

FILED
JUL 10 2007

CLERK OF SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 80276-9
Court of Appeals No. 56736-5

*Redacted
Version*

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellant,

vs.

MICHAEL MILLER,

Respondent.

CLERK

BY RONALD N. CARPENTER

07 JUL 10 AM 8:14

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

Attorney for Repondent:

Jo-Hanna Read, Esq., WSBN: 6938
LAW OFFICE OF JO-HANNA READ
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
(206) 441-1980

ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT.....1

II. COURT OF APPEALS DECISION.....1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE2

V. ARGUMENT.....6

 A. The Court of Appeals Decision Is Not in Conflict With Any Other Washington Appellate Decisions.6

 1. Cunningham v. Reliable Concrete Pumping.7

 2. DeAtley v. Barnett.8

 3. Garrett v. Morgan.9

 4. Bartley-Williams v. Kendall.....10

 5. Arkison v. Ethan Allan.11

 6. Michael Miller’s Alleged “Claim Splitting” Is a Complete Red Herring.....12

 B. This Case Does Not Present an Issue of Substantial Public Interest which Has Not Previously Been Addressed.13

 1. The Nature and Effects of Childhood Sexual Abuse Have Been Extensively Addressed in Prior Washington Cases.....13

 2. Judicial Estoppel Is an Equitable Principle Well-Established and Delineated in Prior Washington Cases.....15

 3. The Particular Controversy in this Matter Is Private in Nature and Not Likely to Recur with any Frequency.17

V. CONCLUSION.....17

APPENDIX

TABLE OF AUTHORITIES

Cases

<u>Arkison v Ethan Allan</u> , no. 78481-7, _ Wn.2d _, _ P.3d _ (May 31, 2007).....	passim
<u>Bartley-Williams v. Kendall</u> , 134 Wn. App. 95, 138 P.3d 1103 (2006)	6, 7, 10
<u>C.J.C. v. Corp of Catholic Bishop</u> , 138 Wn.2d 699, 985 P.2d 262 (1999)	6, 13
<u>Cloud v. Summers</u> , 98 Wn. App. 724, 991 P.2d 1169 (1999).....	14
<u>Cunningham v. Reliable Concrete Pumping</u> , 126 Wn.App. 222, 108 P.3d 147 (2005)	passim
<u>DeAtley v. Barnett</u> , 127 Wn. App. 478, 112 P.3d 540 (2005)	passim
<u>Garrett v. Morgan</u> , 127 Wn. App. 375, 112 P.3d 531 (2005).....	6, 9, 10
<u>Hollmann v. Corcoran</u> , 89 Wn. App. 323, 949 P.2d 386 (1997).....	4, 13
<u>John S. Clark Co. v. Faggert & Frieden, P.C.</u> , 65 F.3d 26 (4th Cir. 1995)	16
<u>Korst v. McMahon</u> , 136 Wn. App. 202, 148 P.3d 1081 (2006)	4, 14, 15
<u>Miller v. Campbell</u> , 137 Wn.App. 762, __ P.3d __ (2007)	passim
<u>Norco Constr., Inc. v. King Cy.</u> , 106 Wn.2d 290, 721 P.2d 511 (1986)	12
<u>Oostra v. Holstine</u> , 86 Wn. App. 536, 937 P.2d 195 (1997).....	14
<u>Rains v. State</u> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	12

Statutes

RCW 4.16.340	3, 13, 15
RCW 5.60.030	17

I. IDENTITY OF RESPONDENT

Respondent Michael Miller was the Appellant below and asks this Court to deny review.

II. COURT OF APPEALS DECISION

The Estate of Campbell has petitioned for review of the Court of Appeals' (Division I) decision in Miller v. Campbell, 137 Wn.App. 762, __ P.3d __ (2007). A copy of the court's decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Is the decision of the Court of Appeals in conflict with a decision of the Supreme Court (RAP 13.4(b)(1))?
2. Is the decision of the Court of Appeals in conflict with another decision of the Court of Appeals (RAP 13.4(b)(2))?
3. Does the petition for review involve an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4))?

IV. STATEMENT OF THE CASE

In its opinion below, Division I of the Court of Appeals set out the following outline of pertinent facts, which are amply supported in the record¹:

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. ... When Miller filed for bankruptcy, he was unaware of the serious injuries for which he currently seeks compensation.

