No. 23-CV-21

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

YOLANDA MARIA STEWART,

Appellant

v.

THE HOWARD UNIVERSITY, d/b/a Howard University Hospital,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION

(Case No. 2019-CA-008178-M; Hon. Shana Frost Matini, Judge)

BRIEF OF APPELLANTS

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II. RULE 28(a)(1) STATEMENT

The undersigned, counsel of record for Appellants Yolanda Maria Stewart and Marc Albert as Trustee of the Estate in Bankruptcy of Yolanda M. Stewart, certifies that the following listed parties and counsel appeared below:

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These representations are made in order to allow the judges of this Court to evaluate possible disqualifications or recusal.

/s/ Steven M. Pavsner
Steven M. Pavsner
Counsel for Appellants

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

IV. JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to D.C. Code § 11-721(a)(1), this being an appeal from a final order (granting summary judgment and denying substitution) disposing of the entire case. *See* Appx. 9.

V. ISSUES PRESENTED FOR REVIEW

1. Whether the court below erred by denying a Motion for Substitution by which a Trustee in Bankruptcy, as the real party in interest, sought to enter and take control of a civil claim for damages that was filed by the debtor-plaintiff but which belonged to the Trustee.

2. Whether the court below erred in applying judicial estoppel to deprive a Trustee in Bankruptcy of the right to pursue a civil claim for damages for the benefit of a debtor-plaintiff's creditors, on the ground that the debtor-plaintiff failed to list the claim on her bankruptcy schedules before re-opening the bankruptcy proceedings, listing the claim, and obtaining appointment of a Trustee who elected to pursue the claim.

VI. STATEMENT OF THE CASE

Appellant Yolanda Maria Stewart ("Mrs. Stewart") was injured as a result of medical negligence by Appellee The Howard University, d/b/a Howard University Hospital ("Howard") in 2015. She retained the law firm of Joseph, Greenwald & Laake, P.A. ("JGL") to bring a lawsuit for those injuries ("Lawsuit"). Between the

time JGL filed the statutory Notice of Intention to Sue and the time they filed the Lawsuit, Mrs. Stewart— *pro se* and without the benefit of any attorney— filed a Petition for Bankruptcy ("Bankruptcy Petition") in the United States District Court for the District of Columbia ("Bankruptcy Court"). The Bankruptcy Petition sought to discharge approximately $16,000 in debt.

Not understanding the potential impact of the bankruptcy filing on the Lawsuit or what constituted a "claim against a third party," Mrs. Stewart unwittingly failed to list the Lawsuit on her bankruptcy schedule of assets. She obtained a discharge of her debts in March 2020.

The Lawsuit proceeded apace until March 2022, when defense counsel informed JGL of the Petition. Mrs. Stewart thereupon retained separate Bankruptcy Counsel who filed pleadings in the Bankruptcy Court to re-open the proceeding, amend the schedule of assets to identify the Lawsuit, and appoint a Trustee to assume control of Mrs. Stewart's Estate in Bankruptcy.

Following his appointment, the Trustee elected to pursue the claim set forth in the Lawsuit for the benefit of Mrs. Stewart's creditors, and obtained authority from the Bankruptcy Court to retain JGL as Special Litigation Counsel to the Trustee. JGL thereupon filed a Motion for Substitution pursuant to SCR-Civ 17(a), seeking to substitute the Trustee for Mrs. Stewart as the real party in interest.

While Mrs. Stewart was taking the steps necessary to correct her bankruptcy schedule and have a trustee appointed to take control of the Lawsuit, Howard moved for summary judgment on grounds that, as a result of Mrs. Stewart's initial bankruptcy filing and failure to disclose the Lawsuit at that time, she lacked standing to sue and was judicially estopped from pursuing the Lawsuit.

The court below heard argument on the motions for substitution and summary judgment on December 14, 2022. By Order entered December 20, 2022, the court below denied the Motion for Substitution and granted the Motion for Summary Judgment. This appeal was timely noted on January 9, 2023.[1]

VII. STATEMENT OF FACTS

Mrs. Stewart was injured as the result of medical negligence in the course of gynecologic surgery at Howard University Hospital ("Howard") on July 13, 2015. Appx. 66, 68-70 (Complaint) at ¶¶ 21-23. She first learned that she had a potential claim in July 2018, when another physician at Howard, to whom she had complained that her problems continued after the 2015 surgery, disclosed that the Howard surgeon who operated on her in 2015 had not performed the procedure that he was supposed to perform. *Id.* at ¶17.

[1] The original Notice of Appeal had a misplaced apostrophe, which was corrected on January 17, 2023. *See* Appx. 255-258.

On February 19, 2019, by letter pursuant to D.C. Code §16-2802, Mrs. Stewart advised Howard of her intent to file suit relating to its employee's failure to perform the proper procedure. (Letter of Intent). Appx. 102-103. The Lawsuit was filed on December 13, 2019. Appx. 1 (Docket Entries), 66 (Complaint).

On November 27, 2019, between the dates of the Letter of Intent and the filing of the Lawsuit, Mrs. Stewart filed a Voluntary Chapter 7 Petition for Bankruptcy, on her own and without the benefit of counsel. Appx. 104 (Voluntary Petition); Appx. 203 (Affidavit of Yolanda Stewart) at ¶¶ 3-4. When she filled out and filed the "Summary of Assets and Liabilities" schedules with her Petition, Mrs. Stewart checked "No" in response to questions 33 and 34, inquiring about the existence of "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment," and "contingent and unliquidated claims." Appx. 121.

On March 1, 2020, again without the benefit of counsel, Mrs. Stewart filed an Amended Summary of Assets and Liabilities to add a student loan to her schedule of liabilities. Appx. 148, 149. In all, Mrs. Stewart sought discharge of $15,900 in debts. Appx. 152. On March 17, 2020, the Bankruptcy Court entered an Order of Discharge pursuant to 11 U.S.C. § 727. Appx. 158.

