unless the debtor was unable to disclose it at that time. Dividing Miller's claim into two claims based on two "sets" of psychological injuries has no basis in law or fact, and does not defeat the inconsistency. The Court of Appeals confused the standard for disclosure in bankruptcy with the standard of accrual of a cause of action under the limitation statute by holding that Miller's later discovered injuries constitute a different claim. The Court of Appeals contradicted prior holdings that a bankrupt who fails to disclose a claim may not later pursue that claim, and lacks standing. The trial court had ample basis to apply judicial estoppel, and Miller produced no evidence warranting a different result. The Estate respectfully requests the court to accept review, reverse the Court of Appeals, and affirm the dismissal of this claim by the trial court.

RESPECTFULLY SUBMITTED this 7 day of June, 2007.

LEE, SMART, COOK, MARTIN &
PATTERSON, P.S., INC.

By: Rose Jenkins

Patricia K. Buchanan, WSBA No. 19892
Nicholas L. Jenkins, WSBA No. 31982
Rosemary J. Moore, WSBA No. 28650
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on June 7, 2007, I caused service of *Petition for Review* to:

VIA LEGAL MESSENGER

(June 7, 2007):

Clerk
Court of Appeals, Division I
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VIA LEGAL MESSENGER

(June 7, 2007):

Attorney for Michael James Miller:
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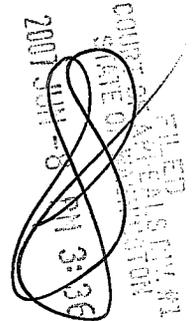
(June 7, 2007):

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Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL MILLER,) NO. 56736-5-I
)
Appellant,)
)
v.) PUBLISHED OPINION
)
CHARLES CAMPBELL, as Personal)
Representative of the Estate of)
PATRICK W. CAMPBELL,)
)
Respondent.) FILED: APRIL 2, 2007

BECKER, J. -- Four years after going through bankruptcy, appellant Michael Miller sued the estate of his deceased stepfather to recover damages for sexual abuse inflicted upon him by the stepfather when Miller was young. The trial court applied the doctrine of judicial estoppel to dismiss the suit because Miller did not disclose the potential claim as an asset in bankruptcy. Judicial estoppel is an equitable doctrine that bars a litigant from taking "clearly inconsistent" positions in court. Cunningham v. Reliable Concrete Pumping Inc., 126 Wn. App. 222, 224, 108 P.3d 147 (2005). When Miller filed for bankruptcy,

he was unaware of the serious injuries for which he currently seeks compensation. Because Miller's present claim against his stepfather's estate is not clearly inconsistent with his failure to disclose in bankruptcy that he was a victim of childhood sexual abuse, he is not judicially estopped from pursuing it now.

Born in 1965, Miller claims that from the time he was 11 years old he lived in constant fear of his stepfather, Patrick Campbell. He says he was physically beaten, yelled at, belittled, and sexually abused by Campbell on a regular basis. The sexual abuse involved Campbell touching Miller's genitals, rubbing his groin against him, exposing himself, and urinating in Miller's bathwater. In 1984 Miller's mother divorced Campbell. Miller moved out of the family home and did not see Campbell again. Miller did not tell anyone he had been sexually abused, but he always remembered being abused and knew that it had been harmful to him. He was "guilty and ashamed",¹ had few friends and often felt worthless.

Patrick Campbell died in November 2002. In the months leading up to his death, Miller's mother began to mention Campbell and talk about his health problems. Miller became increasingly upset at hearing Campbell's name. He had been plagued for years by nightmares about Campbell, but now they became more frequent. Miller says he started "remembering more and more incidents of abuse, and experiencing crippling, overwhelming feelings of

¹ Clerk's Papers at 333 (Declaration of Michael Miller, March 31, 2004).

worthlessness."² Miller went to Campbell's funeral in part because "I wanted to assure myself he really was dead."³

In March 2003, Miller timely filed with Campbell's estate a creditor's claim for \$500,000 for physical, mental and emotional damages caused by Campbell's sexual abuse.⁴ Right after filing the claim, Miller went into counseling for a couple of months with Dr. Adriance, a clinical psychologist. According to Dr. Adriance, Miller had long been aware that the childhood sexual abuse had caused him to have "anger, problems sleeping, and intrusive memories".⁵ But Miller had never had counseling or treatment and did not know that other symptoms he had experienced, such as episodes of dissociation, were also connected to his history of sexual abuse.⁶ Dr. Adriance diagnosed Miller as currently suffering from post-traumatic stress disorder and major depression as a result of childhood sexual abuse. She said counseling was therapeutic for Miller because it provided "a label for and context in which to understand his symptoms" and it "appeared to provide Mr. Miller with some relief."⁷

The estate denied Miller's claim. Miller filed a lawsuit. The estate, after taking Miller's deposition, moved to dismiss the suit based on the three year statute of limitations. According to the estate, Miller was seeking to recover for

² Clerk's Papers at 334 (Declaration of Michael Miller, March 31, 2004).

