No. 23-CV-0021

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

YOLANDA MARIA STEWART,

Plaintiff – Appellant,

v.

HOWARD UNIVERSITY,
d/b/a HOWARD UNIVERSITY HOSPITAL,

Defendant – Appellee.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

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

BRIEF OF APPELLEE, INCLUDING RESPONSE TO AMICUS BRIEF

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RULE 28(a)(1) STATEMENT

The undersigned, counsel of record for Defendant-Appellee Howard University, hereby adopt the Rule 28(a)(1) Statement of Plaintiff-Appellant Yolanda Stewart and Appellant – proposed Intervenor Marc Albert, trustee of the Estate in Bankruptcy of Appellant Stewart.

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COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the court below properly applied the doctrine of equitable estoppel to bar Plaintiff Yolanda Stewart from further pursuing a personal interest in her civil claim for damages in this action, on the ground that she failed to disclose this personal injury damages claim on the bankruptcy schedules supporting her November 27, 2019 Petition for Bankruptcy, which was filed subsequent to sending her February 19, 2019 notice-of-intent-to-sue letter to set up her damages claim in this action, and just weeks before she filed suit on December 13, 2019?[1]

2. If this Court affirms the judicial estoppel judgment below against Plaintiff Stewart, whether equity also allows remand to the court below for further proceedings on Plaintiff's Motion to substitute trustee Marc Albert as the real party in interest, for the limited purpose of allowing him to seek damages herein sufficient to make whole the creditors of Ms. Stewart's reopened 2019 bankruptcy estate, who reportedly received nothing when she was granted a summary Order of Discharge on March 17, 2020?

3. Whether this Panel's review of the ruling below is controlled by this Court's equitable-estoppel precedents, including the 2021 *Dennis v. Jackson* decision, so that any pertinent contraction or other narrowing of the law of judicial estoppel in

[1] Appellant's statement of Issues Presented for Review does not expressly raise this issue, so the Court might reasonably deem the issue waived on appeal, but Appellants' Brief makes some such contentions in section B of its Argument.

the bankruptcy-related context would require *en banc* review?

COUNTER-STATEMENT OF THE CASE

In February 2019, Plaintiff Stewart provided Defendant Howard timely notice of her medical malpractice claim pursuant to D.C. Code § 16-2802. The claim was based on allegations of negligence during a surgical procedure she underwent at Howard University Hospital in July 2015, which Plaintiff reportedly did not discover until years later. On December 13, 2019, Plaintiff Stewart filed the instant Complaint for damages alleging medical malpractice.

On November 27, 2019, shortly before this medical malpractice suit was filed, and well after her counsel had given Defendant Howard the statutorily written notice for medical malpractice actions, Plaintiff Stewart filed a Petition for Bankruptcy in the United States Bankruptcy Court for the District of Columbia, without alerting her counsel in this action or retaining bankruptcy counsel. Her petition for bankruptcy did not disclose the within lawsuit under her Summary of Assets and Liabilities. Further, on March 1, 2020, after the instant action was filed, Plaintiff Stewart filed an amended assets and liabilities form adding a creditor that was excluded from her original filing, but she again failed to disclose the instant action. The bankruptcy petition as so amended resulted in an Order discharging Plaintiff Stewart's disclosed debts of approximately $15,900 on March 17, 2020, without any payment to creditors. Plaintiff Stewart never disclosed her personal injury action

against Howard, despite multiple opportunities to do so through her Summaries of Assets and Liabilities. When Plaintiff Stewart filed each Summary, she signed a declaration under the penalty of perjury that her submissions were true and accurate.

Defendant Howard's counsel became aware of Plaintiff's bankruptcy petition and discharge in March 2022, more than two (2) years into the within personal injury damages action, and Howard promptly alerted Plaintiff's counsel herein.

Plaintiff Stewart's eventual response was to retain bankruptcy counsel who, on June 21, 2022, filed a Motion to reopen her original bankruptcy proceeding. Plaintiff then filed an amended Summary of Assets and Liabilities – disclosing for the first time the existence of her claim and pending action against Defendant Howard, although she erroneously asserted that it was an exempt asset. On September 22, 2022, the bankruptcy court granted Plaintiff's Motion to reopen that action, and assigned bankruptcy trustee Albert to marshal, liquidate and distribute such assets to the creditors whose claims had been discharged in March 2020. Thereafter, the bankruptcy court granted trustee Albert's Application to authorize retention of Plaintiff Stewart's counsel as special litigation counsel in connection with the instant action. Plaintiff's counsel then filed a motion below to substitute trustee Albert as the real party in interest in the instant personal injury action for damages.

While Plaintiff Stewart's counsel were taking steps to reopen and pursue the bankruptcy action, Defendant Howard moved for summary judgment. Defendant

Howard's grounds for summary judgment were that, as a result of Plaintiff Stewart's initial bankruptcy filing, the related failure to disclose her medical malpractice claim and action against Howard, and her successful pursuit of the March 17, 2020 discharge in the original bankruptcy action, she (a) lacked standing to pursue this action in her own name and (b) should be found judicially estopped from pursuing this action any further personally.

On December 14, 2022, after briefing below, the court heard oral argument on Defendant Howard's summary judgment motion and Plaintiff's Motion for Substitution seeking to add trustee Albert as the real party in interest. (*See* **A.12-57**, Transcript of Hearing). At the end of this hearing, the court made findings and conclusions in open court. (*See id.*, **A.57-64**.) By Order entered December 20, 2022, the trial court granted Howard's Motion for Summary Judgment and denied the Motion for Substitution as moot. (*See* **A.9**.)

COUNTER-STATEMENT OF THE FACTS

A. The Material Facts

The material facts pertinent to the issues properly presented on appeal, albeit largely procedural, are set forth below in sufficient detail to emphasize the full sequence of events in both this action and the bankruptcy proceeding.

On December 13, 2019, Plaintiff filed her Complaint herein, claiming medical negligence relating to a laparoscopic supra-cervical hysterectomy performed at

Howard University Hospital ("HUH") on July 13, 2015. (*See* **A.66-73**, Complaint.) As required by D.C. Code § 16-2802, Plaintiff's counsel served a February 19, 2019 "notice of intention to file suit" letter. (*See* **A.102-103**, Claim Notice Letter.)

On November 27, 2019, apparently without informing her counsel herein, Plaintiff Stewart filed a Chapter 7 Petition for Bankruptcy in the United States Bankruptcy Court for the District of Columbia. (*See* **A.104-111**, Voluntary Ch. 7 Petition for Bankruptcy (19-00792-SMT, Dkt. # 1).) Likewise, in her initial chapter 7 Summary of Assets and Liabilities, Plaintiff Stewart did not disclose the instant claim. (***See*** **A.112-147**, 11/27/2019 Summary of Assets and Liabilities.) Specifically, when she filled out the "Summary of Assets and Liabilities" with her Petition, Plaintiff Stewart checked "No" in response to questions 33 and 34, which require disclosure of "Claims against third parties, whether or not you have filed a lawsuit or made a demand for payment," and about "contingent and unliquidated claims." (**A.121**; *also see* Appellants' Brief, at 4.) Despite being aware of her claim and pending suit, Plaintiff Stewart swore to the bankruptcy court under penalty of perjury that her filed assets schedule was accurate. (**A.147,** *id*., Dkt. # 8, p. 36.)

On or about March 2, 2020, less than three months after the instant damages action was filed, Plaintiff Stewart filed an Amended Summary of Assets and Liabilities in the bankruptcy court, in order to add student loan information from UDC. (*See* **A148-152** (*id*., Dkt. # 28, pp. 1-5).) That was yet another opportunity

for her to add the instant action to make her bankruptcy disclosures accurate and complete, but she failed to do so. Plaintiff Stewart then also filed a document called Amendment to List of Creditors, in which she declared under penalty of perjury that the amendment was true and correct. (*See* **A.153-155** (*id.*, Dkt. # 30, p. 2).)

On March 3, 2020, the bankruptcy court ordered Plaintiff Stewart to file Amended Schedules to include a signed declaration, or to show cause why her schedules should not be stricken with respect to her Amended Summary of Assets and Liabilities. (**A.156** (*id.*, Dkt. # 33).) On March 15, 2020, Plaintiff Stewart filed the required Declaration, in which she declared once again under penalty of perjury that she had read the summaries of assets and liabilities filed with the Declaration and that they were all true and correct. (*See* **A.157** (*id.*, Dkt. # 36).) Plaintiff Stewart nevertheless did not add the instant damages action to her schedules or otherwise disclose its existence to the bankruptcy court.

In presumed reliance on all of Plaintiff Stewart's filings, the bankruptcy court entered an Order of Discharge in her favor on March 17, 2020, pursuant to 11 U.S.C. § 727. (*See* **A.158** (*id.*, Dkt. # 37).) The result of the Order was that Plaintiff Stewart had convinced the bankruptcy court that she had no unprotected assets capable of repaying any of her listed creditors, and that formally discharged those debts. (*See id.*) That effectively left Plaintiff free and clear to pursue, collect and keep any damages she might be able to collect from Defendant Howard in this action.

