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SUPREME COURT NO. 80276-9

*RJC*  
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COURT OF APPEALS NO.: 56736-5-I

STATE OF WASHINGTON

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

Petitioner,

v.

MICHAEL JAMES MILLER,

Respondent.

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ANSWER TO WSTLA AMICUS BRIEF

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## I. IDENTITY OF PETITIONER

The Estate of Patrick W. Campbell, by and through its Personal Representative Charles W. Campbell submits the following in response to the Supplemental Brief of Amicus WSTLA.

## II. STATEMENT OF THE CASE

Charles Campbell incorporates the statements of the case set forth in his petition for review, in his supplemental brief to this Court and in the appellate briefs incorporated therein.

### A. **Mr. Miller's claim is not based on new injuries because they are diagnostic labels for the same injuries.**

WSTLA perpetuates the fiction that Mr. Miller limited his claim to newly-discovered later injuries from the outset of his claim.

As discussed at length in Charles Campbell's previous briefs, the "new injuries" discovered in 2003 were diagnostic labels for the symptoms that Mr. Miller always knew that he suffered and associated with the abuse. CP 267, 331, 333-335, 416-417. Mr. Miller specifically limited his claim to injuries discovered in 2003 only after Charles Campbell raised judicial estoppel. CP 18, 272; *cf.* CP 343-345, 333-335, 414-418, 617-618, 673-683. Further, Mr. Miller filed his creditor's claim for \$500,000 against the Estate of Patrick Campbell, an essential pre-requirement for filing this lawsuit **before** he sought treatment for his injuries. CP 331, 338-39, 331, 617-18

In a further twist, Miller now represents that the claim belongs to the bankruptcy trustee after all. Mot. for Substitution at 2.

### III. SUMMARY OF ARGUMENT

In the absence of evidence of inconsistent conduct by the trustee in bankruptcy, the trustee is not barred from pursuing Mr. Miller's claim by the principles of judicial estoppel.<sup>1</sup>

The statement of the case presented by Charles Campbell is derived from the sworn testimony of Mr. Miller, the opinions of Mr. Miller's own expert Dr. Adriance, and from the undisputed record of Mr. Miller's conduct. Therefore, there are no issues of material facts<sup>2</sup> which prevent this court affirming the superior court's discretion in applying the doctrine of judicial estoppel to Mr. Miller.

WSTLA argues that Mr. Miller's claim was not clearly inconsistent because he is making a claim for more serious injuries that he discovered later. On the undisputed record, this is factually incorrect and legally this falls foul of Washington's prohibition against claim splitting and the broad definition of a claim under the Bankruptcy Code.

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<sup>1</sup> Charles Campbell is unaware of any conduct of the bankruptcy trustee that would result in judicial estoppel applying to the trustee. He reserves the right to raise judicial estoppel in future should he discover conduct that would act as a bar to Ms. Burdette pursuing Mr. Miller's claim.

<sup>2</sup> Charles Campbell reserves the right to dispute the truth of those facts.

WSTLA argues that the imposition of judicial estoppel as to Mr. Miller would conflict with the legislature's policy towards victims of childhood sexual abuse as set forth in RCW 4.16.340. Therefore, WSTLA argues, because there are disputed issues of fact surrounding when Mr. Miller reached an understanding as to all his injuries, the issue of judicial estoppel should be deferred to the trier of fact.

However, nowhere does the legislature state that RCW 4.16.340 does anything more than extend the latest point by which a claim must be brought. Further, the application of judicial estoppel as to Mr. Miller is not in conflict with the philosophy expressed in RCW 4.16.340 and in the legislature's intent and findings. On the undisputed facts, Mr. Miller understood in 1998 that he suffered significant injuries that were caused by sexual abuse by Patrick Campbell and untruthfully gave sworn testimony to the federal court omitting those injuries.

WSTLA and Mr. Miller argue that this court should ignore the federal Bankruptcy Code's broad definition of a claim and the requirement of full disclosure of a potential or contingent claim imposed upon a debtor by the Bankruptcy Code. On the contrary, this court should not ignore that Mr. Miller violated his duty under federal law to disclose his claim against Patrick Campbell.

Nor is it inequitable to hold Mr. Miller to his sworn testimony to the bankruptcy court where he voluntarily chose to enter that forum for the purpose of obtaining a palpable benefit. Even if Mr. Miller did not understand the full extent of his injuries in 1998, he understood that he had significant injuries and that he had a duty to disclose them, and his sworn testimony that he had no claim is clearly inconsistent with the current claim.

The superior court did not abuse its discretion; nor are there disputed issues of material fact. Therefore, the court should affirm the finding of judicial estoppel as to Mr. Miller.

