No. 23-CV-0021

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

YOLANDA MARIA STEWART,

Plaintiff – Appellant,

v.

THE HOWARD UNIVERSITY.
d/b/a HOWARD UNIVERSITY HOSPITAL

Defendant – Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

Superior Court Case No. 2019-CA-008178-M

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF APPELLANT

ALEXANDER M. LAUGHLIN
BRADLEY D. JONES
Odin, Feldman &
Pittleman, P.C.
1775 Wiehle Ave., Suite 400
Reston, VA 20190
Phone: (703) 218-2100
Fax: (703) 218-2160
Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, *amicus* states that it is not a publicly held corporations, nor does it have a parent corporation, and no public corporation owns 10% or more of its stock. *Amicus* is a non-profit 501(c)(6) organization. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the participation of The National Association of Bankruptcy Trustees.

This case is related to a bankruptcy case filed by Yolanda Maria Stewart. Marc Albert serves as the duly appointed chapter 7 trustee.

Mr. Albert is a trustee member of the NABT. Other than through his support of the NABT by paying annual membership dues, Mr. Albert has made no financial contribution to the preparation of this brief.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

PRELIMINARY STATEMENT 2

ARGUMENT 3

I. The Trustee's Role is to Collect Money for Creditors as a Separate, Independent Party from the Debtor 3

II. Application of Judicial Estoppel to Unscheduled Litigation Claims is a Frequently Occurring Issue But Courts Agree Estoppel Does Not Apply to Bankruptcy Trustees 9

III. The Superior Court's Judgment Should be Reversed 18

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 25

REDACTION CERTIFICATE DISCLOSURE FORM 26

CERTIFICATE OF SERVICE 28

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

United States Supreme Court

First Nat. Bank v. Lasater,
196 U.S. 115 (1905) 13, 14

New Hampshire v. Maine,
532 U.S. 742 (2001) 10, 11

United States Courts of Appeals

Biesek v. Soo Line R.R. Co.,
440 F.3d 410 (7th Cir. 2006) 16

Cadle Co. v. Mims,
608 F.3d 253 (5th Cir. 2010) 6

Eastman v. Union Pac. R. Co.,
493 F.3d 1151 (10th Cir. 2007) 16

Knight v. New Farmers Nat. Bank,
946 F.2d 895 (6th Cir. 1991) 21

Marshall v. Honeywell Tech. Sys. Inc.,
828 F.3d 923 (D.C. Cir. 2016)..... 10, 17

Martineau v. Wier,
934 F.3d 385 (4th Cir. 2019) 21

Metrou v. M.A. Mortenson Co.,
781 F.3d 357 (7th Cir. 2015) 16

Moses v. Howard University Hospital,
606 F.3d 789 (D.C. Cir. 2010)..... 17

Parker v. Wendy's Int'l., Inc.,
365 F.3d 1268 (11th Cir. 2004) 16

Reed v. City of Arlington,
650 F.3d 571 (5th Cir. 2011) 14, 15, 16

Sherwood Partners, Inc. v. Lycos, Inc.,
394 F.3d 1198 (9th Cir. 2005) 7

Stephenson v. Malloy,
700 F.3d 265 (6th Cir. 2012) 16

Wieburg v. GTE Sw. Inc.,
272 F.3d 302 (5th Cir. 2001) 20, 21

United States Bankruptcy Appellate Panel

In re Cheng,
308 B.R. 448 (B.A.P. 9th Cir. 2004) 16

United States District Courts

Moses v. Howard Univ. Hosp.,
601 F. Supp. 2d 1 (D.D.C. 2009) 21

District of Columbia Court of Appeals.