On August 25, 2020, five months after the bankruptcy court's Order of Discharge, Plaintiff Stewart was deposed in this action. At no time during her deposition testimony did she reveal her bankruptcy suit or the resulting discharge of debts (*see* **A.160-164**, Stewart 8/25/2020 Dep. Tr., at 40:11-14 & 42:14-17):

> Q: Other than this lawsuit, have you ever been a party to another claim or lawsuit?
>
> A: I was a passenger in a car that was involved in an accident.
>
> * * *
>
> Q: Other than the accident you just discussed and this lawsuit have you ever been a party or part of another claim or lawsuit?
>
> A: No.

On or around March 16, 2022, counsel for Defendant Howard reported to Plaintiff Stewart's counsel having discovered that Plaintiff had filed a bankruptcy action. (*See* **A.165**.) Plaintiff's counsel appeared to be unaware of that proceeding and asked Defendant's counsel to provide any related document, which Howard's counsel did later the same day. (*See id*.) On April 11, 2022, when Howard's counsel asked for an update on the bankruptcy situation, Plaintiff's counsel advised that he was "looking into the matter" and waiting on information from "bankruptcy counsel." (*See* **A.166**, Pavsner 4/11/2022 e-mail to undersigned counsel.)

On September 12, 2022, Howard's counsel again contacted Plaintiff's counsel to report learning that the bankruptcy court's docket showed that the original bankruptcy action had been reopened and to ask whether Plaintiff would be filing a Suggestion of Bankruptcy in the instant action. Plaintiff's counsel advised that they

were "in the process of working this out with the trustee" and denied that a suggestion of bankruptcy was necessary. At that time, Howard's counsel requested consent for their planned Motion for Summary Judgment based upon lack of standing and judicial estoppel. (*See* **A.167-170**)

In fact, through bankruptcy counsel, Plaintiff Stewart had filed a Motion to reopen the original District of Columbia bankruptcy proceedings on June 21, 2022, which the bankruptcy court granted the same day. (*See* **A.171-174** (*id*., Dkt. # 39 & # 39.1).) Then, in an apparent attempt to correct her original non-disclosure, Plaintiff Stewart filed an amended Schedule claiming the instant damages action against Howard as "exempt" property, while listing it for the first time under "claims against third parties," in contrast with the absence of such disclosure or contention at any time during the original bankruptcy that resulted in a discharge of all debts. (*See* **A.176-183** (*id*., Dkt. # 42, pp. 4 & 6).)

On September 22, 2022, the bankruptcy court granted Plaintiff Stewart's motion to reopen her bankruptcy action and potential intervenor Marc Albert was appointed as the bankruptcy trustee therein. (*See* **A.184-185** (*id*., Dkt. # 50).)

B. The Summary Judgment Hearing and Ruling Below

At the end of the December 14, 2022 hearing below, Judge Matini first summarized the material facts as follows (A.57-58):

> As far as the facts here, they are basically undisputed. The Plaintiff underwent a laparoscopic super cervical hysterectomy at Howard

> University on July 13, 2015. On February 19, 2019 she gave notice to the Defendants pursuant to D.C. Code §16-2802 of her intent to file the instant medical malpractice lawsuit. On November 27, 2019[,] she filed her Petition for Chapter 7 Bankruptcy in the U.S. Bankruptcy Court here in D.C., submitted under oath[,] where no personal injury or medical malpractice [claim] was identified.
>
> Two weeks later more or less she filed her complaint in this court in the instant matter. On March 1, 2020[,] while this case was pending, she filed an amended summary of assets and liabilities in the bankruptcy matter to add some student loan information. No amendments were made to the portion that would inquire about claims for personal injury even though the [instant] lawsuit had at that point been pending for about three months.
>
> And then a couple of weeks after that in response to an order of the Bankruptcy Court, Plaintiff filed a declaration confirming that the information was true and correct. And then shortly thereafter the Bankruptcy Court entered an Order of Discharge of the Plaintiff's debts based on the information that the Plaintiff had provided.

Judge Matini – who had done her homework (*see* **A.57**) and discovered a precedent neither party had briefed, *Dennis v. Jackson*, 258 A.3d 860 (D.C. 2021) – explained the significance of that precedent (A.58-60):[2]

> So of course as stated by the *Dennis* court, judicial estoppel recognizes that where a party successfully assumes a certain position in a legal proceeding as Ms. Stewart did in the bankruptcy case, she may not assume a contrary position in a different proceeding simply because that party's interests have changed and particularly where that change in position results in an unfair advantage to that party or the change works an unfair detriment upon another party.
>
> And so in *Dennis*, there like here, judicial estoppel arose from the failure to disclose the medical malpractice claim as a potential asset in the bankruptcy case. In *Dennis* like here, the bankruptcy trustee and the creditors whose debts were discharged were unaware of the potential

[2] Emphasis added herein unless otherwise noted.

asset when the case was closed with an order of discharge.

> The timing in *Dennis* was far less compelling than it was here. And I know that there is no dispute as to the timing and Mr. Pavsner has acknowledged that plainly Ms. Stewart was aware of the civil case when she filed her bankruptcy. It's the more nuanced awareness of the implication that he has asserted. And so in the *Dennis* case, bankruptcy was filed November of 2014. Bankruptcy discharge was March 2015. And then it was four months later that she filed her notice of intent to sue and then several months after that when she filed her medical malpractice suit.
>
> Here, the notice of intent to sue was filed – was already on file [–] when the bankruptcy case was filed. And the actual complaint was filed two weeks after the bankruptcy petition was submitted. The Plaintiff also here amended her schedules while the suit was pending. In *Dennis* the bankruptcy was closed long before the notice of intent to sue or not long before, but months before the actual lawsuit was filed. And so there can be no dispute on these facts that the Plaintiff was aware of her pending claim against the Defendants when she filed her bankruptcy and when she amended the schedules and she obtained the benefits of the bankruptcy proceedings.

Judge Matini then proceeded to evaluate the undisputed facts in light of the key factors set forth in the Supreme Court's opinion in *New Hampshire v. Maine*, 532 U.S. 742 (2001) – which was carefully followed in this Court's opinion in *Dennis* as well as in the D.C. Circuit's decision in *Moses v. Howard University Hospital*, 606 F.3d 789 (D.C. Cir. 2010), as follows (**A.60-64**):[3]

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[3] At the hearing below, where Plaintiff's counsel recognized the right to call witnesses but did not do so, Judge Matini correctly concluded that none of the six putative differences from the *Dennis* situation that Plaintiff's counsel asserted made any difference here:

(a) the fact that the debtor in *Dennis* had bankruptcy counsel at the time of the inaccurate original asset disclosures (*see* **A.16-18**);

> And so[,] following the elements set forth in *New Hampshire v. Maine*, [first,] the position of the party must be clearly inconsistent with its earlier position. Here, Plaintiff's position in her bankruptcy case was that she had no unliquidated claims, whether exempt or not. And then [she] asserted the identical unliquidated claims malpractice claim in this proceeding.
>
> So that element is established. Second, that the party had succeeded in persuading a court to accept the earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled.
>
> Obviously the trustee and the bankruptcy court w[ere] misled in believing that there was -- this asset was not, did not exist. And the Defendants here and this Court was also not aware of the pendency of the bankruptcy and the impact quite frankly that should have had on this case. If the Plaintiff had filed for bankruptcy, then technically this Court wouldn't have jurisdiction while that was pending. So there was a problem there that quite frankly when this Court is put in a position

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(b) the fact that the *Dennis* debtor actually discussed the issue with her bankruptcy counsel and then decided not to disclose the pending claim, which in error she thought was statutorily exempt (*see* **A.18-19**);

(c) the fact that, when she belatedly returned to the bankruptcy court to disclose the damages claim, she asserted that it was exempt (*see* **A.19-22**);

(d) the fact that the *Dennis* court discussed the trial court's finding there of a "meaningful connection" between the matters at issue in the bankruptcy action and the damages action (*see* **A.24-28**);

(e) the fact that the recently appointed trustee in the *Dennis* case apparently did not seek to pursue the belated damages claim for the benefit of creditors, but did not formally abandon it either (*see* **A.28-30**); and, as a result,

(f) that fact that the damages claim defendant did not have a chance – even a belated one – to resolve the damages claim efficiently via negotiation with creditors, whom might otherwise not have been willing to pursue the claim (*see* **A.30-31**.)

At the hearing below, Judge Matini explored each such issue with Plaintiff's counsel, but did not find any material basis for undermining her conclusion that the *Dennis* opinion was both persuasive generally and applicable here *a fortiori*.

where it may act without jurisdiction, that's [sic] sort of goes against everything that a judge of this court is supposed to do.

That's one thing that you try to avoid. And so, and I just want to be clear. I accept Mr. Pavsner's representation 110% that he had no knowledge of this other proceeding, the bankruptcy proceeding, but this case would have been handled differently I believe or at least we would have had to have a discussion about how this case would have been handled had we all known that there was this pending bankruptcy.

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. And I recognize that Mr. Pavsner said that can be fixed now, that creditors are now part or can be part of this case and can actually now benefit from this case.

I think while I appreciate that that is a distinguishing factor, what remains however is the fact that the bankruptcy court, like all courts, are publicly funded. They have limited resources. And what's happening here is that the bankruptcy court has to essentially redo what it already did, which could have been avoided had there been proper disclosure under oath as was required. And so if to permit a situation where a party can simply say once found out, oh we can fix this now. If that were allowed, then one, that initial petition and the amendments where you're singing under oath saying one thing would become meaningless.