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," 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

¹ Citations to the record contained in the Court of Appeals decision have been omitted.

experiencing crippling, overwhelming feelings of worthlessness." Miller went to Campbell's funeral in part because "I wanted to assure myself he really was dead."

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. 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". 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. 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."

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 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.

...

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 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." 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." Under this category, Miller listed a small estimated tax refund and the possibility of a small lemon law claim against Ford. 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.

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[.]

137 Wn. App. 763-768.²

² Respondent has not attempted to respond point by point to Petitioner's "Statement of the Case." There are some notable inaccuracies, including the following:

The Court of Appeals found that Michael Miller did have a duty to disclose his possible claim against Campbell to the bankruptcy trustee, but that the trial court abused its discretion in applying judicial estoppel to bar Miller's present claim because of his nondisclosure, in light of the circumstances of his omission at the time of the bankruptcy and

Petitioner repeatedly asserts and makes much of the assertion that only in response to the June, 2005, Motion to Dismiss premised on judicial estoppel did Respondent argue that his claim was limited to injuries he discovered after March 27, 2003. Petition, pp. 4, 6, and 8. The citations to the record accompanying these assertions demonstrate that Respondent in fact made this clear throughout the case. This was part of the basis of the earlier denial of a summary judgment motion based on the statute of limitations. See, for example, Plaintiff's Response to Defendant's Motion for Summary Judgment (dated April 1, 2004) §IV.B.2: "The Date of Discovery that Mr. Miller's Injuries Were Caused by the Acts of Childhood Sexual Abuse Was after March, 2003; Therefore the Statute [of Limitations] Did not Begin to Run until Then.", CP 679.

A particularly puzzling example of misstatement as to this issue is in the Petition on p. 6: "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." That is in fact precisely what Miller did argue in 2004. The citation to CP 272 is to Plaintiff's Response to Motion to Dismiss, which reiterates the position Plaintiff took in CP 673-683 in 2004.

Another puzzling assertion in the Petition is the following: "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." [emphasis added] Petition, pp. 2-3. The first part of this sentence could simply be argument. The italicized portion implies that there is evidence in the record that Miller "dreaded [an action brought when Campbell was alive] because Campbell might have produced compelling evidence to disprove Miller's allegations." Neither the cited pages of the Clerk's Papers nor any other evidence in the record supports this statement in any way.

Washington's strong public policy "to provide a broad avenue of redress for victims of childhood sexual abuse."³

V. ARGUMENT

A. The Court of Appeals Decision Is Not in Conflict With Any Other Washington Appellate Decisions.

Petitioner asserts that the decision below conflicts with existing Washington precedent, citing five cases: Cunningham v. Reliable Concrete Pumping, 126 Wn.App. 222, 108 P.3d 147 (2005); DeAtley v. Barnett, 127 Wn. App. 478, 112 P.3d 540 (2005); Garrett v. Morgan, 127 Wn. App. 375, 112 P.3d 531 (2005); Bartley-Williams v. Kendall, 134 Wn. App. 95, 138 P.3d 1103 (2006); and Arkison v Ethan Allan, no. 78481-7, __ Wn.2d __, __ P.3d __ (May 31, 2007). To the contrary, the decision below is fully in accord with these cases.

Four of these decisions recognize that judicial estoppel is an equitable principle, and that there are circumstances where it may be inappropriate to apply it. Cunningham, *supra*, p. 229 (noting that the finding that judicial estoppel should apply was based on "the facts of this case"); Garrett, *supra*, p. 379 (judicial estoppel does not apply in some situations "such as where the party can reasonably explain the differing positions."); DeAtley, *supra*, pp. 483-484 (listing factors a court should

³ Miller v. Campbell, *supra*, at 773, citing C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wn.2d 699, 712 (1999).

consider in deciding whether to apply judicial estoppel); Arkison, supra, pp. 5-6 (listing factors to consider and noting situations where it may be inappropriate to apply judicial estoppel). The fifth decision, Bartley-Williams, supra, simply does not address this issue.