In March of 2022, Howard became aware of the bankruptcy filing and provided documents from the bankruptcy docket to JGL. Appx. 165. Mrs. Stewart thereafter obtained separate Bankruptcy Counsel, who filed a motion to reopen her bankruptcy proceeding to list the Lawsuit, and to appoint a Trustee to protect the interests of Mrs. Stewart's creditors on June 21, 2022. Appx. 171. On September 22, 2022, the Bankruptcy Court granted Mrs. Stewart's motion and Marc Albert was appointed as the Trustee in the reopened bankruptcy case. Appx. 184.

Once appointed, Mr. Albert sought authority from the Bankruptcy Court to retain JGL as Special Litigation Counsel to the Estate, to pursue the Lawsuit for the benefit of Mrs. Stewart's creditors. That authority was sought on October 31, 2022 and obtained on November 15, 2022. Appx. 211, 244. Three days later, on November 18, 2022, a Motion was filed in the Lawsuit pursuant to SCR 17(a), to substitute the Trustee, the real party in interest, for Mrs. Stewart. Appx. 8, 241.

On September 27, 2022, knowing that Mrs. Stewart was in the process of reopening her bankruptcy proceeding to amend her list of assets and obtain appointment of a Trustee who could pursue the Lawsuit[2], Howard filed a Motion for Summary Judgment seeking dismissal of the Lawsuit on the grounds of Mrs.

[2] Mrs. Stewart's Motion to Reopen the bankruptcy proceeding appeared as Exhibit L to Howard's Opposed Motion for Summary Judgment. Appx. 171.

Stewart's lack of standing (because the Lawsuit belonged to the Trustee), and judicial estoppel (because Mrs. Stewart did not list the Lawsuit in her initial bankruptcy filing). *See* Appx. 7, 74.

Mrs. Stewart filed an Opposition on October 11, 2022 ("Opposition"). Appx. 7, 186. With respect to standing, the Opposition noted that the Trustee was in the midst of obtaining approval to enter the case and that when he did, the standing issue would be resolved. *See* Appx. 202 (Trustee's Letter). With respect to judicial estoppel, the Opposition included an Affidavit in which Mrs. Stewart explained that her failure to list the Lawsuit in her initial bankruptcy filing was entirely inadvertent and unintentional, and offered other grounds and authorities why judicial estoppel should not be applied to preclude the Trustee from protecting Mrs. Stewart's innocent creditors. *See* Appx. 203.

The two motions were heard on December 14, 2022. Appx. 8, 10-65. Counsel argued their respective legal positions, but no testimony was taken and no decision was made as to the merits of the Lawsuit. *See* Appx. 34 ("I haven't really had the opportunity to hear about the underlying merits…."). Nonetheless, in an Oral Opinion delivered from the bench, the court denied the Motion for Substitution, and granted the Motion for Summary Judgment. Appx. 57-64.

No reasons were given for denying the Motion for Substitution, Appx. 10-65, although the trial court apparently thought it would be moot if summary

judgment were granted. Appx. 64 (denying "the other motions" as "moot"). With respect to summary judgment, the court attempted to follow the elements of judicial estoppel set forth in *New Hampshire v. Maine*, 532 U.S. 749 (2001), a case which arose in an entirely different context, and held that because Mrs. Stewart knew of the malpractice claim at the time she filed her bankruptcy schedule and failed to list it, and obtained a discharge of her debts, she therefore was seeking to and did obtain an unfair advantage over her creditors, thus justifying imposition of judicial estoppel. Appx. 23, 61-64.

The Order was docketed on December 20, 2022. Appx. 8, 9. On January 9, 2023, Mrs. Stewart and Mr. Albert noted their appeal from both the denial of the Motion for Substitution and the granting of summary judgment for Howard, dismissing the Lawsuit. Appx. 255-258.

VIII. SUMMARY OF THE ARGUMENT

SCR-Civ 17(a)(1) provides that "An action must be prosecuted in the name of the real party in interest." Rule 17(a)(3) prohibits the court from dismissing an action for failure to prosecute in the name of the real party in interest until a reasonable time has been allowed for the real party interest to ratify, join or be substituted in the action. The Rule further provides that, after substitution, the action proceeds as if it had been originally commenced by the real party in interest.

Despite the clear mandate of the Rule, the court below denied Appellants' motion to substitute Marc Albert, Mrs. Stewart's Trustee in Bankruptcy, for Mrs. Stewart personally. The court gave no reasons for denying the Motion for Substitution, and there were none. The court made no finding regarding the time it took the Trustee to seek to become a party to the Lawsuit, so no argument can be made that it took the Trustee more than a "reasonable time" to do so. Because it denied substitution, the court below did not have the real party in interest before it, yet rendered a decision that deprived the real party in interest of a valuable property right, to the detriment of the innocent creditors of Mrs. Stewart's Estate.

In addition to unfairly imputing Mrs. Stewart's unwitting mistake to the Trustee, the court below also treated her mistake as an intentional act intended to defraud the court. It was undisputed that Mrs. Stewart's omission of the Lawsuit from her list of assets was inadvertent and unintentional, premised on a layperson's lack of understanding of the legal definition of "unliquidated" and "third-party" claims, yet the court below held that the debtor-plaintiff's lack of understanding warranted depriving the innocent Trustee of the right to pursue the Lawsuit on behalf of Mrs. Stewart's equally innocent creditors. In so doing, the court failed to properly balance the equities, and instead fashioned an inflexible rule that the mere failure of a debtor-plaintiff to list a claim as an asset on a bankruptcy schedule, deprives the innocent Trustee— the real party in interest— of the right to pursue

the claim for the benefit of the debtor-plaintiff's equally innocent creditors, if the debtor-plaintiff has obtained a discharge of debts.