And two, the resources of the trustee and the bankruptcy court would be unfairly taxed by having to go back and do what should have and they could have done earlier had there been a proper disclosure. And so I think there's still harm here to everyone on the bankruptcy side because of the non-disclosure of this asset.

And getting to this claim of inadvertence, both the trial court and the Court of Appeals [in *Dennis*] discussed the failure to comply being inadvertent only with lack of knowledge which of course there can be, or a direct motive for the concealment or no direct motive for the concealment. There is, quite frankly, a motive here in that a party can discharge all those debts and then keep whatever might be gained from this claim for themselves with no recourse quite frankly for those creditors if this is later revealed that the creditors had no opportunity to

get involved.

And I think everyone basically has acknowledged that this issue is a proper one for the Court to consider based on what the Court of Appeals has said in there being no role for a jury to determine whether to apply judicial estoppel. That rests with me.

And it is among the many decisions that I must make that involve weighing disputed facts. And I did find that language in Dennis to be that I cited towards the end to Mr. Pavsner, to be quite compelling. Here, there were several inequities that could have and should have been addressed.

The creditors were disadvantaged in not knowing of this. The fact that they can now assert a claim given the passage of time, the resources that the creditors already spent and now would have to expend again in addressing this potential claim. The Plaintiff did obtain an unfair advantage here over the creditors and the Defendants here were unaware of this action, unable to possibly negotiate with the trustee and obtain a benefit from those proceedings for themselves.

And, you know, and quite frankly, the integrity of the court process, both the proceedings here and the bankruptcy proceedings, and the whole purpose of being able to obtain a legally available benefit to this Court, that depends on – that's rooted in candor. That's about fairness not only to the debtor, but to the creditors.

And the ability of the trustee to do his or her job in managing the estate and all of that. That was impacted here. It was significantly impacted. And to say that the trustee now has to do that job all over again because of a situation that was created by the Plaintiff, when she clearly read through the petition. She answered all the questions. And then had certainly enough knowledge to go back and amend it to add additional information.

And so for those reasons, again, applying the analysis of *Dennis* which this Court it's not only binding on this Court, but certainly does make sense under the facts of this case. I am granting the Summary Judgment Motion, denying the other motions as moot and of course vacating the April trial date.

On December 20, 2022, Judge Matini's judgment Order was docketed. (*See* A.8-9.)

Appellants did not seek reconsideration, and this Appeal followed. (*See* A.255-258.)

SUMMARY OF ARGUMENT

As the judge below – sitting as a chancellor in equity – correctly found, Plaintiff Stewart's original rights to file this action became subject to judicial estoppel when – as a party both to this action and to a bankruptcy action initiated just weeks before filing this personal injury action for damages – she inexplicably: (a) failed to disclose the existence of her planned damages claim when she filled out the required schedules supporting her Petition in Bankruptcy; (b) failed to amend her bankruptcy filings to disclose this action after she filed it; (c) failed to disclose the filing and pendency of this action when she later filed amended bankruptcy schedules to name additional creditors; and (d) failed just weeks later in not correcting this disclosure deficiency when the bankruptcy court, in preparing to discharge her debts for lack of any accessible disclosed assets, called upon her to reaffirm under oath the accuracy of her disclosures.

Plaintiff Stewart's inactions back in late 2019 and early 2020 – which did not come to light until Defendant Howard's counsel discovered them and alerted Plaintiff's own tort-claim counsel to the situation in March 2022 – resulted in each of the following: (a) almost three years of intensive and expensive litigation herein without the presence of the actual real party in interest; (b) the trial court's distraction from numerous other, legitimately filed matters before it; (c) the time-

consuming distractions arising from the belated discovery that Plaintiff Stewart potentially was not a real party in interest; and (d) the time and expense of investigating and pursuing the summary judgment below for judicial estoppel.

Moreover, Plaintiff's inactions back in 2019 and 2020 misled the bankruptcy court into granting a total discharge of Plaintiff Stewart's debts – reportedly involving almost 50 creditors – without any payment to them, because she failed to disclose that she had a potentially lucrative personal injury claim against Defendant Howard, which – among other things – was denied the opportunity to negotiate with a trustee during the original bankruptcy proceeding about settling her claim before litigation commenced. Once Plaintiff Stewart's bankruptcy-disclosure failures became known to her counsel herein in March 2022, she then: (i) petitioned for reopening the original bankruptcy proceedings; (ii) obtained the appointment of a trustee to the marshal, liquidate and distribute her belatedly disclosed assets, and (iii) supported the trustee's proposal to intervene belatedly in the instant damages action. All this eventually would result in renewed notice to creditors who had effectively wasted their time participating in the original bankruptcy action and now would have to participate again to seek to share in any damages owed by Defendant Howard herein or in a related settlement. To allow such a plaintiff the ability to do so only would only encourage debtors to conceal potential assets and only disclose them if caught, and, as noted in *Moses* (606 F.3d at 800), granting such relief would

undermine the incentive for such debtors to provide truthful initial disclosures.

In ruling against Plaintiff Stewart, Judge Matini correctly recognized that, in addition to meeting all the requirements for equitable estoppel under federal precedents such as *New Hampshire* and *Moses*, the key facts of this action regarding Plaintiff Stewart's disclosure failures are such that a finding of equitable estoppel against her follows *a fortiori* from the rulings of the trial court and this Court's affirmance in *Dennis*. In particular, as Judge Matini recognized, the compact sequence of events relating to Plaintiff Stewart's original non-disclosures weighs even more heavily towards a finding of judicial estoppel here than did the facts in *Dennis.* Among other things, Plaintiff Stewart reaffirmed her misrepresentations in the bankruptcy court at least twice before receiving the March 2020 Order of Discharge. Furthermore, there is nothing in the record below that could justify not finding equitable estoppel here, given the holdings and rationale in *Dennis*.

Appellants' Brief questions Judge Matini's conclusion that granting summary judgment for Defendant Howard permitted a finding that Plaintiff's Motion For Substitution substituting trustee Marc Albert as Plaintiff was moot, but Appellants did not seek reconsideration below, and accordingly the record is poorly developed in that regard. Defendant Howard acknowledges that significant cases (including *Dennis*) recognize that proper adjudication of equitable estoppel issues arising from misrepresentations in a bankruptcy proceeding requires special consideration,

although there can be situations where the continuation of litigation in the name of the bankruptcy trustee would not be appropriate, and perhaps the bankruptcy court's vacating the debtor's ill-gotten bankruptcy discharge and restoring the creditors' legal rights against the debtor would be the best available remedy.

Instead, if this Court concludes that the trustee properly could have been substituted as the real party in interest below notwithstanding the argument that it would encourage bankruptcy litigants to conceal assets, Defendant Howard recognizes that equity would require that it cooperate with the trustee in this regard, as suggested by the Amicus Brief of the National Association of Bankruptcy Trustees, assuming that Plaintiff Stewart has become judicially estopped from proceeding any further in seeking damages for herself. Upon any remand here, however, the court below should coordinate further proceedings herein with those likely to take place in the bankruptcy court. For example, because Plaintiff's disclosed debts discharged in the original bankruptcy proceeding were only approximately $15,900, further proceedings below could be stayed to allow the trustee to notify the original creditors that the bankruptcy has been reopened, in order to work out a settlement for their benefit with Defendant Howard here. Indeed, it would be inequitable for the parties herein to prepare for and try this case at great further expense, when the stakes at issue for creditors are comparatively low.

ARGUMENT

Appellants' Brief is primarily focused on (A) whether the recently re-appointed trustee for Ms. Stewart's belatedly reopened 2020 bankruptcy estate should be allowed to appear at this stage of her damages action against Defendant Howard as the real party in interest, and (B) whether the summary judgment below against Plaintiff Stewart on grounds of judicial estoppel should not have rendered moot the Plaintiff's Motion to Substitute. Along the way, Appellants' Brief also interjects arguments for reversing the judicial estoppel finding below, but even the Conclusion in Appellants' Brief (at 34) only asks expressly that "the judgment below should be vacated," and the case therefore remanded to "allow the Lawsuit to proceed on the merits in the name of [trustee Albert]."

Indeed, it is only in section B.2.a of Argument that Appellants' Brief offers excuses for Plaintiff Stewart's repeated misrepresentations under oath to the bankruptcy court as "an unintentional, inadvertent mistake" (*id*. at 17-20) and contends that "there is no evidence that Ms. Stewart intended to conceal the Lawsuit from the Bankruptcy Court." *Id*. at 20-28. In addition, Appellants' Brief (at 28-29) treats this Court's recent analysis and holding in *Dennis* dismissively, and even argues that *Dennis* is "consistent" with potentially more lenient judicial estoppel decisions elsewhere in the country in other contexts – conduits through which this Court supposedly could justify reversing Judge Matini's finding of judicial estoppel.

However, no D.C. precedent supports such a devious procedure.

In any event, much as Appellants might wish it otherwise, the actual key topic here – Plaintiff Stewart's bankruptcy case deception and all the mischief it has caused – was properly resolved against her by the court below, and the finding of equitable estoppel against Plaintiff Stewart should be affirmed on the merits, before any further proceedings for the limited purpose of compensating her creditors who were mistakenly deprived of relief by the March 2020 Order of Discharge.