In the present case the Court of Appeals found that the clear public policy supportive of claims on behalf of victims of childhood sexual abuse called for an exception to the application of judicial estoppel where, as here, the victim knew he had been abused and knew it had hurt him, but had not yet discovered more serious injuries for which claim is later brought. This is a far cry from the factual situations in Cunningham, DeAtley, or Arkison, all of which involve debtors who were fully aware of all components of the claims they omitted from their bankruptcy schedules at the time bankruptcy was filed.

1. Cunningham v. Reliable Concrete Pumping.

The Court of Appeals relied specifically on its holdings in Cunningham, supra, quoting from Cunningham several times in the opinion below. The Court explicitly distinguished the facts in Cunningham from those in the present matter, stating:

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.

Miller v. Campbell, p. 770.

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 repetition 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.

Miller v. Campbell, pp. 773-774.

2. **DeAtley v. Barnett.**

DeAtley v. Barnett, supra, is a Court of Appeals Division III case involving a party (DeAtley) who failed to list in bankruptcy schedules filed in 1992 an alleged violation of a right of first refusal which had occurred in 1991 as to interest in a piece of real estate. DeAtley did list an obligation pertaining to that same real estate, and that debt was discharged in the bankruptcy. DeAtley later sued the owner of the land for damages allegedly arising from the 1991 violation of the right of first refusal.

Division Three held that DeAtley was judicially estopped from asserting his claim because he had failed to list the claim as an asset in the very same bankruptcy where he discharged a debt pertaining to the same property.

The DeAtley opinion cites Cunningham, supra, noting that “[j]udicial estoppel has been recently applied in a similar bankruptcy context” in Cunningham. DeAtley at p. 484. Again, the decision focuses on the obvious conclusion that the debtor knew about the asset, since he listed the accompanying obligation and discharged it. There are no countervailing public policy issues in DeAtley or Cunningham. There is no conflict at all between these decisions and Division One’s decision in the present case which hinges on the particular public policy reasons not to apply the harsh remedy of judicial estoppel in a case involving claims based upon childhood sexual abuse where the abuse is remembered by the debtor but particular harms are not known to him at the time of the bankruptcy filing.

3. Garrett v. Morgan.

The factual background in Garrett, supra, is set out succinctly in the opinion at p. 377:

In May 1997, the Davises filed a Chapter 7 bankruptcy petition. In June 1997, they filed a personal injury lawsuit against Morgan based on the medical care he provided to Rebecca Davis between 1994 and 1996.

In the statement of damages in their negligence lawsuit against Morgan, the Davises claimed \$7,625.80 in special damages and \$5,000,000.00 in general damages: They did not list this claim in their bankruptcy schedules and during their creditors' meeting; they further denied having any future personal injury claims. The bankruptcy court closed their case as a "no asset" one and discharged their debts.

Under the circumstances, Division II of the Court of Appeals found that judicial estoppel should be invoked to prevent both the Davises and the bankruptcy trustee (Garrett) who had subsequently re-opened the bankruptcy for the purpose of pursuing the negligence lawsuit as an asset of the bankruptcy estate from pursuing the claim omitted in the bankruptcy filing.⁴ The trial court in Garrett had found, after an evidentiary hearing, that Ms. Davis had intentionally omitted the claim, of which she was quite aware, from the Davis bankruptcy schedules. Given the particular facts of the case, which amounted to intentional misconduct on the part of the Davises, judicial estoppel was appropriately applied.

4. Bartley-Williams v. Kendall.

In Bartley-Williams, *supra*, a Division I case, the Bartley-Williamses had actually filed a medical malpractice case some months prior to filing for bankruptcy. They did not list the pending case as an

⁴ Garrett's holding that the bankruptcy trustee was also judicially estopped from pursuing the claim was subsequently explicitly overruled by this court in Arkison, *supra*, at 9 ("We therefore overrule Garrett to the extent necessary to clarify that 'a trustee ordinarily may not be judicially estopped on account of an earlier inconsistent position taken by the debtor.'").

asset, and their debts were subsequently discharged. The bankruptcy trustee learned of the negligence action, reopened the bankruptcy estate, and moved to be substituted into the negligence action as the real party in interest. All parties agreed that the Bartley-Williamses would be judicially estopped from pursuing the negligence claim on their own behalves, as they had actively misled the bankruptcy court. The Court of Appeals found that the bankruptcy trustee was not estopped from going forward with the claim on behalf of the bankruptcy estate. This created a split of opinions between the divisions on this issue, which was subsequently resolved by this court in Arkison v. Ethan Allan, *supra*.