IX. ARGUMENT

A. The Court Below Erroneously Denied Appellants' Timely Motion to Substitute the Real Party in Interest, Mrs. Stewart's Trustee in Bankruptcy, for Mrs. Stewart Personally

1. Standard of Review

SCR-Civ. 17(a) mandates that the court *may not* dismiss an action for failure to prosecute in the name of the real party in interest until, after objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. Thus, where, as here, there is no issue of whether the defense of failure to prosecute in the name of the real party in interest was timely raised, or whether the real party in interest had a "reasonable opportunity" to "ratify, join or be substituted into the action," the issue of whether the Trustee was entitled to enter the case as the real party in interest is a question of law, reviewable *de novo*. *See Duckett v. District of Columbia*, 654 A.2d 1288, 1290-91 (1995) (dismissal for failure to prosecute in name of real party in interest held *error of law*, where trial court failed to recognize plaintiff's ability to substitute real party in interest under SCR-Civ. 17(a)). *See also Estate of Raleigh v. Mitchell*, 947 A.2d 464, 473 (D.C. 2008) (Rule 17(a)(3) prohibits dismissal of a complaint

for failure to prosecute an action in the name of the real party in interest, "until a reasonable time has been allowed for substitution of that party.")

That said, in *other* cases, where there *is* an issue of timeliness, or where substitution of the real party in interest is not necessary to avoid injustice, the lower court's determination of that issue is reviewed for abuse of discretion. *See Martin v. Santorini Capital, LLC*, 236 A.3d 386, 395, n. 8 (D.C. 2020) ("A Rule 17 defense . . . may '*not* be raised at any time, for the real party [in interest] must have the opportunity to step into the 'unreal' party's shoes and should not be prejudiced by undue delay.' [citation omitted]. Thus, it would be an abuse of discretion for the trial court to allow a Rule 17(a) defense 'as late as the start of trial if the real party has been prejudiced by the defendant's laxness.'") (quoting *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992) (emphasis in original); *Estate of Raleigh v. Mitchell*, 947 A.2d 464, 472-473 (D.C. 2008) (effort to substitute real party in interest, made 34 months after summary judgment on alternative theory was rejected, denied); *Francis v. Recycling Solutions*, 695 A.2d 63, 76 (D.C. 1997) (no abuse of discretion in dismissal where *plaintiff* invoked Rule 17 in effort to "preserve or generate cause[s] of action") (citation omitted).

2. The Trustee was the Real Party in Interest

There is no dispute in this case that the Trustee was the real party in interest, as the Voluntary Petition was filed before the Lawsuit. *See supra* at 3. SCR-

Civ.17(a)(1) provides that "An action must be prosecuted in the name of the real party in interest." Rule 17(a)(3) further provides:

> 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 interest to ratify, join or be substituted in the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest. (Emphasis added)

See generally Rousseau v. Diemer, 24 F.Supp.2d 137, 143 (D. Mass. 1998) and cases there cited (when a debtor commences an action and asserts claims that belong to its bankruptcy estate, the usual remedy is to substitute the bankruptcy trustee for the debtor as the real party in interest); *Hess v. Eddy,* 689 F.2d 977, 981 (11th Cir. 1982), *cert. denied*, 462 U.S. 1118 (1983), *abrogated on other grounds by Jones v. Preuit & Mauldin,* 876 F.2d 1480 (11th Cir. 1989) (addressing the identical Federal rule) (plain language of the Rule clearly provides that when an action is brought by someone other than the real party in interest and the real party in interest joins or ratifies the action, the amendment or ratification relates back to the time suit was originally filed). *See also Wadsworth v. United States Postal Serv.,* 511 F.2d 64, 66 (7th Cir. 1975) (quoting 3A J. Moore, Federal Practice ¶17.15-1, at pp. 602-03 (2d ed. 1974)).

Despite the clear dictate of the Rule, the court below denied Appellants' motion to substitute Mrs. Stewart's Trustee in Bankruptcy for Mrs. Stewart personally, thereby denying the real party in interest the right to prosecute the

Lawsuit that he owned and Mrs. Stewart did not, and that he alone was entitled to pursue. In doing so, it erred. *See Duckett v. District of Columbia*, 654 A.2d 1288 (D.C. 1995) (dismissal reversed where trial court failed to allow fair opportunity to substitute real party in interest).

3. The Motion for Substitution was Timely Filed

The court gave no reason (other than presumed "mootness") for denying the Motion for Substitution, Appx. 10-65, but on the facts of this case, the only basis for denying a motion to substitute the real party in interest is that, after objection, the real party in interest does not ratify or join or is not substituted in the action within a "reasonable time." *See* SCR-Civ 17(a)(3). Here, however, Howard made no argument and the court made no finding that the motion for substitution was not brought within a "reasonable time." Appx. 10-65.

Given the process that needed to be completed in the Bankruptcy Court before substitution could occur, substitution was sought within a "reasonable time." Once Howard objected and brought it to Mrs. Stewart's attention that she was not the real party in interest, she promptly retained Bankruptcy Counsel, and Bankruptcy Counsel promptly filed the pleadings necessary to petition the Bankruptcy Court to re-open the proceeding to amend her schedule of assets and request appointment of a trustee. The Bankruptcy Court appointed Mr. Albert as Trustee on September 22, 2022. Appx. 184. The Trustee reviewed the Lawsuit

and sought permission to retain Special Litigation Counsel to pursue it on October 31, 2022. Appx. 211. The Bankruptcy Court granted that permission on November 15, 2022. Appx. 244. The Motion for Substitution was filed three days later, on November 18, 2022. Appx. 8, 241. On these facts, there is no legitimate argument that this process took more than a "reasonable time."

Moreover, Mrs. Stewart kept the court below advised of the process as it was unfolding. On October 11, 2022, Mrs. Stewart advised the court in her Opposition to the Motion for Summary Judgment that the Trustee had been appointed, Appx. 186-187, 202; and on November 1, 2022, Mrs. Stewart advised the court in a Supplement to her Opposition that the Trustee's Application to appoint Special Litigation Counsel to pursue the Lawsuit had been filed and was awaiting approval of the Bankruptcy Court. Appx. 8, 207.

Under the circumstances, there was no factual or legal basis to deny the Motion for Substitution.