With these priorities in mind, the Argument below will proceed in the same order as Defendant Howard's Counter-Statement of Issues Presented for Review.

I. The Court Below Properly Found That Plaintiff Stewart Personally Is Equitably Estopped from Pursuing Any Further Interest in Or Receiving Any Benefit from Her Suit against Defendant Howard Herein.

A. Standards of Review

Contrary to Appellants' contention (*id*. at 15-16), the standards of review for trial and appellate courts considering summary judgment sought based on the affirmative defense of equitable estoppel are not those for ordinary questions of law or mixed questions of law and fact. Instead, as Judge Long wrote in the *Dennis* opinion (258 A.3d at 868 (citations omitted)):

> We recognize the bedrock principle that "[j]udicial estoppel is an 'equitable doctrine' invoked at the court's discretion to prevent 'improper use of judicial machinery'.". . . We review the use of judicial estoppel according to the abuse of discretion standard, and we will affirm where the trial court has satisfied all the requirements for invoking the doctrine. . . .

Under this standard, the trial court – sitting as chancellor in equity – is not limited to considering undisputed material facts. Instead, the trial court in such situations hears the uncontested and contested facts that are presented to it – with an evidentiary hearing if any party asks for one (no one did below here) – and the court then makes findings of facts and draws related conclusions of law.[4] Therefore, contrary to Appellants' position (*id*. at 16-17), the recognition that each equitable-estoppel case "must be decided on its own specific facts and circumstances" (*see* Appellants' Br., at 16-17 (quoting the Fourth Circuit's *King* case[5])) does not mean that such rulings must be made on undisputed facts. Accordingly, judicial estoppel findings are reviewed by the Court of Appeals under an abuse-of-discretion standard, which applies to both findings of fact and applying equitable principles to the facts.[6]

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[4] Appellants' Brief (at 15-16) concedes the correct standard only obliquely, in citing *In re Coastal Plains*, 179 F.3d 197, 205 (5th Cir. 1999), with a parenthetical on point, apparently as part of an overall plan to ignore controlling precedent in the *Dennis* opinion and instead to "weave and cut whole cloth" from myriad opinions elsewhere typically not involving the "unique context of a debtor's nondisclosure of a claim in bankruptcy." *See Winmark Ltd. P'shp v. Miles & Stockbridge*, 109 Md. App. 149, 170-72 (1996), *vacated and remanded on other grounds*, 345 Md. 614 (1997).

[5] *King v. Herbert J. Thomas Memorial Hospital*, 159 F.3d 192, 196 (4th Cir. 1998).

[6] Appellants' Brief (at 17) asserts that courts may not resolve any summary judgment by making findings based on disputed facts, even if the central issue involves an "equitable" claim or defense, or any other dispute that is "within the sole province of the court to decide." *Cf.* Md. Civil Rule 2-502. However, Appellants have not cited any case construing Rule 56 to limit resolution of jurisdictional, equitable, or other questions that are "within the sole province of the court to decide." (*See id).*

B. Disputed Issues of Material Fact Would Not Have Precluded a Summary Judgment Finding of Equitable Estoppel.

By relying on the wrong legal standard in this regard, Appellants have effectively ceded the high ground on appeal to Defendant Howard, which correctly relies on the *Dennis* opinion's accurate summary of the proper role of the trial judge as chancellor in equity in making findings of fact and conclusions of law on an issue of judicial estoppel. (*See* Argument I.A, *supra*.)

1. Judicial Estoppel Is an Equitable Defense, to Be Resolved by the Trial Judge after Making Appropriate Findings of Fact, without Any Right to a Jury Trial on Disputed Fact Issues.

This Court has traditionally used the "abuse of discretion" standard of review for issues of judicial estoppel, and the *Dennis* opinion expressly confirms that "abuse of discretion is the correct standard." *See id*., 258 A.3d at 873-74. As the *Dennis* opinion noted, review of a trial court's use of equitable remedies is governed by the "abuse of discretion" standard. *See id*. at 874, citing *Alternative Systems Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 30-31 (1st Cir. 2004).

For the same reasons, this *Dennis* opinion held that "there is no role for a jury in the determination of whether to apply judicial estoppel." *Id*. at 874-77. Instead, as the *Dennis* opinion explained: "This court has firmly established that where the issue at hand and the remedy sought are equitable in nature, there is no constitutional right to a jury trial on the issue." *Id*. at 874. As that opinion further explained, each precedent cited by the appellant there that reversed a trial court finding of judicial

estoppel used the "abuse of discretion" standard, and no such case remanded for a jury trial on the judicial estoppel issue. *See id*. at 874-87.

2. The Court Below Correctly Considered the Three Basic Elements of Judicial Estoppel, Including Caveats about Their Completeness and Proper Use, and Properly Applied Them to the Specific Facts Here.

Appellants' Brief (at 17-20) acknowledges that there is a basic three-part test for evaluating an asserted defense of equitable estoppel, as articulated by the Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001), and later applied here, first by the D.C. Circuit in the *Moses* case, and more recently by this Court in the *Dennis* case. These factors are: (i) the current position of the party charged with judicial estoppel must be "clearly inconsistent" with its position in an earlier proceeding; (ii) the party so charged must have succeeded in persuading the second court to accept its request for substantive relief, as a result of which that party's reliance on a "clearly inconsistent" position in the second proceeding "would create 'the perception that either the first or the second court was misled';" and (iii) the party "seeking to assert an inconsistent position" in the second proceeding "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *See New Hampshire*, 532 U.S. at 750-51.

Appellants' Brief (at 17-31) does not dispute that the three *New Hampshire* factors are required for purposes of establishing a judicial estoppel defense. Instead, relying on the statement in *New Hampshire* that it was not "establish[ing] 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," Appellants err in contending that every judicial-estoppel case is potentially unique –that "one-size [sic] does not fit all" – in an effort to distinguish the *Dennis* case and other adverse local precedents. *See id*. at 19-20.

Appellants are also incorrect in contending that there is insufficient evidence here for a court to properly find improper intent. Appellants' Brief (*see id*. at 20) frames this issue using two questions: (a) "whether mere failure to list a contingent claim on a bankruptcy schedule is a sufficient basis for [finding] judicial estoppel," and (b) "whether a finding of a motive or intent to conceal is required." In contrast, Defendant Howard's position is: (a) that a mere failure of disclosure in the bankruptcy context may be a sufficient basis for finding judicial estoppel; (b) that there is more conduct and contextual evidence here than Appellants are willing to admit; and (c) that such situations call for a rebuttable presumption of improper motive or intent, so that the plaintiff-debtor has the burden of coming forward with probative rebuttal evidence, because that party is most likely to have such evidence if indeed it exists. *See Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp*., 702 F. Supp. 1317, 1329 (E.D. Mich. 1988) (holding that insured had the burden of producing evidence and the burden of proof to establish that the injurious incident qualified under the "sudden and accidental" exception to the standard liability insurance

policy's pollution exclusion), *citing Fischer & Porter Co. v. Liberty Mutual Ins. Co.*, 656 F. Supp. 132, 140 (E.D. Pa. 1986). As the *Ex-Cell-O* opinion explains: "Among the factors to be considered in allocating the burden of proof is an estimate of the probabilities, fairness and special policy considerations," and "[t]hese elements weigh heavily" in favor of placing the burden on a party making a contention about which it likely has better access to relevant evidence. Plaintiff Stewart is asserting that the usual result from application of the three basic factors in a bankruptcy-related context should not apply here, and she likely is in the best position to come forward with such evidence to disprove motive to conceal and/or intent to deceive.

Defendant Howard agrees that application of judicial estoppel "depends on 'specific factual contexts'," but in this case the specific factual context is "inequitable failure to disclose a pending personal injury damages claim or lawsuit in contemporaneous bankruptcy proceedings initiated by the plaintiff seeking such damages." Accordingly, in its summary judgment motion papers, Howard strongly relied on the 2010 decision in the *Moses* case, as discussed next below.

3. Appellants Try to Switch the Discussion's Focus to the *Moses* Opinion, But Nothing There Aids Plaintiff Stewart Here.

Appellants' Brief (at 20) cites *Moses*, 606 F.3d 789 – which like *Dennis* applied judicial estoppel in a bankruptcy-related context – as supporting their argument that Plaintiff Stewart merely failed to list a contingent claim without "a motive **or** intent to conceal" it, but fails to pinpoint any supporting statement within

Moses. In fact, the following statements from the *Moses* opinion apply squarely here and eviscerate Appellants' contention (*see id*. at 800 (citations omitted)):

> Moses cannot avoid judicial estoppel by claiming that his failure to disclose this lawsuit in the bankruptcy court or his maintenance of the suit in District Court were the result of "inadvertence or mistake." . . . Moses failed to disclose the existence of this case in two separate bankruptcy proceedings, yet in both of those proceedings he listed pending lawsuits that, unlike the instant case, reduced the overall value of his assets through wage garnishment. . . .

The misconduct of the erstwhile plaintiff in *Moses* perhaps was more obvious in retrospect than Plaintiff Stewart's misconduct here, but no less damaging to her creditors and to the bankruptcy system. Moreover, misrepresentation in multiple bankruptcy proceedings is not a judicial estoppel prerequisite – debtors, unlike dogs, are not entitled to one "free bite" – and omitting disclosure of valuable contingent-claim assets is not "OK" as long as you omit worthless ones as well. Likewise, repeated filings in the same bankruptcy proceeding reflecting the same, continuing non-disclosure while the debtor is simultaneously pursuing the omitted claim in a civil action should be fully the equivalent of "two bites by the same dog" here.