Atkins v. 4940 Wisconsin, LLC,
93 A.3d 1286 (D.C. 2014) 17, 18

Dennis v. Jackson,
258 A.3d 860 (D.C. 2021) 18, 22

State Supreme Courts

Alward v. Johnston,
171 N.H. 574 (2018) 17

Arkison v. Ethan Allen, Inc.,
160 Wash. 2d 535 (2007) 16

Dupwe v. Wallace,
355 Ark. 521 (2004) 16

Hamm v. Norfolk S. Ry. Co.,
52 So. 3d 484 (Ala. 2010) 16, 17

McCallister v. Dixon,
154 Idaho 891 (2013) 17

STATUTES

United States Code

11 U.S.C. § 301 5

11 U.S.C. § 303 5

11 U.S.C. § 323(a) 6

11 U.S.C. § 541(a) 6, 9

11 U.S.C. § 541(a)(1) 15

11 U.S.C. § 544 8

11 U.S.C. § 547 8

11 U.S.C. § 548 8

11 U.S.C. § 550 8

11 U.S.C. § 551 8

11 U.S.C. § 701 6

11 U.S.C. § 702 6

11 U.S.C. § 704(a) 6

11 U.S.C. § 704(a)(1) 2

11 U.S.C. § 726(a) 6

28 U.S.C. § 581 6

28 U.S.C. § 589 6

FEDERAL RULES

Fed. R. Civ. P. 17 ..... 20, 24

RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

D.C. App. R. 26.1 i

D.C. App. R. 29(a) 1

D.C. App. R. 29(a)(5) 25

D.C. App. R. 32(a)(6) 25

DISTRICT OF COLUMBIA SUPERIOR COURT CIVIL RULES

Super. Ct. Civ. R. 17 ..... 19, 20

Super. Ct. Civ. R. 17(a)(3) 20

OTHER AUTHORITIES

Caryn Wang, The Last Estop: Why Judicial Estoppel Should Be a Court's Last Resort for Undisclosed Lawsuits from Bankruptcy, 66 Emory L.J. 1209 (2017) 11

Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (1995) 4, 5

Eric Hilmo, Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors, 81 Fordham L. Rev. 1353 (2012) 13

John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 Bankr. Dev. J. 361 (1988) 5

United States Courts, Bankruptcy Filings, Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2021 23

United States Courts, Judiciary News, "25 Years Later, PACER, Electronic Filing Continue to Change Courts" (Dec. 9, 2013) 11

United States Department of Justice, United States Trustees, Chapter 7 Trustee Final Reports, *Chapter 7 Asset Cases Closed Calendar Year 2021* 4, 23

William H. Burgess, Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds FED. LAWYER (May 2015) 12

INTEREST OF *AMICUS CURIAE*

The National Association of Bankruptcy Trustees is a nonprofit association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country and to promote the effectiveness of the bankruptcy system as a whole. Since then, the focus of the organization has expanded to include chapter 11 operating trustees and subchapter V trustees. Membership in NABT is open to chapter 7, chapter 11, and subchapter V trustees as well as judges, employees of the Office of the United States Trustee, and associated professionals and businesses.[1]

NABT files amicus briefs throughout the country on matters of national importance to bankruptcy trustees and the efficient administration of bankruptcy cases.

---

[1] Pursuant to Rule 29(a) *amicus* represent that the trustee and his counsel have consented to the filing of this brief but counsel for Howard University did not provide consent.

The undersigned counsel further represent that no party or party's counsel have authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and that no party other than the *amicus curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

The statutory duties of bankruptcy trustees include collecting and reducing to money the property of bankruptcy estates. 11 U.S.C. § 704(a)(1). The NABT is interested in this case because preserving the ability of bankruptcy trustees to administer estate assets is central to the ability of the NABT's trustee members to fulfill their responsibilities. Among the assets bankruptcy trustees routinely administer are litigation claims that belong to bankruptcy estates. These litigation claims may include causes of actions that debtors in bankruptcy failed to disclose in their sworn schedules of assets and liabilities.

NABT's amicus committee has authorized the filing of a brief in this case.

PRELIMINARY STATEMENT

Every federal Court of Appeals that has considered the issue has recognized that a debtor's failure to schedule a prepetition litigation claim does not prevent a bankruptcy trustee from pursuing the undisclosed litigation. While judicial estoppel may be applied against the debtor, judicial estoppel cannot be applied to prevent the bankruptcy trustee as the real party-in-interest from pursuing the

litigation claim for the benefit of creditors. This Court should reach the same result as the federal Courts of Appeals.