³ Clerk's Papers at 527 (Deposition of Michael Miller, January 27, 2004).

⁴ Clerk's Papers at 617-618 (Creditor's Claim, March 27, 2003).

⁵ Clerk's Papers at 331 (Declaration of Dr. Adriance, March 23, 2004).

⁶ Clerk's Papers at 331 (Declaration of Dr. Adriance, March 23, 2004).

⁷ Clerk's Papers at 331 (Declaration of Dr. Adriance, March 23, 2004).

longstanding injuries, i.e., feelings of fear and unworthiness and difficulties with friendship and sexual relationships, which for all of his adult life he had known to be the effect of the abuse he experienced as a child.⁸

The three-year statute of limitations on a claim arising from an act of childhood sexual abuse does not begin to run at least until the victim discovers "that the act caused the injury for which the claim is brought." RCW 4.16.340(1)(c). Legislative findings supporting this statutory discovery rule state the Legislature's intent "that the earlier discovery of less serious injuries should not affect the statute of limitations for injuries that are discovered later." Laws of 1991, ch. 212, § 1. The legislative findings disapprove of "the line of cases that state that discovery of any injury whatsoever caused by an act of childhood sexual abuse commences the statute of limitations." Laws of 1991, ch. 212, § 1. An example of this line of cases is Raymond v. Ingram, 47 Wn. App. 781, 737 P.2d 314 (1987), a case holding on facts similar to Miller's that the statute of limitations expired, but which relied on Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986), the case the legislature expressly intended to reverse by enacting RCW 4.16.340.

Miller responded that until he began therapy in 2003, he was unaware of the serious injuries diagnosed by Dr. Adriance, i.e., dissociative disorders and major depression, and did not know Campbell's conduct had caused these

⁸ Clerk's Papers at 489-500 (Campbell Estate's Summary Judgment Motion, March 8, 2004).

injuries. Hence it was not possible to say as a matter of law that Miller, more than three years previously, had discovered that "the injury for which the claim is brought" was caused by Campbell's conduct. RCW 4.16.340(c). Applying the statutory discovery rule, the trial court denied the estate's motion for summary judgment. This result was consistent with cases decided under RCW 4.16.340. See, e.g., Hollmann v. Corcoran, 89 Wn. App. 323, 949 P.2d 386 (1997); Korst v. McMahon, 136 Wn. App. 202, 148 P.3d 1081 (2006).

In June 2005, the estate moved again for dismissal, this time based on Miller's "failure to identify the claims during bankruptcy proceedings."⁹ The estate had discovered that in 1998, Miller retained counsel and filed a Chapter 7 bankruptcy. He was 32 years old at the time. Bankruptcy Schedule B required Miller to list his assets, including "contingent and unliquidated claims of every nature, including tax refunds, counter claims of the debtor, and the rights to setoff claims."¹⁰ Under this category, Miller listed a small-estimated tax refund and the possibility of a small lemon law claim against Ford.¹¹ He did not list any claim related to being a victim of sexual abuse in childhood. The bankruptcy court, finding that Miller had no assets, discharged all of his debt, totaling \$34,220. The creditors received no payment.

⁹ Clerk's Papers at 324 (Campbell Estate's Motion to Dismiss, June 3, 2005).

¹⁰ Clerk's Papers at 297 (Bankruptcy Schedule of Personal Property, September 28, 1998).

¹¹ Clerk's Papers at 297 (Bankruptcy Schedule of Personal Property, September 28, 1998).

Based on Miller's failure to disclose to the bankruptcy court the possibility of a claim against Patrick Campbell, the estate invoked the doctrine of judicial estoppel and moved to dismiss the present suit. The estate argued that the claim Miller was asserting in his present lawsuit was a potential claim in 1998, and he should have disclosed it to give the trustee the opportunity to decide whether there was a viable cause of action worth litigating at that time.

The trial court granted the motion to dismiss based on judicial estoppel:

The major issue in this case . . . Did the plaintiff have knowledge of a claim and not list that claim?

. . . The plaintiff, in this case, the Court determines, knew at the time that he filed for bankruptcy that he had been sexually abused, and he knew that he had been injured. He may not have known the full extent of those injuries. But he had an obligation to list the above as a potential asset, and it is not for us to look back and say would the trustee have done this, would the trustee have done that, when we wouldn't have to do that at all had the plaintiff listed what he knew: That he had been sexually abused and injured. Plaintiff was legally required to list this potential claim and he didn't.^[12]

Miller appeals from the order of dismissal.