Furthermore, on the "no meaningful connection" issue, the *Moses* opinion also eviscerates Appellants' position here (*see id*. at 799 (citations omitted)):

> With this caveat, and taking into account the three considerations addressed in [*New Hampshire v.*] *Maine*, we are satisfied that the District Court did not err in applying judicial estoppel in this case. First, Moses continued to hold himself out before the District Court as a proper plaintiff, a position which was clearly inconsistent with his pursuit of bankruptcy. The inconsistency did not arise simply as a result of the fact

> that "neither [Moses] nor [his] attorney ever listed the discrimination claim as an asset" in his bankruptcy proceedings. . . . Rather, the inconsistency stems from the fact that Moses "had already filed and was pursuing [his] employment discrimination claim at the time [he] filed [his] bankruptcy petition[s].". . . He continued to pursue his initial discrimination claim even though he was no longer a proper plaintiff once he sought Chapter 7 bankruptcy.

That is, what "no meaningful connection" actually refers to would be an attempt to use judicial estoppel to bar pursuit of a properly disclosed personal injury claim against the Smiths because the plaintiff failed to disclose an unrelated personal injury claim against the Joneses, even a contemporary one. *See Dennis*, 258 A.3d at 864.

The *Moses* case also is relevant on the issue of detriment to the defendant in the personal injury case, which also was Howard University there (*see id.*at 799):

> Moses's inconsistent positions also adversely affected Howard. Had the trustee known of this lawsuit during the Chapter 7 bankruptcy proceedings, she might have settled this case early or decided not to pursue it, actions that might have benefitted Howard.

Notably, the *Dennis* opinion adds (258 A.3d at 869, citing *Moses*, 606 E.3d at 799):

> While appellants refer to it dismissively in their briefing, it was something specific and not without logic or clarity. Whether a settlement finally would have been achieved is unknown, but the discrete detriment was the lost opportunity to negotiate. Another unfair detriment is that, if the Trustee had been aware of the claim, the Trustee "might have . . . decided not to pursue it."

In theory, of course, while trustees have authority to abandon certain disclosed claims – *e.g.*, as not economically worthwhile to pursue – Appellants should not be heard to assert that abandonment would have been either permissible or likely here.

Finally, the *Moses* opinion explains that a plaintiff's belated attempt to "cure"

a bankruptcy disclosure omission – by amending bankruptcy filings only after the defendant discovered the omission and notified the court – would improperly "diminish the necessary incentive for the debtor to provide the bankruptcy court with a truthful disclosure of [his] assets" at the outset. *See id*., 606 F.3d at 800 (*quoting Burnes v. Pemco Aeroplex, Inc*., 291 F.3d 1282, 1288 (11th Cir. 2002)).

4. Appellants Err in Contending that There Was No Evidence that Ms. Stewart Intended to Conceal This Action from the Bankruptcy Court.

As Judge Matini correctly found, there was enough circumstantial evidence to properly conclude as follows: (a) that, when Ms. Stewart filed for bankruptcy in November 2019, she had to appreciate the potential value of her damages claim against Defendant Howard, which was then the subject of a notice-of-intent-to-sue letter; (b) that such knowledge should have been reinforced when she actually filed suit against Howard just weeks later; and (c) that her damages suit was well in progress when she repeatedly further misled the bankruptcy court under oath by amending her Schedule of Assets and Liabilities and then reaffirming the accuracy of her previous disclosures in early March 2020, which led the bankruptcy judge to issue the March 17, 2020 Order of Discharge for lack of any assets to redistribute.

In an effort at triage after her bankruptcy deception came to light, Plaintiff Stewart signed – and her counsel filed – a conclusory Affidavit in the court below, denying that she '[]ever had any intention of concealing the medical malpractice

claim from the bankruptcy court or my creditors." (*See* **A.203-204**.) Then, trying to shift blame here to the United States bankruptcy courts for a putative failure of its longstanding and generally understood debt and asset disclosure forms to list by name every basis for a personal injury claim, contingent or otherwise, Plaintiff's Affidavit denies understanding that Question 33 concerning "accidents, employment disputes, insurance claims, or rights to sue" does include medical malpractice and other "rights to sue," and further asserts that she did not fully understand the meaning of "contingent and unliquidated claims" in Question 34. Plaintiff Stewart apparently understood the inquiry posed by the bankruptcy forms enough to amend them to add an additional creditor solely to her benefit, however, and yet she failed to disclose the instant litigation by amendment. Significantly, Plaintiff's Affidavit – which likely was drafted by counsel – necessarily admits that she actually knew about the medical malpractice claim, where it states that "those terms [in Question 34] did not bring to mind the [pending] medical malpractice claim" that she was about to file in court. Thus, despite doubts such a state of mind should have confronted, Plaintiff Stewart failed to seek assistance from bankruptcy counsel, or from the Clerk's office of the bankruptcy court or anyone else, including her counsel in this action. Instead, despite the risk factually and legally, Plaintiff Stewart submitted those forms to the bankruptcy court on or about November 22, 2019, with her "No" answers for Questions 33 and 34 on the Assets Schedule, under cover of the standard Official

Form 106Dec, headed Declaration About an Individual Debtor's Schedules, below which was the statement that, "[u]nder penalty of perjury, I declare that I have read the summary and schedules filed with this declaration and that they are true and correct." Indeed, just below the heading on Form 106Dec is the following statement:

> Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines of up to $250,000, or imprisonment for up to 20 years, or both.

Thus, as things now stand – barring a ruling from this Court that factually false answers to the aforementioned Questions 33 and 34 are not binding, *e.g.*, because the questions are incomplete, badly worded, or otherwise misleading, either generally or as applied to the rather ordinary facts of this case – Plaintiff Stewart's 11/22/2019 Petition for Bankruptcy and supporting schedules are *prima facie* evidence of perjury, and arguably much worse. Therefore, these are good reasons why such conduct qualifies as material evidence supporting judicial estoppel here.

Last, but not least, Appellants' counsel presumably had the opportunity to have Plaintiff testify at the December 14, 2022 hearing, but apparently chose not to do so. As a result, any putative failure by Judge Matini to "make her decision without taking any testimony or evaluating the credibility of any witnesses" (*see* Appellants' Brief, at 21) is solely the fault of Plaintiff or her counsel, rather than the responsibility of Judge Matini, and such deficiency claims are deemed waived now.

5. Contrary to Appellants' Contention, Plaintiff Stewart Did Act "Deliberately" in Making Her False Bankruptcy Filing.

Appellants' Brief (at 21-22) attempts to stretch the meaning of the term "deliberate" or "deliberately" to mean "with fraudulent or otherwise illegal intent." However, the basic issue is not whether the specific misrepresentation in answering Questions 33 and 34 on the Schedule of Assets that misled the bankruptcy court was made intentionally to deceive that Court. Instead, the basic issue is whether invoking the formal processes of the bankruptcy court using documents signed under penalty of perjury in order to secure discharge of all disclosed debts without disclosing the personal injury claim that Plaintiff admits knowing she had when she filed her Petition for Bankruptcy was inequitably wrongful. In fact, as both legal and other dictionaries note with requisite precision, the adjective "deliberate" and adverb "deliberately" include the broader meanings "intentionally" and "purposely" (*see* Black's Law Dictionary, 4th ed. (1968)), in the sense of "characterized by presumed **or** real awareness of the implications or consequences of one's actions or sayings" (*see Merriam-Webster's Third International Dictionary*, at 596 (1966)).

Furthermore, contrary to what Appellant's Brief contends (at 22-26), District of Columbia law regarding application of judicial estoppel in bankruptcy-related medical malpractice personal injury damages actions was effectively settled in the *Dennis* case. The *Dennis* opinion upheld the finding below that the plaintiff should be estopped from further pursuing her claim against Georgetown University Hospital

– and the physician who had conducted her abdominal surgery there – on the grounds that she and her husband had failed to disclose the claim that led to their civil damages claim when she filed a petition in bankruptcy. *See id*., 258 A.3d at 862-77.

As the *Dennis* opinion explains, the "timing of her knowledge of the claim [was] significant" factually there (*see id.* at 863), and the same is true of Plaintiff Stewart's claim here *a fortiori*. Specifically, Ms. Dennis's allegedly improper surgery took place on October 5, 2012 (see *id.* at 863) and, "[a]s early as the summer of 2013, she had decided that she wanted to sue Dr. Jackson." *See id*. On November 20, 2014, Ms. Dennis and her husband filed a petition in bankruptcy, which expressly mentioned the losses resulting from her inability to work after the 2012 surgery as the basis for their inability to pay their debts. *Id*. One of the questions on the Schedule of Assets for which Ms. Dennis answered "none" was the equivalent of Question 34 in the instant case – "other contingent and unliquidated claims of every nature . . . ," along with the estimated value of each such claim. One of the debts that the Dennises listed on the corresponding Schedule of Debts was a co-pay she owed for about $300 in medical services received because of alleged sequelae to the 2012 surgery. *See id.* On March 9, 2015, the Bankruptcy Judge there issued an Order discharged over $85,000 in debts, including the above-referenced surgery-related medical expense. Then, on or about July 1, 2015, an attorney retained by the Dennises in or about 2014 sent the hospital a Notice of Intention to File Suit letter.

