

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NEW CASTLE MOTORS, INC.,	)	
	)	Case No. 208, 2014
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	Court Below, Superior Court
	)	of the State of Delaware
NAKIRA DARDEN,	)	C.A. No. N12C-01-219 FSS
	)	
Plaintiff Below,	)	
Appellee.	)	

**OPENING BRIEF OF DEFENDANT BELOW, APPELLANT,**  
**NEW CASTLE MOTORS, INC.**

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A handwritten signature in cursive script, appearing to read "George T. Lees III".

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Dated: June 9, 2014

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## NATURE OF THE PROCEEDINGS

Plaintiff Below-Appellee Nakira Darden (hereinafter “Darden”) brought suit against Defendant Below-Appellant New Castle Motors, Inc. (hereinafter “New Castle Motors”) for personal injuries arising out of a slip and fall that occurred on February 23, 2011 at Appellant’s place of business located at 234 South DuPont Highway, New Castle, Delaware 19720.

Appellee filed her Complaint on January 27, 2012, alleging damages as a result of the subject slip and fall. New Castle Motors filed its Answer on May 1, 2012 and the parties engaged in written discovery and depositions. (A1- A10).

In compliance with the June 6, 2012 Scheduling Order, on July 31, 2013, New Castle Motors filed its Motion for Summary Judgment as Plaintiff is Estopped from Bringing the Present Action. (A11 –A115). That Motion attached as Exhibits the Chapter 13 Bankruptcy Petition and requisite schedules filed by Ms. Darden (A18 –A55) as well as the Bankruptcy docket (A56 –A76). The Motion also attached as exhibits pleadings from two (2) Quiet Title Actions that Appellee had filed in Pennsylvania (A92 –A109) in which she claimed an interest in certain real property that similarly was not disclosed in her Bankruptcy Petition or Schedules. The Bankruptcy Docket demonstrated that at no time subsequent to the February 23, 2011 incident did Ms. Darden file Amended Bankruptcy Schedules disclosing the claim she had arising out of the slip and fall. The exhibits

to the Motion further demonstrated that Ms. Darden received an Order Discharging Debtor in November 2011 (A110 –A115) and subsequently filed the present action shortly thereafter.

The Motion for Summary Judgment proceeded to hearing before the Court on October 3, 2013. (A116 –A157). During the hearing, the Court indicated that it was going to deny the motion without prejudice and permitted the filing of a six (6) page supplemental pleading addressing specific issues and concerns the Court had regarding the “ownership” of the personal injury claim. (A130 –A131). Later that day, the Court entered its Order denying the Motion for Summary Judgment on the issue of Estoppel. (A158 –A159).

New Castle Motors filed the supplemental pleading contemplated by the Court on October 17, 2013. (A160 – A168). The supplemental pleading was titled a Motion for Reargument and/or Reconsideration and addressed the specific questions that the Court raised at the Oral Argument.

The parties prepared and submitted their Pretrial Stipulation in advance of the November 14, 2013 Pre-Trial Conference. (A169 –A178). The Appellee’s Bankruptcy Petition and the Docket were identified as intended defense exhibits, as were the Complaints and dockets regarding litigation that Appellee had initiated seeking to quiet title to certain property in Philadelphia to which she alleged an ownership interest, which pre-dated her bankruptcy filing, and Appellee had



similarly failed to disclose this property interest in her Bankruptcy Petition.

During the conference on November 14, 2013, the Court rendered certain rulings regarding the admissibility of the Defendant's proposed exhibits, in particular the Bankruptcy materials and the Philadelphia Quite Title action documents. Unfortunately, no Court Reporter was present at the Pre-Trial Conference to preserve the Court's pre-trial evidentiary rulings. At the Pre-Trial Conference, the Court also addressed the then pending Motion for Reargument and/or Reconsideration, denying same. The Court specifically indicated during the conference that to the extent that the Appellee received a verdict in her favor, the Court would address the issue of ownership of her claim and disposition of any recovery after trial.

Later that same day, the Court filed the Superior Court Proceeding Worksheet denoting the denial of the Motion for Summary Judgment Based on Judicial Estoppel and also documenting the intent of the Court to address ownership of the claim post trial. (A179). The final signed Pre-Trial Stipulation was also filed on the docket on that date. (A180 – A189).

The parties proceeded to trial on November 25, 2013. (See A190 –A226; A227- A253). Prior to the start of trial, the undersigned confirmed for the record the Court's ruling regarding the admissibility of proposed exhibits, areas of inquiry and the issue of whether the failure to disclose the personal injury claim and

property interest on Appellee's Bankruptcy Schedules was done in bad faith. (A192).

The parties then called witnesses and solicited testimony within the parameters of the Court's ruling regarding the admissibility of the Bankruptcy Petition and the Philadelphia Quiet Title Actions. The Bankruptcy Petition and the Quiet Title Pleadings were not admitted into evidence, although some limited questioning regarding Appellee's inconsistent statements in the documents was permitted.

During closing arguments, when discussing the issue of percentage negligence of the Appellee, Appellee's counsel stated: "[i]f you determine that Miss Darden's damages were \$100,000." (A243). This statement drew an immediate objection from Appellant. At the conclusion of the jury being charged, a motion for mistrial was made based upon the improper suggestion by Appellee of a number for her damages in closing arguments. (A251). The Court denied the motion for mistrial without prejudice for same to be revisited after the verdict was returned. (A251).