Curiously, in its Reply to Plaintiff's Opposition to its Opposed Motion for Summary Judgment, and again in its Opposition to Plaintiff's Motion for Substitution, Howard relied on *Simmers v National Railroad Passenger Corporation*, Case 1:20-cv-01548-JEB Doc. 18) (*Simmers*), to argue that the Lawsuit should be dismissed because Mrs. Stewart lacked standing to pursue it. *See* Appx. 223, 235, 247. In so doing, Howard overlooked the hornbook principle

set forth in the Rule itself, that after ratification, joinder or substitution, the action is not dismissed on account of the putative plaintiff's lack of standing, but rather "proceeds as if it had been originally commenced by the real party in interest." SCR Civ 17(a)(3).

Indeed, as we pointed out below, *Simmers* actually supported substitution, not Howard's effort to deny the Trustee the right to pursue the Lawsuit as the real party in interest. In *Simmers*, as here, a debtor-plaintiff neglected to identify an unliquidated claim as an asset in a bankruptcy filing and had been discharged. But from all that appears in the case report, Simmers's bankruptcy proceeding had not been re-opened, he had not gone back and amended his schedule of assets, a new trustee had not been appointed, the new trustee had not received permission from the bankruptcy court to pursue the claim, and the new trustee had not sought leave to appear in place of the debtor-plaintiff to pursue the claim. As none of that had yet happened, the court held that, "*at least as of now*, only the Trustee has standing to pursue Simmers's FELA cause of action." Appx. 235 (emphasis added). The court therefore dismissed the case "*without prejudice, which means that the trustee may renew the suit*, *or Simmers may refile in the event the trustee subsequently abandons the claim.*" Appx. 239 (emphasis added).

Thus, even in the significantly different procedural posture of *Simmers*, the court explicitly noted that once the steps we took here were taken there, Mr.

Simmers's Trustee could pursue the claim, or Mr. Simmers could pursue it himself if the trustee elected to abandon it— *notwithstanding the fact that Mr. Simmers had initially failed to disclose the case to the bankruptcy court and obtained discharge*.

In stark contrast to *Simmers*, in our case the Trustee was figuratively knocking on the courthouse door, asking for permission to enter and pursue the Lawsuit, when the court below inexplicably denied him permission to do so and then dismissed the Lawsuit so that he could not pursue it for the benefit of Mrs. Stewart's innocent creditors.

B. The Court Below Erroneously Granted Howard's Motion for Summary Judgment, Depriving the Trustee of the Right to Pursue the Claim for The Benefit of Mrs. Stewart's Creditors

1. Standard of Review

With respect to summary judgment, the issue of whether there exists a genuine dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law, is a question of law, reviewed *de novo*. *Burch v. Amsterdam Corp*., 366 A.2d 1079 D.C. 1976) ("In reviewing the propriety of summary judgment, *we* must first determine whether there was any issue of fact pertinent to the ruling and also whether the substantive law was correctly applied.") (emphasis added). *Accord*, *Basch v. George Washington University*,

370 A.2d 1364 (D.C. 1977); *Turner v. American Motors General Corp*., 392 A.2d 1005 (D.C. 1978); *Sullivan v. Heritage Foundation*, 399 A.2d 856 (D.C. 1979).

In making its determination, this Court reviews the facts as the lower court should have—in the light most favorable to the appellant/non-moving party below. *Solid Rock Church v. Friendship Pub. Charter Sch., Inc.*, 925 A.2d 554, 559 (D.C. 2007) ("This court reviews summary judgment decisions *de novo*, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in favor of that party."); *Swann v. Waldman*, 465 A.2d 844 (D.C. 1983); *Sturdivant v. Seaboard Service System, Ltd*., 459 A.2d 1058 (D.C. 1983); *Himmelfarb v. Greenspoon*, 411 A.2d 979 (D.C. 1980); *Yasuna v. Miller,* 399 A.2d 68 (D.C. 1979); *International Brotherhood of Painters and Allied Trades v. Hartford Acc. & Indem. Co*., 388 A.2d 36 (D.C. 1978).

That said, judicial estoppel is an equitable principle subject to the sound discretion of the court. *See. e.g., Dennis v. Jackson*, 258 A.3d 860, 868, 873-74 (D.C. 2021) (*Dennis*). Thus, if *undisputed facts* below had supported judicial estoppel, the court would have had discretion to apply it or not, and its decision would have been reviewed for abuse of discretion. *King v. Herbert J. Thomas Mem. Hospital,* 159 F.3d 192, 196 (4th Cir. 1998) (*King*) ("As an equitable doctrine, judicial estoppel is invoked in the discretion of the district court and with the recognition that each application must be decided upon its own specific facts

and circumstances." (footnote omitted)); *In re Coastal Plains*, 179 F.3d 197, 205 (5th Cir. 1999) ("Because judicial estoppel is an equitable doctrine, and the decision whether to invoke it within the court's discretion, we review for abuse of discretion the bankruptcy court's rejection of the doctrine." (citation omitted)).

However, where, as here, there are disputed issues of material fact, the court on summary judgment does not have discretion to resolve them most favorably to the moving party, and summary judgment that is predicated on doing so is granted in error.

2. Disputed Issues of Material Fact Precluded Summary Judgment

a. An inadvertent, unintentional failure to disclose a contingent claim on a bankruptcy schedule is not, in and of itself, a sufficient basis to impose judicial estoppel to preclude a claim.

There is no dispute in this case that Mrs. Stewart did not list the Lawsuit on her bankruptcy schedule. In its Oral Opinion, the court treated that fact as if it were alone sufficient to justify judicial estoppel, but it is not. Completely absent from the record below is *any* fact—much less an *undisputed* fact—that shows that Mrs. Stewart's omission was anything other than an unintentional, inadvertent mistake.

In its Oral Opinion, the court below invoked the three-part test for judicial estoppel set forth in *New Hampshire v. Maine*, 532 U.S. 742 (2001) (*New*

Hampshire). In that case, the Supreme Court described judicial estoppel as follows:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895). This rule, known as judicial estoppel, "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000); *see* 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory") (hereinafter Wright).

Id. at 749.