See id. at 865. On February 4, 2016, the Dennises filed suit against the Hospital and Dr. Jackson. *See id*. at 863-64. At deposition, Ms. Dennis confirmed these facts, as well as disclosing that she had consulted bankruptcy counsel who reportedly told her that Maryland law – where the Dennises resided – "exempts from bankruptcy money received in compensation for personal injury;" however, that understanding turned out to be wrong, because Maryland law does not exclude damages for lost wages in that context. *See id*. at 865 & 867-68 (citing *Calafiori v. Werner Enterprises*, 418 F. Supp. 2d 795, 799-800 (D. Md. 2006) ("To the extent any aspects of the plaintiff's plea for damages fall into nonexempt categories, the petitioner [debtor] did have a motive to conceal.")). The District of Columbia, notably, lacks any such exclusion.

Among the issues that the Dennises raised in opposing summary judgment on judicial estoppel grounds were "whether [the Dennises] intentionally sought to mislead the Bankruptcy Court, asserting that there was no evidence of a deliberate motive to do so . . . ," as well as "that there was no evidence that [the Dennises] intentionally sought to gain an unfair advantage specifically over the hospital and physician defendants there, on the theory that "the nondisclosure itself is not proof of such intent." *See id*. at 864-65.

Like Judge Matini's ruling here, the trial court's decision in *Dennis* in this same regard tracked the basic elements of judicial estoppel as outlined by the Supreme Court in the *New Hampshire* case. *See id.* at 865-66.

- Regarding the first element, "the trial court [in *Dennis*] found that the appellants had taken a position in the civil action that was inconsistent with their position in the bankruptcy case, because they failed to divulge to the bankruptcy court any "unliquidated claims, whether exempt or not[,] and then asserted the identical unliquidated claim [in the civil action] that was known to [the Dennises] at the time of the bankruptcy proceeding." *Id*. at 866.

- Regarding the second element, "the trial judge [in *Dennis*] found that the appellants succeeded in persuading the Bankruptcy Court to accept their position because they obtained discharge of all debts identified in their petition, where one of the Schedules in the petition asserted that the [Dennises] had no unliquidated claims." Further, in this regard, "the trial court found that 'judicial acceptance of her inconsistent position here would create . . . the perception that the bankruptcy court [sic] was misled'." *See id*.

- Regarding the third element there, "the trial court found 'that the undisputed facts compel the conclusions that [Ms. Dennis] derived an unfair advantage over her creditors, as at least part of the money she is seeking now . . . [including] lost wages and pre-petitioned [sic] medical expenses, could have been used to satisfy some of those claims'." That trial court also noted that, "when the nondisclosure problem was exposed, [the Dennises] attempted to neutralize the problem by petitioning the Bankruptcy Court to reopen the case and exempt the entire malpractice claim as an [accessible] asset." *See id*. Furthermore, where the hospital and physician "are concerned as the 'opposing' parties [in the civil action], "that trial court "concluded that Ms. Dennis 'derived an unfair advantage over the defendant [sic][,] who could have negotiated with the trustee had this been raised at the time when it was still an active case'," especially where, "[b]y the time the petition to reopen was filed,

it was two years after discharge."[7] *Id*.

Regarding the "inadvertence or mistake" defense, the trial court in *Dennis* had "examined in detail how much Ms. Dennis knew . . . when she filed her bankruptcy petition and required schedules." As the appellate opinion stated: "The trial court rejected the defense of mistake or inadvertence, noting that appellate courts interpret inadvertence narrowly, 'such that the failure to comply with the bankruptcy court's disclosure duty is inadvertent only when a party either lacks the knowledge of the undisclosed claim or has not direct motive for their concealment." *See id.* at 867.

Finally, as the *Dennis* opinion noted: "Balancing the equities was certainly a part of the trial court's findings and conclusions. *See id*. at 868. While recognizing that Mr. Dennis "had presented claims of medical problems that were 'both serious and debilitating'," the *Dennis* trial court "found that a combination of equities on the defense side was more important, *i.e.*[,] not only the bad effect of the nondisclosure on both the creditors and appellees but also the harm to the bankruptcy system itself, effectuated by a party who was represented by an attorney and who made a conscious decision not to disclose." *Id*. While the two cases are not identical, Plaintiff Stewart here was arguably less conscientious than Ms. Dennis, in failing to confer with counsel or seek clarification from the Clerk of the bankruptcy court about the two

[7] As the *Dennis* opinion noted, the trial court also found a "meaningful connection" between the two judicial proceedings, because one debt that the Dennises sought to discharge was a medical services bill related to alleged sequelae to the 2012 surgery.

key asset questions she admits not fully understanding. Judge Matini carefully considered the situation here, but reasonably concluded that the cited differences were not sufficient to distinguish this case from *Dennis*, and on review this Court should affirm unless convinced that Judge Matini abused her equitable discretion.

Indeed, Judge Matini's rulings here track the trial court rulings in *Dennis* closely. Moreover, as Judge Matini correctly noted, the time frame in *Dennis* was considerably more spread out than in Plaintiff Stewart's case, in that the Dennises had received their bankruptcy court discharge before they even filed suit, and yet the trial court in *Dennis* properly concluded that finding judicial estoppel was appropriate there. As a result, it is not surprising that Judge Matini found that the *Dennis* case was precedent for an *a fortiori* finding of judicial estoppel.

Like the appellants in *Dennis*, Appellants here question whether there was adequate support for Judge Matini's ruling on the "unfair advantage or unfair detriment" issue and question whether Plaintiff Stewart's conduct was a "calculated attempt to improperly use the judicial machinery to derive such an unfair advantage or impose such an unfair detriment" on Defendant Howard. Also, like the appellants in *Dennis*, Appellants here assert various potential abuses of discretion, including (a) the finding that a detriment befalling Plaintiff Stewart was an inability to settle the threatened malpractice claim while she was in the bankruptcy process, which the appellants in *Dennis* asserted was "ethereal;" and (b) failing to submit disputed

issues of fact regarding the judicial estoppel to a jury.

However, the Court of Appeals in *Dennis* court disposed of each such issue raised there. First, regarding the unfair advantage or detriment issue, the *Dennis* court held that the defendants' loss of the opportunity to negotiate a settlement of the personal injury claim during the bankruptcy process was factually concrete and legally sufficient, noting in addition that the trial court was not required to speculate about whether such a settlement actually would have occurred. *See id*. at 869.

Second, the *Dennis* court made it clear that the critical issue in such bankruptcy-related cases of judicial estoppel "is not about whether the nondisclosure caused an unfair detriment to a particular party in the subsequent civil action, but rather [is about] whether the nondisclosure created an unfair detriment to the creditors or whether it obstructed the bankruptcy system itself." *See id*. at 869-70 (citing cases including *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 2012)). As the *Dennis* opinion further explained: "The core fallacy in appellants' position is the belief that there was not actual detriment to the appellees because neither the doctor nor the Hospital was a creditor in the bankruptcy proceeding and thus, neither could have been an 'opposing party' in bankruptcy," referring to the fact of such creditor-defendant overlaps as mere "happenstance." *Id.* at 870. As the *Dennis* court noted, a classic example is seen "where the undisclosed cause of action was one for employment discrimination, and where the job loss caused by the alleged

discrimination was partly the reason for the inability to pay debts and the need to file a bankruptcy petition." *See id*., *citing Moses*, *supra*, and *Robinson v. District of Columbia*, 10 F. Supp. 3d 181, 188 (D.D.C. 2014). Thus, the *Dennis* court explained, any requirement for the tort defendant to have been a bankruptcy creditor is a "red herring" in the judicial estoppel context. *See id.* As the *Dennis* court further explained, the requirement for involvement of identical parties sometimes plays a role in the doctrine of equitable estoppel, but not here. *Id*. at 870-71.

Thus, as the *Dennis* opinion summed up its principal rulings (*id.* at 871-73):

> In the present case, the trial court found evidence of more than one of the above inequities: (1) harm to the bankruptcy creditors because of the nondisclosure; (2) creation of an advantage for the appellants in the bankruptcy case because the nondisclosure left them free to sue for damages that would have been subject to potential distribution to the creditors; and (3) harm to the appellees by eliminating their opportunity to settle the potential claims against them while the bankruptcy case was still open. The record contains solid evidence of all three.

Finally, the *Dennis* opinion (at 873-77) explains in detail why parties to a judicial estoppel dispute ordinarily do not have the right to a jury trial on disputed fact issues, and therefore why *de novo* review of a properly conducted hearing and decision on a judicial estoppel issue is not appropriate. *See id*.

Ignoring the *Dennis* case up front, Appellants' Brief (at 20-28) uses the *Moses* case to introduce a lengthy detour through a thicket of judicial estoppel cases elsewhere, most of which did not involve bankruptcy nondisclosures. For example, Appellants' Brief (at 20) asserts without citation that the *Moses* opinion supports

their position on "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." Next, Appellants' Brief (at 22) cites *Moses* for this "sufficient, but not necessary" assertion (*see id.*, 606 F.3d at 798 (court's italics):

> 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 [federal] district court where that debtor *deliberately* fails to disclose the pending suit in a bankruptcy case.