The Jury then returned a verdict in favor of Appellee in the amount of \$70,476.43, reduced by 20% contributory negligence assessed the Appellee. (A254 –A255).

On December 12, 2013 New Castle Motors filed a Motion for New Trial and

Motion for Relief from Judgment. (A256 –A277). That motion sought to address not only the estoppel issue and the right of the Plaintiff to prosecute the action and recover damages but also the denial of the motion for mistrial based upon the comments as to a specific dollar figure in closing.

Judge Silverman issued his Order denying the Motion for New Trial and for Relief from Judgment on March 28, 2014. (A278 -A281).

New Castle Motors timely filed its Notice of Appeal on April 25, 2014. A briefing schedule was issued on April 25, 2014, setting a deadline for the filing of New Castle Motor's Opening Brief and Appendix of June 9, 2014. This is New Castle Motor's Opening Brief on Appeal.

## SUMMARY OF ARGUMENT

- I. THE SUPERIOR COURT ERRED WHEN IT DENIED THE MOTION FOR SUMMARY JUDGMENT, THE MOTION FOR RE-ARGUMENT AND/OR RECONSIDERATION AND THE MOTION FOR RELIEF FROM JUDGMENT THAT ASSERTED THAT PLAINTIFF WAS ESTOPPED FROM PROSECUTING THE CASE DUE TO HER FAILURE TO LIST THE PERSONAL INJURY CLAIM AGAINST DEFENDANT ON HER BANKRUPTCY SCHEDULES PRIOR TO HER BANKRUPTCY DISCHARGE.
  
- II. THE SUPERIOR COURT ERRED WHEN IT PROHIBITED COUNSEL FROM QUESTIONING PLAINTIFF AS TO HER FAILURE TO DISCLOSE HER PERSONAL INJURY CLAIM ON HER BANKRUPTCY PETITION AT TIME OF TRIAL AND NOT PERMITTING THE BANKRUPTCY PETITION AND SCHEDULES FILED OF RECORD BY PLAINTIFF INTO EVIDENCE.
  
- III. THE SUPERIOR COURT ERRED WHEN IT DENIED THE MOTION FOR NEW TRIAL.

## STATEMENT OF FACTS

On July 9, 2002, Appellee Nakira Darden was indicted in the United States District Court for the Eastern District of Pennsylvania on several charges, including Conspiracy to Commit Interstate Transportation of Stolen Goods and Interstate Transportation of Stolen Goods. A superseding Indictment was then issued on November 19, 2002. On January 8, 2003, Appellee entered into a Guilty Plea Agreement and ultimately, Ms. Darden was ordered to pay restitution in the amount of \$845,270.00 on March 17, 2004.

On October 3, 2007, Appellee filed a Chapter 13 Bankruptcy Voluntary Petition in the United States Bankruptcy Court for the District of Delaware. (A18 – A55). Appellee was represented by counsel, Fred Barakat, Esquire, throughout the bankruptcy proceeding. (A57). Appellee's Bankruptcy remained open and active for several years, and was still pending as a Chapter 13 Petition at the time that Appellee fell at New Castle Motors on February 23, 2011.

Prior to February 23, 2011, it snowed starting at 18:59 hours on February 21, 2011, continuing until 04:42 hours on February 22, 2011. (A265 –A274). No snow fell the evening of February 22, 2011 into the morning of February 23, 2011.

Ms. Darden drove to New Castle Motors on the morning of February 23, 2011 to buy a car. When she arrived at about 8:55 a.m. (A203), she saw snow in the parking lot and people at the dealership preparing to put salt and stuff down.

(A203). She then proceeded into the parking lot, and was proceeding between two (2) cars when she slipped and fell on ice.

After she fell, Ms. Darden met with salesperson David Moseder and manager Shemika Freeland. When issues arose with Ms. Darden's ability to purchase a vehicle, she requested that an incident report be completed. Additionally, 911 was called and an ambulance arrived at the car lot, although Ms. Darden refused to be transported to the hospital for treatment. Following the accident, Appellee sought medical treatment from a number of medical providers before being involved in a second accident, an automobile accident, on June 23, 2012.

On June 23, 2011, the Bankruptcy Trustee appointed to Appellee's pending Petition filed a Motion to Dismiss the Chapter 13 Petition. (A73). Until that filing, no Amended Schedules were filed by Appellee or her counsel which listed as a contingent claim the February 23, 2011 slip and fall. On July 25, 2011, Appellee filed a Notice of Conversion, changing the pending bankruptcy case to a Chapter 7 Petition. (A73). After filing that Notice, Appellee filed Amended Schedules/Statements with the Court. (A79 –A91). Appellee did not disclose the contingent and unliquidated personal injury claim in the Amended Schedules.

In addition to failing to disclose the 2011 slip and fall in her Bankruptcy Petition and Schedules, Appellee also failed to disclose a claim she had to real

property in Philadelphia, Pennsylvania. In fact, while her Chapter 13 petition was pending, and prior to its conversion, Appellee filed a Quiet Title Action in June 2009 seeking to assert an ownership interest in real property located at 1519 Fountain Street, Philadelphia, Pennsylvania. (A92 –A100). That 2009 action was dismissed in 2010, only to be refilled in January 2012. (A101-A109).