A lower court's application of the doctrine of judicial estoppel is reviewed for abuse of discretion. Cunningham, 126 Wn. App. at 227. "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

¹² Report of Proceedings at 25-26.

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Cunningham, 126 Wn. App. at 224-225. Its purposes are to preserve respect for judicial proceedings without the necessity of resorting to the 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 the waste of time. Cunningham, 126 Wn. App. at 225. There are two primary limitations on the application of the doctrine. First, it may be applied "only where the position of the party to be estopped is clearly inconsistent with its previous one;" and second, "that party must have convinced the court to accept that previous position." In re Coastal Plains, Inc., 179 F.3d 197, 206 (5th Cir. 1999).

It is well established that judicial estoppel may apply to parties who accrue legal claims, file for bankruptcy, fail to list the claims among their assets, and then attempt to pursue the claims after the bankruptcy discharge. Bartley-Williams v. Kendall, 134 Wn. App. 95, 98-99, 138 P.3d 1103 (2006). "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." Coastal Plains, 179 F.3d at 208 (trial court erred by not judicially estopping debtors from later asserting a \$10 million claim that they did not disclose in bankruptcy) (quoting Rosenshein v. Kleban, 918 F.

Supp. 98, 104 (S.D.N.Y. 1996)). "By not disclosing the asset, the debtor keeps an asset that may have created a dividend for the debtor's unsecured creditors." Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 909, 28 P.3d 832 (2001). Thus, when a Chapter 7 debtor obtains a "no asset" discharge, as Miller did here, it will often be seen as equitable to preclude the debtor from later pursuing an undisclosed pre-petition personal injury claim. For example, in Cunningham, 11 days after having his debts discharged in bankruptcy, the former debtor commenced an action for a workplace injury he had known about but failed to disclose to the trustee in bankruptcy. The lower court appropriately dismissed the personal injury action based on judicial estoppel. The litigant's personal injury action was clearly inconsistent with his implicit representation in bankruptcy that he did not have such a claim, and he had convinced the bankruptcy court to accept that representation. Cunningham, 126 Wn. App. at 230-231.

Here, the trial court found Miller's situation to be comparable to the Cunningham debtor's. Miller obtained the benefit of a no-asset discharge by convincing the court to accept his representation that he had minimal assets.¹³ The trial court found it was clearly inconsistent for him to be pursuing a \$500,000 sexual abuse claim against Campbell five years later.

Miller admits that he always knew he had been injured by Campbell's abuse. But he contends that at the time he declared bankruptcy he had no

¹³ Report of Proceedings at 24.

"claim" to disclose. He could not disclose the present claim because it is premised on new injuries, the major depression and post-traumatic stress disorder recently discovered through therapy with Dr. Adriance. And, he says, the statute of limitations had long ago run on any claim arising from the relationship difficulties and memories of abuse that had plagued him throughout his life.

Miller's argument that he had no duty to disclose a possible claim against Campbell is contrary to bankruptcy law. The Bankruptcy Code and court rules "impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims." Coastal Plains, 179 F.3d at 207-208. Potential lawsuits must be disclosed to the bankruptcy trustee:

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.

Coastal Plains, 179 F.3d at 208 (quoting Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n, 93 F. Supp. 859, 867 (E.D. Tex. 1996)). Full disclosure gives the trustee the opportunity to pursue viable claims in order to repay creditors.

"Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized."

Coastal Plains, 179 F.3d at 208.

In order to obtain relief from his outstanding debts, Miller voluntarily chose to enter a forum where full disclosure of potential and contingent assets was

required, even though the potential for success was doubtful or unknown. He knew that Campbell had harmed him. Even if he thought the claim was stale, and even though he felt so ashamed of his memories that he had never discussed them with anyone, his duty under bankruptcy law was to disclose.

Still, judicial estoppel, an equitable doctrine, is not to be applied inflexibly. New Hampshire v. Maine, 532 U.S. 742, 751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). Its purpose is 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.” Coastal Plains, 179 F.3d at 205 (quoting Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988)). A party’s nondisclosure of a claim in bankruptcy does not automatically lead to estoppel in a future suit. For example, courts have refused to apply judicial estoppel where the party who failed to disclose in bankruptcy either lacks knowledge of the undisclosed claims or has no motive for their concealment. See Coastal Plains, 179 F.3d at 210; see also Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996) (potential employment discrimination claim allowed to go forward; debtor’s failure to schedule it as an asset was not done in bad faith as it was highly speculative at the time and completely unrelated to matters in the bankruptcy). While we held in Cunningham that it is not essential for the court to make a finding of manipulative intent, deliberate or intentional manipulation can typically be inferred from the record in cases where judicial estoppel has been applied. Cunningham, 126 Wn. App. at 234. In such cases it is not uncommon

to see the court refer to the debtor's "bad faith,"¹⁴ deliberate assertion of inconsistent positions "in order to gain advantage,"¹⁵ or "reckless disregard for the truth".¹⁶

[T]he doctrine of judicial estoppel is not an absolute bar to obtaining legal relief on the basis of new information, even if inconsistent old information had gotten the party an advantage in some other proceeding.