This case arises from a medical malpractice lawsuit filed against Howard University after the debtor filed a chapter 7 bankruptcy case. The debtor did not disclose the litigation in her bankruptcy schedules. After the chapter 7 trustee learned of the litigation, he obtained the bankruptcy court's permission to hire counsel and sought to be substituted as the plaintiff. However, the Superior Court granted summary judgment to the defendant University on judicial estoppel grounds and denied as moot the trustee's motion to substitute as plaintiff.

The Superior Court's judgment should be reversed, and the case remanded with instructions to grant the chapter 7 trustee's motion to substitute.

ARGUMENT

I. The Trustee's Role is to Collect Money for Creditors as a Separate, Independent Party from the Debtor.

In a chapter 7 bankruptcy case, the trustee is a separate, independent party from the debtor. While individual debtors file bankruptcy to obtain a discharge of their pre-petition debts, the trustee

is a fiduciary whose role is to maximize creditor recoveries. The heart of chapter 7 is a *quid-pro-quo*: individuals obtain a fresh-start free of their pre-bankruptcy debts; but in exchange for that statutory discharge of indebtedness, a bankruptcy trustee liquidates their non-exempt assets to minimize the losses suffered by their creditors.

Bankruptcy trustees serve an important role in upholding the economics of this bargain. In 2021, chapter 7 trustees distributed over $1.6 billion to creditors in bankruptcy cases. United States Department of Justice, United States Trustees, Chapter 7 Trustee Final Reports, *Chapter 7 Asset Cases Closed Calendar Year 2021*.[2] Of this sum, over $500 million was paid to general unsecured creditors, *id.*, who without the work of trustees, would have limited ability to efficiently monetize their claims.

1. The Chapter 7 Trustee's Primary Responsibility is to Monetize Assets for Creditors.

Bankruptcy trustees' work for creditors in the modern system is consistent with the role these professionals have always played. Bankruptcy began as a collections remedy. Charles Jordan Tabb, *The*

[2] Available at https://tinyurl.com/y98t8tup (last accessed July 8, 2023).

History of the Bankruptcy Laws in the United States, 3 Am. Bankr. Inst. L. Rev. 5, 14 (1995). All cases were begun by the involuntary filing of a petition by creditors. *Id.* Upon the creditor providing sufficient proof of the debtor's commission of an act of bankruptcy, commissioners appointed by the district courts would appoint assignees to liquidate and distribute a bankrupt's assets. *Id.*

Voluntary bankruptcy petitions first became possible in 1841. John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 Bankr. Dev. J. 361, 361-62 (1988). Allowing for voluntary bankruptcy was a break from English Common Law precedent and established a uniquely American bankruptcy system. *Id.* All subsequent American bankruptcy laws have featured voluntary proceedings. Tabb, 3 Am. Bankr. Inst. L Rev. at 18.

Today, while involuntary petitions in bankruptcy may still be filed, *see* 11 U.S.C. § 303, the vast majority of bankruptcy cases are voluntary petitions filed by debtors under 11 U.S.C. § 301. However, regardless of how bankruptcy cases begin, creditor collections remain a central objective.

Under the current Bankruptcy Code, when a debtor files for bankruptcy, an estate is created that is comprised of all of the debtor's legal and equitable interests in property as of the date the case was commenced. 11 U.S.C. § 541(a).

To administer each bankruptcy estate, the United States Trustee[3] appoints a private individual to serve as a chapter 7 trustee. 11 U.S.C. §§ 701, 702. The trustee is the representative of the estate, 11 U.S.C. § 323(a), and has the statutory duty to collect and reduce to money the property of the bankruptcy estate for the benefit of creditors. 11 U.S.C. § 704(a). The creditors are then paid in accordance with a statutory priority scheme. 11 U.S.C. § 726(a).

As relevant in this case, the bankruptcy estate includes all pre-petition litigation claims the debtor may have had. *Cadle Co. v. Mims*, 608 F.3d 253, 257–58 (5th Cir. 2010). In such case, the trustee is the real party-in-interest, possessing the authority to use, sell, or compromise those litigation claims. *Id.* at 266.

[3] The United States Trustee is an official of the United States Department of Justice appointed by the Attorney General to supervise the administration of bankruptcy cases. 28 U.S.C. §§ 581–589.

2. To Protect Creditor Interests, Trustees Must Be Able to Pursue Litigation Recoveries Regardless of Debtor Preferences or Conduct.