Appellee proceeded to a 341 Meeting of the Creditors on September 22, 2011. (A75). Following the Meeting, the Trustee issued a Report advising that the Bankruptcy Estate had no property available for distribution (A75) and the Bankruptcy Court issued its Order Discharging Appellee on November 1, 2011 (A110 -A113). Appellee’s Bankruptcy case was then closed on November 3, 2011. (A115). There is no evidence of record to demonstrate that Appellee ever disclosed at any time to the Bankruptcy Court either her contingent and unliquidated claim arising out of the February 2011 slip and fall, the subject of the present action, or the interest she asserted in 2009 and 2012 to real property in Philadelphia, despite clear statutory mandate that she disclose both claims. Further, it is clear that Appellee had knowledge of both claims during the pendency of her Bankruptcy Petition.

Appellant raised these issues and the failure of Appellee to make the requisite disclosures to the Bankruptcy Court in its Motion for Summary Judgment. (A11 –A115). After the Court denied without prejudice the Motion for

Summary Judgment on October 3, 2013 (A158 –A159), New Castle Motors, as suggested by the Court, filed its Motion for Reargument addressing specifically the questions the Court raised regarding not only prior precedents where Courts have found that persons such as Appellee forfeited their claims when they failed to disclose them on the Bankruptcy Schedules. Appellant also addressed the Court’s questions regarding the affirmative duty to update Bankruptcy Schedules to reflect interests acquired in property after the commencement of the Bankruptcy Petition.

The Motion was then heard at the Pretrial Conference, and as the Superior Court Proceeding Worksheet indicates, was denied. (A179).

Additionally, during the Pretrial Conference, the Court ruled that certain materials relating to the Bankruptcy and Philadelphia Quiet Title Actions were not admissible at trial. The Court’s ruling as to those exhibits was confirmed on the first morning of trial as not court reporter was present at the Pretrial Conference. (A192).

During Appellee’s testimony, the Court permitted some questioning regarding both the “Petition” that Appellee filed in Federal Court and the Pennsylvania Quiet Title Actions, but neither the pleadings nor the associated dockets were permitted to be introduced into evidence. (A221 A224). What however was clear from the testimony is that Ms. Darden owned the property that was the subject of the Philadelphia Quiet Title Actions from a young age (A224)



but it was not disclosed, much like this personal injury claim, in Appellee's Bankruptcy Petition. Stated simply, Appellee had actual knowledge of the facts giving rise to both her personal injury claim and the claim to the Philadelphia property, and yet failed to disclose either known claim to the Bankruptcy Court or the Trustee. This failure to disclose provides further evidence of the intent of the Appellee to attempt to exit Bankruptcy with assets.

In advance of trial, Plaintiff made a settlement demand of \$125,000.00. (A276).

At the conclusion of trial, during closing arguments, the issue of Appellee's comparative negligence was addressed by Appellee's counsel. During that presentation to the Jury, counsel used an example "picking an easy figure" (A243, P.62, l. 3) and mentioned the figure of "\$100,000.00". (A243, P.62, l. 4). The undersigned objected and the Court gave a curative instruction to the jury at that time. After the jury was charged, Appellant moved for a mistrial because the mentioning of the sum of \$100,000.00 in closing arguments, where the demand was \$125,000.00, was prejudicial and inappropriate and no charge to the jury could undo the prejudice inflicted upon Appellant by the comment. (A251, 93:21-94:10).

## ARGUMENT

### I. THE SUPERIOR COURT ERRED WHEN IT DENIED THE MOTION FOR SUMMARY JUDGMENT, THE MOTION FOR RE-ARGUMENT AND/OR RECONSIDERATION AND THE MOTION FOR RELIEF FROM JUDGMENT THAT ASSERTED THAT PLAINTIFF WAS ESTOPPED FROM PROSECUTING THE CASE DUE TO HER FAILURE TO LIST THE PERSONAL INJURY CLAIM AGAINST DEFENDANT ON HER BANKRUPTCY SCHEDULES PRIOR TO HER BANKRUPTCY DISCHARGE

#### A. Question Presented

Did the Superior Court below commit legal error when it denied New Castle Motors Motion for Summary Judgment, the Motion for Reargument and/or reconsideration and Motion for Relief from Judgment which all asserted that Plaintiff was estopped from prosecuting the pending personal injury action?

New Castle Motors position regarding this issue of law is contained in Motion for Summary Judgment as Plaintiff is Estopped from Bringing the Present Action (A167-A339), the Motion for Reargument and/or Reconsideration (A160 - A168) and the Motion for Relief from Judgment filed below. (A256-A277).

#### B. Scope Of Review

The Supreme Court of Delaware reviews questions of law *de novo*. *Evans v. Lee*, 996 A.2d 793 (Del. 2010); *Dambro v. Meyer*, 974 A.2d 121, 129 (Del. 2009); *citing Delaware Bay Surgical Serv. v. Swier*, 900 A.2d 646, 652 (Del. 2006). Where the Court overrides or misapplies the law in reaching its decision, it has abused its discretion. *Pitts v. White*, 109 A.2d 786, 788 (Del. 1954).

As this Court must determine whether the Superior Court erred as a matter of law in determining that Appellee's failure to list the contingent and unliquidated personal injury claim estopped her from prosecuting the action for damages, this Court's review shall be *de novo*.