The Court continued:

> Courts have observed that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." [Citations omitted]. Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. [Citations omitted]. . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled," [Citation omitted]. Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," [citation omitted], and thus poses little threat to judicial integrity. [Citations omitted]. A third

> consideration is 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. [Citations omitted].
>
> *In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts*.

Id. at 750-51(emphasis added).

The court below noted the Supreme Court's admonition that the three-pronged test it applied in *New Hampshire* did *not* "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel[,]" and that "[a]dditional considerations may inform the doctrine's application in specific factual contexts," yet it followed that three-pronged test slavishly, without regard for the very different context in which *New Hampshire* arose, and the very different facts of our case.

New Hampshire was a dispute between contiguous states over a riparian boundary. A 1977 consent decree between them had established one boundary, but in 2000 New Hampshire claimed that historical records placed the boundary elsewhere. Obviously, the case presented no bankruptcy issues and no issues of motive or intent. The Court had no difficulty finding that New Hampshire could not take and benefit from the position that the boundary was in one place in 1977 but in a different place in 2000. Other than providing a definition of judicial estoppel, the most notable contribution of *New Hampshire* to our case is its

admonition that one-size does not fit all, and that application of the doctrine depends on "specific factual contexts."

Moses v. Howard University Hospital, 606 F.3d 789 (D.C. Cir. 2010) (*Moses*) arose after *New Hampshire* and involved a debtor-plaintiff's pursuit of a lawsuit against Howard for retaliatory discharge that he failed to list on his bankruptcy schedule of assets. *Moses* was the backbone of Howard's Motion for Summary Judgment below, but it actually supports Appellants' position on the critical issue of whether the mere failure to list a contingent claim on a bankruptcy schedule is a sufficient basis for judicial estoppel, or whether a finding of a motive or intent to conceal is required.

b. There was no evidence that Mrs. Stewart intended to conceal the Lawsuit from the Bankruptcy Court

In contrast to the complete lack of evidence to support the proposition that Mrs. Stewart's failure to list the Lawsuit on her bankruptcy schedule was a deliberate act, Mrs. Stewart offered an Affidavit that her omission was unintentional and inadvertent. She swore that she never had any intention of concealing the medical malpractice claim from the Bankruptcy Court or from her creditors, and answered the questions on the bankruptcy schedule as best she understood them as a lay person. Her Affidavit stated:

> 5. I never had any intention of concealing the medical malpractice claim from the bankruptcy court or from my creditors. When I came to

> Questions 33 and 34 on the bankruptcy schedules, my attention was drawn to the fact that "accidents, employment disputes, insurance claims, or rights to sue" were listed as the claims that needed to be disclosed. As I was aware of no such claims, I answered "No" to Question 33. I did not fully understand the meaning of "contingent and unliquidated claims," "counterclaims," or "rights to set off claims" in Question 34, but those terms did not bring to mind the medical malpractice claim, so I also answered "No" to that Question.
>
> 6. Similarly, l was asked in my deposition if I had ever been "party or part of another claim or lawsuit." I did not understand this question to encompass a bankruptcy proceeding, and I was not asked about a bankruptcy proceeding.
>
> 7. As soon as it was brought lo my attention that I should have listed the malpractice claim on the bankruptcy schedules, I authorized Mr. Pavsner to retain bankruptcy counsel on my behalf. I retained Brett Weiss. Esq. to re-open the bankruptcy proceedings and amend the schedules I had filled out on my own.

Appx. 203-204. No evidence was offered to dispute Mrs. Stewart's sworn statements. The court made its decision without taking any testimony or evaluating the credibility of any witnesses. *See* Appx. 10-65.

Despite the lack of evidence that Mrs. Stewart's omission of the Lawsuit from her bankruptcy schedule was intentional, the court conflated our situation—where Mrs. Stewart unintentionally and inadvertently obtained an unfair benefit over her creditors which, as soon as it was brought to her attention, she took steps to rectify, with a different situation entirely, in which a debtor-plaintiff *actually seeks* to derive an unfair advantage—that is, acts deliberately. In its Oral Opinion, the court said:

> The third element is whether the party taking the inconsistent position *was seeking to* derive an unfair advantage or impose an unfair detriment on the opposing party. Yes, Plaintiff here derived an unfair benefit over her creditors.

Appx. 61 (emphasis added). So the court recognized the third prerequisite of judicial estoppel— whether in failing to list the Lawsuit, Mrs. Stewart *was seeking to* derive an unfair advantage or impose an unfair detriment, but then accepted as proof of that element, evidence that, viewed most favorably to Mrs. Stewart, showed no such thing. That was error. As the court noted in *Moses*:

> It appears that every circuit that has addressed the issue has found that judicial estoppel is justified to bar a debtor from pursuing a cause of action in district court where that debtor *deliberately* fails to disclose the pending suit in a bankruptcy case. [3]

Moses, *supra* at 798 (emphasis added) (citations omitted).

The prerequisite that the debtor-plaintiff act *deliberately* to conceal an asset— embedded in the *Moses* Court's three factors and treated separately by other courts— arises from the purpose of judicial estoppel. As the Fourth Circuit explained in *King v. Herbert J. Thomas Mem. Hospital*, 159 F.3d 192 (4th Cir. 1998) ("*King*"):

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[3] In *Moses*, that evidence was found in the fact that the debtor disclosed some claims but not others: he failed to disclose the retaliation lawsuit he sought to pursue that would have increased his assets, but *did* disclose other pending lawsuits against him as a defendant that reduced the overall value of his assets. *Moses, supra* at 800. No such evidence is present in this case.

> the doctrine is invoked to prevent a party from "playing fast and loose with the courts," from "blowing hot and cold as the occasion demands," or from attempting "to mislead the [courts] to gain unfair advantage." (Citations omitted).

Id. at 196. Because the doctrine is intended to prevent litigants "from playing fast and loose," "blowing hot and cold," and "attempting to mislead" the court,

> judicial estoppel will not be applied where the party's inconsistent positions resulted from inadvertence or mistake. *See Lowery*, 92 F.3d [219 (4th Cir. 1996)] at 224, *Clark Co*., 65 F.3d [26 (4th Cir. 1995)] at 29.