5. Arkison v. Ethan Allan.

In Arkison this Court recently held: “Absent some inconsistency on the part of the trustee, applying judicial estoppel to bar a bankruptcy trustee from becoming the real party in interest and pursuing the debtor's claims on behalf of the creditors is an abuse of discretion. Arkison, *supra*, p. 9. Arkison does not address the pivotal issue in the present case. There is no conflict between its holding and the holding below.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. Michael Miller's Alleged "Claim Splitting" Is a Complete Red Herring.

Petitioner argues that the Court of Appeals opinion impermissibly allows Michael Miller to "split" a claim in two. He appears to be asserting that res judicata somehow prevents Mr. Miller from bringing this claim. As this Court observed in Norco Constr., Inc. v. King Cy., 106 Wn.2d 290, 293, 721 P.2d 511 (1986), cited by Petitioner in support of his "claim splitting" argument:

The purpose of res judicata is to ensure the finality of judgments. Res judicata occurs when a prior judgment concurs in identity with a subsequent action in four respects:

There must be identity of (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.

Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983).

There is no prior claim or action, and there is no prior judgment as to Michael Miller's claims for childhood sexual abuse. There is no identity of parties. There is no "claim splitting."

B. This Case Does Not Present an Issue of Substantial Public Interest which Has Not Previously Been Addressed.

Petitioner asserts that this case presents the following "issue of substantial public interest": "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." Petition for Review, p. 17. This statement really presents multiple issues, all of which have either been adequately addressed by previous caselaw or do not present issues of substantial public interest.

1. The Nature and Effects of Childhood Sexual Abuse Have Been Extensively Addressed in Prior Washington Cases.

The legislative findings appended to RCW 4.16.340 (the Childhood Sexual Abuse Statute of Limitation) in 1991 "make clear that [the legislature's] primary concern 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 Catholic Bishop, 138 Wn.2d 699, 712, 985 P.2d 262 (1999). "[T]he statute of limitations is tolled until the victim of childhood sexual abuse in fact discovers the causal connection between the defendant's acts and the injuries for which the claim is brought." Hollmann v. Corcoran, 89 Wn.

App. 323, 325, 949 P.2d 386 (1997). See also, Oostr v. Holstine, 86 Wn. App. 536, 937 P.2d 195 (1997). The broad intent of this statute is discussed in Cloud v. Summers, 98 Wn. App. 724, 733, 991 P.2d 1169 (1999), as follows:

Our Legislature has determined that a victim of childhood sexual abuse may know he was abused, but be unable to make a connection between the abuse and emotional harm or damage until many years later. He may also be aware of some injuries, but not discover more serious injuries until many years later. This is because of the insidious nature of childhood sexual abuse - it is a traumatic experience causing long-lasting damage.

These principles were again emphasized by Division II in Korst v. McMahan, 136 Wn. App. 202, 208, 148 P.3d 1081 (2006):

The legislature specifically anticipated that victims may know they are suffering emotional harm or damage, but not be able to understand the connection between those symptoms and the abuse.

The facts as to understanding the causal connection between the abuse and particular harms caused in Korst are similar in some regards to those in the present case. Ms. Korst always remembered childhood sexual abuse by her father and in fact revealed it to her mother when she was 14 years old. She wrote a letter to her father many years later (as an adult) about the immense pain the sexual abuse had caused her. Some seven years after writing this letter, she began seeing a counselor and gradually came to understand the connections between the abuse and various

symptoms and conditions she was suffering, including Post Traumatic Stress Disorder. The Court of Appeals found that the earlier anger and hurt and the statement that the abuse had “haunted” Ms. Korst throughout her life expressed in the letter did not constitute proof that she understood the nature of the damage that had been done. Korst, supra, at 209-210.

All of the appellate courts of this state have interpreted the present version of RCW 4.16.340 and legislative findings accompanying it as expressing a strong public policy in favor of allowing childhood sexual abuse victims to go forward years later with claims for damages stemming from the abuse and a clear understanding of the barriers caused by the effects of the abuse on the victim. The Court of Appeals herein has simply restated clearly established public policy in this regard.

