

674471

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**COURT OF APPEALS DIVISION I OF THE STATE OF  
WASHINGTON**

**NO. 674471**

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**LARRY LARSEN, APPELLANT**

v.

**JOSEPH D. BURZOTTA and "JANE DOE" BURZOTTA,  
husband and wife, RESPONDENTS**

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**BRIEF OF APPELLANT**

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STATE OF WASHINGTON  
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## I. ASSIGNMENTS OF ERROR

The trial Court erred in granting the respondent's motion for summary judgment when the appellant's position in the bankruptcy was not "clearly inconsistent" with this action, the appellant has not gained an unfair advantage, the respondent has not derived an unfair detriment and the appellant's bankruptcy case has been re-opened.

## II. STATEMENT OF THE CASE

According to respondent's underlying motion for summary judgment, on October 30, 2007, the respondent was driving a Toyota Camry, failed to stop and crashed into the rear of the appellant's vehicle, causing the appellant's injuries. CP 1.

On or about January 30, 2008, the appellant sought bankruptcy protection. CP 3. According to respondent's underlying motion for summary judgment, under Statement of Financial Affairs, the bankruptcy schedules asked the appellant to disclose the following (CP 39):

### 8. Losses

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under Chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS
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In answering the above, the appellant checked the box "none". CP 39. The respondent is arguing that because the appellant should have

identified this claim against him under that section and therefore, failure to do so, he should not be responsible for this motor vehicle accident. CP 3.

On June 1, 2011, the appellant filed a motion with the United States bankruptcy Court for the Western District of Washington to re-open his bankruptcy case and include the personal injury claim that is the subject matter of this litigation. CP 165. On June 20, 2011, Judge Monica Benton granted the respondent's motion for summary judgment based upon judicial estoppel on June 20, 2011. CP148-149.

On June 29, 2011 Bankruptcy Judge Lynch granted the appellant's motion and re-opened the appellant's bankruptcy case. CP 160, 166. On June 30, 2011, appellant's filed a motion for reconsideration. CP 150-159. Judge Monica Benton denied the appellant's motion for reconsideration. CP 176.

### **III. ARGUMENT**

The appellate court reviewing a ruling on summary judgment places itself in the position of the trial court and considers the facts in the light most favorable to the non-moving party. Del Guzzi Constr. Co. v. Global Northwest, Ltd., 105 Wn.2d 878, 882, 719 P.2d 120 (1986). The Court reviews the application of judicial estoppel to the particular facts of a case for abuse of discretion. Broussard v. University of California, 192 F.3d 1252, 1255 (9<sup>th</sup> Cir. 1999).

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Arkison v. Ethan Allen, Inc., 160 Wash.2d 535, 538, 160 P.3d 13 (2007) (citing Bartley-Williams v. Kendall, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006)). See also New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed. 2d 968 (2001).

The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wash.App. 222, 225, 108 P.3d 147 (2005).

The burden is on the defendant to establish the elements of judicial estoppel by "clear and convincing" evidence. See Lilly v. Lynch, 88 Wn.App. 306, 945 P.2d 727 (1997) citing Thomas v. Harlan, 27 Wash.2d 512, 178 P.2d 965, 170 A.L.R. 1138 (1947)).

The purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process, not the interest of a defendant attempting to avoid liability. See Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008) citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir.1996) ( "Judicial estoppel is not meant to be a technical defense for litigants seeking to derail potentially meritorious

claims ... and is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity.) (quoting Gleason v. United States, 458 F.2d 171, 175 (3d Cir.1972))).

According to our Supreme Court in Arkison, at least three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is 'clearly inconsistent' with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' "; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." See Arkison v. Ethan Allen, Inc., 160 Wash.2d 535, 160 P.3d 13 (2007) citing New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed. 2d 968 (2001) (citing Davis v. Wakelee, 156 U.S. 680, 689 (1895)).