King at 196-197.

Not only is intent *a* factor to be considered in assessing whether judicial estoppel should be applied, it is *the determinative factor*. As the Fourth Circuit explained in *John S. Clark Co. v. Faggert Friden*, *P.C.,* 65 F.3d 26 (4th Cir. 1995) ("*Clark Co*."):

> Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. *United Virginia Bank v. B.F. Saul Real Estate Investment Trust*, 641 F.2d 185, 190 (4th Cir.1981). The purpose of the doctrine is to prevent a party "from playing 'fast and loose' with the courts, and to protect the essential integrity of the judicial process." *Allen v. Zurich Ins. Co*., 667 F.2d 1162, 1166 (4th Cir.1982). Even so, courts must apply the doctrine with caution. *Allen*, 667 F.2d at 1167. *The "determinative factor" in the application of judicial estoppel is whether the party who is alleged to be estopped "intentionally misled the court to gain unfair advantage*." *Tenneco Chemicals v. William Burnett & Co*., 691 F.2d 658, 665 (4th Cir.1982). The vice which judicial estoppel prevents is the cold manipulation of the court to the detriment of the public interest. It is inappropriate, therefore, to apply the doctrine when a party's prior position was based on inadvertence or mistake. *Johnson Service Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir.1973); *accord Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980).

Clark Co. at 28-29 (emphasis added).

Similarly, in *In re Coastal Plains, Inc*., 179 F.3d 197 (5th Cir. 1999), the Fifth Circuit said:

> The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from *playing fast and loose with the courts*, and prohibiting parties from *deliberately* changing positions according to the exigencies of the moment." *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir 1993). The doctrine is generally applied where "*intentional* self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice". *Scarano v. Central R. Co*., 203 F.2d 510, 513 (3rd Cir.1953).
>
> . . .
>
> And, many courts have imposed the additional requirement that *the party to be estopped must have acted intentionally, not inadvertently*. *E.g., Johnson*, 141 F.3d at 1369 ("If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply"); *Folio*, 134 F.3d at 1217-18; *McNemar v. Disney Store, Inc*., 91 F.3d 610, 618 (3d Cir. 1996) (internal quotation marks and citation omitted) (part of threshold inquiry for application of judicial estoppel is whether party to be estopped "assert[ed] either or both of the inconsistent positions *in bad faith-i.e., with intent* [179 F.3d 207] to play fast and loose with the court"); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355, 358, 362 (3rd Cir. 1996) (internal quotation marks and citation omitted) (judicial estoppel doctrine "not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts"; doctrine "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"; inconsistency "must be attributable to intentional wrongdoing"); *Matter of Cassidy*, 892 F.2d at 642 (judicial estoppel should not be applied "*where it would work an injustice*, such as where the former position was the product of inadvertence or mistake"); *Johnson Serv. Co. v. Transamerica Ins. Co*., 485 F.2d 164, 175 (5th Cir. 1973) (applying Texas law on judicial estoppel; "the rule looks toward cold manipulation and not an unthinking or confused blunder").

In re Coastal Plains at 206-207 (emphasis added).

Eubanks v CBSK Fin. Group, Inc., 385 F.3d 894 (6th Cir. 2004) ("*Eubanks*") is in accord. There, the Sixth Circuit reversed the application of judicial estoppel where there was evidence that omission of the claim in the bankruptcy proceeding was inadvertent. The court reviewed applicable law from other jurisdictions and concluded:

> Before *Browning* [*v. Levy*, 283 F.3d 761 (6th Cir. 2002)], this Court had not dealt with the issue of whether bad faith or an attempt to mislead the court was necessary to apply the doctrine of judicial estoppel; however, *our sister circuits have held the application of judicial estoppel to be inappropriate when such omissions are the result of mere mistakes or inadvertent conduct*. *Id.* (citing *United States v. Hussein*, 178 F.3d 125, 130 (2d Cir. 1999); *King v. Herbert J. Thomas Mem'l Hosp*., 159 F.3d 192, 196-97 (4th Cir. 1998); *Helfand v. Gerson*, 105 F.3d 530, 536 (9th Cir. 1997)); *see also Ryan Operations v. Santiam-Midwest*, 81 F.3d 355, 362 (3rd Cir. 1996) (holding the application of judicial estoppel would be inappropriate because there was no evidence Mrs. Stewart acted in bad faith).

Eubanks at 898 (emphasis added)

Ryan Operations v. Santiam-Midwest, 81 F.3d 355 (3rd Cir. 1996), relied on in *Eubanks*, is another case that shows the centrality of the issue of intent. There, an obviously sophisticated corporation, represented by counsel, failed to disclose a multi-million dollar claim on its bankruptcy schedules, and then sued multiple defendants to collect on the claim. The defendants raised judicial estoppel and the trial court granted summary judgment based on the omission of the claim from the debtor-plaintiff's bankruptcy schedule. Despite the uncontroverted omission, the Third Circuit reversed, saying: "We conclude that judicial estoppel would be

inappropriate in any event as there is no evidence that Ryan acted in bad faith." *Ryan* at 362.

The *Ryan* Court further explained that the mere fact of non-disclosure— which is what the court below based its decision on here— is not sufficient to support judicial estoppel:

> We note in addition that while plaintiff cites district court decisions from various jurisdictions that support its position, *defendant cites no case in which a court held that intent to mislead or deceive could be inferred from the mere fact of nondisclosure, and we are aware of none.* We are persuaded, however, that policy considerations militate against adopting a rule that the requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding. Such a rule would unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good- faith inconsistencies. While we by no means denigrate the importance of full disclosure or condone nondisclosure in bankruptcy proceedings, *we are unwilling to treat careless or inadvertent nondisclosures as equivalent to deliberate manipulation when administering the "strong medicine" of judicial estoppel*. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993).

Ryan at 362 (emphasis added).