A bankruptcy estate includes all of the debtor's pre-litigation claims, but a chapter 7 bankruptcy trustee is not merely a successor-in-interest to the debtor.

Many persons interested in the assets of a particular debtor come before the bankruptcy court to seek distributions that will be made out of the bankruptcy estate. The trustee's role is to bring property into the estate in the organized manner set forth in the statutes empowering and controlling the trustee. This protects creditors from one another. The equitable distribution provided by a trustee avoids a race among creditors to seize a debtor's assets immediately prior to a bankruptcy filing. *See Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1203 (9th Cir. 2005) (discussing bankruptcy as providing "a distinctive form of collective proceeding"). Creditors are protected because bankruptcy allows for the equitable division of a debtor's assets among all creditors—not just to the one creditor, or those few creditors, who won the race to a courthouse to obtain judgments. *Id.* at 1203–04.

Bankruptcy law endeavors to treat all similarly situated creditors the same.

To achieve this equality of treatment, bankruptcy must provide certain powers to a trustee that go beyond the rights possessed by the debtor pre-bankruptcy. A trustee must be able to look back in time, at least briefly, so that creditors who have just obtained a judgment can be characterized similarly to creditors who have not yet done so. The Bankruptcy Code accomplishes that through the preference provisions in 11 U.S.C. § 547. Equality among parties is destroyed if a debtor is able to transfer assets to third parties before filing bankruptcy. For this reason, a trustee may pursue assets fraudulently transferred under 11 U.S.C. § 548. Similarly, 11 U.S.C. § 544 of the bankruptcy code preserves for the trustee the ability to bring all avoidance claims available to a debtor's creditors under generally applicable non-bankruptcy law. Finally, 11 U.S.C. §§ 550 and 551 establish liability of the transferee of the avoided transfer and preserves liens for the benefit of the bankruptcy estate.

In seeking to undo preferential payments or fraudulent conveyances, the trustee is not stepping into the shoes of the debtor.

Rather, a bankruptcy trustee exercises the traditional and statutory collection powers that, on behalf of all creditors, serve the Bankruptcy Code's mandate of equal treatment among similarly situated parties. The trustee's mission is to seek this result, even if the outcome is directly contrary to the debtor's pre-bankruptcy intentions. Indeed, the trustee's interests and the debtor's interests are often in conflict.

An unlisted litigation asset—just like any other asset that a debtor failed to properly disclose, concealed or attempted to fraudulently transfer—is an asset of the bankruptcy estate. *See* 11 U.S.C. § 541(a). In bankruptcy such assets generally are recoverable by the trustee for the benefit of a debtor's creditors. Allowing an asset to be lost because of a debtor's conduct before or after filing bankruptcy is contrary to the Bankruptcy Code's goal of allowing the trustee to serve as the collection agent for creditors by maximizing the assets of the estate.

II. Application of Judicial Estoppel to Unscheduled Litigation Claims is a Frequently Occurring Issue But Courts Agree Estoppel Does Not Apply to Bankruptcy Trustees.

Judicial estoppel is a judicially created doctrine that prevents a litigant from asserting a position that is inconsistent with one the

litigant asserted in the same or previous proceeding. *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 928 (D.C. Cir. 2016). When a debtor pursues litigation, which the debtor should have but did not disclose in a prior bankruptcy case, defendants frequently invoke judicial estoppel as a defense.

Combined with wider access to electronic court records in the past two decades, judicial estoppel has become an increasingly common defense due to increased interest in the doctrine by state and federal courts. But as these cases have been litigated, courts have also reached a consensus that, while judicial estoppel may be applied as a remedy to address improper concealment by a debtor, the defense is not applicable to innocent bankruptcy trustees. Chapter 7 trustees retain the ability to pursue litigation recoveries as the real party-in-interest for the benefit of the creditors of their bankruptcy estates and discharge their statutory duties.

1. Judicial Estoppel Has Become an Increasingly Common Defense Asserted in Litigation Filed by People Who Have Filed Bankruptcy.