2. Judicial Estoppel Is an Equitable Principle Well-Established and Delineated in Prior Washington Cases.

As discussed in section V.A. above, judicial estoppel is a well-established equitable doctrine under Washington law. The Court of Appeals correctly defines it as follows: “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).” Miller v. Campbell, supra, at 764-765. The decision below recognizes the general rule: When a debtor fails to list a

known possible claim as an asset in a bankruptcy and the bankruptcy court accepts the debtor's implied assertion that he has no unlisted claims, a subsequent discharge of debts judicially estops the debtor from later pursuing the unlisted claim. ("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 prepetition personal injury claim." Miller v. Campbell, supra at 769-770.)

But the Court of Appeals also recognized the equitable nature of the doctrine and additional factors, well established in Washington law, which should be considered in particular fact situations. As this Court very recently said: "Application of the doctrine may be inappropriate 'when a party's prior position was based on inadvertence or mistake.' New Hampshire, 532 U.S. at 753 (quoting John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995))." Arkison v. Ethan Allan, supra at 5-6.

The Court of Appeals decision below correctly sets out the well-established parameters of judicial estoppel under Washington law. There is no need for clarification by this Court.

3. The Particular Controversy in this Matter Is Private in Nature and Not Likely to Recur with any Frequency.

The controversy in question here is a claim for damages for childhood sexual abuse against a private individual's estate. It presents a rather unique situation, because the estate waived the protections of the Dead Man's Statute, RCW 5.60.030, earlier in the litigation. CP 470. This particular fact situation is unlikely to crop up again.

It is possible that this issue might arise in claims arising from childhood sexual abuse against living individuals, but it is unlikely to be a very common issue. This is not "an issue of substantial public interest" that calls for determination by this Court.

V. CONCLUSION

The Court of Appeals correctly construed and applied well-settled law pertaining to claims on behalf of survivors of childhood sexual abuse and to application of judicial estoppel under the unique facts of this case. The Court of Appeals found that "federal bankruptcy law is controlling on when a duty to disclose arises but ... state law provides the touchstone for determining whether a party has asserted clearly inconsistent positions supporting judicial estoppel of a state tort action," Miller v. Campbell, supra, at 772. The Court of Appeals also found "no tenable grounds for concluding that Miller's present lawsuit is clearly inconsistent with his

position in bankruptcy”, Id., at 774. The Court of Appeals then carefully balanced and applied principles of two very important and well-established legal principles: protection of the rights and interests of victims of childhood sexual abuse and protection of the integrity of the judicial process.

This Court should not accept review of this decision.

DATED this 9 July 2007.

LAW OFFICE OF JO-HANNA READ

By 
JO-HANNA READ, WSBN: 6938
Attorney for Respondent

Appendix - A

RECEIVED

APR 03 2007
LAW OFFICE OF
Jo-Hanna Read

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL MILLER,) NO. 56736-5-1
)
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.

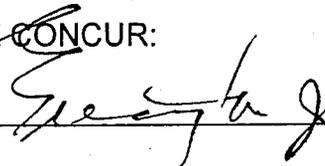
For that reason, the statute of limitations is closely intertwined with the equities of applying judicial estoppel to a claim of childhood sex abuse. The Legislature's primary concern in enacting the special statute of limitations "was to provide a broad avenue of redress for victims of childhood sexual 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

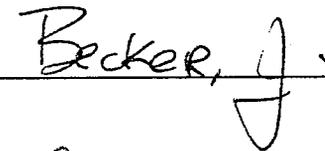
triggered a new flood of memories and crippling symptoms. At trial he must still face the estate's statute of limitations defense, and the estate will have the opportunity to argue to the fact finder that Miller's positions have been inconsistent. Under these circumstances we cannot say that allowing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

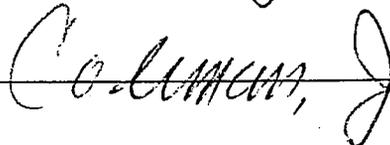
In summary we find no tenable grounds for concluding that Miller's present lawsuit is clearly inconsistent with his position in bankruptcy. At the same time, we reject Miller's argument that he was entitled to judgment as a matter of law. Miller moved unsuccessfully for partial summary judgment on the 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:







cl
4-3-07