### **C. The Merits**

The principle question addressed by the Court below is whether Ms. Darden is precluded from prosecuting this personal injury action because she failed to disclose the existence of the claim on her Bankruptcy Schedules to the Bankruptcy Court and U.S. Trustee prior to obtaining a no asset discharge from the Bankruptcy Court. New Castle Motors contends that Ms. Darden's failure to list the personal injury claim against New Castle Motors in her Bankruptcy Schedules prior to receiving her discharge is fatal to her ability to continue to assert a claim against New Castle Motors for any injuries she may have sustained. New Castle Motors also contends that Appellee's intent to gain an unfair advantage is evidenced by the fact that Appellee failed to disclose not one, but two (2) claims, the personal injury claim and the real property ownership claim, despite her actual knowledge of the existence of both claims prior to her Bankruptcy Discharge.

As the Court is aware, judicial estoppel is an equitable doctrine that seeks to prevent a litigant from advancing an argument that contradicts one previously taken in the same or earlier proceeding. *Motorola Inc. v. Amkor Tech., Inc.*, 958

A.2d 842, 859 (Del. 2008). Because Ms. Darden failed to disclose the existence of this claim for personal injuries, her attempt to assert the claim in Superior Court is inconsistent with the position she took in the Bankruptcy Court and mandates that her claim be dismissed with prejudice.

The first question that the Court must address is whether Appellee had a duty to disclose the personal injury claim to the Bankruptcy Court. As noted previously, bankruptcy law requires one seeking the benefits available in the Bankruptcy Court to satisfy a companion duty to schedule, for benefit of creditors, all her interests and property rights. *See Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3d Cir. 1988). Moreover, 11 U.S.C. §521 provides a non-exhaustive list of the debtor's duties in a bankruptcy case, including the requirement that the debtor "file a ... schedule of assets and liabilities...and a statement of the debtor's financial affairs..." Additionally, pursuant to 11 U.S.C. §1125(b), the debtor must file a disclosure statement containing "adequate information," meaning "information as far as is reasonably practicable in light of the nature and history of the debtor...that would enable a hypothetical reasonable investor typical of holders or claims or interests of the relevant class to make an informed judgment about the pain." Finally, it has been held that a debtor must disclose any litigation "likely to arise in a non-bankruptcy contest." *See Oneida Motor Freight, Inc.*, 848 F.2d at 417. New Castle Motors acknowledges that the

factual predicate in *Oneida* is slightly different from the case at bar, in that the claim that the *Oneida* Court held was barred by the doctrine of judicial estoppel in *Oneida* arose prior to the filing of a Petition seeking relief from the Bankruptcy Court. As *Oneida*'s claim predated the filing in Bankruptcy Court, the failure to disclose the existence of the claim precluded *Oneida* from later asserting the claim. Based upon the undisputed facts in this case, Appellee's duty to disclose the interest in the real property in Philadelphia arose at the time that she filed her Petition in 2007 and she did not.

The next question the Court must address is whether Ms. Darden had an obligation to disclose the personal injury claim that arose out of the 2011 slip and fall. A personal injury claim is a contingent and unliquidated claim. *See In Re Kevin P. Kollar*, 176 F.3d 175 (3<sup>rd</sup> Cir. 1999). Contingent and unliquidated claims are required to be disclosed in Schedule B, Item 21 with an estimated value and also Schedule C, Property Claimed as Exempt, if the assertion is that the personal injury claim is exempt from the estate. *Kollar*, 176 F.3d at 177; *Queen v. TA Operating, LLC*, 2013 U.S. App. LEXIS 17296 at \*5 (10<sup>th</sup> Cir. Aug. 20, 2013). However, Ms. Darden's personal injury claim did not exist at the time of the Bankruptcy filing in 2007 and could not by its very nature have been disclosed at that time. New Castle Motors contends that the answer can be found in 11 U.S.C. §541(a)(7) which requires the debtor to update her schedules to reflect any

subsequently acquired property of the estate. The bankruptcy debtor must update the property of the estate pursuant to 11 U.S.C. §541(a)(7), including “[a]ny interest in property that the estate acquires after the commencement of the case.” *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999); *see also Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6<sup>th</sup> Cir. 2004). The Bankruptcy Code requires debtors to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. §521(1). This duty of disclosure is continuing in nature and encompasses all potential claims, even those that are "contingent, dependent, or conditional." *In re Coastal Plains, Inc.*, 179 F.3d at 208. Further, the phrase “property of the estate” is broad enough to cover all kinds of property, including tangible and intangible property, and causes of action. *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 241 (3<sup>rd</sup> Cir. 2001) (*quoting United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983)). The Schedule of assets and liabilities must disclose “contingent and unliquidated claims of every nature.” *Id.* Based upon the aforementioned United States Code citation and the case law interpreting same, Appellant contends that Ms. Darden had an affirmative duty to disclose the personal injury claim which arose after the February 2011 slip and fall. In fact, Ms. Darden filed her Chapter 7 Statement of Current Monthly Income and Means-Test Calculation on August 10, 2011 (A80 –A87) and at least

two (2) Amended Schedules on August 30, 2011 (A88 –A91). No where in any of those documents is the contingent, unliquidated damages claim against New Castle Motors identified. As such, Ms. Darden failed to comply with her statutory duty and disclose the personal injury claim prior to her bankruptcy discharge.