Application of the doctrine may be inappropriate when a party's prior position was based on inadvertence or mistake. Arkison v. Ethan Allen, Inc., 160 Wash.2d 535, 538-39, 160 P.3d 13 (2007) citing New Hampshire, 532 U.S. at 753, 121 S.Ct. 1808 (quoting John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995)).

In Miller v. Campbell, our Supreme Court has cited Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d

Cir.1996) as to the limits and purposes of the doctrine of judicial estoppel. As such, the Ryan Court made clear that restraint should be exercised in applying the doctrine and emphasized that "this court has expressly left open the question of whether nondisclosure, standing alone, can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial-estoppel doctrine." (Ryan Operations G.P., *supra*, 81 F.3d at p. 362.)

Under Ryan, the court concluded that judicial estoppel would be inappropriate in any event unless the moving party establishes that the debtor acted in bad faith. Ryan Operations G.P., *supra*, 81 F.3d at p. 362. The doctrine of judicial estoppel does not apply 'when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court. Id. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing, deliberate inconsistencies that are tantamount to a knowing misrepresentation to or even fraud on the court. Id., at 362-363.

Further, the Ryan court made clear it's position that the use of judicial estoppel in the bankruptcy context is an "extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice". Id., at 365, citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir. 1988). As such, judicial

estoppel is a concept to be applied with restraint in egregious cases only and with clear regard for the facts of the particular case.

To find that the doctrine of judicial estoppel applies, cases emanating from the Court of Appeals for the Third Circuit require that: (1) the party to be estopped took two irreconcilably inconsistent positions; (2) the change of position was done in bad faith, in order to play "fast and loose" with the court; and (3) the sanction of estoppel is "tailored to address the harm" and cannot be remedied by a lesser sanction. Montrose Med. Group Participating Saving Plan v. Bulger, 243 F.3d 773, 779-80 (3d Cir. 2001) quoting Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 108 (3d Cir. 1999). The doctrine of judicial estoppel is to be applied sparingly and reserved for the most egregious case. Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC, 337 F.3d 314, 324 (3d Cir. 2003).

Further, in Arkison, our Supreme Court held these factors are not an "exhaustive formula" and "additional considerations" may guide a court's decision. *New Hampshire* at 751, 121 S.Ct. 1808; *see, e.g., Markley v. Markley*, 31 Wash.2d 605, 614-15, 198 P.2d 486 (1948) (listing six factors that may likewise be relevant when applying judicial estoppel).

Our Supreme Court in Markley, as cited in Arkison, held that the following are essential to the establishment of an estoppel under the rule

that a position taken in an earlier action estops the one taking such position from assuming an inconsistent position in a later action:

(1) The inconsistent position first asserted must have been successfully maintained;

(2) a judgment must have been rendered;

(3) the positions must be clearly inconsistent;

(4) the parties and questions must be the same;

(5) the party claiming estoppel must have been misled and have changed his position;

(6) it must appear unjust to one party to permit the other to change.

Citing Markley v. Markley, 31 Wash.2d 605, 614-15, 198 P.2d 486 (1948)).

Once the trustee has either abandoned the claim, or substituted in, no possibility of unfair advantage is apparent. Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008) citing Cloud v. Northrop Grumman Corp., 67 Cal.App.4th 995, 1020-21, 79 Cal.Rptr.2d 544 (1998)

### **Arkinson Three "Core" Factors**

**(1) whether "a party's later position" is 'clearly inconsistent' with its earlier position";**

Here, the plaintiff was asked a question as follows:

List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of this case or since the commencement of this case...

Nowhere in preparing the Bankruptcy schedules of assets does it define "casualty". If the bankruptcy trustee was more concerned about

personal injury claims, it would be incumbent upon the trustee to be more specific in their forms.

Asking a debtor to list all losses from “fire, theft, other casualty or gambling” hardly makes it clear to a debtor to include losses from a personal injury accident. The Schedule is very clear as to losses from a fire, theft, or gambling, all easily identifiable to a lay person. However, to include an all encompassing term such as “other casualty” and expect a debtor to accurately understand what the question means.