Discussing *Ryan,* the court in *In re Coastal Plains* put the matter succinctly: "The court concluded that intent to mislead or deceive could not be inferred from the mere fact of nondisclosure. [*Ryan*] at 364-65."

Yet that is exactly what the court below did here: inferred a deliberate intent to mislead or deceive from the mere fact of non-disclosure, and in the face of undisputed evidence that the non-disclosure was entirely inadvertent and

unintentional. Further, it did so in violation of the venerable principle that on summary judgment, all facts and inferences must be viewed in the light most favorable to Mrs. Stewart as the non-moving party.

Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996) ("*Lowery*") presented what Professor Geoffrey Hazard described as the "particularly galling . . . situation where a criminal convicted on his own guilty plea seeks as a plaintiff in a civil action to claim redress based on a repudiation of the confession." Geoffrey Hazard, *Revisiting the Second Restatement of Judgments; Issue Preclusion and Related Problems*, 66 Cornell L. Rev. 564, 578 (1981). Yet even in that situation, after recounting the *Moses* factors, the Fourth Circuit said:

> Finally, the party sought to be estopped must have "*intentionally* misled the court to gain unfair advantage." *Tenneco*, 691 F.2d at 665. Indeed, we have stated that this factor is the "determinative factor" in the application of judicial estoppel to a particular case. *Id.*; *Faggert & Frieden*, 65 F.3d at 29. Thus, courts will not apply judicial estoppel "when a party's prior position was based on inadvertence or mistake." *Faggert & Frieden*, 65 F.3d at 29. With these principles in mind, we turn to consider whether the district court erred in applying the doctrine of judicial estoppel to preclude Lowery from contradicting the statements he made when he pleaded guilty to violating Va. Code § 18.2-51.1**.**

Lowery, supra at 221 (emphasis added). Of course the court had no trouble finding that a knowing and voluntary guilty plea was not the sort of inadvertence or mistake that would preclude application of judicial estoppel, but a knowing and voluntary guilty plea made in the presence and with the assistance of counsel is a far cry from the situation here—an unintentional, inadvertent omission in a 35-

page schedule of assets and liabilities completed by an unsophisticated party, on her own, to the best of her understanding, which she promptly corrected when the mistake was brought to her attention.

The court below treated this Court's decision in *Dennis v. Jackson*, 258 A.3d 860 (D.C. 2021) (*Dennis*) as inconsistent with this prevailing consensus of other courts, but it is not. In *Dennis*, as in our case, a debtor-plaintiff brought a lawsuit for medical malpractice after failing to disclose the existence of that claim on her bankruptcy schedule, and went back and amended her schedule to disclose the claim when the omission was discovered. But the similarities end there. Mrs. Dennis was represented by counsel in her bankruptcy proceeding; in our case, Mrs. Stewart was not represented by counsel and completed the bankruptcy schedules on her own.[4] That difference is particularly significant because Mrs. Dennis actually discussed the omitted claim with her counsel, and then *deliberately* decided not to disclose it. She claimed that she had made a "legal mistake" by not disclosing it, because she "reasonably believed" that she did not have to disclose it as she did not know if she would be able to obtain expert opinion that the claim was viable, and she thought that some or all of the claim was exempt. *Dennis,*

[4] In its motion for summary judgment, Howard asserted that Mrs. Stewart was represented by counsel in the Bankruptcy Court, but admitted during oral argument on the motion that she was not. Appx. 39.

supra at 873. The trial court declined to endorse a rule that would allow a debtor-plaintiff to avoid disclosing a potential claim by delaying obtaining an expert, or that left it to the debtor-plaintiff to decide whether a claim had sufficient merit to require disclosure, and this Court agreed. *Id.* at 866-867

None of that reasoning applies to our case, as Mrs. Stewart was not represented in the bankruptcy proceeding, there is no evidence that she discussed either her intention to file or the substance of her filing with anyone, much less counsel, and there is no evidence of a deliberate decision not to disclose anything. As this Court observed, the trial court in *Dennis* appropriately "examined in detail" how much Mrs. Dennis knew at the time she filed her bankruptcy petition. The Court held that there was no abuse of discretion in deciding that the equities favored application of judicial estoppel in *Dennis*, because Mrs. Dennis *"was represented by an attorney and . . . made a conscious decision not to disclose*." *Id.* at 868. The same cannot be said of Mrs. Stewart.

Where, as here, there was evidence that the debtor-plaintiff's prior inconsistency was not an attempt to mislead the court but was instead unintentional and inadvertent— which must be taken as true on summary judgment— it was an abuse of discretion to first elevate that unintentional and inadvertent act to a deliberate intent to conceal, and then implicitly impute Mrs. Stewart's non-disclosure to the innocent Trustee to grant summary judgment and bar the

Trustee's claim. *See John S. Clark Co. v Faggert Frieden, P.C.,* 65 F.3d 26 (4th Cir. 1995) ("*Clark Co*.") (dismissal improper when the facts alleged to have prompted the prior inconsistent position are in dispute; case reversed and remanded for trial).

Indeed, summary judgment is particularly inappropriate where, as here, motive or intent is an issue. *3511 13th St. Tenants' Ass'n v. 3511 13th St., N.W. Residences, LLC*, 922 A.2d 439, 444 (D.C. 2007) (summary judgment "not appropriate and should be granted sparingly in cases involving motive or intent as material elements.") (quoting *Young v. Delaney*, 647 A.2d 784, 790 (D.C. 1994)); *Spellman v. American Sec. Bank, N.A.*, 504 A.2d 1119, 1122 (D.C. 1986) (summary judgment is an extreme remedy appropriate only when there are no material facts in issue, and that "[i]t should be granted sparingly in cases involving motive or intent.") (citation omitted); *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1358 (D.C. 1994) ("[t]he question of fraudulent intent is a question of fact and not of law, . . . and appellate courts do not usually sustain grants of summary judgment on the issue of fraudulent intent.") (internal quotation and citation omitted).