It is anticipated that Appellee may argue that she was unaware of her affirmative obligation to disclose her interests in both the real property and personal injury claim, and as such Appellee did not take an “inconsistent position” such that judicial estoppel bars her claim. It is undisputed that the doctrine of judicial estoppel applies where the prior inconsistent position occurred intentionally rather than through “inadvertence or mistake.” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The failure to disclose a cause of action may be deemed inadvertent or mistaken where the debtor: (i) lacks the knowledge of the factual basis of the undisclosed claims, or (ii) has no motive for concealment. *Id.* at 753. Appellee’s anticipated assertion is insufficient to overcome the bar to her claim which arises from her own failures because “[t]o prove that she did not know of the inconsistent position, she must show not that she was unaware that she had a duty to disclose her claims but that ... she was unaware of the facts giving rise to them.” *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 2013 U.S. App. LEXIS 20418, at \*11(5<sup>th</sup> Cir. Oct. 4, 2013). Appellee clearly knew of the contingent personal injury claim prior to obtaining her Bankruptcy discharge as evidenced by

the medical records from ATI Physical therapy/Pro Physical Therapy submitted at time of trial. Those records specifically denote that Appellee had retained Ken Roseman, Esquire, trial counsel below, as her counsel to pursue a personal injury claim by at least April 18, 2011. Appellee clearly had knowledge of the existence of an unliquidated contingent personal injury claim and the doctrine of judicial estoppel acts to bar her claim because of her failure to disclose the claim to the Bankruptcy Court.

The Court below was skeptical that the holdings in *Guay v. Burack*, 677 F.3d 10 (1<sup>st</sup> Cir. 2012)<sup>1</sup> and *Love v. Tyson Foods, Inc.*, 677 F.3d 258 (5<sup>th</sup> Cir. 2012)<sup>2</sup> were controlling because of the factual predicate in each of those cases, which in the Court's eyes presented different theories of recovery than what it viewed as Appellee's personal injury claim for damages. While Appellant disagrees that the nature of the claim asserted has any bearing on the issue of judicial estoppel being invoked to bar a claim such as that asserted by Appellee, Courts throughout the country have held that persons such as Appellee are barred from prosecuting personal injury claims where they fail to disclose those claims to the Bankruptcy Court even where the claim arises after the Bankruptcy proceeding has been commenced.

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<sup>1</sup> *Guay* was a claim under 42 U.S.C. §1983 alleging damages for a violation of his Fourth, Fifth and Fourteenth Amendment rights.



In direct response to the Court's query about cases where other Courts had barred a Plaintiff's post-Bankruptcy Petition personal injury claim, Appellant noted the holding in *Berge v. Mader*, 957 N.E.2d 968 (Ill. App. Ct. 2011). The factual predicate in *Berge* is identical to the facts at bar in every aspect save two (2). The situation in *Berge* is different only in the fact that the personal injury case arose out of an automobile accident, as opposed to a slip and fall, and the dates of filing of the Chapter 13 Bankruptcy Petition, the date of conversion of the Petition to a Chapter 7 and the date of Discharge. All other facts, including the occurrence of the personal injury accident after the filing of the Chapter 13 Petition but prior to the conversion to a Chapter 7 Petition and Discharge are identical to the factual situation at hand.

In *Berge*, the Plaintiff filed a Chapter 13 Bankruptcy petition in April 2006. *Berge*, 957 N.E.2d at 970. The following month, she was involved in a motor vehicle accident involving the defendant. *Id.* In November 2007, the Plaintiff filed a personal injury lawsuit concerning the accident in state court. *Id.* In May 2009, the plaintiff converted her Chapter 13 bankruptcy petition to a Chapter 7 bankruptcy petition. *Id.* Finally, in October 2009, the Plaintiff received a "no assets" discharge of her debts in bankruptcy court and her Chapter 7 petition was fully resolved. *Id.* Ms. Berge failed to disclose the personal injury lawsuit to the

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<sup>2</sup> *Love* included claims under 42 U.S.C. §2000e, *et seq.*, 42 U.S.C. §1981 and state law claims for

Bankruptcy Court while her bankruptcy petitions were pending. *Id.* The Defendant independently learned of the bankruptcy petition and filed a motion for summary judgment on the bases of judicial estoppel. *Id.* The Trial Court in *Berge* granted the Motion for Summary Judgment and held that Ms. Berge’s claim was barred by the doctrine of judicial estoppel. The case was then appealed.

In affirming the trial court’s decision to grant summary judgment, the Illinois Court of Appeals concluded that judicial estoppel had been established given the Plaintiff’s totally inconsistent positions in the two proceedings, made under oath, for her benefit. *Id.* at 972. The Court of Appeals rejected the Plaintiff’s arguments to the contrary in that her failure to amend was a product of mere inadvertence rather than bad faith, and that she had informed her attorney about her lawsuit. *Id.* at 973.

The Illinois Court of Appeals found that “universally, federal courts have not shown much forgiveness when a party fails to disclose assets in a bankruptcy case. . . [t]his is true no matter what the parties' excuses or the nature of their intent — good or bad.” *Id.* at 974. Further, the Court refused to consider the actions of Ms. Berge’s attorney in failing to list the claim on her schedules or file the requisite amended schedules. The Court held that “plaintiff is bound by her attorney’s actions.” *Id.* at 973. In fact, the Court held the Plaintiff to be bound by

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intentional infliction of emotional distress.

her statements, “regardless of any advice or actions by her bankruptcy attorney and without regard to whether she relied on her attorney in good faith.” *Id.* at 973, citing *Cannon-Stokes v. Potter*, 453 F.3d 446 (7<sup>th</sup> Cir. 2006) (en banc). As such, even though it is expected that Ms. Darden will attempt to shield from the application of the doctrine of judicial estoppel behind the assertion that she told her attorney, that assertion is insufficient to avoid the application of the doctrine of judicial estoppel and any such “hearsay presentations or arguments ... are better left to others in any subsequent litigation.” *Id.* at 973.