In 2001, the Supreme Court decided a non-bankruptcy case, *New Hampshire v. Maine*, 532 U.S. 742 (2001). This case was the modern

Court's first detailed exploration of the judicial estoppel doctrine. *See id.* at 749–50 ("[W]e have not had occasion to discuss the doctrine elaborately[.]"). Following the *New Hampshire* decision "[j]udicial estoppel has continued to evolve" resulting in varying interpretations by federal and state courts. Caryn Wang, *The Last Estop: Why Judicial Estoppel Should Be a Court's Last Resort for Undisclosed Lawsuits from Bankruptcy*, 66 Emory L.J. 1209, 1224 (2017).

Simultaneously, the scale and availability of electronic access to federal court records "changed dramatically in the early 2000s, as more courts adopted online filing." United States Courts, Judiciary News, "25 Years Later, PACER, Electronic Filing Continue to Change Courts," (Dec. 9, 2013).[4] While in 2002, less than half of bankruptcy courts used the Public Access to Court Electronic Records (PACER) technology, by 2007 the system was "nearly universal" among federal courts. *Id.* Before PACER, "the vast majority of cases were practically obscure," but electronic access in the federal courts now allows "all dockets, opinions, and case file documents [to] be accessed world-wide in real time, unless they are sealed or otherwise restricted for legal purposes." *Id.*

[4] Available at https://tinyurl.com/48yyypyn (Last Accessed July 8, 2023).

Because bankruptcy case records can be easily accessed electronically, litigation defendants increasingly search for past bankruptcy cases in order to assert judicial estoppel as a defense. As some commentators have recognized, "[t]his issue—whether to judicially estop a plaintiff from continuing to prosecute a lawsuit that was not disclosed in bankruptcy—appears to arise *several times each week* in the federal and state courts." William H. Burgess, *Dismissing Bankruptcy-Debtor Plaintiffs' Cases on Judicial Estoppel Grounds*, at 55, 59 fn.2. FED. LAWYER (May 2015)[5] (noting approximately 280 written federal decisions in 2013; 263 in 2012; and 185 in 2010)[6] (emphasis added).

Because judicial estoppel "can be a case-dispositive weapon for defendants and often catches plaintiffs by surprise" many publications "advise defense attorneys to check a plaintiff's bankruptcy filings." *Id.* at 54, 55.

---

[5] Available at https://tinyurl.com/mvpk2ue2 (Last Accessed July 8, 2023).

[6] The same search methodology results in approximately 141 cases in 2022; 153 in 2021; and 174 in 2020.

As a result "judicial estoppel has become an increasingly popular means of dismissing claims brought by former debtors who failed to disclose those claims as assets in their prior bankruptcy proceedings." Eric Hilmo, *Bankrupt Estoppel: The Case for a Uniform Doctrine of Judicial Estoppel as Applied Against Former Bankruptcy Debtors*, 81 Fordham L. Rev. 1353, 1354 (2012).

2. Federal and State Courts Generally Agree that Judicial Estoppel Does Not Prevent a Trustee From Asserting Unlisted Claims for the Benefit of Creditors.

While electronic searches have raised the frequency and importance of the judicial estoppel doctrine, the importance of protecting bankruptcy estates from the loss of litigation assets is not a new concept. As the Supreme Court acknowledged in 1905:

> It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. *If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled*, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property.

First Nat. Bank v. Lasater, 196 U.S. 115, 119 (1905) (emphasis added).

Lasater recognizes that applying judicial estoppel in the bankruptcy context requires a recognition that litigation claims are assets that belong to the trustee. The trustee—and by extension the debtor's creditors—are harmed by the dismissal of a debtor's lawsuit, if the litigation could have been pursued to benefit the creditors.

Given this history, it is not surprising that while judicial estoppel can bar a debtor's ability to assert unlisted claims, the federal courts universally agree that judicial estoppel is not a barrier to the bankruptcy trustee's ability to pursue the litigation.

The leading case is *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) in which an *en banc* panel determined that judicial estoppel resulting from a debtor's failure to schedule a claim did not extend to the bankruptcy trustee. The Court's rationale rested on two primary bases: (i) its analysis of the relevant provisions of the Bankruptcy Code regarding when the trustee's rights in the litigation assets begin; and (ii) its recognition that judicial estoppel is an equitable remedy and applying the doctrine to the trustee would unfairly eliminate an asset available to provide a distribution to innocent creditors. *Id.* at 574–75.