However, that cleverly worded sentence is not the same as stating that "judicial estoppel is justified to bar a debtor from pursuing a cause of action only where the debtor deliberately fails to disclose the pending suit in a bankruptcy case" and, as noted earlier, the term "deliberate" has a range of meanings – legally and otherwise – that require careful scrutiny of its use in this equitable context.

Appellants' quotes from other federal court precedents addressing the same issue are similarly unavailing, because *Dennis* and other controlling precedents here explain that the phrase "inadvertence or mistake" is construed narrowly in this context. For example, in citing *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995) (regarding judicial estoppel from prior contentions between law firm clients during later malpractice action against certain law firms and partners), *citing Tenneco Chemicals, Inc. v. William T. Burnett & Co.*, 691 F.2d 658, 664-65 (4th Cir. 1982) (regarding judicial estoppel from prior procedural contentions within a patent dispute), Appellants' Brief (at 23) shifts to the term

"intent" to describe generically what previously cited cases refer to as "deliberate" conduct, as distinguished from "inadvertence or mistake."[8] Similarly, Appellants' Brief (at 24) relies on a quotation from the Fifth Circuit's *Coastal Plains* case, but, as noted *supra*, the *Dennis* opinion actually discusses that case. Thus, the only reasonable conclusion is that the *Dennis* court did not regard the holding or discussion in *Coastal Plains* as incompatible with affirmance in *Dennis*. Likewise, Appellants' Brief (at 25) includes a similar quotation from *Eubanks v. CBSK Financial Group, Inc.*, 385 F.2d 894, 898 (6th Cir. 2004), and thereafter (*id*. at 25-26) cites *Ryan Operations v. Santiam-Midwest*, 81 F.3d 355, 362 (3d Cir. 1996), but the *Dennis* opinion (258 A.3d at 875) also mentions *Eubanks* and *Ryan Operations* and expressly distinguishes them from situations like *Dennis* and here. *See id*.

Indeed, in construing the "mistake or inadvertence" exception narrowly in bankruptcy-related cases, other courts "have asked not whether the debtor's

[8] The *Clark Co.* opinion concludes that the factual disputes about whether there was "intent to mislead" that "is required to invoke judicial estoppel" are such as to require resolution in some regards by a jury trial, but that opinion is either (a) wrong in specifically concluding that findings of disputed fact concerning judicial estoppel require trial by jury or, instead, (b) recognizes that federal courts in appropriate cases must follow the doctrine of *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-80 (1962). That precedent held that cases with a factual overlap between (i) the substantive claim at issue – which in *Dairy Queen* was breach of a trademark-licensing contract – and (ii) equitable defenses or other remedies including estoppel require trying the overlapping disputed facts before a jury in the case on the merits and then resolving the equitable issues in light of overlapping facts found during the jury trial. No such factual overlap exists here, so there is no *Dairy Queen* issue.

omission of the pending claim from the bankruptcy schedules was inadvertent or mistaken; instead, they have asked only whether the debtor knew about the claim when he or she filed the bankruptcy schedules and whether the debtor had a motive to conceal the claim," especially "in the face of a duty to disclose."[9]

Thus, try as they might, Appellants cannot succeed in arguing that "knowledge and motive" evidence in bankruptcy-related judicial estoppel cases falls onto two isolated points, like "integer" numbers: (1) a "mere fact of nondisclosure" point and (2) a substantially separate "intentional deception" point. Instead, the precedents Appellants cite merely identify the nature of two contrasting points on a continuous spectrum, between which trial courts that make findings of fact about judicial estoppel disputes will need to weigh the factual evidence.[10]

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[9] *See Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151, 1157 (10th Cir. 2007) ("When a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit sometimes *sub silentio*, infer deliberate manipulation."); *accord, Guay v. Burack,* 677 F.3d 10, 20 & n.7 (1st Cir. 2012); *Barger v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003); *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416-18 (3d Cir. 1988) ("a rebuttable inference of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose"). This interpretation of "inadvertence" is narrow in part because the motive to conceal [valuable] claims from the bankruptcy court is, as several courts have explained, nearly always present. *See Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 601 (5th Cir. 2005), and *Coastal Plains*, 179 F.3d at 212-13.

[10] In passing, Appellants' Brief (at 22-25 & 27-28) also cites other cases addressing analogous "end point" disputes, such as *Lowery v. Stovall*, 92 F.3d 219, 221 (4th Cir. 1996), but most such other cases do not involve the special situation presented by bankruptcy-related misrepresentations. In *Lowery*, for example, a criminal

The remainder of Appellants' section B.2.b Argument (at 28-31) depends upon the misconception that summary judgment must be based on undisputed material facts, even as to adjudication of judicial estoppel or other equitable issues whose resolution lies solely within the province of the court. As the *Dennis* opinion made clear (*see id*., 258 A.3d at 862, 868 & 873-77), there is no general right to a jury trial on the judicial estoppel issue, which here does not involve the claim allegations of the Complaint, and thus the trial judge is solely responsible for resolving any disputed issues of material facts, as Judge Matini did here.

Accordingly, the Court should affirm the judicial-estoppel judgment below.

II. Any Contingent Rights of the Trustee of an Estate in Bankruptcy for Which the Debtor Failed to Disclose the Claim Herein As an Asset Should Be Protected Only As to Amounts That the Non-Disclosure Actually Deprived Creditors Discharged in the Original Bankruptcy.

A fundamental canon of equity is that "those who seek equity must do equity." Defendant Howard acknowledges this canon's potential applicability here, and will therefore rely on the Court to do equity in resolving this appeal overall. In that regard, one equitable factor involves balancing the legitimate interests of the various parties adversely affected by Plaintiff Stewart's inequitable conduct, including – in the following order, (a) the integrity of the District of Columbia courts, (b) the

convicted on his own guilty plea later sought damages supported by a repudiation of his confession. *See id*. Judicial estoppel's equitable considerations are complex enough in the bankruptcy context, and this Court need not focus on such other cases.

interest of Defendant Howard in its well supported judicial-estoppel defense, (c) the integrity of the bankruptcy courts; (d) the interests of Plaintiff Stewart's creditors in the original bankruptcy proceeding, and (e) Plaintiff Stewart's interest in securing final resolution of the debts she put at issue there.

If the judicial estoppel judgment below as to Plaintiff Stewart is affirmed, it appears that equity factors (a) and (b) above will be reasonably well satisfied. Appellants' Brief (at 9-15 and 31-34) has addressed the general rights of trustee Albert at length, but has not adequately limited the extent to which he should be permitted to intervene now. Under precedents including *Dennis* and *Moses*, bankruptcy trustees should be allowed to intervene – especially in the face of a finding of judicial estoppel against the debtor – only for the limited purpose of pursuing a damages judgment against Howard sufficient to satisfy the claims of creditors that the bankruptcy court mistakenly discharged in reliance on the debtor's failure to disclose her planned lawsuit for damages as an asset. In addition, Appellants' Brief (*passim*) has not adequately explained that the relief the trustee seeks on behalf of Plaintiff Stewart's bankruptcy estate is appropriate not only to resolve such creditor claims, but also ultimately to thereby preserve her discharge in bankruptcy. In other words, the remedy of judicial estoppel in this context partly involves the concept of election of remedies, and in this instance equity preserves her election of the bankruptcy discharge remedy while foreclosing personal access

to the damages remedy against Defendant Howard.

Accordingly, Defendant Howard respectfully limits itself to the following response to Appellants' Brief (at 9-15 and 31-34).

A. Standards of Review

Application of Superior Court Civil Rule 17(a) is a question that it is within the sole province of the court to decide, and therefore courts are permitted to make findings of fact and draw reasonable inferences therefrom in resolving Rule 17(a) issues. Indeed, Appellants' Brief (at 10) effectively concedes this issue, by admitting that Rule 17 decisions are reviewed *de novo* when the facts are undisputed and for abuse of discretion where any fact finding is involved. *See id*. Thus, for Rule 17(a) purposes, the correct appellate test is again "abuse of discretion," except to the extent that there are no disputes of material fact or inferences therefrom.

B. Defendant Howard Does Not Oppose Remand to the Trial Court for the Limited Purpose of Further Proceedings on the Trustee's Petition for Intervention.

1. Trustee Albert Is a Real Party in Interest

Plaintiff Stewart was the beneficiary of a summary discharge in bankruptcy on the erroneous conclusion – based on her deficient filings and sworn representations – that there were no assets to marshal, liquidate or distribute for the benefit of creditors. Therefore, the Motion to Intervene below by trustee Albert arose from Plaintiff Stewart's belated and essentially involuntary request that the bankruptcy court reopen her original action, where Mr. Albert was originally

appointed as her estate's trustee, and to authorize him to employ Plaintiff's counsel as special litigation counsel herein, who thereafter sought leave to substitute trustee Albert as the real party in interest.

For whatever reason, Judge Matini either believed that her granting summary judgment against Plaintiff Stewart rendered moot the Plaintiff's motion to substitute the trustee as the real party in interest, or Appellants' failed to convince Judge Matini that granting that motion was justified. In that event, however, it would have been more appropriate for such dismissal to be without prejudice, in the manner applied by Judge Boasberg in the *Simmers* case, as discussed in the following subsection. Defendant Howard represents that it is not aware of any good-faith basis for opposing a remand for the court below to further consider Plaintiff's Motion for Substitution, but respectfully reserves all its rights for any such further proceedings.