The decision in *Berge* is not a lone outlier, and in fact is one of several decisions which have each found that the failure to amend the Bankruptcy Schedules in a pending Bankruptcy Petition are grounds for the subsequently filed personal injury action to be barred by the doctrine of judicial estoppel. In *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, Plaintiff filed for Chapter 13 bankruptcy protection in 2004 and was then involved in an automobile accident in March 2007. 2013 U.S. App. LEXIS 20418 (5<sup>th</sup> Cir. Oct. 4, 2013). Plaintiff then filed an Amended Chapter 13 Plan in July 2007 and obtained a Discharge in November 2008. During the entire time that the Chapter 13 Petition was pending post-accident, no disclosure was ever made of the contingent, unliquidated personal injury claim. The Court of Appeals for the Fifth Circuit held that “Chapter 13 debtors have a continuing obligation to disclose post-petition causes

of action.” *Id.* at 5. In applying the doctrine of judicial estoppel, the Court held that Plaintiff was barred from prosecuting her personal injury claim.

A similar result was reached by the United States Bankruptcy Court for the Southern District of Texas, in *In re Kaufman*, 2013 Bankr. LEXIS 2552 (Bankr. Tex. June 25, 2013). In *Kaufman*, the Plaintiff filed a Chapter 13 Bankruptcy Petition and then was involved in an automobile accident. Plaintiff then converted the pending Bankruptcy Petition to a Chapter 7 Petition and then filed a personal injury action as result of the automobile accident. Plaintiff attempted to then shield the personal injury claim by disclosing it in the Bankruptcy Schedules, but listing it as exempt property as it arose post-petition. The Plaintiff’s personal injury lawsuit was dismissed and then the Plaintiff’s sought the assistance of the Bankruptcy Court in setting aside the State Court’s order of dismissal. The Court refused to assist the Plaintiff’s and held that the Plaintiffs were judicially estopped from asserting that the personal injury claim was part of the Bankruptcy Estate in an effort to defeat the State Court’s order of dismissal.

Similarly, *In re Adams*, the United States Bankruptcy Court for the Northern District of Mississippi held that Plaintiff was required to disclose her post-petition personal injury claim or face the invocation of the doctrine of judicial estoppel. 481 B.R. 854 (Bankr. N.D. Miss. 2012). In *Adams*, Plaintiff filed a Chapter 13 Petition in 2004 and her plan was confirmed in 2005. The incident giving rise to

the personal injury claim occurred on December 7, 2007. Plaintiff then obtained her discharge order on March 31, 2009. Plaintiff did not list the personal injury action on her Bankruptcy Schedules nor did she disclose same to the Trustee. The Court, much as Appellant is advocating herein, found that 11 U.S.C. §1306(a) specifically required that the post-Bankruptcy Petition personal injury claim be listed on the Bankruptcy Schedules and was an asset “includable in Adam’s bankruptcy estate.” *Id.* at 8. Because the parties conceded that the issue of judicial estoppel was not before the Bankruptcy Court, the Court’s decision discusses *in dicta* the issue of motive to conceal claims, which “is self-evident because of potential financial benefit resulting from the nondisclosure.” *Id.* at 17, *citing Thompson v. Sanderson Farms, Inc.*, 2006 U.S. Dist. LEXIS 48409, at 12-13 (S.D. Miss. May 21, 2006).

The Supreme Court of Georgia similarly agreed that the failure to disclose a claim for personal injuries acquired during the pendency of a Chapter 13 Bankruptcy Petition resulted in the doctrine of judicial estoppel acting as a bar to Plaintiff’s personal injury claim. *Wolfork v. Tackett*, 540 S.E. 2d 611 (Ga. 2001).

The Courts in Delaware appear to have had limited opportunity to address the issue of a Plaintiff’s failure to disclose a claim in a Bankruptcy petition and Schedules. In *Klein v. Handley*, Judge Herlihy was forced to address this exact issue. 47 A.3d 524 (Del. Super. 2012). The facts in *Klien* are slightly different

from those at bar in that the claim asserted by Mr. Klein arose prior to the filing of personal bankruptcy by him in June 2007. Mr. Klein did not disclose in his bankruptcy petition, in Schedule B, the claim he had that pre-dated the Bankruptcy Petition. However, unlike the situation herein, Mr. Klein did list the exact amount of the claim elsewhere in Schedule B of his Petition. The Court found no wrong doing on Mr. Klein's part because if the assets had been listed elsewhere, the filing would appear to count the same assets twice. *Klein*, 47 A.3d at 530.

*Klein* is also instructive in that the Court adopted the Third Circuits analysis from *Ryan Operations G.P. v. Santium-Midwest Lumber, Co.*, 81 F.3d 355 (3<sup>rd</sup> Cir. 1996) which required a finding that the conduct was a "means of obtaining an unfair advantage." *Klein*, at 529. The Court found significant the fact that Mr. Klein did not know of his potential claim against the Defendants as he did not have legal counsel. *Id.* at 530. Further, the Court noted that there was "strong evidence that Klein *unintentionally* listed these claims incorrectly in his bankruptcy case." *Id.* at 530. Unlike in *Klein*, Ms. Darden did not incorrectly list her personal injury claim in the wrong place on her Schedule B, she simply failed to list it entirely. The failing to list the claim, even though Appellee was represented by not one (1) but two (2) attorneys at the time of the filing of the Amended Schedules only further demonstrates that the failure to disclose was the direct result of the desire by the Appellee to hide the claim, much as she attempted to hide her claim to the

property in Philadelphia, so she could assert same less than three (3) months after her Bankruptcy discharge. Appellee, much as the above cited decisions note, was attempting to keep any recovery she might obtain for herself, as opposed to for the benefit of her creditors in the Bankruptcy proceeding. *Maritime Elec.Co. v. United Jersey Bank*, 1992 U.S. App. LEXIS 5144, at \*1 (3<sup>rd</sup> Cir. Mar. 24, 1992).