#### IV. ARGUMENT

Charles Campbell incorporates the legal arguments set forth in his Answer to WSTLA's Amicus Brief, in his Petition for Review, in his Supplemental Brief and in the remaining appellate briefs incorporated therein.

**A. Miller's position is clearly inconsistent because all agree that he knew of serious injuries in 1998 that he omitted from his bankruptcy disclosure.**

A statute of limitations, lays down the latest date by which a law suit must be commenced. RCW 4.16.340(1)(a)-(c) sets forth three alternative criteria for determining the limitation date to commence a

claim of childhood sex abuse. The plaintiff must commence his law action by the latest of these three dates.

In 2004, the superior court held that there were issues of fact whether Mr. Miller's claim was time-barred. Although Mr. Miller testified in 2004 that he related many substantial injuries to the sexual abuse most of his adult life he also denied that he understood completely the full extent of his injuries and their causal relationship to the abuse until he consulted Dr. Adriance in 2003. CP 333-335. For example, he testified that he did not know that the symptoms constituted PTSD and Major Depression, and that his symptoms were commonly shared by persons complaining of sexual abuse. *Id.* He alleged that he remembered some additional incidents of abuse. *Id.*

RCW 4.16.340(2) states that a plaintiff need not establish which act in a continuing series of sexual abuse caused the injury complained of but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

(2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

RCW 4.16.340(2).

WSTLA and Mr. Miller essentially argues that a debtor plaintiff cannot make clearly inconsistent representations until he knows the full extent of his alleged injuries, and that because, WSTLA argues, there are issues of fact as to when Miller knew the full extent of his injuries, judicial estoppel cannot be determined as a matter of law.

However, the statute of limitations is not relevant to the determination of the federal duties and definitions at issue here because they determine different points in the evolution of the claim and serve different purposes. The purpose of the statute of limitations is to determine the latest point at which a victim may obtain a remedy from a wrongdoer in respect of a mature claim. The purpose of federal bankruptcy statutes and the definition of a claim is to determine what potential assets may exist to satisfy innocent creditors who are being denied rightful recovery of funds. The Bankruptcy Code seeks to discover all potential, immature or contingent claims that a debtor may have.

WSTLA would have this court ignore the federal Bankruptcy Code although Miller plainly breached his obligations under that code.

Accepting Mr. Miller's sworn testimony as true for the purposes of summary judgment, it is undisputed that, whether or not Mr. Miller

understood the full extent of all his injuries, in 1998 he believed that he was seriously injured by Patrick Campbell's sexual abuse.

Even if he did discover more serious injuries later (and there is no support in the record for this except to the extent that he discovered the diagnostic labels for the injuries Mr. Miller always related to the abuse) Mr. Miller had a duty to disclose his potential claim against Patrick Campbell if he wanted to obtain the benefit of a discharge in bankruptcy.

There is no inequity in applying judicial estoppel against Mr. Miller for failing to disclose a claim as he was required to do under the rules of the forum that he voluntarily chose to enter. This is particularly true when it is considered that no-one forced Mr. Miller to enter the bankruptcy court. Mr. Miller could have chosen to withdraw if he was too ashamed or could not face disclosure while Patrick Campbell was alive.

WSTLA's position might be more compelling if the disclosure requirement in 1998 was restricted to "fully accrued lawsuits where the debtor is fully aware of the full extent of all alleged acts and injuries." However, the disclosure requirement is much broader than that. Mr. Miller's representation that he had "no knowledge" in 1998 is clearly inconsistent with his representation in 2004 that in fact he had "some" knowledge in 1998.

WSTLA essentially asserts that because Miller claims to have learned more about additional abusive acts and injuries after he filed his \$500,000 claim, he was not required to disclose what he did know in bankruptcy. That is, that no disclosure was required until Miller knew the full extent of the alleged harm, in other words, a mature claim. However, Miller was required to disclose an immature claim no matter how contingent. The assertion that Miller learned of additional acts and claims later does not eliminate the duty to disclose what he did in fact already know.

WSTLA's position also ignores the fact that Miller was able to make a claim for \$500,000 before receiving therapy and before discovery of any of the additional injuries he maintains comprise the full extent of his knowledge and extend the statute of limitations. Thus, the alleged additional knowledge may create an issue of fact extending the statute of limitations; however, the lack of that knowledge did not preclude him from making a claim.

Because the inconsistency is so glaring, Miller and WSTLA repeatedly argue that he is only seeking recovery for those acts and injuries he discovered later. Even if this did not violate Washington's prohibition against claim splitting, the reality is that the acts and injuries cannot be neatly divided into those discovered pre- and post- March 28

2003. Further, the record clearly demonstrates that this was an argument Mr. Miller raised only after judicial estoppel was raised. Therefore, Miller did not see these as separate claims at all, and this argument simply holds no weight and does not eliminate prior knowledge.

Moreover, Mr. Miller now concedes that the claim belongs to the bankruptcy trustee.