It is incumbent upon the Bankruptcy Court to prepare schedules that are clear and easy to understand for unsophisticated debtors, especially if the schedules could potentially impair a debtors, and his creditors, significant rights. In this case, the plaintiff’s case should not be dismissed because the Bankruptcy schedules are unclear, vague and ambiguous. It certainly should not be a windfall for the defendant that the plaintiff was unable to understand what “other casualty” means.

When the bankruptcy schedules ask you to list losses from fire, theft, other casualty or gambling, it is completely reasonable for a debtor to believe “other casualty” would be consistent with “fire, theft, or gambling losses”. It is not clear, certainly to an unsophisticated debtor.

In addition to the all encompassing and vague term of “other casualty”, the question is asking for losses, not claims, which the vast majority of debtors would not understand.

To somehow use an overly vague question to identify any losses against the plaintiff does not serve the ends of justice and would simply allow the defendant to avoid liability because the plaintiff failed to list this claim as “other casualty”.

In order for the doctrine of Judicial Estoppel to apply, the plaintiff’s position must be clearly inconsistent with its earlier position. In this case, simply because the plaintiff failed to list a personal injury claim against the defendant as a loss from “other casualty” is not clearly inconsistent with the current action.

Perhaps if the questions specifically included all losses from personal injuries, auto-accidents, or other injuries. However, because the question was so overly vague and ambiguous, the plaintiff cannot take a position that is “clearly inconsistent”.

**(2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'";**

Based upon the question “other casualty”, it would fair to say neither court was intentionally misled. If the Bankruptcy court was misled because they relied upon the schedule in concluding the debtor had no personal injury claims, then it would be the bankruptcy court’s responsibility to make the schedules more clear, define the term “other casualty” and make their schedules easy to understand for an unsophisticated debtor.

**(3) Whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.**

With respect to this factor, the defendant fails to address this critical factor. As to this litigation, the plaintiff has not gained an advantage in this litigation by failing to list his auto accident as “other casualty” under the bankruptcy schedules. This factor would require the defendant to prove, when viewing the evidence in the light most favorable to the plaintiff, that the plaintiff somehow gained an advantage in this litigation.

In the alternative, the defendant would have to prove how failing to include his personal injury claim as “other casualty” imposed an unfair detriment to the defendant. In either case, the defendant has wholly failed to establish how the plaintiff derived an unfair advantage in this litigation over the defendant, or, how the plaintiff’s actions in the bankruptcy case imposed an unfair detriment to the defendant.

Essentially, the Defendant wants the Court to use judicial estoppel to limit its liability to the extent that the Plaintiff would receive any benefit from a judgment. However, according to our Supreme Court in Miller v. Campbell, 164 Wn.2d 529, 192 P.3d 352 (2008), Judicial estoppel is meant to protect the integrity of the Judicial Process, it is not meant to be a technical defense for litigants seeking to avoid liability and derail potentially meritorious claims and it is not a sword to be wielded by

adversaries unless such tactics are necessary to ‘secure substantial equity.’ (quoting Gleason v. United States, 458 F.2d 171, 175 (3d Cir.1972))).

Further, Washington has a strong preference to resolve issues on the merits. See CHD, Inc v. Taggart, 153 Wn. App. 94, 106, 220 P.3d 229 (2009) citing Griffith v. City of Bellevue, 130 Wn.2d 189, 192, 922 P.2d 83 (1996).

Bankruptcy is a unique set of laws and the defendant has failed to prove that the plaintiff benefitted in any way from failing to include this claim under “other casualty”. For starters, the laws of subrogation may very well leave the plaintiff with no personal recovery and the defendant has failed to prove the extent the plaintiff would personally benefit. Bankruptcy law has a unique set of priorities and there is no evidence that with subrogation, liens, and attorney’s fees, that the plaintiff has would receive any personal recovery.

Further, Bankruptcy law allows for a certain amount of exempted funds for personal injuries. See RCW 6.15.010(3)(f), see also 11 U.S.C §522 (d)(11)(D). In addition to the exempted amount for personal injuries, Bankruptcy law allows a “wild card” exemption that can be used for anything. See RCW 6.15.010(3)(b), see also 11 U.S.C §522 (d)(5). In this case, the defendant has wholly failed to prove that even if this claim was listed as “other casualty” there would have been any money for unsecured creditors.