In fact in *Hopkins v. AstraZeneca, LP*, then Judge Slight noted “[i]n Delaware and in the vast preponderance of the federal jurisdictions, isn’t there an inference of non-inadvertent conduct when the plaintiff knows of the claim and has a motive on the face of the facts to not disclose the claim?” C.A. No. 06C-01-325 SER, Transcript of Oral Argument on May 18, 2009. (A282 –A295 at 20:3-7). The Court in *Hopkins* was confronted with a slightly different situation, in that in *Hopkins*, the Plaintiff’s claim arose prior to the filing of the Bankruptcy Petition. Additionally absent from the case at hand is that in *Hopkins* the Bankruptcy case had been re-opened and the Trustee had stepped forward to assert a claim on behalf of the bankruptcy estate and creditors. The Court noted that since the Bankruptcy Petition was filed after the claim arose, by operation of law, Plaintiff was divested of her interest in the claim and it became the sole right of the Bankruptcy trustee.

The Court was also confronted with the issue of whether the Trustee could assert a claim against the Defendant for more than the amount that was due and owing the creditors of the bankruptcy estate. The Court undertook a judicial

estoppel analysis, finding that the Plaintiff's failure to disclose the personal injury claim was "clearly inconsistent" with the position taken in the Superior Court, attempting to assert the personal injury claim. (A293 at 44:12). The Court also found that the Bankruptcy Court accepted the representation of no claim when it granted the Plaintiff discharge. (A293 at 45:10-14). The Court then discussed what constituted "inadvertence" as it relates to disclosure of claims. The Court then stated that

the failure of the debtor to satisfy his or her statutory disclosure duty is inadvertent only when, in general, the debtor lacks knowledge of the undisclosed claims or has no motive for the concealment. (A294 at 46:1-6).

The Court then went on to discuss the facts such as the Plaintiff retaining counsel to prosecute the personal injury action and the actual knowledge of the Plaintiff of the existence of the claim. The Court also noted the motive of the Plaintiff in not disclosing the claim, and that it was exactly as had played out. Specifically, Plaintiff attempted to on the one hand have her debts discharged, and on the other "she would have prosecuted this action and received any and all of the fruits of its success. All of this to the detriment of her creditors." (A294 at 46:21-47:1). Ultimately, the Court held that under the doctrine of judicial estoppel while the trustee could prosecute the action, it was solely for the benefit of the bankruptcy estate and creditors, with the Plaintiff not being entitled to recover any amounts herself.



The record in this action is abundantly clear. Appellee was aware of the nature and existence of the property interested related to the fall at Defendants place of business on the date it happened. This awareness is reflected in her retention of counsel to advocate and advance her personal injury claim within two (2) months of the accident occurring. Despite knowing of the claim and evidencing her intent to prosecute a claim for personal injuries, Appellee failed to satisfy her statutory duty and amend her Bankruptcy Schedules to reflect the claim. She denied the Trustee and the Bankruptcy Court the right to consider the claim and contest the conversion of the case from a Chapter 13 to Chapter 7 Bankruptcy. Appellee hid the claim from the Court such that following the Meeting of Creditors, the Trustee issued a report to the Court that there was “no property available for distribution” and there was no assets claimed as exempt. (A75). Moreover, at no time has Appellee sought to re-open her Bankruptcy case to amend her schedules to disclose the personal injury claim, nor should she be permitted to do so at this juncture, when this issue has been raised on three (3) prior occasions in the Court below and now in this appeal.

In light of Appellee’s lack of candidness to the bankruptcy court, Appellee must be estopped from recovering damages in the instant action. This Court should not permit her to benefit from concealing her contingent and unliquidated claim to one Court and then permit her to recover for that undisclosed claim in

another. For this reason, in reliance upon the above precedent, this Court should reverse the decision of the Court below and issue a decision holding that Appellee is barred from prosecuting the present action and Judgment is entered for New Castle Motors.

## **II. THE SUPERIOR COURT ERRED WHEN IT PROHIBITED COUNSEL FROM QUESTIONING PLAINTIFF AS TO HER FAILURE TO DISCLOSE HER PERSONAL INJURY CLAIM ON HER BANKRUPTCY PETITION AT TIME OF TRIAL AND NOT PERMITTING THE BANKRUPTCY PETITION AND SCHEDULES FILED OF RECORD BY PLAINTIFF INTO EVIDENCE.**

### **A. Question Presented**

Did the Superior Court commit legal error when it prohibited the introduction of the Bankruptcy Petition and Docket and preclude questioning of Appellee on same at time of trial?

New Castle Motors' position regarding this issue is contained in the Pretrial Stipulation (A169 –A178), the Final Court Executed Pretrial Stipulation (A180 – A189) and the Trial Transcript – Day 1 (A192).