2. The Court Below Did Not Expressly Reach the Issue of Whether the Motion for Substitution Was Timely Filed, and That Issue Has Not Been Adequately Explored in the Record.

As noted *supra*, Rule 17 expressly provides that, "[a]fter ratification, joinder, or substitution [by the trustee, in this case], the action proceeds as if it had been originally commenced by the real party in interest." If the drafters of Rule 17 meant that a belatedly joined real party in interest would be entitled to start the litigation over *ab initio*, the Rule presumably would so provide expressly. Therefore, the Rule's more reasonable meaning is that the belatedly joined trustee or other real

party in interest is bound by what has previously taken place in the Plaintiff-debtor's civil action. Indeed, that is why the precedents cited in Appellants' Brief (at 10) place limitations on belated intervention by a trustee or other real party in interest.

Appellants' Brief (at 12-15) provides certain useful – but not entirely sufficient – record information on this issue. Notably, in the latter regard, discovery was already closed below, and the court below accepted and heard Defendant Howard's Motion for summary judgment, albeit on the affirmative defense of judicial estoppel rather than the merits of the claims for liability and damages. Because the court's decision below did not include any substantive discussion of such timeliness issues – including but not limited to whether Plaintiff and trustee Albert were not adequately diligent in moving for intervention – this Court should remand for further proceedings, not inconsistent with its rulings, on this timing question and any other issues to be presented here.

In this regard, Appellants' Brief (at 13-14) cites *Simmers v. National Railroad Passenger Corp.*, 2020 U.S. Dist. LEXIS 227485, at *1-*7 (D.D.C. Dec. 1 2020), in the context of Civil Rule 17(a)(3), for the general proposition that, after ratification, joinder or substitution in the civil damages action by a duly appointed bankruptcy trustee, "the action is not dismissed on account of the putative [original] plaintiff's lack of standing, but rather 'proceeds as if it had been originally commenced by the real party in interest'." Notably, that *Simmers* statement is *dictum*, because the only

complaining party before the *Simmers* court was the plaintiff-debtor – who already had been discharged in the related bankruptcy – and no one had taken steps to reopen the bankruptcy, get a trustee appointed, or seek intervention by the trustee. *See id*. In that specific situation, Judge Boasberg chose to dismiss the action without prejudice, upon finding that the plaintiff-debtor lacked standing to bring the suit in his own name, even though Rule 17 suggests a need to give notice to the real party in interest, and therefore Judge Boasberg chose not to reach the merits of Defendant Amtrak's motion for summary judgment based on judicial estoppel.

The *Simmers* plaintiff did not appeal the decision to dismiss, presumably because the dismissal was without prejudice, as explained noted above. Likewise, Amtrak presumably declined to appeal the court's decision not to reach the judicial estoppel issue in light of the court's following explanation (*see id*. at*6-*7):

> . . . As the Court finds no standing, it will dismiss 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. Plaintiff will need to overcome Amtrak's alternative defense of judicial estoppel, which courts may invoke "[w]here a party assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position. . . .

Notably, Judge Boasberg's opinion (at *7) ends with the presumption that "[t]his doctrine, conversely, would not pose an obstacle for the trustee," but that comment is mere *dictum*, because the court there did not have a record sufficient to adjudicate such issues factually. *See id*. Furthermore, nothing in the *Simmers*

opinion suggests that Judge Boasberg would not have promptly reached the judicial estoppel issue as to the plaintiff there if a trustee had already moved to intervene.[11]

Inexplicably, Appellants' Brief (at 13-15) purports to rely heavily on Judge Boasberg's handling of the *Simmers* case, as reflected in that 2020 opinion, without mentioning its subsequent history. In fact, after Judge Boasberg effectively ceded jurisdiction back to the bankruptcy court's trustee, the trustee formally abandoned the *Simmers* personal injury claim, after which Mr. Simmers refiled his action in federal district court. Amtrak thereupon moved again for summary judgment on grounds of judicial estoppel, and – echoing the earlier decision's warning that judicial estoppel could be raised again – Judge Friedrich granted Amtrak's Motion. *See id*., 2022 U.S. Dist. LEXIS 33744, at *2-*9 (D.D.C. Feb. 22, 2022). One again, Mr. Simmers did not take an appeal, and only then was the *Simmers* case concluded.

3. Judge Matini Did Not Grant Judgment As a Matter of Law against the Trustee, and Instead Only Made a Mootness Ruling That This Court Could Correct for Remand.

Citing primarily the D.C. Circuit's discussion of a similar issue in *Moses*,

[11] Indeed, under Rule 17(a)(3) as quoted from the *Simmers* opinion, "the action proceeds as if it had been originally commenced by the real party in interest." That should mean, not only that the action does not restart *ab initio*, but also that the trustee is potentially encumbered, if not permanently bound, by what already has occurred to date . *See id*. A trustee sometimes might want to argue otherwise, but the Rule presumably is a compromise approach intended to encompass potentially difficult situations. Thus, trial courts should proceed in ways that avoid prejudicing the legitimate interests of the defendant, taking into consideration the time and expense already invested in investigating and briefing the judicial estoppel situation.

Appellants' Brief (at 31-34) argues that judicial estoppel cannot apply to an innocent trustee in bankruptcy who timely appears or petitions to intervene, at least in the absence of circumstances where allowing intervention too late in the debtor-plaintiff's original case would either materially prejudice the defendant, the trustee, or both. Nothing in Judge Matini's ruling below, however, expressly purports to apply her judicial estoppel ruling against Plaintiff Stewart to trustee Albert as well.

Accordingly, in light of the present record, Defendant Howard does not oppose remand for the limited specific purpose of enabling trustee Albert to perfect and pursue the rights of Plaintiff Stewart's reopened estate in bankruptcy solely to protect the rights of creditors in her reopened 2019 bankruptcy action.

III. The Law and Logic of This Court's 2021 Opinion in the *Dennis* Case Arguably Governs Review Here *a Fortiori*.

This Panel's review of the ruling below should be governed by the Court's equitable-estoppel precedents, including the 2021 *Dennis* decision. In potential contrast, under this Court's current practice, any proposed retraction or other change in the law of judicial estoppel in the bankruptcy-related context – as set forth in *Dennis* – should be made only by the Court *en banc*, in which case this panel should affirm the judicial estoppel ruling on the basis of *Dennis* as controlling precedent.

As shown *supra*, Judge Matini correctly recognized that the facts of this action are legally equivalent to the facts in this Court's 2021 *Dennis* opinion. Moreover, Judge Matini observed that the time sequence in this action is considerably more

compact, leaving even less room for doubt that a finding of judicial estoppel here is appropriate. At the hearing below, Appellants' counsel (*see* note 2, *supra*) purported to find six material differences between the *Dennis* facts and those here, of which the most significant was the plaintiff patient in *Dennis* had consulted legal counsel before filing her bankruptcy petition and related asset disclosures, and then did so without mentioning the medical negligence claim.

In that regard, Ms. Dennis stated in her Declaration: "I recall [my bankruptcy attorney who filed the petition] explaining to my husband and I [sic] that Maryland law exempts from bankruptcy money received as compensation for personal injuries." *See id*., 258 A.3d at 865. The *Dennis* opinion notes initially that "[t]he record contains no other details about the conversation" with her bankruptcy attorney (*see id*.), and thereafter explains how the trial court evaluated that situation, where the plaintiff knew she had a claim, but nevertheless relied on such advice. In fact, her attorney perhaps misunderstood the scope of Maryland's bankruptcy exemption for damages in respect of bodily injury, or she perhaps misunderstood the scope of damages she was seeking in the negligence action. *See id*. at 867-68. Either way, the trial court and the appellate court in *Dennis* each concluded that Ms. Dennis had a *prima facie* motive to conceal there, because damages for lost wages and pre[-]petition medical expenses were not excluded as bankruptcy assets in Maryland. The clear implication here from the *Dennis* court's discussion is that the plaintiff-

debtor's affidavit did not provide sufficient information to raise a material fact issue.

Worse yet here, Plaintiff Stewart did not bother to consult any counsel before initiating her bankruptcy, and simply took a chance on whether she correctly understood Questions 33 and 34 on the Schedule of Assets and whether she correctly appreciated the potential relevance of her claim and the suit she was about to file against Defendant Howard. Plaintiff Stewart here was less diligent than the plaintiffs in *Dennis*, in failing to seek legal advice or some other form of other clarification, and in failing to notify her tort-claim counsel about the bankruptcy issue. Accordingly, under governing principles consolidated in the *Dennis* opinion, Plaintiff Stewart has less reason to complain about being found judicially estopped.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Defendant Howard University asks that this honorable Court affirm the judgment below for judicial estoppel against Plaintiff Yolanda Stewart in its entirety, and respectfully suggests that the Court should thereafter equitably consider trustee Albert's request of remand for the limited purpose of protecting the rights of Ms. Stewart's creditors under the bankruptcy court's now vacated March 17, 2020 Order of Discharge.

Respectfully submitted this first day of September 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September 2023, the foregoing document was filed 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:

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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/ Andrew Butz
Signature

23-CV-0021
Case Number(s)

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