Two recent Supreme Court cases, Arkison v. Ethan Allen, Inc. and Miller v. Campbell make it clear that the analysis is much deeper than that set forth in Cunningham v. Reliable Concrete Pumping, Inc and Judicial Estoppel cannot be used as a technical defense. The defendant cannot show how he/she has been prejudiced in any way. Therefore, even based upon the “core factors”, the defendant cannot establish, as a matter of law, that this case should be dismissed.

#### **Additional Markley Factors**

#### **(4) The parties and questions must be the same;**

In applying the additional factors addressed in *Arkison* as set forth in *Markley*, the doctrine of Judicial Estoppel does not apply in this case. Judicial Estoppel originally applied when the parties and the questions were the same in the prior litigation. In this case, the prior litigation was a Bankruptcy and the parties were not the same. Therefore, the fact that the defendant was not a party to the prior bankruptcy would suggest that judicial estoppel does not apply.

#### **(5) The party claiming estoppel must have been misled and have changed his position;**

Further, the history of judicial estoppel requires that the defendant in this case was somehow misled and therefore, was prejudiced thereby. This factor suggest that judicial estoppel does not apply in this case. The defendant in no way was misled by the plaintiff's prior bankruptcy.

Perhaps if the defendant had known about the plaintiff's prior bankruptcy, reviewed the filings and concluded that the plaintiff did not have a claim against the defendant and was thereby prejudiced, but those are not the facts. The defendant was completely unaffected by the plaintiff filing for bankruptcy.

**(6) It must appear unjust to one party to permit the other to change.**

The defendant was not prejudiced in any manner by the failure of the plaintiff to include this incident as "other casualty" in his bankruptcy schedules. Either way, the defendant would have been held accountable, either the trustee would have pursued the claim, or abandoned the claim allowing the plaintiff to pursue outside of bankruptcy.

**(7) Simple Mistake or Inadvertance**

The doctrine may be inappropriate 'when a party's prior position was based on inadvertence or mistake.' Arkison v. Ethan Allen, Inc., 160 Wash.2d 535, 538-39, 160 P.3d 13 (2007) citing New Hampshire, 532 U.S. at 753, 121 S.Ct. 1808 (quoting John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995)).

In this case, the Defendant has not established, as a matter of law, that the failure of the plaintiff to include this claim as "other casualty" was not based on the plaintiff's mistake or inadvertence. According to the documents provided by the defendant, it appeared as though the plaintiff

was pro se for his bankruptcy. The term “other casualty” is not clear and when surrounded by terms such as “losses from fire, theft or gambling” would not necessarily lead an unrepresented debtor to understand that to include car accident.

It would be simply unjust to allow a vague and ambiguous reference to “other casualty” to be the basis to apply the doctrine of judicial estoppel. In a summary judgment motion, the Court must look at all evidence and inferences in the light most favorable to the non-moving party.

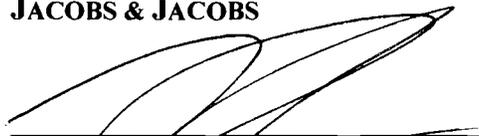
#### IV. CONCLUSION

In this case, the trial court abused it’s discretion by not analyzing all the necessary factors in coming to it’s conclusion. There is no evidence of bad faith on the part of the plaintiff and when the Court analyzes the factors in their totality to the facts of this case, the Court abused it’s discretion in dismissing the appellant’s claims.

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RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of October, 2011.

**JACOBS & JACOBS**

  
G. Parker Reich, WSBA#35500  
Attorney for Appellant

#### DECLARATION OF SERVICE

I hereby declare that I sent a copy of the document on which this declaration appears via fax/mail/messenger service to Rory Leid.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Executed at Bellevue, WA on 10-13-11  
Signed by: G. Parker Reich