... Judicial estoppel is strong medicine, and this has led courts and commentators to characterize the grounds for its invocation in terms redolent of intentional wrongdoing.

Chaveriat v. Williams Pipeline Co., 11 F.3d 1420, 1428 (7th Cir. 1993). The flavor of manipulation is not readily discernible in this record.

The brief of amicus Washington State Trial Lawyers Association Foundation recognizes that federal bankruptcy law is controlling on when a duty to disclose arises, but contends that state law provides the touchstone for determining whether a party has asserted clearly inconsistent positions supporting judicial estoppel of a state tort action. We agree. "Additional considerations may inform the doctrine's application in specific factual contexts." New Hampshire v. Maine, 532 U.S. at 751. In this case a substantial additional consideration bearing on the equities is the unique nature of childhood sexual abuse. The special statute of limitations, RCW 4.16.340, indicates that it is not inconsistent for a victim to be aware for many years that he has been abused, yet

¹⁴ Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996).

¹⁵ Ryan Operations G.P., 81 F.3d at 363.

¹⁶ In re Okan's Foods, Inc., 217 B.R. 739, 755 (Bankr. E.D. Pa. 1998).

not have knowledge of the potential tort claim against his abuser. "Indeed, as our Legislature has found, childhood sexual abuse, by its very nature, may render the victim *unable* to understand or make the connection between the childhood abuse and the full extent of the resulting emotional harm until many years later." Cloud v. Summers, 98 Wn. App. 724, 735, 991 P.2d 1169 (1999). The victim in effect is under a "disability" and will not be charged with knowledge of the tort claim for serious injuries until that "disability" is lifted. Cloud, 98 Wn. App. at 735.

For that reason, the statute of limitations is closely intertwined with the equities of applying judicial estoppel to a claim of childhood sex abuse. The Legislature's primary concern in enacting the special statute of limitations "was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation." C.J.C. v. Corp. of the Catholic Bishop, 138 Wn.2d 699, 712, 985 P.2d 262 (1999). In view of the public policy embodied in the statute of limitations, Miller's assertion of a claim against Campbell in 2003 is not clearly inconsistent with his failure to mention a claim based on childhood sexual abuse in his schedule of assets in 1998. Unlike in Cunningham and other similar cases where former debtors have been precluded from bringing personal injury claims, Miller is not attempting to revive a known pre-petition claim. He is pursuing a different claim, a claim for more serious injuries that he did not know about during his bankruptcy; a claim Miller says he did not begin to become aware of until the death of his stepfather

triggered a new flood of memories and crippling symptoms. At trial he must still face the estate's statute of limitations defense, and the estate will have the opportunity to argue to the fact finder that Miller's positions have been inconsistent. Under these circumstances we cannot say that allowing Miller to pursue the claim will affront the integrity of the judicial process.

In summary we find no tenable grounds for concluding that Miller's present lawsuit is clearly inconsistent with his position in bankruptcy. At the same time, we reject Miller's argument that he was entitled to judgment as a matter of law. Miller moved unsuccessfully for partial summary judgment on the estate's liability and argues that his motion should have been granted because he presented uncontroverted evidence that Campbell sexually abused him. Campbell being dead, it is not surprising that the estate was unable to come up with controverting affidavits. The court was not obligated to take Miller's assertions as true; at trial, the estate may be able to raise doubts as to Miller's credibility. The trial court did not err in denying Miller's motion for partial summary judgment.

The order of dismissal is reversed.

~~WE CONCUR:~~

Greene, J.

Becker, J.

Collman, J.

Appendix B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
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CASE #: 56736-5-1
Michael Miller, Appellant v. Charles Campbell, Respondent

Counsel:

~~Enclosed please find a copy of the order entered by this court in the above case today.~~

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

LLW

enclosure

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL MILLER,) NO. 56736-5-1
)
Appellant,) ORDER DENYING MOTION
)
v.) FOR RECONSIDERATION
)
CHARLES CAMPBELL, as Personal)
Representative of the Estate of)
PATRICK W. CAMPBELL,)
)
Respondent.)
_____)

Respondent, Charles Campbell as the Personal Representative of the Estate of Patrick Campbell, having filed his motion for reconsideration, and a panel of the court having determined that the motion should be denied; Now, therefore, it is hereby

ORDERED that the Motion for Reconsideration is denied.

Dated this 9th day of May, 2007.

FOR THE COURT

Becker, J.
Judge

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