### **B. Scope Of Review**

The Supreme Court of Delaware reviews the trial court's decision to admit or deny evidence for abuse of discretion. *Wright v. State*, 25 A.3d 747, 752 (Del. 2011); *citing Longfellow v. State*, 688 A.2d 1370, 1372 (Del. 1997). "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice." *Wright*, at 752; *citing Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999). To the extent that admissibility of evidence rests on a question of law, the review shall be *de novo*. *Wright* at 752; *citing Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008).

As this Court must determine whether the Superior Court abused its discretion in excluding the Bankruptcy Petition and precluding questioning on same resulted in the Court not having the information it deemed necessary to find Appellee's claim was barred by judicial estoppel, this Court's review shall be *de novo*.

### **C. The Merits**

The Court in its decision of letter March 27, 2014 (A278 –A281) discussed why it believed the doctrine of judicial estoppel was not a bar to the Appellee's claim. Interestingly, the Court noted that "Defendant has not made a record from which the court can hold Plaintiff had a duty to declare the incident." (A280). However, it was the very rulings of the Court, precluding the introduction into evidence of the Bankruptcy Petition and Schedules and the prohibition on questioning the Appellee about her disclosures that lead to the trial record being what it was. Further, the record was clear as to the Appellee's statutory non-dischargeable duty to disclose the claim at a minimum by the citations to the United States Code and the mandates contained therein contained in the Motion for Reargument and/or Reconsideration (A160-168).

Similarly, the Court noted that "Defendant similarly has not made a record of the extent, if any, the omission influenced the bankruptcy court." (A280). Here again, Appellant was precluded from questioning Appellee at trial as to her failure

to disclose the claim to the Bankruptcy Court and that after her failure to disclose the claim, the Court granted her discharge.<sup>3</sup> The denial of the opportunity to present evidence and question the Appellee on an issue and then the Court holding that evidence of record to support the contention that the claim is barred by application of the doctrine of judicial estoppel works an injustice on the Appellant and mandates the vacating of the Jury Verdict and remand of this matter for a new trial. Appellant can then introduce the evidence it sought to introduce, which the Court below opines was necessary to support the application of the doctrine of judicial estoppel.

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<sup>3</sup> Evidence of the reliance by the Bankruptcy Court on the misrepresentation was part of the written record however, as evidenced by the Bankruptcy Court Docket noting no assets, no claims being exempt (A75) and the ultimate discharge of Appellee.

### **III. THE SUPERIOR COURT ERRED WHEN IT DENIED THE MOTION FOR NEW TRIAL**

#### **A. Question Presented**

Did the Superior Court below commit legal error when it denied New Castle Motors Motion for New Trial?

New Castle Motors position regarding the necessity of a new trial is set forth in the Motion for New Trial. (A256 –A277).

#### **B. Scope Of Review**

The Supreme Court of Delaware reviews a decision on a motion for a new trial for abuse of discretion. *Streetie v. Progressive Classic Ins. Co.*, 35 A.3d 419, 419 (Del. 2011); *citing Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997). To establish abuse of discretion, appellants must “show that the improper comment ‘was prejudicial so as to deny them a fair trial.’” *Deangelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993); *citing Shively v. Klein*, 551 A.2d 41, 44 (Del. 1988).

This Court must determine whether the Superior Court abused its discretion in denying the Motion for New trial.

#### **C. The Merits**

As a result of the slip and fall, Appellee claimed medical expenses in the amount of \$31,164.43. (A170). In advance of trial, Appellee demanded \$125,000.00 in full and final settlement of her claims. (A276). In closing, counsel mentioned a specific dollar figure of \$100,000.00 when discussing application of

the doctrine of comparative negligence. In effect, counsel suggested to the jury a verdict of \$50,000.00. with the jury's verdict, after application of the Appellee's comparative negligence, being \$56,381.14.

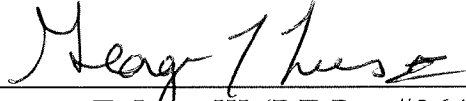
Appellant immediately objected to the improper comments that it contends were made with the "studied purpose" of suggesting to the jury the amount of damages to be awarded Appellee. *Cox v. Artesian Water Co.*, 1993 Del. Super LEXIS 373, at \*8 (Del. Super. Dec. 12, 1993); *citing McNally v. Eckman*, 466 A.2d 363, 375 (Del. 1983). The argument made to the jury was in effect a mathematical formula for the jury to follow in rendering its verdict, which is improper. See e.g., *Vermuelen v. D'Angelo*, 1988 Del. Super LEXIS 206 (Del. Super. 1988); and *Henne v. Balick*, 146 A.2d 394 (Del. 1958).

Appellant recognizes that the Court did issue an instruction to the jury, once the "bell" was rung and a number suggested to the jury, the damage was done and a new trial should have been granted. The correlation between the amount ultimately awarded by the jury and the hypothetical \$50,000.00 in counsel's closing are too close and indicate that the jury accepted counsel's suggestion and adopted it as their own. The improper argument in closing, when viewed in light of the totality of the circumstances, prejudiced New Castle Motors such that the only proper relief is the granting of a new trial on all issues.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the Superior Court's Decision of March 28, 2014 and enter an Order finding in favor of Appellant New Castle Motors, Inc. that Appellee's claim is barred by the doctrine of judicial estoppel. Alternatively, the Court should vacate the jury's verdict and grant Appellant New Castle Motors, Inc. a new trial.

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