In analyzing the relevant provisions of the Bankruptcy Code the Fifth Circuit considered the debtor and the trustee as separate parties, recognizing that the trustee is an independent actor in bankruptcy cases. *Id.* at 575. The Court concluded the debtor "was properly estopped for his dishonesty." *Id.* However, the debtor's misconduct "does not adhere to the [t]rustee" who was the real party-in-interest. *Id.* Pursuant to 11 U.S.C. § 541(a)(1), the trustee is vested with the litigation assets immediately upon the filing of the bankruptcy case. *Id.* As a result, the trustee receives the estate's litigation assets untainted from any failure of the debtor to properly disclose those assets in the debtor's bankruptcy schedules, which necessarily occurs post-petition. *Id.* at 575–76. As a result, judicial estoppel did not apply to the trustee, who takes the litigation claims "free and clear" of the debtor's misconduct. *Id.* at 575.

The *en banc* panel also recognized that applying judicial estoppel to the trustee would be inequitable due to the harm that would be caused to innocent parties. The Fifth Circuit recognized that a basic tenet of bankruptcy law is "preserving the assets of the bankruptcy estate for equitable distribution to the estate's innocent creditors." *Id.*

at 572. Estopping the trustee from pursuing the litigation "would thwart one of the core goals of the bankruptcy system—obtaining a maximum and equitable distribution for creditors—by unnecessarily 'vaporizing' the assets effectively belonging to innocent creditors." *Id.* at 576 (citing *Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 413 (7th Cir. 2006)).

Every federal Court of Appeals that has considered the issue has agreed that judicial estoppel does not bar a bankruptcy trustee from pursuing litigation claims that a debtor failed to disclose. *See Parker v. Wendy's Int'l.*, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1155 fn.3 (10th Cir. 2007); *Stephenson v. Malloy*, 700 F.3d 265, 272 (6th Cir. 2012); *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 360 (7th Cir. 2015).[7]

The highest courts for Alabama, Arkansas, Idaho, New Hampshire, and Washington State have also agreed with the federal Courts of Appeals. *Dupwe v. Wallace*, 355 Ark. 521, 525 (2004); *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 541 (2007) (*en banc*); *Hamm v.*

[7] The same result was also reached by the Ninth Circuit Bankruptcy Appellate Panel. *In re Cheng*, 308 B.R. 448, 455 (B.A.P. 9th Cir. 2004) (procedural history omitted).

Norfolk S. Ry. Co., 52 So.3d 484, 492 (Ala. 2010) (finding the state trial court exceeded its discretion by refusing to substitute the trustee); *McCallister v. Dixon*, 154 Idaho 891, 898 (2013) (applying judicial estoppel to the debtor was equitable because the trustee could pursue recovery for bankruptcy creditors); *Alward v. Johnston*, 171 N.H. 574, 588 (2018).

Neither this Court nor the D.C. Circuit have directly addressed whether judicial estoppel applies to a bankruptcy trustee's assertion of unscheduled litigation claims. But in applying judicial estoppel to debtors, both courts have consistently noted that the bankruptcy trustee was either permitted to intervene at an earlier stage in the litigation or that the purpose of estoppel was to protect the trustee and creditors of the bankruptcy estate. *See Moses v. Howard University Hospital*, 606 F.3d 789, 799 (D.C. Cir. 2010) (affirming judicial estoppel applied to debtor after noting the District Court amended its judgment to make clear estoppel did not apply to the bankruptcy trustee); *Marshall*, 828 F.3d at 927 (D.C. Cir. 2016) (holding that debtor was judicially estopped after noting the trustee had been provided opportunity to intervene); *Atkins v. 4940 Wisconsin, LLC*, 93 A.3d 1286,

1287 fn. 1 (D.C. 2014) (applying judicial estoppel after noting the trustee had affirmatively decided not to participate); *Dennis v. Jackson*, 258 A.3d 860, 862 (D.C. 2021) (applying judicial estoppel against a debtor due to harm to the trustee).

Each of these decisions considered the trustee's rights in the litigation claims. This consideration is consistent with recognizing that a bankruptcy trustee should have the opportunity to preserve and protect litigation assets for the benefit of creditors.