**B. Affirming the superior court's ruling of judicial estoppel does not offend the findings and intent of the legislature in enacting RCW 4.16.340.**

The legislature's stated purpose of enacting RCW 4.16.340 was to extend the limitation period for those persons who repressed the memory of the abuse; for those persons who were unable to connect the abuse to any injury; or for those persons who, while aware of some injuries, later discovered more serious injuries after the limitations period had run. *Amic. Supp. Br. App.*; 1991 C 212.

Applying the doctrine of judicial estoppel to Mr. Miller on the undisputed facts of this case is not in conflict with the intent of the legislature. Mr. Miller's failure to disclose his injuries when required to do so in the bankruptcy court was clearly inconsistent with his later assertion of the claim because he always knew of some (serious) injuries.

The stated purpose of RCW 4.16.340 is to extend the limitation period. Nowhere does the legislature state that a prospective litigant is

entitled to conceal a claim of which he has knowledge in sworn testimony and in violation of another statutory code.

Before filing his lawsuit, Miller voluntarily submitted himself to the bankruptcy court, its requirements and statutes, to obtain the benefit of a fresh start. His creditors lost the right to recovery in order for him to obtain this fresh start.<sup>3</sup> It was his conscious and voluntary choice to involve third parties and their interests in his own, that is why his assets and “claims” are no longer his own. The policy of providing the plaintiff a remedy must give way to his earlier obligation to disclose, an obligation he freely accepted and benefited from.

WSTLA and Mr. Miller essentially argue that it is inequitable to apply judicial estoppel to alleged victims of childhood sexual abuse because of Washington policy that such victims may not know the full extent of their injuries or may not remember that the alleged abuse occurred. Imposing such a general rule would preclude any discretion of the trial court in defiance of the very doctrine itself, however egregious the facts.

There is no need to impose such a general rule. The doctrine of judicial estoppel carries sufficient safeguards to preclude application

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<sup>3</sup> Even though the trustee in bankruptcy has now been substituted as the real party in interest, any recovery by the creditors has been delayed ten years.

where it is not warranted. Had Mr. Miller pled mistake or lack of any knowledge of a claim, his claim would not be barred under existing principles of the doctrine. Washington law already recognizes that judicial estoppel might not apply in cases of simple error or inadvertence, that is, when the debtor lacks knowledge of the undisclosed claim or has no motive for concealment. *Cunningham v. Reliable Concrete Pumping, Inc*, 126 Wn. App. 222, 108 P.3d 147 (2005). Thus, where the plaintiff debtor actually presents evidence of an absence of knowledge or of no memory, the trial court already has the ability and the discretion to deny application of judicial estoppel. That is just not the factual pattern presented here.

However, the general rule urged by WSTLA would deny trial courts the discretion to apply judicial estoppel where, for example, the plaintiff debtor is consulting with counsel or other persons before filing a bankruptcy petition or while the bankruptcy is pending. Adoption of the rule proposed by WSTLA and Mr. Miller would unnecessarily restrict the discretion already granted to trial courts, produce injustice to creditors, and promote nondisclosure under federal statutes.

Moreover, it is not inequitable to ask this Court to respect the requirements of another court, particularly when Miller chose to be there.

The superior court considered the undisputed facts of this matter on the record and gave a reasoned opinion as to why judicial estoppel should be imposed on the fact of this case. VRP 23-48; see also, VRP 47-48. The court did not abuse its discretion by finding what all parties have admitted to: Miller had knowledge of a claim. The trial court did not abuse its discretion and this court should affirm its decision as to Mr. Miller.

**C. The Court retains authority to affirm the application of judicial estoppel as to Mr. Miller.**

WSTLA suggests that judicial estoppel is moot if this Court permits substitution of the trustee in bankruptcy. This is contrary to federal and Washington precedent as set forth in Charles Campbell's Supplemental Brief at § VI.E.

**V. CONCLUSION**

WSTLA's position is basically that the plaintiff must know the full extent of his alleged injuries before the federal duty to disclose is imposed, or before his lawsuit can be considered to be "clearly inconsistent" with prior non-disclosure of a claim. This ignores the entire law of bankruptcy, a statutory system to which Miller voluntarily agreed in order to obtain its benefits, and rewrites the doctrine of judicial estoppel. This Court should affirm the application of judicial estoppel as to Mr. Miller because there

are no material issues of fact, and the superior court did not abuse its discretion in applying judicial estoppel to those facts.

RESPECTFULLY SUBMITTED this 15 day of May, 2008.

LEE SMART, P.S., INC.

By: Rosemary J. Moore  
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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 May 15, 2008, I caused service of *Answer to WSTLA Amicus Brief* to the following:

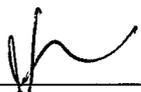
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