The court below reached the wrong result because it applied the wrong standard. Instead of assuming the truth of Mrs. Stewart's Affidavit that her failure to list the Lawsuit was unintentional and inadvertent, as it was required to do on

summary judgment, the court below equated the omission with “playing fast and loose with the courts," or "blowing hot and cold as the occasion demands," or attempting "to mislead the [courts] to gain unfair advantage,” and held that the mere failure to list the Lawsuit was sufficient to demonstrate a motive or intent to conceal. As it is not, Howard was not entitled to judgment as a matter of law against Mrs. Stewart.

Having erroneously granted summary judgment as a matter of law against Mrs. Stewart, the court below then compounded the error by erroneously and without any basis in fact or law implicitly imputing Mrs. Stewart’s omission to the Trustee. The perverse effect of doing so was to harm the very persons whom the bankruptcy disclosure requirement is intended to protect: the debtor-plaintiff’s innocent creditors.

3. Appellee was not entitled to judgment as a matter of law against the Trustee

Whether the evidence below is viewed as undisputed that Mrs. Stewart’s omission was unintentional and inadvertent, or viewed as disputed that it was intentional, the result is the same. An unintentional, inadvertent omission in a bankruptcy filing is not alone sufficient to invoke judicial estoppel to bar an undisclosed civil suit. But even if it were alone sufficient to invoke judicial estoppel against the debtor-plaintiff who failed to disclose the claim, it is not

sufficient to invoke judicial estoppel against the innocent Trustee who was the true owner of the claim when it was filed and now wishes to pursue it.

The point is demonstrated in *Moses*, where the trial court found sufficient facts to conclude that Mr. Moses deliberately intended to conceal his retaliatory discharge claim from the bankruptcy court, and entered summary judgment in favor of Howard. The Trustee then filed a Rule 59(e) motion to alter or amend the judgment, to clarify that the judgment ran against Mr. Moses only, and barred only Mr. Moses from pursuing the retaliation claim in his own right, *but did not run against the Trustee or bar her from pursuing the claim for the benefit of the Estate if she chose to do so*. The trial court granted the motion to clarify. On appeal, Howard raised a number of issues related to the Trustee's exclusion from the bar, but the Court of Appeals affirmed, explaining:

> At the time when the trustee filed her Rule 17(a) and Rule 59(e) motions, she was the only party who had a right to pursue the cause of action that had been initiated by Moses. As noted above, "a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it." (Citation omitted).
>
> Nesse's Rule 17(a) motion was a mere formality to confirm on the court's docket papers that the trustee, and not Moses, was the proper plaintiff in this case. If there was a live case in the District Court in July 2008 — and there was — the only proper plaintiff was the trustee, not Moses.
>
> And the trustee surely had the right to file a Rule 59(e) motion, because the District Court's decision in *Moses HI*— dismissing the case on grounds of judicial estoppel — directly affected the trustee's authority to pursue the cause of action on behalf of the estate.

> It is also quite clear that the trustee cannot in any way be faulted for her actions. Moses secured a discharge of his debt on January 5, 2004, pursuant to the judgment entered in his Chapter 7 bankruptcy proceeding. It was not until early 2008, after Howard had uncovered Moses's failures to disclose, that Moses moved to reopen his Chapter 7 bankruptcy proceeding in the District of Maryland to amend his original "Statement of Financial Affairs." This would have impaired the trustee's authority to pursue this cause of action on behalf of the estate. The trustee's Rule 17(a) and Rule 59(e) motions merely served to confirm, not initiate, the trustee's party status. Howard's suggestion that Nesse was not a party when she filed her Rule 59(e) motion is thus without merit.

Moses, *supra* at 796-797.

The trustee in *Moses* later elected to abandon the retaliatory discharge claim, so that it reverted back to Mr. Moses, and in his hands for his benefit only, it was barred by judicial estoppel, but that fact is not relevant to the analysis. The point is that even the *Moses* Court recognized that there was no basis to apply judicial estoppel *against the Trustee*.

Numerous federal circuit courts and state appellate courts have come to the same conclusion: that regardless of whether judicial estoppel is properly invoked against a debtor-plaintiff who fails in bankruptcy to disclose the claim on which (s)he later sues, it is not properly invoked against the innocent trustee. *See, e.g.*, *Metrou v. M.A. Mortenson Co.*, 781 F.3d 357, 360 (7th Cir. 2015); *Stephenson v. Malloy*, 700 F.3d 265, 272 (6th Cir. 2012); *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011); *Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1155 fn.2 (10th Cir. 2007); *Parker v. Wendy's Int'l.*, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004); *Hamm*

v. Norfolk S. Ry. Co., 52 So. 3d 484, 492 (Ala. 2010); *Dupwe v. Wallace*, 355 Ark. 521, 525 (2004); *McCallister v. Dixon*, 154 Idaho 891, 898 (2013); *Alward v. Johnston*, 171 N.H. 574, 588 (2018); *Arkison v. Ethan Allen, Inc.*, 160 Wash. 2d 535, 541 (2007) (*en banc*).

Thus, even if Mrs. Stewart's conduct met the requirements of judicial estoppel— and we have shown it did not— there was no basis to invoke judicial estoppel against the innocent Trustee, who should have been permitted to substitute his appearance for Mrs. Stewart's and pursue the claim for the benefit of her Estate in Bankruptcy.

X. CONCLUSION

As shown above, the trial court erred in declining to allow Mrs. Stewart's Trustee in Bankruptcy to enter the Lawsuit and pursue it on behalf of Mrs. Stewart's Estate in Bankruptcy, and erred in granting summary judgment dismissing the case on the ground of judicial estoppel. It follows that the judgment below should be vacated, and this case remanded to the Superior Court with instructions to grant the Motion for Substitution and allow the Lawsuit to proceed on the merits in the name of the real party in interest: Marc Albert, Trustee in Bankruptcy of the Estate of Yolanda M. Stewart.

Respectfully submitted,

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XI. CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2023, a true copy of the foregoing Appellants' Brief was served electronically via CaseFileXpress upon:

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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 tax payer 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.

Steven M. Pavsner	23-CV-21
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