III. The Superior Court's Judgment Should be Reversed.

The Superior Court dismissed the litigation below after Howard University argued that the debtor, Yolanda Stewart, could not pursue her medical malpractice claim because she filed for bankruptcy on November 27, 2019 and did not schedule the litigation claim.

The University made two arguments, claiming: (i) the debtor lacked standing, because her bankruptcy trustee was the real party in interest; and (ii) that the debtor was judicially estopped from proceeding since she did not disclose her claims in the bankruptcy.

The Superior Court did not specifically rule on the standing issue. Instead, the Superior Court granted summary judgment to the

University on judicial estoppel grounds without considering whether the trustee—the real party-in-interest in the litigation—had defenses to the judicial estoppel argument or whether the judicial estoppel argument was even applicable to the trustee. (Tr. Page 35, Ln 14).[8]

The court failed to apply the proper analysis with respect to the bankruptcy trustee. Neither standing nor judicial estoppel provide a reason to refuse to allow the litigation to be pursued by the trustee, who is the real party-in-interest in the litigation and is not subject to judicial estoppel. The judgment of the Superior Court should be reversed and the case remanded with instructions to grant the trustee's motion to be substituted as the plaintiff. This preserves the litigation asset for the benefit of the trustee and innocent creditors.

1. Pursuant to Superior Court Rule of Civil Procedure 17 Provides the Trustee Should be Substituted in these Circumstances.

A lawsuit does not need to be dismissed because the case was filed by the debtor rather than the bankruptcy trustee who is the real party-in-interest. Where a case was filed by the wrong plaintiff, the relevant

[8] References to the transcript of the December 14, 2022 Hearing before the Honorable Shana Frost Martini of the Superior Court of the District of Columbia, Civil Division, are cited as "(Tr. [page(s), line(s))."

rules of civil procedure provide the case should not be dismissed; instead on proper motion, the correct party-in-interest should be permitted to be substituted as the plaintiff.

Superior Court Rule of Civil Procedure 17(a)(3) provides:

> *Joinder of the Real Party in Interest.* The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.

The comments to the rule make clear that it is designed to be essentially identical to Federal Rule of Civil Procedure 17, except for minor, technical changes.

Rule 17 may be properly invoked to substitute a bankruptcy trustee as the real party-in-interest in litigation filed by a debtor. In *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302 (5th Cir. 2001), the Fifth Circuit found that the bankruptcy trustee was the real party-in-interest in an action filed by a debtor. The court cited to Fed. R. Civ. P. 17 and found that the district court abused its discretion by dismissing case rather than joining the trustee. *Id.* at 308–09. Central to that holding was the district court's failure to consider the impact of the dismissal on the

debtor's creditors, who potentially could have obtained a recovery from the trustee's litigation. *Id.* at 309.

Other courts have ruled similarly. *See Knight v. New Farmers Nat. Bank*, 946 F.2d 895 (6th Cir. 1991) (reversing because the district court should have allowed the debtor to seek substitution of the bankruptcy trustee before dismissing the case) (per curiam); *Martineau v. Wier*, 934 F.3d 385, 391 (4th Cir. 2019) (filing by debtor rather than bankruptcy trustee could be cured by post-filing joinder of trustee under Rule 17); *Moses v. Howard Univ. Hosp.*, 601 F. Supp. 2d 1, 4 (D.D.C. 2009) (granting bankruptcy trustee's motion to substitute under Rule 17 because it would be inequitable to deny the motion and punish the trustee and bankruptcy creditors for the debtor's misconduct).

Here, the trustee's motion to substitute as plaintiff should have been granted. The applicable rules of civil procedure specifically address substitution and provide that the case should not be dismissed until providing a reasonable time for the real party-in-interest to seek substitution, as the trustee did. Plus, multiple courts, including the United States District Court for the District of Columbia, have granted Rule 17 substitutions in similar circumstances.

At the very least, the Superior Court's conclusion that the issue was moot was clearly wrong as a matter of law. The trustee has an interest in the outcome of the matter and had valid defenses to the judicial estoppel issue, which the Superior Court did not separately consider on the record. *See* (Tr. Page 48–55).

2. The Superior Court's Failure to Consider the Trustee as an Independent Party Requires Reversal.

Nationwide, the courts that have considered the issue generally agree that judicial estoppel cannot be applied to prevent an innocent bankruptcy trustee from administering litigation assets for the benefit of creditors. *See Supra*, Pages 13–18.

Below, the Superior Court relied heavily on *Dennis v. Jackson* but does not appear to have fully appreciated the import of the trustee's intervention. Judicial estoppel may have been properly applied to extinguish the debtor's claim. But the trustee is an independent party and the equitable factors underlying a judicial estoppel analysis must be considered before extinguishing the interests of the bankruptcy estate in the litigation. *See Supra*, Pages 7–9. The Superior Court did not undertake that analysis, which constitutes reversible error.

Left uncorrected, the result of the trial court's ruling is that creditors are disadvantaged and the alleged tortfeasor obtains a windfall by escaping liability for its purported negligence. This result is inequitable.

General unsecured creditors face significant difficulty obtaining recoveries on their claims, despite the work of bankruptcy trustees to recover assets. Approximately 288,000 chapter 7 cases were filed in 2021. United States Courts, Bankruptcy Filings, *Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2021*.[9] But chapter 7 trustees were only able to make distributions in 30,297 cases in 2021. *See Chapter 7 Asset Cases Closed Calendar Year 2021*.[10] Essentially, year-over-year approximately 90% of chapter 7 cases end with no distribution made to creditors.

This case presents a rare example in which, depending on the outcome of the litigation claim, unsecured creditors may not only receive a distribution but could receive payment in full. Extending

---

[9] Available at https://tinyurl.com/294686tv (last accessed July 8, 2023).

[10] Available as provided *Supra,* Footnote 2.

judicial estoppel to bar the trustee's attempt to preserve and monetize this litigation asset harms those creditors' rights to a recovery. That result is contrary to the equitable nature of judicial estoppel and the preservation of estate assets required by the Bankruptcy Code. The judgment of the Superior Court should be reversed.

CONCLUSION

For these reasons, the judgment of the D.C. Superior Court should be reversed and the case remanded with instructions to grant the chapter 7 trustee's motion to substitute.

July 10, 2023

Respectfully Submitted,

/s/ Alexander M. Laughlin
Alexander M. Laughlin
Bradley D. Jones
ODIN FELDMAN & PITTLEMAN, P.C.
1775 Wiehle Avenue, Suite 400
Reston, Virginia 20190
Direct: 703-218-2134
Fax: 703-218-2160
E-Mail: Alex.Laughlin@ofplaw.com
Brad.Jones@ofplaw.com
Counsel for Amicus Curiae
THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

CERTIFICATE OF COMPLIANCE

Amicus curiae certify that this brief complies with the type-volume limits of the Rules of the District of Columbia Court of Appeals. Pursuant to Rule 29(a)(5), this brief does not exceed 25 pages exclusive of the required statements, tables, and addenda. This brief also complies with the typeface and style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point font.

/s/ Alexander M. Laughlin
Alexander M. Laughlin
Counsel for Amicus Curiae

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Alexander M. Laughlin
Signature

Alexander M. Laughlin
Name

Alex.Laughlin@ofplaw.com
Email Address

No. 23-CV-21
Case Number(s)

July 10, 2023
Date

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2023, I electronically filed the foregoing document electronically with the Clerk of the Court for the District of Columbia Court of Appeals by using the Court's Appellate E-Filing System, which provides e-served copies to registered parties.

Copies of the foregoing document were also provided by first-class mail postage prepaid to:

Steven M. Pavsner
JOSEPH, GREENWALD
& LAAKE, P.A.
6404 Ivy Lane, #400
Greenbelt, MD 20770

Counsel for Appellant
Yolanda Stewart

Alan S. Block
Deidre L. Robokos
KIERNAN TREBACH, LLP
1233 20th Street, NW, 8th
Floor
Washington, DC 20036

Counsel for Appellee
The Howard University dba
Howard University Hospital

/s/ Alexander M. Laughlin
Alexander M. Laughlin
Counsel for Amicus Curiae

#5640118v2 092820/000001